COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **FRANKLIN LYNCH,** Defendant and Appellant.	**CAPITAL CASE** S026408

Alameda County Superior Court No. H-10662
The Honorable Philip V. Sarkisian, Judge

RESPONDENT'S BRIEF

SUPREME COURT
FILED
OCT 1 2 2005
Frederick K. Ohlrich Clerk
Deputy

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
State Bar No. 104400
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1361
Fax: (415) 703-1234
Email: gerald.engler@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
A. Guilt Phase	2
1. The Attacks	3
a. Pearl Larson	3
b. Adeline Figuerido	5
c. Anna Constantin	7
d. Ruth Durham	11
e. Bessie Herrick	13
2. Officer Ross Finds The Russian Bracelet	16
3. The Identifications	18
4. Other Evidence	21
5. Appellant's Interrogation	23
B. Guilt Phase Defense	25
C. Penalty Phase	28
1. Prior Convictions	28
2. Uncharged Violent Acts	29
D. Penalty Phase Defense	32

TABLE OF CONTENTS (continued)

Page

ARGUMENT 34

I. **THERE WAS NO ABUSE OF DISCRETION IN THE DENIAL OF APPELLANT'S *FARETTA* MOTIONS BASED ON THE FINDING THAT HE WAS TRYING TO DELAY THE TRIAL** 34

II. **THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN EXCUSING FOUR PROSPECTIVE JURORS FOR CAUSE BASED ON THEIR CONFLICTING AND EQUIVOCAL ANSWERS ABOUT THEIR ABILITY TO IMPOSE THE DEATH PENALTY** 47

A. This Court Should Adopt A Contemporaneous Objection Rule For Claims Of *Witherspoon-Witt* Error 48

B. The Four Jurors In Question Were Properly Excused Based On Their Equivocal And Conflicting Answers 56

III. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER COUNTS** 67

IV. **THE TRIAL COURT CORRECTLY DECLINED TO GIVE APPELLANT'S PROPOSED INSTRUCTION THAT THE JURY'S CONSIDERATION OF THE EVIDENCE ON ANY COUNT "SHOULD NOT BE INFLUENCED" BY THE OTHERS** 76

TABLE OF CONTENTS (continued)

Page

		Page
V.	**THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATIONS MADE AT THE LIVE LINEUP FOR VIOLATION OF THE *WADE/GILBERT* RULE WHERE TWO ATTORNEYS ATTENDED THAT LINEUP ON APPELLANT'S BEHALF**	79
VI.	**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REMOVING A JUROR DURING TRIAL WHERE THE JUROR ACKNOWLEDGED THAT HIS ANGER FROM BEING ACCUSED OF DRINKING WOULD IMPAIR HIS ABILITY TO FOCUS ON THE TRIAL AND WHERE THE COURT'S SUBSEQUENT OBSERVATIONS SHOWED THAT TO BE THE CASE**	85
VII.	**APPELLANT'S ABSENCE FROM VARIOUS TRIAL PROCEEDINGS, IF ERROR, WAS HARMLESS**	97
VIII.	**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING UNDER THE SPONTANEOUS STATEMENTS HEARSAY EXCEPTION STATEMENTS ANNA CONSTANTIN MADE TO HER DAUGHTER SHORTLY AFTER SHE WAS ATTACKED**	103
IX.	**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING APPELLANT'S PURPORTED THIRD-PARTY CULPABILITY EVIDENCE CONCERNING THREE MEN IN A VAN**	116

TABLE OF CONTENTS (continued)

		Page
X.	SUFFICIENT EVIDENCE CONNECTED APPELLANT TO THE DURHAM CHARGES TO PERMIT THESE COUNTS TO GO TO THE JURY	121
XI.	APPELLANT WAIVED HIS CLAIM OF PROSECUTORIAL MISCONDUCT BY FAILING TO REQUEST AN ADMONITION; IN ANY EVENT, NO PREJUDICE CAN BE DEMONSTRATED	125
XII.	DELIVERY OF CONSCIOUSNESS OF GUILT INSTRUCTIONS WAS NOT ERROR	130
XIII.	THE TRIAL COURT'S REFUSAL TO STRIKE THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE RELATING TO PEARL LARSON WAS NOT ERROR; APPELLANT'S ACQUITTAL OF ROBBERY AGAINST MS. LARSON DOES NOT REQUIRE REVERSAL OF ANY OF THE GUILTY VERDICTS OR SPECIAL CIRCUMSTANCE FINDINGS RELATING TO MS. LARSON'S MURDER	133
XIV.	THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S REQUEST TO DELETE CERTAIN MITIGATING FACTORS FROM CALJIC NO. 8.85 OR BY FAILING TO INSTRUCT THE JURY SUA SPONTE THAT THE ABSENCE OF A MITIGATING FACTOR MAY NOT BE CONSIDERED AGGRAVATING	140
XV.	THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE APPELLANT'S PROPOSED INSTRUCTION CONCERNING MITIGATING FACTORS	142

TABLE OF CONTENTS (continued)

		Page
XVI.	**CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL**	146
XVII.	**APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW**	154
XVIII.	**ALL OF THE CONVICTIONS AND SPECIAL CIRCUMSTANCES CONSIDERED BY THE JURY WERE SUPPORTED BY SUFFICIENT EVIDENCE**	155
XIX.	**THERE IS NO CUMULATIVE EFFECT OF ALLEGED ERRORS REQUIRING REVERSAL OF THE GUILT OR PENALTY JUDGMENTS**	158
CONCLUSION		159

TABLE OF AUTHORITIES

Page

Cases

Adams v. Texas
(1980) 448 U.S. 38 48, 65

Apprendi v. New Jersey
(2000) 530 U.S. 466 147, 150, 157

Arizona v. Fulminante
(1991) 499 U.S. 279 97

Armant v. Marquez
(9th Cir. 1985) 772 F.2d 552 40

Atkins v. Virginia
(2002) 536 U.S. 304 152, 153

Batson v. Kentucky
(1986) 476 U.S. 79 95

Bean v. Calderon
(9th Cir. 1998) 163 F.3d 1073 77, 78

Blakely v. Washington
(2004) __ U.S. __
[124 S.Ct. 2531, 159 L.Ed.2d 403] 147, 150

Boulden v. Holman
(1969) 394 U.S. 478 49, 50

Boulware v. State
(Tex. Crim. 1976) 542 S.W.2d 677 52

Brown v. State
(Fla. 1980) 381 So.2d 690 52

	Page
Bustamante v. Eyman (9th Cir. 1972) 456 F.2d 269	99
California v. Velasquez (1980) 448 U.S. 903	48
Campbell v. Rice (9th Cir. 2002) 302 F.3d 892	98
Campbell v. Rice (9th Cir. 2005) 408 F.3d 1166	98
Cardenas v. Dretke (5th Cir. 2005) 405 F.3d 244	52
Carter v. Sowders (6th Cir. 1993) 5 F.3d 975	99
Chapman v. California (1967) 386 U.S. 18	97, 118, 120
Clark v. State (1978) 264 Ark. 630 [573 S.W.2d 622]	52
Cook v. State (Tenn. Crim. App. 1971) 466 S.W.2d 530	83
Correa v. Superior Court (2002) 27 Cal.4th 444	111
Crawford v. Washington (2004) 541 U.S. 36	103, 111-114
Demons v. State (Ga. 2004) 595 S.E.2d 76	113

TABLE OF AUTHORITIES (continued)

	Page
Donnelly v. DeChristoforo (1974) 416 U.S. 637	127
Faretta v. California (1975) 422 U.S. 806	34-41, 43-46
Francis v. Franklin (1985) 471 U.S. 307	132
Fritz v. Spalding (9th Cir. 1982) 682 F.2d 782	40, 45
Gilbert v. California (1967) 388 U.S. 263	79, 81-84
Gray v. Mississippi (1987) 481 U.S. 648	50, 51, 65, 66, 95
Hammon v. State (Ind.Ct.App. 2004) 809 N.E.2d 945	113
Harris v. State (Texas Crim. 1970) 457 S.W.2d 903	51
Harris v. Texas (1971) 403 U.S. 947	49-51
Hirschfield v. Payne (9th Cir. 2005) 420 F.3d 922, ___ (2005 U.S. App. LEXIS 17984)	40-42
In re Eric J. (1979) 25 Cal.3d 522	151
Jackson v. Virginia (1979) 443 U.S. 307	121, 138
Johnson v. Zerbst (1938) 304 U.S. 458	100

TABLE OF AUTHORITIES (continued)

	Page
Kirby v. Illinois (1972) 406 U.S. 682	81
LaCrosse v. Kernan (9th Cir. 2000) 211 F.3d 468	99
LaCrosse v. Kernan (9th Cir. 2001) 244 F.3d 702	99
Larson v. Tansy (10th Cir. 1990) 911 F.2d 392	99
Latham v. State (Ark. 1994) 883 S.W.2d 461	95
Lopez v. State (Fla.App. 2004) 888 So.2d 693	113
Maxwell v. Bishop (1970) 398 U.S. 262	49, 50
McMillan v. Pennsylvania (1986) 477 U.S. 79	135
McNeil v. Wisconsin (1991) 501 U.S. 171	81
Neder v. United States (1999) 527 U.S. 1	135
Owens v. Superior Court (1980) 28 Cal.3d 238	35
Patton v. Yount (1984) 467 U.S. 1025	64
People v. Abbott (1956) 47 Cal.2d 362	95

TABLE OF AUTHORITIES (continued)

	Page
People v. Alcala (1992) 4 Cal.4th 742	119
People v. Allen (1986) 42 Cal.3d 1222	151
People v. Anderson (2001) 25 Cal.4th 543	140, 150
People v. Arias (1996) 13 Cal.4th 92	75
People v. Ashmus (1991) 54 Cal.3d 932	92
People v. Bacigalupo (1991) 1 Cal.4th 103	131
People v. Balderas (1985) 41 Cal.3d 144	68
People v. Bean (1988) 46 Cal.3d 919	72
People v. Benavides (2005) 35 Cal.4th 69	131, 132
People v. Benson (1990) 52 Cal.3d 754	141, 155
People v. Berryman (1993) 6 Cal.4th 1048	121
People v. Bolden (2002) 29 Cal.4th 515	146, 151, 158
People v. Bonin (1988) 46 Cal.3d 659	126

TABLE OF AUTHORITIES (continued)

	Page
People v. Box (2000) 23 Cal.4th 1153	140
People v. Boyette (2002) 29 Cal.4th 381	92
People v. Bradford (1997) 15 Cal.4th 1229	68, 69, 72, 73, 97, 118
People v. Brown (2004) 33 Cal.4th 382	146, 154
People v. Burton (1989) 48 Cal.3d 843	40, 42
People v. Cain (1995) 10 Cal.4th 1	48, 134-137
People v. Carpenter (1997) 15 Cal.4th 312	48, 82, 84, 149
People v. Carpenter (1999) 21 Cal.4th 1016	47, 82
People v. Cleveland (2001) 25 Cal.4th 466	96
People v. Cole (2004) 33 Cal.4th 1158	121, 122
People v. Compton (1971) 6 Cal.3d 55	92
People v. Corella (2004) 122 Cal.App.4th 461	113
People v. Cox (1991) 53 Cal.3d 618	151

TABLE OF AUTHORITIES (continued)

	Page
People v. Cox (2003) 30 Cal.4th 916	129, 149
People v. Cummings (1993) 4 Cal.4th 1233	71
People v. Cunningham (2001) 25 Cal.4th 926	47
People v. Davenport (1995) 11 Cal.4th 1171	140
People v. Davis (2005) 36 Cal.4th 510	97-100
People v. Drinkwater (Colo. App. 1980) 622 P.2d 582	83
People v. Ervin (2000) 22 Cal.4th 48	97, 100
People v. Fauber (1992) 2 Cal.4th 792	150
People v. Flood (1998) 18 Cal.4th 470	134
People v. Frye (1998) 18 Cal.4th 894	146
People v. Fudge (1994) 7 Cal.4th 1075	94
People v. Gates (1987) 43 Cal.3d 1168	92
People v. Grant (2003) 113 Cal.App.4th 579	77, 78

Page

People v. Gray
(2005) 37 Cal.4th 168 — 158

People v. Green
(1980) 27 Cal.3d 1 — 126

People v. Haley
(2004) 34 Cal.4th 283 — 47, 61, 63

People v. Hall
(1986) 41 Cal.3d 826 — 118

People v. Hamilton
(1963) 60 Cal.2d 105 — 92, 96

People v. Hardy
(1992) 2 Cal.4th 86 — 100

People v. Harris
(1989) 47 Cal.3d 1047 — 127

People v. Harris
(2005) 37 Cal.4th 310 — 118

People v. Hayes
(1990) 52 Cal.3d 577 — 144, 148

People v. Hendricks
(1988) 44 Cal.3d 635 — 144

People v. Hernandez
(1998) 19 Cal.4th 835 — 135

People v. Hernandez
(2003) 30 Cal.4th 1 — 96

People v. Hill
(1998) 17 Cal.4th 800 — 127, 128

	Page
People v. Hillhouse (2002) 27 Cal.4th 469	151
People v. Holt (1997) 15 Cal.4th 619, 652	48, 49, 53, 55, 149
People v. Horning (2004) 34 Cal.4th 871	135
People v. Howard (1931) 211 Cal. 322	95, 96
People v. Jackson (1996) 13 Cal.4th 1164	131
People v. Jenkins (2000) 22 Cal.4th 900	68, 146, 148
People v. Johnson (1993) 6 Cal.4th 1	92
People v. Jones (1997) 15 Cal.4th 119	147
People v. Jones (2003) 29 Cal.4th 1229	47, 62, 63
People v. Kipp (1998) 18 Cal.4th 349	69
People v. Kipp (2001) 26 Cal.4th 1100	140
People v. Kobrin (1995) 11 Cal.4th 416	137
People v. Koontz (2002) 27 Cal.4th 1041	158

	Page
People v. Kraft (2000) 23 Cal.4th 978	145
People v. Lewis (2001) 26 Cal.4th 334	118
People v. Lucas (1995) 12 Cal.4th 415	93
People v. Lucero (2000) 23 Cal.4th 692	97
People v. Marsden (1970) 2 Cal.3d 118	37, 38, 44, 46
People v. Marshall (1990) 50 Cal.3d 907	151
People v. Marshall (1996) 13 Cal.4th 799	92, 93
People v. Marshall (1997) 15 Cal.4th 1	41, 42, 45, 46
People v. Medina (1995) 11 Cal.4th 694	64, 144
People v. Mendoza (2000) 24 Cal.4th 130	146
People v. Michaels (2002) 28 Cal.4th 486	146, 150
People v. Mickey (1991) 54 Cal.3d 612	49, 53-55, 155
People v. Miller (1990) 50 Cal.3d 954	69, 71, 72, 123

TABLE OF AUTHORITIES (continued)

Page

People v. Millwee
(1998) 18 Cal.4th 96 92

People v. Mincey
(1992) 2 Cal.4th 408 111, 131, 132

People v. Miranda
(1987) 44 Cal.3d 57 150

People v. Monterroso
(2004) 34 Cal.4th 743 148

People v. Montiel
(1993) 5 Cal. 4th 877 126, 127

People v. Morris
(2003) 107 Cal.App.4th 402 94

People v. Morrison
(2004) 34 Cal.4th 698 147

People v. Nakahara
(2003) 30 Cal.4th 705 131

People v. Poggi
(1988) 45 Cal.3d 306 108

People v. Prieto
(2003) 30 Cal.4th 226 135, 147, 150, 156

People v. Ray
(1996) 13 Cal.4th 313 146

People v. Riel
(2000) 22 Cal.4th 1153 141

People v. Rincon
(2005) 129 Cal.App.4th 738 113

TABLE OF AUTHORITIES (continued)

	Page
People v. Rogers (1978) 21 Cal.3d 542	54
People v. Roldan (2005) 35 Cal.4th 646	61, 144, 154
People v. Samayoa (1997) 15 Cal.4th 795	63, 64
People v. Samuels (2005) 36 Cal.4th 96	92
People v. Sandoval (1992) 4 Cal.4th 155	69
People v. Seaton (2001) 26 Cal.4th 598	64, 144
People v. Silagy (1984) 101 Ill.2d 147 [461 N.E.2d 415]	52
People v. Smith (2005) 35 Cal.4th 334	149-151
People v. Stitely (2005) 35 Cal.4th 514	141, 147
People v. Taylor (1990) 52 Cal.3d 719	142
People v. Turner (1994) 8 Cal.4th 137	140
People v. Velasquez (1980) 26 Cal.3d 425	48, 49, 51, 52, 54, 55

	Page
People v. Viera (2005) 35 Cal.4th 264	141
People v. Vigil (Colo.App. 2004) 104 P.3d 258	113
People v. Waidla (2000) 22 Cal.4th 690	97, 98, 100, 102
People v. Watson (1956) 46 Cal.2d 818	98, 118, 120
People v. Wharton (1991) 53 Cal.3d 522	100
People v. Williams (1971) 3 Cal.3d 853	81, 82, 84
People v. Williams (1988) 45 Cal.3d 1268	151
People v. Windham (1977) 19 Cal.3d 121	39, 40, 42-44
People v. Young (2005) 34 Cal.4th 1149	150
People v. Zapien (1993) 4 Cal.4th 929	134
Ramirez v. Dretke (5th Cir. 2005) 398 F.3d 691	113, 114
Ring v. Arizona (2002) 536 U.S. 584	147, 150, 156, 157
Robards v. Rees (6th Cir. 1986) 789 F.2d 379	40, 45

TABLE OF AUTHORITIES (continued)

	Page
Roper v. Simmons (2005) __ U.S. __ [161 L.Ed.2d 1, 125 S.Ct. 1183]	152, 154
Russell v. Lynaugh (5th Cir. 1989) 892 F.2d 1205	52
Silva v. Woodford (9th Cir. 2002) 279 F.3d 825	156
Stancil v. United States (D.C.App. 2005) 866 A.2d 799	113
State v. Cash (S.C. 1971) 185 S.E.2d 525	83
State v. Griffin (Kan. 1970) 469 P.2d 417	83
State v. Haskins (Wash. App. 1982) 654 P.2d 1208	82
State v. Manuel (Wis.Ct.App. 2004) 685 N.W.2d 525	114
State v. Wigglesworth (1969) 18 Ohio St.2d 171	50, 51
Sullivan v. Louisiana (1993) 508 U.S. 275	149
Tuilaepa v. California (1994) 512 U.S. 967	146
Tyler v. Cain (2001) 533 U.S. 656	50, 51

TABLE OF AUTHORITIES (continued)

	Page
United States v. Ellenbogen (2d Cir. 1966) 365 F.2d 982	95
United States v. Ewing (9th Cir. 1971) 446 F.2d 60	82, 83
United States v. Flewitt (9th Cir. 1989) 874 F.2d 669	40
United States v. George (9th Cir. 1995) 56 F.3d 1078	40
United States v. Gordon (D.C. Cir. 1987) 829 F.2d 119	99
United States v. Khoury (9th Cir. 1995) 62 F.3d 1138	95
United States v. Nazemian (9th Cir. 1991) 948 F.2d 522	111
United States v. Nichols (2d Cir. 1995) 56 F.3d 403	99
United States v. Smallwood (D.C. Cir. 1972) 473 F.2d 98	82
United States v. Wade (1968) 388 U.S. 218	79, 81-84
United States v. Zambito (4th Cir. 1963) 315 F.2d 266	96
Wainwright v. Witt (1985) 469 U.S. 412	47-49, 51-55, 62, 64-66
White v. Illinois (1992) 502 U.S. 346	113

TABLE OF AUTHORITIES (continued)

Page

Wigglesworth v. Ohio
(1971) 403 U.S. 947 49, 50

Williams v. Superior Court
(1984) 36 Cal.3d 441 68

Witherspoon v. Illinois
(1968) 391 U.S. 510 49-55, 65, 95

Witt v. State
(Fla. 1977) 342 So.2d 497 52

Constitutional Provisions

United States Constitution
Fifth Amendment 146
Sixth Amendment 81, 125, 146, 150
Eighth Amendment 146, 148, 150-152, 154
Fourteenth Amendment 146, 148, 151

California Constitution
article 1, section 13 95

Statutes

Code of Civil Procedure
§ 12a 35

	Page
Evidence Code	
§ 350	118
§ 352	118
§ 354	120
§ 1101	69
§ 1240	103, 108, 113
Penal Code	
§ 187	1
§ 190.2	146
§ 190.2, subd. (a)(17)(i)	1
§ 190.2, subd. (a)(17)(vii)	1
§ 190.2, subd. (a)(3)	1
§ 190.3	140, 146, 149
§ 211	1
§ 459	1
§ 664	1, 135
§ 667	1
§ 954	68
§ 977	98
§ 995	79
§ 1043	98
§ 1089	91, 95, 96
§ 1118.1	121
§ 1170, subd. (f)	150
§ 1203.09, subd. (a)	1
§ 1239, subd. (b)	2
§ 1382	35
§ 12022.7	1

Page

Other Authorities

California Jury Instructions, Criminal

	Page
No. 2.01	132
No. 2.03	130, 131
No. 2.06	130, 131
No. 2.52	130, 131
No. 2.92	132
No. 6.00	134-136
No. 8.81.17	133
No. 8.85	140, 141
No. 17.02	76-78

Supreme Court Practice (8th ed. 2002) § 5.12(b), p. 319 — 50

Webster's New Internat. Dict. (2d ed. 1958) p. 177 — 135

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. FRANKLIN LYNCH, Defendant and Appellant.	CAPITAL CASE S026408

STATEMENT OF THE CASE

On August 30, 1988, the Alameda County District Attorney filed a 15-count information charging appellant Franklin Lynch with three counts of murder (Pen. Code, § 187),[1] two counts of attempted murder (§§ 187, 664), five counts of residential burglary (§ 459), and five counts of residential robbery (§ 211). All 15 counts included enhancements for intentional infliction of great bodily injury (§ 12022.7) and commission of a crime against a person over 60 (§ 1203.09, subd. (a)). Prior serious felony convictions (§ 667) for robbery and burglary were also alleged. The information alleged seven special circumstances: three for robbery-murder (§ 190.2, subd. (a)(17)(i)), three for burglary-murder (§ 190.2, subd. (a)(17)(vii)), and one for multiple murders (§ 190.2, subd. (a)(3)). (CT 2943-2958.) Appellant pleaded not guilty and denied all enhancements and special circumstances. (CT 2965.) The district attorney subsequently dismissed the great bodily injury and age enhancements on all counts concerning the three murder victims. (CT 2959, 3174.)

On March 17, 1992, a jury returned verdicts finding appellant guilty of

1. Further unspecified statutory references are to the Penal Code.

three counts of murder, five counts of burglary, and four counts of robbery. The jury found all seven special circumstances true and sustained the charged enhancements against the surviving victims. The jury returned not guilty verdicts on the two counts of attempted murder and one count of robbery. (CT 3365-3386.) On April 2, 1992, the jury returned a penalty verdict of death. (CT 3447.)

On April 28, 1992, the trial court denied appellant's motion to modify the death verdict (§ 190.4) and entered a judgment of death. (CT 3448-3449, 3510-3515.) The court imposed seven-year sentences for each of the non-murder counts, but stayed execution of the sentences pending execution of the death sentence. (CT 3448-3449.) This appeal is automatic. (§ 1239, subd. (b); see also CT 3516.)

STATEMENT OF FACTS

A. Guilt Phase

For almost two months during the summer of 1987, residents in the East Bay communities of San Leandro and Hayward were terrorized by a series of highly similar home invasion attacks. In each of the five attacks, the assailant entered a residence during daylight hours and severely beat an elderly female occupant. Three of the victims died. The assailant bound each of his murder victims and placed some sort of covering over the victim's body or head. Although witnesses observed a suspicious man at or near each victim's residence close to the time of each assault, law enforcement authorities developed no solid leads until after the final San Leandro murder. The key investigative break in the case came from an unlikely source—an Oakland police officer whose job it was to monitor pawn shops in that city. While sifting through sales documents from second-hand dealers, the officer came across a purchase slip which showed that, within hours of the attack upon San Leandro

victim Anna Constantin, appellant had sold a distinctive bracelet taken from her residence to a second-hand shop in nearby Oakland. Upon learning this information, investigators quickly assembled a photographic lineup that included appellant's picture. That same day, a survivor and two witnesses of recent non-fatal attacks identified appellant's photo. A total of eleven witnesses were eventually able to make positive identifications that connected appellant to each of the crime scenes.

1. The Attacks

a. Pearl Larson

The first attack occurred on June 24, 1987, when 76-year-old Pearl Larson was murdered in her San Leandro home, likely at about noon. (RT 3282.)[2/] Ms. Larson lived in a residence on the corner of Wake Avenue and Diletta Street in San Leandro. (RT 2668.)

Ms. Larson was last seen alive at about 11:30 or 11:45 a.m. on that day by her gardener, Jolevia Jones, who briefly chatted with her outside her residence. (RT 3138, 3142, 3146-3147, 3160, 3166.) Within about 10 minutes of arriving at Ms. Larson's, Jones drove to another job, leaving his helper, David Wesley, to finish Ms. Larson's lawn. (RT 3142, 3147, 3167-3168.) When Jones returned about 40 minutes later, Wesley had already moved to another job up the street. (RT 3148-3149.) Jones picked up a garbage can Wesley had left behind and moved on to the next job. (RT 3149.)

At about noon or a few minutes after, Jacqueline Brown, a live-in nurse who cared for an elderly woman directly across the street from Ms. Larson, saw

---

2. The jury found appellant guilty of murder and burglary in Ms. Larson's case, but not guilty of robbery. (CT 3493-3495.) The jury also found true the special circumstance allegations that Ms. Larson's murder was committed during burglary and the commission or attempted commission of robbery. (CT 3496-3496.1.)

a Black man jump over Ms. Larson's backyard fence, which was about five feet high and overgrown with bushes. (RT 3174-3176, 3180, 3184, 3186, 3208.) The man ran away down Wake Avenue. (RT 3185.) She had seen the same man in Ms. Larson's side yard at about 11:20 a.m. (RT 3179, 3184.) She had watched him for about five minutes at that time as he "scoped the backyard," looked all around, appeared to urinate in some bushes, then walked to the front of Ms. Larson's residence and out of Ms. Brown's sight. (RT 3180-3181.)

At about 12:15 p.m., Bettie Agliano, Ms. Larson's friend, telephoned her residence, but there was no answer. (RT 3231, 3236.) Jacqueline Brown noticed that Ms. Larson's car was still parked on the street under a shade tree at about 7:30 or 8:00 p.m. (RT 3187.) This was odd because, although Ms. Larson typically moved her car under the tree in the morning, she never left it there at night. (RT 3187.)

Ms. Larson's body was apparently found by her teenage grandson, Daniel, at about 11:00 p.m. that evening. (RT 3242, 3244.) Daniel had left the home at about 11:00 a.m. that morning. (RT 3207.) Daniel told police that when he returned home he found the front door locked, but the back door open. (RT 3247-3248.) Ms. Larson's body was lying on her bed, with her hands bound by nylons or pantyhose. (RT 3243, 3274.) A cloth had been tied around her face. (RT 3274-3275.) Her housecoat was pulled up to about her waist and she was wearing no undergarment, but the autopsy revealed no evidence of a sexual assault. (RT 3248, 3274, 3281, 3284.)

Pathologist Paul Hermann autopsied Ms. Larson's body on June 25. (RT 3271, 3273.) He found injuries to the larynx and deep structures of her neck most likely caused by squeezing or strangulation. (RT 3281, 3287, 3289.) He also found blunt trauma injuries around her eyes and a deep contusion to the back of her head. (RT 3277, 3287.) He observed fresh abrasions to the ring finger of her left hand that suggested someone unsuccessfully tried to remove

her ring while she was still alive. (RT 3276.) Dr. Hermann determined that Ms. Larson died due to asphyxia caused by the cloth around her face and the injuries to her neck. (RT 3289.)

A San Leandro police officer spoke with Jacqueline Brown, Ms. Larson's neighbor, on June 25. (RT 3189.) She stated that she thought the man she had seen the day before in Ms. Larson's back yard was the gardener—not Jones, who was more than 80 years old, but his assistant. (RT 3139, 3190, 3203.) She also said that the man had a peculiar limp. (RT 3319.) David Wesley, the gardener's assistant, did have a pronounced limp from arthritis, but it was so severe he could not run, jump, or climb fences. (RT 3323-3325; see also RT 3150-3151, 3170-3171.) Wesley also acknowledged that he had urinated in the bushes in Ms. Larson's backyard on occasion. (RT 3331.) On June 27, police showed Jacqueline Brown a photo lineup that included Wesley's picture. She indicated Wesley's photo was someone she had see around before, but picked a different photo as resembling the man she saw "jumping the bushes . . . ." (RT 3263-3264.) On July 1, Brown and a San Leandro police officer observed Wesley as he was mowing a lawn about a block away. (RT 3295-3296, 3299.) She stated that Wesley definitely was not the man she had seen jump over Ms. Larson's back fence on the day of the murder. (RT 3194, 3300, 3303.) Sometime in early July, Brown saw the same man walking along Bancroft Avenue in San Leandro. (RT 3221-3223, 3227.) She was so surprised that she stopped her car in the middle of the street. (RT 3227.) Though she told her family about seeing the man again, she did not call the police. (RT 3222, 3227.)

b. Adeline Figuerido

The next attack occurred on July 28, 1987, when 89-year-old Adeline Figuerido was murdered in her home at 833 143rd Avenue in San Leandro. (RT

3374-3379.)[3] The previous day, Irma Casteel, who lived at 1245 144th Avenue in San Leandro, saw an unfamiliar Black man walk by her house while she was in the yard doing gardening. (RT 3798-3800, 3812-3813.) She watched the man for about five minutes as he walked to the end of her dead-end block, then turned and came back. (RT 3201-3202.) An elderly woman lived in one corner house at the end of the block, and an elderly couple lived in the other. (RT 3800-3801.)

Adeline Figuerido's home on 143th Avenue was not a corner dwelling, but the last house before the BART tracks on one side, and was separated from the nearest dwelling on the other side by a large vacant lot. (RT 3365.) Ms. Figuerido lived with her daughters, Marie and Olivia. (RT 3361-3362.) When the daughters left home at about 10:30 a.m. on July 28 to do some grocery shopping, they told Ms. Figuerido they would be home in time for lunch. (RT 3363-3364, 3367.) They locked the doors when they left, but Ms. Figuerido, who enjoyed her garden, would often go outside and look at her flowers. (RT 3363, 3366.) At about 11:30 a.m., Jan Morris, who worked at the business across the street from Ms. Figuerido's home, saw a Black man in Ms. Figuerido's driveway. (RT 3579-3583.) The man looked around in both directions, then quickly walked towards the back of Ms. Figuerido's house. (RT 3583-3584.)

Marie and Olivia Figuerido returned from shopping sometime between 11:30 a.m. and noon. (RT 3366, 3375.) As they entered the back door, they saw their mother's glasses on the floor in the entryway and found her body on the dining room floor. (RT 3368.) Her body was covered with one bedspread and a second bedspread was "wrapped and wrapped around her head." (RT 3378,

---

3. The jury convicted appellant of burglary, robbery, and murder in Ms. Figuerido's case and found true burglary-murder and robbery-murder special circumstances. (CT 3497-3500.)

3383.) Her hands were tightly tied behind her back with an electrical cord. (RT 3378-3379, 3381.) There was a large amount of blood near her body. (RT 3369.) The house had been ransacked and various items had been gathered on the kitchen and dining room tables. (RT 3368, 3370, 3379.) The daughters determined that a number of items were missing, including some 18-karat gold bracelets and rings, some sterling silver chains, and cash. (RT 3368-3370, 3379-3381, 3384.) Costume jewelry had not been taken. (RT 3382.) Among the items strewn about the home was an opened miniature liquor bottle left atop the dining room table. (RT 3370; 3392-3393.)

Pathologist Sharon Van Meter performed an autopsy of Adeline Figuerido on July 29. (RT 3340-3342.) She observed multiple contusions and fractures to her face and head as well as neck injuries consistent with prolonged compression. (RT 3342-3344, 3347-3348, 3350.) She estimated that Ms. Figuerido had suffered at least 10 to 12 forceful blows. (RT 3349.) Dr. Van Meter determined that Ms. Figuerido died from "blunt trauma to the head and neck." (RT 3355.)

c. Anna Constantin

The next three attacks were committed in rapid succession on August 13, 15, and 17. These attacks were preceded by a suspicious incident that bore hallmarks of the charged offenses. On the afternoon of August 12, 86-year-old Lavinia Harvey was alone in her home on the outskirts of Hayward, her husband having left at about 3:00 p.m. (RT 3047-3049.) The Harveys' house was on a corner lot. (RT 3048; see also RT 2661; Peo's. Exh. 2-C.) As Mrs. Harvey looked out her sitting room window, she saw the top of someone's head moving along outside the lower edge of the window. (RT 3050-3051.) Thinking that a youngster was perhaps trying to steal tools from her yard, she grabbed a two-foot long piece of pipe and went onto to her back porch. (RT 3052-3053.) Instead of finding a boy, she was startled to find an adult Black

man in her garden. (RT 3053, 3067.) The man also seemed startled to see her. (RT 3053.) Mrs. Harvey asked the man what he wanted, and he muttered something to the effect of, "Was there a Black kid come out this garden?" (RT 3054.) Not finding the man menacing at first, Mrs. Harvey gave him permission to look in her back yard, but then told him to get out of her yard. (RT 3054-3056, 3069.) She watched the man as he walked away until he disappeared from her view. (RT 3057-3058.) The man kept looking back at her as he walked. (RT 3057-3058.) He had a vicious look in his eyes. (RT 3056; see also RT 3077 ["They were terrible eyes"].)

The next day, August 13, 73-year-old Anna Constantin was attacked in her home at 595 Blossom Way in San Leandro, a corner residence. (RT 3532-3533; see RT 4097; Peo's. Exh. 2-F.)[4] Ms. Constantin's daughter Vickie, who lived with her mother, said goodbye when she left for work at about 6:00 a.m. that day. (RT 3533-3534.) According to her usual custom, Vickie called home and spoke to her mother between noon and 2:00 p.m. that day. (RT 3534.) Ms. Constantin had a large garden and typically worked in it for several hours each day. (RT 3534.)

At about 3:15 or 3:30 p.m., Adele Manos was driving southbound along Bancroft Avenue. (RT 3495-3499.) About one block past Blossom Way she saw a Black man coming from between some hedges in front of an apartment building. (RT 3497.) The man was headed in the opposite direction, or back towards Blossom. (RT 3499-3500.) She slowed when she saw the man because it startled her to see him coming from the bushes. (RT 3498.) Manos estimated that she saw the man for a total of 10 to 15 seconds, including three or four seconds of continuous eye contact as she passed by him. (RT 3501.)

