IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ANDRE STEPHEN ALEXANDER,** Defendant and Appellant.	**CAPITAL CASE** S053228

Los Angeles County Superior Court No. BA065313
The Honorable Charles E. Horan, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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INTRODUCTION

Pursuant to this Court's Orders dated September 21, 2006, and June 1, 2007, respondent hereby files its Supplemental Respondent's Brief addressing the augmented and additional arguments presented by appellant in his Supplemental Opening Brief.

ARGUMENT

I.

AGENT BULMAN'S TESTIMONY REGARDING HIS IDENTIFICATION OF APPELLANT'S PHOTOGRAPHS DID NOT VIOLATE APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS

Appellant contends that Agent Bulman's testimony regarding his identification of appellant's photographs violated "his constitutional rights to a fair trial, confrontation and effective assistance of counsel under the Sixth Amendment" in addition to "reliable determinations of guilt, death-eligibility and penalty as provided by the Eighth Amendment." (Suppl. AOB 2-3.) These constitutional claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 51-67), the identification procedure was not impermissibly suggestive as to violate due process, Agent Bulman's identification of appellant's photographs was reliable under the totality of the circumstances, and, even assuming it was error to admit Agent Bulman's testimony regarding his identification of appellant's photographs, any such error was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6 [federal claims raised by defendant "fail on the merits because . . . any error was harmless"], 1197, fn. 8 [defendant's federal claims fail on their merits "because . . . the evidence was properly admitted"]; *People v. Yeoman* (2003) 31 Cal.4th 93, 117, 133.)

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S REQUEST FOR THE APPOINTMENT OF A PARTICULAR COUNSEL

Appellant contends the trial court's denial of his request for the appointment of a particular counsel following his arraignment violated his "fundamental constitutional right to due process under the Fifth and Fourteenth Amendments, a fair adversary proceeding under the Sixth Amendment," and "reliable determinations of guilt, death-eligibility and penalty under the Eighth Amendment." (Suppl. AOB 4.) Even assuming that the doctrine of law of the case does not bar consideration of the issue (see *Alexander v. Superior Court* (1994) 22 Cal.App.4th 901), these constitutional claims fail on their merits because, as demonstrated in the Respondent's Brief (RB 68-85), substantial evidence supports the trial court's exercise of discretion under state law in denying appellant's request for the appointment of a particular counsel (see also *Alexander v. Superior Court, supra*, 22 Cal.App.4th at pp. 910-919).

Where the predicate of appellant's federal constitutional claim rests on the existence of state law, such as here, and there is no violation of state law, such as here, "the claim of federal constitutional error falls of its own merit." (*People v. Cole, supra,* 33 Cal.4th at p. 1187, fn. 1.) Since substantial evidence supports the trial court's exercise of discretion under state law in denying appellant's motion for the appointment of a particular counsel, and denial of the motion did not violate appellant's constitutional right to counsel and/or equal protection, all of the remaining federal constitutional claims raised by appellant in his opening brief and supplemental brief regarding the trial court's denial of his motion are meritless. (*People v. Cole, supra,* 33 Cal.4th at p. 1187, fn. 1, 1234, fn. 28; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133.)

III.

THE TRIAL COURT'S REFERENCES TO THE MURDER OF A PEACE OFFICER SPECIAL CIRCUMSTANCE DURING VOIR DIRE WAS PROPER AND, IN ANY EVENT, APPELLANT WAS NOT PREJUDICED BY THE REFERENCES

Appellant contends the trial court's references during voir dire to the special-circumstance allegation of murder of a peace officer violated his constitutional right to a fair trial by impartial jurors under the Sixth and Fourteenth Amendments, impermissibly lessened the prosecution's burden of proof and violated his right to due process under the Fifth and Fourteenth Amendments, and deprived him of his right to reliable determinations of guilt and death-eligibility under the Eighth Amendment. (Suppl. AOB 5-6.) These constitutional claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 86-89), assuming waiver and invited error do not preclude review of the issue, the references were proper and non-prejudicial since the victim's status as a federal peace officer would have been presented to the jury regardless of the peace officer special-circumstance allegation. (See *People v. Cole, supra,* 34 Cal.4th at pp. 1187, fn. 1, 1195, fn. 6, 1197, fn. 8; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133.)

IV.

APPELLANT'S *WHEELER*[1]/*BATSON*[2] CLAIM IS MERITLESS

Appellant contends the trial court prejudicially erred by denying his *Wheeler/Batson*[3] motion, which was made on the ground that the prosecutor had exercised peremptory challenges against nine Black potential jurors as well as one Black alternate juror. (Suppl. AOB 7-42.) In his initial Opening Brief, appellant discussed the peremptory challenges of four Black jurors, specifically, Juror Numbers 11, 42, 76, and 89. (AOB 237-243.) In his Supplemental Opening Brief, appellant now focuses on four additional prospective jurors (Juror Nos. 143, 145, 184, and 196) and one prospective alternate juror (Juror No. 162) and argues that the prosecutor's stated reasons for excusing these jurors are not supported by the record, the prosecutor took comments made by these prospective jurors out of context, the justifications offered by the prosecutor were "insufficient as a matter of law," and "even if some of the proffered reasons were genuine or race-neutral, the prosecutor failed to show how the finding was 'related to the particular case to be tried.'" Appellant further argues that he can demonstrate by comparative analysis that the prosecutor's reasons for challenging these five prospective jurors were simply "pretextural" and that there was "purposeful discrimination."

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1. *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

2. *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*).

3. Although appellant did not specifically invoke *Batson* in his objection at trial, this Court has held that an objection under *Wheeler* preserves a federal constitutional objection because the legal principle that is applied is ultimately the same. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117.) For ease of reference, respondent will refer to appellant's motion as a "*Wheeler* motion" and his claim as a "*Wheeler* claim."

(Suppl. AOB 7-42.) Respondent submits that all of appellant's contentions are without merit.

A. Background

During jury selection, appellant's trial counsel made a *Wheeler* motion after the prosecution excused Juror No. 196:

> I would like to make a motion based on *Wheeler* because the prosecution has challenged all five Black females.
>
> There are five challenges that were directed toward Black females. They are the only Black females on the jury.
>
> And some of them there may have been basis, but others it would appear that I would have been the one to challenge them.
>
> So it seems to me that it is – that there is a prima facie showing at this point.

(43RT 4321.)

After the prosecutor pointed out that he had exercised 12 peremptories against several groups of people, the trial court took the matter under submission. (43RT 4322.) Later, defense counsel asked to "broaden" his motion to include Black males as well as Black females. (43RT 4371.) In support of the motions, counsel stated, "On the jury that was selected, there are three Blacks and maybe one left in the audience." (43RT 4384.)

The trial court denied appellant's motions finding:

> The Court will find again that there is no prima facie showing, but the Court feels that the record is not clear as to the following:
>
> I will give the People the opportunity, if they wish, to make a statement for the record.
>
> I don't think the prima facie case has been made. I will allow counsel to comment.

(43RT 4385.) The Court later added, "As to some of these folks in the Court's humble opinion, there is ample ground for peremptory challenges." (43RT 4385-4386.) The following day, the Court again reiterated that he found "no prima facie showing to exist" with respect to defense counsel's *Wheeler* motions. (44RT 4488.)

Following the prosecutor's excusal of potential alternate Juror No. 162, defense counsel "renew[ed]" his motion. (44RT 4496.) Again, the trial court denied appellant's motion finding:

> As I say, the Court has ruled there is no prima facie showing. The Court will make the further observation.
>
> As to the vast majority of the jurors referred to by the People, there were ample and obvious reasons for them to be dismissed by the use of peremptory challenges.
>
> The Court feels the following:
>
> The Court is not required to make this ruling but I will do so.
>
> Although there is no prima facie showing, the Court rules that there are also reasons stated for the exercise of each challenge and those are not sham reasons; that as to all but two of those jurors the reason was compelling and obvious.
>
> As to two the Court will indicate the following:
>
> While the Court believes the People, and accept the People's representation, but the Court feels that tactically they were not wise.[4/]

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4. While the trial court ultimately disagreed with the prosecutor's trial tactics in excusing two of the challenged jurors, nowhere does *Wheeler* or *Batson* say that tactically "incorrect" reasons are invalid. "'What is required are reasonably specific and neutral explanations that are related to the particular case being tried.'" (*People v. Reynoso* (2003) 31 Cal.4th 903, 917, quoting *People v. Johnson* (1989) 47 Cal.3d 1194, 1218.) "The proper focus of a [*Wheeler*] inquiry . . . is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness*

[Defense counsel] pointed that out yesterday and the Court does not disagree.

Two of those jurors struck the Court as – I don't want to say pro-defense or pro-prosecution but jurors that typically would be allowed to sit.

Nonetheless, the Court makes it clear that the People – the Court does not feel they are sham reasons.

One does not grant a *Wheeler* motion because one side is using tactics that the Court might not agree with in terms of the wisdom of their challenges as opposed to their motivation in making the challenge.

The Court finds as to the People, A, no prima facie showing, but, B, even assuming one was made there has been no showing of bias as to any of the challenges.

(44RT 4497-4499.)

B. Relevant Law

Peremptory challenges, in both California and federal courts, occupy "an important position in our trial procedures" (*Batson*, *supra*, 476 U.S. at p. 98) and are considered a "necessary part of trial by jury" (*Swain v. Alabama* (1965) 380 U.S. 202, 219 [85 S.Ct. 824, 13 L.Ed.2d 759]; see also *People v. Johnson*, *supra*, 47 Cal.3d at p. 1215 ["We recognized in *Wheeler*, and the United States Supreme Court recognized in *Batson*, that peremptory challenges have

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of those reasons." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 924, italics in original.) Indeed, the prosecutor could "exercise a peremptory challenge for any permissible reason or no reason at all." (*People v. Huggins* (2006) 38 Cal.4th 175, 227.) Even a "reason that makes no sense is nonetheless 'sincere and legitimate' as long as it does not deny equal protection." (*People v. Stanley* (2006) 39 Cal.4th 913, 936, quoting *People v. Guerra* (2006) 37 Cal.4th 1067, 1101.)

historically served as a valuable safety valve in jury selection"]). The peremptory challenge is "an arbitrary and capricious right and it must be exercised with full freedom, or it fails of its full purpose." (*Swain v. Alabama*, *supra*, 380 U.S. at p. 219, internal quotation marks and citations omitted.)

> Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial towards the other side, are a means of eliminating extremes of partiality on both sides, thereby assuring the selection of a qualified *and unbiased* jury.

(*Holland v. Illinois* (1990) 493 U.S. 474, 484 [110 S.Ct. 803, 107 L.Ed.2d 905], internal quotation marks, brackets, and citations omitted.)

> We also bear in mind that peremptory challenges are not challenges for cause – they are *peremptory*. We have said that such challenges may be made on an "apparently trivial" or "highly speculative" basis. Indeed, they may be made "'without reason or for no reason, arbitrarily and capriciously.'"

(*People v. Jones* (1998) 17 Cal.4th 279, 294, citations omitted.)

While a presumption exists that the prosecution has exercised its peremptory challenges in a constitutional manner (*People v. Clair* (1992) 2 Cal.4th 629, 652), a prosecutor may not use peremptory challenges to remove prospective jurors for "group bias" (*Wheeler*, *supra*, 22 Cal.3d at pp. 274-276). In other words, jurors may not be excused solely because they are members of an identifiable racial, religious, ethnic, or similar group. Instead, peremptory challenges may be used to remove jurors based on a "specific bias," that is, bias stemming from individual biases related to the facts of the case, the evidence, the parties, or witnesses. (*Ibid.*)

The exercise of peremptory challenges on the basis of group bias, rather than for reasons specific to the challenged juror, violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section

of the community as guaranteed under the California Constitution. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66; *People v. Cleveland* (2004) 32 Cal.4th 704, 732; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. (*Batson*, *supra*, 476 U.S. at pp. 88-89.)

In resolving a *Wheeler* motion, the trial court employs a well-defined procedure:

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]

(*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129].)

As in civil rights cases, *Wheeler* error is based on a discriminatory motive. Yet, before the prosecutor is required to disclose his or her motive, the defendant must identify facts that give rise to an inference the motive was race based. (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 226-227.)

In determining whether the defendant ultimately has carried his burden of proving purposeful racial discrimination,

> the trial court "must make 'a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case, as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire

and has exercised challenges for cause or peremptorily . . . .' [Citation]" [Citation.]

(*People v. Reynoso*, *supra*, 31 Cal.4th at p. 919.)

However,

> the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine. [Citation.] Inquiry by the trial court is not even required. [Citation.] All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. [Citation.] A reason that makes no sense is nonetheless sincere and legitimate as long as it does not deny equal protection. [Citation.]

(*People v. Guerra*, *supra*, 37 Cal.4th at pp. 1100-1101, quotation marks omitted.)

It is well established that the defendant has the burden of demonstrating that the prosecutor intentionally discriminated in exercising the peremptory challenge or challenges at issue:

> *Batson*, of course, explicitly stated that the defendant ultimately carries the burden of persuasion to prove the existence of purposeful discrimination. This burden of persuasion rests with, and never shifts from, the opponent of the strike. Thus, even if the State produces only a frivolous or utterly nonsensical justification for its strike, the case does not end – it merely proceeds to step three.

(*Johnson v. California*, *supra*, 545 U.S. at pp. 170-171, internal quotation marks and citations omitted.)

A reviewing court reviews a trial court's ruling on a motion under *Wheeler/Batson* for substantial evidence. (*People v. Avila* (2006) 38 Cal.4th

491, 541; *People v. Jones, supra,* 17 Cal.4th at p. 293; *People v. Alvarez* (1996) 14 Cal.4th 155, 196; see also *People v. Trevino* (1997) 55 Cal.App.4th 396, 402, fn. 4 [substantial evidence standard applicable to *Wheeler* motions is consistent with "clearly erroneous" standard applied by federal courts in reviewing a trial court's ruling on a *Batson* motion].) As the California Supreme Court observed:

> It follows that the determinations underlying a ruling of this sort, that is, whether the defendant bore his burden of a prima facie showing of the presence of purposeful discrimination and, if he succeeded, whether the prosecutor bore his consequent burden of a showing of its absence, are themselves examined for substantial evidence: they are each reducible to an answer to a purely factual question . . . .

(*People v. Alvarez, supra,* 14 Cal.4th at pp. 196-197

Further, because there is a presumption that a prosecutor uses peremptory challenges in a constitutional manner, a reviewing court is bound by this presumption "in deference to the legislative intent underlying such challenges, in order to encourage their use in all proper cases, and out of respect for counsel as officers of the court." (*Wheeler, supra,* 22 Cal.3d at p. 278; see also *People v. Howard* (1992) 1 Cal.4th 1132, 1155 ["Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with considerable deference on appeal"].)

C. Substantial Evidence Supports The Trial Court's Conclusion That Appellant Failed To Establish A Prima Facie Case

Appellant contends that the prosecutor exercised his peremptory challenges in a racially discriminatory fashion during jury selection. (Suppl. AOB 7-42.) Appellant is wrong. Indeed, the trial court found that appellant failed to produce evidence sufficient to satisfy the first step of *Batson* and

establish a prima facie case of discrimination. (43RT 4321-4322, 4385-4386; 44RT 4488, 4497-4499.) That finding is supported by substantial evidence.

When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the trial court's ruling and will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1101; *People v. Farnam* (2002) 28 Cal.4th 107, 135.) If the reviewing court finds that the trial court properly determined that no prima facie case was made, it need not review the adequacy of the prosecutor's justifications, if any, for the peremptory challenges. (*Ibid.*; see also *People v. Griffin* (2004) 33 Cal.4th 536, 555 ["where trial court found no prima facie case, . . . [w]e sustain the ruling when the record discloses grounds upon which the prosecutor properly might have exercised the peremptory challenges against the prospective jurors in question"].)

As a preliminary matter, respondent notes that the trial court did not expressly state the standard it applied in determining whether appellant had made a prima facie showing of impermissible discrimination. (43RT 4321-4322, 4385-4386; 44RT 4488, 4497-4499.) However, respondent submits that it is not necessary to determine whether the court decided that appellant failed to show a "strong likelihood" that prospective jurors had been excluded on the basis of group bias (see *People v. Fuentes* (1991) 54 Cal.3d 707, 714; *People v. Sims* (1993) 5 Cal.4th 405, 428), or that appellant failed to show that the totality of the relevant facts gave rise to an "inference" of discriminatory purpose (the standard more recently set forth in *Johnson v. California*, *supra*, 545 U.S. at pp. 168-169; see also *People v. Cornwell, supra*, 37 Cal.4th at p. 66). Because the record does not support even an "inference" of discriminatory purpose, this Court should reject appellant's

claim. (See *People v. Cornwell, supra*, 37 Cal.4th at p. 73 [California Supreme Court applied the standard set forth in *Johnson v. California* and resolved the *legal* question whether the record supported the required inference by finding that it did not support any such inference and was "devoid of any suggestion that the basis for the challenge . . . was even 'close' or 'suspicious.'"].)

In order to establish a prima facie case of discrimination, the defendant bears the burden to show that the excluded jurors are members of a cognizable group,[5] and that a "reasonable inference" can be drawn that the jurors were excused because of their group association. (*People v. Avila, supra*, 38 Cal.4th at p. 553, quoting *Johnson v. California, supra*, 545 U.S. at p. 169.) A defendant must show that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." (*People v. Avila, supra*, 38 Cal.4th at p. 552, quoting *Batson, supra*, 476 U.S. at p. 94.)

Here, in arguing that a prima facie case had been made, defense counsel did nothing more than point out that the prosecution had challenged all five Black females, while acknowledging that "there may have been basis" for some of them. (43RT 4321.) After the motion was broadened to include Black males, defense counsel added, "On the jury that was selected, there are three Blacks and maybe one left in the audience." (43RT 4321.)

On these facts alone, appellant failed to establish a prima facie case. A prima facie showing is not supported merely by arguing that peremptory challenges were used against members of a cognizable group or that the resulting jury contained only a small number of members of the cognizable group. (See *People v. Farnam, supra*, 28 Cal.4th at pp. 134-135 [assertion that use of peremptory challenges against four Black jurors did not demonstrate prima facie case, particularly where resulting jury has six Black members];

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5. Blacks are a cognizable group for purposes of both *Wheeler* and *Batson*. (*People v. Alvarez, supra*, 14 Cal.4th at p. 193.)

People v. Arias (1996) 13 Cal.4th 92, 136, fn. 15 [assertion of group bias based solely on number and order of exclusion of protected group members and final jury composition not sufficient to establish prima facie case].) Here, the record shows that appellant failed to meet his burden of establishing a reasonable inference of racial discrimination by pointing out only the number of excluded and the composition of the jury, which included Black members. (See *People v. Box* (2000) 23 Cal.4th 1153, 1188, 1189 [insufficient showing of prima facie case where "the only basis . . . cited by defense counsel was that the prospective jurors - like defendant - were Black"].)

Moreover, as acknowledged by defense counsel, there were Black members of the jury. (43RT 4321.) This factor further supports the trial court's determination that appellant failed to establish a prima facie case of discrimination.

> "'While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection.'"

(*People v. Guerra*, *supra*, 37 Cal.4th at p. 1108 citing *People v. Ward* (2005) 36 Cal.4th 186, 203 and *People v. Turner* (1994) 8 Cal.4th 137, 168, abrogated on other grounds in *People v. Griffin, supra,* 33 Cal.4th at p. 556, fn. 5; see also *People v. Davenport* (1995) 11 Cal.4th 1171, 1201, abrogated on other grounds in *People v. Griffin*, *supra*, 33 Cal.4th at p. 556, fn. 5 [fact that jury included African-Americans supported trial court's determination that a prima face showing had not been made under *Wheeler*]; *People v. Snow* (1987) 44 Cal.3d 216, 225.)

Further, apart from any actual explanation offered by the prosecutor (step two), where the voir dire itself presents an obvious race-neutral reason for exercising a challenge as to that venire person, the defendant has failed

to establish a prima facie case. (*People v. Avila*, *supra*, 38 Cal.4th at p. 554 [no inference of discrimination where prospective juror's written answers to the questionnaire and her responses during oral voir dire "disclosed a number of 'reasons other than racial bias for *any* prosecutor to challenge her,'" quoting *People v. Cornwell*, *supra*, 37 Cal.4th at p. 70]; *People v. Turner*, *supra*, 8 Cal.4th at p. 168 ["the record clearly established specific nonrace-related reasons why a prosecutor might want to excuse the challenged prospective jurors," citation omitted]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092 [no prima facie case where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors he excused].)

Here, the record amply supports the legal conclusion that there was insufficient evidence to support the inference that the prosecutor excused any prospective jurors on the basis of race. As discussed in detail below, each of the excused jurors exhibited a specific bias against law enforcement, the prosecution, the death penalty, or a combination thereof. For these reasons, appellant's *Wheeler* motion was properly denied. (See *People v. Avila*, *supra*, 38 Cal.4th at p. 554.)

D. Even Assuming The Trial Court Had Made A Finding Of A Prima Facie Showing, Appellant's Contention Fails

Even assuming the trial court had made a finding of a prima facie showing, appellant's contention regarding the prosecutor's exercise of peremptory challenges against certain prospective jurors fails.[6/]

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6. Respondent notes that the trial court's invitation to the prosecutor to provide reasons as to the excused venire persons does not constitute a finding that appellant had made the required showing. (*People v. Farnam*, *supra*, 28 Cal.4th at p. 136 [where prosecutor was permitted "out of an abundance of caution" to make whatever record it wished, court held, "[o]n this record, there is no basis for concluding that a prima facie case of racial bias had been found,

In step two of the procedure for ruling on a *Wheeler* motion, once the trial court has found a prima facie case of group bias, the prosecutor must then state adequate race-neutral reasons for the peremptory challenges. (*Johnson v. California*, *supra*, 545 U.S. at p. 168.)

> Although the prosecutor must present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible;" so long as the reason is not inherently discriminatory, it suffices.

(*Rice v. Collins* (2006) 546 U.S. 333 [126 S.Ct. 969, 973, 163 L.Ed.2d 824], quoting *Purkett v. Elem* (1995) 514 U.S. 765, 767-768 [115 S.Ct. 1769, 131 L.Ed.2d 834] (per curiam)].)