---

4. The jury convicted appellant of burglary, robbery, and murder in Ms. Constantin's case and found true burglary-murder and robbery-murder special circumstances. (CT 3488-3492.)

Vickie Constantin returned home from work at about 5:45 p.m. (RT 3535-3536.) She heard the dogs barking excitedly in the back yard, and she went around to the back door. (RT 3536.) As she entered the home, she observed her mother lying on the floor propped up against the back door. (RT 3536-3537.) She was badly injured, and her face was swollen beyond recognition, but she was alive. (RT 3537.) Vickie asked her mother what had happened. (RT 3537.) Ms. Constantin told Vickie to call 9-1-1, which she did. Vickie then again asked her mother what had happened. (RT 3538.)

Speaking in her native Russian, Ms. Constantin said she had heard the dogs barking ferociously while she was watering in the front yard. (RT 3538.) When she went back into her house and proceeded to the back door area to see why they were barking, she was hit from behind, beaten savagely, and tied up. (RT 3535, 3538-3539.) Earlier, she had latched the back screen door but left the door itself open. (RT 3538.) Upon being attacked she did not fall immediately, but managed to steady herself until her attacker pushed the back of her legs and forced her to the floor. (RT 3539.) Once she was on the floor, the attacker began beating her on her back. (RT 3539.) She tried to turn over to look at the person, but he stepped on her face and neck and beat her some more. (RT 3539.) She could not understand everything the man was saying, but several times heard him say, "Fuck you, bitch, I'll kill you." (RT 3539-3540.) Ms. Constantin told her daughter that the person's voice sounded like that of a Black man (or "chorsum" in Russian). (RT 3539-3540.) She continued to try to turn over to look at him and kept asking, "why, why," which made the man angrier and prompted him to sit on her and beat her for a long time. (RT 3540.) She never was able to get a look at the man's face. (RT 3551.) Eventually, after she became quiet, the man got off of her. (RT 3540.) Ms. Constantin could hear the man walking around the room and moving items. (RT 3541.) Eventually, he came back, covered her with a blanket, beat her

some more, and struck her with what she believed was a clothes iron. (RT 3541.)

Emergency personnel arrived and took Ms. Constantin to the hospital by ambulance, with Vickie riding along. (RT 3542.) Ms. Constantin was in a lot of pain and told Vickie she would tell her more at the hospital. (RT 3542-3543.) Ms. Constantin was able to continue describing what happened to her at the hospital. (RT 3543.) She told her daughter that she had heard the man go upstairs and ransack the house after the initial beating, then come back downstairs and beat her some more before leaving out the back door. (RT 3543.) She also said that she had managed to untie herself. (RT 3566.)

Police investigators found a cut in the screen door leading to the back entrance of Ms. Constantin's home. (RT 3823-3824.) Inside the home, investigators found a clothes iron, an electrical cord, and a can of spilled rust-colored paint on the floor in close proximity to where Ms. Constantin had been found. (RT 3638-3640.) Vickie Constantin had also noticed the paint can on the floor and what appeared to be paint as well as blood on her mother. (RT 3541-3542.) Other rooms of the home had been ransacked and some items had been gathered and placed on the dining room table. (RT 3688-3690, 3697.) Vickie Constantin reported to the San Leandro police that a variety of items were missing, including a Russian bracelet that Vickie had played with as a little girl and which her mother gave her when she turned 21. (RT 3544-3545.) The bracelet was very heavy and tarnished, and a charm stamped "1902" was attached to it with a clasp. (RT 3554-3555.) Vickie also noticed that other items of jewelry were missing as well as some cash, but not her mother's costume jewelry. (RT 3545-3546.)

Ms. Constantin never recovered from her wounds, remaining hospitalized until her death on September 26, 1987. (RT 3736-3737, 3543.) When she was admitted to the hospital shortly before 6:00 p.m. on August 13,

she suffered from multiple injuries, including a fractured cheek bone, a fractured rib, and a deep two-inch wound to the scalp that went down to the skull. (RT 3665-3666, 3669-3670, 3674-3675.) The emergency room physician believed the scalp wound could have been caused by a blow from the edge of an iron or a paint can. (RT 3671-3672.) Ms. Constantin's scalp wound became infected and never healed, and, although she may have rallied briefly, her general condition deteriorated until her death. (RT 3673-3675, 3680-3681; see also RT 3745-3746.) Pathologist Van Meter, who performed an autopsy on September 29, found multiple blood clots in Constantin's lungs, pulmonary artery, and legs. (RT 3738.) Such clotting, or "thrombi," is a common side effect of prolonged hospitalization and confinement to bed. (RT 3747-3748.) Dr. Van Meter determined that Ms. Constantin's death was caused by the blood clots, which, in turn, were proximately caused by the blunt trauma injuries inflicted on August 13 that caused her hospitalization. (RT 3742-3743; see also RT 3748 ["[T]he thrombi cause the death. The thrombi are the result of the treatment and complications of the injuries sustained"].)

d. Ruth Durham

The last two charged attacks were not fatal. On August 15, 88-year-old Ruth Durham was attacked in her home at 226 Alden Road in unincorporated Hayward. (CT 350; RT 2711-2712.)[5] Ms. Durham lived next door to her daughter and son-in-law, whose home was on the corner of Alden and Boston Roads. (CT 370-371; RT 2764-2765.) Ms. Durham habitually worked in her garden in the morning and visited with her daughter in the afternoon. (RT 2767-

---

5. Ms. Durham was legally unavailable by the time of trial in 1992. By stipulation, her videotaped preliminary hearing testimony was played to the jury. (RT 2727-2729.) The transcript of that testimony appears at pages 350 to 375 of the Clerk's Transcript on Appeal. The jury found appellant guilty of burglary and robbery with infliction of great bodily injury in Ms. Durham's case, but not guilty of attempted murder. (CT 3484-3487.)

2768.)

On August 15, Ms. Durham visited her daughter next door in the afternoon in accord with her usual routine, and then returned home at about 4:30 p.m. (CT 350.) She entered through the back door and latched the screen door with a hook. (CT 351-352.) As she sat down in her living room, someone hit her in the jaw. (CT 353.) She was struck on both sides of her face. (RT 361.) The next thing she remembered was being in the hospital. (CT 353.) She did not see who hit her. (CT 353.)

At about 4:30 p.m. that day, Joseph and Patricia Armstrong were driving at five to ten miles per hour on Alden Road approaching the intersection at Boston Road. (RT 2790-2793, 2805, 2820-2822.) As Mr. Armstrong prepared to make the turn onto Boston, they both saw a Black man walking on Alden and then crossing the intersection. (RT 2793-2794, 2822-2823, 2828.) The man was on the opposite side of the street from Ms. Durham's residence. (RT 2805.) They passed within about 10 feet of the man. (RT 2796.) Mrs. Armstrong estimated she was able to observe him for about five seconds or so (RT 2796, 2804-2805); Mr. Armstrong estimated one to two seconds. (RT 2823.) Mrs. Armstrong and the man stared directly at each other until she looked away. (RT 2796-2797.) It was unusual to see an adult of any race walking in their neighborhood since generally only children played in the streets, and especially unusual to see a Black man since no Blacks lived in the area at that time. (RT 2798, 2806, 2824.)

At about 5:30 p.m. on August 15, Ms. Durham's son-in-law found her sitting on the steps of her front porch dazed and bleeding. (RT 2772-2774.) She was conscious but unable to speak. (RT 2776.) The front door, which had been locked, was open. (CT 370; RT 2775.) The back screen door had a slit in it near the hook and eye latch. (RT 2789.) Inside, the house "looked like a cyclone had hit it . . . ." (RT 2779.) There was blood in the hallway. (RT

2780.) Emergency personnel were summoned, and Ms. Durham was taken to the hospital. (RT 2777.)

The emergency room doctor, Kenneth Miller, found fractures to both sides of her jaw and around her right eye as well as massive swelling to her face, a laceration to her face, and hemorrhaging in her right eye. (RT 2854, 2858-2861.) All of the injuries were caused by blunt trauma, and Dr. Miller believed that Ms. Durham received at least two blows that could have come from a closed fist. (RT 2862-2864.) Ms. Durham's fractures required surgery to repair, and she also received sutures to injuries to her right eyelid and the corner of her mouth. (RT 2861, 2866.) Ms. Durham stayed in the hospital for two weeks, then lived with her daughter and son-in-law for about six months before moving back into her own home. (CT 353-354; RT 2778.) She was confined to a wheelchair for months. (CT 355.) When she was able to go through her home following her discharge from the hospital, she found six dollars missing from her purse. (CT 355-357.) Her hearing aid and some sweaters were also missing. (CT 355-356, 365.) Her ring and her watch, which she was wearing at the time of the attack, were not taken from her by the assailant. (CT 362, 373.)

e. Bessie Herrick

The final charged incident occurred on August 17, 1987, when 74-year-old Bessie Herrick was attacked in her home she shared with her husband Frank at the corner of Royal Avenue and Bartlett Street in unincorporated Hayward. (CT 790-792, 796; RT 2874)[6] At about 3:00 p.m. that day, Eric Hoak passed by the Herricks' home on his way to work. (RT 2874-2875.) He saw a Black

---

6. Mrs. Herrick was deceased by the time of trial. (RT 2975, 2991.) Her videotaped preliminary hearing testimony was played to the jury. (RT 2926-2929.) The transcript of that testimony appears at pages 790 to 866 of the Clerk's Transcript on Appeal. The jury found appellant guilty of burglary and robbery with infliction of great bodily injury in Mrs. Herrick's case, but not guilty of attempted murder. (CT 3482-3484.)

man on the front porch of the Herricks' residence walking away from the front door. (RT 2875-2876.) Hoak, who lived nearby, was not aware of any Blacks who lived in the area and did a double-take when he saw the man on the Herricks' porch. (RT 2876, 2894.) Hoak estimated that he was able to view the man for about five seconds. (RT 2876.)

Mrs. Herrick and her husband returned home at about 3:30 p.m. that day after lunching at a senior center. (CT 792.) Mrs. Herrick entered her home upon their return, while her husband went into the back yard to do some watering. (CT 836; RT 2977-2978.) After awhile, Mrs. Herrick went outside and asked her husband if he was coming in soon. (CT 837.) He said he was coming right in, after which Mrs. Herrick returned to the living room and sat in her favorite chair. (CT 837, 841.) Shortly after that, she recalled seeing a Black man in her living room; she stood up, was hit in the head, and was "knocked down and out." (CT 793-798, 842, 855.) The next thing she remembered, she was in the hospital. (CT 799.) The emergency room physician, Edwin Whitman, found multiple blunt trauma injuries to Mrs. Herrick's face and neck, including broken bones in her nose and near her left eye. (RT 2956-2957, 2960-2963.) Dr. Whitman believed the injuries could have been caused by a forceful blow from a clenched fist or some other spherical object. (RT 2963-2964, 2968.) Mrs. Herrick was unclear about how the man got into her house. While drifting in and out of consciousness, she told the first officer on the scene that she had been hit from behind. (RT 3893-3894, 3897.) Later that day at the hospital, she told a sheriff's deputy that she opened the front door and the man struck her in the face. (RT 3094-3095, 3104.) At the preliminary hearing, she testified that the man was already in her house when she first noticed him and that she was hit from the front, not from behind. (CT 793-795, 855.)

While Mrs. Herrick's husband Frank had been working in the garden, he noticed a man jogging up Royal. (RT 2979.) He watched the man for several

seconds; it was not unusual to see joggers of different races in that neighborhood. (RT 2980-2981.) About five minutes later, Mr. Herrick happened to look into the house from the back patio windows. (RT 2982, 2984.) He saw his wife lying on the floor by the fireplace and the same man he had seen jogging crouching over her and hitting her. (RT 2983-2985, 2995.) Mr. Herrick hurried into the house through the garage and found his wife motionless on the floor with blood all over the place. (RT 2985-2986.) By this time, the attacker was gone. (RT 2986.) Mrs. Herrick was only able to tell her husband that a man had pushed her. (RT 2995.) Mr. Herrick called 9-1-1, and emergency personnel quickly arrived. (RT 2986.)

At about 4:30 p.m., John Wulf was driving on Bartlett to a church near the intersection of Bartlett and Royal to do some gardening. (RT 2930-2932.) As Wulf was driving towards the Herrick's home, he saw a Black man jogging down the street towards him. (RT 2932, 2942-2943.) The man kept looking back over his shoulder in the general direction of the intersection at Bartlett and Royal, which struck Wulf as unusual. (RT 2934-2935, 2944.) As Wulf neared the man, he ran across the street diagonally in front of Wulf's vehicle, passing within 30 feet or so and causing Wulf to slow to avoid hitting him. (RT 2933-2934.) Wulf estimated that he observed the man for 15 to 20 seconds and was able to look at the man's full face for about five seconds. (RT 2946.) Wulf proceeded to the church parking lot. (RT 2937.) Within a short time, he heard sirens and saw police vehicles and an ambulance arrive at the Herricks' home. (RT 2938, 2948.)

When he found his wife on the floor, Mr. Herrick noticed her purse and billfolds laying on the floor. (RT 2987.) Mrs. Herrick had set her purse on a table near the front door. (CT 843.) Mrs. Herrick later determined that the cash she had in it was missing. (CT 798, 844-846, 862.) Also missing was an emerald ring that Mrs. Herrick had placed in a dish on a table close to the chair

where she had been sitting before she was attacked. (CT 799; RT 2988-2989.) The house did not appear ransacked, but the drawers of a dining room hutch and a master bedroom dresser had been opened. (RT 3021, 3041-3042.) Sheriff's Deputy William O'Bryant, the evidence technician on the case, was not able to lift any fingerprints from the hutch or dresser, although he did find two smudges on the dresser and one on the hutch that he believed could have been made by a gloved hand. (RT 3016-3017, 3022-3023, 3036-3037.) Deputy O'Bryant acknowledged that the smudges could have been caused by many other things, as well. (RT 3044.)

2. Officer Ross Finds The Russian Bracelet

On August 14, 1987, the day after Anna Constantin was attacked, San Leandro Police Sergeant Joseph Kitchen called Officer Lloyd Ross of the Oakland Police Department pawn detail and described the missing gold bracelet. (RT 3630, 3774.) Officer Ross's duties included monitoring pawn shops and second-hand dealers. (RT 3628-3629.) Under state law, whenever a pawn broker or second-hand dealer makes a purchase from an individual, the dealer must fill out a report, or "buy slip," that describes the items purchased, contains identifying information and a thumb print from the seller, and states the date and time of the transaction. (RT 3630, 3632, 3636, 3706.) These reports are then turned over to the police for the purpose of detecting and deterring trafficking in stolen goods. (RT 3631.) On August 17, Officer Ross was examining buy slips from S & D Coin, a second-hand dealer of coins and jewelry on MacArthur Boulevard in East Oakland. (RT 3630-3631, 3698-3699.) Officer Ross noticed a buy slip that described the sale of a bracelet on August 13 at 5:02 p.m. by Franklin Lynch. (RT 3631-3632.)[7]

---

7. The witnesses and attorneys sometimes referred to the buy slip from S & D Coin as a "pawn ticket" (see, e.g., RT 3775), which was technically inaccurate since S & D Coin was a second-hand dealer, not a pawn shop. (RT

Rebecca Archuletta Slover, the vice-president of S & D Coin, recalled that appellant came to the store between 4:45 and 5:00 p.m. on August 13. (RT 3698, 3701-3702.) Appellant was well known to her as she had seen him in the store about 20 to 30 times over the previous five to seven years selling coins and jewelry. (RT 3698-3700.) Her father called appellant by the nickname of "Cognac Frank." (RT 3707.) On August 13, appellant had a gold bracelet he wanted to sell. (RT 3702-3703.) S & D Coin was in the business of purchasing gold and silver coins and jewelry, not costume jewelry. (RT 3701.) The business paid a percentage of the market value of an item based on weight, then melted down the item and resold it. (RT 3705.) Slover weighed the bracelet, verified that it was gold using an acid test, and paid appellant $235. (RT 3705.) Slover did not recall any charm being attached to the bracelet. (RT 3718; see also RT 3635.) She did not ask appellant where he got the bracelet as she had never had problems purchasing items from him before. (RT 3707.) She filled out the buy slip containing identifying information about appellant and had him place his thumb print on the back of the form. (RT 3706-3707.)

After seeing the buy slip describing the bracelet sold by appellant, Officer Ross drove to S&D Coin, examined the bracelet, and told the shop's owner not to dispose of it. (RT 3633.) He then passed along his discovery to the San Leandro Police Department. (RT 3633-3634.)

Sergeant Kitchen received the second-hand buy slip from the Oakland Police Department on the morning of August 18 and went to S & D Coin that same day at about 11:00 a.m. (RT 3633-3664, 3774-3777.) He retrieved the bracelet and took it to Vickie Constantin, who was at the hospital with her mother. (RT 3776-3777.) Vickie Constantin identified the bracelet as the Russian bracelet belonging to her mother. (RT 3777; see also RT 3548-3549.) The "1902" charm was no longer attached. (RT 3554.) Using the thumb print

---

3636.)

and identifying information on the buy slip, the San Leandro police obtained a photo of appellant and assembled a six-person photographic lineup that included appellant's photo in the fifth position. (RT 3307, 3779.) Sergeant Kitchen returned to S & D Coin that same day and showed the lineup to Rebecca Archuletta Slover, who selected appellant's photo as the person who sold her the bracelet. (RT 3779-3780.)

3. The Identifications

Acting on information provided by Sergeant Kitchen plus composite drawings prepared by witnesses Eric Hoak and John Wulf, Alameda County Sheriff's investigators constructed two different six-person photo lineups, both containing appellant's photograph. (RT 2904, 3095, 3100, 3107-3108, 3115; see also RT 4023-4024.) By the end of the day on August 18, three witnesses had selected appellant's photo from the sheriff's photo lineups, implicating him in the attacks against Ruth Durham and Bessie Herrick. Patricia Armstrong picked appellant's photo as the man she had seen walking along the street across from Ms. Durham's residence on August 14. (RT 2799-2800, 2904-2907, 2918.) At 1:33 p.m., Eric Hoak picked appellant's photo as the man he had seen on Mrs. Herrick's porch the preceding afternoon. (RT 2878-2879, 2906-2907, 2918.) At 7:10 p.m that evening, Bessie Herrick picked appellant's photo as the man who had attacked her the previous day. (CT 802-804; RT 3096-3097.)

In the next few days, four more witnesses made photo identifications of varying strength that implicated appellant in several of the offenses. On August 19, Jacqueline Brown, the nurse who lived across the street from Pearl Larson, indicated that appellant's photo and that of one other person in the lineup shown to her looked similar to the man she had seen jumping over Ms. Larson's back fence. (RT 3194-3195, 3307-3308.) She also said the man had been wearing sunglasses. (RT 3195, 3308.) Also on August 19, Irma Casteel, the woman

who had seen appellant walking on 144th Avenue on July 27, the day before Adeline Figuerido was murdered on 143rd Avenue, selected appellant's photo from the same lineup, stating, "I won't say for sure, but No. 5 looks more closely on it." (RT 3624-3626; 3805.)[8] On August 20, Adele Manos, the woman who had seen appellant coming from the hedges in the apartment building near Anna Constantin's home, saw appellant's photograph in the paper and contacted the police. (RT 3502.) A San Leandro officer brought a photo lineup for her to view. (RT 3652-3653.) She selected photo number five, appellant's photo, stating, "Photo number 5 is the person I saw walking on Bancroft Avenue." (RT 3503-3505.)[9] On September 1, 1987, Lavinia Harvey, the woman who confronted the stranger in her back yard on the day before the Constantin murder, was shown a photographic lineup by a sheriff's officer. (RT 3083-3084.) Ms. Harvey was unable to make a positive identification, but did indicate of appellant's photo, "I think this could be him, the eyes are his." (RT 3062-3063.) She also indicated that the complexion of another person in the photo lineup looked similar to the man she had seen. (RT 3085.) The officer then showed her a different single photo of appellant. (RT 3086-3087.) Mrs. Harvey identified that photo as the person she had seen, writing, "I'm sure that's him" on the back of the photo. (RT 3064-3065.)

Six of these seven witnesses (Mrs. Herrick, Eric Hoak, Patricia Armstrong, Jacqueline Brown, Adele Manos, and Lavinia Harvey) attended a

---

8. Ms. Casteel claimed she saw a photo of appellant on the front page of the newspaper on July 28 and realized it was the man she had seen on her street on July 27. (RT 3803-3804.) However, the first photograph of appellant did not appear in the newspapers until August 20. (RT 3985, 4000.) Media coverage of the July 28 Figuerido murder included a description of a suspect, though not a photo. (RT 3898-3899, 4003-4004.)

9. San Leandro police typically memorialized the exact words stated by the witness when making a photo identification. (See RT 3454, 3505, 3636.)

live lineup on November 4, 1987, in which appellant appeared in the fourth position. (RT 2681-2682, 2694, 2696-2698.) Each identified appellant as the man connected with the respective incident to which he or she was a witness. (CT 805, 807-808 [Mrs. Herrick]; RT 2800-2802 [Patricia Armstrong], 2880-2881 [Eric Hoak], 3065-3066 [Lavinia Harvey], 3196-3197 [Jacqueline Brown], 3505-3506 [Adele Manos].) Three additional witnesses also made identifications at the live lineup: Joseph Armstrong, who had been unable to make a photo identification of appellant as the man he and his wife Patricia saw near Ruth Durham's home (RT 2825-2827), John Wulf, who had been unable to make a photo identification of appellant as the man he saw jogging away from the area of Bessie Herrick's home (RT 2940-2942), and Frank Herrick, who apparently had not been asked to make a photo identification. (RT 2989-2990, 3103.)

Witness Irma Casteel did not attend the live lineup. (See RT 3806.) Sergeant Kitchen visited her in January 1988 and showed her a video of the live lineup. (RT 3806.) She placed question marks on a diagram for appellant's position and that of another person in the live lineup, stating that they looked alike. (RT 3449, 3472.) She also said that she recognized the person in the fourth position (appellant) as someone she had seen in the photo lineup. (RT 3472.) At trial, Casteel testified that in fact she recognized the person in the fourth position as the person she had seen on her street on July 27, but that she also mentioned the person in the third position because "I was trying to throw 'em a little bit there, I was trying to throw 'em, but, yes 4 is the man." (RT 3809.) She explained that she had been "trying to get out of it, I guess." (RT 3809-3810.)

One more witness made a pretrial identification of appellant—Jan Morris, the woman who saw a man walking down Adeline Figuerido's driveway from her office across the street contemporaneous with the time of Ms.

Figuerido's murder. When first shown a photo lineup on August 19, 1987, Morris told police she could not make an identification, stating, "I do not think it is any of them." (RT 3588.) That night she admitted to her husband and cousins that she had recognized the man in one of the photos, but she did not bring this fact to the attention of the police or prosecution until she was contacted by a district attorney's investigator in June 1988. (RT 3589-3591, 3621, 3623.) Thereafter, she was shown the same San Leandro lineup on June 20, 1988, and picked appellant's photo, stating, "That's him, I am sure, Number 5." (RT 3594.) Morris explained that she had not been candid the first time she was shown the lineup because "I was afraid. I was scared to death. I've never been through anything like that before, and I just, snap decision, I didn't want to get involved." (RT 3594-3595.)

Jan Morris's identification brought to 11 the number of witnesses who identified appellant. Nine of those identifications tied him to the time and place of all five attacks: Jacqueline Brown to the Larson murder; Jan Morris to the Figuerido murder; Adele Manos to the Constantin murder; Patricia and Joseph Armstrong to the Durham attack; and Eric Hoak, John Wulf, and Mr. and Mrs. Herrick to the Herrick attack. The other two identifications by Irma Casteel and Lavinia Harvey connected appellant to suspicious similar behavior in the general area of the attacks. All 11 of these witnesses subsequently made positive, in-court identifications of appellant. (CT 793-794, 813-814 [Bessie Herrick]; RT 2802-2803 [Patricia Armstrong], 2828 [Joseph Armstrong], 2881-2882 [Eric Hoak], 2936 [John Wulf], 2983, 3012 [Frank Herrick], 3054-3055 [Lavinia Harvey], 3197-3198 [Jacqueline Brown], 3502, 3508 [Adele Manos], 3586-3587 [Jan Morris], 3803 [Irma Casteel].)

4. Other Evidence

On August 20, 1987, Mackie Williams, an acquaintance of appellant's, was arrested on a parole violation. (RT 3754-3757.) Williams was on parole

for a 1980 robbery conviction in Santa Clara County, and was on probation in Alameda County at the time of his trial testimony. (RT 3755, 3769.)[10] At the time of his arrest, Williams was wearing two gold chains—one with an ivory elephant and the second with a pearl. (RT 3755, 3782.) Williams told San Leandro Police Sergeant Kitchen that he received the jewelry as a gift from appellant about a week earlier. (RT 3756, 3759-3761.) Williams asked appellant for the two pieces because they looked feminine, so appellant gave them to him. (RT 3795.) Williams had known appellant for about three weeks. (RT 3768-3769.) Appellant occasionally stayed at the same East Oakland motel where Williams was staying, though appellant did not keep clothes at the motel. (RT 3756-3757.) Appellant was driving a Monte Carlo at the time. (RT 3757.) Occasionally, he let Williams borrow the car. (RT 3767.) During this period, Williams was using amphetamine (RT 3762); he saw appellant using cocaine and drinking cognac. (RT 3757-3759.) The police told Williams that they were looking for appellant, not drugs. (RT 3764-3765, 3788-3789.) They found a disassembled gun without a firing pin in his room, but told him they would not charge him with being an ex-con in possession of a firearm. (RT 3765.)

Williams was wearing several other items of female jewelry at the time of his arrest, but Sergeant Kitchen focused on the two necklaces because they matched the general description of items reported stolen by Vickie Constantin. (RT 3794-3795.) Constantin had described one chain with an elephant and another with a herring bone pattern and a pearl. (RT 3794.) At trial, Vickie Constantin identified the two necklaces—one a tarnished gold chain with an ivory elephant figurine and the other a gold chain with a pearl dangling from a small diamond chip and two gold figures—as the items that were missing after

---

10. Williams testified that the robbery was committed by two cohorts using his car while he was passed out in the back seat. (RT 3772.) The victim was an elderly lady. (RT 3766.)

the attack on her mother. (RT 3545-3546, 3755.)

5. Appellant's Interrogation

Appellant was arrested in Los Angeles in October 1987. (RT 3846.) On October 24, 1987, Sergeant Kitchen and an Alameda County Sheriff's Sergeant interviewed appellant at the Los Angeles Police Department, also known as Parker Center. (RT 3846-3847.) Appellant agreed to talk with the officers after receiving *Miranda* advisements. (RT 3849.) Appellant stated that he had read in the paper that he had sold a bracelet belonging to murder victim Anna Constantin at S & D Coin. (RT 3850.) Appellant admitted selling the bracelet, but denied stealing it, stating, "I did sell a bracelet in there that I bought from somebody else." (RT 3850, 3853.) He said he did not know the person who sold him the bracelet. (RT 3851.) He traded five rocks of cocaine worth about $60 to $70 for it. (RT 3858-3859.) He had dealt with the man once before on an Oakland street corner known for drug sales. (RT 3853.) He said he was pretty sure he did not buy anything else from the man and denied giving any jewelry to Mackie Williams. (RT 3854, 3892.)

Appellant said he sold the bracelet at S & D Coin a little before closing time for about $200 cash. (RT 3851.) He said he had been selling merchandise at S & D since about 1971; they rarely completed a buy slip for the transactions. (RT 3857.) On this occasion, they made him leave his thumb print, the first time he had been required to do so. (RT 3851, 3857.)[11]

When confronted with the fact that a witness had reported seeing him near Anna Constantin's house at about 3:20 p.m. on the day of the attack upon her, appellant replied, "3:20? No. I don't think so. Shit." He continued, "Doesn't take but 10 minutes to get from San Leandro to S & D Coins."

---

11. According to Sergeant Kitchen, the thumb print requirement was a new procedure that had just taken effect that year. (RT 3857.)

Denying that he attacked Constantin, appellant stated, "Well, it wasn't me. I admit having the bracelet, yes. I admit selling the bracelet, yes. That's about it." (RT 3892-3893.) Appellant said he was probably at his Aunt Patsy MacGowan's home on the afternoon on August 13, where he usually stayed until 4:00 or 5:00 p.m. (RT 3889-3990.) He had been staying with his aunt for a week or two. (RT 3873.) When he read in the newspaper that the police wanted to question him about the bracelet, he left for Reno the same day, where he "won a little money." (RT 3868-3869.) Appellant stated that he came back from Reno, bought a Monte Carlo with his winnings, and signed over the car to "Patsy." (RT 3869.) However, he also stated, inconsistently, that he "never came to the Bay Area from Reno" (RT 3869), and then again that he did come back. (RT 3870-3871.)[12]

The officers also confronted appellant with evidence that witnesses had seen him at or near other crime scenes. He said he had seen something about the Figuerido murder on the television at his cousin's house. (RT 3859-3860.) He denied being in her house. (RT 3863.) He also denied being chased out of a yard in Hayward (RT 3874), denied being in a house on Alden Road in Hayward or knowing where Alden Road was (RT 3873, 3875-3876), and denied assaulting a woman in her rocking chair before being interrupted by her husband. (RT 3885, 3889.) Appellant stated, "Well, why should I be beating these ladies up?" He continued, "If I wanted somebody that age, if I was going to do something to 'em, I could just easily maybe just push 'em out of the way and—" (RT 3877.)

When Sergeant Kitchen suggested it was "too much of a coincidence" that so many witnesses had identified him, appellant responded, "Yeah, I'm

---

12. Appellant's acquaintance Mackie Williams told police that appellant had been driving a Monte Carlo about a week before Williams's arrest on August 20, 1987. (RT 3754-3757.)

seeing what you're saying. But you sure these people just says sees me, might a been walking by one of these places or— " (RT 3888.) When asked if he had walked by any of the places, the following exchange occurred:

"A. Not that I could recall. But I'm just saying, you know.

"Q. Well, how could they see you?

"A. That could be the case."

(RT 3888.)

Appellant stated that if he had been in any of the houses, the police would have some evidence such as his fingerprints. (RT 3863, 3887.) When Sergeant Kitchen reminded him that they had the bracelet, appellant replied, "That wouldn't convict me of that there because I left a bracelet. I knew that all along, even though I was running. But I just didn't want to be questioned for what—I didn't want to be, you know." (RT 3863.) When the sheriff's sergeant asked, "What if I told you we got fingerprints, Frank?," appellant replied, "I— well, I'd doubt it." (RT 3887.)

B. Guilt Phase Defense

Appellant did not testify. The defense was mistaken identity. No fingerprint or other physical evidence directly tying appellant to the crimes was found at any of the crime scenes. (RT 3897, 4026.) Psychology professor Elizabeth Loftus testified about various factors that can affect the reliability of an eyewitness identification, including cross-racial identifications and post-event information, such as seeing the suspect's photograph in the media or in a suggestive lineup. (RT 4030-4031, 4041, 4044.) Such post-event information might cause a witness to identify a suspect based on seeing the picture in the media rather than actual recall of the event. (RT 4046, 4049.) Dr. Loftus also testified that people tend to overestimate time when viewing an event (RT 4038), and that older people have more difficulty making identifications. (RT

4051.)

There was considerable media exposure in the case. The San Leandro police disseminated a physical description of the suspect after the Larson and Figuerido murders, which received media coverage in July 1987. (RT 3898-3899, 4003-4004.) Appellant's photograph was first released to the media on August 19, 1987. (RT 3894.) His photo appeared on television news that night and in the newspapers the following morning. (RT 3895.) The Daily Review published appellant's photo 21 times between August 20, 1987, and June 30, 1988, including seven times before the live lineup on November 4, 1987. (RT 4000.) The Daily Review also published composite drawings on August 18 and 19, 1987. (RT 3999-4000.) Most of the witnesses saw a composite drawing or appellant's photo in the media prior to the live lineup. (See, e.g., RT 2812-2813, 2837-2838, 2898-2899, 2949, 3075-3076, 3215-3216, 3502; but see CT 848; RT 2997-2998, 3009-3010.) Most did not see any composite drawing or photo of appellant in the media before making identifications from the photo lineups. (See, e.g., CT 828-829; RT 2810, 2890-2891, 2918, 3075, 3217-3218; but see RT 3501-3502, 3612-3613, 3804.) In fact, five witnesses made photo identifications on August 18 or 19, before appellant's photo appeared in the media. (RT 2904-2907, 3096-3097, 3624-3626, 3307-3308.)

The defense called two witnesses who had been unable to make an identification from the photo or live lineups: Thomas Ivory, who worked at a business near Adeline Figuerido's residence and saw a Black man near her home at about 11:45 a.m. on the day of the murder (RT 3988-3995), and Barbara Sullivan, who saw a Black man a block away from Ruth Durham's home at about 4:30 p.m. on the day of the attack upon her. (RT 3971-3972, 3975-3977, 3980-3982.) The defense also established that Jan Morris—the witness across the street from Adeline Figuerido's home—did not appear afraid or apprehensive when she originally said she could not make a photo

identification. (RT 4004-4006.)[13]

A significant portion of the defense case consisted of an attempt to raise a doubt whether the bracelet appellant sold at S & D Coin was the one stolen from Anna Constantin. Vickie Constantin told police that her mother's bracelet was an antique and was about 200 years old. (RT 3553-3554.) At trial, she explained that her mother had told her the bracelet had been given to her when she was in her 20's, which would have been between 1933 and 1943. (RT 3558.) Vickie assumed the bracelet was quite old given the charm stamped "1902." (RT 3558.)[14]

The defense presented testimony from a gemologist-appraiser who stated that the style of the bracelet indicated it was made in the post-war Soviet period based on its craftmanship, general appearance, and hallmark stamp. (RT 3941-3942 ["These bracelets were not in vogue prior to World War II."].) The bracelet was "a cast item," "more or less mass-produced . . . ." (RT 3944.) While it was possible such a bracelet existed before World War II, the gemologist had no doubt it had been made after the war. (RT 3956, 3959.) He estimated the value of the bracelet would be about $2,000 as a second hand item, though he acknowledged he had not weighed it. (RT 3945-3946.) He could not tell if there had been a charm attached to the bracelet, since it would

---

13. During cross-examination of prosecution witnesses, the defense highlighted differences in the descriptions given by witnesses of the Black man they had seen at or near the various crime scenes. These differences concerned height, weight, hair length, facial hair, clothing, and age. (See, e.g., CT 830-831; RT 2830, 2887-2888, 2935, 2947, 2993-2994, 3011-3012, 3073-3074, 3199-3202, 3523, 3582, 3597-3598, 3817-3818.) A typical example is Lavinia Harvey who, when questioned about her estimate of the age of the person she saw in her backyard, replied, "I wasn't very good at aging. I'm good at faces, but not age." (RT 3077.)