"'[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Williams* (1997) 16 Cal.4th 635, 664, quoting *Batson*, *supra*, 476 U.S. at p. 97.) A justification may be no more than a "hunch" about a juror, "so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*People v. Williams*, *supra*, 16 Cal.4th at p. 664, citation omitted.) Peremptory challenges may be based on a juror's manner of dress, a juror's unconventional lifestyle, a juror's experiences with crime or with law enforcement, or simply because a juror's answer on voir dire suggested potential bias. (*Wheeler*, *supra*, 22 Cal.3d at p. 275.) Peremptory challenges may be predicated on evidence

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implicitly or otherwise"]; *People v. Davenport*, *supra*, 11 Cal.4th at pp. 1200-1202.) Thus, this Court need only analyze whether the trial court properly ruled that no prima facie case had been made, without reference to the prosecutor's optional justifications. (See *People v. Farnam*, *supra*, 28 Cal.4th at p. 167 ["when an appellate court is presented with such a record, and concludes that the trial court properly determined that no prima facie case was made, it need not review the adequacy of counsel's justifications for the peremptory challenges"].)

suggestive of juror partiality that ranges from the "virtually certain to the highly speculative." (*Ibid.*)

If the trial court makes a "sincere and reasoned effort" to evaluate the prosecutor's nondiscriminatory justifications, its determinations are entitled to deference on review. (*People v. Avila*, *supra*, 38 Cal.4th at p. 541 quoting *People v. Burgener* (2003) 29 Cal.4th 833, 864 ["'It is presumed that the prosecutor uses peremptory challenges in a constitutional manner, and we give deference to the court's ability to distinguish "bona fide reasons from sham excuses,"'"]; *People v. Ward, supra,* 36 Cal.4th at p. 200 [review of a trial court's determination regarding the sufficiency of a prosecutor's reasons should be done with "great restraint" and "great deference"]; cf *Rice v. Collins*, *supra*, 126 S.Ct. at p. 973 [noting that "[t]he trial court, . . . , which had the benefit of observing the prosecutor firsthand over the course of the proceedings, rejected Collins' challenge"].)

> In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court's credibility determinations and would discount the variety of [subjective] factors and considerations, including prospective jurors' body language or manner of answering questions, which legitimately inform a trial lawyer's decision to exercise peremptory challenges.

(*People v. Montiel* (1993) 5 Cal.4th 877, 909, quotation marks omitted.)

Further, that the prosecutor ultimately accepted a jury with Black jurors tends to support the prosecutor's assertion that the Black prospective jurors he challenged were excused for race-neutral reasons. This Court has recognized that, while not conclusive, the inclusion of members of the excluded group in the final jury tends to support the prosecutor's good faith assertion of race-neutral reasons. (*People v. Stanley*, *supra*, 39 Cal.4th at p. 938, fn. 7;

People v. Huggins, *supra*, 38 Cal.4th at p. 236; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1108; *People v. Turner*, *supra*, 8 Cal.4th at p. 168.)

E. The Prosecutor Provided Sufficiently Specific Race-Neutral Reasons For Excusing Each Of The Challenged Jurors

It is well established that a party cannot *assume* in exercising its peremptories that because a prospective juror belongs to a cognizable minority group, that person holds biased views common to the group, and, therefore, is undesirable as a juror. (*Batson*, *supra*, 476 U.S. at pp. 86, 91, 96-97, 99.) However, a prosecutor may excuse prospective jurors, including members of cognizable groups, based on personal, individual biases those individuals *actually express*. (*Wheeler*, *supra*, 22 Cal.3d at p. 277 & fn. 18.) Here, the prosecutor provided sufficiently specific race-neutral reasons for excusing each of the challenged jurors based on personal and individual biases those individuals actually expressed.

1. Juror No. 143

The prosecutor explained that he excused Juror No. 143 because: 1) he had previously been in court for a bankruptcy; 2) had been jailed for traffic violations; 3) his brother was convicted of making threats to his spouse, and he thought his brother was treated unfairly; 4) he worked with the defense lawyer in his brother's case; 5) his indication that he needed an eyewitness or strong physical evidence to convict someone; 6) his belief that the evidence against O.J. Simpson "was not beyond a reasonable doubt;" 7) his prior unpleasant experiences with the police; and 8) his belief that Blacks are stopped more often for traffic violations. (44RT 4495.)

This Court has repeatedly upheld the exercise of peremptory challenges to jurors who have expressed a negative experience with law enforcement.

(*People v. Avila*, *supra*, 38 Cal.4th at p. 556 ["based on the questionnaire as a whole, there were many reasons other than racial bias for any prosecutor to challenge her, including but not limited to her negative experience with a law enforcement officer"]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125 ["A prospective juror's negative experiences with law enforcement can serve as a valid basis for peremptory challenge," citation omitted]; *People v. Arias*, *supra*, 13 Cal.4th at p. 138; *People v. Turner*, *supra*, 8 Cal.4th at p. 171; *People v. Garceau* (1993) 6 Cal.4th 140, 172, overruled on other grounds in *People v. Yeoman, supra,* 31 Cal.4th at pp. 117-118 [the arrest or conviction of a juror's relative may provide a legitimate, group-neutral basis for excluding a juror]; *People v. Walker* (1988) 47 Cal.3d 605, 625-626; *Wheeler*, *supra*, 22 Cal.3d at pp. 275, 277, fn. 18.)

More specifically, a prospective juror's view that he or she has been unfairly treated by law enforcement is a valid race-neutral basis for exercising a peremptory challenge. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1125 [prospective juror's view that her son "was harassed by authorities and falsely accused of using drugs" was sufficient race-neutral reason for exercising peremptory challenge]; *Wheeler*, *supra*, 22 Cal.3d at p. 275 ["For example, a prosecutor may fear bias on the part of one juror because he . . . has complained of police harassment"]; cf. *People v. Arias*, *supra*, 13 Cal.4th at pp. 137-139 [voir dire responses from which a prosecutor could infer an "apparent distrust of the system" deemed adequate race-neutral reasons].)

Here, Juror No. 143 admitted that his brother was convicted of making threats to his spouse and stated that he thought his brother was treated unfairly. Juror No. 143 also had prior negative experiences with law enforcement himself, including time spent in jail for traffic violations. Based on these experiences, it is permissible to surmise that this particular juror would be unsympathetic to the prosecution. On that basis, a peremptory challenge was

proper. (*People v. Arias*, *supra*, 13 Cal.4th at p. 138; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Allen* (1989) 212 Cal.App.3d 306, 312.)

Juror No. 143 further stated that he would not be able to find someone guilty without an "eyewitness or strong physical evidence," despite the fact that an eyewitness is not required under the law. Based on this belief it is not surprising the prosecutor excused this juror given that the prosecutor had an eyewitness who failed to identify appellant as a suspect during a line-up.

Appellant argues that, despite this juror's negative experiences and opinions about law enforcement, because he stated that he would be impartial and fair, the prosecutor's reasons for excusing him were pretextural. (Suppl. AOB 19-20.) Appellant is wrong. A prosecutor is not required to accept a venire person's assertions that he could be fair and impartial. (*People v. Lewis* (2006) 39 Cal.4th 970, 1011 [upholding challenge when, despite the juror's contrary assurances, "the prosecutor had reason for her expressed skepticism that [he] would be fair to the People"]; *People v. Avila*, *supra*, 38 Cal.4th at pp. 554-555 [record revealed obvious reasons for prosecutor to excuse venire person "notwithstanding [juror's] assurances that her prior experiences would not carry over to this case if she were chosen as a juror," citation omitted]; *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1125 [prospective juror's view that her son had been harassed by law enforcement adequate basis for [peremptory challenge] despite "[h]er claim that she could remain impartial"]; *People v. Jordan* (2006) 146 Cal.App.4th 232, 257 ["prosecutor was not required to believe [the juror's] assertion that she could set aside her feelings about the Oakland Police Department"].)

For all these reasons, the prosecutor's use of a peremptory challenge against Juror No. 143 was proper and supported by race-neutral reasons.

2. Juror No. 145

The prosecutor explained that he excused Juror No. 145 due to: 1) his belief that the prosecution did not prove that O.J. Simpson was guilty; 2) his statement that the Los Angeles Police Department and the Coroner's Office should have some kind of protocol to follow; and 3) his view that the Los Angeles Police Department treats Blacks differently. (44RT 4494.)

A peremptory challenge to Juror No. 145 was proper because he demonstrated a potential bias against law enforcement by expressing his belief that the police treat Blacks differently. (See *People v. Turner*, *supra*, 8 Cal.4th at p. 171; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 275.) Furthermore, Juror No. 145's responses indicated skepticism about the reliability of information and data coming from certain law enforcement offices expected to testify during trial. Based on these opinions, it is permissible to surmise that this particular juror would be unsympathetic to the prosecution. On that basis, a peremptory challenge was proper. (*People v. Arias*, *supra*, 13 Cal.4th at p. 138; *People v. Douglas*, *supra*, 36 Cal.App.4th at p. 1690; *People v. Allen*, *supra*, 212 Cal.App.3d at p. 312.)

Appellant disputes the significance of Juror No. 145's statement regarding the need for police and lab protocol by arguing that the prosecutor took the statement out of context. (Suppl. AOB 15.) Appellant is wrong. In response to Question No. 35 on the juror questionnaire regarding opinions of certain law enforcement agencies based on "any current publicity," Juror No. 145 responded, "Coroner's office, crime lab could have some protocol to follow." (14 Suppl. CT II 3956.) Given the negative publicity these agencies had recently received during the O.J. Simpson trial, the only reasonable conclusion to be drawn from this statement is that this juror believed that these departments did not have a protocol, but should. Since members of the coroner's office and crime lab would be testifying at trial, it was fair for the

prosecutor to be concerned that Juror No. 145 would be biased against their testimony or discount the information received from them.

Appellant argues that, despite this juror's negative opinions about law enforcement, because he stated that he would listen to the evidence with an "open mind," the prosecutor's reasons for excusing him were pretextural. (Suppl. AOB 15-16.) Appellant is wrong. A prosecutor is not required to accept the venire person's assertions that he could be fair and impartial. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1011; *People v. Avila*, *supra*, 38 Cal.4th at pp. 554-555; *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1125; *People v. Jordan*, *supra*, 146 Cal.App.4th at p. 257.)

For all these reasons, the prosecutor's use of a peremptory challenge against Juror No. 145 was proper and supported by race-neutral reasons.

3. Juror No. 184

The prosecutor explained that he excused Juror No. 184 because: 1) he indicated that the police had pointed guns at him, which was an "unpleasant experience;" 2) his belief that the Los Angeles Police Department treated Blacks differently; 3) that he did not favor the death penalty, thought it served no purpose, and categorized it as "not a comfortable way to punish people;" and 4) his response of "I guess" to the question of whether he could impose the death penalty or vote for it in this case. (44RT 4493.)

Here, the prosecutor properly excused Juror No. 184 based on his negative opinion of and experiences with law enforcement. (*People v. Avila*, *supra*, 38 Cal.4th at p. 556; *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1125; *People v. Arias*, *supra*, 13 Cal.4th at p. 138; *People v. Turner*, *supra*, 8 Cal.4th at p. 171; *People v. Garceau*, *supra*, 6 Cal.4th at p. 172; *People v. Walker*, *supra*, 47 Cal.3d at pp. 625-626; *Wheeler*, *supra*, 22 Cal.3d at pp. 275, 277, fn. 18.)

Notably, Juror No. 184 admitted that he had had an unpleasant experience with police officers pointing their guns at him. Based on this experience, it is permissible to surmise that he would be unsympathetic to the prosecution. On that basis, a peremptory challenge was proper. (*People v. Arias*, *supra*, 13 Cal.4th at p. 138; *People v. Douglas*, *supra*, 36 Cal.App.4th at p. 1690; *People v. Allen*, *supra*, 212 Cal.App.3d at p. 312.) Indeed, Juror No. 184's negative opinion and bias towards law enforcement is further confirmed by his belief that the Los Angeles Police Department treats Blacks differently.

The California Supreme Court has also upheld the use of peremptories for jurors who expressed concern regarding the death penalty. (*People v. Avila*, *supra*, 38 Cal.4th at p. 558; *People v. Brown* (2004) 33 Cal.4th 382, 403; *People v. Burgener*, *supra*, 29 Cal.4th at p. 864; *People v. McDermott* (2002) 28 Cal.4th 946, 975 [although juror's "final statements indicated neutrality on the death penalty," challenge was proper when prior answers "could cause the prosecutor legitimate concern"]; *People v. Turner*, *supra*, 8 Cal.4th at p. 171 [peremptory challenge against death penalty skeptic who was not otherwise excusable for cause proper].) Here, the prosecutor was obviously looking for prospective jurors bearing a favorable attitude about imposing the death penalty. Since Juror No. 184 did not share this attitude, as evidenced by his statements that he did not favor the death penalty, categorized it as not a "comfortable" way to punish people, and that it served no purpose (44RT 4493-4494), his excusal was proper.

Appellant argues that, despite this juror's negative experience and opinions about law enforcement, because he stated that these things would not affect his deliberations, the prosecutor's reasons for excusing him were pretextural. (Suppl. 10-12.) Appellant is wrong. A prosecutor is not required to accept the venire person's assertions that he could be fair and

impartial. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1011; *People v. Avila*, *supra*, 38 Cal.4th at pp. 554-555; *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1125; *People v. Jordan*, *supra*, 146 Cal.App.4th at p. 257.) A prosecutor is also not required to accept a venire person's assertion that he can impose the death penalty in light of prior statements disapproving of such form of punishment. (See *People v. McDermott*, *supra*, 28 Cal.4th at p. 975 [although juror's "final statements indicated neutrality on the death penalty," challenge was proper when prior answers "could cause the prosecutor legitimate concern"].)

For all these reasons, the prosecutor's use of a peremptory challenge against Juror No. 184 was proper and supported by race-neutral reasons.

4. Juror No. 196

The prosecutor explained that he excused Juror No. 196 because: 1) her husband was arrested for driving under the influence by the Los Angeles Sheriff's Department; 2) she believed that "there was not evidence beyond a reasonable doubt" in the O.J. Simpson trial and that the victim's family were "too involved;" 3) her view that discrimination by the Los Angeles Police Department is "out of control" and that the department treats Blacks differently; 4) her reference to a "police code of silence;" and 5) her belief that the death penalty was morally wrong and that many people who have been convicted were "railroaded." (44RT 4492-4493.)

Here, the prosecutor properly excused Juror No. 196 based on her negative opinion of law enforcement coupled with a family member's arrest. (*People v. Avila*, *supra*, 38 Cal.4th at p. 556; *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1125; *People v. Arias*, *supra*, 13 Cal.4th at p. 138; *People v. Turner*, *supra*, 8 Cal.4th at p. 171; *People v. Garceau*, *supra*, 6 Cal.4th at p. 172; *People v. Walker*, *supra*, 47 Cal.3d at pp. 625-626; *Wheeler*, *supra*,

22 Cal.3d at pp. 275, 277, fn. 18.) Juror No. 196 admitted that her husband had previously been arrested for driving under the influence. Based on this experience, it is permissible to surmise that this close relative's contact with the criminal justice system might make this particular juror unsympathetic to the prosecution. On that basis, a peremptory challenge was proper. (*People v. Arias*, *supra*, 13 Cal.4th at p. 138; *People v. Douglas*, *supra*, 36 Cal.App.4th at p. 1690; *People v. Allen*, *supra*, 212 Cal.App.3d at p. 312.)

Indeed, Juror No. 196's negative opinion and bias towards law enforcement is confirmed by her reference to a "police code of silence" and her statement that "discrimination is out of control" within certain law enforcement agencies. Appellant attempts to soften these views by arguing that they were taken out of context. Appellant is mistaken. On the juror questionnaire, Juror No. 196 wrote in her own words, "They [law enforcement agencies] all need to clean up their act. Discrimination is out of control." (15 Suppl. CT II 4229.) During voir dire, the full extent of Juror No. 196's negative attitude was exposed. For example, upon questioning, the trial court was able to discover that this juror included the District Attorney's Office among the agencies wherein she believed discrimination "was out of control." Furthermore, when questioned further on this topic, Juror No. 196 did not expressly state that she would not be influenced by this opinion; instead, she indicated that she would "look at all the evidence and then use [her] reason and logic to make an opinion about it." (43RT 4298-4299.) Similarly, the prosecutor did not take Juror No. 196's statement about a police code of silence out of context. Here too, Juror No. 196's negative opinion is clearly apparent on the record. In her response to Question No. 37 on the juror questionnaire regarding the believability of testimony of a law enforcement officer, Juror No. 196 stated, "I think they [law enforcement] have a 'code of silence' and sometimes put themselves about [*sic*] the law." (Question No. 37, 15 Suppl. CT II 4229.) Thus, based on these

views, it was reasonable for the prosecutor to infer that Juror No. 196 would not be a fair and impartial juror.

The use of a peremptory challenge against Juror No. 196 was also proper based on her opinions regarding the death penalty. (*People v. Avila*, *supra*, 38 Cal.4th at p. 558; *People v. Brown*, *supra*, 33 Cal.4th at p. 403; *People v. Burgener*, *supra*, 29 Cal.4th at p. 864; *People v. McDermott*, *supra*, 28 Cal.4th at p. 975; *People v. Turner*, *supra*, 8 Cal.4th at p. 171.) Here, the prosecutor was obviously looking for prospective jurors bearing a favorable attitude about imposing the death penalty. However, Juror No. 196 stated that she thought the death penalty was "morally wrong" and wrote that her views were based on her belief that many defendants did not have a "proper defense" and were "railroaded." In her opinion, the death penalty was only appropriate in cases where there is "[d]eath or harm to children and premeditated murder." (15 Suppl. CT II 4232.) Since those circumstances were not at issue in this case, her excusal was proper.

Appellant argues that, despite this juror's negative experience and opinions about law enforcement, because she stated that she would be impartial and fair, the prosecutor's reasons for excusing her were pretextural. (Suppl. AOB 27-28, 31.) Appellant is wrong. A prosecutor is not required to accept the venire person's assertions that she could be fair and impartial. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1011; *People v. Avila*, *supra*, 38 Cal.4th at pp. 554-555; *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1125; *People v. Jordan*, *supra*, 146 Cal.App.4th at p. 257.) Indeed, it is important to note that the prosecutor's reasons for excusing Juror No. 196 were so compelling that the trial court asked the prosecutor to "move on" as he was explaining his reasons. (44RT 4493.)

For all these reasons, the prosecutor's use of a peremptory challenge against Juror No. 196 was proper and supported by race-neutral reasons.

5. Alternate Juror No. 162

The prosecutor explained that he excused alternate Juror No. 162 because: 1) she had previously served on juries that could not reach a verdict; 2) her concern that evidence was planted in the O.J. Simpson case and her doubts about the evidence and "Mr. Fuhrman"; 3) her belief that sometimes innocent people are sentenced to death; and 4) her mixed feelings about the death penalty. (44RT 4497.)

Here, the prosecutor properly excused alternate Juror No. 162 based on her belief that the evidence in the O.J. Simpson matter had been mishandled and possibly planted by the police. These views exhibited a potential bias against law enforcement, and the prosecutor challenged her accordingly. (*People v. Avila*, *supra*, 38 Cal.4th at p. 556; *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1125; *People v. Arias*, *supra*, 13 Cal.4th at p. 138; *People v. Turner*, *supra*, 8 Cal.4th at p. 171; *People v. Garceau*, *supra*, 6 Cal.4th at p. 172; *People v. Walker*, *supra*, 47 Cal.3d at pp. 625-626; *Wheeler*, *supra*, 22 Cal.3d at pp. 275, 277, fn. 18.)

The use of a peremptory challenge against alternate Juror No. 162 was also proper based on her "mixed" opinions regarding the death penalty. (*People v. Avila*, *supra*, 38 Cal.4th at p. 558; *People v. Brown*, *supra*, 33 Cal.4th at p. 403; *People v. Burgener*, *supra*, 29 Cal.4th at p. 864; *People v. McDermott*, *supra*, 28 Cal.4th at p. 975; *People v. Turner*, *supra*, 8 Cal.4th at p. 171.) Here, the prosecutor was obviously looking for prospective jurors bearing a favorable attitude about imposing the death penalty. However, alternate Juror No. 162 stated that she had "mixed" feelings about the death penalty, and that "[a]s a nurse [she had] been trained to assist in saving, maintaing [*sic*], and improving quality of life." (Question No. 48, 14 Suppl. CT II 4076.)

Appellant argues that, despite this juror's initial negative comments about the death penalty, because she later stated that such punishment could be

appropriate in certain circumstances, the prosecutor's reasons for excusing her were inadequate. (Suppl. AOB 35-36.) Appellant is wrong. A prosecutor is also not required to accept a venire person's assertion that she can impose the death penalty in light of prior statements disapproving of such form of punishment. (See *People v. McDermott, supra*, 28 Cal.4th at p. 975.)

For all these reasons, the prosecutor's use of a peremptory challenge against alternate Juror No. 162 was proper and supported by race-neutral reasons.

The record thus shows that the excluded Black jurors made specific statements during their questioning that justified their exclusion for reasons other than race. Since the totality of the relevant facts does not justify an inference that the peremptory challenges were used for a discriminatory purpose, appellant's motion was properly denied. (See *People v. Guerra, supra*, 37 Cal.4th at p. 1101.)

F. Because The "Accepted" Jurors Were Different In "Notable Respects" From The Challenged Jurors, Appellant's Comparative Analysis Argument Fails

Appellant further argues that when the prosecutor's explanations for his peremptory challenges are compared with the responses of certain other jurors, "purposeful discrimination" can be shown. (Suppl. AOB 8-36.) Relying upon *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196] (*Miller-El*), appellant asks this Court to perform a comparative juror analysis to review the trial court's finding on this issue. In *Miller-El*, the United States Supreme Court held that, in the context of a challenge of a Black prospective juror, the defendant had established purposeful discrimination under *Batson* and was entitled to relief on that ground in federal habeas corpus proceedings

(28 U.S.C. § 2254). (*Miller-El, supra*, 545 U.S. at p. 266.) In so holding, the high court observed:

> If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step.

(*Id.* at p. 241.)

Assuming that a comparative juror analysis should be conducted for the first time on appeal,[7] appellant's proffered analysis fails to establish purposeful discrimination. First, appellant has failed to make an adequate record to sustain the comparison because the record does not reflect the race of all of the jurors. In addition, a race-neutral distinction between the jurors is apparent from the juror questionnaires and the transcript of the voir dire. Thus, based on the whole of the record, appellant has failed to establish that the prosecutor's justifications were mere pretext.

1. Juror No. 143

Appellant argues that the prosecutor's excusal of Juror No. 143 based on the fact that both he and his brother had served time in jail is pretextural since he allowed others to serve on the jury who had either also spent time in jail or had relatives who had spent time in jail. (Suppl. AOB 17-19.) Appellant also argues that the prosecutor's excusal of Juror No. 143 based on his beliefs

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7. Respondent notes that this Court has declined to decide whether a comparative juror analysis on direct appeal is constitutionally required by *Miller-El*, preferring to engage in such analysis on the "assumption" that it is required. (E.g., *People v. Lewis, supra*, 39 Cal.4th at p. 1017; *People v. Avila, supra*, 38 Cal.4th at p. 546; *People v. Huggins, supra*, 38 Cal.4th at p. 232; *People v. Cornwell, supra*, 37 Cal.4th at p. 71. On January 24, 2007, this Court granted review in *People v. Lenix*, Case No. S148029, to decide this issue.

that the prosecution in the *Simpson* case had not met their burden of proof and that the Los Angeles Police Department treats Blacks differently are pretextural since he allowed others to serve on the jury who shared the same views. (Suppl. AOB 19-20.) Appellant's reliance on this comparative analysis is misplaced.

Here, a side-by-side comparison of the supposedly similar jurors reveals that although Juror No. 143 had "isolated and discrete similarities" with some of the "accepted" jurors, they were not, in fact, "similarly situated" for comparative analysis purposes. (See *Miller-El*, *supra*, 545 U.S. at p. 247; *People v. Lewis*, *supra*, 39 Cal.4th at p. 1019, fn. 15; *People v. Huggins*, *supra*, 38 Cal.4th at pp. 234-235.)

For example, appellant argues that the prosecutor's excusal of Juror No. 143 based on his confinement in jail is pretextural because Juror Nos. 69 and 84 had also served time in jail. (Suppl. AOB 17.) However, these jurors were not similarly situated to Juror No. 143. First, it appears that Juror No. 84 was only held in jail for a short time while the police investigated a shooting at a party he attended. (Question No. 23, 13 Suppl. CT II 3576.) Furthermore, Juror No. 69 did not agree with Juror No. 143's position regarding the O.J. Simpson trial. (Question No. 34, 12 Suppl. CT II 3446.) In addition, unlike Juror No. 143, Juror Nos. 69 and 84 did not believe that the Los Angeles Police Department treated Blacks differently from Caucasians. (Question No. 39, 12 Suppl. CT II 3446; 13 Suppl. CT II 3578.) Also, there is no evidence that either juror had ever filed for bankruptcy.

Next, appellant argues that the prosecutor's excusal of Juror No. 143 based on his brother's time in jail is pretextural because Juror Nos. 23 and 192 also had relatives who had been jailed. (Suppl. AOB 18-19.) However, these jurors were not similarly situated to Juror No. 143. First, unlike Juror No. 143, Juror No. 23 did not have any contact with the defense lawyer or prosecutor for

his brother's case. (Question 24G, 12 Suppl. CT II 3260.) Furthermore, Juror No. 23 did not know whether the Los Angeles Police Department treated Blacks differently from Caucasians. (Question 39, 12 Suppl. CT II 3262.) In addition, there is no evidence Juror No. 23 ever filed for bankruptcy. Juror No. 192 is not similarly situated to Juror No. 143 since the charges against his brother were dropped. (Question No. 24B, 11 Suppl. CT II 3087.) Furthermore, he did not have an opinion about the O.J. Simpson case (Question No. 34, 11 Suppl. CT II 3089), and there is no evidence that he filed for bankruptcy.

Appellant also argues that the prosecutor's reason for challenging Juror No. 143 based on his opinion of the O.J. Simpson case is a sham because others who felt the same way (Juror Nos. 130 and 146) were allowed to serve on the jury. (Suppl. AOB 19.) Again, appellant is mistaken. First, unlike Juror No. 143, Juror No. 130 did not share the same opinion regarding the Simpson matter. Indeed, Juror No. 130 stated that he thought Simpson was guilty but that there was "reasonable doubt." (Question No. 34, 14 Suppl. CT II 3852.) In addition, Juror Nos. 130 and 146 had never spent time in jail for a crime and did not know anyone who had been arrested or charged with a crime. (Question Nos. 23 and 24, 14 Suppl. CT II 3850, 3967.) Also, unlike Juror No. 143, Juror No. 146 did not know whether the Los Angeles Police Department treated Blacks differently from Caucasians. (Question No. 39, 14 Suppl. CT II 3969.) Finally, there is no evidence that either juror ever filed for bankruptcy.

Appellant further argues that the prosecutor's excusal of Juror No. 143 based on his belief that the Los Angeles Police Department treats Blacks differently was not "genuine" because he permitted others (Juror Nos. 130, 192, 187 and 132) to serve on the jury who had similar views. (Suppl. AOB 20.) Again, appellant's comparative analysis is misguided. First, for all the reasons discussed above, Juror Nos. 130 and 192 were not similarly situated to Juror

No. 143. Furthermore, contrary to appellant's assertions, Juror No. 132 did not share a similar view regarding the Los Angeles Police Department's treatment of Blacks. Indeed, in response to Question No. 39, Juror No. 132 responded, "Possibly a very small minority have not acted correctly." (Question 39, 14 Suppl. CT II 3865.) Juror No. 132, as well as Juror No. 187, had never spent time in jail for a crime and did not know anyone who had been arrested or charged with a crime. (Question Nos. 23 and 24, 14 Suppl. CT II 3863; 15 Suppl. CT II 4266.) There is also no evidence that either juror had ever filed for bankruptcy.

Thus, because the "accepted" jurors were different in "notable respects" from Juror No. 143, appellant's comparative analysis argument fails.

2. Juror No. 145

Appellant argues that the prosecutor's excusal of Juror No. 145 based on his beliefs that the prosecution in the O.J. Simpson case had not met their burden of proof and that the Los Angeles Police Department treats Blacks differently are pretextural since he allowed others to serve on the jury who shared the same views. (Suppl. AOB 14-16.)

Here, a side-by-side comparison of the supposedly similar jurors reveals that although Juror No. 145 had "isolated and discrete similarities" with some of the "accepted" jurors, they were not, in fact, "similarly situated" for comparative analysis purposes. (See *Miller-El*, *supra*, 545 U.S. at p. 247; *People v. Lewis*, *supra*, 39 Cal.4th at p. 1019, fn. 15; *People v. Huggins*, *supra*, 38 Cal.4th at pp. 234-235.)

Appellant argues that the prosecutor's challenge to Juror No. 145 based on his view of the O.J. Simpson matter was not a race-neutral justification since others (Juror Nos. 130 and 146) were allowed to serve on the jury with the same views. First, Juror No. 130 did not share the same opinion regarding the

Simpson matter as Juror No. 145. Indeed, Juror No. 145 opined that the "prosecution's case showed that he could [not] have committed the crimes" (Question No. 34, 14 Suppl. CT II 3956), while Juror No. 130 stated that he thought Simpson was guilty but that there was "reasonable doubt" (Question No. 34, 14 Suppl. CT II 3852). In addition, Juror No. 130 did not share Juror No. 145's opinion regarding the need for protocol in the crime lab and coroner's office. Juror No. 146 was not similarly situated to Juror No. 145 in that they did not share the same views regarding the Los Angeles Police Department's treatment of Blacks. (Question No. 39, 14 Suppl. CT II 3956, 3969.)

Appellant's arguments regarding the prosecutor's challenge to Juror No. 145 based on his belief that the Los Angeles Police Department treats Blacks differently also fail. Although other jurors (Juror Nos. 187, 130, 192, and 132) may have expressed similar views, they are not similarly situated to Juror No. 145. First, Juror Nos. 132, 187, and 192 did not share Juror No. 145's opinions regarding the O.J. Simpson matter. Specifically, Juror No. 132 stated that he "question[ed]" whether the jury understood the "technical DNA evidence" (Question No. 34, 14 Suppl. CT II 3865), and Juror No. 187 thought that some of the jurors believed Simpson was guilty but did not have the "courage of their convictions" (Question No. 34, 15 Suppl. CT II 4273). Juror No. 192 wrote that he "did not look at enough of the case to form an opinion about [Simpson's] guilt or innocence." (Question No. 34, 11 Suppl. CT II 3089.) Further, in response to Question No. 39 regarding the Los Angeles Police Department, Juror No. 132 wrote, "Possibly a very small minority have not acted correctly." (Question No. 39, 14 Suppl. CT II 3865.)

Thus, because the "accepted" jurors were different in "notable respects" from Juror No. 145, appellant's comparative analysis argument fails.

3. Juror No. 184

Appellant argues that the prosecutor's excusal of Juror No. 184 based on his belief that the Los Angeles Police Department treats Blacks differently is pretextural since he allowed others to serve on the jury (Juror Nos. 187, 130, 192, and 132) who shared the same view. (Suppl. AOB 9, 11.) However, a side-by-side comparison of the supposedly similar jurors reveals that although Juror No. 184 had "isolated and discrete similarities" with some of the "accepted" jurors, they were not, in fact, "similarly situated" for comparative analysis purposes. (See *Miller-El*, *supra*, 545 U.S. at p. 247; *People v. Lewis*, *supra*, 39 Cal.4th at p. 1019, fn. 15; *People v. Huggins*, *supra*, 38 Cal.4th at pp. 234-235.)

First, unlike Juror No. 184, Juror Nos. 132, 187, and 192 had never had guns pointed at them by the police and had not had an unpleasant experience with law enforcement. (Question No. 36, 11 Suppl. CT II 3089; 14 Suppl. CT II 3865; 15 Suppl. CT II 4268.) In addition, Juror Nos. 130, 132, 187, and 192 did not share the same views as Juror No. 184 regarding the death penalty. (Question Nos. 48-51, 11 Suppl. CT II 3092; 14 Suppl. CT II 3855, 3868; 15 Suppl. CT II 4271.)

Thus, because the "accepted" jurors were different in "notable respects" from Juror No. 184, appellant's comparative analysis argument fails.

4. Juror No. 196

Appellant argues that the prosecutor's excusal of Juror No. 196 based on the fact that her husband had a prior arrest is pretextural since he allowed others to serve on the jury who "either themselves or their close friends and/or family members had the same, similar or more serious prior arrests and/or convictions." (Suppl. AOB 24.) Appellant also argues that the prosecutor's

excusal of Juror No. 196 based on her beliefs that the prosecution in the *Simpson* case had not met their burden of proof and that the Los Angeles Police Department treats Blacks differently are pretextural since he allowed others to serve on the jury who shared the same views. (Suppl. AOB 26, 30.)

Here, a side-by-side comparison of the supposedly similar jurors reveals that although Juror No. 196 had "isolated and discrete similarities" with some of the "accepted" jurors, they were not, in fact, "similarly situated" for comparative analysis purposes. (See *Miller-El*, *supra*, 545 U.S. at p. 247; *People v. Lewis*, *supra*, 39 Cal.4th at p. 1019, fn. 15; *People v. Huggins*, *supra*, 38 Cal.4th at pp. 234-235.)

For example, appellant argues that the prosecutor's excusal of Juror No. 196 based on her husband's prior conviction is pretextural because several other accepted jurors (Juror Nos. 23, 68, 69, 81, 84, 106, 147, 180, and 192) either suffered convictions themselves or had family members with prior arrests and/or convictions. (Suppl. AOB 24.) However, these jurors were not similarly situated to Juror No. 196. First, as for Juror No. 84, it appears that he was only held in jail for a short time while the police investigated a shooting at a party he attended. (Question No. 23, 13 Suppl. CT II 3576.) Similarly, the charges against Juror 192's brother were dropped. (Question No. 24B, 11 Suppl. CT II 3087.) In addition, Juror Nos. 69, 84, 147, 180, and 192 did not agree with Juror No. 196's position regarding the O.J. Simpson trial. (Question No. 34, 11 Suppl. CT II 3063, 3089; 12 Suppl. CT II 3446; 13 Suppl. CT II 3578; 14 Suppl. CT II 3982.) Furthermore, unlike Juror No. 196, Juror Nos. 23, 68, 69, 81, 84, 106, 147, and 180 did not believe that the Los Angeles Police Department treated Blacks differently from Caucasians. (Question No. 39, 11 Suppl. CT II 3063; 12 Suppl. CT II 3262, 3432, 3446; 13 Suppl. CT II 3552, 3578, 3734; 14 Suppl. CT II 3982.) Also, Juror Nos. 68, 69, 81, 84, 106, 147, 180, and 192 did not share Juror No. 196's views regarding the death

penalty. (Question Nos. 48-51, 11 Suppl. CT II 3066, 3092; 12 Suppl. CT II 3265, 3426, 3449; 13 Suppl. CT II 3555, 3581, 3737; 14 Suppl. CT II 3985.) Notably, none of these "accepted" jurors expressed a belief that discrimination was "out of control" in the Los Angeles Police Department or referred to a police "code of silence."

Appellant also argues that the prosecutor's reason for challenging Juror No. 196 based on her opinion of the O.J. Simpson case is a sham because others who felt the same way (Juror Nos. 130 and 146) were allowed to serve on the jury. (Suppl. AOB 26.) Again, appellant is mistaken. First, unlike Juror No. 196, Juror No. 130 did not share the same opinion regarding the Simpson matter. Indeed, Juror No. 130 stated that he thought Simpson was guilty but that there was "reasonable doubt." (Question No. 34, 14 Suppl. CT II 3852.) In addition, Juror Nos. 130 and 146 had never spent time in jail for a crime and did not know anyone who had been arrested or charged with a crime. (Question Nos. 23 and 24, 14 Suppl. CT II 3850, 3967.) Also, unlike Juror No. 196, Juror No. 146 did not know whether the Los Angeles Police Department treated Blacks differently from Caucasians. (Question No. 39, 14 Suppl. CT II 3969.) Also, Juror Nos. 130 and 146 did not share Juror No. 196's views regarding the death penalty. (Question Nos. 48-51, 14 Suppl. CT II 3855, 3972.) Further, neither one of these jurors expressed a belief that discrimination was "out of control" in the Los Angeles Police Department or referred to a police "code of silence."

Appellant further argues that the prosecutor's excusal of Juror No. 196 based on her belief that the Los Angeles Police Department treats Blacks differently was not "genuine" because he permitted others (Juror Nos. 130, 192, 187 and 132) to serve on the jury who had similar views. (Suppl. AOB 30.) Again, appellant's comparative analysis is misguided. First, for all the reasons discussed above, Juror Nos. 130 and 192 were not similarly situated to Juror

No. 196. Furthermore, contrary to appellant's assertions, Juror No. 132 did not share a similar view regarding the Los Angeles Police Department's treatment of Blacks. Indeed, in response to Question No. 39, Juror No. 132 responded, "Possibly a very small minority have not acted correctly." (Question 39, 14 Suppl. CT II 3865.) Juror No. 132, as well as Juror No. 187, had never spent time in jail for a crime and did not know anyone who had been arrested or charged with a crime. (Question Nos. 23 and 24, 14 Suppl. CT II 3863; 15 Suppl. CT II 4266.) Also, Juror Nos. 132 and 187 did not share Juror No. 196's views regarding the death penalty. (Question Nos. 48-51, 14 Suppl. CT II 3868; 15 Suppl. CT II 4271.) Further, neither of these jurors expressed a belief that discrimination was "out of control" in the Los Angeles Police Department or referred to a police "code of silence."

Thus, because the "accepted" jurors were different in "notable respects" from Juror No. 196, appellant's comparative analysis argument fails.

5. Alternate Juror No. 162

Appellant argues that the prosecutor's excusal of alternate Juror No. 162 based on her belief that the prosecution in the O.J. Simpson case had not met their burden of proof is pretextural since he allowed others to serve on the jury who shared the same view. (Suppl. AOB 34.)

Here, a side-by-side comparison of the supposedly similar jurors (Juror Nos. 130 and 146) reveals that although alternate Juror No. 162 had "isolated and discrete similarities" with some of the "accepted" jurors, they were not, in fact, "similarly situated" for comparative analysis purposes. (See *Miller-El*, *supra*, 545 U.S. at p. 247; *People v. Lewis*, *supra*, 39 Cal.4th at p. 1019, fn. 15; *People v. Huggins*, *supra*, 38 Cal.4th at pp. 234-235.) First, unlike alternate Juror No. 162, Juror No. 130 did not share the same opinion regarding the Simpson matter. Indeed, Juror No. 130 stated that he thought

Simpson was guilty but that there was "reasonable doubt." (Question No. 34, 14 Suppl. CT II 3852.) Also, Juror Nos. 130 and 146 did not share Juror No. 196's views regarding the death penalty. (Question Nos. 48-51, 14 Suppl. CT II 3855, 3972.)

Thus, because the "accepted" jurors were different in "notable respects" from alternate Juror No. 162, appellant's comparative analysis argument fails.

G. The Trial Court Properly Evaluated The Prosecutor's Reasons For Excusing Each Of The Black Prospective Jurors

Appellant further argues that trial court denied his *Wheeler* motion "without inquiry into or evaluation of the prosecutor's reasons to distinguish bonafide reasons from sham reasons" and accepted the prosecutor's explanations "at face value without regard to the record of voir dire and the questionnaires." (Suppl. AOB 37-41.) Appellant is mistaken.

Here, the record clearly reflects the trial court's thoughtful consideration of the voir dire process and the prosecutor's explanation for each peremptory challenge. For example, after the prosecutor explained all of his challenges, the trial court explained that based on his "observations . . . there were ample and obvious reasons for [the jurors] to be dismissed by the use of peremptory challenges." He further stated that "as to all but two of those jurors the reason was compelling and obvious." (44RT 4497-4498.) Indeed, the monologue given by the trial court in ruling on appellant's motion clearly evidences the consideration he gave to each of the prosecutor's explanations. Regardless,

> the trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine. [Citation.] Inquiry by the trial court is not even required. [Citation.] All that matters is that the prosecutor's reason for

> exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. [Citation.] A reason that makes no sense is nonetheless sincere and legitimate as long as it does not deny equal protection. [Citation.]

(*People v. Guerra*, *supra*, 37 Cal.4th at pp. 1100-1101, quotation marks omitted.)

Appellant has failed to explain how any further inquiry by the trial court was necessary or would have compelled a different conclusion. For these reasons, appellant's arguments must be rejected.

H. Conclusion

Substantial evidence supports the trial court's ruling that appellant failed to meet his step one burden and establish a prima facie case of discrimination. In any event, the prosecutor offered specific race-neutral reasons for each of his peremptory challenges. Furthermore, appellant's attempt to demonstrate a discriminatory purpose with comparative analysis must fail as the "accepted" jurors were not similarly situated to the "challenged" jurors listed by appellant. For all these reasons, appellant's arguments must be rejected.

V.

APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY A 12-YEAR DELAY BETWEEN THE CRIME AND HIS ARREST

Appellant contends that the 12-year delay in filing charges against him resulted in the unavailability of material witnesses and the loss or fading of memories, as well as the actual destruction of critical evidence, which was potentially exculpatory. Based on this, appellant argues that "his rights to a fair trial, present a defense as well as witnesses and evidence on his behalf, effective assistance of counsel and to reliable determinations of guilt, death-eligibility and penalty" under the "Fifth, Sixth, Eighth and Fourteenth Amendments of the United States" were violated. (Suppl. AOB 43.) These constitutional claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 100-107), substantial evidence supports the trial court's finding that appellant was unable to demonstrate prejudice as a result of the 12-year delay. (*People v. Cole, supra,* 33 Cal.4th at p.1225, fn.22; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133.)

VI.

APPELLANT'S MOTION TO DISMISS UNDER TROMBETTA[8] AND YOUNGBLOOD[9] WAS PROPERLY DENIED

Appellant contends that the government's failure to preserve and/or destruction of certain evidence (i.e., audiotape of hypnosis session with Agent Bulman, originals of composite drawings based on Agent Bulman's description of the suspects, and swabs from presumptive phenolphthalein testing of appellant's jacket) violated his "constitutional rights to due process and a fundamentally fair trial under the Fourteenth Amendment," as well as his "rights to present a defense under the Sixth Amendment and Fourteenth Amendments, and reliable determinations of guilt, death-eligibility and penalty as provided by the Eighth Amendment." (Suppl. AOB 44.) These constitutional claims fail on their merits because, as demonstrated by respondent in the Respondent's Brief (RB 108-114), there was no violation of due process where substantial evidence supports the trial court's ruling that the evidence had no apparent exculpatory value and, in any event, comparable evidence was available to appellant. (See *People v. Cole, supra,* 34 Cal.4th at pp. 1187, fn. 1, 1195, fn. 6, 1225, fn. 22; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133.)

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8. *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413].

9. *Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281].

VII.

THE APPLICATION OF EVIDENCE CODE SECTION 795 ONLY TO HYPNOSIS SESSIONS OCCURRING AFTER ITS EFFECTIVE DATE DOES NOT VIOLATE EQUAL PROTECTION OR ANY OTHER FEDERAL CONSTITUTIONAL RIGHT

Appellant contends the failure to retroactively apply the provisions of Evidence Code section 795 to the 1980 hypnosis sessions of Agent Bulman not only denied him equal protection of the law, as he argued in his opening brief, but also deprived him of his rights to due process, confrontation and a fundamentally fair trial based on reliable evidence, his state-created liberty interest, and reliable determinations of guilt, death-eligibility and penalty as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments. (Suppl. AOB 45-46.) Assuming appellant preserved a federal constitutional claim below, these claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 115-121), limitation of Evidence Code section 795 to hypnosis sessions conducted after January 1, 1985, did not violate appellant's constitutional right to equal protection. Even assuming the provisions of Evidence Code section 795 should have been applied to the 1980 hypnosis sessions, any such error was harmless under *Chapman v. California, supra,* 386 U.S. at p. 24. (See *People v. Cole, supra,* 33 Cal.4th at pp. 1195, fn. 6, 1197, fn. 8; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133.)

VIII.