14. Vickie Constantin was 39 at the time of trial in February 1992, meaning that she would have been born in 1952 or 1953. (RT 3545.)

not have left a mark if attached by a clasp. (RT 3952.) The gemologist went on to state that he had no doubt the bracelet was of Russian or Soviet origin (RT 3948, 3955), and that while he had seen about a dozen similar bracelets in his 30-year career, he had never seen another bracelet exactly like this one. (RT 3950, 3960.)

C. Penalty Phase

The prosecution presented evidence of prior convictions appellant suffered for burglary and robbery, including a 1983 Santa Clara County robbery in which appellant was caught in the act of robbing an elderly woman in her home during the daytime. The prosecution also presented evidence of several uncharged violent acts, including a murder in Contra Costa County in October 1987 that was highly similar to the murders for which appellant was convicted.

1. Prior Convictions

In 1973, appellant was convicted of burglary in Alameda County and received a grant of probation. (RT 4302.) In 1983, he was convicted of robbery in Santa Clara County and sentenced to state prison for three years. (RT 4302.) The evidence underlying the robbery conviction showed that Palo Alto police received a report of a woman screaming for help at about 10:00 a.m. on January 18, 1982. (RT 4303-4305.) An officer responded to the residence in question and saw appellant inside through the glass front door. (RT 4306-4308.) Appellant refused to open the door despite repeated demands and said something to the effect that no one was home. (RT 4306-4307.) Appellant then tried to flee by breaking and jumping out a window on the side of the house. (RT 4307-4309.) The officer pursued appellant over several backyard fences, eventually capturing him with the help of another officer. (RT 4310.) The officer found a glove in appellant's back pocket. (RT 4310.) Retracing the path

of the chase, the officer found a second glove and a watch cap along the chase route. (RT 4310-4311.)

The officer then went into the residence and contacted the occupant, a small woman named Rose Nimitz who was about 70 years old. (RT 4311, 4319.) Ms. Nimitz had an abrasion or cut on her left ring finger, which bore no ring. (RT 4311.) A second officer also observed the injuries to Ms. Nimitz's ring finger. (RT 4319.) At the police station, appellant was searched and a woman's diamond ring was found in one of his pockets. (RT 4318.) Appellant said he bought the ring from a man named Valentine for $50. (RT 4319.) Ms. Nimitz was able to describe her ring to the police, and the police eventually returned the ring they found on appellant to her. (RT 4321.)

2. Uncharged Violent Acts

At about noon on October 15, 1987, 76-year-old Agnes George was found dead in her Richmond home. (RT 4404-4406, 4437-4438, 4479, 4481-4483.) Her hands and ankles were bound with electrical cord and rope and her body was covered with a blanket. (RT 4405, 4483.) There was a lot of blood on her body. (RT 4406.) A hammer was found on the floor near her body. (RT 4416.) Some evidence suggested Ms. George may have been killed the previous night, including that her television was playing, a night light was still on, and she was found in her pajamas. (RT 4415-4416, 4420.) According to her daughter, Ms. George usually did not watch television in the morning and turned off the lights before going to bed. (RT 4448.) An autopsy performed the next day showed that she died from multiple traumatic head and neck injuries. (RT 4382-4384.) She had multiple abrasions, fractures, and tears to her head and face; both of her jawbones and cheekbones had been broken; and she had injuries to her neck that could have been caused by choking or blows. (RT 4386, 4393-4395, 4401.) The pathologist believed that injuries to Ms. George's head and scalp could have been caused by blows from a hammer and were not

likely caused by fists alone. (RT 4390-4391.)

Ms. George's home had been ransacked. (RT 4405.) Several empty miniature liquor bottles were found amidst items strewn on the living room floor. (RT 4423, 4488, 4536.) When Ms. George's daughter went through the house two days later, she found on the bedroom floor an empty box in which her mother typically kept several hundred dollars of cash. (RT 4437-4440.) The daughter also noticed that a hall closet, in which her mother kept sweaters and work shirts, was empty. (RT 4443.)

One eyewitness placed appellant outside Ms. George's home on the day of the murder, and a second placed him about a block away a week earlier. On October 7, 1987, one week before Ms. George's murder, Hilda Lopez saw a Black man walking slowly in her Richmond neighborhood and looking all around at about 1:00 p.m. (RT 4426-4428, 4431-4432.) Lopez lived at 885 McLaughlin Street (RT 4426), and Agnes George lived at 787 McLaughlin. (RT 4404.) Lopez thought the man's behavior was unusual. (RT 4428, 4431.) She got a good look at him. (RT 4432.) On October 19, 1987, Lopez identified appellant's photo in a photo lineup as the person she had seen in her neighborhood on October 7. (RT 4428-4430, 4454-4455, 4524.) Lopez also identified appellant in court as the man she had seen. (RT 4430.)

On October 15, 1987, Darlene Fleming, who lived across the street from Ms. George, saw a Black man in the street near Ms. George's house at about 10:00 a.m. (RT 4467-4468, 4474.) Fleming had earlier noticed that Ms. George had not opened her bedroom curtains that morning, which was unusual. (RT 4770, 4774.) Fleming, who had seen Ms. George the previous afternoon, had been unable to reach Ms. George by telephone when she called at about 9:40 a.m. (RT 4471, 4474.) The Black man was talking to two people in a car. (RT 4475-4476.) The car drove off in one direction, and the man walked off in another, looking all around as he went. (RT 4475-4476.) Fleming watched the

man until he disappeared from her view, then drove in the same direction she had seen him walk as she went to do some errands. (RT 4476-4478.) She saw the man walk through a broken fence or gate near a motel on San Pablo Boulevard. (RT 4477-4478.) Fleming described the man's eyes as "wild." (RT 4509, 4511-4512.) At about noon that day, Fleming and another neighbor entered Ms. George's home and found her body. (RT 4479-4483.) At about 4:00 p.m., the Richmond police showed Fleming a photo lineup containing appellant's picture. (RT 4485-4486, 4524.) Fleming circled appellant's photo and one other in the lineup, saying that either one could be the man. (RT 4527-4528.) Fleming attended the live lineup on November 4, 1987, and identified appellant. (RT 4490-4492.)[15] Fleming also made a courtroom identification of appellant at the penalty trial. (RT 4476-4477.)

In addition to evidence relating to the murder of Agnes George, the prosecution presented evidence relating to three incidents of assault by appellant upon police officers. On January 4, 1983, at about 6:00 p.m., a Santa Clara police officer saw appellant walking through front yard shadows in a residential area where there had been a rash of burglaries. (RT 4323-4326.) When the officer attempted to stop appellant for questioning, appellant struck the officer in the cheek and ran away. (RT 4326-4329.) The officer found him hiding in a nearby backyard. (RT 4329-4330.) Appellant fought with the officer again when the officer attempted to handcuff him. (RT 4330.) Eventually, the officer was able to handcuff him. (RT 4330.) Appellant was not charged with any of the burglaries committed in the area. (RT 4334.)

The final two uncharged acts occurred in the Alameda County jail while appellant was awaiting trial in the present case. On June 26, 1988, Sheriff's

---

15. Fleming told a Richmond officer that she first placed a question mark for appellant at the live lineup, then changed it to a positive identification. (RT 4546; but see RT 4519-4520.)

Deputies Chiabotti and Walters were escorting appellant from a jail visiting booth where he had been visiting with his ex-wife and young daughter. (RT 4335, 4338-4341, 4354-4355.) As Chiabotti attempted to handcuff appellant to take him back to his cell, appellant pulled away three times and said he did not want to be handcuffed in front of his daughter. (RT 4341-4342, 4375-4376.) After the third attempt, appellant turned and pushed Chiabotti backwards. (RT 4342-4343.) A struggle ensued between appellant and the escort officers and lasted for several minutes until the officers were able to handcuff appellant. (RT 4344-4345, 4365-4370.) When appellant saw Deputy Walters again later that day, he said, "You guys fucked up. You should have killed me when you had a chance." (RT 4371.) Three days later, Deputy Chiabotti and another officer were escorting appellant from his cell to get ready for a court appearance. (RT 4345-4346.) As appellant stepped out of his cell, he began punching Chiabotti in the face, complaining about what Chiabotti did in front of his child. (RT 4347-4349.) When Deputy Walters saw appellant later that day, appellant stated, "There is the other one. You should have stayed home." (RT 4371-4372.)

D. Penalty Phase Defense

As at the guilt phase, appellant did not testify. The defense claimed mistaken identity as to the Agnes George murder and presented testimony from a number of friends and family members as to appellant's good character. No fingerprint or other physical evidence tied appellant to the murder of Ms. George. (RT 4545.) Darlene Fleming, Agnes George's neighbor, did not mention to the police that the eyes of the man she had seen in the street outside George's house looked wild. (RT 4551-4553, 4556-4557.) The Richmond police received numerous reports of sightings of appellant the day after the murder. (RT 4564.) One officer stopped a man whose clothing matched the description given, but released him immediately upon seeing the man was

Hispanic, not Black. (RT 4560-4564.) Appellant was not charged with the murder of Agnes George. (RT 4593-4594.)

Appellant was born in 1955, the second of three children. (RT 4582-4583.) He was not abused as a child and lived at home through high school. (RT 4584-4585, 4589.) The whole family attended a Baptist Church almost every Sunday, and appellant's father tried to raise him to be God-fearing. (RT 4587.) Appellant got married and moved out of the family home when he was 17. (RT 4586.) Appellant was the father of six children. (RT 4586.)

For several years during the mid-1970's, appellant sang in a gospel quartet, the Golden West Gospel Singers. (RT 4572-4574.) The group performed at churches, high schools, and a detention center. (RT 4573.) The members of the group were required to adhere to the Bible's tenets, especially that members not come to the group smelling of alcohol or go to parties and get drunk. (RT 4579-4580.) Appellant left the group of his own accord after they made a recording. (RT 4580-4581.)

Billie Rachal met appellant when he was a teenager. (RT 4565-4566.) After her husband died in 1977 and she found herself in financial difficulty, appellant gave her a $100 bill as an unsolicited gift. (RT 4568-4569.) He said he had won the money in Reno. (RT 4570-4571.) Ms. Rachal last saw appellant in 1987, the day before "they had flashed his picture on T.V." (RT 4570-4571.) He came by her house, offered to help her carry in some groceries, and asked her for $10, but she did not have the money to give him. (RT 4570-4571.)

Appellant's older brother Raymon, a Jehovah's Witness minister and program analyst for the IRS, discussed the Bible with appellant during a jail visit and wrote him a letter about his own religious conversion, which helped him overcome a substance abuse problem. (RT 4588-4591.) Appellant's mother and father asked the jury to spare appellant's life. (RT 4583, 4586.)

ARGUMENT

I.

THERE WAS NO ABUSE OF DISCRETION IN THE DENIAL OF APPELLANT'S *FARETTA* MOTIONS BASED ON THE FINDING THAT HE WAS TRYING TO DELAY THE TRIAL

Appellant contends the trial court erroneously denied his several requests to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806. (AOB 55-75.) The record establishes his motions were properly denied because they were made for the purpose of delay. Appellant argues that the motions were *timely* because they were made sufficiently in advance of trial. However, his *Faretta* motions were not denied merely because they were not made sufficiently in advance of trial, but because they were made for the purpose of delaying that trial. This is a distinct basis for denial of a *Faretta* motion that falls well within applicable state and federal precedent.

The procedural history of appellant's requests to represent himself is somewhat unusual. Appellant made two *Faretta* motions before the judge originally assigned to try the case which were both denied based on findings that the motions were brought to delay the trial. However, that judge subsequently granted a disqualification motion appellant had filed the same day he filed his second *Faretta* motion. The case was then reassigned to another judge, who reviewed the entire record and reiterated the denial of appellant's second *Faretta* motion. In greater detail, the record shows the following relevant facts.

On September 4, 1991, appellant filed a "withdrawal of waiver of right to speedy trial" and demanded a trial within 60 days. (CT 3033; see also RT [Sept. 4, 1991] at p. 2.) On that date, the matter was assigned to Judge DeLucchi, and the next court date was set for September 11. (CT 3032, 3035.)

A firm trial date was not set immediately, but the parties agreed that the trial had to commence by November 1, 1991. (RT [Sept. 11, 1991] p. 3; RT [Oct. 7, 1991] pp. 19-20.)[16] On September 11, the matter was continued to October 7 for motions and to pick a trial date. (RT [Sept. 11, 1991] at p. 1.) On September 27, 1991, appellant filed a written "Notice of Motion and Motion to Act as Counsel in Pro-Per (*Faretta* Motion)." (CT 3037-3042.) This motion was heard in camera by Judge DeLucchi at the next scheduled court hearing on October 7, 1991. (See RT [Oct. 7, 1991] at p. 3; sealed RT [Oct. 7, 1991] at pp. 5-19.) At that hearing, appellant indicated dissatisfaction with the strategy of his appointed counsel. (Sealed RT [Oct.7, 1991] at p. 8.) Judge DeLucchi observed that appellant had requested the court to appoint private investigators in his written motion and asked, "But you need some time; right?" (*Id.* at p. 8.) Appellant replied, "Yes." (*Ibid.*) When Judge DeLucchi asked appellant, "How much time are we talking about, here?," appellant replied, "Actually, I hadn't considered any time as far as what—how long it would take for me to go over, you know, some of the, you know, evidence and, you know." (*Id.* at p. 9.)

After Judge DeLucchi referred to the "boxes, boxes of discovery," the following colloquy occurred:

> THE COURT: You're going to have to review all that stuff; right?
> THE DEFENDANT: Yes, and there is no way that I could say exactly how long that would take. You know.
> THE COURT: You're talking about months?
> THE DEFENDANT: Yeah. I'm not sure.

---

16. The parties seem to have been under the misapprehension that the trial had to start on November 1 because November 3, the sixtieth day, was a Sunday. In fact, the trial could have properly started on Monday, November 4 under Code of Civil Procedure section 12a, which is applicable to the speedy trial provisions of Penal Code section 1382. (See *Owens v. Superior Court* (1980) 28 Cal.3d 238, 242.)

(*Id.* at pp. 9-10.) A short time later, another exchange took place between the court and appellant, during which appellant made clear that he intended to seek a delay of the trial:

> THE DEFENDANT: What I want to ask you is, I seem to get that everyone beside myself is sort of somewhat pushing or ready as of now, you know, to go to trial. I'm trying to figure out for what reason are we all of a sudden, you know, ready to proceed now that, you know, I'm requesting to exercise my Sixth Amendment rights.
>
> THE COURT: I'll give you two reasons. One, the case is four years old.
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right. Also, you withdrew your time waiver, so you get everybody jumping around here putting this case together.
>
> THE DEFENDANT: Yes, but actually—
>
> THE COURT: Everybody says I want to have my trial. Everybody is ready to go to trial now.
>
> I'm just answering your question, sir.
>
> THE DEFENDANT: But, see, actually by me requesting to represent myself, that's somewhat in a sense requesting to vacate that time waiver.
>
> THE COURT: I understand that.
>
> THE DEFENDANT: At the same time—
>
> THE COURT: Because you're going to need more time. I understand that.
>
> THE DEFENDANT: Because, truthfully, actually, the time waiver wasn't my idea. It was my attorney's idea because of some strategic move or whatever.

(*Id.* at pp. 14-15.) The context makes plain that when appellant used the phrase "time waiver," he meant the *withdrawal* of his time waiver. Thus, his remarks to the Court demonstrate that his *Faretta* motion also entailed a request to vacate the *withdrawal* of his time waiver. The in camera portion of the hearing concluded with appellant's counsel affirming that he was ready for trial. (*Id.* at p. 17.)

Judge DeLucchi then reconvened the case in open court and ascertained

from the prosecutor that there were seven witnesses between the ages of 71 and 92 who were all ready to come to court and testify. (RT [Oct. 7, 1991] at pp. 22-23.) While they were not under formal subpoena, the witnesses were all in telephone contact with the prosecution. (*Id.* at p. 23.) The prosecutor urged the court to deny appellant's *Faretta* motion as a dilatory tactic. (*Ibid.*) Judge DeLucchi indicated that he was ready to start trial with pretrial motions on October 21, 1991. (*Id.* at p. 20.) He then ruled that "because of the advanced age of the victims . . . and because of the possible delay in the proceedings which might arise in the event I granted Mr. Lynch his pro per status, the Court's going to rule that this motion is not timely made." (*Id.* at p. 25.)

On October 16, 1991, appellant filed a second written *Faretta* motion as well as a second *Marsden*[17] motion to obtain new counsel and a motion to disqualify Judge DeLucchi. (CT 3053-3065.)[18] Judge DeLucchi heard these motions at the next scheduled court day on October 17. After first denying appellant's disqualification motion (RT [Oct. 17, 1991] at pp. 42-43), Judge DeLucchi considered and denied appellant's *Marsden* and *Faretta* motions. (Sealed RT [Oct. 17, 1991] at pp. 70-72.) Specifically regarding the *Faretta* motion, appellant complained that at the previous hearing on October 7 the district attorney had shifted the blame "to me as far as trying to delay this trial." (*Id.* at p. 69.) The court responded, "I shifted it to you. I said that your motion wasn't speedy, wasn't timely made." (*Ibid.*) The court further explained, "All this is doing is you're trying to do—in my opinion is just to postpone this some

---

17. See *People v. Marsden* (1970) 2 Cal.3d 118.

18. Appellant's first *Marsden* motion was made June 10, 1991, and was denied on August 1, 1991, by Judge Goodman. (CT 3028-3031; sealed CT 11876-11881.)

more, and it's not timely made." (*Id.* at p. 70.)[19] The case was continued to October 21 for further pretrial motions. (CT 3066.) On that date, Judge DeLucchi was informed that the home of appellant's lead counsel had burned down the previous day in the catastrophic Oakland Hills fire; the court continued the case to October 23. (RT [Oct. 21, 1991] at pp. 80-83.) On October 23, Judge DeLucchi decided to reverse himself on the disqualification motion. He also set aside his *Marsden* and *Faretta* rulings from October 17 and advised appellant he could renew them before the new judge. (RT [Oct. 23, 1991] at pp. 85-86.)

The case was returned to the master calendar department where, on October 28, 1991, the case was reassigned to Judge Sarkisian and appellant agreed to a limited waiver of time to November 18, 1991, for the start of pretrial motions. (CT 3075.1; RT [Oct. 28, 1991] at p. 1.) On October 28, the parties stipulated that Judge Sarkisian could decide the second *Faretta* and *Marsden* motions from the record of the prior proceedings. (RT 3-4.) Appellant's counsel informed Judge Sarkisian, "I discussed this with Mr. Lynch, and rather than restate what was said before, he is prepared to submit both the *Marsden* and *Faretta* motions on the transcripts of the proceedings that were held before Judge DeLucchi." (RT 3.) At the next court hearing, on October 31, Judge Sarkisian indicated he had reviewed the proceedings that were before Judge DeLucchi and announced his decision, denying both motions. (RT 8-9.) Regarding appellant's *Faretta* motion, Judge DeLuchhi stated:

> Turning to the defendant's motion to represent himself, it's my independent conclusion from a review of the record, that this request is untimely. Among the factors that I have considered in assessing the defendant's request are his prior proclivity to attempt to substitute counsel, the stage of the proceedings, and in

---

19. Appellant also disparaged the court's reliance on the fact that there were elderly witnesses in the case: "If you bring up the old age clause, you had four years to worry about the old age clause." (*Id.* at p. 71.)

> particular the disruption and the delay that might reasonably be expected to follow the granting of his motion. This record indicates that many of the witnesses in this case are elderly. I will note that Mr. Lynch has been represented by present counsel for a number of years.
>
> Accordingly, in the exercise of my discretion, I am denying the defendant's motion for self-representation.

(RT 8-9.) Pretrial motions began on November 14 and concluded on December 3, covering five court days, and a jury panel was summoned on December 4. (CT 3109, 3118, 3136, 3164-3166.) This record demonstrates that appellant's *Faretta* motions were not merely untimely because they were were made too close to the trial, but because they were made for the *purpose* of delaying the trial.

In *Faretta v. California, supra*, 422 U.S. at p. 807, the Supreme Court held that a criminal defendant has a constitutional right to represent himself at trial. However, the Court noted that the right could be denied to a defendant who engaged in "obstructionist conduct." (*Id.* at p. 834, fn. 46.) The Court ultimately found that Faretta's constitutional right of self-representation was denied where his knowing and intelligent request to represent himself was made and denied "weeks before trial." (*Id.* at pp. 835-836.)[20] No subsequent Supreme Court opinion has addressed whether an untimely or purposefully delayed *Faretta* motion is the type of obstructionist conduct that may justify denial of self-representation. This Court, however, has held "that in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial." (*People v. Windham* (1977) 19 Cal.3d 121, 127-128.) Explaining the "reasonable time" requirement, the Court stated, "We intend only that a defendant should not be

---

20. The state made no argument in *Faretta* that the motion should have been denied as untimely or because it was made for purpose of delay.

allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice." (*Id.* at p. 128, fn. 5.) And further, "When . . . a defendant merely seeks to delay the orderly processes of justice, a trial court is not required to grant a request for self-representation without any ability to test the request by a reasonable standard." (*Ibid.*) As the explanatory footnote in *Windham* makes clear, the reasonable-time-before-trial requirement encompasses not only the question of whether trial has actually started, but also whether the defendant's motion is brought for the purpose of delaying a trial that has not yet started. "In such a case the request for self-representation is addressed to the sound discretion of the trial court which should consider relevant factors such as whether or not defense counsel has himself indicated that he is not ready for trial and needs further time for preparation." (*Ibid.*) In addition, "[t]he fact that the granting of the motion will cause a continuance, and that this will prejudice the People, may be evidence of the defendant's dilatory intent." (*People v. Burton* (1989) 48 Cal.3d 843, 854; see also *Robards v. Rees* (6th Cir. 1986) 789 F.2d 379, 388; *Fritz v. Spalding* (9th Cir. 1982) 682 F.2d 782, 784.)

Some federal courts draw a sharper distinction between "timeliness" and "delay." For example, in the Ninth Circuit, a *Faretta* motion is timely if it is made before the jury is impaneled. (*Armant v. Marquez* (9th Cir. 1985) 772 F.2d 552, 555.) However, even a timely motion may be denied for the separate and distinct ground that it is made for the purpose of delay. (*Hirschfield v. Payne* (9th Cir. 2005) 420 F.3d 922, ___ (2005 U.S. App. LEXIS 17984, *10); *United States v. George* (9th Cir. 1995) 56 F.3d 1078, 1084; *United States v. Flewitt* (9th Cir. 1989) 874 F.2d 669, 674.) As this Court explained in *People v. Burton, supra*, 48 Cal.3d at p. 854, there is little practical difference between the federal approach and *Windham*'s "reasonable time" requirement because, under both, the trial court has discretion to deny a motion that is made for

purpose of delay. Both the Ninth Circuit and this Court have upheld denials of *Faretta* motions even when made "weeks before trial" where the trial court found that the defendant was attempting to delay the proceedings. (See *People v. Marshall* (1997) 15 Cal.4th 1, 17, 26-27; *Hirschfield v. Payne, supra*, 420 F.3d at p. ___ (2005 U.S. App. LEXIS at **10-11).)[21]

This Court's recognition that intent to delay can support denial of a *Faretta* motion is most explicit in *People v. Marshall, supra*, 15 Cal.4th 1. There, the defendant made his first request for self-representation more than one month in advance of trial. (*Id.* at p. 17.) At the hearing on the defendant's motion, both counsel announced that they would be ready for trial. (*Ibid.*)[22] On review, this Court upheld the denial of the defendant's *Faretta* motion because it found the defendant's request to be equivocal and also because it found the motion was made for the purpose of delay. The Court stated, "There was not only equivocation, *but also evidence that defendant's purpose was delay and disruption of the proceedings*. . . ." (*Id.* at p. 26; italics added.) And

---

21. We note that the Ninth Circuit found error in the denial of the second of two pretrial *Faretta* motions made in *Hirschfield*. It upheld the first upon concluding that the trial judge reasonably found the motion was made for purpose of delay. (*Id.*, 420 F.3d at p. ___ (2005 U.S. App. LEXIS at **10-11).) It disapproved the second denial made two and one-half weeks later by a different judge because that judge denied self-representation solely for the impermissible reason that the defendant was not familiar with legal procedures. (*Id.*, 420 F.3d at p. ___ (2005 U.S. App. LEXIS at **11-14).) The Ninth Circuit noted that its result was frustrating because the second judge likely would have denied the motion for delay had he realized his error, but concluded that circuit precedent prohibited substitution of an alternative reason for that used by the trial judge. (*Id.*, 420 F.3d at p. ___ (2005 U.S. App. LEXIS at ** 14-16).) There was no state appellate ruling to defer to because the state appellate court had failed to address the second *Faretta* motion. (*Ibid.*)

22. In *Marshall*, the case did not actually go to trial for more than six months due to an intervening mental competency proceeding. (*Id.* at pp. 17-19.)

again, "We conclude that defendant's statements did not represent an unequivocal and sincere invocation of the right of self-representation, and that *they were made for the purpose of delay* rather than in a sincere effort to secure self-representation." (*Id.* at p. 27; italics added.)[23]

Applying these principles to the present case, the record shows that appellant sought to represent himself in order to delay the trial. When appellant's motion was heard on October 7, trial was set to commence by November 1, or in less than a month. Pre-trial motions were scheduled to begin on October 21. Both attorneys indicated they were ready to proceed. The district attorney noted that many of his witnesses were elderly. Yet, appellant indicated he would need more time to prepare his own defense and stated that "there is no way that I could say exactly how long that would take," acknowledging that it could be months. (Sealed RT [Oct. 7, 1991] at pp. 8-10.) Appellant later stated that "everyone beside myself is sort of somewhat pushing or ready," but that he, by seeking self-representation, was in effect requesting to rescind the withdrawal of his time waiver, which he said had been counsel's idea rather than his own. (*Id.* at pp. 14-15.) In other words, appellant was acknowledging that it would require a delay of trial were he to be granted self-representation status. These responses make clear that granting self-representation would have entailed a delay of trial, which at that point had been pending more than three years from the filing of the information (CT 2843) and more than four years from the filing of the complaint. (CT 1.)

Appellant suggests that Judge DeLucchi was trying "to convince

---

23. Although we do not contend that appellant's requests were equivocal in this case, *Marshall* does not suggest that requests made for purpose of delay must be granted unless the request is also equivocal. To the contrary, by repeatedly referring to delay as a separate reason for upholding the trial court, *Marshall* plainly implies that a purpose of delay alone can support denial of self-representation. This is consistent with *Windham*, *Burton,* and the Ninth Circuit authorities cited above.

appellant he *would* need more time" while appellant was assertedly "not eager for a continuance or in any way seeking to delay the trial." (AOB at 56, fn. 38; original italics.) This assertion cannot be squared with the record. Judge DeLucchi was not obliged blindly to accept appellant's *Faretta* motion as sincere with no underlying purpose of delay. Instead, he was entitled to "test the request" with reasonable inquiry. (See *People v. Windham, supra*, 19 Cal.3d at p. 128, fn. 5.) As he quickly ascertained, appellant fully contemplated a substantial delay. Appellant's coy refusal to specify exactly how long he wanted does not negate the inference that he intended to delay the proceedings. Quite the opposite, it reinforces the trial court's conclusion that appellant had a hidden agenda of delaying the rapidly approaching trial when he sought to represent himself on October 7. Judge DeLucchi therefore had ample basis to conclude that appellant's motion was made for the purpose of delay and committed no abuse of discretion in denying appellant's first *Faretta* motion on October 7.

Though Judge DeLucchi later set aside his second *Faretta* ruling of October 17, his comments on that date amplify and reinforce his ruling of October 7 and make clear that he had denied that motion because he believed appellant was trying to delay the trial. When appellant complained that the district attorney had shifted the blame to him "as far as trying to delay this trial," Judge DeLucchi immediately responded, "I shifted it to you." (Sealed RT [Oct. 17, 1991] at p. 69.) A short time later, Judge DeLucchi stated, "All this is doing is you're trying to do—in my opinion is just to postpone this some more, and it's not timely made." (Sealed RT [Oct. 17, 1991] at p. 70.) Thus, the record shows that when Judge DeLucchi ruled on October 7 that appellant's *Faretta* motion was "not timely made," (RT [Oct. 7, 1991] at p. 25), the judge relied on the principle that allows denial of a *Faretta* motion where it is made for the purpose of delaying the orderly processes of justice. (*People v.*

Windham, supra, 19 Cal.3d at p. 128, fn. 5.)

The record also demonstrates that Judge Sarkisian invoked the same sense of timeliness when he revisited the second *Faretta* ruling. Appellant agreed Judge Sarkisian could decide the issue based solely on the transcripts of the earlier hearing. Judge Sarkisian thus had before him the same record that was before Judge DeLucchi. This, of course, included appellant's acknowledgment that he would need more time, perhaps months, to prepare the case. Significantly, even though appellant knew Judge DeLucchi had concluded he intended to delay the proceedings based on those very same comments, appellant did not seek to rebut that inference before Judge Sarkisian in any way, such as by announcing that he was ready for trial and would not seek a continuance. Judge Sarkisian's comments in denying appellant's second *Faretta* motion demonstrate that he believed delay was appellant's real purpose. He referred to appellant's prior unsuccessful *Marsden* motions and the late stage of the self-representation request despite the fact appellant had been represented by the same counsel for years. (RT 8-9.) He also referred to the fact that many of the witnesses were elderly, which can only be understood as an indication of the prejudice the prosecution would risk from further delay. (RT 8-9.) Taken together, these comments evince Judge Sarkisian's belief that appellant was seeking to delay the trial. Like Judge DeLucchi before him, Judge Sarkisian acted well within his discretion in denying appellant's motion for self-representation under these circumstances.

Appellant repeatedly emphasizes that he made no explicit request for a continuance. (See AOB 56, 58, 73.) But the absence of an explicit request using the word "continuance" does not mean that either Judge DeLucchi or Judge Sarkisian was prohibited from discerning what was obvious from appellant's comments: appellant would need a substantial delay if he was granted self-representation status. The record need only show that a court

would be "obliged to postpone" trial in order for the trial court to infer dilatory intent; there is no requirement that the defendant expressly confirm that state of affairs. (See, e.g., *Robard v. Rees, supra*, 789 F.2d at p. 384; see also *Fritz v. Spalding, supra*, 682 F.2d at p. 784.) Here, appellant's comments on the record made his designs apparent.

Appellant also alludes to the fact that the jury voir dire did not actually begin until December 4 and that a petit jury was not sworn until more than two months later (AOB 59); by this observation, presumably, he hopes to show that his motion was actually made well before the start of the trial. However, at the time Judge DeLucchi ruled on appellant's first *Faretta* motion on October 7, everyone agreed the trial had to start by November 1. When Judge Sarkisian ruled on appellant's second *Faretta* motion on October 31, the parties had agreed pretrial motions would begin no later than November 18. Both rulings must be assessed by what was known to the judge at the time, not by what later transpired. (See, e.g., *People v. Marshall, supra*, 15 Cal.4th at pp. 15–19, 26-27 [trial court's ruling denying *Faretta* motion one month in advance of original trial date assessed for abuse of discretion even though case ultimately did not go to trial for more than six months].) It was certainly not unreasonable for either judge to conclude that appellant intended to substantially delay the proceedings beyond these dates, however the "start" of trial may be defined, based on his comments highlighted above.

Appellant also argues that Judge DeLucchi and Judge Sarkisian merely concluded that granting self-representation might have the *effect* of delaying proceedings, but not that it was appellant's *purpose* to delay. (AOB 72-73; see *Fritz v. Spalding, supra*, 682 F.2d at p. 784.) Certainly, Judge DeLucchi could scracely have been more emphatic in his findings—as amplified by his comments on October 17—that appellant intended a purposeful delay: "All this is doing is you're trying to do—in my opinion is just to postpone this some

more . . . ." (Sealed RT [Oct. 17, 1991] at p. 70.) It is true that Judge Sarkisian did not explicitly state that appellant was trying to delay the proceedings, but the fair meaning of his comments taken as a whole shows that he independently reached the same conclusion as Judge DeLucchi. He referred to appellant's multiple *Marsden* motions, the fact that he had accepted representation for years, and the advanced age of many of the state's witnesses. (RT 8-9.) These comments would have been superfluous if Judge Sarkisian had been concerned only that granting the *Faretta* motion might have the *effect* of delay. But they are highly relevant to show that Judge Sarkisian believed appellant's *purpose* was delay.

In any event, neither Judge DeLucchi nor Judge Sarkisian was required "to make an express finding on the record that the request [for self-representation] was . . . made for the purpose for delay." (*People v. Marshall, supra*, 15 Cal.4th at p. 25.) This Court is entitled to examine the record below and find that the request for self-representation "was made to delay and disrupt the proceedings." (*Ibid.*) Appellant's comments on the record—while, at times, cleverly worded—nevertheless support the plain inference that his *Faretta* motions were an obstructionist tactic designed to delay a trial which promised many elderly witnesses against him. Given this record, neither judge below abused his discretion in denying appellant's *Faretta* motions.

II.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN EXCUSING FOUR PROSPECTIVE JURORS FOR CAUSE BASED ON THEIR CONFLICTING AND EQUIVOCAL ANSWERS ABOUT THEIR ABILITY TO IMPOSE THE DEATH PENALTY

Appellant contends that the trial court erred in excusing for cause four jurors based on their views concerning the death penalty. Appellant argues that each of these jurors expressed a willingness to impose the death penalty. (AOB 76-110.) However, they each also expressed a contrary view. Under the settled rule that the trial court's resolution of conflicting juror answers is binding on appeal (see, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 975), appellant's argument fails as to each juror.