THE TRIAL COURT'S FINDING THAT AGENT BULMAN WAS NOT HYPNOTIZED IN MAY OF 1987, SUCH THAT EVIDENCE CODE SECTION 795 DID NOT BAR HIS TESTIMONY, IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant contends the trial court's failure to bar the testimony of Agent Bulman under Evidence Code section 795 due to his 1987 hypnosis session "seriously undermined his constitutional rights to confrontation and the reliability of the guilt, death-eligibility and penalty determinations in this case" as guaranteed by the Sixth and Eighth Amendments. (Suppl. AOB 47.) These constitutional claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 122-127), Evidence Code section 795 was inapplicable to Bulman's testimony since the record contains substantial evidence to support the trial court's finding that Bulman was *not* hypnotized during the 1987 session. Thus, Bulman's testimony regarding the 1987 interview was properly admitted under state law.

Where the predicate of appellant's federal constitutional claims rests on the existence of state law, such as here, and there is no violation of state law in the admission of the evidence, such as here, "the claim of federal constitutional error falls of its own merit." (*People v. Cole, supra,* 33 Cal.4th at p. 1187, fn. 1.) Further, because the trial court properly applied state law rules of evidence in admitting Bulman's testimony, appellant cannot show that the admission of the evidence "resulted in an arbitrary deprivation of a purely state law entitlement as provided by the Fifth and Fourteenth Amendments of the United States Constitution." (See Suppl. AOB 48; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175].) Thus, all of the federal constitutional claims raised by appellant in his opening brief and

supplemental brief regarding Evidence Code section 795 acting as a bar to Agent Bulman's testimony are meritless.

IX.

THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF WITNESS MATHESON REGARDING THE PRESUMPTIVE BLOOD TESTS CONDUCTED ON APPELLANT'S JACKET

Appellant contends that the erroneous admission of irrelevant expert testimony by Los Angeles Police Department forensic chemist Gregory Matheson regarding the presumptive blood tests conducted on appellant's jacket violated his constitutional rights to due process and a fair trial, as well as reliable determinations of death-eligibility and penalty as guaranteed by the Fifth, Eighth and Fourteenth Amendments. (Suppl. AOB 49.) Assuming appellant preserved a federal constitutional claim below, these claims fail on their merits because, as respondent demonstrated in its Respondent's Brief (129-135), the record amply supports the exercise of the trial court's discretion in determining that Matheson's testimony regarding the presumptive blood tests was admissible under Evidence Code sections 210 and 352.

Where the predicate of appellant's federal constitutional claim rests on the existence of state law error, such as here, and there is no violation of state law in the admission of the evidence, such as here, "the claim of federal constitutional error falls of its own merit." (*People v. Cole, supra,* 33 Cal.4th at p. 1187, fn. 1.) Further, because the trial court properly applied state law rules of evidence, appellant cannot show that admission of the evidence "resulted in an arbitrary deprivation of a purely state law entitlement and appellant's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution." (See Suppl. AOB 49; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Thus, all of the federal constitutional claims raised by appellant in his opening brief and supplemental brief regarding the admission of Matheson's testimony are meritless.

X.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE TESTIMONY OF APRIL WATSON AND DETECTIVE HENRY

Appellant contends that the trial court's erroneous admission of April Watson's "irrelevant and prejudicial" testimony, as well as Los Angeles Police Detective Buck Henry's "improper hearsay testimony," violated his "fundamental rights to due process and a fair trial" as provided by the Fifth Amendment, as well as "reliable determinations of guilt, death-eligibility and penalty" under the Eighth Amendment. (Suppl. AOB 50-51.) These constitutional claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 136-144), the trial court properly exercised its discretion in admitting Watson's testimony under Evidence Code section 210 and, assuming without conceding appellant made a specific and timely objection to Henry's testimony, such testimony was properly admitted under the hearsay exceptions contained in Evidence Code sections 1235 and 1237.

Where the predicate of appellant's federal constitutional claim rests on the existence of state law, such as here, and there is no violation of state law in the admission of the evidence, such as here, "the claim of federal constitutional error falls of its own merit." (*People v. Cole, supra,* 33 Cal.4th at p. 1187, fn. 1.) Further, because the trial court properly applied state law rules of evidence in admitting the testimony of Watson and Detective Henry, appellant cannot show the admission of the evidence "resulted in the arbitrary deprivation of appellant's state law entitlement in violation of the Due Process Clause of the Fifth and Fourteenth Amendments." (See Suppl. AOB 51; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Thus, all of the federal constitutional claims raised by appellant in his opening brief and supplemental brief regarding the admission of the testimony of Watson and Henry are meritless.

XI.

EVIDENCE OF APPELLANT'S REFUSAL TO STAND IN A LINEUP WAS PROPERLY ADMITTED

Appellant contends the admission of evidence regarding his refusal to stand in a lineup constituted improper consciousness of guilt evidence which violated his constitutional rights to due process and a fair trial, not incriminate himself, and reliable determination of guilt, death-eligibility and penalty as guaranteed by the Fifth, Eighth and Fourteenth Amendments. (Suppl. AOB 52.) These constitutional claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 145-146), the trial court did not abuse its discretion under Evidence Code section 210 in admitting the evidence, since the circumstances surrounding appellant's refusal to stand in the lineup support an inference of consciousness of guilt. Further, even though appellant did not object to the evidence under Evidence Code section 352, respondent demonstrated in the Respondent's Brief that the record did not support exclusion on that ground as well. (RB 146-147.) Respondent thus demonstrated in the Respondent's Brief that the evidence surrounding appellant's refusal to stand in the lineup was properly admitted under state law rules of evidence.

Where the predicate of appellant's federal constitutional claim rests on the existence of state law error, such as here, and there is no violation of state law in the admission of the evidence, such as here, "the claim of federal constitutional error falls of its own merit." (*People v. Cole, supra,* 33 Cal.4th at p. 1187, fn. 1.) And, because the trial court properly applied state law rules of evidence, appellant cannot show admission of the evidence "resulted in an arbitrary deprivation of a purely state law entitlement as provided by the Fifth and Fourteenth Amendments of the United States Constitution." (See Suppl. AOB 53; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Thus, all of the

federal constitutional claims raised by appellant in his opening brief and supplemental brief regarding the circumstances surrounding his refusal to stand in the lineup are meritless.

XII.

JACQUELINE SHEROW'S TESTIMONY REGARDING STATEMENTS MADE BY CHARLES BROCK WAS PROPERLY EXCLUDED

Appellant contends that the trial court's exclusion of Jacqueline Sherow's testimony regarding supposedly inculpatory statements made to her by Charles Brock deprived him "of his right to due process and a fundamentally fair jury trial under the Fifth Amendment as well as his right to present witnesses in his defense under the Sixth Amendment." Appellant further contends that exclusion of Sherow's testimony deprived him "of his right to reliable determinations of guilt, death-eligibility, and penalty as provided by the Eighth Amendment." (Suppl. AOB 54.) Assuming appellant preserved a federal constitutional claim below, these claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 148-154), the record amply supports the trial court's exercise of discretion in ruling that Sherow's testimony regarding Brock's statements were not declarations against penal interest, and thus not subject to admission under Evidence Code section 1230.

Where the predicate of appellant's constitutional claim rests on the existence of state law error, such as here, and there is no violation of state law error, such as here, "the claim of federal constitutional error falls of its own merit." (*People v. Cole, supra,* 33 Cal.4th at p. 1187, fn. 1.) Further, because the trial court properly applied state law rules of evidence, appellant cannot show that exclusion of Sherow's testimony deprived him "of his state-created liberty interests in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution." (See Suppl. AOB 55; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Thus, all of the

federal constitutional claims raised by appellant in his opening brief and supplemental brief regarding the exclusion of Sherow's testimony are meritless.

XIII.

THE JURY WAS PROPERLY INSTRUCTED WITH CALJIC NOS. 2.04 AND 2.05

Appellant contends that there was insufficient evidence to support the giving of CALJIC Nos. 2.04 (Efforts By Defendant To Fabricate Evidence) and 2.05 (Efforts By Someone Other Than Defendant To Fabricate Evidence) and that the instructions lessened the prosecution's burden. Appellant maintains that the giving of the instructions

> reduced the reliability of the jury's determinations, created the risk that the jury would make erroneous factual determinations, and deprived appellant of his right to reliable determinations of guilt, death-eligibility and penalty provided by the Eighth and Fourteenth Amendments.

(Suppl. AOB 56-57.) Assuming appellant preserved a federal constitutional claim below, these claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 155-158), the instructions were amply supported by the evidence and the instructions did not lessen the prosecution's burden of proof. (See *People v. Cole, supra,* 34 Cal.4th at pp. 1187, fn. 1, 1195, fn. 6, 1228, fn. 23 [defendant's constitutional claim involving instructional error "fails because . . . the court instructed the jury adequately"]; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133.)

XIV.

THE JURY WAS PROPERLY INSTRUCTED REGARDING AIDING AND ABETTING

Appellant contends that the trial court erroneously instructed the jury on aiding and abetting, and thus violated his constitutional "rights to due process, a fundamentally fair jury trial, prepare an adequate defense, and counsel," and "reliable determinations of guilt, death-eligibility and penalty" as guaranteed by the Fifth, Sixth, and Eighth Amendments. (Suppl. AOB 58-59.) Assuming appellant preserved a federal constitutional claim below, these claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 158-159), the jury was properly instructed on aiding and abetting, and the record contains substantial evidence to support the giving of each challenged instruction. (See *People v. Cole, supra,* 33 Cal.4th at pp. 1196, fn. 6, 1212, fn. 14, 1217, fn. 16, 1219, fn. 17, 1221, fn. 18, 1222, fn. 20, 1228, fn. 23, 1229, fn. 24; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133.)

XV.

JESSICA BROCK WAS PROPERLY QUESTIONED REGARDING WHETHER APPELLANT HAD COMMITTED A CRIMINAL OFFENSE IN 1978

Appellant contends the trial court's ruling permitting the prosecutor to elicit from Jessica Brock "highly inflammatory evidence" that appellant had committed a prior serious offense with Terry Brock violated his constitutional rights to "due process, a fair trial and a trial which does not impermissibly lighten the prosecution's burden of proof," as well as to "reliable determinations of guilt, special circumstances and penalty" as guaranteed by the Fifth, Sixth and Eighth Amendments. (Suppl. AOB 60-61.) Assuming appellant preserved a claim of federal constitutional error below, these claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 169-179), the trial court properly ruled the evidence relevant under Evidence Code section 210, admissible under Evidence Code section 1101, and not unduly prejudicial under Evidence Code section 352. (*People v. Cole, supra,* 33 Cal.4th at pp.1187, fn. 1, 1195, fn, 6; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133.)

Where the predicate of appellant's constitutional claim rests on the existence of state law error, such as here, and there is no violation of state law error, such as here, "the claim of federal constitutional error falls of its own merit." (*People v. Cole, supra,* 33 Cal.4th at p. 1187, fn. 1.) Thus, all of the federal constitutional claims raised by appellant in his opening brief and supplemental brief regarding Jessica Brock's testimony are meritless.

XVI.

APPELLANT'S MOTION FOR A MISTRIAL WAS PROPERLY DENIED

Appellant contends the trial court's denial of his motion for a mistrial based on evidence that he had previously committed a "triple murder" with Terry Brock (i.e., Jessica Brock's reference to the "triple murder" in response to the prosecutor's question that sought to clarify whether appellant and Terry Brock had visited her apartment in 1978, two years before the murder of Julie Cross) violated his constitutional rights "to due process, a fair trial, an impartial jury, a trial which does not impermissibly lighten the prosecution's burden of proof" as well as "reliable determinations of death-eligibility and penalty provided under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution." (Suppl. AOB 182-185.) Assuming appellant preserved a claim of federal constitutional error below, these claims fail because, as respondent demonstrated in the Respondent's Brief (RB 180-185), the record amply supports the trial court's exercise of discretion under state law in denying appellant's mistrial motion.

Where the predicate of appellant's federal constitutional claim rests on the existence of state law error, such as here, and there is no violation of state law, such as here, "the claim of federal constitutional error falls of its own merit." (*People v. Cole, supra,* 33 Cal.4th at p. 1187, fn. 1.) Thus, all of the federal constitutional claims raised by appellant in his opening brief and supplemental brief regarding the trial court's denial of his mistrial motion are meritless.

XVII.

SUBSTANTIAL EVIDENCE SUPPORTS THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE

Appellant contends that the insufficiency of the evidence to support the robbery-murder special-circumstance finding violated his "rights to due process and reliable determinations of death-eligibility and penalty under the Fifth and Eighth Amendments to the United States Constitutions." (Suppl. AOB 64-65.) These constitutional claims fail on their merits because, as demonstrated in the Respondent's Brief (RB 186-190), substantial evidence was presented to the jury to support the robbery-murder special circumstance. (See *People v. Cole, supra,* 33 Cal.4th at p. 1225, fn. 22; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133.)

XVIII.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A CONTINUANCE TO FILE A NEW TRIAL MOTION AND PROPERLY MADE A RECORD OF ITS RULING HAD SUCH A MOTION BEEN FILED

Appellant contends the improper actions of the trial court (i.e., denying appellant's motion for a continuance to file a new trial motion and "deeming" a new trial motion filed on appellant's behalf) deprived him of his constitutional rights "to present a defense, due process and reliable determinations of guilt, death-eligibility and penalty under the Fifth, Sixth, and Eighth Amendments to the United States Constitution." (Suppl. AOB 66-67.) These constitutional claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 191-201), the record amply supports the trial court's exercise of discretion in denying appellant's request for a continuance to make a new trial motion. And, to the extent appellant properly preserved the issue, respondent further demonstrated in the Respondent's Brief (RB 301-203), the trial court did not file a new trial motion on appellant's behalf under Penal Code section 1181. Rather, in anticipation of a subsequent claim the trial court prejudicially abused its discretion in denying the continuance request or that appellant received the ineffective assistance of counsel, the trial court made a record of how it *would have* ruled had appellant filed a motion for a new trial. Thus, respondent demonstrated the trial court properly denied appellant's request for a continuance under applicable state law.

Where the predicate of appellant's federal constitutional claim rests on the existence of state law, such as here, and there is no violation of state law, such as here, "the claim of federal constitutional error falls of its own merit." (*People v. Cole, supra,* 33 Cal.4th at p. 1187, fn. 1.) Thus, all of the federal constitutional claims raised by appellant in his opening brief and

supplemental brief regarding the trial court's denial of appellant's motion for a continuance to file a new trial motion are meritless.

XIX.

THE JURY WAS PROPERLY INSTRUCTED REGARDING HOW TO VIEW MITIGATING EVIDENCE AT THE PENALTY PHASE

Appellant contends that the trial court's refusal to give his special instruction at the penalty phase (i.e., that mitigating circumstances need not be proven beyond a reasonable doubt and that mitigation may be found no matter how weak the evidence) violated his

> constitutional rights to due process and fundamentally fair trial by jury, present a defense, instructions which are not confusing or misleading, adequate instructions on the theory of the defense and a determination based on consideration of all relevant aspects of appellant's character and record under the Fifth, Sixth, and Fourteenth Amendments.

(Suppl. AOB 68-69.) Assuming appellant preserved a federal constitutional claim below, these claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 205-210), the penalty jury was properly instructed, and thus the trial court properly refused to give appellant's requested instruction. Moreover, respondent demonstrated in the Respondent's Brief that any instructional error in this regard was harmless under the "reasonable possibility" test of prejudice. (See *People v. Cole, supra,* 33 Cal.4th at pp. 1195, fn. 6, 1212, fn. 14, 1217, fn. 16, 1219, fn. 17, 1221, fn. 18, 1222, fn. 20, 1228, fn. 23, 1229, fn. 24; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133.)

XX.

THE TRIAL COURT PROPERLY REFUSED APPELLANT'S REQUEST THAT THE JURY BE INSTRUCTED THAT ANY ONE MITIGATING FACTOR, EVEN IF NOT LISTED IN THE JURY INSTRUCTIONS, COULD SUPPORT A DETERMINATION THAT DEATH WAS NOT THE APPROPRIATE PENALTY

Appellant contends that the trial court's refusal to give his special instruction at the penalty phase (i.e., that a single mitigating circumstance, even one not listed by the court, may be sufficient to support a penalty less than death) violated his

> constitutional rights to due process and fundamentally fair trial by jury, present a defense, instructions which are not confusing or misleading, adequate instructions on the theory of the defense and a determination based on consideration of all relevant aspects of appellant's character and record under the Fifth, Sixth, Eighth and Fourteenth Amendments.

(Suppl. AOB. 70-71.) Assuming appellant preserved a federal constitutional claim below, these claims fail on their merits because, as respondent demonstrated in the Respondent's Brief (RB 211-215), the penalty jury was properly instructed, and thus the trial court properly refused appellant's requested instruction. Moreover, respondent demonstrated in the Respondent's Brief that any instructional error in this regard was harmless under the "reasonable possibility" test of prejudice. (See *People v. Cole, supra,* 33 Cal.4th at pp. 1195, fn. 6, 1212, fn. 14, 1217, fn. 16, 1219, fn. 17, 1221, fn. 18, 1222, fn. 20, 1228, fn. 23, 1229, fn. 24; *People v. Yeoman, supra,* 31 Cal.4th at pp. 117, 133.)

XXIII.

THE TRIAL COURT PROPERLY DENIED THE AUTOMATIC APPLICATION FOR MODIFICATION OF THE VERDICT PURSUANT TO PENAL CODE SECTION 190.4, SUBDIVISION (E)

Appellant contends the trial court's reading of appellant's probation report prior to denying the automatic application for modification of the verdict pursuant to Penal Code section 190.4, subdivision (e), violated the Eighth Amendment, as well as due process and the confrontation clause under the Fifth, Sixth and Fourteenth Amendments. (Suppl. AOB 72.) As explained in the Respondent's Brief (RB 222-224), although the trial court may have read the probation report prior to ruling, the record demonstrates that the trial court's ruling on the Penal Code section 190.4, subdivision (e), motion was *not* based on the materials contained in the probation report. Rather, the trial court's ruling properly considered only the aggravating and mitigating evidence presented to the penalty jury. Thus, as demonstrated in the Respondent's Brief (RB 222-224), the trial did not err in ruling under Penal Code section 190.4, subdivision (e), that the penalty was appropriate.

Where the predicate of appellant's federal constitutional claim rests on the existence of state law error, such as here, and there is no violation of state law, such as here, "the claim of federal constitutional error falls on its own merit." (*People v. Cole, supra,* 33 Cal.4th at p. 1187, fn. 1.) Further, because the trial court properly denied the motion under Penal Code section 190.4, subdivision (e), appellant cannot show an arbitrary deprivation of a purely state law entitlement and appellant's due process rights under the Fifth and Fourteenth Amendments. (See Suppl. AOB 72; *Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Thus, all of the federal constitutional claims raised by appellant in his opening brief and supplemental brief regarding the trial court's ruling on the Penal Code section 190.4, subdivision (e), motion are meritless.

XXV.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT APPELLANT COULD BE CONVICTED OF FIRST DEGREE MURDER

Appellant contends the trial court prejudicially erred, and violated his constitutional rights under the federal and state Constitutions, by improperly instructing the jury on first degree premeditated murder as well as first degree felony-murder when the information charged appellant only with second-degree malice-murder under Penal Code section 187. Arguing he was only charged with second-degree malice murder under Penal Code section 187, appellant maintains, the trial court "lacked jurisdiction to try appellant for first degree murder." Accordingly, appellant argues that his conviction for first degree murder must be reversed because he was convicted of an "uncharged crime." (Suppl. AOB 73-80.) Respondent submits the trial court properly instructed the jury that appellant could be convicted of first degree murder.

Appellant's entire argument is based on the erroneous premise that he was only charged with second-degree murder in the information. This is simply wrong. The amended information alleged that "on or about June 4, 1980, ANDRE ALEXANDER, in violation of PENAL CODE SECTION 187(A), a Felony, did willfully and unlawfully and with malice aforethought murder AGENT JULIE CROSS, a human being." (3CT 589.)

As can be seen, contrary to appellant's assertion, the information does not reference second degree murder but rather charges appellant with malice murder in violation of Penal Code section 187. This Court has held for nearly a century that if the charging document charges the offense in the language of the statute (i.e., Penal Code section 187), as is the case here, the offense charged includes both degrees of murder. Thus, a defendant can legally be convicted

of either first or second degree murder if warranted by the evidence. As noted by this Court in *People v. Witt* (1915) 170 Cal. 104, 107-108 (*Witt*):

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto* [(1883)], 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought.' (Pen. Code, sec. 187.) Murder, thus defined, includes murder in the first degree and murder in the second degree. [Footnote omitted.] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

This Court reaffirmed the validity of the *Witt* decision in *People v. Hughes* (2002) 27 Cal.4th 287, 368-370. In rejecting the claim that the defendant was improperly convicted of first degree murder on a felony murder theory where he was charged in the information only with "malice murder" as defined in Penal Code section 187, this Court stated:

> In summary, we reject, as contrary to our case law, the premise underlying defendant's assertion that felony murder and malice murder are two separate offenses. Accordingly, we also reject defendant's various claims that because the information charged him only with murder on a malice theory, and the trial court instructed the jury pursuant to both malice and a felony-murder theory, the general verdict convicting him of first degree murder must be reversed.

(*People v. Hughes, supra*, 27 Cal.4th at p. 370.) Thus, appellant's claim must be rejected since this Court has clearly and definitively spoken on the issue.

Appellant's entire argument is predicated on the erroneous premise that this Court's holding and rationale in *Witt* was undermined and implicitly overruled by this Court's decision in *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), a case which held, according to appellant, that "[Penal Code] section 189 is the statutory enactment of the felony murder rule in California." Thus, the argument is that felony murder and premeditated murder are separate crimes and *Dillon* effectively overruled *Witt*'s holding that a defendant can be convicted of felony murder even though he is only charged with malice murder in the information. (Suppl. AOB 73-80.)

Unfortunately for appellant, this Court rejected this identical argument:

> As the People observe, numerous appellate court decisions have rejected defendant's jurisdictional argument. We have rejected defendant's argument that felony murder and murder with malice are separate offenses ([*People v.*] *Carpenter* [(1997)] 15 Cal.4th 312, 394-395 [it is unnecessary for jurors to agree unanimously on a theory of first degree murder]; and, subsequent to *Dillon, supra*, 34 Cal.3d 441, we have reaffirmed the rule of [*Witt*], *supra*, 170 Cal.104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely. Thus, we implicitly have rejected the argument that felony murder and murder with malice are separate crimes that must be pleaded separately.

(*People v. Hughes, supra*, 27 Cal.4th at p. 369.)

Finally, it must be noted that appellant's reliance on *Apprendi v. New Jersey* (2004) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] is misplaced since, as shown above, appellant was not convicted of an "uncharged crime."

Accordingly, for all of the foregoing reasons, appellant's claims must be rejected.

XXVI.

THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY THAT IT WAS REQUIRED TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY-MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

Appellant contends the trial court erred in failing to instruct the jury that it was required to unanimously agree on whether he had committed a premeditated murder or a felony-murder before returning a verdict finding him guilty of murder in the first degree. This failure to so instruct the jury, argues appellant, deprived him "of his right to have all the elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of an unanimous jury," as well as "his right to a fair and reliable determination that he committed a capital offense" under the California and United States Constitutions. (Suppl. AOB 81-89.)

This Court, however, has repeatedly rejected this type of claim. The law is clear that a jury is not required to unanimously agree on the *theory* of guilt (i.e., deliberate and premeditated murder or felony-murder) in support of a first degree murder verdict. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1221; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Lewis* (2001) 25 Cal.4th 610, 654; *People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 394-395.) Further, there is no need to reconsider this rule, as urged by appellant, "in light of recent decisions of the United States Supreme Court." (Suppl. AOB 81-82.) This Court has previously noted that the United States Supreme Court's decisions in such cases as *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 466 and *Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555], cases cited and relied upon by appellant (see Suppl.

AOB 86-88), do not hold otherwise. (*People v. Cole, supra* 33 Cal.4th at p. 1221; *People v. Nakahara* (2003) 30 Cal.4th 705, 712-713; *People v. Box, supra,* 23 Cal.4th at p. 1212.) Appellant's claim must therefore be rejected.

XXVII.

THE INSTRUCTIONS CONCERNING THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AS WELL AS THE APPLICATION OF THOSE FACTORS TO APPELLANT'S CASE, WERE CONSTITUTIONAL

Appellant raises a number of constitutional challenges to the giving of CALJIC No. 8.85,[10/] the instruction regarding the statutory factors set forth in

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10. CALJIC No. 8.85 states:

In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as

Penal Code section 190.3 that are to be considered by the jury in determining whether to impose a sentence of death or life imprisonment without the possibility of parole. (Suppl. AOB 90-106.) As demonstrated below, this Court has previously rejected the identical claims raised by appellant. This Court should do so again in the instant case as appellant has not presented any compelling or persuasive reason for this Court to reconsider its prior decisions on these points.

First, appellant raises several issues regarding the use of unadjudicated activity as aggravation at the penalty phase. (Suppl. AOB 91-99.) These claims (i.e., the use of such evidence and the failure to require a unanimous jury finding on the use of an unadjudicated act of violence) have been previously rejected by this court. (*People v. Chatman* (2006) 38 Cal.4th 344, 310;

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a result of mental disease or defect or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given t you in the guilt or innocence phase of this trial which conflicts with this principle].

The following language was also added by the trial court:

Disregard the last paragraph of 1.00, which has been stricken.

The permissible aggravating factors are limited to those factors upon which you have been specifically instructed. Thus, evidence relating to drug use sales, forgery or counterfeiting cannot be used as an aggravating factor.

(15CT 3892-3893.)

People v. Guerra, supra, 37 Cal.4th at p. 1165; *People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Morrison* (2004) 34 Cal.4th 698, 729; *People v. Brown, supra,* 33 Cal.4th at p. 499; *People v. Maury* (2003) 30 Cal.4th 342, 439; *People v. Kipp, supra,* 26 Cal.4th at p. 1138.) These claims should be rejected again in the instant case.

Second, the failure to delete inapplicable sentencing factors did not violate appellant's constitutional rights. (Suppl. AOB 99-101.) This Court has repeatedly held that the trial court is not required to omit inapplicable sentencing factors when instructing the jury. (*People v. Panah, supra,* 35 Cal.4th at p. 499; *People v. Kipp, supra,* 26 Cal.4th at p. 1138; *People v. Riel* (2000) 22 Cal.4th 1153, 1225.) This claim should be rejected again in the instant case.

Third, appellant claims, without explanation, that the inclusion in potential mitigating factors of such descriptions as "extreme" in factor (b) and "substantial" in factor (g) acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments. (Suppl. AOB 101.) This Court has previously held that the use of the words "extreme" and "substantial" as set forth in the death penalty statute have common sense meanings which are not impermissibly vague. (*People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Maury, supra,* 30 Cal.4th at p. 429; *People v. Brown, supra,* 33 Cal.4th at p. 402.) Thus, respondent submits, the use of such adjectives did not act as a barrier to the consideration of mitigating evidence.

Fourth, appellant's claim that written findings regarding the aggravating factors is required under the federal Constitution (Suppl. AOB 102-104) has been rejected by this Court on numerous occasions. (*People v. Prieto, supra,*

30 Cal.4th at p. 275; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Lucero* (2000) 23 Cal.4th 692, 741.) It should be rejected again in this case.

Finally, appellant claims that the absence of the "previously addressed procedural safeguards" render the death penalty scheme unconstitutional because, according to him, those safeguards are provided to non-capital defendants. (Suppl. AOB 104-106.) This Court has held many times that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Hinton, supra,* 37 Cal.4th at p. 912; *People v. Smith, supra,* 35 Cal.4th at p. 374; *People v. Morrison, supra,* 34 Cal.4th at p. 371; *People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Boyette* (2002) 29 Cal.4th 381, 465-467.) Thus, appellant's claim is meritless.

XXVIII.

THE INTERCEPTION OF A CONVERSATION BETWEEN APPELLANT, HIS MOTHER, AND A DEFENSE INVESTIGATOR DOES NOT CONSTITUTE EGREGIOUS CONDUCT OR RISE TO THE LEVEL OF A CONSTITUTIONAL VIOLATION, AND, IN ANY EVENT, APPELLANT HAS FAILED TO DEMONSTRATE THAT HE WAS PREJUDICED IN ANY WAY AS A RESULT OF THE RECORDING

Appellant contends that his judgment and sentence must be reversed and the case dismissed because the prosecution impermissibly intercepted privileged communications relating to defense trial strategy. (Suppl. AOB 107-123.) Respondent submits that the recording of a conversation between appellant, his mother, and a defense investigator does not constitute egregious conduct or rise to the level of a constitutional violation, and, in any event, appellant has failed to demonstrate that he was prejudiced in any way as a result of the recording.

A. Background

During jury selection, the prosecution revealed that they had recently received audiotapes that contained conversations recorded pursuant to a court-approved wiretap. (44RT 4390-4391.) After defense counsel determined that three of the conversations included defense investigator Don Ingwerson, and believing the prosecution had received privileged communication, appellant filed a motion to dismiss for interference with right to counsel. (14CT 3731-3781.)

Following appellant's trial, and after a lengthy hearing on the matter, the trial court denied appellant's motion. As an initial matter, the court determined that only one of the three conversations at issue, Conversation A – the one

between appellant, his mother, and Ingwerson[11] – bore "the indicia of attorney/client privilege." (78 RT 8513-8514.)

After hearing testimony and argument from both sides, the trial court denied the motion and made the following findings:

> The Court has given the benefit of the doubt as to [appellant] as to [Conversation] A, although it is far from clear that there is a privilege involved. . . .
>
> [¶]
>
> The claim, however, of prejudice, that is, harm to the defense, is absolutely belied by the facts.
>
> There is no testimony or no suggestion that anybody profited from any of the information contained in those conversations, specifically in [Conversation] A.
>
> There is further testimony from the investigator [Detective Henry] that the individuals mentioned [in the conversation] were not only aware or not only known to the prosecution, but had been investigated by them or interviewed by them.
>
> [Defense counsel's] declaration . . . that the defense's strategy was somehow impacted and the defense was prevented from proceeding with the planned defense, the Court gives zero weight to that statement.

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11. During the course of the conversation, which was facilitated by appellant's mother, appellant and Ingwerson discussed the whereabouts of two potential defense witnesses, who never actually testified. (14CT 3743-3752, 3754-3758, 3766-3769.) The purported relevance of these witnesses was never discussed nor was their expected testimony revealed. Ingwerson and appellant also discussed a newspaper article wherein Detective Richard "Buck" Henry stated that he may have attended school at the same time as appellant. (14CT 3752-3754.) Appellant also requested certain portions of the transcript from his triple murder trial. (14CT 3760-3761.)

There has been no showing whatsoever that the witnesses were ever found, what the witnesses would have said had they been found and how in the world that impacted upon the defense in this case. . . .

[¶]

The Court does credit the testimony that there was no exploitation by prosecutors on the case. In fact, there is uncontroverted testimony from them and the detective that they were never made aware of the contents of the three calls in question.

[¶]

The Court will further find there has been no egregious conduct here in the case. The parties were proceeding pursuant to a valid court order signed by a judge of a court of competent jurisdiction to intercept various phone calls.

[¶]

I also note that the claim of prejudice, if there is one, is further belied by the fact that immediately after the conversation or shortly thereafter the mother is repeating almost verbatim to others the information gleaned in [the conversations.]

[¶]

So at best what you have is a technical violation of the attorney/client relationship, not exploited, not undertaken in bad faith, but had no bearing on the outcome of this trial and could not have had any bearing on the outcome of this trial.

The motion, therefore, must be and is denied.

(78RT 8528-8531.)

B. The Recording Of The Conversation Between Appellant, His Mother, And Ingwerson Does Not Rise To The Level Of A Constitutional Violation, And, In Any Event, Appellant Has Failed To Demonstrate Any Prejudice

Evidence Code section 954 provides that the lawyer-client privilege protects a confidential communication between a lawyer and a client.

> Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. It is no mere peripheral evidentiary rule, but is held vital to the effective administration of justice.

(*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 715, internal quotation marks and citations omitted.)

However, abridgement of the right to confidential communication with counsel does not always result in reversal. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 236.) In *Weatherford v. Bursey* (1977) 429 U.S. 545 [97 S.Ct. 837, 51 L.Ed.2d 30], an undercover officer participated in meetings with the defendant and his attorney, where he overheard trial strategy. He later testified at trial as a prosecution witness. The record demonstrated, however, that the officer did not communicate any of the privileged information to the prosecution and the content of the conversations were not used as evidence at trial. In reviewing the case for constitutional error, the Supreme Court held:

> There being no tainted evidence in this case, no communication of defense strategy, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment . . .

It is also apparent that neither Weatherford's trial testimony nor the fact of his testifying added anything to the Sixth Amendment claim. Weatherford's testimony for the prosecution related only to events prior to the meetings with Wise and Bursey and referred to nothing said at those meetings.

(*Weatherford v. Bursey*, *supra*, 429 U.S. at p. 558.)

In addition, certain violations of the right to counsel may be disregarded as harmless error. (*United States v. Morrison* (1981) 449 U.S. 361, 365 [101 S.Ct. 665, 66 L.Ed.2d 564] (*Morrison*).)

Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. Our relevant cases reflect this approach. . . . ¶ The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial. ¶ More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate.

(*Morrison*, *supra*, 449 U.S. at pp. 364-365.)

Indeed,

when a reviewing court is satisfied that no prejudice could have occurred, suppression is generally found to be an adequate remedy, even

where the violation of the defendant's Sixth Amendment rights was deliberate. [Citations.]

(*People v. Garewal* (1985) 173 Cal.App.3d 285, 292.)

In *People v. Zapien* (1993) 4 Cal.4th 929, this Court elaborated upon the burden to demonstrate prejudice. There, the prosecutor discovered a sealed envelope containing a taped conversation between the defendant and his attorney. (*People v. Zapien*, *supra*, 4 Cal.4th at p. 961.) The prosecutor instructed his investigator to listen to the tape and report back to him, but the investigator threw away the envelope instead, and eventually told his supervisor about the incident. (*Id.* at pp. 961-962 .) A different prosecutor ultimately tried the case. (*Id.* at p. 962.)

On appeal, this Court announced that,

> [w]here it appears that the state has engaged in misconduct, the burden falls upon the People to prove, by a preponderance of the evidence, that sanctions are not warranted because the defendant was not prejudiced by the misconduct.

(*People v. Zapien*, *supra*, 4 Cal.4th at p. 967.) The purpose of sanctions is to place "the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. [Citation.]" (*Ibid.*, emphasis in original.) Under this standard, the court found sanctions were not warranted because the prosecution did not listen to the tape recording and that "a transcription of the tape recording had been made and was in the possession of defense counsel." (*Ibid.*)

In *People v. Alvarez*, *supra*, 14 Cal.4th at p. 155, a death penalty case, where an interpreter improperly disclosed information "reflecting 'privileged communications between counsel and client,'" this Court found that reversal was not warranted.

> We cannot conclude . . . that any improper disclosure would require reversal. We believe that a defect of this sort is subject to the general rule for error under California law that reversal requires prejudice.

(*Id.* at p. 235.) The Court stated that, even if the improper disclosure had a chilling effect on communications between the defendant and counsel, or even on their relationship,

> even a reasonable possibility of an effect on attorney-client communications or even the attorney-client relationship . . . does not amount to a reasonable possibility of an effect *on the outcome.*

(*People v. Alvarez, supra*, 14 Cal.4th at p. 236, emphasis in original.)

In *People v. Benally* (1989) 208 Cal.App.3d 900, where the police recorded a conversation between the defendant's counsel and counsel's investigator, the defendant made no showing of prejudice and the reviewing court refused to dismiss the charges in the defendant's post-conviction appeal. (*Id.* at pp. 908-911.) The court explained that a showing of prejudice could be made by showing the attorney-client conversations were presented at trial, were used for other purposes to the detriment of the defendant, or provided the prosecutor with information about the defense strategy. (*Id.* at p. 908.)

Similarly, in *People v. Lowery* (1988) 200 Cal.App.3d 1207, the court, citing the Supreme Court's ruling in *Morrison, supra*, 449 U.S. 361, refused to reverse a conviction on the ground that the defendant's constitutional right to counsel was violated when a conversation between the defendant and a codefendant was surreptitiously recorded. The court observed that the defendant had not established that he suffered any prejudice and stated, "Absent demonstrable prejudice, or substantial threat thereof, dismissal of the information is plainly inappropriate." (*People v. Lowery, supra*, 200 Cal.App.3d at p. 1228.)

Respondent recognizes that "[d]ismissal is, on occasion, used by courts to discourage flagrant and shocking misconduct by overzealous governmental officials in subsequent cases." (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 429.) This type of due process violation, however, requires the court to conclude that the prosecutor's conduct shocks the court's conscience. (See *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1260 (*Morrow*).) In *Morrow*, the appellate court concluded a defendant suffered a due process violation when a prosecutor deliberately "orchestrated" an eavesdropping, in court, of the defendant's privileged discussions with his counsel. This conduct was deemed so outrageous that "the court's conscience [was] shocked," and dismissal was required regardless of whether prejudice had been shown. (*Id.* at p. 1261.)

That is not the case presented here. The *Morrow* case addressed different, far more egregious, activity by the prosecution. By contrast, the recording of a questionably-privileged conversation that was never reviewed by the prosecuting attorneys does not amount to conduct "so outrageous as to interfere with an accused's right of due process of law . . . ." (See *Morrow*, *supra*, at p. 1260.) Moreover, there is no evidence that law enforcement "purposefully" intruded into the attorney-client privilege. The wiretap that recorded the conversation between appellant, his mother, and Ingwerson was pursuant to a court order and was in furtherance of an investigation of threats to potential witnesses and jurors. Law enforcement was not looking for evidence or trial strategy. (Compare *People v. Towler* (1982) 31 Cal.3d 105, 121-122 [defendant's jail cell searched without a warrant *and* prosecutor admitted reading privileged documents; constitutional violation found but defendant failed to prove prejudice requiring dismissal].)

In support of his argument that prejudice should be presumed in cases like this and, therefore, his case dismissed, appellant relies on *United States v.*

Levy (3d Cir. 1978) 577 F.2d 200 (*Levy*) and *Barber v. Municipal Court* (1979) 24 Cal.3d 742 (*Barber*). Appellant's reliance on these cases is misplaced.

In *Levy*, several defendants were indicted for conspiring to distribute heroin. Visceglia, one of the defendants, was an informant for the Drug Enforcement Administration (DEA). Visceglia and another defendant, Verna, were represented by the same attorney. During the course of the representation, the DEA learned important defense strategy, which was later communicated to the prosecutor. *Levy, supra*, 577 F.2d at pp. 202-205. Verna was tried by a jury and convicted. (*Id.* at p. 206.)

The Third Circuit Court of Appeals reversed the conviction with directions to dismiss the indictment. In so doing, the Court held:

> We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilt and innocence are determined in our society.

(*Levy, supra*, 577 F.2d at p. 209.)

In *Barber*, an undercover government agent posing as a codefendant infiltrated confidential meetings between his codefendants and their attorney. At these meetings, he learned of various defense strategies and communicated this information to his superiors. (*Barber, supra*, 24 Cal.3d at pp. 746-749.) The California Supreme Court held that such conduct violated defendants' right to counsel and, thereafter, created a "chilling effect" on the attorney-client relationship. (*Id.* at p. 753.) Under the circumstances, the Court ruled that dismissal was in order. (*Id.* at pp. 759-760.) It concluded that exclusion of the

evidence was inadequate because the police conduct had resulted in the unwillingness of the protestors to participate in their own defense. (*Id.* at p. 756.)

This Court's ruling in *Barber* hinged largely on the fact that the prejudice suffered by the defendants in that case could not be calculated. There, the seized evidence consisted of unrecorded conversations, rather than documents or transcribed conversations, which could have been examined by the trial court to determine "whether or not the prosecution was actually aided by the information and whether some remedy short of dismissal would [have been] adequate to protect [defendants'] rights." (See *People v. Towler, supra,* 31 Cal.3d at p. 122.) As a consequence, the *Barber* rule of dismissal has been limited to cases in which prejudice cannot be "reasonably measured." (*People v. Cantrell* (1992) 7 Cal.App.4th 523, 550.)

The instant matter is distinguishable from both *Levy* and *Barber*. First, the interception of the conversation between appellant, his mother, and Ingwerson did not in any way impair appellant's right or ability to consult privately with his counsel. Indeed, none of appellant's private conversations with his attorney were ever recorded, and there is no evidence in the record to suggest that appellant was concerned about such a situation. Second, although appellant argues that defense strategy was discussed and strategic decisions were revealed (Suppl. AOB 107), an independent reading of the transcript reveals that, for the most part, the conversation largely consisted of discussions regarding potential witnesses never called by the defense, yet already known by the prosecution. (14CT 3743-3769.) Moreover, the undisputed evidence is that the prosecuting attorneys did not obtain *any* information regarding the defense case. (78RT 8517, 8524-8525; 14CT 3809-3810.) Any argument by appellant to the contrary is nothing more than mere speculation. In addition, there is nothing to suggest that appellant was deterred from participating in his own

defense as a result of the wiretapping. Indeed, the record clearly reflects that appellant was an active participant with counsel during the course of trial.

Furthermore, and most importantly, both *Levy* and *Barber* were decided before the Supreme Court's ruling in *Morrison*, *supra*, 449 U.S. 361. In *Morrison*, the defendant was indicted on two counts of distributing heroin and retained private counsel. Thereafter, two agents of the DEA, who were aware that Morrison was represented, met and conversed with her about a related investigation, without the knowledge or consent of counsel. During the course of the conversation, the agents disparaged the legal ability of her lawyer. Subsequently, Morrison moved to dismiss the indictment on the ground that the conduct of the agents violated her Sixth Amendment right to counsel. The district court denied the motion. She then appealed to the Third Circuit Court of Appeals. That court decided that Morrison's right to counsel had been violated, and that the appropriate remedy was dismissal of the indictment with prejudice. (*Id.* at pp. 362-363.)

On appeal, the United States Supreme Court reversed the decision of the court of appeals and reaffirmed the need for a showing of prejudice to justify a dismissal, "even though the violation may have been deliberate." (*Morrison*, *supra*, 449 U.S. at p. 365.)

> [W]e do not condone the egregious behavior of the Government agents. Nor do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings. We simply conclude that the solution provided by the Court of Appeals is inappropriate where the violation, which we assume has occurred, has had no adverse impact upon the criminal proceedings.

(*Morrison*, *supra*, 449 U.S. at p. 367.)

In the instant matter, neither Detective Henry nor Gene Salvino, another member of law enforcement who monitored the wiretap, testified in front of the

jury as to what they heard. (78RT 8515-8524.) Furthermore, the trial court found that no attorney learned of the contents of the challenged conversation, none of the prosecution's evidence originated from information on the tape, there was no showing the taped conversation was used by the prosecution to gain an unfair advantage, and the prosecuting attorneys did not learn about appellant's trial preparations. (78RT 8528-8531.) In the face of these findings, which are supported by substantial evidence, appellant cannot demonstrate prejudice. Therefore, dismissal is not warranted. (See *People v. Cantrell*, *supra*, 7 Cal.App.4th at pp. 550-551 [upholding denial of motion to dismiss where trial court concluded prosecution had not reviewed privileged material "of any significance"]; *People v. Benally*, *supra*, 208 Cal.App.3d at p. 909 [even though agent of the prosecution overheard defense strategies, with no showing of prejudice, dismissal is inappropriate].)

Tellingly, appellant has made no attempt to demonstrate how he suffered any *actual* prejudice from the taping of his conversation with his mother and Ingwerson. Instead, he incorrectly argues that prejudice should be presumed and offers a vague statement that his own defense was "significantly impaired" and that he was "constrained in discussing his case freely with his attorney." (Suppl. AOB 121.) However, in making these specious arguments, appellant has failed to demonstrate any prejudice. Indeed, appellant implicitly concedes that there is no *actual* evidence the prosecution used any information from the taped conversation by his reference to the prosecution's "*probable*" use of privileged defense strategy information. (Suppl. AOB 121.) Appellant's unfounded assertion of a "chilling effect" must be entirely disregarded because it lacks any evidentiary support. (*See People v. Chessman* (1950) 35 Cal.2d 455, 462 [explaining general rule that every criminal judgment is presumed fair and valid on appeal, leaving defendant with burden of showing prejudicial error in the record]; *see also People v. Williams* (1988) 44 Cal.3d

883, 933 [explaining that "factual basis, not speculation, must be established before reversal of a judgment may be had on grounds of ineffective assistance of counsel"].) Appellant has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of his counsel to provide adequate representation. For this reason, "[t]here is no effect of a constitutional dimension which needs to be purged to make certain that [appellant] has been effectively represented and not unfairly convicted." (See *Morrison*, *supra*, 449 U.S. at p. 366.) Absent demonstrable prejudice or substantial threat thereof, reversal of his conviction is plainly inappropriate.