This Court has frequently set forth the relevant law relating to challenges of prospective jurors based on death penalty views. In *People v. Haley* (2004) 34 Cal.4th 283, 306, the Court stated:

> A trial judge may properly exclude a prospective juror in a capital case if the juror's views on capital punishment would prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Jones* (2003) 29 Cal.4th 1229, 1246; *People v. Guzman* (1988) 45 Cal.3d 915, 955.) The determination of a juror's qualifications fall "within the wide discretion of the trial court, seldom disturbed on appeal." (*People v. Kaurish* (1990) 52 Cal.3d 648, 675.) There is no requirement that a prospective juror's bias against the death penalty be proven with unmistaken clarity. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1035.) Instead, "it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*People v. Jones, supra*, 29 Cal.4th at pp. 1246-1247.) "On review, if the juror's statements [regarding the death penalty] are equivocal or conflicting, the trial court's determination of the

juror's state of mind is binding. If there is no inconsistency, we will uphold the court's ruling if it is supported by substantial evidence. ([*People v.*] *Carpenter* [(1997)] 15 Cal.4th [312,] 357.)

Appellant specifically complains about the removal of Jurors M, C, K, and P. As a threshold matter not addressed by appellant, we observe that appellant objected only to the removal of Juror M. (RT 632.) As to the other three jurors, he simply "submitted" the prosecutor's challenge to the court for ruling without objection or argument. (RT 959, 1686, 1849.)[24] This Court has previously noted that it is an open question whether nonopposition to a *Witt* challenge for cause waives any claim of error on appeal. (*People v. Holt* (1997) 15 Cal.4th 619, 652, fn. 4.) For the reasons that follow, we urge the Court to resolve this issue and adopt a contemporaneous objection rule.

A. This Court Should Adopt A Contemporaneous Objection Rule For Claims Of *Witherspoon-Witt* Error

In *People v. Holt, supra*, 15 Cal.4th 619, this Court observed:

> We have not decided whether "nonopposition" to a *Witherspoon-Witt* challenge for cause waives any claim of error on appeal. (See *People v. Cain* [(1995)] 10 Cal.4th 1, 61, fn. 22.) We recognized that controlling federal precedent holds that *Witherspoon* error is not waived by "mere" failure to object in *People v. Velasquez* (1980) 26 Cal.3d 425, 443, judgment vacated and case remanded *sub nom. California v. Velasquez* (1980) 448 U.S. 903 for further consideration in light of *Adams v. Texas* [(1980)] 448 U.S. 38, reiterated in its entirety (1980) 28 Cal.3d 461.

---

24. Appellant did initially object to the challenge against Juror C (RT 957), but submitted the matter following the prosecutor's renewed challenge after additional voir dire of the juror. (RT 959.) He made no objection whatsoever to the challenges against Jurors K and P.

(*People v. Holt, supra*, at p. 652, fn. 4.)[25]

This Court has previously held "that a defendant should be required to object to the excusal of a juror on grounds other than a *Witherspoon-Witt* challenge in order to preserve any claim of error on appeal." (*People v. Holt, supra*, 15 Cal.4th at p. 656; see also *People v. Mickey* (1991) 54 Cal.3d 612, 655, fn. 7.) Examination of the supposed "controlling federal precedent" cited in *Velasquez* to support a *Witherspoon-Witt* exception to the contemporaneous objection rule demonstrates that there is, in fact, no federal bar to an objection requirement. To the contrary, *Witt* itself recognizes Florida's contemporaneous objection rule, and other states also enforce such a rule.

We begin with the cases cited in *Velasquez*, namely, *Boulden v. Holman* (1969) 394 U.S. 478, *Maxwell v. Bishop* (1970) 398 U.S. 262, *Wigglesworth v. Ohio* (1971) 403 U.S. 947, and *Harris v. Texas* (1971) 403 U.S. 947. The defendants in each of these cases was tried *before Witherspoon* and did not raise any trial objection at all because, obviously, the law at the time each was tried would not have supported such an objection. In each case, the Supreme Court remanded for further consideration in light of *Witherspoon*. Only two of the cases resulted in reasoned decisions. In *Boulden v. Holman, supra*, the Supreme Court allowed the defendant to raise the *Witherspoon* issue for the first time in his brief and oral argument on the merits even though his petition for certiorari was limited to another issue. (394 U.S. at pp. 481, 484, fn. 8.) The Supreme Court remanded to the district court so that "the issue that has belatedly been brought to our attention may be properly and fully considered." (*Id.* at pp. 484-485.) *Maxwell v. Bishop* is identical: the defendant was tried before *Witherspoon*; the issue was raised for the first time in the Supreme Court

25. The reference in the quoted text to "*Witherspoon-Witt*" refers to the United States Supreme Court decisions in *Wainwright v. Witt, supra*, 469 U.S. 412, and *Witherspoon v. Illinois* (1968) 391 U.S. 510, the two seminal decisions on removal of jurors for cause based on their death penalty views.

after the petition for certiorari had been granted; and the matter was remanded to the district court to allow full consideration of the issue. (398 U.S. 2 at pp. 263-264, 266-267.) Neither *Boulden* nor *Maxwell* contains any suggestion that a state could not insist on a contemporaneous objection rule to preserve a *Witherspoon* claim at trials which take place *after* that decision.

Wigglesworth and *Bishop* are not reasoned decisions and therefore are even less consequential. In both cases the Supreme Court summarily granted certiorari, reversed the underlying state court judgment, and remanded to the state court for reconsideration in light of *Witherspoon, Boulden,* and *Maxwell.* (See *Wigglesworth v. Ohio, supra*, 403 U.S. 97; *Harris v. Texas, supra*, 403 U.S. 97.) Later, in *Gray v. Mississippi* (1987) 481 U.S. 648, 666, the Supreme Court cited the summary dispositions in *Wigglesworth* and *Harris*, stating they "can be read as having rejected" an argument that *Witherspoon* error may be treated as harmless. In the underlying state judgment in *Wigglesworth,* the Ohio Supreme Court had concluded both that the defendant waived any appellate complaint about a juror's removal by failing to object at trial and that any error was not prejudicial. (*State v. Wigglesworth* (1969) 18 Ohio St.2d 171, 173, 179-181 [248 N.E.2d 607, 609, 614].) However, the Supreme Court has never suggested that it reversed *Wigglesworth* based on the contemporaneous objection aspect of the case. Given the general rule that a "grant-vacate-remand" order is not a final ruling on the merits and therefore of little precedential value (see *Tyler v. Cain* (2001) 533 U.S. 656, 666, fn. 6; see also Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* (8th ed. 2002) § 5.12(b), pp. 319-320) as well as the specific statement in *Gray v. Mississippi* reading *Wigglesworth* as involving the propriety of making a harmless error finding, *Wigglesworth* simply cannot be relied upon as authority for the proposition that a contemporaneous objection rule is precluded for claims of *Witherspoon* error.

For largely the same reasons, *Harris v. Texas, supra*, is no better authority for any such purported rule. In fact, despite the statement in *People v. Velasquez, supra*, 26 Cal.3d at p. 443, that the state court in *Harris* had held "failure to object waived *Witherspoon* error," examination of the underlying state decision shows that the Texas court made no such holding. The defendant in *Harris*—like all the other defendants in the cases cited in *People v. Velasquez, supra*—was tried before *Witherspoon* was decided. (*Harris v. State* (Texas Crim. 1970) 457 S.W.2d 903, 908.) The Texas Court of Criminal Appeals cited Florida and Ohio (namely, *Wigglesworth*) authority that required a contemporaneous objection as well as a Washington state case that treated *Witherspoon* error as harmless. (*Harris v. State, supra*, 457 S.W.2d at pp. 910-912.) The Texas court did not affirmatively adopt either a waiver or a harmless error rule, but simply concluded that there was no *Witherspoon* violation. (*Id.* at p. 912.) Even if the Texas court had announced a waiver rule, the Supreme Court's subsequent grant, vacatur, and remand would not support a conclusion that such a rule violated federal standards. (See *Tyler v. Cain, supra*, 533 U.S. at p. 666, fn. 6.) This is especially so in light of the fact that *Gray v. Mississippi* read *Harris* as a harmless error case, not a waiver case.

In short, none of the four Supreme Court cases cited in *People v. Velasquez, supra*, as "controlling federal precedent" precluding a contemporaneous objection rule in claims of *Witherspoon* error stands for any such proposition. Indeed, none so much as mentions the contemporaneous objection rule, let alone considers and rejects it.

The contemporaneous objection rule is mentioned, however, in the later case of *Wainwright v. Witt, supra*. In *Witt*, in the course of concluding that a trial court is not required to give a statement of reasons when excusing a juror, the Supreme Court observed "that in this case the court was given no reason to think that elaboration was necessary; defense counsel did not see fit to object

to [the juror's] recusal, or to attempt rehabilitation." (*Wainwright v. Witt, supra*, 469 U.S. at pp. 430-431.) The Supreme Court noted that it was not suggesting the issue had been waived because the state courts had reached the merits of the *Witherspoon* claim despite the lack of a contemporaneous trial objection. (*Id.* at p. 431, fn. 11.) The Supreme Court then made the following significant comment: "We note that since *Witt* [*v. State* (Fla. 1977) 342 So.2d 497] was decided by the Florida Supreme Court that court has enforced a contemporaneous objection rule when dealing with *Witherspoon* challenges." (*Wainwright v. Witt, supra*, 469 U.S. at p. 431, fn. 11, citing *Brown v. State* (Fla. 1980) 381 So.2d 690, 693-694.) *Witt* does not give the slightest suggestion that Florida's contemporaneous objection rule might run afoul of federal standards. Though we recognize that the issue was not explicitly decided in *Witt*, we submit that *Witt's* acknowledgment without criticism of the contemporaneous objection rule is surely of greater authoritative value than the total silence on the subject in the four cases cited in *People v. Velasquez, supra*.[26]

The same reasons that support a rule requiring an objection to preserve a claim of error in the granting of a non-*Witherspoon-Witt* challenge for cause apply with equal force to a *Witherspoon-Witt* challenge. Defense counsel may have sound tactical reasons for not objecting to the challenge. Counsel may

---

26. Florida is not alone in enforcing a contemporaneous objection rule in post-*Witherspoon* cases. Without attempting to survey all of the jurisdictions which permit capital punishment, we note that Arkansas (see *Clark v. State* (1978) 264 Ark. 630, 636-637 [573 S.W.2d 622, 625-626]), Illinois (see *People v. Silagy* (1984) 101 Ill.2d 147, 167 [461 N.E.2d 415, 414-425]), and Texas (see *Boulware v. State* (Tex. Crim. 1976) 542 S.W.2d 677, 682-683) all require a contemporaneous trial objection to preserve a claim of *Witt-Witherspoon* error for appellate review. (See also *Cardenas v. Dretke* (5th Cir. 2005) 405 F.3d 244, 249 [finding Texas's contemporaneous objection rule an independent and adequate state rule sufficient to bar federal habeas review of *Witherspoon* claim]); *Russell v. Lynaugh* (5th Cir. 1989) 892 F.2d 1205, 1207-1208 [same].)

have determined the juror would be unfavorable regardless of the juror's death penalty views. Counsel thus can save a peremptory challenge by not objecting to the prosecutor's *Witherspoon-Witt* challenge and thereby gain a tactical advantage. To allow the defense to achieve the tactical benefits of not objecting while at the same time preserving a potential appellate issue that could lead to reversal of the death penalty works a manifest injustice. "Having made that choice the defendant should not be heard to complain on appeal that excusing the juror was reversible error." (*People v. Holt, supra*, 15 Cal.4th 619, 657.)

We acknowledge that in *People v. Mickey*, *supra*, 54 Cal.3d at p. 665, fn. 7, the Court suggested that *Witherspoon* challenges for cause need not be objected to in order to preserve the issue on appeal because "functionally, a challenge for cause by the People is similar to an objection to the subsequent excusal by the defendant—that is to say, it puts the *Witherspoon* question at issue in a timely fashion." We respectfully submit that this statement is insufficient to dispense with the contemporaneous objection requirement rule for several reasons.

First, the interest identified in *Mickey*—putting the trial court on notice that a legal issue is being raised—is just one of several important interests advanced by the contemporaneous objection rule. The rule also discourages gamesmanship and thus advances interests of fairness, reliability, and finality. As further stated in *People v. Mickey, supra*, 54 Cal.3d at pp. 657-658.

> The requirement of a contemporaneous and specific objection promotes the fair and correct resolution of a claim of error both at trial and on appeal, and thereby furthers the interests of reliability and finality. When a contemporaneous and specific objection is made, the parties are put on notice to characterize the claim as they think proper and to set out the law and facts as they deem necessary. With their response, the trial court is provided with a basis on which to define the claim and then determine whether it is meritorious and, if so, how any harm may be avoided or cured as promptly and completely as possible.

(See also *People v. Rogers* (1978) 21 Cal.3d 542, 548 ["The contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at trial secure in the knowledge that a conviction would be reversed on appeal'"].)

If notice were the only purpose of the rule, that interest would be satisfied whenever any challenge for cause is made, not just a *Witherspoon-Witt* challenge, for any such challenge is sufficient to alert the trial court that it is about to make a legal ruling that could be overturned on appeal. But, as stated above, an objection not only puts the court on notice, it helps to prevent or cure error in the first instance. The examination of Juror C is an apt example of the benefits of the contemporaneous objection rule. When appellant initially objected to the prosecutor's *Witt* challenge (RT 957), the prosecutor conducted further voir dire examination that removed any ambiguity regarding whether Juror C's death penalty views substantially impaired her ability to serve as a juror. (RT 958-959.) Yet, under the *Velasquez* rule, appellant could have sat silent after the initial questioning and thereby increased his chances of prevailing on appeal. Instead, the objection led to a more complete record and greatly enhanced the likelihood that the trial court's ultimate ruling would be fair, reliable, and final.

Mickey's stated justification of a *Witherspoon-Witt* exception to the contemporaneous objection rule apparently derives from language in *People v. Velasquez, supra*, but greatly overgeneralizes what was said in that earlier decision. *Mickey* states that a challenge for cause is functionally similar to a defense objection because it puts the *Witherspoon* question in issue. (*People v. Mickey, supra*, 54 Cal.3d at p. 665, fn. 7.) This statement is similar to language in *People v. Velasquez, supra*, 26 Cal.3d at p. 444, but omits significant aspects of that case. There, "the trial judge was alerted to the possibility of *Witherspoon* error by the prosecutor and further *was informed that*

defendants did not consent to the dismissal of [the juror]." (*Ibid.*; italics added.) Moreover, the court indicated it was going to stand by its ruling, suggesting "*any formal objection would have been futile.*" (*Ibid.*; italics added.) *Velasquez*, thus, is not authority for the broad statement in *Mickey* that any *Witherspoon* challenge for cause is the functional equivalent of a defense objection. Viewed in its original context, the quoted language in *Velasquez* appears to be merely a particular application of the established futility exception to the contemporaneous objection rule and not a broad declaration that a prosecutor's *Witherspoon* challenge is always the functional equivalent of a defense objection. As we have shown, the purposes of the contemporaneous objection rule are fully applicable to *Witherspoon-Witt* challenges, and no federal case forbids such a rule. To the contrary, at least one federal circuit has endorsed it.

Accordingly, respondent respectfully requests that this Court hold that a contemporaneous trial objection must be made to a *Witherspoon-Witt* challenge for cause in order to preserve the issue for appellate review. We recognize that when the court adopted a similar rule for non-*Witherspoon-Witt* challenges for cause in *People v. Holt, supra*, 15 Cal.4th at p. 658, it made the rule prospective only. We have no objection to a prospective rule for *Witherspoon-Witt* challenges given the prior holding of this Court in *People v. Velasquez, supra*, that a contemporaneous objection is not required. Nevertheless, even though the state will not benefit in this case, given that the federal cases cited in *Velasquez* do not support a waiver rule, that a number of other jurisdictions employ a contemporaneous objection rule, that the United States Supreme Court has not suggested a contemporaneous objection rule is impermissible, and that requiring a contemporaneous objection serves principles of fairness, reliability, and finality, we urge the court to overrule *Velasquez* and adopt a contemporaneous objection rule for *Witt-Witherspoon* challenges for

cause in all trials occurring after the court's decision in this case becomes final.

B. The Four Jurors In Question Were Properly Excused Based On Their Equivocal And Conflicting Answers

Turning to the four specific jurors at issue in this case—M, C, K, and P—the record shows that each gave equivocal and conflicting answers about her ability to impose the death penalty.

Prospective Juror M

Prospective Juror M stated in her written questionnaire, "If the crime was of the nature to warrant the death penalty I believe it should be done." (CT 4355.)[27] But on voir dire, Juror M was asked about her written response by the court and replied,

> I've thought about that after I wrote that down. Of course, you just think very fast, and I do believe in the death penalty, but I don't know if I could be the person who says, Okay, this is it, you have to decide whether this person gets it or not. I don't know if I could really do it.

(RT 614.) The court inquired if she was someone who "could never vote to send someone to die in the gas chamber," and Juror M replied, "I really don't know. I really don't know how to answer that." (RT 616.) When asked if she could "just say right now" whether she could vote for the death penalty, Juror M answered, "No, I couldn't just decide one way or the other." (RT 616.) Under further questioning by the court, Juror M stated she thought she could vote for death if she believed it was appropriate under all the circumstances, but expanded on her answer to state, "There would have to be absolutely

---

27. The questionnaire consisted of 18 pages. The last question asked, "What are your feelings about the death penalty?," and followed a preamble explaining that the jury might not reach a penalty phase depending on the outcome of the guilt phase. (See CT 4355.) No other question in the questionnaire touched on the death penalty. (See CT 4338-4354.)

elimination of everything to the point that that is the only thing left to do." (RT 617.) Juror M explained that by "elimination of everything" she meant, "like any other thoughts, thinking there is a chance that he should have life rather than death. I would have to just clear it out in my mind completely." (RT 617.) The court then asked if she honestly believed she would be open to imposing either death or life without parole; Juror M responded, "I think so." (RT 618.)

Further questioning followed by the attorneys. When the prosecutor asked Juror M if she could be part of a panel which "sends somebody to their death," she replied, "No, I honestly cannot give a direct answer to that because I don't know how I could live with myself. Can I actually be part of a group that would say this man has to die?" (RT 624.) When the prosecutor persisted by asking, "We have to know. Can you do it?", Juror M answered, "It's really— it's—when you think something in your mind one way and then when it comes right down to it, like you say, I don't know, so I guess the answer would have to be no, wouldn't it?" (RT 624-625.)

Under subsequent questioning by appellant's attorney, Juror M gave inconsistent answers, saying that she had voted for the death penalty when it was on the ballot (RT 626), that she did not "want to be the final—the final person to say, okay, do it" (RT 626), but that there were circumstances in which she could vote for the death penalty. (RT 627.) In a final exchange, the court indicated to Juror M that she "sounded like a different person" when answering the defense attorney's questions as opposed to those of the prosecutor. The court asked,

> My sense of your views are—and I want you to correct me if I am wrong—that you do believe in the death penalty, and you think there are certain cases that warrant the death penalty, but that your views are such that even if you personally determined that death was the appropriate penalty under all of the circumstances in this case, you could not come down into open court, face Mr. Lynch, and announce that that is your vote, knowing that that is going to cause him to be put to death in the

gas chamber, is that correct, am I correct?

Juror M responded with a simple, "Yes." (RT 629.) The court then granted the prosecution's challenge for cause, over appellant's objection, stating

> I was carefully listening to her answers. I was carefully observing her demeanor as she answered the questions. She gave, at least arguably, I think more than arguably, inconsistent or equivocal answers, and I'm satisfied that her views on capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with the court's instructions and her oath.

(RT 632.) The record amply supports the trial court's conclusion. The court's resolution of this conflict in favor of the prosecution's challenge was not an abuse of discretion.

Prospective Juror C

In her questionnaire Juror C stated, "I feel that the death penalty should be imposed on certain individual[s] but not all. Also I am not against or in favor of it." (CT 6330.) In response to questioning by the trial court, Juror C stated that she "sometimes" felt she would always vote for life, never for death, regardless of the circumstances. (RT 954.) The court inquired whether Juror C felt the type of crimes charged against appellant were "not so terrible that [she] would . . . ever vote for death, life in prison is always going to be fine." (RT 956.) Juror C responded, "I would say probably life in prison." (RT 956.)

The attorneys followed with questioning in which Juror C told appellant's counsel, "I wouldn't say I wouldn't vote for the death penalty" (RT 956), that there was a "possibility" she could vote to impose death (RT 957), and she could "probably" do so. (RT 957.) Juror C then told the prosecutor that she did not have a preference between life in prison and death, but, when the prosecutor asked her if she "could ever personally vote to send somebody to die in the gas chamber," Juror C responded, "I don't think so." (RT 959.) When the prosecutor asked Juror C if she could say in open court that she had

voted to send appellant to his death, she replied, "I don't believe so." (RT 959.) The trial court then granted the prosecution's challenge for cause based on Juror C's demeanor and responses, stating, "I'm satisfied that her views on capital punishment would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath." (RT 959-960.)[28] The record supports the court's conclusion based on the conflicting answers given by Juror C, which the trial court implicitly resolved in favor of the prosecution's challenge.

Prospective Juror K

In her questionnaire Juror K stated, "I do believe in the death penalty if warranted." (CT 8305.) On voir dire, the court asked Juror K if she had "any feelings along [the] lines" of one who would invariably vote for death. (RT 1676.) In response, Juror K stated:

> Not that I would sway any kind of decision. I couldn't say right now. But to be perfectly honest, I don't know exactly what kind of verdict I would give. I don't feel comfortable with either penalty. I don't like – I don't want to have to be put in the position to make that decision. If I'm going to have to, I'm going to have to. But I'd rather not say at this point.

(RT 1676.) She subsequently stated that she could be open to either punishment (RT 1678), that she did not think her discomfort with either penalty would prevent her from following the court's instructions (RT 1682), and that she could vote for death if she believed it was justified. (RT 1683-1684.) After these responses, however, Juror K equivocated on her ability to return a death verdict and ultimately stated that she did not think she could affirm a death verdict in open court. The prosecutor described people who "get cold feet,"

---

28. Appellant's counsel initially opposed the challenge for cause (RT 957), but then simply "submitted" the issue following the prosecutor's renewed challenge when Juror C stated she did not believe she could personally vote for death. (RT 959.)

become "weak in the stomach," and personally cannot vote for the death penalty even though they believe a defendant deserves it, and then asked if Juror K had "any feelings as to that?" (RT 1654.) Juror K responded, "Yeah. That's why I say I'm not comfortable in making the decision. I believe that, but like I said, I'm not comfortable in making the decision." (RT 1685.)

This exchange prompted the court to ask several additional questions. The court asked Juror K if she would be able to announce a death verdict in open court. (RT 1685.) Juror K replied, "It's hard to say, to tell you the truth." (RT 1685.) The court then described the polling process in which jurors would be asked to affirm a verdict of death and asked, "Are you telling me that you don't think you can do that or you are not sure that you could do that if you personally determined upstairs that death was the appropriate punishment after this determining process?" (RT 1685-1686.) Juror K answered, "No, I don't." (RT 1686.) The court then granted the prosecutor's challenge for cause, without defense objection, finding that Juror K's views would prevent or substantially impair her duties as a juror. (RT 1686.) Here, again, Juror K's equivocal and inconsistent statements regarding her ability to return a death verdict demonstrate that the trial court did not abuse its discretion in removing her for cause.

Prospective Juror P

In her questionnaire, Juror P merely wrote "fine" when asked to state her feelings about the death penalty. (CT 8971.) Juror P was questioned only by the court on voir dire. When asked if she could impose the death penalty Juror P replied, "Well, if the second trial is evidence, you know, warrants it or I think maybe it proves up to a certain point, yes, that – that would be possible." (RT 1845-1846.) When the court asked different versions of the same basic question, Juror P answered, "I—I really don't know. You know, it depends on the circumstances, the evidence, and . . . all that sort of stuff," and, somewhat

more equivocally, "I guess so." (RT 1847.) However, Juror P then gave far more definitive answers indicating she could not vote for the death penalty in appellant's case. When asked if there was anything else she wanted to say concerning her views on the death penalty, Juror P replied, "Well, it was just have to be so horrible, you know, beyond wildest imagination, before I could just say somebody got to die." (RT 1848.) The court asked a final question whether appellant's crimes were "serious enough where the death penalty could possibly apply," to which Juror P answered, "No, not really." (RT 1848.) The trial court granted the prosecutor's challenge for cause without defense objection. (RT 1849.) Given Juror P's statement that the case would have to be "beyond wildest imagination" before she could vote for death, the trial court did not abuse its discretion in determining that her views substantially impaired her ability to serve as a juror. (RT 1849.)

Reference to other decisions of this Court confirms that the trial court did not abuse its discretion in excusing any of the four jurors at issue based on their conflicting and equivocal answers. In *People v. Roldan* (2005) 35 Cal.4th 646, 698, a juror stated she did not like the death penalty but could understand why it was sometimes necessary. She indicated she would not automatically vote for either death or life without parole. However, she also answered, "I honestly don't know," when asked if she would vote against a first degree murder verdict to avoid reaching a penalty phase and ultimately stated, "I don't think I would ever vote for death." The Court found no abuse of discretion in the trial court's removal of the juror for cause based on her conflicting answers regarding the death penalty. (*Id.* at p. 699.)

In *People v. Haley*, *supra*, 34 Cal.4th at p. 308, a juror seemingly confirmed that she could vote for the death penalty in response to questioning by the defense attorney. However, in response to questioning by the prosecutor, she replied, "I really don't think so," when asked if she could impose the death

penalty and agreed that she should not serve on the jury based on her death penalty views. The Court found no abuse of discretion in the trial court's removal of the juror for cause based on her conflicting views. (*Ibid.*)

In *People v. Jones*, *supra*, 29 Cal.4th at p. 1247 & n. 3, 1248, a juror stated he could vote for the death penalty but also indicated the death penalty should be imposed only if there was "no doubt" about guilt. In follow-up questioning, the juror told the defense attorney that he understood the standard was proof beyond a reasonable doubt, not beyond all possible doubt. However, he subsequently told the prosecutor he would require proof beyond all possible doubt to impose death. In final questioning by the court, the juror said he was confused by the prosecutor's questions and could vote for death even if only convinced of guilt beyond a reasonable doubt. This Court deferred to the trial court's resolution of the conflicting answers and found no abuse of discretion in the removal of the juror for cause. (*Id.*)

Appellant does not seriously dispute that each of the four jurors in this case gave conflicting or equivocal answers. Instead, he argues (1) since all of the jurors indicated they "would be willing to impose" the death penalty, the prosecution failed to prove that the jurors "would be unable to carry out those duties required by the court's instructions and their oath as jurors" (AOB 91; italics deleted); (2) the prosecutor used improper tactics to get the jurors to say they would not announce a death verdict in open court (AOB 95-98); and (3) jurors may not be removed for cause under the *Witt* standard merely because they equivocate about their ability to impose death. (AOB 99-110.) Each of these complaints is meritless.

As to the first issue, appellant ignores that, though each juror gave some indication she could impose the death penalty, she also gave contrary indications that she could not. (See RT 624-625 [Juror M stated " . . . I don't know how I would live with myself" and " . . . I guess the answer would have

to be no" in response to questions whether she could be part of a panel that "would say this man has to die"]; 957, 959 [Juror C said "I don't think so" and "I don't believe so" in response to questions whether she could personally vote for death or affirm a death verdict in open court]; 1685-1686 [Juror K said that she did not believe she could personally affirm a verdict of death in open court]; 1848 [Juror P stated that the crime would have to be "beyond wildest imagination, before I could just say somebody got to die"].) The trial court acted well within its discretion in crediting the responses indicated above, discrediting the contrary answers, and therefore determining that each juror was substantially impaired in her ability to follow and apply the court's instructions at the penalty phase. (See, e.g., *People v. Haley, supra* 34 Cal.4th at p. 308; *People v. Jones, supra*, 29 Cal.4th at pp.1248-1249.)

Appellant complains that the jurors did not really say they could not impose the death penalty, only that they could not "announce" their decision in open court. He argues that the "trial court confused the *nondisqualifying concept* of reluctance to announce the verdict with the *disqualifying concept* of unwillingness to follow the court's instructions and the juror's oath." (AOB 95; original italics.) However, this Court has previously determined that questions which inquire whether, in response to a jury poll, the prospective juror can "look at the defendant" and "stand up and tell" the defendant that the juror has voted for death are permissible in "ascertaining whether each prospective juror's views concerning capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*People v. Samayoa* (1997) 15 Cal.4th 795, 853; citation and internal quotation marks deleted.) If the questions are proper, then it is certainly not improper for a trial court to conclude that a juror who admits she would not be able to affirm her death penalty in open court—as did Jurors M (RT 629), C (RT 959), and K (RT 1685-1686)—would be substantially

impaired in her duty to follow her oath and the court's instructions.

As to appellant's argument that the prosecutor asked improper and inflammatory questions of several of the jurors regarding whether the juror could affirm a death verdict in open court, appellant's complaints are both waived and meritless. Appellant did not object to any of the prosecutor's questions below, and has therefore waived any complaint on appeal. (*People v. Seaton* (2001) 26 Cal.4th 598, 636.) Moreover, neither the questions themselves (*People v. Samayoa, supra*, 15 Cal.4th 795, 853), nor the colloquial phrasing used by the prosecutor (see, e.g., RT 1684 ["cold feet"; "weak knees"]) were improper. (See, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 741-745.)

As to appellant's remaining complaint that equivocal juror responses regarding death penalty views are insufficient to warrant removal for cause, he ignores language in *Wainwright v. Witt, supra*, 469 U.S. 412, that is decidedly to the contrary. *Witt* concerned the deference to be given state factual determinations of a juror's state of mind in a subsequent federal habeas proceeding. In deciding that the lower federal court erred in failing to accord a presumption of correctness to state court factfindings, the Supreme Court observed—in language expressly applicable to both direct and collateral review—as follows:

> We noted [in *Patton v. Yount* (1984) 467 U.S. 1025] that the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations were entitled to deference even on direct review; "[the] respect paid such findings in a habeas proceeding certainly should be no less."

(*Wainwright v. Witt, supra*, 469 U.S. at p. 428, citing *Patton v. Yount, supra*, 467 U.S. at p. 1038; footnote omitted.) In other words, the Supreme Court has

expressly recognized that the determination of a juror's state of mind is a factual question for the trial judge. Where the juror gives conflicting answers, the judge must necessarily decide which answer reflects the juror's true state of mind. The juror's demeanor—a factor expressly relied on by the trial court as to each excused juror in this case (RT 623, 959-960, 1686, 1849)—is also an important factor in resolving the juror's state of mind. Thus, *Witt* plainly supports this Court's approach to appellate review where a juror has given conflicting answers.

Appellant suggests that *Adams v. Texas, supra,* 448 U.S. 38 and *Gray v. Mississippi*, *supra*, 481 U.S. 648 support a different view and actually prohibit the removal of jurors who give equivocal or conflicting answers about their ability to impose the death penalty. (AOB 105-110.) Neither case supports appellant's argument. *Adams* concerned a Texas statute that required jurors to take an oath affirming the penalty determination would not affect their deliberations. Jurors who refused to take this oath were excluded for cause. The Supreme Court reversed the death judgment because the Texas statutory oath permitted removal of jurors for broader reasons than permitted under *Witherspoon* and was therefore constitutionally impermissible. (448 U.S. at pp. 40, 42, 50-51.) The opinion contains no discussion concerning whether a trial judge is entitled to resolve conflicting or equivocal views in favor of a challenge for cause.

Gray concerned whether *Witherspoon* error could be harmless. The Supreme Court concluded it is not subject to harmless error review. (481 U.S. at p 668.) The case involved a juror who had given "somewhat confused" answers regarding her ability to impose the death penalty though she ultimately affirmed that she would do so. (*Id.* at p. 653 & fn. 5.) However, "[e]very Justice of the Mississippi Supreme Court expressly stated that [the disputed] panel member . . . 'was clearly qualified to be seated as a juror under the *Adams*

and *Witt* criteria.'" (*Id.* at p. 659.) The Supreme Court indicated it agreed with this conclusion. (*Ibid.*) The Mississippi reviewing court did not defer to the trial judge—who had stated the juror was "totally indecisive"—no doubt at least in part because the trial judge qualified other jurors who had given equivocal responses but changed his practice as to the disputed juror merely because the prosecutor had used up all his peremptory challenges. (*Id.* at pp. 653-657 & 657, fn. 7.) The Supreme Court granted certiorari solely to "consider whether the improper excusal of a juror for cause can be harmless." (*Id.* at p. 657.) The question whether equivocal responses could support a challenge for cause is not a part of the *Gray* decision. That case casts no doubt on the express recognition in *Witt* that the determination of a juror's state of mind is a factual question to be resolved by the trial judge. (*Wainwright v. Witt, supra*, 469 U.S. at p. 428.)

To sum up, each of the four disputed panel members in this case gave conflicting and equivocal answers about her ability to return a death verdict. The trial judge was entitled to resolve any conflict by determining that each juror's true state of mind substantially impaired her ability to follow the law. No abuse of discretion can be demonstrated. Appellant's challenge must be rejected in its entirety.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SEVER COUNTS

Appellant contends that the trial court abused its discretion in denying his motion to sever counts. (AOB 111-171.) There was no abuse of discretion because evidence of the various crimes was cross-admissible.

Appellant moved for separate trials as to each of the five victims, arguing that he would be denied his right to due process and a fair trial if all the counts were tried together. (CT 3099-3105.) The prosecution opposed the motion (CT 3106-3108), and the matter was submitted to the trial court without argument. (RT 36.) The trial court denied the motion, ruling as follows:

> The matter being submitted, let me indicate that I have reviewed the defendant's points and authorities in support of his motion to sever counts and the People's points and authorities in opposition thereto.
>
> For the purpose of the record, first, I want to briefly review some general principles that govern motions such as this. Clearly, in the interest of justice and for good cause shown, the court may order the different offenses set forth in the information to be tried separately. The determination of a severance motion is, in the words of the Supreme Court, a highly individualized exercise, one which requires the trial judge to weigh the benefits of joinder against any potential prejudice to the rights of the defendant. It is also clear the defendant has the burden of establishing a substantial danger of prejudice if the severance is not granted.
>
> With these general principles in mind, I have considered this defendant's motion in light of the showings made in the moving papers.
>
> This is a capital case, and we have charges that involve brutal attacks on five elderly women inside their homes. The attacks, alleged attacks, were made during daytime hours over a relatively limited period of time. The offenses appear to share common characteristics, which arguably are suggestive of a single, common perpetrator.

> The charges are all potentially inflammatory in the court's view.
>
> As far as the relative evidentiary strength or weakness of the various charges or counts, other than the potential for prejudice which is always present when there are multiple incidents involving similar charges, that is, the possibility that a single jury will aggregate all of the evidence, suffice it to say that on the record presented, the defendant has not met his burden.
>
> There are significant benefits in judicial economy to be gained by maintaining joinder of these charges. Jury selection alone would, in all likelihood, take additional weeks, even months, if separate trials are ordered on the capital charges. This Court is aware that joinder for judicial economy is not permitted if it would deny the defendant a fair trial.
>
> However, on the record before me on this motion, it's my conclusion that there has not been an adequate showing of potential prejudice.
>
> Accordingly, the motion to sever is denied.

(RT 36-38.)

Penal Code section 954 permits joint charging and trial of two or more offenses of the same class of crimes. Appellant concedes that joinder was permissible in his case under section 954. (AOB 117.) Where joinder is statutorily authorized, severance is required only if joinder results in prejudice so great as to deny the defendant a fair trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 947; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 447.) The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.) Although evidence on the crimes to be jointly tried need not be cross-admissible to support joinder, if the evidence is cross-admissible "any inference of prejudice is dispelled." (*People v. Balderas* (1985) 41 Cal.3d 144, 171-172; see also *People v. Bradford, supra*, 15 Cal.4th at p. 1315.) Where the offenses are not cross-admissible, the denial of severance may be an abuse of discretion if: (1) highly inflammatory offenses were joined with noninflammatory crimes; (2) a relatively weak case was joined

with a relatively strong case so that the aggregate evidence had a spillover effect and altered the outcome on the relatively weak charges; or (3) one of the charges carried the death penalty. (*People v. Bradford, supra*, 15 Cal.4th at p. 1315; *People v. Sandoval* (1992) 4 Cal.4th 155, 172-173.)

Evidence from one murder is cross-admissible at the trial of another under Evidence Code section 1101 where "the incidents disclose a distinctive modus operandi tending to establish the killer's identity." (*People v. Bradford, supra*, 15 Cal.4th at p. 1316.) "To be admissible to demonstrate a distinctive modus operandi, the evidence must disclose common marks or identifiers, that, considered singly or in combination, support a strong inference that the defendant committed both crimes." (*Ibid.*; see also *People v. Miller* (1990) 50 Cal.3d 954, 988-989.) There need not be a single signature running through all the crimes to make them cross-admissible. Rather, it is the "collective significance" of the factors in common that combine to demonstrate cross-admissibility. (*People v. Miller, supra*, 50 Cal.3d at p. 989.) Sometimes, even general characteristics shared in the abstract by many crimes can recur in such a pattern so as to set the joined crimes apart from other crimes of the same general variety and to support a strong inference that the joined crimes were committed by the same person. (*Ibid.*) Similarities among the victims and proximity in time and place of the crimes can be especially significant in assessing cross-admissibility. (See *People v. Bradford, supra*, 15 Cal.4th at p. 1317.) "[T]he likelihood of a particular group of geographically proximate crimes being unrelated diminishes as those crimes are found to share more and more common characteristics." (*People v. Miller, supra*, 50 Cal.3d at p. 989.) Of course, to the extent that the shared features are also distinctive, this only increases the strength of the case for cross-admissibility. (*People v. Kipp* (1998) 18 Cal.4th 349, 370.)

Here, the evidence favoring cross-admissibility is overwhelming. No

rational person could look at the pattern of the charged crimes and conclude anything other than that they were committed by the same person. Listing the most prominent similarities: (1) all of the victims were older women, the youngest being 73; (2) all of the crimes were committed in the geographically proximate communities of San Leandro and unincorporated Hayward; (3) the attacks occurred within a two-month period during the summer of 1987; (4) all of the crimes occurred during the afternoon hours; (5) all of the victims were savagely beaten about the head and neck—with the beatings sufficient to cause the death of the three murder victims and to cause great bodily injury against the two survivors; (6) all of the victims' wounds were attributable solely to blunt trauma; (7) in each case the motive for the attack was robbery; (8) all of the attacks occurred inside a detached dwelling home; (9) each victim's home was situated on a corner lot or otherwise located so as to support an inference that the attacker chose it to facilitate an easy getaway in any of several possible directions (see RT 2668 [Pearl Larson's home on corner lot]; RT 3365 [Adeline Figuerido's home adjacent to large vacant lot on one side and last home before BART tracks on the other side]; RT 4097 [Anna Constantin's home on corner lot]; CT 370 [Ruth Durham's home next to daughter's corner home]; CT 792 [Bessie Herrick's home on corner lot]); and (10) in each case a Black man was identified as being at or in close proximity to the victim's home at or near the time of the attack.

In addition to these common features shared by all of the crimes, numerous features were shared by some of the crimes which, taken together, add to the strong inference of a single perpetrator: (1) the hands of the three murder victims were bound with something obtained at the crime scene—stockings in the case of Pearl Larson (RT 3274) and electrical cord in the case of Adeline Figuerido (RT 3342) and Anna Constantin (RT 3538, 3640); (2) the head of each murder victim was also covered with some type of

fabric—a cloth tied around Pearl Larson's head (RT 3284), a bedspread wrapped around Adeline Figuerido's head (RT 3378), and a blanket placed over Anna Constantin's head (RT 3489); (3) in at least four of the attacks, the perpetrator took or attempted to take only fine jewelry or cash, never costume jewelry (see RT 3368-3370, 3379-3382, 3384 [gold and silver jewelry and cash missing from Figuerido home]; RT 3545-3546 [bracelet, jewelry, and cash missing from Constantin home]; CT 798-799 [cash and a ring missing from Herrick home]; RT 3276 [evidence that someone had attempted to remove forcibly Pearl Larson's ring]);[29] (4) three of the victim's homes were ransacked (RT 3779, 3370, 3688-3689), and in a fourth—the Herrick home, where the perpetrator was interrupted by Mr. Herrick—there was evidence the perpetrator opened a dining room hutch and a bedroom dresser (RT 3021, 3041-3042); (5) in the Figuerido and Constantin cases, the perpetrator used the dining room table as a gathering point for household belongings (RT 3370, 3689-3690); and (6) the apparent method of entry in the Constantin and Durham incidents was identical—a slit or cut to a back screen door (RT 2789, 3823-3824). These additional features are not insignificant. Complete cross-admissibility is not necessary to justify the joinder of multiple counts (*People v. Cummings* (1993) 4 Cal.4th 1233, 1284), and there is no requirement that each factor of similarity be shared by *all* of the joined crimes. (See *People v. Miller, supra*, 50 Cal.3d at pp. 987-989.) In particular, we submit the fact that the attacker of each murder victim covered the victim's head with some form of cloth is so distinctive as to amount to a signature mark in the three murder cases.

---

29. Equally significant to what was taken is what was not: there is no evidence the perpetrator took any electronic item such as might typically be stolen in a burglary. This similarity applies equally to the Durham incident. Ms. Durham found cash missing from her purse when she was able to return to her home several weeks after the attack, along with some sweaters from a hall closet. (See CT 353-356, 365.)

Although in any case challenging joinder the trial court's decision must be assessed based on all the facts in that particular case, it is nevertheless useful to compare appellant's case to other decisions of this Court. In *People v. Bradford, supra*, 15 Cal.4th at pp. 1316-1317, the Court concluded that multiple murders were cross-admissible where the victims were both young women who died of ligature strangulation, were killed nine days apart in remote desert locations, and had been induced to accompany the defendant in the belief that he would photograph them to advance their modeling careers. In *People v. Miller, supra*, 50 Cal.3d at pp. 987-989, the Court found that four murders and four attempted murders were cross-admissible where all the victims were gay men, all attacks but one occurred in the same community, all of the attacks occurred around midnight (extended over a period of nine months (*id.* at pp. 967-979)), all the victims suffered wounds inflicted by a blunt instrument, all the attacks but one occurred on a quiet side street, all the murder victims were found without wallet or identification, and various other similarities were present in most—but not all—of the cases. In contrast, in *People v. Bean* (1988) 46 Cal.3d 919, a case relied on by appellant (AOB 163), although there were general similarities in the time, place, manner, and motive for two killings, these were outweighed by more compelling and specific dissimilarities. One crime involved a night-time entry by two perpetrators in which the victim was killed in her bedroom while the second involved a daytime attack on a victim in her yard by a single perpetrator, leading the Court to conclude that the two cases were "quite dissimilar." (*Id.* at pp. 937-938.)

Just as the combination of circumstances established a case for cross-admissibility in *Bradford* and *Miller*, so too here. Taken together, the similarities are overwhelming and any dissimilarities comparatively innocuous. The record permits only one reasonable conclusion: the same person committed all the crimes. Accordingly, since the incidents were cross-admissible, the trial

court did not abuse its discretion in denying appellant's motion to sever counts.

Appellant attacks the overwhelming case for cross-admissibility in several ways. He attempts to shift the burden to support joinder to the prosecution by arguing that the trial prosecutor "did not establish that the evidence was, in fact, cross-admissible." (AOB 114.) However, the burden was on appellant to show that separate trials were required, not on the prosecution to show a joint trial was permissible. (*People v. Bradford, supra*, 15 Cal.4th at p. 1315.) In any event, the prosecutor certainly never abandoned a theory of cross-admissibility in opposing appellant's short motion for severance (CT 3099-3105) with his own short response. (CT 3106-3108.) Instead, he cited the rule that cross-admissibility dispels any inference of prejudice (CT 3107) and argued that appellant had not carried his burden of showing prejudice. (CT 3108.) Moreover appellant acknowledged in his own moving papers that "[t]he prosecution maintains that all of the cases charged have distinctive Modus Operandi by which the identity of the perpetrator can be proved." (CT 3100.) Appellant's motion was submitted for decision without oral argument. (RT 36.) In denying the motion, the trial court explicitly referred to common characteristics shared by the crimes as tending to point to a single, common perpetrator. (RT 37.) This record is certainly sufficient to preserve cross-admissibility as a reason for upholding the trial court's ruling.

At much greater length, appellant attempts to characterize the various crimes as dissimilar (see AOB 120-140), ultimately asserting that "[a]ny similarities among the cases were general" (AOB 157) and that the various crimes cannot be "set apart from the garden variety burglaries that could happen, and do happen, every day everywhere." (AOB 162.) This argument simply cannot be credited in view of the overwhelming and distinctive similarities set forth above which combine to show an unmistakable pattern of

a single, common perpetrator who committed his crimes in the same area, within a short time period, at the same time of day, against the same type of victim, with the same motive, seeking the same type of property, with the same method of killing, and then left a virtual calling card by covering each murder victim's head with a cloth. It defies credulity to call these "garden variety" burglaries. These were not crimes that occurred "every day, everywhere"; they were crimes that occurred at a particular time (the summer of 1987), in a particular place (the neighboring communities of San Leandro and Hayward), against particular victims (elderly women), with a particular motive (robbery of fine jewelry or cash), at a particular time of day (afternoon), in a particular manner (corner home, blunt trauma to the head, head of victims covered). The crimes were all cross-admissible.

Having established that the crimes were cross-admissible, we do not dwell on the remaining factors for assessing prejudice from joinder as these factors only come into play where there is no cross-admissibility. Suffice it to say that all of the crimes were equally inflammatory—vicious attacks upon elderly women in their own homes in broad daylight—and that all of the murder charges carried the death penalty. Appellant essentially maintains that all prejudice flowed from the comparatively stronger Constantin case based on appellant's possession of Ms. Constantin's Russian bracelet. (AOB 142.) This is not an argument he made below (CT 3099-3105), and therefore cannot be a basis for showing abuse of discretion by the trial court. In any event, while we agree that appellant was not connected with any of the other crimes by the recent possession of stolen property, he was tied to each and every incident by one or more witnesses who repeatedly identified him as being at or near the crimes scene at the time of the attack, or, in the Herrick case, as being the perpetrator of the attack. In light of these identifications, it is an overstatement at best to assert that appellant was convicted of all the crimes solely on account

of an alleged spillover effect from the Constantin case. (See AOB 141-142.) Moreover, we know the jury in fact decided each crime individually, as it acquitted appellant of several charged offenses, including the attempted murder of Bessie Herrick, the attempted murder of Ruth Durham, and the robbery of Pearl Larson. Thus, even apart from the question of cross-admissibility, appellant has failed to demonstrate that he received an unfair trial as result of the joinder. (*People v. Arias* (1996) 13 Cal.4th 92, 127.) At all events, then, he has failed to show the trial court abused its discretion by denying his motion to sever.

IV.

THE TRIAL COURT CORRECTLY DECLINED TO GIVE APPELLANT'S PROPOSED INSTRUCTION THAT THE JURY'S CONSIDERATION OF THE EVIDENCE ON ANY COUNT "SHOULD NOT BE INFLUENCED" BY THE OTHERS

Appellant contends that the trial court erred by failing to give a special instruction that the jury's consideration of the evidence on any count "should not be influenced" by the other charges. (AOB 172-177.) This argument is premised on the acceptance of appellant's preceding contention that the offenses were not cross-admissible. Because, as we have shown, the offenses were cross-admissible, this contention is meritless.

The trial court instructed the jury with CALJIC No. 17.02 as follows:

> Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each count must be stated in a separate verdict.

(CT 3312; see also RT 4246.) The trial court refused to give appellant's proposed modification to that instruction, which stated:

> Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged, but your consideration of the evidence as to one count should not be influenced by the fact that other counts have been charged. For any count which has not on its own and independently of other charges been proven beyond a reasonable doubt you must find the defendant not guilty.

(CT 3241.) The court stated that topic was "adequately covered by 17.02, and it also could be confusing." (RT 3926.)[30]

---

30. At the start of the instructions conference, the court stated, "[T]he record should reflect that except as indicated on this record during this session,

Relying on *People v. Grant* (2003) 113 Cal.App.4th 579 and *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, appellant contends his proposed instruction should have been given. *Grant* and *Bean* are inapposite as both involved cases in which evidence of multiple counts was not cross-admissible.

In *Grant*, the defendant was jointly charged with unrelated incidents involving burglary and receiving stolen property. (*People v. Grant, supra*, 113 Cal.App.4th at pp. 583-586.) The court of appeal relied on a combination of four factors to conclude that joinder had deprived the defendant of a fair trial: (1) the evidence on the crimes was not cross-admissible (*id.* at pp. 589); (2) the prosecutor improperly argued that the jury should find the defendant guilty of the burglary count because he possessed stolen property in the unrelated receiving count (*id.* at pp. 589-591); (3) the trial court failed to give a limiting instruction that would have told the jury that only common marks of distinctiveness between crimes warranted an inference that the same person committed both (*id.* at pp. 591-592); and (4) the evidence on each count bolstered the other. (*Id.* at pp. 593-594.) Obviously, the decision in *Grant* turned on cross-admissibility: if the offenses had been cross-admissible because they supported an inference of identity, then the prosecutor could have properly urged that inference and no limiting instruction would have been required.

Likewise, in *Bean v. Calderon, supra*, 163 F.3d 1073, there was no cross-admissibility between two murder counts. (*Id.* at p. 1084.) And, as in

---

all instructions are being given by stipulation. [¶] Any instructions that are not being given are deemed withdrawn voluntarily. And I urge counsel to jump in and correct me if I misstate what we have done." (RT 3921.) When the court later indicated that it had refused to give appellant's modification to CALJIC No. 17.02, counsel did not "jump in" to clarify whether he had voluntarily withdrawn the instruction. We are willing to assume that he did not, and therefore that the issue is adequately preserved for review, because the trial court used the word "refused" rather than "withdrawn" when describing why he would not give the instruction. (Compare RT 3924 with RT 3926.)

Grant, in *Bean* the prosecutor improperly urged the jury to draw an inference of identity from the joined counts even though they were not cross-admissible for that purpose. (*Ibid.*) In these circumstances, the Ninth Circuit concluded that CALJIC No. 17.02 "availed little in ameliorating the prejudice arising from joinder." (*Ibid.*; see also *id.* at p. 1083 [quoting CALJIC No. 17.02].)

Here, the offenses *were* cross-admissible, as we have demonstrated in our preceding argument. The combined pattern of similarities supported a strong inference that the same person committed them all. In view of the cross-admissibility of the crimes, the prosecutor was fully entitled to argue—as he did without objection—that "the similarity of these vicious attacks" removed "any doubt" that they were all committed by the same person. (RT 4096.) And given that cross-admissibility, it would have been highly misleading and confusing to suggest to the jury that the evidence bearing on one count could not "influence" the consideration of any other count or that the defendant's guilt could only be established "independently" of evidence bearing on a different count. (CT 3241.) The trial court, therefore, committed no error in declining to give appellant's proposed modification of CALJIC No. 17.02.

V.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATIONS MADE AT THE LIVE LINEUP FOR VIOLATION OF THE *WADE/GILBERT* RULE WHERE TWO ATTORNEYS ATTENDED THAT LINEUP ON APPELLANT'S BEHALF

Despite the fact that two attorneys attended the November 4, 1987, lineup on appellant's behalf, he contends that he was deprived of the right to have his *own* counsel at the videotaped lineup. (AOB 178-195.) His contention is meritless. The purposes of having counsel at a lineup were fully satisfied by the two attorneys who were appointed to attend on appellant's behalf.

Appellant unsuccessfully litigated this issue at the preliminary hearing (CT 782-789), in a motion to dismiss pursuant to Penal Code section 995 (CT 2970-2987, 3010), in a pretrial writ petition (which was summarily denied) (CT 21), and in a motion to suppress the lineup. (CT 3078-3089; RT 30.) The record was fully developed at the preliminary hearing, where testimony revealed the following. After a criminal complaint was filed against appellant (CT 6-8), Deputy Public Defender Allan Hymer was assigned to represent him on October 27, 1987. (CT 587, 589-590.) On November 2, Hymer was informed that a lineup would be held on November 4. (CT 591.) On November 3, the Alameda County Public Defender filed a declaration of conflict of interest. (CT 587.) Hymer called a jail sergeant on the morning of November 3 and asked him to inform appellant that he was no longer his attorney. (CT 595-596.) The county bar association then located two attorneys—Valerie West and Joseph Stephens—to attend the lineup pursuant to its attorney appointment program. (CT 603, 607-608, 612.) West and Stephens were not the attorneys recommended to represent appellant in his court proceedings. Though they

were not among the 17 attorneys considered qualified by the bar for court appointment in capital cases, they were experienced in felony cases and had each attended lineups on multiple occasions. (CT 606, 614, 641-642, 691.) The appointment program always appointed a different attorney to attend the lineup than the one recommended to represent the defendant in court because the lineup attorney was a potential witness in subsequent court proceedings. (CT 611, 615.) The program selected two attorneys to attend appellant's lineup because 22 witnesses were expected to attend and the charges were very serious. (CT 609.)

West and Stephens arrived before the lineup and met with appellant privately, telling him they were there to observe the lineup and that Hymer no longer represented him. (CT 630-632, 653, 682-689, 689-690.) They told appellant they did not "represent him on his cases" and "were not in a position to advise him." (CT 632.) Appellant was upset to learn that Hymer would not be there and said he would refuse to participate in the lineup without his counsel. (CT 632-634.) The attorneys informed the police of appellant's position. (CT 634.) The police told appellant that if he refused to participate in the lineup they would drag him in—along with all the other participants in order to treat everyone equally. (CT 686; see also CT 635.) They also informed him that his refusal to participate could be used against him as an admission of guilt. (CT 636, 686-687.) West and Stephens briefly spoke to appellant again privately. (CT 650-651, 689.) Appellant asked if he could participate in the lineup under protest; the attorneys said he could. (CT 654.)

The lineup proceeded, with West and Stephens observing. West did not note "anything in particular" that she considered as unfair—no obvious differences in height or clothing of the participants or any conduct by the officers drawing special attention to appellant or singling him out. (CT 644-648.) Stephens did not see the police do anything to single out appellant, but

he did notice that appellant was the only participant wearing a white t-shirt. (CT 686, 693.) New counsel was appointed for appellant at the next court hearing on November 6. (CT 587.)

Both West and Stephens testified that they did not see it as their role at the lineup to represent appellant or to give him legal advice. (CT 632, 682-684.) West testified, "My understanding of my role is that I am to be a witness to the lineup, that I can speak with the person, explain to them what is going on but that I am not there to give them legal advice." (CT 642.) And further, "My own sense is that I am there to observe what happens so that if there's a question about it later I would be able to testify." (CT 649.) Stephens testified that he understood his duty was "[b]asically, to see that the lineup was conducted in a fair fashion." (CT 682.) Both attorneys were paid the standard fee of $100 upon submitting a form to the appointment program for "miscellaneous representation . . . lineup observation." (CT 620, 624, 660-661, 690.)

In *United States v. Wade* (1968) 388 U.S. 218, the Supreme Court held that a post-indictment lineup is a critical stage at which a criminal defendant has a Sixth Amendment right to counsel. (See *id.* at pp. 236-237; see also *Gilbert v. California* (1967) 388 U.S. 263 [same].) In *Kirby v. Illinois* (1972) 406 U.S. 682, the Supreme Court clarified that the right to counsel attaches upon the initiation of adversary criminal proceedings, but that there is no right to counsel at a pre-indictment lineup if the defendant has not been charged. (*Id.* at p. 689 (plurality opinion); see also *McNeil v. Wisconsin* (1991) 501 U.S. 171, 175.) This Court has subsequently explained that the *Wade/Gilbert* rule was "adopted for two primary reasons: to enable an accused to detect any unfairness in this confrontation with the witness, and to insure that he will be aware of any suggestion by law enforcement officers, intentional or unintentional, at the time the witness makes his identification." (*People v. Williams* (1971) 3 Cal.3d 853,

856; see also *People v. Carpenter, supra*, 15 Cal.4th at p. 368.) Apart from fulfilling these purposes, counsel's role at the lineup is limited: "defense counsel must not be allowed to interfere with a police investigation." (*People v. Carpenter, supra*, 21 Cal.4th at 1046; see also *People v. Williams, supra*, 3 Cal.3d at p. 860 (dissenting opinion of Mosk, J.) ["At most, defense counsel is merely present at the lineup to silently observe and to later recall his observations for purposes of cross-examination or to act in the capacity of a witness."], cited with approval in *People v. Carpenter, supra*, 21 Cal.4th at p. 1046; cf. *United States v. Ewing* (9th Cir. 1971) 446 F.2d 60 [*Wade* does not require active participation by counsel at lineup].)

Appellant does not attempt to identify any unfairness in the procedure used or the identifications obtained at his pretrial lineup. Indeed, it is impossible to see how he could do so given that the lineup was videotaped and attorneys West and Stephens witnessed the lineup, reported their observations to his trial counsel, testified at the hearing before the magistrate, and failed to identify anything impermissibly suggestive about it. Instead, he focuses entirely on the statement in *Wade* that an accused "has the right to the presence of *his* counsel" at critical stages in criminal proceedings to argue that only his *own* counsel could satisfy the *Wade/Gilbert* rule. (See AOB 185-186, citing *United States v. Wade, supra*, 388 U.S. at p. 227; italics added.) He is mistaken. *Wade* itself recognized that the use of substitute counsel may be appropriate. (*Id.* at p. 237, fn. 27.) Many courts, including this Court, have accepted the use of substitute counsel where the purposes of *Wade* are satisfied—including in some situations where counsel had not yet been appointed for counsel and others where substitute counsel informed the defendant he was not his lawyer. (See, e.g., *People v. Carpenter, supra*, 15 Cal.4th at p. 368; *United States v. Smallwood* (D.C. Cir. 1972) 473 F.2d 98, 100 [substitute counsel appeared in lieu of appointed attorney, who was ill]; *State v. Haskins* (Wash. App. 1982)

654 P.2d 1208, 1209-1210 [substitute private counsel who did not consider himself counsel for or consult with defendant appeared in lieu of appointed public defender]; *People v. Drinkwater* (Colo. App. 1980) 622 P.2d 582, 583-584 [public defender appeared in lieu of defendant's own counsel]; *State v. Cash* (S.C. 1971) 185 S.E.2d 525, 527 [police obtained different attorney than defendant's retained counsel]; *Cook v. State* (Tenn. Crim. App. 1971) 466 S.W.2d 530, 533 [codefendant's attorney, who "observed everything that went on," satisfied *Wade* even though he told defendant he did not represent him]; *State v. Griffin* (Kan. 1970) 469 P.2d 417, 420 [where no attorney had been appointed to represent defendant, *Wade* was satisfied where private attorney "was present at the lineup on behalf of defendant and, even though he had not been appointed by any court to represent defendant, his knowledgeable observations as a lawyer were available to the defendant and to his [subsequent] court-appointed counsel"].)

Here, West's and Stephen's presence fulfilled the purpose of the *Wade/Gilbert* rule. Semantics aside about whether they "represented" appellant, they obviously attended the lineup solely on his behalf. Their own words reveal as much. (See CT 642, 649 [West: "my role is that I am to be a witness to the lineup, that I can speak with the person, explain to them what is going on" and "observe what happens so that if there is a question about it later I would be able to testify"; CT 682 [Stephens: role is "to see that the lineup was conducted in a fair fashion"].) Appellant asserts that West and Stephens did not take an "active advisory role" at the lineup. (AOB 191.) While we question this assessment given that they met privately with appellant twice, told him he could participate in the lineup under protest, observed post-identification procedures, and attempted to interview witnesses, the level of their participation is irrelevant because it was not their role to be active participants. (*United States v. Ewing, supra*, 446 F.2d 60.) To the contrary, counsel's role is simply

that of an observer and witness. (*People v. Williams, supra*, 3 Cal.3d at p. 860 [dissenting opinion of Mosk, J.].) Appellant also complains that West and Stephens were unfamiliar with prior witness descriptions by which to "test the suggestiveness of the lineup. . . ." (AOB 195.) Again, that is not the role of lineup counsel. No case has ever suggested that a defendant can delay a lineup until after his attorney receives pretrial discovery and sifts through it to master the witness descriptions. Appointed trial counsel had ample time for any comparisons he wanted to make after the lineup utilizing the observations of lineup counsel as well as the videotape of the lineup itself. Indeed, appellant does not claim the lineup was suggestive.

The substance of the *Wade/Gilbert* rule was satisfied in every respect by the presence of two attorneys on appellant's behalf. Appellant merely attempts to elevate form over substance by arguing the attorneys were not his "own." The trial court committed no error in denying appellant's motion to suppress the results of the lineup.[31]

---

31. Because we believe appellant's contention is patently meritless, we find it unnecessary to dwell on the question whether the eyewitness identifications were purged of any taint caused by an improper live lineup. (See *Gilbert v. California, supra,* 388 U.S. 263.) Suffice it to say that seven witnesses made identifications from photographic lineups before attending the live lineup, and one witness who did not attend the live lineup later made an identification from a photo lineup. Only three of the 11 eyewitnesses made their first identification at the live lineup. All 11 confirmed their identifications in court. Even if there were some impropriety that appellant could show from the live lineup, the fact that the lineup itself was videotaped and the circumstances of the various identifications would convincingly defeat any claim of prejudice. (See Statement of Facts, *ante*, at pp. 18-21 and record citations therein; see also *People v. Carpenter*, *supra*, 15 Cal.4th at p. 369 [tape recording lineup minimized any harm from counsel's absence at post-lineup witness interviews].)

VI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REMOVING A JUROR DURING TRIAL WHERE THE JUROR ACKNOWLEDGED THAT HIS ANGER FROM BEING ACCUSED OF DRINKING WOULD IMPAIR HIS ABILITY TO FOCUS ON THE TRIAL AND WHERE THE COURT'S SUBSEQUENT OBSERVATIONS SHOWED THAT TO BE THE CASE

Appellant contends that the trial court erred by excusing a juror who said he was so shaken by an allegation of drinking made against him that he felt he "wouldn't be able to serve" (RT 3410) or "focus" on the case (RT 3414). (See AOB 196-217.) The trial court did not abuse its discretion by excusing this juror.

Juror A was among the jurors sworn to try the case on February 18, 1992. (CT 3225.) On February 24, another juror reported to the bailiff that Juror A smelled of alcohol. (RT 3118.) The reporting juror was examined in camera at the start of proceedings the next day. (RT 3118.) She stated that she sat next to Juror A and that he smelled of alcohol at every court session. (RT 3119.) The court examined Juror A in camera at the end of that day's session. (RT 3265.) Using neutral language, the court informed Juror A, "It has been brought to my attention that one or more members of the jury may have consumed alcoholic beverages during the course of one or more of the court days," and asked Juror A, "Have you or to your knowledge have any other members of the jury had anything alcoholic to drink during the course of the court day itself?" (RT 3265-3266.) Juror A replied, "No way," and was told to return the next day. (RT 3266-3267.) After Juror A left, the court commented that he "appeared cold stone sober" and seemed shocked by the allegation. (RT 3267-3269.) The court also stated it had observed Juror A closely during the day's session, noticed no odor while standing close to him,

found him attentive, and had no basis to believe he was unable to perform his duties. (RT 3268-3269.) The court stated that "[a]s far as I'm concerned, this is the end of the matter." (RT 3269.) Neither counsel disagreed. (RT 3269-3270.)

The next morning, Juror A approached the bailiff and indicated he was upset and embarrassed by the allegation. (RT 3407.) The court spoke to Juror A again in camera on February 27 in an attempt to allay the juror's concerns. (RT 3408.) The court told Juror A, "These things happen all the time, and you were not the only juror to whom we spoke." (RT 3408.) The court continued that it had "every confidence you will continue to follow the oath that you took, and that you will be able to render a just verdict on this case, based solely on the evidence presented in accordance with the court's instructions." (RT 3409.) After repeatedly apologizing for "any confusion or embarrassment that I may have caused you," the court directed Juror A to reconvene in open court. (RT 3408-3409.)

To these comments, Juror A responded, "Do you mean I don't have a say?" (RT 3409.) When the court asked what Juror A would like to say, he responded:

> When I left your chambers Tuesday, I was furious, I was furious. Someone made an allegation against me, I don't know who it was. The thing I was most concerned with was the fact that in the – in the past, when it came to serving any type of jury trial, I felt that if the defendant did not want to get up on the stand, and look his accuser in the eye and say, "I did not do it," I was prejudiced against him. That automatically made me think, if he did not want to get up here and do it, I automatically thought it was, you know, I would be prejudiced against the case.
>
> And here, something had occurred, I don't know when, where, how, but somebody, in my mind, made an accusation against me. And I cannot look that same person in the eye and say, "Hey, wait a minute, this, you know, this did not occur and I want to know why you're making these allegations against me." And it's really kind of shaken my faith as far as, I guess,

> proceedings down here in this building.
>
> I have been called for jury trial in the past 15 years, I guess. And this is the first time that I have felt that I wouldn't be able to serve—well, objectively, without any, you know, prejudices or anything else, this is one of the first cases. And to be honest with you, I really am kind of shaken by this.

(RT 3409-3410.)

The court asked Juror A if he felt he was unable to continue to serve. Juror A replied:

> I don't know if someone in that jury room upstairs made these comments—but I don't know if it was, you know, a member of counsel. I don't know if it was a member of the clerk, or bailiffs. I don't know who made this comment, but I am—I am shaken by this, I really am.

(RT 3410.) The court again sought to allay Juror A's concerns, and reminded him of his duty "to focus in on your oath" and ultimately to deliberate with the other jurors. (RT 3411.) Juror A responded:

> That's the entire point. I have to sit with 11 other people and one person that I don't know or know of, made these allegations. And that's the tough point about it.

(RT 3411.) Juror A continued:

> Maybe one of these 11 people up there that I am serving with has some kind of comment or allegation against me personally, I know did not occur. And I just, I could not—boy.

(RT 3412.)

The court followed these statements with this question: "Well, let me ask you this, do you think this is going to cause you to perhaps not, you know, not decide this case based just on the evidence?" (RT 3412.) Juror A replied, "It may possibly be so." (RT 3412.)

Defense counsel then made his own comments about jurors not getting along and asked Juror A whether he would be able to decide the case according

to the facts and the law. (RT 3413.) Juror A replied, "Regarding Mr. Lynch's trial, yes, I could. But as stated earlier, there's some sort of a thing going on here now." (RT 3413.) The court asked whether Juror A could put the episode behind him and "focus in on your duty as a juror, or is it going to prevent you from doing so?" (RT 3414.) Juror A responded, "You mentioned the 'focus' part, and that is this thing I don't think I would be able to do." (RT 3414.) The court asked if Juror A was "saying this experience is somehow going to be so—be of such a nature it will prevent you from paying attention to the evidence? (RT 3414.) Juror A simply replied, "Once again, the word 'focus.'" (RT 3414.)

The trial court then made several additional inquiries whether appellant would be able to decide the case based solely upon the evidence. Juror A stated:

> I'd make it my utmost to try, utmost attempt, but I would want both counsel to know that I do harbor a lot of resentment right now at this time, not at either counsel. I just want to let it be known that I, in these proceedings, I do harbor a lot of resentment.

(RT 3414.) He also stated he "would make the utmost attempt" not to let resentment affect his deliberations, but not knowing who made the accusation "did not sit well" and left him "rather shaken." (RT 3415.) Juror A referred to his experience in labor negotiations, noting, "I know the rules, they were very clear back then. And that's what is most upsetting to me, that someone accused me of violating those rules." (RT 3416.) Juror A continued, "I will still try to be as fair and subjective as possible. But I just want both counsel to know that I just feel a bit tainted okay." (RT 3417.) He also told the court he would give the trial "one hundred percent." (RT 3417.)

Appellant's lead counsel then interjected, "[Y]ou were selected because all of us felt you would be fair and impartial. I don't think anything that has

occurred here has changed our opinion, and I speak for myself and [cocounsel] . . . [¶] . . . But from my standpoint, if this were a motion to have you withdraw as a juror, I would oppose it. Because I see no change in your fairness and impartiality as far as I am concerned." (RT 3418.) This prompted the prosecutor to state in kind, "[Y]ou were chosen because we like you. And at least, from my point of view, I don't see anything that has happened here which would disqualify you. [¶] . . . And if you can assure us that both sides are getting a fair trial based solely on the evidence, I am totally delighted to have you remain." (RT 3418-3419.) Juror A made some final comments, stating twice that he felt his integrity "was compromised greatly, and that's the only thing I've got" (RT 3419), and again saying he would "give it one hundred percent" to give both sides a fair trial notwithstanding the incident. (RT 3420.)

Juror A was then directed to assemble with the other jurors, and the parties discussed his continued service. Everyone acknowledged that, despite the plaudits they had given Juror A, they were concerned about his continued service. The prosecutor stated, "We can talk all the platitudes we want with him here, but I am getting a little concerned." (RT 3420-3421.) The court responded, "It concerns the court as well." (RT 3421.) The prosecutor continued, "I mean, he said something along the line that if Lynch doesn't take the stand, he will be prejudiced." (RT 3421.) Appellant's counsel immediately agreed, "That scared the daylights out of me." (RT 3421.) The prosecutor added, "I don't know how to take that attitude, plus the fact that he might not focus. I am very close to asking him to be replaced, seriously." (RT 3421.) The prosecutor stated that he wanted to review a transcript of the hearing before deciding whether to issue a challenge. (RT 3421-3422.) The court advised defense counsel to do the same, stating, "[N]otwithstanding the platitudes that we all put on the record here to reassure Juror [A], there were other comments he made that would perhaps be of concern to a defendant who is not going to

testify." (RT 3422.) Defense counsel replied, "I think that's valid, your honor. I want to consider it." (RT 3422.) Defense counsel noted that Juror A was one of three Black jurors, a factor he had to take into consideration, concluding, "So, I am not in a position to make a motion or give an answer at this time, either." (RT 3422.) The court concluded the hearing by stating it would not remove Juror A absent motion or stipulation. (RT 3422.)