In support of his argument, appellant attempts to challenge the credibility of Detective Henry. (Suppl. AOB 121-122.) Such attacks, however, are without any evidentiary support. The trial court determined, based on Detective Henry's testimony, that no privileged material had been divulged to any member of the prosecution team. (78RT 8528-8529.) Clearly, the trial court was in the best position to judge the credibility of this testimony. And, just as clearly, the record supports the court's findings in this regard. (See *People v. Garewal*, *supra*, 173 Cal.App.3d at p. 293.) Moreover, there is nothing in the record to suggest that Detective Henry used any of the information gleaned from the conversation. Indeed, Detective Henry testified that he did not review the conversation between appellant and Ingwerson in its entirety until a few days before the hearing on the matter - well after appellant was convicted. (78RT 8516.)

Appellant's reliance on dissenting opinions and federal cases, including out-of-circuit opinions, for the proposition that dismissal may be proper even without a showing of prejudice is equally unpersuasive. It is well established that opinions such as these are not binding on this Court. (See *Kalfountzos v. Hartford Fire Ins. Co* (1995) 37 Cal.App.4th 1655, 1660 ["[Appellant] cites a federal appeals court case and asserts it is binding on us. It is neither binding

nor on point," citation omitted]; see also *People v. Zapien*, *supra*, 4 Cal.4th at p. 990 [federal circuit court decisions are not binding on California courts]; *People v. Coston* (1990) 221 Cal.App.3d 898, 905 ["Happily, however, we need not seek to resolve those doubt [about the Ninth Circuit case cited by appellant] since, whatever may be said of the reasoning of *Mulder*, its holding is not binding upon us . . . "]; *People v. Harbolt* (1988) 206 Cal.App.3d 140, 151 ["While the Ninth Circuit has seen fit to adopt such a requirement, it is by no means binding on us"].)

More importantly, the United States and California Supreme Courts have made clear repeatedly that a finding of prejudice is a precondition to dismissal. (See *Morrison*, *supra*, 449 U.S. at pp. 364-365 [dismissal inappropriate because no finding of prejudice where government agents met with defendant without presence or permission of counsel]; *People v. Alvarez*, *supra*, 14 Cal.4th at pp. 235-236 [dismissal inappropriate where defendant not prejudiced by government interpreter's improper disclosure of confidential attorney-client communications]; *People v. Zapien*, *supra*, 4 Cal.4th at pp. 966-968 [where prosecutor discovered tape containing defense counsel's planned comments at strategy session and directed police officer to listen to tape, but officer refused and destroyed tape instead, dismissal inappropriate because defendant not prejudiced].) Any dicta to the contrary in lower court opinions must be rejected. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Even *United States v. Danielson* (9th Cir. 2003) 325 F.3d 1054, relied upon by appellant, recognized that where "the prosecution has obtained a *particular piece of evidence* [in violation of the Sixth Amendment], we have put the burden on the defendant to show prejudice." (*Id.* at p. 1070, italics added.)

Even assuming that outrageous governmental conduct may be a bar to prosecution without a showing of prejudice, this case does not rise to that level. Contrary to appellant's assertions, the recording of his conversation with his

mother and Ingwerson, which was recorded pursuant to a court-approved wiretap, was not so egregious as to require dismissal under the due process clause. The alleged misconduct here is distinguishable from the deliberate eavesdropping orchestrated by the prosecutor in *Morrow*. There is nothing on the record to suggest that the police deliberately violated any privilege in recording the conversation at issue. Indeed, Detective Henry testified that he reasonably believed that any privilege that could have attached to the conversation was waived by the presence of appellant's mother - a belief that was confirmed by the District Attorney's Office. (78RT 8488-8492.) Furthermore, the prosecuting attorneys did not review any part of the tape or the transcript and never learned of the contents of the conversation.

In sum, because the alleged misconduct, if any, was neither "outrageous" nor prejudicial, the trial court properly refused to dismiss appellant's case.

XXIX

THE TRIAL COURT DID NOT INTRUDE INTO THE JURY'S DELIBERATIVE PROCESS OR COERCE THE VERDICT

Appellant contends that the trial court violated appellant's state and federal constitutional rights by "impermissibly intruding into the jury's deliberative process and by coercing the guilt verdict." (Suppl. AOB 124-152.) Appellant's contentions are without merit. Moreover, any alleged error was invited by appellant.

A. Relevant Proceeding

On the third day of jury deliberations, the trial court received a note from the jury foreman that read:

> Your Honor:
>
> As a first time juror, I find myself foreman of a jury on a major crime case & in need of your help on a jury room problem. We have one juror that will not listen to reason regarding circumstantial evidence & has stated from the start of deliberations that since we have no ID of the killer & their [*sic*] is no proof the glasses are the defendants [*sic*], he is not guilty. I feel very strong about our obligation & responsibility, but feel our efforts are in vain. The other eleven jurors are willing to openly discuss the case & try to reach a unanimous decision. How can we convince this juror that this case depends on circumstantial evidence. I will formally poll the jury this morning & am prepared to stay with it as long as the discussions are productive.

(14CT 3852.)

The trial court solicited comments from both counsel regarding the note, and, after hearing argument from both sides, rejected the prosecutor's

request to remove the juror in question. Finding the note to be ambiguous, however, the court decided to question the foreman and learn more about the situation. (67RT 7553-7557.) During questioning, the jury foreman revealed that the problem with the juror at issue came to his attention "within the first 30 minutes" of deliberations. He described the juror as "basically non-cooperative" and that there is "no room for real discussion" with this juror with respect to circumstantial evidence. (67RT 7559.) He elaborated by stating, "[w]hen certain topics are brought up, there is no discussion by the individual even if you ask him questions." According to the foreman, these "topics" were "the inability of Bulman to positively i.d. [appellant] in a line up and in pictures." (67RT 7560.) The foreman advised the court that when these issues were raised by others, the juror in question just "clams up" and "literally sits silently, refusing to "contribute or become involved." (67RT 7561.) Upon further questioning, the foreman advised the court that this juror believed that "without a positive i.d. it is impossible to convict a person of such an offense." (67RT 7563-7564.) He further stated that the juror's "mind was made up by the time he got in [the jury room]." (67RT 7566.)

Based on this examination of the foreman, and after hearing comments and suggestions from both counsel, the trial court made the following statements to the jury:

> You have had some readback now and the Court has a couple of comments to make and wants to reread some instructions to you.
>
> And please understand that everything that I say and that all of the instructions that I read at this point and have read apply not to any particular juror or group of jurors but to all jurors and to the jury as a whole.

It is not the intention of the Court in bringing you out here to take a position or imply to you that the Court takes a position as to whether the matter should be resolved and if so in what way.

It is simply the intent of the Court to give you information that may assist you in doing your duties that a juror should in a case.

With that proviso let me reread to you the following instructions.

Please, again, the Court is not telling you to disregard any other instructions given by the Court or only to reread some that may be under discussion by the jurors.

(67RT 7587-7588.)

Following this introduction, the trial court reread CALJIC Nos. 2.00[12] and 2.01.[13] The court then made the following comments:

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12. CALJIC No. 2.00 states:

> Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a fact.
>
> Evidence is either direct or circumstantial.
>
> Direct evidence is evidence that directly proves a fact, without the necessity of an inference. It is evidence which by itself, if found to be true, establishes that fact.
>
> Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.
>
> An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.
>
> It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

(CALJIC. No. 2.00; 67RT 7588-7589; 15CT 3921.)

13. CALJIC No. 2.01 states:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstances upon which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that

While here on the subject of evidence in the case, the Court will point out the following to you:

That as I have just indicated that there is no preference for direct evidence or no preference for circumstantial evidence, there is a special rule, 2.01, that applies when the case is based on circumstantial evidence.

I suggest that you reread that. Discuss that.

Additionally, in terms of the forms or sorts of evidence that you might see in the homicide case or in other case, you might see fingerprints. You might see confessions. You might see eyewitness identification in court.

There is no requirement under the law that there is any – that there be fingerprints or a confession or be someone who comes into court and identifies a defendant as the perpetrator of the crime.

The issue is this. It is stated quite simply.

Given the evidence presented by the People and their witnesses and their items of evidence, and given the evidence presented by the defense and their witnesses and items of evidence, you take that mound, that group of facts as you determine from the evidence, and you ask yourself are the proven facts sufficient to convince me beyond a reasonable doubt that the defendant is guilty or not?

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interpretation which points to the defendant's innocence and reject that interpretation which points to his guilt.

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(CALJIC. No. 2.01; 67RT 7589-7591; 15CT 3922.)

If the evidence, whatever form it comes in, is sufficient to convince you beyond a reasonable doubt under these instructions that the defendant is guilty, the law says vote guilty.

If the sum total of that evidence is not of the type and nature that convinces you beyond a reasonable doubt that the defendant is guilty, you vote not guilty.

There is no legal requirement, as I have set forth, for a particular sort of thing, fingerprint evidence or eyewitness evidence, confession evidence or anything like that.

If there was, I would tell you that.

The issue is given all the evidence does that equal proof beyond a reasonable doubt in this case or not. You look at the totality of everything that was introduced by the prosecution and by the defense and you then answer that question.

Additionally, let me remind you of the following or give you one new instruction that may be of some assistance.

We will send this one in in writing as well.

Don't place any special emphasis on any of these. No particular instruction should be singled out to the exclusion of all the others. You read them as a whole.

Here is a new one. 2.92. This has to do with some factors that you might consider when you are determining what weight to assign to any sort of identification evidence whether it is photo identification evidence or in court, i.d. or anything relating to that subject matter.

Here you have evidence that you asked for reread on, I believe yesterday, that had to do with a couple of People's exhibits. [¶] I want to say 18 and 19. I may be wrong but those photographs.

(67RT 7591-7593.)

Following CALJIC No. 2.92,[14] the court then reread CALJIC Nos. 17.40[15] and 17.41.[16] It is important to note that when the court came to

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14. CALJIC No. 2.92 states:

Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of the crime charged. In determining the weight to be given eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:

The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;

The stress, if any, to which the person was subjected at the time of the observation;

The witness' ability following the observation to provide a description of the perpetrator of the act;

The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;

The cross-racial or ethnic nature of the identification;

The witness' capacity to make an identification;

Evidence relating to the witness' ability to identify other alleged perpetrators of the criminal act;

Whether the witness was able to identify the alleged perpetrator in a photograph or physical lineup;

The period of time between the alleged criminal act and the witness' identification;

Whether the witness had prior contacts with the alleged perpetrator;

The extent to which the witness is either certain or uncertain of the identification;

Whether the witness' identification is in fact a product of his own recollection;

And any other evidence relating to the witness' ability to make an identification.

(CALJIC No. 2.92; 67RT 7593-7595; 15CT 3905-3906.)

15. CALJIC No. 17.40 states:

The People and the defendant are entitled to the individual opinion of each juror.

the part about changing opinions, it made the following statement: "This goes for everyone. This is not singling out any juror or group of jurors or anybody else. This is as to everyone." (67RT 7596.)

Finally, the court concluded as follows:

> You are not prosecutors or defense attorneys. You are judges of the facts of this case. You must do your very best conscientiously and under the law or arrive at a verdict based on these instructions and the evidence.
>
> There is a requirement, and I stress it again, that the defendant in this case or any criminal case be proven guilty beyond a reasonable doubt. In other words, the prosecution has the burden here of proving beyond

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> Each of you must consider the evidence for the purpose of reaching the verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.
>
> Do not hesitate to change an opinion if you are convinced that it is wrong. However, do not decide any question in a particular way because the majority of the jurors, or any of them, favor such a decision.
>
> Do not decide any issue in this case by chance, such as the drawing of lots or by any other chance determination.

(CALJIC No. 17.40; 67RT 7596-7597; 15CT 3973.)

16. CALJIC No. 17.41 states:

> The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused, and one may hesitate to change a position even if shown it is wrong. Remember you are not partisans or advocates in this matter. You are the impartial judges of the facts.

(CALJIC No. 17.41; 67RT 7597-7598; 15CT 3974.)

a reasonable doubt that [appellant] was involved in those events and is guilty under the law before a jury could return a verdict of guilt.

However, that requirement need not be met by any particular type of evidence.

The question is, again, I stress to you, given the totality of the evidence in the case, whatever it is, whether it is 100 eyewitnesses or no eyewitnesses, you look at all the evidence and you ask yourself does that evidence equal proof beyond a reasonable doubt under the instructions given by the Court as a whole.

(67RT 7598.)

After three additional days of deliberations, the jury returned a guilty verdict. (14CT 3849-3851, 3855-3858.)

B. The Trial Court's Actions In Response To The Foreperson's Note Did Not Constitute An Impermissible Intrusion Into The Jury's Deliberations

Appellant contends that the trial court's actions in response to the foreperson's note constituted an "impermissible intrusion into the jury's deliberations which coerced a unanimous guilty verdict." (Suppl. AOB 141-152.) Appellant's contentions are without merit.

California courts have recognized the need to protect the sanctity of jury deliberations. (*People v. Cleveland* (2001) 25 Cal.4th 466, 475.) The need to protect such sanctity, however, does not preclude reasonable inquiry by the trial court into allegations of misconduct during deliberations. (*Id.* at p. 476.)

"Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it is obligated to make reasonable inquiry into the factual explanation for that possibility."

(*People v. Cleveland, supra*, 25 Cal.4th at p. 477, quoting *People v. McNeal* (1979) 90 Cal.App.3d 830, 838; see also *People v. Keenan* (1988) 46 Cal.3d 478, 533 [trial court had "ample reason to investigate" after receiving information that one juror refused to consider the death penalty under any circumstances]; *People v. Burgener* (1986) 41 Cal.3d 505, 520 ["once the court is put on notice of the possibility a juror is subject to improper influences it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error"].) "Such an inquiry is central to maintaining the integrity of the jury system, and therefore is central to the criminal defendant's right to a fair trial. [Citation.]" (*People v. Kaurish* (1990) 52 Cal.3d 648, 694.)

The decision whether to investigate the possibility of juror bias, incompetence, or misconduct rests within the sound discretion of the trial court. (*People v. Ray* (1996) 13 Cal.4th 313, 343.) Furthermore,

> the court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry. [Citation.]

(*People v. Beeler* (1995) 9 Cal.4th 953, 989.) Nevertheless, the inquiry "should be complete enough to determine good cause." (*People v. McNeal, supra*, 90 Cal.App.3d at p. 837.)

> [A trial] court does have a duty to conduct reasonable inquiry into allegations of juror misconduct or incapacity – always keeping in mind that the decision whether (and how) to investigate rests within the sound discretion of the court. [Citations.]

(*People v. Engelman* (2002) 28 Cal.4th 436, 442.)

This duty to investigate does have some boundaries.

> "[A] trial court's inquiry into possible grounds for discharge of a deliberating juror should be as limited in scope as possible, to avoid

> intruding unnecessarily upon the sanctity of the jury's deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists.

(*People v. Cleveland*, *supra*, 25 Cal.4th at p. 485.)

However, in some circumstances, during the investigation by the trial court, it may become necessary to discover the content of deliberations.

> Claims of misconduct may merit judicial inquiry even though they may implicate the content of deliberations. For example . . . a juror is required to apply the law as instructed by the court, and refusal to do so *during deliberations* may constitute a ground for discharge of the juror. [Citation.] Refusal to deliberate also may subject a juror to discharge [citation] even though the discovery of such misconduct ordinarily exposes facts concerning the deliberations – if, after *reasonable inquiry* by the court, it appears "as a 'demonstrable reality' that the juror is unable or unwilling to deliberate." [Citation.]

(*People v. Engelman*, *supra*, 28 Cal.4th at p. 484.)

For example, although Evidence Code section 1150 renders evidence of the jurors' mental processes inadmissible, it expressly permits, in the context of an inquiry into the validity of a verdict, the introduction of evidence of "statements made . . . within . . . the jury room " when "the very making of the statement sought to be admitted would itself constitute misconduct." (*People v. Cleveland*, *supra*, 25 Cal.4th at p. 484.) "In rare circumstances a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible. [Citation.]" (*People v. Hedgecock*

(1990) 51 Cal.3d 395, 419 [jurors could be compelled to testify at a post-verdict evidentiary hearing regarding allegations of juror misconduct].)

In order to determine whether a trial court's comments were impermissibly coercive, the court must evaluate them "in [their] context and under all the circumstances." (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 237 [108 S.Ct. 546, 98 L.Ed.2d 568].) A claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case. (*People v. Pride* (1992) 3 Cal.4th 195, 265; *People v. Breaux* (1991) 1 Cal.4th 281, 319-320; *People v. Sheldon* (1989) 48 Cal.3d 935, 959-960; *People v. Rodriguez* (1986) 42 Cal.3d 730, 775-776.)

> The determination whether there is reasonable probability of agreement rests in the discretion of the trial court. [Citations.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' [Citation.]

(*People v. Breaux, supra*, 1 Cal.4th at p. 319.)

Here, the trial court's examination of the foreman was reasonable under the circumstances. (Cf. *People v. Keenan, supra*, 46 Cal.3d at pp. 530-536 [trial court properly exercised its discretion in first questioning only the jury foreperson and thereafter deciding questioning of other jurors was unnecessary].) Once the court received evidence that one juror might not be deliberating, it had a duty to investigate the situation. Due to the nature of the alleged misconduct and the ambiguous language in the foreman's note, the court was required to ask direct questions about the minority juror's statements and conduct during deliberations. Although the inquiry did not occur post-verdict, the necessity of determining the juror's specific statements and conduct during deliberations was similar to an Evidence Code section 1150 inquiry because the "very making of the statements" constituted the misconduct.

Indeed, the trial court was under a duty to investigate the failure of one of its jurors to deliberate. Asking the foreman to confirm the juror's comments and conduct did not reveal the content of the jury's deliberations, but only revealed the juror's refusal to follow the law. Thus, contrary to appellant's assertions, the trial court did not improperly "delve well into the mental processes" of the jury. Furthermore, since the foreperson was the only juror questioned, the court's inquiry was "conducted with care so as to minimize pressure on legitimate minority jurors." (See *People v. Keenan*, *supra*, 46 Cal.3d at p. 533.) For all these reasons, the trial court's investigative procedures were appropriately measured under the circumstances.

C. The Trial Court's Statements To The Jury Did Not Coerce The Jury Or Amount To An *Allen*[17] Charge; In Any Event, Any Alleged Error Was Invited

Appellant contends that the trial court's supplemental instructions to the jury amounted to an *Allen* charge, which improperly coerced the verdict. (Suppl. AOB 140-152.) Again, appellant is wrong.

In dealing with a situation involving possible juror misconduct, this Court has recognized that

> it often is appropriate for a trial court that questions whether all of the jurors are participating in deliberations to reinstruct the jurors regarding their duty to deliberate and to permit the jury to continue deliberations
>
> . . . .

(*People v. Cleveland*, *supra*, 25 Cal.4th at p. 480.) In *Allen*, the United States Supreme Court approved a jury instruction which encouraged the minority

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17. *Allen v. United States* (1893) 164 U.S. 492 [17 S.Ct. 154, 41 L.Ed. 528] (*Allen*).

jurors to reexamine their views in light of the views expressed by the majority. The concept was expressed in the following passage:

> if much the large number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

(*Allen*, *supra*, 164 U.S. at p. 501.)

Instructions like this have typically been referred to as *Allen* instructions or "dynamite" instructions as they are thought to "blast" a verdict out of a deadlocked jury. (*People v. Gainer* (1977) 19 Cal.3d 835, 844 (*Gainer*).) In *Gainer*, *supra*, 19 Cal.3d 835, this Court specifically disapproved of two elements of the typical "*Allen* charge." First, this Court found "the discriminatory admonition directed to minority jurors to rethink their position in light of the majority's views" was improper in that, by counseling minority jurors to consider the majority view, whatever it might be, the instruction encouraged jurors to abandon a focus on the evidence as the basis of their verdict. (*Id.* at p. 848.) Second, this Court took issue with the direction that the jury "should consider that the case must at some time be decided." (*Id.* at p. 845.) The Court also noted that a "third common feature of the *Allen*-type instructions is a reference to the expense and inconvenience of a retrial." It held that such language is "equally irrelevant to the issue of defendant's guilt or innocence, and hence similarly impermissible." (*Id.* at p. 852.) Such "features of the *Allen*-type charge . . . inject extraneous and improper considerations into the jury's debates." (*Ibid.*)

Although the Court prohibited these three components of a so-called *Allen* instruction, it recognized the continuing viability of a trial court's use of supplemental instructions to enable a deadlocked jury to reach a verdict where these forbidden components are absent. (*Gainer*, *supra*, 19 Cal.3d at p. 856.) Indeed, a trial court has "broad latitude" in commenting to a deliberating jury, "so long as it does not effectively control the verdict." (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 768.) The trial court may comment on the proceedings in order "to give jurors the benefit of his experience in evaluating evidence." (*Ibid.*)

> The basic question . . . is whether the remarks of the court, viewed in the totality of applicable circumstances, operate to displace the independent judgment of the jury in favor of considerations of compromise and expediency. Such a displacement may be the result of statements by the court constituting undue pressure upon the jury to reach *a* verdict, whatever its nature, rather than no verdict at all.

(*People v. Carter* (1968) 68 Cal.2d 810, 817, abrogated on other grounds by *Gainer*, *supra*, 19 Cal.3d at pp. 851-852.)

1. Any Alleged Error Was Invited

First, it is important to note that the instructions now complained of by appellant were specifically requested by defense counsel. Indeed, following the questioning of the jury foreman and prior to the Court's supplemental instructions to the jury, counsel discussed how to address the juror note. At one point, after initially raising a concern about the Court giving an instruction to the jury stating that there is no legal requirement for eyewitness identification, defense counsel stated,

> If the Court is contemplating giving any instruction relative to identity, then I would ask the court to give 2.91 and 2.92 rather than any

generalized instruction because I think that is what CALJIC says is the way it should be done. . . . [¶] I think if any instructions are given on identity, I would request 2.91 and 2.92.