At the start of court proceedings on March 3—two court days after the final hearing with Juror A (CT 3233, 3235, 3243)—the prosecutor moved to dismiss the juror. (RT 3724-3727.) The prosecutor recounted Juror A's statements at the hearing and stated that he had observed the juror with his head down and eyes closed for six minutes later that same afternoon during defense counsel's cross-examination of a witness. (RT 3726-3727.) Defense counsel stated that he had not observed the juror, but agreed the prosecutor had immediately brought the matter to his attention. (RT 3727.) Defense counsel also volunteered that Juror A had seen appellant in shackles on one occasion. (RT 3727.) Defense counsel stated he was "very personally concerned" with Juror A's comments, but objected to his removal at the wishes of appellant and because he thought Juror A, as a Black individual, might be favorable on the issue of cross-racial identification. (RT 3727-3729.)

The trial court granted the prosecutor's motion, ruling as follows:

> Well, again, the juror was shaken and furious at this inquiry concerning possible misconduct. He said that he possibly suspected another juror of being the source of this, and indicated some doubt as to whether or not he'd be able to trust a person in that situation.
>
> He did, as the district attorney pointed out, say that he might be unable to decide the case solely on the evidence. He does not think that he would be able to focus solely on the evidence in reaching a verdict. He harbors lots of resentment, although he did say he'd try to be as fair as possible to this.
>
> And to this record must be added the court's observation of his demeanor both in and out of chambers. While in

> chambers, he appeared very upset and visibly shaken and angry.
>
> It had been my hope and my intention at the time of the second session with him in chambers simply to reassure him that no one thought him guilty of misconduct. Frankly, I hoped it was going to be a monologue, but he would not let go. I think his words were something to the effect: "Don't I get to say anything?" When I, in effect, asked him to return to the jury room, and at that point, we were off and running.
>
> As I feared, this incident has taken on a life of its own. During sessions in court following the second in camera with him, he, at times, did not appear to be paying attention. Rather, he would sit with his arms folded and stare straight ahead not looking at the witness who was testifying or at counsel as they asked questions. At other times, he appeared to have his head down. In fairness, most of the time during the presentation of evidence he did seem to act appropriately.
>
> In conclusion, I'm satisfied that cause exists to excuse [Juror A] in that his state of mind is such that I have grave concerns and doubts that he will be able to act with entire impartiality and without prejudice to the substantial rights of either party.
>
> Accordingly, the challenge is allowed.

(RT 3729-3730.) The trial court did not abuse its discretion by excusing Juror A.

Penal Code section 1089 permits the discharge of a juror who is unable to perform his duty. The section provides, in relevant part:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.[32]

---

32. Appellant correctly notes that section 1089 has been amended since the time of his trial. (AOB 203, fn. 86.) The amendment to the quoted section served to make the statute gender neutral but did not otherwise change the

A trial court "has broad discretion to investigate and remove a juror in the midst of trial where it finds that, for any reason, the juror is no longer able or qualified to serve." (*People v. Millwee* (1998) 18 Cal.4th 96, 142, fn. 19; see also *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19 [rejecting defendant's reliance on older cases that characterized trial court's discretion as "limited"].) The trial court's determination to discharge a juror and order an alternate to serve is reviewed for an abuse of discretion. (*People v. Marshall* (1996) 13 Cal.4th 799, 843.) The trial court's decision will be upheld if supported by "any substantial evidence." (*Ibid.*) The Court has also stated that the juror's inability to perform must "appear in the record as a demonstrable reality." (*Ibid.*; internal quotation marks omitted; see also *People v. Samuels* (2005) 36 Cal.4th 96, 132-133; *People v. Johnson* (1993) 6 Cal.4th 1, 21; *People v. Ashmus* (1991) 54 Cal.3d 932, 987.)[33] This Court has upheld a trial court's decision to remove a juror where the juror has admitted he would be distracted

---

substance of the provision. We quote the current text.

33. To our knowledge, the Court has never explicated the phrase "demonstrable reality" in this context. To the extent that it has been defined, it appears to connote the opposite of speculation. (See *People v. Gates* (1987) 43 Cal.3d 1168, 1199.) We assume it is simply an alternative way of describing the "substantial evidence" test, since both tests are tethered to the record. The phrase "demonstrable reality" first appeared in *People v. Compton* (1971) 6 Cal.3d 55, 60, where it was used in summarizing the prior ruling in *People v. Hamilton* (1963) 60 Cal.2d 105, 124-127. *Hamilton*, however, never used the phrase "demonstrable reality" in finding error under Penal Code section 1089. Rather, in that case, the Court, after reviewing the trial record, concluded that "[t]here was no basis at all for the trial court's determination" that the juror was unable to perform her duties. (*Id.* at p. 126.) *Hamilton's* formulation echoes the substantial evidence test. Presumably, if there had been a "basis at all" for the trial court's ruling in *Hamilton* it would have been upheld. To the extent appellant urges that the phrase "demonstrable reality" imposes some heightened level of scrutiny beyond "substantial evidence" (see AOB 204, 207), we respectfully request the Court to clarify that the two phrases are alternative ways of stating the same thing.

and unable to focus on the trial based on an extraneous incident. (See, e.g., *People v. Marshall, supra*, 13 Cal.3d at pp. 845-846 [juror admitted he would not be able to focus on the trial if the district attorney did not intercede to dismiss a speeding ticket that – if upheld – would cost him his job]; *People v. Lucas* (1995) 12 Cal.4th 415, 489 [juror's demeanor indicated her ability to deliberate would be substantially impaired if the length of the trial caused her to miss a pre-planned vacation].) The trial court need not credit a juror's assurances that the extraneous circumstance will not affect his or her ability to render an impartial verdict where the record discloses indications to the contrary. (See, e.g., *People v. Marshall, supra*, at p. 845; *People v. Lucas, supra*, at pp. 487-488.)

The trial court's decision to remove Juror A was not abuse of discretion. Juror A repeatedly acknowledged that the accusation of drinking had so angered him that he did not think he would be able to focus on his duty as a juror (RT 3414) and might not be able to decide the case based solely on the evidence. (RT 3412.) He indicated that he would be wondering whether one of the other jurors had made an unfounded allegation against him (RT 3412), and that it "did not sit well" that he would be unable to find out. (RT 3415.) Although the trial court was tentatively willing to credit the juror's statements that he could continue to abide by his oath notwithstanding his repeated protestations of anger and frustration, subsequent events caused the court to change its mind. That same day, the district attorney noticed the juror close his eyes and bow his head for a continuous six-minute period. (RT 3726-3727.) More importantly, by the time the court returned to the matter two court days later, it noted that "this incident has taken on a life of its own." (RT 3730.) While the juror generally acted appropriately, on other occasions the court observed that he "did not appear to be paying attention. Rather, he would sit with his arms folded and stare straight ahead not looking at the witness . . . or

at counsel," or would "have his head down." (RT 3730.) When coupled with the anger Juror A had displayed in chambers and his acknowledgment that he would be unable to focus on the case, the court's subsequent observations that the juror had not been paying attention provided good cause to excuse him. There was ample evidence in the record to support the court's decision.

Appellant attempts to compartmentalize the court's reasons for removing Juror A into two separate reasons—"emotional upset" and "inattentiveness." (AOB 205.) This tactic is unconvincing. The trial court did not remove the juror merely because he was upset at the allegation of drinking or merely because he was periodically inattentive at trial. Rather, the court relied on the combination of the juror's demeanor and statements in camera plus his subsequent inattentiveness during the proceedings. Juror A himself acknowledged that he was so upset and resentful at the allegation that he did not think he would be able to focus on the trial. This is precisely what the court observed to be the case in the several days following the second in camera hearing. Appellant's reliance on an (unpublished) court of appeal opinion involving a juror who was "agitated" by the trial court's questioning (AOB 205) or another (published) lower court case regarding a "sleeping" juror (AOB 208) is entirely beside the point since neither case involved the combination of circumstances here.

Appellant also repeatedly attempts to inject an alleged improper racial motivation on the part of the prosecutor into this issue. (AOB 209-210, 213.) This baseless speculation is improper. Appellant made no claim whatsoever at trial that the prosecutor sought to remove Juror A "because of his race" (AOB 210) and therefore may not raise this claim for the first time on appeal. (See, e.g., *People v. Fudge* (1994) 7 Cal.4th 1075, 1097; *People v. Morris* (2003) 107 Cal.App.4th 402, 409.)

Finally, appellant contends that any error in the removal of Juror A is

reversible per se. (AOB 211-217.) He is mistaken. This Court has long required a showing of prejudice from the erroneous removal of a seated juror in violation of Penal Code section 1089. (*People v. Abbott* (1956) 47 Cal.2d 362, 371-372; *People v. Howard* (1931) 211 Cal. 322, 324-325; accord, *United States v. Khoury* (9th Cir. 1995) 62 F.3d 1138, 1140; *Latham v. State* (Ark. 1994) 883 S.W.2d 461, 464.)[34] Typically, the substitution of an alternate juror dispels any inference of prejudice, for a defendant "is not entitled to be tried by a jury composed of any particular individuals." (*People v. Abbott, supra*, 47 Cal.2d at p. 372, citing *People v. Howard, supra*, 211 Cal. 324-325; see also *United States v. Khoury, supra*, 62 F.3d at p. 1140 [defendant "failed to address how he possibly could have been prejudiced by having the alternate juror, whom he approved, seated"].) Moreover, prejudice should be assessed under the state "miscarriage of justice" standard set forth in article 1, section 13 of the California Constitution. We are unaware of any United States Supreme Court authority suggesting it is a violation of the federal constitution to substitute an alternate juror in violation of a state statutory provision. The federal circuit courts have never suggested that similar violations of federal statutory law rise to the level of constitutional error. (See, e.g., *United States v. Khoury, supra*, 62 F.3d at p. 1140; *United States v. Ellenbogen* (2d Cir. 1966) 365 F.2d 982,

---

34. Appellant attempts to analogize to the automatic reversal rules for cases of *Witherspoon* or *Batson* error. (AOB 211-212.) Both situations are far different than the erroneous removal of a juror under Penal Code section 1089. The reversal rule of *Witherspoon v. Illinois, supra*, 391 U.S. 510, is designed to prevent the formation of a jury that is deliberately tipped toward death. (*Gray v. Mississippi, supra*, 481 U.S. at pp. 666-667.) The reversal rule of *Batson v. Kentucky* (1986) 476 U.S. 79 is rooted in the longstanding principle that a conviction may not stand where it is obtained by a jury chosen through intentional discrimination. (See *id.* at p. 100, and cases cited therein.) Both types of error may be seen as defects that strike at the heart of the guarantee of a fair trial. Error under section 1089 does not remotely approach this magnitude.

989; *United States v. Zambito* (4th Cir. 1963) 315 F.2d 266, 269.) Typically, this Court has found a prejudicial violation of section 1089 only where the record has disclosed that the improperly removed juror was a favorable defense juror. (See, e.g., *People v. Cleveland* (2001) 25 Cal.4th 466, 486 [juror who was improperly excused during deliberations believed there was not any evidence to support conviction]; *People v. Hamilton, supra*, 60 Cal.2d at pp. 122-124, 128 [juror who was improperly excused during penalty phase indicated she was considering "the probability of a life sentence"].)[35]

Here, Juror A was removed early in the trial and replaced by a qualified alternate. He never expressed any opinion indicating that he was favorably disposed to the defense case such that his removal could be taken as evidence that the prosecutor was trying to "load" the jury. (See *People v. Hamilton, supra*, 60 Cal.2d at p. 128.) Accordingly, his removal and replacement with a qualified alternate was not prejudicial. (See *People v. Howard, supra*, 211 Cal. at pp. 324-325.) Appellant suggests that the juror was "potentially favorable" to the defense because of his race. (AOB 216.) This rank speculation cannot substitute for a showing of prejudice. Appellant has failed to demonstrate either that the removal of Juror A was an abuse of discretion or that it was prejudicial.

---

35. Appellant cites *People v. Hernandez* (2003) 30 Cal.4th 1, 9, as a case upholding reversal of an improperly excused juror where there was no indication the juror was leaning for one side or the other. In fact, the excused juror "seemed inclined to give serious consideration to the testimony of the defense witness" and indicated she had been bothered by the tone and demeanor of the prosecutor's cross-examination. (*Id.* at p. 10.) Moreover, the question reviewed in *Hernandez* was not whether the removal was prejudicial, but whether retrial was barred by double jeopardy. (*Id.* at pp. 1-11.) *Hernandez,* therefore, does not support appellant's position that any error of this type is reversible per se.

VII.

APPELLANT'S ABSENCE FROM VARIOUS TRIAL PROCEEDINGS, IF ERROR, WAS HARMLESS

Citing thirteen instances when he was absent from various conferences and in-chambers discussions, appellant contends that his federal and state constitutional and state statutory rights to be present at trial were violated. (AOB 218-238.) Appellant demonstrates neither error nor prejudice.

The Court has recently summarized the applicable principles to a claim of "presence error" as follows:

> A criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution. . . . A defendant, however, does not have a right to be present at every hearing held in the course of a trial. A defendant's presence is required if it bears a reasonable and substantial relation to his full opportunity to defend against the charges. The standard under [Penal Code] sections 997 and 1043 is similar. [T]he accused is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him . . . .

(*People v. Davis* (2005) 36 Cal.4th 510, 530; internal citations and quotation marks omitted; see also *People v. Lucero* (2000) 23 Cal.4th 692, 716-717; *People v. Waidla* (2000) 22 Cal.4th 690, 742; *People v. Ervin* (2000) 22 Cal.4th 48, 74.) Contrary to appellant's claim that "presence error" is reversible per se (AOB 234-236) a defendant "has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial." (*People v. Ervin*, *supra*, 22 Cal.4th at p. 78; *People v. Bradford*, *supra*, 15 Cal.4th 1229, 1357.) Federal constitutional presence error is evaluated under the harmless-beyond-a-reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23. (*People v. Davis*, *supra*, 36 Cal.4th at p. 532; see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 307 [listing "denial of a defendant's right to

be present at trial" among types of error which may be assessed for harmlessness]; *Campbell v. Rice* (9th Cir. 2005) 408 F.3d 1166, 1172 (en banc) ["any error resulting from [defendant's] exclusion from the in-chambers meeting was not a structural error, but was, instead, trial error subject to harmless error review"].)[36] State statutory error under Penal Code sections 977 and 1043 that does not rise to a federal constitutional violation is evaluated under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, requiring the defendant to show a reasonable probability he would have received a more favorable trial outcome had he been present at the proceedings in question. (*People v. Davis, supra,* 36 Cal.4th at pp. 532-533.) Speculation is inadequate to show prejudice under either standard. (*People v. Waidla, supra,* 22 Cal.4th at p. 742; see also *Campbell v. Rice, supra,* 408 F.3d at p. 1169, fn.1.)

Turning to the thirteen proceedings identified by appellant, none resulted in a prejudicial violation of his right to be present. The first three concerned brief sessions during which counsel entered stipulations as to jurors who would be excused based solely on review of their written questionnaires. (RT 157-163, 824-826, 1997-1998.) Four concerned the in camera hearings regarding the allegation of drinking against Juror A, his response, and his eventual removal. (RT 3118, 3165, 3407, 3724.) The remaining proceedings involved two discussions regarding media disruptions (RT 2971, 3615-3616), a discussion of guilt phase exhibits and instructions and argument on appellant's motion for acquittal on several counts (RT 3903-3927), a discussion of a jury question received during guilt deliberations (RT 4275), an unreported

---

36. Appellant cites to the Ninth Circuit panel decision in *Campbell v. Rice* (9th Cir. 2002) 302 F.3d 892, for the proposition that a violation of a defendant's right to be present is reversible per se. (AOB 235.) After appellant filed his opening brief, the Ninth Circuit granted en banc review and, as indicated, concluded that presence error is subject to harmless error review. (*Campbell v. Rice, supra,* 408 F.3d at p. 1172.)

discussion in chambers at which there is no evidence anything of substance was discussed or ruled upon (CT 3387), and a discussion of penalty phase exhibits and instructions. (RT 4596-4607).

A threshold question is whether appellant waived his presence at any or all of these proceedings. As appellant concedes, his trial counsel orally waived his presence at each of the proceedings. (AOB 220.) In *People v. Davis*, *supra*, 36 Cal.4th 510, this Court noted that some federal cases have held that defense counsel may waive a defendant's presence if there is evidence the defendant consented to the waiver and understood the right he was waiving and the consequences of doing so. (*Id.* at p. 532, citing *United States v. Nichols* (2d Cir. 1995) 56 F.3d 403, 416-417; *Carter v. Sowders* (6th Cir. 1993) 5 F.3d 975, 981-982; *Larson v. Tansy* (10th Cir. 1990) 911 F.2d 392, 396-397; but see *United States v. Gordon* (D.C. Cir. 1987) 829 F.2d 119, 125-126 [defendant must make personal waiver]; *Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 274 [counsel's waiver without defendant's knowledge was ineffective].)[37] The Court did not squarely decide in *Davis* whether counsel may waive a defendant's presence under state law because the record was inadequate to show the defendant consented to the waiver or understood what he was waiving. (*People v. Davis*, *supra*, 36 Cal.4th at p. 532.)

Here, the record supports an inference that appellant made a "voluntary, knowing and intelligent" waiver of his right to be present at several of the hearings in question. (*People v. Davis*, *supra*, 36 Cal.4th at p. 531, quoting

---

37. Appellant cites *LaCrosse v. Kernan* (9th Cir. 2000) 211 F.3d 468, 474 for the proposition that a personal waiver is required by the defendant. (AOB 227.) That opinion was withdrawn on September 8, 2000, and eventually replaced by *LaCrosse v. Kernan* (9th Cir. 2001) 244 F.3d 702, which does not support the principle appellant advances.

Johnson v. Zerbst (1938) 304 U.S. 458, 464).[38] However, as to most of the proceedings, the oral waiver by counsel is indistinguishable from the waiver found insufficient in *People v. Davis, supra*, 36 Cal.4th at p. 532. Accordingly, we will proceed to address the merits of whether there was error, and if so, whether it was prejudicial.

At all of the proceedings with the possible exception of those concerning Juror A, this Court's precedent establishes that appellant's absence bore "no reasonable, substantial relation to his opportunity to defend the charges against him," and, therefore, did not constitute error under either state or federal law. These include the jury questionnaire sessions (see *People v. Ervin, supra*, 22 Cal.4th at pp. 72, 74), the discussions about the media, instructions, and the admission of exhibits (see, e.g., *People v. Waidla, supra*, 22 Cal.4th at p. 742; *People v. Hardy* (1992) 2 Cal.4th 86, 177-178), and the discussion regarding the jury note. (*People v. Wharton* (1991) 53 Cal.3d 522, 602-603.) Even assuming appellant's state or federal right to be present was implicated at one or more of these proceedings, his absence could not possibly have been prejudicial.[39] Appellant does not even attempt to make a specific claim of prejudice regarding any of these hearings, merely making the conclusory (and, therefore, insufficient) assertion that his "presence would have

---

38. See RT 157 (second jury questionnaire session, at which court stated appellant "agreed and counsel concurred that he need not be present at this particular session"); RT 3903 (conference reviewing admissibility of evidence, at which court stated "it was Mr. Lynch's wish not to be brought in for this particular session where the attorneys have been reviewing the documentary . . . evidence, and so he was not brought in").

39. We note that all of these proceedings were brief. Appellant misleadingly refers to a session on March 4, 1992, at which evidence and instructions were discussed, as an "all day hearing." (AOB 219.) While this was the only court business conducted that day, both the morning and afternoon sessions were quite brief, consuming a total of 25 pages of reporter's transcript. (RT 3903-3927.)

been a benefit to himself or to his counsel." (AOB 226-227.) Nor does he argue that the trial court made any substantive error at any of these proceedings that his presence might have helped to prevent. Under any standard, appellant's absence from these hearings was not prejudicial.

The four hearings regarding Juror A perhaps present a closer question of whether appellant had a right to be present, but not on whether his absence was prejudicial. These are the only proceedings for which appellant attempts to make a specific showing of prejudice, but his attempt is unconvincing. Appellant hypothecates that, because both appellant and the juror are of the same race, his presence "might very well have helped [Juror A] feel less threatened by what he later perceived to be an accusation which he took personally." (AOB 224.) To argue that Juror A would have somehow managed to regain his focus and would have given different responses to the court simply had someone of his own race—namely, appellant—been present seems to us to be a resort to stereotype. Suffice it to say this assertion is entirely speculative and untethered to anything in the record.

Appellant also states that had he been present at the first hearing at which the report against Juror A was made, he himself "could have been watching the juror" the rest of the day for any signs of intoxication or inattention. (AOB 224.) Apart from questioning the wisdom of ever having a defendant watch a specific juror during trial, we observe that after the first hearing the court and counsel reported no significant problems from their own day-long observations of Juror A. There was nothing for appellant to add at this point. It was only later—after Juror A professed doubt in his own ability to focus on the trial—that the court observed that the juror had indeed become inattentive. The record establishes that appellant was fully apprised of the situation at that point and asked his counsel to oppose removal of Juror A. (RT 3727.)

Finally, appellant speculates that had he been present at the hearing at which Juror A was replaced, he "would have arguably had a greater influence on his attorney when the time came to make the case for retaining" the juror. (AOB 225.) The record shows that appellant *did* advise his attorney how he wanted the issue handled and that counsel expressly invoked appellant's instructions in opposing removal of the juror. (RT 3727-3728.) Counsel and appellant had discussed the pros and cons of retaining Juror A (see RT 3727) and jointly came to a conclusion that he should be kept. It is impossible to see how appellant would have had any greater influence on counsel had he been present, since counsel did exactly what appellant wanted. (See, e.g., *People v. Waidla*, *supra*, 22 Cal.4th at pp. 742-743 [rejecting argument that defendant was prejudiced by absence from instructions conference because he could have "nudged" counsel to request particular instruction had he been present].) In short, the record shows that counsel conferred with appellant regarding the situation with Juror A and expressly made appellant's views known to the court, and therefore conclusively refutes any suggestion that appellant was prejudiced by his absence from any of the four conferences concerning the juror.[40] Under any standard, appellant's absence from these four hearings—as well as the others discussed above—was harmless.

---

40. An additional barrier to a showing of prejudice which appellant makes no effort to overcome is that Juror A was replaced by a qualified alternate juror, as explained above in our Argument VI.

VIII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING UNDER THE SPONTANEOUS STATEMENTS HEARSAY EXCEPTION STATEMENTS ANNA CONSTANTIN MADE TO HER DAUGHTER SHORTLY AFTER SHE WAS ATTACKED

Appellant contends the trial court committed state and federal error by allowing Vickie Constantin to testify about the statements her mother, Anna, made to her at home and at the hospital shortly after she was attacked by appellant. (AOB 239-256.) The court did not err. These statements were admissible under the hearsay exception for spontaneous statements under Evidence Code section 1240, and their admission did not violate the Confrontation Clause of the federal Constitution as interpreted by *Crawford v. Washington* (2004) 541 U.S. 36.

As set forth in greater detail in our statement of facts above, Anna Constantin, speaking in her native Russian, told her daughter Vickie what had happened to her when Vickie found her in a badly beaten condition on the floor near the back door of their home. In response to Vickie's question of what had happened to her, Mrs. Constantin was able to describe what she had been doing immediately before the attack and to describe the attack itself including her assailant's threats to kill her. She said she had been unable to see her attacker's face, but that his voice sounded like a "chorsum," Russian for a Black person. (See Respondent's Statement of Facts, *ante*, at p. 9.) Later that same day at the hospital, Vickie asked her mother for more information about what had happened. Mrs. Constantin added some details about hearing the man ransack the house upstairs and being able eventually to untie herself. (*Ante* at pp. 9-10.)

Considered simply as a question whether *Anna Constantin's* statements meet the hearsay exception for spontaneous statements (Evid. Code, § 1240), this is a straightforward issue. However, appellant focuses almost entirely on

whether *Vickie Constantin* was a reliable reporter of her mother's statement, which is a different question. Specifically, he asserts (incorrectly) that Vickie did not mention in her first report of the statements to the police that her mother said the attacker sounded Black. (AOB 242-243.) Appellant suggests that Vickie must have added this detail "weeks later," perhaps after she had additional conversations with her mother or learned more about the case as time passed. (AOB 243-244.) He goes on to argue that Vickie was such an unreliable reporter that her testimony should not have been admitted at all. (AOB 247-250.) It is therefore necessary to explain in some detail what the record shows about how and when Vickie heard and related the statements made by her mother in order to demonstrate that appellant's argument is devoid of merit. There is nothing so inherently untrustworthy in Vickie's testimony that the trial court should have taken the extraordinary step of precluding it altogether.

The first indications in the record that Anna Constantin made any statement to her daughter appear in the police reports attached to an affidavit in support of a warrant for appellant's arrest. (CT 22.) A police report written by a Detective Meenderink on August 17, 1987—which appellant fails to mention in his brief—indicates that the detective was present in the hospital emergency room with Anna and Vickie Constantin at about 6:30 p.m. on August 13, the day of the attack. (CT 109.) The detective heard Anna speak to Vickie in Russian and reported the following:

> Through her daughter, the victim explained she never got to see the suspect at all. She did see his shoes ho[w]ever, which she said were white tennis shoes. She went on to say that though she could not see her attacker, *she knew he was black, because of his voice.*

(CT 109; italics added.) Detective Meenderink's report went on to note other details Mrs. Constantin related to her daughter, including her estimate that placed the attack at about 4:00 p.m., her statement that her assailant tied her

hands behind her with a cord, and her statement that she could hear the suspect ransacking her house. (CT 109-110.) Appellant entirely overlooks Detective Mendeerink's report showing that Anna Constantin told her daughter that her attacker sounded Black on the day of the offense.

Another report attached to the warrant application consists of a five-page transcription of a tape-recorded interview Vickie Constantin gave to Sergeant Kitchen shortly after 11:00 a.m. on August 14, the day after the attack upon her mother. (CT 104-109.) In this statement, Vickie Constantin gave a short narrative—not in response to any question—in which she described finding her mother bleeding on the floor, calling 9-1-1 at her mother's direction, then asking her mother what had happened. (CT 104-105.) Vickie stated:

> And she said that she was beaten. And I said, how? And she said, it came from behind and hit me. . . he put something over my head and he beat me up.

(CT 105.) The sergeant asked no follow-up questions, but moved to the subject of Vickie's own observations. (CT 105.) He subsequently asked Vickie whether her mother said anything in the ambulance on the way to the hospital. Vickie replied, "No. She was in too much pain." (CT 105.) The sergeant then asked if they had talked at the hospital. (CT 105.) When Vickie replied, "Yes," the sergeant asked what her mother said. (CT 105.) Vickie replied with more detail than in her previous reference to what her mother had said at home, but did not mention that her mother had stated that the assailant sounded Black. (CT 106.) The remainder of the interview concerned other topics, primarily concerning what was missing from the home. (CT 107-108.)

At the preliminary hearing, the prosecutor made several unsuccessful efforts to elicit from Vickie Constantin what her mother had told her on the day of the attack, but on each occasion the magistrate sustained an objection from appellant's counsel. After Vickie testified that emergency personnel arrived within three to five minutes of her 9-1-1 call, the prosecutor asked if she had

been able to talk to her mother during this interval. (CT 2001.) Vickie replied that she had, but the magistrate refused to permit her to relate the contents of her mother's statement, ruling that the prosecutor had laid an insufficient foundation of Anna Constantin's condition or the "time factor" between the time of the attack and the time of the statement. (CT 2001-2003.) After the prosecutor asked further questions in an attempt to show the likely time of the beating and of Anna Constantin's condition (CT 2004-1009), he twice attempted to ask Vickie what her mother said at the hospital (but did not return to what was said in the house). (CT 2008-2009.) The magistrate sustained appellant's objection of "[n]o foundation" because she believed the prosecutor had not shown the statements were sufficiently close in time to the attack to permit an inference that they were made without reflection. (CT 2009-2010; see also CT 2011-2016.)[41]

At trial, the prosecutor filed an in limine motion seeking admission of Anna Constantin's comments to Vickie under the spontaneous statements hearsay exception. (CT 3183-3188.) In his written pleading, he mentioned only the statement at the hospital, not the first statement made at the house. (CT 3187.) Appellant opposed the motion, arguing that the hospital statement did not satisfy the foundational requirements for a spontaneous statement and that Vickie Constantin could not be relied upon to relate the statement accurately because she was a biased reporter. (CT 3206-3212.) Appellant's opposition mistakenly implied that Anna Constantin made no statement at home (CT 3207) even though the transcription of Vickie's interview with Sergeant Kitchen clearly indicated the existence of such a statement and the prosecutor had attempted to elicit it at the preliminary hearing. The in limine hearing on the prosecution's motion likewise focused only on the hospital statements. (RT

---

41. The magistrate's ruling, of course, was not binding on the trial court.

2591-2597.) The court preliminarily ruled that they were admissible. (RT 2598.)

Before Vickie Constantin was called to testify, appellant's counsel asked that she not be permitted to "testify that the assailant was Black based on what her mother told her." Counsel pointed out that Vickie's August 14 police interview did not disclose this detail. Counsel indicated it was disclosed in a later interview of September 2 (which is not in the record on appeal). (RT 3475-3476.) The prosecutor responded that the September 2 interview "put down more fully" what Mrs. Constantin had said to her daughter at the hospital on the day of the attack and that he believed he was entitled to elicit the entire contents of Anna Constantin's statements to her daughter. (RT 3476-3477.) The trial court indicated that while the statement it had reviewed (apparently, Vickie's August 14 police interview) did not include references to the attacker's race, "if those were statements that were made at that same time, then I see no reason why they wouldn't fall within the same spontaneous statement exception" to the hearsay rule. (RT 3477-3478.) Appellant's counsel claimed that "the information we had by way of discovery did not indicate that Anna Constantin said the person was black at the time of the first admission into the hospital" (which was a misstatement since counsel presumably was aware of the arrest warrant affidavit that included Detective Meenderink's report). (RT 3479.) The trial court decided it would permit appellant's counsel to examine Vickie Constantin in limine before she was permitted to testify before the jury. (RT 3479.)

Thereafter, the court conducted a foundational hearing out of the jury's presence in which Vickie Constantin described both the statements her mother made to her at home and at the hospital. (RT 3483-3493.) Vickie testified that her mother had described the attacker's voice as sounding like a Black man during the statement made at home before emergency personnel arrived. (RT

3488.) She also testified that she was giving an exact translation of what her mother told her. (RT 3490.) The trial court again ruled that the statements were admissible under Evidence Code section 1240. (RT 3494-3495.) In her trial testimony, Vickie again related that Anna Constantin disclosed during the initial comments at home the detail that her attcker sounded Black. (RT 3540.) Vickie was not asked whether Anna had reiterated this detail at the hospital later that day.

As to the basic question of whether Anna Constantin's statements met the technical elements of a spontaneous statement under Evidence Code section 1240, appellant raises no specific complaint. That section provides:

> Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

This Court has explained the section as follows:

> To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance, and (3) the utterance must relate to the circumstance of the occurrence preceding it.

(*People v. Poggi* (1988) 45 Cal.3d 306, 318; citation and internal quotation marks omitted; brackets in *Poggi*.) "'Neither the lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.*'" (*Ibid.*; citation omitted; italics in *Poggi*.)

Whether the elements of the spontaneous statement exception are met in a given case is largely a question of fact for the trial court, and its decision will not be overturned on appeal absent an abuse of discretion. (*Ibid.*)

Appellant does not dispute that Anna Constantin suffered a startling occurrence, namely, the vicious attack upon her; that she was still under the dominating influence of that attack when she made the statements to her daughter at home and at the hospital; or that her statements related to the attack. He does argue that the statements were "too long" to be considered spontaneous, though he acknowledges that "the Evidence Code places no limit on the length of the statement." (AOB 248.) Suffice it to say that no court has suggested length alone is a disqualifying factor if a statement otherwise satisfies the hearsay exception. Rather, like other factors such as the lapse of time or the nature of questioning, the length of the statement is merely a factor for the trial court to consider in assessing whether the declarant is still under the predominant influence of the startling occurrence.[42] The trial court did not abuse its discretion in finding that the requirements for a spontaneous statement were met.

Turning to appellant's more earnest complaint that Vickie Constantin's testimony concerning her mother's spontaneous statements should have been excluded because it was unreliable, we respond that this complaint fails at both the factual and legal levels. As a factual matter, appellant is demonstrably incorrect when he speculates that Vickie may have made up the detail that her mother identified the voice of her attacker as sounding Black because Vickie did not mention this detail in her "original statement" to Sergeant Kitchen on August 14, the day after the attack. (AOB 247; see also AOB 242-243.) As we

---

42. In any event, the record shows that Vickie and Anna Constantin had only three to five minutes to talk at home before emergency personnel arrived. (CT 2001.)

have shown, Vickie's original statement was in fact made at the hospital in the evening of August 13, when she translated to Detective Meenderink what her mother was telling her in Russian. In that statement, Anna Constantin told Vickie "that although she could not see her attacker, she knew he was black, because of his voice." (CT 114.) Therefore, appellant's accusation that Vickie added this detail "weeks later" (AOB 244) is false.

Other examples appellant cites in an attempt to show Vickie added details to her mother's original statements are equally unpersuasive. He claims that Vickie must have been relating her own observations—rather than what her mother told her—when she testified that the attacker bound Anna Constantin's hands with a cord, put a blanket over her head, and went upstairs to ransack the house. (AOB 244.) However, all of these details were related in the statement Vickie simultaneously translated to Detective Meenderink as her mother spoke in Russian at the hospital on the night of the attack. (CT 114 ["After some time, the suspect left her lying on the floor and got a blanket, which she said he then covered her head with, and then he took a cord and tied her hands behind her"]; CT 115 ["The victim could hear the suspect ransacking the house"].)

We acknowledge that Vickie's statement to Sergeant Kitchen on August 14 did not include the detail about the voice of the attacker which she had reported to Detective Meenderink on the evening of August 13. But this discrepancy is meaningless on the question of Vickie's reliability as a reporter for at least two reasons. First, in her very first statement, Vickie did tell Meenderink that her mother said the attacker's voice sounded Black. Vickie's report to Meenderink, made as she translated her mother's spontaneous statement at the hospital, was given at a time when Vickie could not have learned anything about the perpetrator from a source other than her mother. Second, the omission of this detail from the report Vickie gave to Sergeant Kitchen the following day is insignificant given that Kitchen asked no follow-

up questions regarding what her mother told her at home. Moreover, his follow-up comments regarding what her mother told her at the hospital were far from focused or specific. (See CT 106.) In fact, much more of the interview concerned what Vickie observed when she came home (CT 104-105) and what she later discovered missing (CT 107-108) rather than what Anna Constantin told Vickie. In short, there were no inexplicable inconsistencies between what Vickie reported to the police on either the night of the attack or the day after which so undermined the reliability of her trial testimony as to require its exclusion.

As a legal matter, even if there were discrepancies between Vickie's trial testimony and her initial statements to the police, the recognized legal remedy is not exclusion, but cross-examination. Inconsistencies in a witness's testimony or a failure to recollect particular aspects of the subject of the testimony do not disqualify the witness, but present questions for the trier of fact to decide. (See *People v. Mincey* (1992) 2 Cal.4th 408, 444.) There is simply no general impediment in state or federal law to the admission of testimony of a witness on account of doubts about the witness's credibility where the witness testifies and is fully exposed to cross-examination. (See *Crawford v. Washington*, *supra*, 541 U.S. at p. 59.) In particular, any concern over the accuracy of the witness's translation of the out-of-court statements of another is satisfied by requiring the translator to appear and face cross-examination. (*Correa v. Superior Court* (2002) 27 Cal.4th 444, 459; see also *United States v. Nazemian* (9th Cir. 1991) 948 F.2d 522, 527.)

Here, Vickie Constantin testified and was subject to unrestricted cross-examination. Any consistencies between her trial testimony, her translation to Detective Meenderink on the night of the attack, and her statement to Sergeant Kitchen the day after the attack, could have been fully exposed to the jury. In fact, appellant's counsel did question Vickie closely about her recitation of her

mother's statement, reminding her that she had "to separate . . . what your mother exactly told you and what you have reconstructed, if anything." (RT 3492.) Counsel repeatedly asked the circumstances surrounding her mother's mention of the race of the perpetrator. (See RT 3491, 3493-3494.) The jury was fully able to resolve any possible doubts as to the accuracy or reliability of Vickie's testimony. Exclusion of the testimony would have been an inappropriate—and unnecessary—measure.

Appellant also contends that Anna Constantin's statements should have been excluded as hearsay under *Crawford v. Washington, supra*, 541 U.S. 36. In *Crawford*, the United States Supreme Court held that the Confrontation Clause of the United States Constitution precludes the use of "testimonial" hearsay against a defendant in a criminal trial, unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. (*Id.* at p. 68.) The Supreme Court did not provide a comprehensive definition of what comprises a "testimonial" statement (*ibid.*), but it did cite to various formulations of what constitutes "testimonial" hearsay. The Court indicated that formal statements to government officers, affidavits, depositions, prior testimony that the defendant was unable to cross-examine, custodial examinations, and confessions constitute testimonial statements, as do other statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. (*Id.* at pp. 51-52.) By contrast, non-testimonial statements include overheard remarks, casual remarks to an acquaintance, and hearsay exceptions such as business records and coconspirator statements. (*Id.* at pp. 51, 56.) Significantly, the Court also implied that spontaneous statements are non-testimonial, noting that, historically, this exception applied to statements made "'immediat[ely] upon the hurt received, and before [the declarant] had time to devise or construe anything for her own advantage.' [Citation.]" (*Id.* at p. 58,

fn. 8; see also *People v. Rincon* (2005) 129 Cal.App.4th 738, 756.) The Court did note the "arguabl[e] . . . tension" between its holding in *Crawford* and its earlier decision in *White v. Illinois* (1992) 502 U.S. 346, where a statement made to an investigating officer was treated as a spontaneous declaration. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 58, fn. 8.) But the strong implication from this reference is that classic spontaneous statements made immediately after the startling event and before an opportunity to contrive are not testimonial. (*People v. Rincon*, *supra*, 129 Cal.4th at p. 757.)

Following *Crawford*, lower courts have followed two different approaches to spontaneous statements. Some have taken a categorical approach that all spontaneous statements are non-testimonial. (See, e.g., *People v. Corella* (2004) 122 Cal.App.4th 461, 469 ["it is difficult to identify any circumstances under which a[n Evidence Code] section 1240 spontaneous statement would be 'testimonial'"]; *Hammon v. State* (Ind.Ct.App. 2004) 809 N.E.2d 945, 952-953.) Others have taken a contextual approach, inquiring into the circumstances surrounding the statement, such as whether it was made to an investigating officer. (See, e.g., *Stancil v. United States* (D.C.App. 2005) 866 A.2d 799, 809 ["Some excited utterances are testimonial and others are not, depending upon the circumstances in which the particular statement was made"]; *Lopez v. State* (Fla.App. 2004) 888 So.2d 693, 700.) Every court to decide the question, however, has agreed that "[t]here is nothing in *Crawford* to suggest that 'testimonial evidence' includes spontaneous out-of-court statements made outside any arguably judicial or investigatory context." (*Ramirez v. Dretke* (5th Cir. 2005) 398 F.3d 691, 695; see also *People v. Rincon*, *supra*, 129 Cal.App.4th at pp. 749, 757 [statements by wounded gang member to former gang member in aftermath of shooting not testimonial]; *People v. Vigil* (Colo.App. 2004) 104 P.3d 258 [statement by child to father immediately after assault not testimonial]; *Demons v. State* (Ga. 2004) 595

S.E.2d 76 [statement to friend not testimonial]; *State v. Manuel* (Wis.Ct.App. 2004) 685 N.W.2d 525 [statement to girlfriend not testimonial].)

It is unnecessary to decide whether the categorical or contextual approach is the correct application of *Crawford* because, in all events, Anna Constantin's statements to her daughter were "made outside any arguably judicial or investigatory context." (*Ramirez v. Dretzke*, *supra*, 398 F.3d at p. 695.) The statements made at the home in the several minutes before any emergency personnel were, without question, non-testimonial. The statements made not long afterwards at the hospital perhaps present a closer question since a police detective was present and attempted to record the conversation between Anna and Vickie. (See CT 109-110.) However, there is no evidence that Anna gave or Vickie solicited the statements in response to police prodding, instigation, or investigation. The record contains nothing to suggest that Anna made her statements at the hospital in order to preserve them for a later trial.

Finally, no conceivable prejudice resulted from the admission of Anna Constantin's statements. As evidence of prejudice, appellant points solely to Anna's reference of the voice of her attacker as sounding like that of a Black man.[43] This is not surprising since the rest of Anna Constantin's statements describing the nature and circumstances of the attack against her were not subject to genuine dispute. The nature and extent of the injuries to Ms. Constantin, the condition of her home, and the instruments used against her (iron, paint can, electrical cord, blanket) were all fully established independently of her spontaneous statements. As to Anna's statement that her attacker's voice

---

43. We note that, at trial, Vickie testified only to Anna's statement at home that her attacker sounded Black. She did not mention that Anna reiterated this at the hospital. (See RT 3537-3540, 3543.) No conceivable prejudice, therefore, could have flowed from admission of the hospital statements. As to the statements made at home, admission of these statements was not prejudicial for the reasons that follow.

sounded like that of a Black man, we note that witness Adele Manos saw a Black man (whom she later identified as appellant) walking towards Ms. Constantin's home contemporaneous with the time of the attack. Appellant sold the Russian bracelet stolen from the Constantin home a short time after the attack, a fact which he admitted to the police. In addition, at least one witness from each crime scene saw a Black man at or near the scene contemporaneous with the time of each attack, and appellant was repeatedly identified as that man. All of these facts were far more probative in establishing the identity of Anna Constantin's attacker than was her bare statement that the voice of her attacker—whom she admittedly did not see—sounded like that of a Black man. Any conceivable error in admitting the statements that Anna Constantin made to her daughter Vickie was harmless beyond a reasonable doubt.

IX.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING APPELLANT'S PURPORTED THIRD-PARTY CULPABILITY EVIDENCE CONCERNING THREE MEN IN A VAN

Appellant contends that the trial court erred by excluding testimony from Ruth Durham's neighbor, Steven Berger, that he saw a white van with three Black men in it drive by after the police had arrived at Ms. Durham's. (AOB 257-267.) The trial court did not abuse its discretion in excluding this evidence.

Appellant sought to present three witnesses (Barbara Sullivan, Thomas Ivory, and Steven Berger) he believed might raise a doubt whether some unknown third-party had committed the attacks charged against him. The prosecutor did not object to Barbara Sullivan's testimony (RT 3929), in which she described having seen from her automobile a Black man on the street a block away from Ms. Durham's at about 4:30 p.m. on the afternoon she was attacked. (RT 3971.) She testified that the man wore a red flannel shirt and work boots, and was approximately 19 years old. (RT 3972-3974, 3977) She was unable to make either a photo identification or an identification at the live lineup. (RT 2913, 3976-3977.)[44] Over the district attorney's objection (RT 3931), the trial court permitted Thomas Ivory to testify that he saw a Black man walking along the street several blocks from Ms. Figuerido's residence shortly before noon on the day she was murdered. (RT 3988-3990.) Ivory did not get a good enough look at the person's face to make a positive identification and was unable to select anyone in the photo or live lineup. (RT 3992-3995.) The court sustained the district attorney's objection to the proffered testimony of the

---

44. Sullivan's daughter, Stacy Reznes, who was with Sullivan, likewise made no photo identification (RT 2913.) Reznes did not testify, but a police officer was permitted to testify about her inability to identify anyone in the photo lineup. (RT 2913.)

third witness, Steven Berger. (RT 3931.)

According to the offer of proof from appellant's trial counsel, Steven Berger, the neighbor who first observed Ruth Durham dazed and bleeding on her front porch, told police

> that he saw a van driving around with three Black males. They were laughing, or he felt they were unusual. [¶] My recollection is that his testimony indicated that he observed the van either shortly after he came upon Mrs. Durham or while the initial officers were to the scene.

(RT 3928.)[45] The district attorney corrected defense counsel's proffer to clarify that Berger had reported seeing the van *after* the police were already on the scene:

> . . . I have his statement right here: at about 5:40 he said he observed Ruth Durham sitting on her front perch bleeding, and he went and got Merlin Burkenbine [Ms. Durham's son-in-law]. The police arrived, the medical units arrived and then, at this time when all this stuff and commotion is here he sees the white van with three Black males go by.

(RT 3930.) The district attorney urged the trial court to exclude the evidence as irrelevant and confusing. (RT 3930.) Defense counsel did not disagree with the prosecutor's description of the timing Berger's observation. (See RT 3932.) Exercising its discretion under Evidence Code section 352, the trial court excluded Berger's proffered testimony, stating:

> [W]ith the proposed testimony of Mr. Berger regarding seeing the van in the area, in the court's view, this evidence has little, if any, relevance and doesn't seem to be capable of raising a reasonable doubt of the defendant's guilt. There doesn't appear to be anything that links these people to the actual perpetrator of the crimes. [¶] And under 352, I'll find that any probative value the evidence has is substantially outweighed by the possibility of confusing the jury.

---

45. Counsel apparently misspoke when he referred to Berger's "testimony," as Berger did not testify at either the preliminary hearing or trial.

(RT 3931.)

Appellant argues that Berger's proposed testimony was relevant evidence of a third party's potential culpability for the Durham crimes.

> To be admissible, the third party evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

(*People v. Hall* (1986) 41 Cal.3d 826, 833; see also *People v. Harris* (2005) 37 Cal.4th 310, 340.) "Courts should treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352.)" (*People v. Hall*, supra, 41 Cal.3d at p. 834; see also *People v. Harris*, *supra*, 37 Cal.4th at p. 340.) Where the trial court exercises its discretion to exclude third-party-culpability evidence under Evidence Code section 352, its ruling will not be disturbed on appeal absent an abuse. (*People v. Lewis* (2001) 26 Cal.4th 334, 372.) And where the court permits some but not all of a defendant's third-party culpability evidence, any error is generally reviewed as state evidentiary error under the *Watson* standard (*People v. Watson*, *supra*, 46 Cal.2d at p. 836) rather than a denial of the federal constitutional right to present a defense under the *Chapman* standard (*Chapman v. California*, *supra*, 386 U.S. 18, 36). (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1325.)

Applying these standards, the trial court did not abuse its discretion in excluding the Berger evidence pursuant to Evidence Code section 352. Berger merely saw three Black man drive by in a van *after* police and emergency

personnel had already arrived at Mrs. Durham's—or more than an hour after the time Ms. Durham said she was attacked. (CT 350, 353.) This does not even qualify as "mere opportunity" evidence since there was no evidence suggesting the men in the white van were in Ms. Durham's neighborhood at the time she was attacked. (CT 350, 353.) Even if a remote inference of opportunity could be drawn, there was no direct or circumstantial evidence linking anyone in the van with the actual crimes committed against Ms. Durham. (See *People v. Alcala* (1992) 4 Cal.4th 742, 792 ["mere presence" of third party in general vicinity of crime scene not enough to connect third-party to kidnapping and murder].) The trial court, therefore, did not abuse its discretion in concluding that any marginal relevance to the proposed Berger testimony was outweighed by the potential for confusing the jury.

If there were error, the exclusion of this evidence did not prejudice appellant. He was permitted to show that other witnesses placed an unidentified Black man at the scene of the Durham and Figuerido attacks near the time of their occurrence. Morever, the descriptions given by defense witnesses differed in some respects from appellant's actual appearance and the descriptions of prosecution witnesses. (See, e.g., RT 3974 [defense witness Sullivan described man she saw as being about 19 years old]; RT 3582, 3598 [prosecution witness Morris described man she saw outside Ms. Figuerido's residence and later identified as appellant as wearing dark pants and perhaps a brown shirt, and having a medium build and a medium complexion]; RT 3991 [defense witness Ivory described man he saw walking several blocks from Ms. Figuerido's as wearing faded jeans and a light blue shirt, and having a thin build and a dark complexion].) Appellant was thus given an opportunity to attempt to raise a reasonable doubt about his guilt by suggesting that someone else committed these crimes. The jury obviously was not persuaded. The generic "three Black men in a car" evidence would not have produced a reasonable probability of a

more favorable verdict for appellant (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Even under the *Chapman* standard—which we do not believe applies because appellant was permitted to present third-party culpability evidence—exclusion of the Berger evidence was harmless beyond a reasonable doubt.[46]

---

46. To the extent that appellant contends Berger's testimony was separately admissible at the penalty phase to foster a lingering doubt of his guilt (AOB 260), he has waived that claim by failing to make such an argument below. (Evid. Code, § 354.) In any event, exclusion of the evidence was equally proper and non-prejudicial at the penalty phase for the reasons stated above. In addition, any lingering doubt strategy was thoroughly demolished by the penalty phase aggravating evidence showing that appellant, while carrying gloves, was caught in the act of a highly similar daytime household robbery of an elderly woman in Palo Alto.

X.

SUFFICIENT EVIDENCE CONNECTED APPELLANT TO THE DURHAM CHARGES TO PERMIT THESE COUNTS TO GO TO THE JURY

Appellant contends the trial court erred in denying his motion for judgment of acquittal pursuant to Penal Code section 1118.1 on counts four, five, and six (the burglary, robbery, and attempted murder charges relating to Ruth Durham). (AOB 268-275.) As it relates to the attempted murder charge, appellant's contention is irrelevant since the jury acquitted him on that charge. (CT 3487.) As it relates to the burglary and robbery charges, appellant's contention is meritless.

The same standard that governs a trial court's ruling on a motion for acquittal under Penal Code section 1118.1[47/] applies to an appellate court's review of the sufficiency of the evidence supporting a conviction. (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213.) Namely, in each instance the court asks "'whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime'—and the identity of the perpetrator—'beyond a reasonable doubt.'" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1083, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319; original italics in *Jackson*; some internal

---

47. Penal Code section 1118.1 provides in relevant part:

> In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal.

quotation marks and citation deleted; see also *People v. Cole*, *supra*, 33 Cal.4th at pp. 1212-1213.) This standard is met on the burglary and robbery counts. Ms. Durham suffered the same type of attack appellant inflicted upon all of his other victims. Her home was invaded during daylight hours; she received multiple blows about the head severe enough to break both sides of her jaw and lacerate her face; and upon her return home she discovered some missing property, including cash taken from her purse. (See CT 350-353; RT 2858-2861.) At about the same time as Ms. Durham was attacked, two witnesses, Patricia and Joseph Armstrong, saw an unfamiliar Black man walking across the intersection towards Ms. Durham's residence. (CT 350; RT 2790-2796, 2805-2806, 2824, 2828, 3910.) Both the Armstrongs made multiple identifications of appellant as the man they saw. (RT 2799-2803, 2825-2828, 2904-2907, 2918.) Appellant urges that the identification evidence alone was insufficient to justify his conviction because this evidence merely "connect[ed] appellant to the neighborhood," but not to the burglary or robbery. (AOB 270-271.) We need not debate this point because the additional evidence connecting appellant to the crimes—and permitting a rational inference of identity and guilt—was supplied by the distinctive modus operandi shown in appellant's crimes.

Appellant again argues that the various attacks were not sufficiently distinctive and specifically argues that "[t]he circumstances of the Durham case have almost nothing in common with any of the other cases. . . ." (AOB 272.) We have already demonstrated that all of the crimes were indicative of a distinctive modus operandi so as to be cross-admissible and permit a rational inference that the same person committed all the crimes. Appellant focuses on certain dissimilarities between the Durham crimes and the others. (AOB 272-274.) But, as we previously pointed out, it is the "collective significance" of the shared features that combine to support an inference of a common perpetrator.

(*People v. Miller*, *supra*, 50 Cal.3d at p. 989.) The overall pattern of the Durham crime—attack upon an elderly woman in her home, at or near a corner, during the daytime, for the purpose of robbery, in the same general area as the other attacks, and in same time period of the other attacks—overwhelm any of the dissimilarities appellant highlights. When one further considers the fact that eyewitnesses placed appellant at or near every crime scene during or near the time of the attack, it defies logic to state that the Durham crimes had "almost nothing in common" with the others.

Appellant suggests that the trial prosecutor effectively conceded the merits of his motion below by stating, "[A]t first blush, if you just take the Durham incident standing by itself, I would be in agreement with [appellant's] counsel." (RT 3907; see AOB 269.) He further argues that "[u]nder the prosecution's theory, any daytime burglary of an elderly female could have been attributed to appellant, regardless of any other evidence tying appellant to the crime." (AOB 271.) Appellant misreads the prosecutor's argument. Among the factors the prosecutor relied upon to tie appellant to the attack on Ms. Durham were the identifications by the Armstrongs. (RT 3910.) Those identifications in combination with all the other similarities supported a rational inference that appellant was the perpetrator of this particular attack. (RT 3907-3912.) Obviously, these similarities would not apply to "any daytime burglary of an elderly female"—say, one committed one hundred miles away, two years earlier, for the purpose of sexual assault, in an apartment complex, by multiple assailants, who stole nothing. In any event, this Court does not review the argument of the district attorney in deciding whether there was sufficient evidence to let these charges pass to the jury, but the ruling of the trial court. There was sufficient evidence before the court—consisting of the identifications by the Armstrongs placing appellant near Ms. Durham's residence at the time of the attack coupled with the many distinctive similarities

between the Durham crimes and the other charged attacks—to permit a rational trier of fact to conclude that appellant was the perpetrator.

XI.

APPELLANT WAIVED HIS CLAIM OF PROSECUTORIAL MISCONDUCT BY FAILING TO REQUEST AN ADMONITION; IN ANY EVENT, NO PREJUDICE CAN BE DEMONSTRATED

Appellant contends that the trial prosecutor committed misconduct in his rebuttal argument by stating, "isn't it strange that after Mr. Lynch fled our county, there has been no other cases—" (RT 4200; see AOB 276-287.) Appellant claims that by this lone comment, the "prosecutor himself . . . effectively testified to facts which strongly suggest that appellant must have been guilty" (AOB 281), deprived appellant of his Sixth Amendment right to confront and cross-examine witness (AOB 282), and so "infected the trial with such unfairness" as to constitute a denial of due process. (AOB 282.) Appellant's argument is both unpreserved—for he requested no admonition—and unpersuasive.

Immediately after the prosecutor made the statement quoted above—and before he could conclude his thought—defense counsel objected. (RT 4200.) The prosecutor continued by stating "not one scintilla of evidence" before the trial court could rule on the defense objection. The court then interjected, "Just a moment. [¶] Limit yourself to the evidence, Mr. Anderson [the prosecutor]. Please move on. Thank you." (RT 4200.) Defense counsel did not request an admonition. (RT 4200.) The prosecutor moved on, encountering one further defense objection on a different topic before the end of his rebuttal (RT 4215) (prompting the court to remind the jurors that "nothing the attorneys say is evidence" (RT 4216)). The court then called a short recess and announced that it would deliver concluding instructions when the jurors reconvened. (RB 4216.)

While the jury was in recess, defense counsel moved for a mistrial and

asked that the prosecutor be cited for misconduct for "alluding to the crimes had stopped when Mr. Lynch was apprehended" (RT 4217), which is not exactly what the prosecutor had stated. The prosecutor responded, "That was going to dovetail into alibi, and the court said move on, and I did." (RT 4218.) The prosecutor did not offer further comment or explanation for his statement. The trial court ruled as follows:

> Out of an abundance of caution, I didn't know where that was going. I was concerned when I heard the opening words. I don't think the jury heard anything. I didn't know what you were going to say. I know you didn't want to interrupt your argument. I would have given you an opportunity to be heard outside the presence of the jury. I assume you wanted to go forward. It sounded to me you would be headed in a direction that would not be appropriate, which was the basis of my comments. I think nothing rose to the level of misconduct. [¶] And the matter being submitted, I don't think any admonition is necessary. [¶] The motion for mistrial is denied.

(RT 4218.)

The Court has often stated that an objection alone is insufficient to preserve a claim of prosecutorial misconduct; rather, both an objection and a request for admonition are required. (See, e.g., *People v. Montiel* (1993) 5 Cal. 4th 877, 914; *People v. Bonin* (1988) 46 Cal.3d 659, 689.) "The reason for this rule, of course, is that 'the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury.'" (*People v. Green* (1980) 27 Cal.3d 1, 27.) Appellant seeks to excuse on futility grounds his failure to request an admonition by pointing to the trial court's later *sua sponte* statement, when it denied appellant's mistrial motion, that it did not think an admonition was necessary. (See AOB 279-280.) This comment did not excuse appellant's failure to request an admonition for several reasons. First, in context, the court's statement plainly was an indication that it would not give an admonition

at that point, since the case had already been "submitted"—that is, the parties had concluded all arguments and the jury had been told it would next receive concluding instructions. The court's comment implies nothing about whether it would have earlier granted a timely, contemporaneous request for an admonition. The record strongly suggests it would have, since the court quickly directed the prosecutor to limit his comments to the evidence when counsel interposed his objection. There is, therefore, no reason to conclude that a contemporaneous request for an admonition to disregard the prosecutor's comment would have been futile. Second, the trial court's later comment upon denying the mistrial motion was tentative, not definitive. The court merely stated that it did not "think any admonition is necessary." (RT 4218.) Had counsel disagreed, one would have expected him to state reasons in an effort to change the court's mind—and particularly since the court asked, "anything else," immediately upon denying the mistrial motion. (RT 4218.) To this inquiry counsel replied, "not at this time, your honor." (RT 4218.) On this record, appellant's failure to request an admonition cannot be excused as futile. The claim of prosecutorial misconduct is therefore barred. (*People v. Montiel*, *supra*, 5 Cal.4th at p. 914.)

On the merits, the prosecutor's comment did not deprive appellant of a fair trial or in any other way render his conviction unconstitutional. In general, prosecutorial misconduct violates the federal Constitution "when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Harris* (1989) 47 Cal.3rd 1047, 1084, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.) Appellant relies heavily on *People v. Hill* (1998) 17 Cal.4th 800 to argue that the prosecutor's remark that there were "no other cases" after

appellant fled the area was improper.[48] In *Hill*, this Court found that—among many other instances of misconduct—the trial prosecutor improperly argued without evidentiary support that no violent crimes or assaults had happened at the crime scene parking lot known for drug dealing after the defendant had been arrested and locked up. (*Id.* at p. 828.) The Court stated that this type of argument was tantamount to a suggestion by the prosecutor that "she had information not presented to the jury that pointed to defendant's guilt." (*Ibid.*)

We have found no evidence in the record that any witness was asked whether there were any further similar assaults on elderly women in the San Leandro–Hayward area after the final assault against Bessie Herrick and appellant's admitted flight from the area. The point might seem so obvious as to merit no specific testimony to that effect, but assuming the inference the prosecutor sought to draw was improper absent that precise question, no conceivable prejudice resulted.

Unlike *Hill*, this is not a case in which the prosecutor engaged in serious misconduct at all stages of the trial, including misrepresenting the evidence, misstating the law, repeatedly referring to matters not in evidence, and routinely disparaging opposing counsel. (17 Cal.4th at pp. 823-839.) In *Hill*, the Court observed that "[t]he sheer number of the instances of prosecutorial misconduct, together with the other trial errors, is profoundly disturbing," and concluded that the cumulative effect of the misconduct and the other trial errors deprived the defendant of a fair trial. (*Id.* at p. 847.)

Nothing in this case remotely approaches the gravity or volume of misconduct condemned in *Hill*. In response to the sole instance of potentially improper argument complained of by appellant, the trial court promptly told the

---

48. Presumably, the prosecutor would have limited his comment to *similar* cases had he finished his thought. No rational juror would have thought the prosecutor was claiming that *all* Alameda County crimes of whatever type had stopped following appellant's flight.

prosecutor to limit his comments to the evidence, and he did. (RT 4200.) Shortly thereafter, the court reminded the jurors that "nothing the attorneys say is evidence" (RT 4216), an admonition it had given before. (RT 4094.) Later, the court reiterated this instruction and told the jury that it had to confine its decision to "the evidence received in this trial and not from any other source," and correctly defined the "evidence" the jury could consider. (RT 4222-4223.) Appellant now argues that "the jury's finding of guilt had to have been based, at least in part, upon the prosecutor's unsubstantiated claim." (AOB 283.) But this conclusory assertion ignores the fleeting nature of the prosecutor's remark, the court's instruction that the jury had to limit its decision to the evidence, its repeated admonitions that the attorney's statements were not evidence, and the overwhelming evidence properly admitted at trial that established appellant's guilt. On this record, the complained of comment did not deprive appellant of his right to a fair trial or otherwise taint his conviction in any way.[49]

---

49. Appellant's ancillary claim that the trial court should have granted his mistrial motion (AOB 280) adds nothing. A mistrial motion is committed to the sound discretion of the trial court and should be granted only if incurable prejudice has resulted from the incident giving rise to the motion. (*People v. Cox* (2003) 30 Cal.4th 916, 953.) As we have demonstrated that appellant was not prejudiced by the prosecutor's remark, it follows that the trial court could not have abused its discretion by denying his mistrial motion.

XII.

DELIVERY OF CONSCIOUSNESS OF GUILT INSTRUCTIONS WAS NOT ERROR

The trial court gave three pattern consciousness-of-guilt instructions: CALJIC No. 2.03 (false or misleading statements),[50] CALJIC No. 2.06 (destroying or concealing evidence),[51] and CALJIC No. 2.52 (flight afer crime).[52] Appellant does not seriously dispute the evidentiary bases for these

---

50. As delivered (CT 3263; RT 4225), CALJIC No. 2.03 stated:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

51. As delivered (CT 3264; RT 4225), CALJIC No. 2.06 stated:

> If you find that defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

52. As delivered (CT 3281; RT 4231-4232), CALJIC No. 2.52 stated:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in considering the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

three instructions.[53] Instead, he argues that these instructions are *always* improper because they are partisan, argumentative, invite irrational inferences, and necessarily deprive a criminal defendant of the right to a fair trial. (AOB 288-300.)

The Court has repeatedly rejected similar arguments in prior cases. (See, e.g., *People v. Benavides* (2005) 35 Cal.4th 69, 100 [CALJIC No. 2.03]; *People v. Nakahara* (2003) 30 Cal.4th 705, 713 [CALJIC No. 2.03]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1226 [multiple consciousness of guilt instructions including CALJIC Nos. 2.03, 2.06 and 2.52]; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 128 [CALJIC Nos. 2.03 and 2.52].) Appellant argues that the consciousness of guilt instructions are indistinguishable from the proposed defense instructions in *People v. Mincey*, 2 Cal.4th at p. 437 (see AOB 292), an argument which this Court has likewise previously rejected. (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 713.) *Mincey* did not involve consciousness of guilt instructions, and the argumentative language of the rejected defense instructions in that case contrasts sharply with the neutral language of the consciousness of guilt instructions challenged here.[54]

---

53. As the prosecutor argued, CALJIC No. 2.03 was warranted by appellant's statement to police denying that he had ever been chased out of anyone's yard, despite Lavinia Harvey's statement that she had done so; CALJIC No. 2.06 was warranted by the evidence that Anna Constantin's Russian bracelet was missing the gold charm, leading to the inference that appellant had removed it to make it harder to trace the bracelet to the Constantin residence; and CALJIC No. 2.52 was warranted by appellant's admission that he left the Bay Area after reading in the newspaper that the police wanted to question him about the bracelet. (See RT 4197-4198.)

54. The two instructions in *Mincey* invited the jury to reject a torture murder finding if it found the victim died as a result of a "'misguided, irrational and totally unjustified attempt at discipline'" and stated that the victim's "'wounds could have been inflicted in the cause of a killing in the heat of passion (or a misguided, irrational and totally unjustifiable attempt at discipline) rather than a torture murder.'" (*People v. Mincey*, *supra*, 2 Cal.4th at p. 437,

In addition, an inference of consciousness of guilt can never justify conviction, standing alone. Rather, the circumstantial evidence supporting such an inference must form part of a chain of evidence that rationally supports only a conclusion of guilt, just as appellant's jury was instructed. (See RT 4224-4225 [instructing with CALJIC No. 2.01 regarding evaluation of circumstantial evidence].) In this way, too, the consciousness of guilt instructions are readily distinguishable from the rejected *Mincey* instructions.

The three instructions appellant challenges do nothing more than permit an inference if predicate facts are proved, and do so in neutral, non-argumentative language. The United States Supreme Court has explained that "[a] permissive inference does not relieve the State of its burden of persuasion because it still requires the state to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved . . . . A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Francis v. Franklin* (1985) 471 U.S. 307, 314.) Here, the inference permitted by each consciousness of guilt was not irrational, but based on reason and common sense: a suspect's flight after a crime, his lies about his conduct, and his alteration of evidence may well be indicative of guilt. Appellant presents no persuasive reason why this Court should depart from its previous rulings upholding these consciousness of guilt instructions. (See *People v. Benavides*, *supra*, 35 Cal.4th at p. 100.)

---

fn. 5.) The Court quite understandably found these instructions emphasized the defense version of the facts and were argumentative. (*Id.* at p. 437.) In contrast, the consciousness of guilt instructions contain no pejorative wording nor do they emphasize any particular facts. Instead, it was up to the prosecutor to articulate and urge the facts that might bring the instructions into play. In this sense, the consciousness of guilt instructions are stylistically similar to the neutral eyewitness identification instruction set forth in CALJIC No. 2.92, and quite unlike the argumentative *Mincey* instructions.

XIII.

THE TRIAL COURT'S REFUSAL TO STRIKE THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE RELATING TO PEARL LARSON WAS NOT ERROR; APPELLANT'S ACQUITTAL OF ROBBERY AGAINST MS. LARSON DOES NOT REQUIRE REVERSAL OF ANY OF THE GUILTY VERDICTS OR SPECIAL CIRCUMSTANCE FINDINGS RELATING TO MS. LARSON'S MURDER

Appellant contends that the robbery-murder special circumstance attached to the murder of Pearl Larson (the fourth charged special circumstance) must be reversed because the jury acquitted appellant of the robbery of Ms. Larson. He also maintains that the acquittal for robbery requires reversal of the murder and burglary convictions and the burglary-murder special circumstance relating to Ms. Larson. (AOB 301-320.) We disagree in all respects.

Reviewing the jury's verdicts, the jury convicted appellant of the murder of Pearl Larson and the burglary of her residence, acquitted him of robbing Ms. Larson, and found true the related robbery-murder and burglary-murder special circumstances. (RT 4282-4285.) Regarding the robbery-murder special circumstance, the jury was instructed, pursuant to CALJIC No. 8.81.17, that it could sustain the allegation if it found that "[t]he murder was committed while the defendant was engaged in the commission *or attempted commission* of a robbery . . . ." (CT 3308; italics added; see also RT 4243.) After the jury returned its not guilty verdict on the Larson robbery but its true finding on the robbery-murder special circumstance, appellant moved to strike that finding. (RT 4460.) The trial court denied the motion, finding the verdicts were not inconsistent inasmuch as the jury could have based its special circumstance finding on a theory of *attempted* robbery. (RT 4461.) Appellant points out that

the jury was not given a definition of "attempt" such as that set forth in CALJIC No. 6.00. (AOB 305.) He contends that the omission was prejudicial error because the jury was not given any instruction "which would have supplied the meaning of an attempted robbery" (AOB 309), and that the trial court therefore committed reversible error by failing to strike the robbery-murder special circumstance. (AOB 310-315.)

The question presented is one of potential instructional error, not of sufficiency of the evidence. There is no question that a rational fact finder could find appellant guilty of attempted robbery based on the evidence presented. The evidence showed Ms. Larson had fresh abrasions to a finger on which she wore a ring, which plainly supported an inference that her assailant tried to remove that ring. (RT 3276-3277.) There was also photographic evidence which the prosecutor argued showed Ms. Larson's wallet lying open next to her body on her bed. (RT 4099; see also RT 3251-3255.)[55] This evidence was sufficient to sustain the robbery-murder special circumstance on a theory of attempted robbery. (See, e.g., *People v. Zapien* (1993) 4 Cal.4th 929, 984.)