(67RT 7578-7579.)

Later, when the Court indicated that it would also advise the jury that "there is no requirement in this or any other case that an eyewitness come into court and identify a defendant" (67RT 7585), defense counsel added, "If the Court is going to do that, could the Court also say that there is no requirement that there be a confession or fingerprints or any form – . . . [¶] rather than highlighting." (67RT 7585-7586).

Here, because defense counsel specifically requested the supplemental instructions now complained of by appellant, any alleged error was invited and appellant is precluded from raising such claim on appeal. The doctrine of invited error applies to estop a party from asserting an error on appeal when the error was induced by the party's own conduct. (*People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn. 3.) Invited error precludes the reversal of a criminal conviction where the record shows that defense counsel's inducement of error was deliberate and motivated by a tactical decision. (*People v. Avalos* (1984) 37 Cal.3d 216, 228; *People v. Wickersham* (1982) 32 Cal.3d 307, 333, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200; see *Shields v. United States* (1927) 273 U.S. 583, 586 [47 S.Ct. 478, 71 L.Ed. 787] ["a court can not be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request"].) Here, because defense counsel expressly chose to have the court instruct the jury with CALJIC No. 2.92 and then added his own comments to the Court's special instruction regarding the need for eyewitness testimony, the doctrine of invited error precludes appellant from complaining of such instructions in the instant matter.

2. The Trial Court's Supplemental Instructions Bear No Resemblance To An *Allen*-Charge

Regardless, none of the vices condemned by this Court in *Gainer* are present in the instant case. First, unlike the purpose of a true *Allen*-type instruction, which is directed at breaking a deadlock, here there is no evidence the jury was actually deadlocked. Indeed, when the note was written, the foreman stated that he had not yet even polled the jury regarding appellant's guilt or innocence. (14CT 3852.) All that was actually confirmed by the foreman was that one of the jurors was refusing to discuss the issue of circumstantial evidence, and that this juror was, contrary to the law, unwilling to convict appellant without an eyewitness.

Further, the trial court's comments did not contain a discriminatory admonition directed to the minority jurors to rethink their position in light of the views of the majority. (See *Lowenfield v. Phelps*, *supra*, 484 U.S. 235-241 [verdict not coerced where trial judge's neutrally worded instruction to the jury to continue deliberating did not "speak specifically to the minority jurors," and did not urge only the minority jurors to reconsider their positions].) In fact, during the supplemental instruction, the trial court advised the jury that both sides were "entitled to the individual opinion of each juror" and warned them not to "decide any question in a particular way because the majority of the jurors, or any of them, favor such a decision." (CALJIC No. 17.40; 67RT 7596-7597; 15CT 3973.) The trial court also extolled the importance and virtue of listening during the deliberation process. Further, the trial court did not direct its comments to the minority juror, or even mention any split among the jurors. Indeed, at one point the court stated, "This goes for everyone. This is not singling out any juror or group of jurors or anybody else. This is as to everyone." (67RT 7596.) The instructions did not encourage jurors to consider numerical division or preponderance of opinion. In addition,

there is no evidence the minority juror was even aware that a note had been sent to the court or knew of the contents of the note. In fact, during his examination, the foreman stated that only one other juror had even seen him pass a note to the bailiff. (67RT 7562.) Further, the trial court instructed the foreman not to discuss "any of the questions" that the Court asked of him or "any of the discussions" that had just occurred. (67RT 7570-7571.) It must be presumed that the foreman followed the trial court's admonition not to reveal these communications to the other jurors. (*People v. Frank* (1990) 51 Cal.3d 718, 728.)

Second, the trial court did not inform the jury that the case must at some time be decided. The court made no threats and no statements that could be interpreted as exerting undue pressure on any juror. The jury was never told it must reach a verdict, nor were any other constraints placed on its deliberations. The court made no remarks indicating possible reprisals for failure to reach an agreement, such as prolonging the deliberations or keeping the jurors until a decision had been reached. It did not urge the jury to come to a verdict on any of the counts, and did not suggest that the evidence was clear or that it was a simple case or suggest some necessity for reaching a verdict. And, third, the trial court's comments did not make reference to the expense and inconvenience of a retrial. For these reasons, none of the remarks made by the trial court could be likened to an *Allen* charge.

Further, contrary to appellant's assertions, the supplemental instruction given by the trial court did not "blast" a verdict. Indeed, after receiving the supplemental instruction, the jury continued to deliberate for three more days and requested further clarification of instructions. (Compare *People v. Gainer*, *supra*, 19 Cal.3d at p. 842 [verdict came less than three hours following supplemental instruction]; *People v. Barraza* (1979) 23 Cal.3d 675, 681-682 [verdict came less than three hours following supplemental instruction];

People v. Sanders (1977) 75 Cal.App.3d 501, 512 [verdict came less than one day following supplemental instruction].)

Moreover, nothing in the supplemental instructions injected "extraneous or improper considerations into the jury's debate." (See *Gainer*, *supra*, 19 Cal.3d at p. 852.) Indeed, quite the contrary is true. Unlike the purpose of a true *Allen*-type charge, the court's remarks attempted to focus the jury on the evidence and the correct state of the law. The trial court made this clear when it stated,

> It is not the intention of the Court in bringing you out here to take a position or imply to you that the Court takes a position as to whether the matter should be resolved and if so in what way. [¶]. It is simply the intent of the Court to give you information that may assist you in doing your duties that a juror should in a case.

(67RT 7587.)

Under the circumstances, the court reasonably reinstructed the jury on their responsibility to deliberate and to base their deliberations on the evidence. (See, e.g., *People v. Haskett* (1990) 52 Cal.3d 210, 238 [trial court must intervene promptly to nip any problems during deliberations in the bud].) When the court became aware that a juror was refusing to follow the law and was insisting that a conviction could only be had upon eyewitness testimony, it was incumbent upon the trial court to correct the mistake. Any possible coercion that might have been felt by the minority juror was tempered by the fact that the trial court, at defense counsel's urging, added other forms of evidence to its instructions, including fingerprint evidence and confessions. (67RT 7591-7593.) In addition, the reference to circumstantial evidence was but a small part of the trial court's lengthy monologue.

Subsequent events further support the idea that the jury understood that the trial court's intent was to focus them on their responsibility to deliberate and

that they were to base their deliberations on the evidence. Following the supplemental jury instructions, Juror No. 192 sent the following note:

> I (#192) believe that I need help with the interpretation of the law as it applies to the acceptance of circumstantial evidence, reasonable doubt, evaluating each fact, etc. Section 2.01.

(14CT 3853.)

This note lends support to the argument that the jury continued its deliberations free from coercion, with a proper focus on the law. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1255 [jury's continued deliberations indicate penalty determination was product of its own reasoning processes, not judicial coercion].) Thus, based on the totality of the trial court's remarks, the jurors would have understood that the court's intent "was to provide an opportunity for them to enhance their understanding of the case rather than to coerce them to abandon the exercise of individual judgment." (*People v. Price* (1991) 1 Cal.4th 324, 467.)

Appellant's attempt to parse together certain phrases from a lengthy monologue by the trial court is not persuasive. In reviewing a claim that a trial court's comments coerced a deadlocked jury's verdict, this Court should not focus on isolated portions of the trial court's statements, but should look at the entire statement in context, and assess the effect of the totality of the trial court's statements under the circumstances in which the statements were offered. (See *Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 237; *People v. Keenan*, *supra*, 46 Cal.3d at p. 534.)

Nor were the court's comments improper or coercive in any other way.

> There is always a *potential* for coercion once the trial judge has learned that a unanimous judgment of conviction is being hampered by a single holdout juror favoring acquittal. In such a case, the judge's remarks to the deadlocked jury regarding the clarity of the evidence, the simplicity

of the case, the necessity of reaching a unanimous verdict, or even the threat of being "locked up for the night" might well produce a coerced verdict.

(*People v. Sheldon*, *supra*, 48 Cal.3d at pp. 959-960.)

Here, the potential for coercion was not realized. The court made no threats and no statements that could be interpreted as exerting undue pressure on any juror. The court's comments in no way referred to the status of the vote. The jury was never told it must reach a verdict, nor were any other constraints placed on their deliberations. The court made no remarks either urging a verdict be reached or indicating possible reprisals for failure to reach agreement. The court did not threaten to prolong the deliberations or keep the jurors until a decision had been reached. Accordingly, the court's comments could only have been understood by the jurors as an attempt to refocus them on the evidence and to resume open communications and debate.

In addition, contrary to appellant's assertion, the trial court's comments were not rendered more coercive simply because the trial court was aware of a numerical split within the jury regarding circumstantial evidence. (Suppl. AOB 145-147.) Although appellant may find some support for his view in the federal arena (see *Brasfield v. United States* (1926) 272 U.S. 448, 449-450 [47 S.Ct. 135, 71 L.Ed. 345]), established California law does not support such a view as long as the court's inquiry is neutral and causes no coercion (see *People v. Johnson*, *supra*, 3 Cal.4th at p. 1254; *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 776; *People v. Carter*, *supra*, 68 Cal.2d at p. 815). As this Court noted in *People v. Rodriguez*, *supra*, 42 Cal.3d at page 776 and footnote 14, the federal rule prohibiting an inquiry into the numerical division of a jury has been held to be a matter of federal criminal procedure and, therefore, not required to be followed by the states, whereas in California "a neutral inquiry into numerical division, properly used, is an

important tool in ascertaining the probability of agreement." Indeed, California courts have repeatedly held that it is not inherently coercive for the court to simply ask the jury to continue deliberating after finding out the nature of the division in the voting. (*People v. Pride*, *supra*, 3 Cal.4th at p. 265 [it is not "necessarily coercive" to refuse to discharge a jury after the court learns about an 11-1 vote favoring a death sentence]; *People v. Sheldon*, *supra*, 48 Cal.3d at pp. 959-960; *People v. Neufer* (1994) 30 Cal.App.4th 244, 253-254.) Accepting appellant's argument would virtually always prevent a judge from requiring a deadlocked jury to resume deliberating if the last vote of jurors was not close.

In support of his argument, appellant heavily relies upon *Jiminez v. Myers* (9th Cir. 1993) 40 F.3d 976 (*Jiminez*), and argues that his due process rights were violated by the court's comments. (Suppl. AOB 138-151.) In *Jiminez*, the Ninth Circuit held that the trial judge improperly made a "de facto" *Allen* charge by telling the jurors he approved of the fact they were gradually reaching unanimity, apparently by forcing the holdout defense juror to capitulate. (*Jiminez*, *supra*, 40 F.3d at p. 980.) It determined that the trial court did "much more" than simply conduct a neutral, noncoercive inquiry into the jury's numerical division. (*Ibid.*)

> After the first impasse, by eliciting the progression in the voting, determining it was moving in one direction, expressing his approval of that progression, and telling the jury to continue its deliberations, the trial court effectively instructed the jurors to make every effort to reach a unanimous verdict. In view of the disclosure after the second impasse that only one juror remained in the minority and the trial court's implicit approval of the "movement" toward unanimity, the court's instruction to continue deliberating until the end of the day sent a clear message that the jurors in the majority were to hold their position and persuade the

single hold-out juror to join in a unanimous verdict, and the hold-out juror was to cooperate in the movement toward unanimity.

(*Jiminez, supra*, 40 F.3d at pp. 980-981.)

Appellant's reliance on *Jiminez* is misplaced. First, it must be noted that this decision of the Ninth Circuit is not binding on this court. (*People v. Zapien, supra*, 4 Cal.4th at p. 989.) Further, the trial court's statements in this case constituted the neutral, noncoercive remarks that were so lacking in *Jiminez*. Here, the court did not express its approval for the movement of minority jurors toward the majority, or tell the jurors to make every effort to reach a unanimous verdict. Moreover, the trial court did not suggest in any manner that a verdict must be reached. Although the trial court's instructions advised the jurors that they should not be afraid to change their position if they felt it was wrong, it also clearly warned the jurors that they were not to "decide any question in a particular way because the majority of the jurors, or any of them, favor such a decision." (CALJIC No. 17.40; 67RT 7596-7597; 15CT 3973.) The presumption is that the minority juror followed this instruction. (See *People v. Maury, supra*, 30 Cal.4th at pp. 439-440.)

Appellant complains that the "coercive nature" of the supplemental instruction was "enhanced by the fact that the court did not caution the jury that they need not give up their conscientiously-held beliefs simply to secure a verdict" and did not remind the jury that it could remain deadlocked. (Suppl. AOB 148.) Aside from relying on non-binding federal cases, appellant does not explain how the failure to make these cautionary statements rendered the instructions coercive. Indeed, the additional instructions given by the court advised the jury that they were not to "decide any question in a particular way because the majority of the jurors, or any of them, favor such a decision." (CALJIC No. 17.40; 67RT 7596-7597; 15CT 3973.) As such, an instruction informing jurors that they were not to give up conscientiously held beliefs was

unnecessary. (*People v. Mincey* (1992) 2 Cal.4th 408, 437 [trial court has no duty to provide repetitive instructions].)

In addition, a supplemental instruction given to a deadlocked jury need not remind jurors "that [they] could remain deadlocked" (Suppl. AOB 148), as the law "'does not require a broad hint to a juror that he can hang the jury if he cannot have his way.'" (*People v. Dixon* (1979) 24 Cal.3d 43, 52, quoting *Andres v. United States* (1948) 333 U.S. 740, 766 [68 S.Ct. 880, 92 L.Ed.2d 1055].) In any event, the supplemental instruction informing jurors that they must do their "very best conscientiously and under the law to arrive at a verdict based on these instructions and the evidence", was tempered with CALJIC No. 17.40 which reads, "Each of you must consider the evidence for the purpose of reaching the verdict *if you can do so*." (Italics added.) Thus, the language now requested by appellant was unnecessary. (See *People v. Mincey*, *supra*, 2 Cal.4th at p. 437.)

In sum, the trial court's comments plainly did not constitute an improper *Allen*-type charge or suffer from the defects condemned in *Gainer*. The court did not direct the jurors to re-examine the issues in consideration of their numerical division or the majority's views. Nor did the court direct the minority to conform to the majority's opinions or reach an agreement in the interests of expediency. The jury was not advised that they must reach a verdict and no mention was made of the expense or inconvenience of a retrial. It is clear the trial court took great care in exercising its power "without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency." (See *People v. Proctor* (1992) 4 Cal.4th 499, 539.) Thus, because the trial court's supplemental instructions did not include any of the prohibited aspects of an *Allen* instruction, appellant's claim fails. (See *Gainer*, *supra*, 19 Cal.3d at p. 852.; see also *Lowenfield v. Phelps*, *supra*, 484 U.S. at pp. 234-241; *People v. Keenan*, *supra*, 46 Cal.3d at p. 527.)

Further, because the trial court's comments did not violate this Court's prohibitions in *Gainer*, it also did not violate appellant's federal constitutional rights. (See *Early v. Packer* (2002) 537 U.S. 3, 7 [123 S.Ct. 362, 154 L.Ed.2d 263] [California law offers greater protection to a criminal defendant under a claim of a coerced verdict stemming from an *Allen* instruction than does the United States Constitution].) Accordingly, appellant's claims must be rejected.

XXX.

THE TRIAL COURT PROPERLY RESPONDED TO THE JURY'S NOTE DURING PENALTY DELIBERATIONS

Appellant contends that the trial court violated his state and federal constitutional rights by its response to the jury note regarding a potential deadlock during penalty deliberations. (Suppl. AOB 153-174.) Appellant's contentions are without merit.

A. Background

On the third day of deliberations during the penalty phase, the jury sent out the following note: "We have a split eleven to one & the holdout will not listen to any reason. Please let us know how to continue.

The holdout is based on the children." (15CT 3881; 75RT 8385.)

After reading the note, the trial court solicited comments from both sides. The prosecutor advised the court that he believed that one of the jurors was improperly focusing on "sympathy for [appellant's] children rather than sympathy for [appellant] himself." (75RT 8385.) Wanting to research the matter further, the court called out the jury and made the following statements:

> The Court has a note sent out and the Court has read it and considered it and shared it with counsel and we are going to deal with it today.
>
> We will give you some guidance of some sort or perhaps have additional inquiry for you a little later.
>
> But I want you in the meantime to continue your deliberations. Just go back there and continue the deliberations and we will be with you as soon as we can do that.
>
> Fair enough?

Head back there and keep working.

(75RT 8389.)

After hearing argument from both sides and receiving suggested language from defense counsel, the trial court instructed the jury as follows:

> The Court has read the note and read the note to counsel and without making any inquiry at this point, let me give you some further legal instruction.
>
> All right. [¶] I will give this to you.
>
> You will see it is in a different form than the others. It is on a different kind of paper but that does not make any difference. This was the form available to the Court when it was drafted. Handle it like you do the other instructions.
>
> I will read it to you and you will have it in there.
>
> Do not disregard any instruction that the Court has given you heretofore. This is not a substitute for any instruction given during the trial.
>
> Let me read you this, first of all.
>
> "By these instructions the Court is not suggesting what result would be proper, or that I have or am expressing any opinion on the eventual penalty phase determination.
>
> The following provisions are, however, the law:
>
> It would be inappropriate for any juror whether one favoring a sentence of death or one favoring a sentence of life without parole, to single out one piece of evidence or one instruction and ignore the others. This case must be decided – the case must be decided based on a totality of all the evidence and law that applies.
>
> It would be improper for any juror, whether favoring a sentence of death or a sentence of life without parole, to single out one aggravating

or mitigating factor, and refuse or fail to weigh it as against all of the other aggravating and mitigating factors shown by the evidence.

The facts and the law are there to guide you to a decision. The facts and the law are not there to justify any preformed or preexisting determination to stand for a certain verdict, whether it be for the death penalty or for a sentence of life without parole.

In terms of the evidence relating to [appellant's] family, such evidence was received as it may bear upon that portion of factor (k) relating to 'any sympathetic or other aspect of [appellant's] character or record.' Bear in mind that this 'sympathy' relates to sympathy for [appellant], not solely for any other person or persons. And bear in mind that the 'character' in issue is a character of [appellant]. Insofar as this evidence evinces sympathy for [appellant] or is seen as being evidence relating to the character or record of [appellant], the jury may consider it under factor (k), assign it whatever weight you believe is appropriate, and then weigh it along with all other aggravating and mitigating evidence and factors. Insofar as this evidence raises sympathy only for third parties, it is not appropriate factor (k) evidence. The focus, in other words, is on [appellant's] personal moral culpability, and it is [appellant's] character and background that is the focus of the inquiry, not the effect that your verdict will or may have on any third party or parties.

Do not hesitate to change your position if you are convinced that it is wrong. Do not change your position simply because a majority of the jurors, or any of them, favor such a change.

It is important that all jurors both understand as well as follow the law. If a juror or jurors do not understand the law, the Court will continue to attempt to clarify it. If a juror or jurors refuses or fails to

follow the law, the Court should be notified of that fact. If any juror, whether they are in the majority or the minority, cannot, in good conscience, follow the law, it is the duty of that juror or jurors to notify the Court of that fact.

Each juror should recognize a penalty phase determination is not an unguided arbitrary exercise in raw emotion whether the juror factors one penalty or the other. This decision must be based on a calm, rational assessment of the evidence and a weighing of aggravating and mitigating factors set forth in the law, and shown by the evidence. This requires that each juror render an honest, unbiased assessment of these factors without bias, without fear and without a desire to favor one side over the other. Jurors are not advocates for either side, but must be impartial judges of penalty.

All of these additional instructions are directed at all twelve trial jurors, not those favoring one verdict or the other. Further, please keep in mind as I instructed you at the outset of these instructions, these latest instructions, that these instructions are not to be interpreted by the jury as suggesting an outcome, or as suggesting that the Court is expressing an opinion as to the propriety of one outcome or the other."

Let me add to it the following:

The Court in no way, shape or form is suggesting to you the weight any juror or combination of jurors should place on any aggravating factor, any mitigating factor or an combination thereof.

That is a jury determination, not a determination for the Court.

It is simply a hope that the instruction that I read to you will assist you in following the law in this case and as I have outlined it in earlier instructions.

(75RT 8411-8416; 15CT 3884-3885.)

B. The Trial Court Did Not Impermissibly Coerce The Death Verdict

Appellant contends that the trial court impermissibly coerced the death verdict when it "improperly singled out the holdout juror and effectively directed him/her to capitulate to the majority." (Suppl. AOB 159.) Appellant further contends that the court "improperly second-guessed both what the jury wanted when it sent the note as well as the motivations of the holdout." According to appellant, "[t]his second-guessing by the court led to its impermissible and adverse influence of the jury's deliberative process." (*Ibid.*) Again, appellant's contentions are without merit.

As discussed in Argument XXIX, in order to determine whether a trial court's comments were impermissibly coercive, the court must evaluate them "in [their] context and under all the circumstances." (*Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 237.) A claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case. (*People v. Pride*, *supra*, 3 Cal.4th at p. 265; *People v. Breaux*, *supra*, 1 Cal.4th at pp. 319-320; *People v. Sheldon*, *supra*, 48 Cal.3d at pp. 959-960; *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 775-776.)

> The determination whether there is reasonable probability of agreement rests in the discretion of the trial court. [Citations.] The court must exercise its power, however, without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency.' [Citation.]

(*People v. Breaux*, *supra*, 1 Cal.4th at p. 319.)

Here, appellant contends that the trial court's supplemental instructions to the jury during penalty deliberations amounted to an *Allen* charge. However, this Court has recognized that

> it often is appropriate for a trial court that questions whether all of the jurors are participating in deliberations to reinstruct the jurors regarding

> their duty to deliberate and to permit the jury to continue deliberations . . . .

(*People v. Cleveland*, *supra*, 25 Cal.4th at p. 480.) Further, although the Court prohibited the components of a so-called *Allen* instruction, discussed in detail in Argument XXIX above, it recognized the continuing viability of a trial court's use of supplemental instructions to enable a deadlocked jury to reach a verdict where these forbidden components are absent. (*Gainer*, *supra*, 19 Cal.3d at p. 856.) Indeed, a trial court has "broad latitude" in commenting to a deliberating jury, "so long as it does not effectively control the verdict." (*People v. Rodriguez*, *supra*, 42 Cal.3d at p. 768.) The trial court may comment on the proceedings in order "to give jurors the benefit of his experience in evaluating evidence." (*Ibid.*)

> The basic question . . . is whether the remarks of the court, viewed in the totality of applicable circumstances, operate to displace the independent judgment of the jury in favor of considerations of compromise and expediency. Such a displacement may be the result of statements by the court constituting undue pressure upon the jury to reach *a* verdict, whatever its nature, rather than no verdict at all.

(*People v. Carter*, *supra*, 68 Cal.2d at p. 817.)

None of the vices condemned by this Court in *Gainer* are present in the instant case. First, the trial court's comments did not contain a discriminatory admonition directed to the minority juror to rethink his or her position in light of the views of the majority. (See *Lowenfield v. Phelps*, *supra*, 484 U.S. 235-241 [verdict not coerced where trial judge's neutrally worded instruction to the jury to continue deliberating did not "speak specifically to the minority jurors," and did not urge only the minority jurors to reconsider their positions].) In fact, during the supplemental instruction, the trial court warned the jury not to "decide any question in a particular way because the majority of the jurors, or

any of them, favor such a decision." (75RT 8414; 15CT 3884.) Further, the trial court did not direct its comments to the minority juror, or even mention any split among the jurors. Indeed, throughout the supplemental instruction, the court made reference to "all jurors" and advised the jury that, "All of these additional instructions are directed at all 12 trial jurors, not those favoring one verdict or the other." (75RT 8415; 15CT 3884-3885.) In addition, the instructions did not encourage jurors to consider numerical division or preponderance of opinion.

Second, the trial court did not inform the jury that the case must at some time be decided. The court made no threats and no statements that could be interpreted as exerting undue pressure on any juror. The jury was never told it must reach a verdict, nor were any other constraints placed on its deliberations. The court made no remarks indicating possible reprisals for failure to reach an agreement, such as prolonging the deliberations or keeping the jurors until a decision had been reached. It did not urge the jury to come to a verdict on any of the counts, and did not suggest that the evidence was clear or that it was a simple case or suggest some necessity for reaching a verdict. And, third, the trial court's comments did not make reference to the expense and inconvenience of a retrial.

Moreover, nothing in the supplemental instructions injected "extraneous or improper considerations into the jury's debate." (See *Gainer*, *supra*, 19 Cal.3d at p. 852.) Indeed, quite the contrary is true. Unlike the purpose of a true *Allen*-type charge, the court's remarks attempted to focus the jury on the correct state of the law. The trial court made this clear when it stated,

> By these instructions the Court is not suggesting what result would be proper, or that I have or am expressing any opinion on the eventual

penalty phase determination. [¶] The following provisions are, however, the law . . . .

(75RT 8411-8412.) It also stated, "It is important that all jurors both understand as well as follow the law. If a juror or jurors do not understand the law, the Court will continue to attempt to clarify it." (75RT 8414.) The court's concluding statement lends further support to this argument, "It is simply a hope that the instruction that I read to you will assist you in following the law in this case and as I have outlined it in earlier instructions." (75RT 8416.)

Under the circumstances, it was necessary for the court to reinstruct the jury on what they could properly consider during their deliberations. (See, e.g., *People v. Haskett*, *supra*, 52 Cal.3d at p. 238 [trial court must intervene promptly to nip any problems during deliberations in the bud].) When the court became aware that a juror may have been improperly considering certain evidence in making its penalty determination, it was incumbent upon it to correct the mistake. Thus, based on the totality of the trial court's remarks, the jurors would have understood that the court's intent "was to provide an opportunity for them to enhance their understanding of the case rather than to coerce them to abandon the exercise of individual judgment." (*People v. Price*, *supra*, 1 Cal.4th at p. 467.)

Appellant's attempt to parse together certain phrases from a lengthy monologue by the trial court is not persuasive. In reviewing a claim that a trial court's comments coerced a deadlocked jury's verdict, this Court should not focus on isolated portions of the trial court's statements, but should look at the entire statement in context, and assess the effect of the totality of the trial court's statements under the circumstances in which the statements were offered. (See *Lowenfield v. Phelps*, *supra*, 484 U.S. at p. 237; *People v. Keenan*, *supra*, 46 Cal.3d at p. 534.)

While there is always the potential for coercion once the trial court has learned of a holdout juror (*People v. Sheldon*, *supra*, 48 Cal.3d at pp. 959-960), such potential was not realized here. The court made no threats and no statements that could be interpreted as exerting undue pressure on any juror. The court's comments in no way referred to the status of the vote. The jury was never told it must reach a verdict, nor were any other constraints placed on their deliberations. The court made no remarks either urging a verdict be reached or indicating possible reprisals for failure to reach agreement. The court did not threaten to prolong the deliberations or keep the jurors until a decision had been reached. Accordingly, the court's comments could only have been understood by the jurors as an attempt to refocus them on the evidence and to resume open communications and debate.

Appellant further argues that the admonition given by the trial court "was similar to [CALJIC] No. 17.4.1.1 in that it informed jurors of their obligation to advise the court if a juror 'refuses or fails to follow the law.'" He notes that such instruction was "expressly disapproved of" by this Court and contends that the instruction "would have likely been used by the majority as a lever to cause the holdout to relinquish his/her views in favor of the majority." (Suppl. AOB 156, 163-164.) Appellant's reliance on this proposition is misguided. While this Court did conclude that criticism of CALJIC No. 17.41.1 was "warranted" in *People v. Engelman*, *supra*, 28 Cal.4th at page 445, it nevertheless rejected the constitutional claims put forth by the defendant in that case. In so doing, it held:

> CALJIC No. 17.41.1 does not share the flaws we identified in *Gainer*. The instruction is not directed at a deadlocked jury and does not contain language suggesting that jurors who find themselves in the minority, as deliberations progress, should join the majority without reaching an independent judgment. The instruction does not suggest

> that a doubt may be unreasonable if not shared by a majority of the jurors, nor does it direct that the jury's deliberations include such an extraneous factor. CALJIC No. 17.41.1 simply does not carry the devastating coercive charge that we concluded should make us "uncertain of the accuracy and integrity of the jury's stated conclusion" and uncertain whether the instruction may have "'operate[d] to displace the independent judgment of the jury in favor of considerations of compromise and expediency.'" [Citation.]

(*People v. Engelman*, *supra*, 28 Cal.4th at pp. 444-445.)

Appellant also complains that the trial court's failure to "properly caution the jurors to not give up their conscientiously held beliefs simply to return a verdict" and remind the jury that "no verdict was required" "strongly suggests that the jury was impermissibly coerced to render a unanimous verdict." (Suppl. AOB 166.) First, in support of these arguments, appellant again relies upon the Ninth Circuit's ruling in *Jiminez*, *supra*, 40 F.3d 976. As respondent explained in Argument XXIX above, this decision is not binding on this court and factually distinguishable from the instant matter. Further, appellant does not explain how the failure to make these cautionary statements rendered the instructions coercive. Indeed, the additional instructions given by the court advised the jury that they were not to "decide any question in a particular way because the majority of the jurors, or any of them, favor such a decision." (75RT 8414.) As such, an instruction informing jurors that they were not to give up conscientiously held beliefs was unnecessary. (*People v. Mincey*, *supra*, 2 Cal.4th at p. 437 [trial court has no duty to provide repetitive instructions].) In addition, a supplemental instruction given to a deadlockedjury need not remind jurors "that [they] could remain deadlocked" (Suppl. AOB 166), as the law "'does not require a broad hint to a juror that he can hang the jury if he cannot have his way.'" (*People v. Dixon*, *supra*, 24 Cal.3d at p. 52.)

Appellant also claims that the trial court second-guessed "both what the jury wanted when it sent the note as well as the motivations of the holdout." (Suppl. AOB 159.) Appellant's contentions are nothing more than mere speculation. Indeed, the record belies appellant's claims. After the jury was reinstructed and reminded of its obligations under the law, it was able to return a verdict. If the trial court had improperly "second-guessed" the jury's request, as appellant suggests, it would have sent another note seeking further clarification. Further, appellant fails to explain how this improper "second-guessing" led to an "impermissible and adverse influence of the jury's deliberative process." (Suppl. AOB 159.)

In sum, the trial court's comments plainly did not constitute an improper *Allen*-type charge or suffer from the defects condemned in *Gainer*. The court did not direct the jurors to re-examine the issues in consideration of their numerical division or the majority's views. Nor did the court direct the minority to conform to the majority's opinions or reach an agreement in the interests of expediency. The jury was not advised that they must reach a verdict and no mention was made of the expense or inconvenience of a retrial. It is clear the trial court took great care in exercising its power "without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency." (See *People v. Proctor*, *supra*, 4 Cal.4th at p. 539.) Thus, because the trial court's supplemental instructions did not include any of the prohibited aspects of an *Allen* instruction, appellant's claim fails. (See *Gainer*, *supra*, 19 Cal.3d at p. 852.; see also *Lowenfield v. Phelps*, *supra*, 484 U.S. at pp. 234-241; *People v. Keenan*, *supra*, 46 Cal.3d at p. 527.) Further, because the trial court's comments did not violate this Court's prohibitions in *Gainer*, it also did not violate appellant's federal constitutional rights. (See *Early v. Packer*, *supra*, 537 U.S. at p. 7 [California law offers greater protection to a criminal defendant under a claim of a coerced verdict

stemming from an *Allen* instruction than does the United States Constitution].) Accordingly, appellant's claims must be rejected.

C. The Trial Court's Instruction Did Not Advise The Jury That They Could Not Consider Appellant's Relationship With His Family In Their Penalty Determination

Appellant also contends that the trial court's supplemental instruction "effectively told the jurors, and particularly the holdout juror, that evidence of appellant's relationship with his family could not be considered in their penalty determination." (Suppl. AOB 168-172.) Appellant's claim is not supported by the record.

> The Eighth and Fourteenth Amendments require that the sentencer in a capital case not be precluded from considering any relevant mitigating evidence, that is, evidence regarding "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

(*People v. Frye* (1998) 18 Cal.4th 894, 1015, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973], footnote omitted; see also *Skipper v. California* (1986) 476 U.S. 1, 4 [106 S.Ct. 1669, 90 L.Ed.2d 1]; *People v. Fudge* (1994) 7 Cal.4th 1075, 117.) The constitutional mandate contemplates the introduction of a broad range of evidence mitigating imposition of the death penalty. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 820-821 [111 S.Ct. 2597, 115 L.Ed.2d 720]; *People v. Whitt* (1990) 51 Cal.3d 620, 647.) The jury "must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." (*Jurek v. Texas* (1976) 428 U.S. 262, 271 [96 S.Ct. 2950, 49 L.Ed.2d 929].)

Thus, when any barrier, whether statutory, instructional, evidentiary, or otherwise precludes a jury from considering relevant mitigating evidence, there occurs federal constitutional error, which is commonly referred to as "*Skipper* error." (See generally *Skipper v. South Carolina*, *supra*, 476 U.S. at pp. 4-8.) When the claimed barrier to the jury's consideration of relevant mitigating evidence is an instruction, the crucial question for determining error "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of" such evidence. (*Boyde v. California* (1990) 494 U.S. 370, 378-379 [110 S.Ct. 1190, 108 L.Ed.2d 316].) This standard "better accommodates the concerns of finality and accuracy" than one that concerns itself with "how a single hypothetical 'reasonable' juror could or might have interpreted the instruction." (*Id.* at p. 380.)

> There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

(*Id.* at pp. 380-381.) Further, "'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" (*Id.* at p. 378, quoting *Cupp v. Naughten* (1973) 414 U.S. 141, 146-147 [94 S.Ct. 396, 38 L.Ed.2d 368]; see also *People v. Burgener*, *supra*, 41 Cal.3d at p. 538 [under California law, correctness of jury instructions determined from entire charge of the court].)

At the same time however, the United States Supreme Court has made clear that the trial court retains the authority to exclude, as irrelevant, evidence that has no bearing on the defendant's character, prior record, or the circumstances of the offense. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, fn. 12; *People v. Frye*, *supra*, 18 Cal.4th at p. 1015; *People v. Jackson* (1996) 13 Cal.4th 1164, 1230 [no error in excluding evidence of defendant's offer to stipulate to facts underlying prior conviction for rape because not relevant to character; *People v. Zapien*, *supra*, 4 Cal.4th at p. 989 [trial court acted within discretion in barring evidence having no bearing on defendant's background or circumstances of offense].)

The defendant's background is, of course, material to the jury's penalty determination under California law (see, e.g., *People v. Boyd* (1985) 38 Cal.3d 762, 775, following *People v. Easley* (1983) 34 Cal.3d 858, 877-878) and the United States Constitution (see, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [102 S.Ct. 869, 71 L.Ed.2d 1, 8], following *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604). By contrast, however, the background of the defendant's family is of no consequence in and of itself. That is because under both California law (e.g., *People v. Gallego* (1990) 52 Cal.3d 115, 207) and the United States Constitution (e.g., *Enmund v. Florida* (1982) 458 U.S. 782, 801 [102 S.Ct. 3368, 73 L.Ed.2d 1140, 1154], the determination of punishment in a capital case turns on the defendant's personal moral culpability. It is the "defendant's character or record" that "the sentencer ... [may] not be precluded from considering"- not his family's. (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *People v. Rowland* (1992) 4 Cal.4th 238, 278-279.) Indeed, in *People v. Ochoa* (1998) 19 Cal.4th 353, 456, this Court held that "sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation."

Appellant argues that

> the court's supplemental instruction insured that if the holdout believed the evidence was relevant for the proper reasons – that the evidence evinced sympathy for appellant *as well as* for his children – the court's instruction had the effect of convincing the juror otherwise.

(Suppl. AOB 170.) In addition, while conceding that the court's instruction "was arguably a correct statement of law," appellant nevertheless argues that the instruction "would have caused the holdout, as well as the majority jurors, to believe the he/she was not properly performing his/her duty." (*Ibid.*) Appellant's reading of the instruction is simply not supported by the record. Further, in making this argument, appellant offers nothing more than mere speculation.

First, a major premise of appellant's argument fails. Specifically, the challenged instructions simply did not carry the preclusive implication appellant asserts they did. Nowhere in the supplemental instruction given by the trial court did it state that the jury could not consider mitigating evidence that demonstrated sympathy for *both* appellant and his family. Moreover, a reasonable juror would not have misunderstood the instruction to limit his or her ability to consider evidence that evinced sympathy for appellant *as well as* for his children. A reasonable jury would understand that the instructions did not foreclose evaluation of the mitigating evidence as it pertained to appellant, but only warned against considering "sympathy" evidence that *solely* pertained to third parties. This conclusion is compelled by the plain language used by the trial court in its supplemental instruction to the jury. The court was clear that "sympathy," as it pertained to factor (k) evidence, related to sympathy for appellant. It went on to add:

> Insofar as this evidence evinces sympathy for [appellant] or is seen as being evidence relating to the character or record of [appellant], the jury

> may consider it under factor (k), assign it whatever weight you believe is appropriate, and then weigh it along with all other aggravating and mitigating evidence and factors. Insofar as this evidence raises sympathy *only* for third parties, it is not appropriate factor (k) evidence. The focus, in other words, is on [appellant's] personal moral culpability, and it is [appellant's] character and background that is the focus of the inquiry, not the effect that your verdict will or may have on any third party or parties.

(75RT 8413, emphasis added.)

It is inconceivable that under this instruction the jury could have cast aside the evidence appellant offered in mitigation. For the jury to have accepted the narrow view of factor (k) offered by appellant would have meant disregarding the bulk of appellant's mitigating evidence, since the testimony offered by him during the penalty phase was mainly directed at portraying him as a loving father and son. It is unlikely "that reasonable jurors would believe the court's instructions transformed all of [appellant's] 'favorable testimony into a virtual charade.'" (See *Boyde v. California*, *supra*, 494 U.S. at p. 383.)

Moreover, there is nothing in the record to indicate that the jurors actually applied the challenged instruction in a way that prevented their correct consideration of appellant's mitigating evidence. Further, "[e]ven were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that" evidence that demonstrated sympathy for both appellant *and* his family could be considered in mitigation. (See *Boyde v. California*, *supra*, 494 U.S. at 383.)

For all of the foregoing reasons, the supplemental instructions provided by the trial court during the penalty phase did not constrain the manner in which the jury was able to consider mitigating evidence of appellant's character and background.

D. Any Alleged Error Was Harmless

Assuming the trial court erred in the language of its supplemental instruction, any alleged error was harmless. Once a reviewing court has determined that a defendant was prevented from presenting mitigating evidence, the analysis does not end. Such error is not automatically reversible, but is subject to harmless-error review under the test of *Chapman v. California*, *supra*, 386 U.S. 18. (*People v. Roldan* (2005) 35 Cal.4th 646, 739; *People v. Fudge*, *supra*, 7 Cal.4th at p. 1117; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032.)

Here, based on the actual language used by the trial court in the instruction, it is highly unlikely the jury actually applied the jury instruction in the manner suggested by appellant, and believed that they could not consider evidence tending to show sympathy for *both* appellant and his family. Moreover, the aggravating evidence presented by the prosecution substantially outweighed the mitigating evidence offered by the defense. During the penalty phase of the trial, the jury learned that appellant had committed several other crimes, including a gruesome triple murder, and had had other negative experiences with law enforcement, including a violent encounter with a jail guard while in prison. (70RT 7777-7784, 7787-7795, 7801-7807; 71RT 7837-7847, 7853-7870, 7871-7875, 7901-7902.) The prosecutor also pointed out to the jury that appellant and his family had previously engaged in witness tampering with respect to these prior crimes. (74RT 8313-8316.) The jury heard compelling victim impact evidence from the victim's brother and best friend, as well as from her partner, who was nearly killed in his encounter with appellant. (71RT 7877-7889, 7904-7910.) In addition, the prosecutor reminded the jury about the violent circumstances under which the victim was "executed" by appellant, which amounted to an "aggravated killing." (74RT 8317-8323.)

In contrast, appellant offered evidence that he had completed his high school degree in prison (71 RT 7972; 73RT 8115), took responsibility for some of the other crimes he committed (73RT 8114, 8117, 8140), and attempted to portray himself as a loving father, brother, and son (72RT 7969-7978, 7994-7998, 8004-8005, 8008-8010, 8030-8032, 8076-8078, 8086-8096.).

Thus, to the extent the trial court's supplemental instruction amounted to *Skipper* error, any alleged error was harmless.

XXXI.

CALJIC NO. 8.88 IS CONSTITUTIONAL AND THE TRIAL COURT PROPERLY INSTRUCTED THE JURY PURSUANT TO CALJIC NO. 8.88 [18/]

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18. CALJIC No. 8.88 states:

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [the] defendant.

After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

You shall now retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Appellant contends that CALJIC No. 8.88, the standard penalty phase concluding instruction, which defines the scope of the jury's sentencing discretion and the nature of the deliberative process, is constitutionally flawed in several respects. Specifically, appellant contends CALJIC No. 8.88 was constitutionally deficient and violated his rights under the Sixth, Eighth, and Fourteenth Amendments because the "so substantial" standard for comparing aggravating and mitigating factors in the instruction caused the jury's penalty choice to turn on an impermissibly vague and ambiguous standard that failed to provide adequate guidance and direction. (Suppl. AOB 177-179). Appellant also argues CALJIC No. 8.88 was deficient in several other respects: (1) it failed to inform the jury that the central determination at the penalty phase is whether the death penalty is appropriate, not merely authorized under the law (Suppl. AOB 180-183); (2) it failed to inform the jury that a life sentence is mandatory if the aggravating factors do not outweigh the mitigating ones (Suppl. AOB 182-185); (3) it failed to inform the jury that if they determined that mitigation outweighed aggravation, they were required to return a sentence of life without the possibility of parole (Suppl. AOB 185-186); (4) it failed to inform the jury that it could impose a life sentence even if aggravation outweighed mitigation (Suppl. AOB 186-187); and (5) it failed to inform the jury that appellant did not have to persuade them that the death penalty was inappropriate (Suppl. AOB 187-188). This Court has repeatedly upheld the constitutionality of CALJIC No. 8.88 and has rejected all of the claims raised by appellant. (See *People v. Chatman*, *supra*, 38 Cal.4th at pp. 409-410; *People v. Boyette*, *supra*, 29 Cal.4th at pp. 464-465; *People v. Gurule* (2002)

> Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

(15CT 3902-3903.)

28 Cal.4th 557, 662; *People v. Farnam*, *supra*, 28 Cal.4th at p. 192; *People v. Hughes*, *supra*, 27 Cal.4th at p. 405; *People v. Taylor* (2001) 26 Cal.4th 1155, 1181; *People v. Anderson* (2001) 25 Cal.4th 543, 600, fn. 20.) Appellant has not presented any persuasive reason for this Court to reconsider any of its prior decisions regarding the constitutionality of CALJIC No. 8.88. Appellant's claim must therefore be rejected.

XXXII.

APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW AND/OR THE EIGHTH AMENDMENT

Appellant contends that California's use of the death penalty violates international law, particularly, the International Covenant on Civil and Political Rights ("ICCPR"). He also contends that use of the death penalty violates evolving norms of human decency and, to the extent such international norms of human decency inform its scope, the Eighth Amendment. (Suppl. AOB 189-193.)

This Court, however, has rejected the contention that the death penalty violates international law, evolving international norms of decency, or the ICCPR. (See *People v. Turner* (2004) 34 Cal.4th 406, 439-440; *People v. Brown, supra,* 33 Cal.4th at pp. 403-404; *see also People v. Guerra, supra,* 37 Cal.4th at p. 1164 [international law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511 [same]; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1225 [death penalty not cruel and unusual punishment in violation of the Eighth amendment]; *People v. Samayoa* (1997) 15 Cal.4th 795, 864-865 [same]; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779 [the use of the death penalty as a regular form of punishment does not fall short of international norms of humanity and decency, and does not violate the Eighth Amendment].) Appellant's claim must therefore be rejected.

CONCLUSION

Accordingly, respondent respectfully asks that the judgment of conviction and sentence of death be affirmed.

Dated: July 16, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Supplemental Respondent's Brief** uses a 13 point Times New Roman font and contains **35,427** words.

Dated: July 16, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

CAPITAL CASE

Case Name: **People v. Andre Stephen Alexander**

Number: **S053228**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 16, 2007, I served the attached

SUPPLEMENTAL RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 16, 2007, at Los Angeles, California.

Virginia Gow
Declarant

Virginia Gow
Signature

SSS:vg
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