Even though the evidence was sufficient to support an attempted robbery finding, it is nevertheless true that the trial court did not define attempt. A criminal defendant is entitled to have the jury instructed on every essential element necessary to support a finding against him, including the elements of a special circumstance. (See, e.g., *People v. Cain, supra,* 10 Cal.4th at p. 44; see also *People v. Flood* (1998) 18 Cal.4th 470, 480.) However the omission

---

55. Appellant suggests that the prosecutor's argument was unfounded because a police witness testified he could not "recall" whether anything was on the bed next to Ms. Larson. (See AOB 301-302, fn. 120; RT 3251-3255.) But the officer's lack of recall says nothing about whether the crime scene photo in fact showed an open wallet on the bed. It is telling that appellant's counsel never objected when the prosecutor argued that it did. (RT 4099.)

of a critical element is trial error that is subject to harmless error analysis, and does not require reversal if the error is harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 8-10; see also *People v. Prieto* (2003) 30 Cal.4th 226, 256-257 ["an erroneous instruction that omits an element of a special circumstance is subject to harmless error analysis" under the beyond-a reasonable doubt standard].)

The real question here is whether the CALJIC definition of an "attempt" is tantamount to the elements of an offense. We submit it is not. We are aware of no case—and appellant cites none—that holds the failure to define "attempt" in a felony-murder special circumstance instruction is equivalent to the omission of an essential element.

It is the prerogative of the Legislature, not the CALJIC committee, to define the elements of an offense. (See *People v. Hernandez* (1998) 19 Cal.4th 835, 840; see also *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 85.) Although CALJIC No. 6.00 states in relevant part, "An attempt to commit a crime consists of two elements, namely a specific intent to commit the crime and a direct but ineffectual act done towards its commission," this language does not derive from any statutory definition of attempt. Indeed, Penal Code section 664, the statute proscribing criminal attempts, contains no specialized definition of that term. In the absence of a request, a trial court has no duty to define or clarify words that are "commonly understood and not used in a technical or legal sense." (*People v. Horning* (2004) 34 Cal.4th 871, 908-909.) In *People v. Cain, supra,* 10 Cal.4th at p. 44, this Court stated that the CALJIC definition "merely restates the common meaning of 'attempt.' To attempt an act is to 'try' or 'endeavor to do or perform' the act. (Webster's New Internat. Dict. (2d ed. 1958) p. 177.)" Given that attempt has a commonly understood meaning, that the Legislature has provided no specialized meaning, and that appellant did not request instruction with CALJIC No. 6.00 or any other

definition, the trial court committed no error by failing to define the term "attempt." Because the jury had an evidentiary basis for sustaining the robbery-murder special circumstance (as shown above), and because the court was not required to define the commonly understood word "attempt," no error can be shown. The trial court properly denied appellant's motion to strike the robbery-murder special circumstance.

Even assuming that the trial court should have provided a definition of "attempt" either under its state law obligation to define technical terms or its federal constitutional obligation to instruct on all the elements of an offense, its failure to do so was harmless for the reasons explained in *People v. Cain, supra,* 10 Cal.4th at p. 44. In *Cain*, the trial court failed to define "attempt" in connection with an attempted rape special circumstance. (*Ibid.*) The Court concluded that the jury necessarily found the two elements of attempt stated in CALJIC No. 6.00 by returning a true finding on the special circumstance: "Defendant could not 'try' to rape [the victim] without intending to do so and doing an act toward the rape's commission." (*Ibid.*) For this reason, and without affirmatively declaring that the failure to give a definition of attempt was either state or federal error, the Court found that prejudice could not be shown under any standard. (*Ibid.*)

Similar reasoning applies here. We know that the jury did not find appellant actually robbed Ms. Larson by its not guilty verdict on the robbery count. It therefore had to have sustained the special circumstance allegation on a finding that he attempted—or tried—to rob her. We know that the jury received all the elements of a robbery, and that—by the guilty verdict on the burglary charge—it found appellant intended to steal from Ms. Larson's residence (since the only target offense for which the jury received instructions was theft). (See CT 3295.) And we know that the jury was not completely bereft of guidance on the definition of "attempt," having been told that an

attempted murder consisted of: "1. A direct but ineffectual act . . . done by one person towards killing another human being; and [¶] 2. . . . a specific intent to kill unlawfully another human being." (CT 3298.) Under these circumstances, having necessarily found that appellant "tried" to rob Ms. Larson and having necessarily found that he intended to steal from her, the jury could have only concluded that he intended to rob her and did a direct but ineffectual act toward that goal. As in *Cain*, the trial court's failure to provide a specific definition of attempt in the context of attempted robbery did not contribute to the jury's robbery-murder special circumstance finding and could not have been prejudicial under any standard. (See *People v. Cain, supra,* 10 Cal.4th at p. 44.)

Appellant argues that the omission of a definition of "attempt" could not have been harmless because the evidence of an attempted robbery was not overwhelming. This argument is beside the point, for a finding of lack of prejudice in this case rests not on an assessment of the strength of the evidence but on an assessment of what findings the jury necessarily made when it concluded that appellant murdered Ms. Larson during an attempted robbery. (See, e.g., *People v. Kobrin* (1995) 11 Cal.4th 416, 428 [instructional error is harmless where it is possible to determine that the findings required by the omitted instruction were necessarily made by the jury].) As we have shown, by finding that appellant killed Ms Larson while attempting or trying to rob her and that he possessed an intent to steal, the jury must have necessarily concluded that he did some act toward the goal of robbing her with the intent to do so.[56]

---

56. Appellant also suggests that the jury could not have based its special circumstance verdict on a finding that he committed an attempted robbery, because this would have been inconsistent with a finding that he committed the murder to "advance the commission of a robbery" as required by the special circumstance instruction. (AOB 314-315; see CT 3308.) There is no inconsistency. The jury reasonably could have concluded that appellant killed Ms. Larson to facilitate removal of her ring and the theft of her wallet,

Even if the failure to define attempt was error and it was prejudicial as to the robbery-murder special circumstance, by no stretch of the imagination would it have affected the Larson burglary or murder convictions or the burglary-murder special circumstance finding. Appellant argues that "[t]he fact that the jury acquitted appellant of the robbery leads to the logical and necessary conclusion that appellant should have similarly been acquitted of the burglary *and* the burglary special circumstance" (AOB 318; original italics), and, concomitantly, of the murder conviction against Ms. Larson premised on a felony murder theory. (AOB 318-319.) His conclusions are neither logical nor necessary. Contrary to his claim that there was no evidence of an intent to steal from Ms. Larson (AOB 317-318), sufficient evidence established such an intent. As we have esplained, the evidence supported a logical inference that Ms. Larson's killer attempted to remove her ring while she was still alive, and a crime scene photo evidently showed her wallet beside her body on the bed. This was ample evidence from which a rational fact-finder could conclude that appellant intended to steal from Ms. Larson when he entered her house, and therefore was guilty of burglary. (*Jackson v. Virginia, supra,* 443 U.S. at p. 319.) The not guilty verdict on the robbery charge did not negate a finding of intent to steal. The jury could have rationally concluded that appellant possessed an intent to steal, but that the evidence did not show beyond a reasonable doubt that he actually carried anything away. In this circumstance, it was entirely consistent for the jury to find appellant guilty of burglary but not guilty of robbery. Nothing about the not guilty verdict on the robbery undermines the guilty verdicts for burglary and murder or the finding on the burglary-murder special circumstance. Nor is there any conceivable spillover

---

but that he was unable to remove the ring and that nothing was taken from the wallet (at least, as shown by the evidence beyond a reasonable doubt). The murder would have therefore been in the commission of an attempted robbery while trying to *advance* an intended robbery.

effect from the failure to define "attempt" in connection with the robbery-murder special circumstance, assuming that omission was error. In short, none of appellant's attacks upon the verdicts and special circumstance findings in the Larson case have merit.

XIV.

THE TRIAL COURT DID NOT ERR BY DENYING APPELLANT'S REQUEST TO DELETE CERTAIN MITIGATING FACTORS FROM CALJIC NO. 8.85 OR BY FAILING TO INSTRUCT THE JURY SUA SPONTE THAT THE ABSENCE OF A MITIGATING FACTOR MAY NOT BE CONSIDERED AGGRAVATING

Appellant contends that the trial court committed state and federal constitutional error by denying his request to delete certain factors from the list of mitigating factors set forth in CALJIC No. 8.85 which he believes were irrelevant. Specifically, he contends that Penal Code section 190.3, factors (d) ("extreme" mental disturbance), (e) (victim participation or consent), (f) (reasonable belief in moral justification), (g) ("extreme" duress or "substantial" domination by another), (h) (impaired capacity due to intoxication or mental illness), and (i) (defendant's age) should have been deleted or modified. (AOB 321-327.) The Court has repeatedly rejected the argument that a trial court must delete inapplicable factors from CALJIC No. 8.85. (See *People v. Anderson* (2001) 25 Cal.4th 543, 600; *People v. Box* (2000) 23 Cal.4th 1153, 1217; *People v. Turner* (1994) 8 Cal.4th 137, 207-208.) The Court likewise has repeatedly rejected attacks on factors (d) and (g) as too restrictive for limiting consideration to "extreme" mental or emotional disturbance, "extreme" duress, or "substantial" domination by another. (*People v. Anderson, supra*, 25 Cal.4th at p. 601; *People v. Davenport* (1995) 11 Cal.4th 1171, 1230 [pointing out that factor (k) ("any other circumstance which extenuates the gravity of the crime") affords consideration of "nonextreme" conditions].) And the Court has repeatedly rejected attacks on factors (d) and (h) as too restrictive for limiting consideration of mental disturbance and impairment due to intoxication or mental illness to the time of "the offense." (See *People v. Kipp* (2001) 26

Cal.4th 1100, 1138; *People v. Riel* (2000) 22 Cal.4th 1153, 1225, and cases cited therein.) Appellant has even less cause for concern in the present case because an expanded version of factor (k) was given to his jury.[57] Appellant makes no compelling argument warranting a departure from or reconsideration of any of the above holdings.

Appellant also argues that the trial court should have *sua sponte* instructed the jury that the absence of mitigating factors could not be treated as aggravation. (AOB 327-330.) This argument, too, has been repeatedly rejected by the Court, and appellant gives no compelling reason why this holding should be reexamined. (See *People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Viera* (2005) 35 Cal.4th 264, 298; *People v. Benson* (1990) 52 Cal.3d 754, 802 ["a reasonable juror could not have believed . . . that the absence of mitigation amounted to the presence of aggravation"].) Appellant's complaint about the prosecutor's (unobjected to) argument pointing out that a number of mitigating factors "just don't apply" (see RT 4628-2629) does not strengthen his argument: "nothing in the prosecution's argument noting the absence of various mitigating factors would have misled the jury to consider them as aggravating." (*People v. Viera, supra*, 35 Cal.4th at p. 298.) In short, the trial court did not commit error by giving the whole of CALJIC No. 8.85, or by failing to give an instruction that the absence of mitigation could not be considered aggravating.

---

57. Appellant's jury received a modified version of factor (k) which permitted consideration of not only "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" but also "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." (RT 4686.)

XV.

THE TRIAL COURT DID NOT ERR IN DECLINING TO GIVE APPELLANT'S PROPOSED INSTRUCTION CONCERNING MITIGATING FACTORS

Appellant contends the trial court erred by declining his request to instruct the jury at the penalty phase with the following special instruction:

> If the mitigation evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty.
>
> A mitigating factor does not have to be proved beyond a reasonable doubt to be considered. You may find that a mitigating factor exists if there is any substantial evidence to support it.
>
> Moreover, the law does not require that you find the existence of any mitigating fact before you choose life without the possibility of parole over death. You may find, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.

(AOB 331-338; see CT 3393.) The court did not err in declining to give all or any part of this instruction.

Appellant cites *People v. Taylor* (1990) 52 Cal.3d 719, 746, in support of his argument that the jury should have been told "sympathy or compassion alone" could warrant rejection of a death verdict. *Taylor* is inapposite. There, the jury had been given a restrictive definition of mitigation as "an act, circumstance or condition which involves an abatement or decreasing in seriousness or severity, one that reduces or makes lesser just [sic] a person's degree of culpability." (*Id.* at p. 746.) This Court suggested that, standing alone, the instruction might have been too narrow, because it referred only to the offense and not to the defendant's character and background. (*Ibid.*) However, the Court found no reasonable likelihood that the jury interpreted the

instruction to prevent consideration of the defendant's character and background because the jury was also instructed, "If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty." (*Ibid.*) The Court did not suggest that this latter instruction must be given routinely, and we have found no other case where such an instruction has been delivered. The Court merely looked to the instruction to reject the argument that the narrow definition of mitigation had misled the jury.

Here, by contrast, the jury received unambiguous instructions that directed it to consider every aspect of the defendant's character and background. The trial court defined a mitigating circumstance as "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." (RT 4695.) The court had earlier instructed the jury that "sympathy and mercy for the defendant are proper considerations at the penalty phase." (RT 4675.)

The court then explained:

> If a mitigating circumstance or an aspect of the defendant's background or his character, as shown by the evidence, or by observation of the defendant, arouses sympathy or compassion such as to persuade you that death is not the appropriate penalty, you may act in response thereto and impose a punishment of life imprisonment without the possibility of parole on that basis.

(RT 4675.) Reiterating the point, the court also directed the jury to consider "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." (RT 4686.) Finally, the court told the jury that weighing aggravating and mitigating circumstances was not a mechanical process, but that the jury was "free to assign whatever moral or

sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (RT 4695.) Taking these instructions together, the jury was correctly and repeatedly informed that it should consider sympathy, and, indeed, that it could assign dispositive weight ("whatever . . . value you deem appropriate") to that factor alone. Appellant's proposed instruction was superfluous. It was also potentially misleading and confusing, suggesting perhaps that the jury should start from a base-line of death but then could "reject death" based on sympathy for appellant. Such an approach would be at odds with the requirement that penalty must be determined by weighing aggravating and mitigating factors to determine which penalty is the more appropriate. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.)

Without citation to any authority, appellant also claims that the court should have given the last paragraph of his special instruction to the effect that the jury could return a life sentence even if it found no mitigating evidence. (AOB 334.) This Court has repeatedly rejected identical contentions. (See *People v. Seaton, supra*, 26 Cal.4th at p. 688 ["the court need not instruct that the jury may decline to impose the death penalty even when there are no mitigating circumstances or the factors in aggravation outweigh those in mitigation"]; *People v. Medina, supra*, at p. 782; see also *People v. Hendricks* (1988) 44 Cal.3d 635, 654-655 ["Such an instruction would invite arbitrary decisions based on improper or irrelevant sentencing considerations including, for example, the defendant's race."].)

Appellant urges that the middle paragraph of his proposed instruction – that mitigating factors need not be proven beyond a reasonable doubt – should have been given to avoid the danger jurors would improperly intuit such a burden upon mitigation evidence. (AOB 337.) The Court has likewise repeatedly rejected this argument. (See *People v. Roldan, supra*, 35 Cal.4th at p. 741 ["the trial court did not err in refusing to give this potentially misleading

instruction because the instruction implies erroneously that aggravating factors must be proved beyond a reasonable doubt"]; *People v. Kraft* (2000) 23 Cal.4th 978, 1077.) Accordingly, the trial court did not err in declining to give appellant's proposed instruction.

XVI.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant raises a number of stock challenges to the California death penalty law, arguing "California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution." (AOB 337.) All of these challenges have repeatedly been rejected by this Court. Appellant presents no compelling reason to reexamine any of the court's prior holdings. Accordingly, we will not engage in a lengthy analysis of these issues.

Specifically, appellant makes the following complaints:

A. Appellant contends the death penalty is invalid because Penal Code section 190.2 fails to "meaningfully narrow the pool of murderers eligible for the death penalty. (AOB 340.) This argument has been rejected in *People v. Brown* (2004) 33 Cal.4th 382, 401, *People v. Michaels* (2002) 28 Cal.4th 486, 541, *People v. Frye* (1998) 18 Cal.4th 894, 1028-1029, *People v. Ray* (1996) 13 Cal.4th 313, 356, and other cases cited in those decisions.

B. Appellant contends Penal Code section 190.3, factor (a), permitting the jury to consider "the circumstances of the crime" in aggravation, "has been applied in such a wanton and freakish manner," without any reasonable limiting principle, as to violate the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. (AOB 345-353.) An identical argument was rejected in *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1050-1053; see *id.* at p. 1053 ["The ability of prosecutors in a broad range of cases to rely upon apparently contrary circumstances of crimes in various cases does not establish that a *jury* in a particular case acted arbitrarily and capriciously"; original italics]; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 976; *People v. Bolden* (2002) 29 Cal.4th 515, 566; *People v. Mendoza* (2000) 24 Cal.4th 130,

192.)

C.1.a. Appellant contends that, under *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531, 159 L.Ed.2d 403], a jury must find beyond a reasonable doubt both the existence of at least one aggravating factor and that aggravating factors outweigh mitigating factors. (AOB 354-371.) This Court has rejected these arguments in *People v. Stitely, supra,* 35 Cal.4th at p. 573, *People v. Morrison* (2004) 34 Cal.4th 698, 731, and *People v. Prieto, supra*, 30 Cal.4th at pp. 262-263, 275, among other cases cited therein.

C.1.b. Appellant contends the jury must also unanimously agree (i) on the existence of one or more aggravating factors and (ii) that aggravating factors outweigh mitigating factors. (AOB 371-376.) These arguments have been rejected in *People v. Stitely, supra*, 35 Cal.4th at p. 573, *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731, *People v. Jones* (1997) 15 Cal.4th 119, 196, and other cases cited therein.

C.2.a. Appellant contends penalty jurors must be instructed that they may return a death verdict only if they are persuaded beyond a reasonable doubt that aggravating factors outweigh mitigating factors. (AOB 377-378.) This argument has been rejected in *People v. Stitely, supra*, 35 Cal.4th at p. 573, *People v. Jones, supra*, 15 Cal.4th at p. 196, and cases cited therein.

C.2.b. Appellant contends penalty jurors must be instructed that they may return a death verdict only if they are persuaded beyond a reasonable doubt that death is the appropriate penalty. (AOB 378-383.) This argument has been rejected in *People v. Stitely, supra*, 35 Cal.4th at p. 573, *People v. Jones, supra*, 15 Cal.4th at p. 196, and cases cited therein.

C.3. Appellant contends that, at a minimum, proof of at least a preponderance of the evidence is required to show that (1) an aggravating factor exists, (2) the aggravating factors outweigh mitigating factors, and (3) death is

appropriate. (AOB 384-386.) This argument was rejected in *People v. Monterroso* (2004) 34 Cal.4th 743, 798; see also *People v. Jenkins, supra,* 22 Cal.4th at pp. 1053-1054 ["We also reject defendant's contention that the California death penalty law violates the Eighth and Fourteenth Amendments because the jury is not instructed as to *any* burden of proof in selecting the penalty to be imposed"; original italics].)

C.4. In a variation on his burden of proof arguments, appellant contends that on occasion jurors may find themselves "torn between sparing and taking a defendant's life," and therefore need a "tie-breaking rule . . . to ensure that such jurors . . . respond in the same way, so the death penalty is applied evenhandedly." (AOB 386.) He maintains it would be "'wanton'" and "'freakish'" to allow "one juror or jury . . . [to] break a tie in favor of a defendant and another . . . in favor of the State . . . ." (AOB 387.) The Court rejected an identical argument in *People v. Hayes, supra,* 52 Cal.3d at p. 643, where the defendant contended "that the trial court should have told the jury what to do if it found the circumstances in aggravation and mitigation to be precisely equal in weight."

The Court observed:

> The contention is based on a misapprehension of the nature of the penalty determination process. At the penalty phase, each juror must determine, through the weighing process, which of the two alternative penalties is the more appropriate. Because the determination of penalty is essentially moral and normative (*People v. Rodriguez* (1986) 42 Cal.3d 730, 779), and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. (See *People v. Williams* (1988) 44 Cal.3d 883, 960.) The jurors cannot escape the responsibility of making the choice by finding the circumstances in aggravation and mitigation to be equally balanced and then relying on a rule of law to decide the penalty issue.

(*People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) Appellant's contention also

ignores the plain language of Penal Code section 190.3, which permits a death verdict only if "the trier of fact concludes that the aggrevating circumstances *outweigh* the mitigating circumstances." (Italics added; see also *People v. Cox*, *supra*, 30 Cal.4th at p. 972 ["each juror must believe the circumstances in aggravation substantially outweigh those in mitigation"].) Thus, it is impossible that a juror would return a death verdict merely by finding aggravation and mitigation to be equally balanced.

C.5. In still another variation on his burden of proof arguments, appellant contends that if this Court's repeated pronouncement that there is no burden of proof at the penalty meets constitutional standards, then the jury must be told that there is no burden of proof. Failure to do so, he maintains, is automatically reversible under *Sullivan v. Louisiana* (1993) 508 U.S. 275. The Court has stated that a trial court should not instruct "at all" on the burden of proving aggravating and mitigating circumstances given the inherently moral and normative, not factual, nature of penalty decision-making process. (*People v. Carpenter, supra,* 15 Cal.4th at p. 417; see also *People v. Holt, supra,* 15 Cal.4th at p. 684.) *Sullivan v. Louisiana, supra*, casts no doubt on the validity of this rule. In *Sullivan*, the state conceded that the jury had been given an unconstitutional definition of reasonable doubt on guilt. (508 U.S. at p. 277.) The Supreme Court concluded the error was structural and therefore reversible per se because "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly [denial of a right] . . . whose precise effects are unmeasurable, but without which a criminal jury cannot reliably serve its function." (508 U.S. at p. 281.) *Sullivan* does not address any burden of proof issues relating to penalty phase decision-making in a capital case, and no Supreme Court case undermines this Court's jurisprudence holding that no burden of proof applies to the penalty decision in this state. (See *People v. Smith* (2005) 35 Cal.4th 334, 374.)

C.6. Appellant contends that the failure to require written findings by the jury regarding aggravating factors violates the Sixth Amendment, Eighth Amendment, and Due Process Clause. (AOB 388-392.) This claim has been rejected in *People v. Smith, supra*, 35 Cal.4th at p. 374, *People v. Fauber* (1992) 2 Cal.4th 792, 859, and cases cited therein.

C.7. Appellant contends inter-case comparative proportionality review is required to ensure a constitutional death penalty. (AOB 392-397.) This argument has been rejected in *People v. Smith, supra*, 35 Cal.4th at p. 374, *People v. Anderson, supra*, 25 Cal.4th at p. 602, and cases cited therein.

C.8. Appellant contends that any use of unadjudicated criminal activity violates the constitution, and, alternatively, if unadjudicated activity may be considered, the jury must unanimously agree it is true beyond a reasonable doubt. (AOB 397-398.) These arguments have been rejected in *People v. Smith, supra*, 35 Cal.4th at 473, *People v. Michaels, supra*, 28 Cal.4th at pp. 541-542, *People v. Miranda* (1987) 44 Cal.3d 57, 99, and cases cited therein. Appellant suggests that this Court's decisions have been undermined by the Supreme Court's decisions in *Blakely, supra*, *Ring, supra*, and *Apprendi, supra*. The Court has rejected this argument in *People v. Young* (2005) 34 Cal.4th 1149, 1208 and *People v. Prieto, supra*, 30 Cal.4th 226, 262-263, 265.

D. Appellant recasts several of his previous arguments in terms of the Equal Protection Clause. (AOB 398-409.) Specifically, he contends that it is a denial of equal protection (1) to fail to require any burden of proof for aggravating factors at a capital defendant's penalty phase while requiring that aggravating factors for a determinate sentence imposed on a non-capital defendant be shown by a preponderance of the evidence (AOB 400-401), (2) to fail to afford disparate sentence review under former Penal Code section 1170, subdivision (f) to capital defendants while giving such review to those non-capital defendants sentenced under the Determinate Sentence Law (AOB

401-408), (3) to fail to require written findings for a death verdict while requiring an adequate statement of reasons for a determinate sentence (AOB 408; see also AOB 390), and (4) to fail to require jury unanimity on aggravating factors supporting a death verdict while requiring unanimity on enhancing allegations in non-capital cases. (AOB 408; see also AOB 400-401.) The Court has directly considered and rejected the claim that denial of disparate sentence review denies equal protection to capital defendants. (*People v. Cox* (1991) 53 Cal.3d 618, 691; *People v. Marshall* (1990) 50 Cal.3d 907, 945; *People v. Williams* (1988) 45 Cal.3d 1268, 1330; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) In doing so, the Court made the following observation that is equally dispositive of appellant's remaining equal protection arguments: "in our view, persons convicted under the death penalty law are manifestly not similarly situated to persons convicted under the Determinate Sentencing Law and accordingly cannot assert a meritorious claim to the 'benefits' of the act under the equal protection clause." (*People v. Williams, supra*, 45 Cal.3d at p. 1330.) Because the "first prerequisite to a meritorious equal protection claim is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner" (*In re Eric J.* (1979) 25 Cal.3d 522, 530; original italics), and because this Court has already determined that capital defendants are not similarly situated with non-capital defendants sentenced under the Determinate Sentencing Law, appellant's various equal protection arguments all fail at the threshold inquiry.

E. Appellant contends that "the very broad death scheme in California and death's use as regular punishment violates both international law and the Eighth and Fourteenth Amendments." (AOB 414.) This Court has repeatedly denied claims that California's death penalty scheme violates international law. (See *People v. Smith, supra*, 35 Cal.4th at p. 375; *People v. Bolden, supra,* 29 Cal.4th at p. 567; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) In an

apparent variation on the standard argument that California's death penalty law is prohibited by international law, appellant suggests that the Eighth Amendment in effect incorporates international law in deciding whether capital punishment is lawful under "evolving standards of decency." (See AOB 412, citing *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21.) Therefore, he concludes, since "[n]ations in the Western world no longer accept" capital punishment "as *regular punishment* for substantial number of crimes—as opposed to extraordinary punishment for extraordinary crimes," California's assertedly broad death penalty law is unconstitutional. (AOB 412; original italics.) Appellant seriously overestimates the extent to which international law informs Eighth Amendment analysis. In *Roper v. Simmons* (2005) __ U.S. __ [161 L.Ed.2d 1, 125 S.Ct. 1183], the Supreme Court stated that, while "[t]he opinion of the world community" may provide "significant confirmation for our own conclusions" that the juvenile death penalty violates the Eighth Amendment (*id.*, __ U.S. at p. __ [161 L.Ed.2d at p. 27, 125 S.Ct. at p. 1200]), international opinion is "not controlling, for the task of interpreting the Eighth Amendment remains our responsibility." (*Id.*, __ U.S. at p. __ [161 L.Ed.2d at p. 25, 125 S.Ct. at p. 1198].) In other words, international consensus cannot be the reason to find a state's particular punishment unconstitutional; it can only be looked at as confirmation following a finding, in the first instance, that the punishment violates our own national consensus. Indeed, this is exactly the methodology used in *Roper* and *Atkins.* Before making any mention of international views, the Court in *Roper* concluded that the State of Missouri "cannot show national consensus in favor of capital punishment" for juveniles. (*Roper, supra,* __ U.S. at p. __ [161 L.Ed.2d at p. 20, 125 S.Ct. at p. 1194].) And, in *Atkins*, where the Court found execution of the mentally retarded to violate the Eighth Amendment, the court first concluded "that a national consensus has developed against" execution of the mentally retarded before

adding, in a footnote, that the "world community" also overwhelmingly disapproved executing the mentally retarded. (*Atkins, supra*, 536 U.S. at p. 316 & fn. 21.) Here, appellant has not even attempted to show that there is a national consensus against any of the special circumstances that qualify a person for the death penalty in California, including the multiple murder and felony-murder special circumstances that support the death judgment against him. The reason is obvious: there is no national consensus against the death penalty under these circumstances. Whether the world community does or does not have a consensus against the death penalty for the types of crimes committed by appellant is, therefore, entirely beside the point.

XVII.

APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW

Appellant contends that the California death penalty law violates binding provisions of international law, specifically, the International Covenant of Civil and Political Rights. (AOB 415-418.) The Court has repeatedly rejected this argument. (See *People v. Roldan, supra,* 35 Cal.3d 646, 744, *People v. Brown, supra,* 33 Cal.4th 382, 403-404, and cases cited therein.) Appellant also reprises his argument that the Eighth Amendment incorporates an international consensus against use of the death penalty for "ordinary crimes." (AOB 418-420.) For the reasons stated above in Respondent's Argument XVI.E, this argument is meritless because there is no national consensus prohibiting use of the death penalty for the crimes and attendant special circumstances committed by appellant, and, therefore, no occasion to look to international law for confirmation of that consensus. (See *Roper v. Simmons, supra,* __ U.S. at p. __ [161 LEd.2d at p. 25, 125 S.Ct. at p. 1198].)

XVIII.

ALL OF THE CONVICTIONS AND SPECIAL CIRCUMSTANCES CONSIDERED BY THE JURY WERE SUPPORTED BY SUFFICIENT EVIDENCE

Appellant contends that if this Court reverses for insufficient evidence the burglary and robbery convictions against Ruth Durham, the burglary and murder convictions against Pearl Larson, or the burglary-murder and robbery-murder special circumstances against Pearl Larson, then "the judgment of death must likewise be reversed." (AOB 421.) We have shown above that the evidence was sufficient to support each challenged conviction and special circumstance. The premise of appellant's argument therefore fails.

Even if the evidence were insufficient in any respect urged by appellant, reversal of his penalty would not be warranted. Appellant argues that any penalty consideration of insufficiently proved factors violated his right to a reliable penalty determination. (AOB 422.) However, a penalty jury's consideration of a special circumstance later found to be unsupported by sufficient evidence is not prejudicial per se; rather, the penalty verdict need be reversed only if there is a "reasonable possibility" that the penalty verdict would have been different absent consideration of the insufficient charge. (*People v. Mickey*, *supra*, 54 Cal.3d at pp. 678, 703 [jury's consideration of insufficient financial-gain special circumstance did not require reversal of death penalty]; *People v. Benson*, *supra*, 52 Cal.3d at pp. 784-785, 793 [consideration of insufficient witness-killing special circumstance did not require reversal of death penalty].) Here, given the evidence that appellant viciously murdered three elderly women combined with his similar attack upon Ms. Herrick and the aggravating evidence of the similar incident in Palo Alto in 1982—when he was caught in the act of stealing jewelry from an elderly woman during a daytime robbery in her home—there is no reasonable possibility that any

improper consideration of the Durham incident or the Larson special circumstances adversely affected the jury's penalty determination.

Appellant's citation to *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849, does not alter this conclusion. In *Silva*, the Ninth Circuit did not grant relief merely because three of four special circumstances had been invalidated. Rather, it relied on that fact to support its conclusion that counsel's deficient penalty phase mitigation case had prejudiced Silva. (*Ibid.*) In fact, *Silva* suggested that if a death sentence had been inevitable "because of the enormity of the aggravating circumstances" it would have reached a different result. (*Ibid.*) Here, there was just such an "enormity of aggravating circumstances." *Silva* is thus not authority for the proposition that any consideration of an invalid special circumstance or underlying conviction requires a death penalty to be set aside.

Appellant also argues that harmless error analysis is precluded by *Ring v. Arizona, supra*, 536 U.S. at p. 588, which holds that a jury – not a judge – must find the aggravating circumstances necessary for imposition of the death penalty. (See *People v. Prieto, supra*, 30 Cal.4th at p. 256.) This Court has held that *Ring* does not prevent harmless error analysis for the omission of an element of a special circumstance. (*People v. Prieto, supra*, at pp. 256-257.) In such a case, the jury has made the essential finding, but has done so without complete instructions. The instructional error may therefore be reviewed for harmlessness. Likewise, *Ring* does not undermine the ability of a reviewing court to engage in harmless error analysis where the jury resolves the penalty determination in favor of death, but in doing so considers some evidence a reviewing court later finds deficient or otherwise improper. A contrary conclusion would require reversal of a penalty verdict whenever *any* evidence

was improperly received by a penalty jury.[58] Nothing in *Ring* (or its precursor, *Apprendi v. New Jersey, supra*, 530 U.S. 466) supports the staggering proposition that a reviewing court is powerless to assess the affect of improperly considered or admitted evidence on a jury's guilt or penalty verdict. Appellant's suggestion to the contrary is meritless.

58. Indeed, under appellant's theory, no harmless error analysis could be undertaken from any guilt verdict if any evidence was improperly admitted at trial because to do so would substitute the reviewing court's judgment for the jury's.

XIX.

THERE IS NO CUMULATIVE EFFECT OF ALLEGED ERRORS REQUIRING REVERSAL OF THE GUILT OR PENALTY JUDGMENTS

In his final argument, appellant contends that the "cumulative effect of the multiple errors requires reversal of the guilt judgment and the penalty determination." (AOB 424.) We have demonstrated above that all of appellant's various claims of guilt or penalty phase error lack merit. Accordingly, there is no error to cumulate. (*People v. Gray* (2005) 37 Cal.4th 168, 238; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094.) To the extent that error is found in one or more of the claims as urged by appellant, we have shown that any possible error was harmless. Consideration of the cumulative effect of any possible errors does not alter our analysis: appellant received a fair trial and was not prejudiced by the asserted errors, whether considered individually or cumulatively. (See *People v. Bolden*, *supra*, 29 Cal.4th 515, 567-568; *People v. Koontz, supra*, 27 Cal.4th at p. 594.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

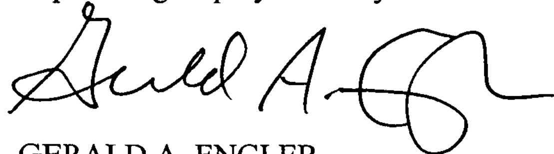
Dated: October 12, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General



GERALD A. ENGLER
Senior Assistant Attorney General

Attorneys for Respondent

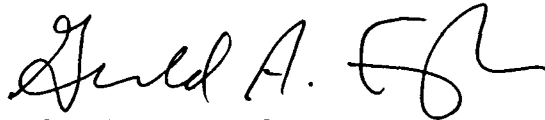
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 49536 words.

Dated: October 12, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



GERALD A. ENGLER
Senior Assistant Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Franklin Lynch***

Case No. **S026408**

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. 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 October 12, 2005, I served the attached

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General,455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102, for deposit in the United States Postal Service that same day in the ordinary course of business in a sealed envelope, postage fully prepaid, addressed as follows:

Ellen J. Eggers
Deputy State Public Defender
801 K Street, Suite 1100
Sacramento, CA 95814
(2 copies)

California Appellate Project
Attn: Michael Millman
101 Second Street
Suite 600
San Francisco, CA 94105

The Honorable Thomas J. Orloff
District Attorney
County of Alameda
1225 Fallon Street, Room 900
Oakland, CA 94612

Alameda County Superior Court
Attn: Clerk, Criminal Division
1225 Fallon Street, Room 107
Oakland, CA 94612

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on October 12, 2005, at San Francisco, California.

J. Wong

(Signature)