IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

RESPONDENT'S BRIEF

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General

RICHARD T. BREEN
Deputy Attorney General
State Bar No. 185877

300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 897-5573
Fax: (213) 897-2806

Attorneys for Plaintiff-Respondent

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STATEMENT OF THE CASE

In an amended information filed by the Los Angeles County District Attorney, appellant was charged with one count of murder in violation of Penal Code[1/] section 187, subdivision (a). The following special circumstances were alleged: 1) that the victim was a federal law enforcement officer who was killed while engaged in the performance of her duties (§ 190.2, subd. (a)(8)); 2) that the murder was committed in the commission of robbery (§ 190.2, subd. (a)(17)); and 3) that appellant had previously been convicted of three counts of murder (§ 190.2, subd. (a)(2)). It was also alleged that in the commission of the offense appellant personally used a shotgun within the meaning of section 12022.5, subdivision (a), and that during the commission of the offense a principal was armed with a handgun within the meaning of section 12022, subdivision (a). (CT 589-591.)

Appellant pleaded not guilty and denied all special allegations. (CT 879.) A jury found appellant guilty of murder and found the firearm enhancement allegations under sections 12022.5, subdivision (a) and 12022,

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1. All subsequent statutory references are to the Penal Code unless otherwise indicated.

subdivision (a), to be true. The jury also found the multiple murder and robbery special circumstances allegations under section 190.2, subdivisions (a)(2) and (a)(17) to be true.[2/] (CT 3855, 3857, 3859, 3861.) Appellant was sentenced to death. (CT 3879, 3985, 4059-4063, 4078-4085.) This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. GUILT PHASE

1. Prosecution Evidence

At approximately 7:30 p.m. on June 4, 1980, Special Agent Lloyd Bulman of the United States Secret Service, and his partner, Agent Julie Cross, were on duty at the corner of Belford Avenue and Interceptor Street in Los Angeles. (RT 4751-4754, 4756-4757, 4759, 4773.) The area was close to Los Angeles International Airport. (RT 4758.) The two agents were sitting in a parked Secret Service car facing west on Interceptor Street. Agent Bulman was in the driver's seat and Agent Cross was in the passenger seat. (RT 4753-4754, 4756-4757, 4759, 4775.) Only Agent Cross's window was open. (RT 4774.) Agents Bulman and Cross were stationed to prevent the possible escape of a suspected counterfeiter whose house on Belford Avenue was going to be the subject of a search warrant. (RT 4759-4762.)

U.S. Secret Service Special Agent Terry Torrey was in a van on the southeast corner of Belford Avenue and Manchester as part of the counterfeiting surveillance. Agent Torrey was a few hundred yard from where Agents Cross and Bulman were parked on Interceptor. (RT 5186-5188.) Agent

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2. Pursuant to section 1118.1, appellant was acquitted of the allegation that the victim was a federal law enforcement officer who was killed while engaged in the performance of her duties within the meaning of section 190.2, subdivision (a)(8). (CT 3857.)

Torrey was positioned so that from the rear of the van he could see a car on the west side of Belford Avenue that was the subject of the surveillance. (RT 5189.)

Agents Bulman and Cross were each armed with a wooden-handled .357 magnum pistol that was loaded with .38 caliber rounds, and there was a shotgun on the floorboard that was alternatively loaded with rifle slugs and "4X" buckshot. (RT 4763, 4767-4770, 4772.) The shotgun was a specially modified Remington 12-gauge shotgun with a short barrel, a pistol grip, a folding stock, and a slide stop that prevented the user's hand from coming too far forward after the weapon was pumped. (RT 4765-4767.) The shotgun was loaded with four rounds, but did not have a cartridge in the chamber. The safety on the shotgun was "off," but in order to use the shotgun, the slide would need to be pulled back in order to chamber a cartridge. (RT 4771-4772.) The shotgun was engraved with the letters "U.S.S.S." for United States Secret Service, and the folding stock bore the inscription "For Law Enforcement Use Only." (RT 4773.)

At some point before dark, a medium brown, rusted, car with a lighter-colored vinyl roof drove by slowly at ten to fifteen miles per hour. (RT 4774-4776.) The brown car was a large two-door model with a slanted trunk area. (RT 4786.) A neatly groomed black male with a mustache was driving the car, and a black male wearing a knit stocking cap was in the passenger seat. (RT 4777.) The two men in the brown car looked at Agents Bulman and Cross as they drove by. The passenger in the brown car turned his head and continued looking for two to three car lengths as they drove past the agents. (RT 4778.) The brown car turned north when it reached the corner of Interceptor Street and Airport Boulevard. (RT 4780.)

Three to five minutes later, Agent Cross said, "Here comes that car again." The same brown car, with the same occupants that the agents had seen

earlier came south on Belford Avenue and turned west onto Interceptor Street at the same slow speed as before. (RT 4780-4782, 4785.) Again, the occupants of the brown car looked at Agents Bulman and Cross. (RT 4785.) The brown car parked just east of an apartment complex at 5845 Interceptor Street. (RT 4782.) The occupants of the brown car got out and walked in between an apartment building and a garage, out of Agent Bulman's sight. (RT 4783-4784.) Two to three minutes later, the occupants of the brown car came back into sight, got back in their car, drove west on Interceptor, and again turned north on Airport Boulevard. (RT 4786-4787.) It was now close to 8:00 p.m., and it was dusk. (RT 4787.)

After it was dark outside, Agent Cross said, "I think somebody is coming up on my side of the car." (RT 4789.) Both agents drew their pistols out of their holsters, and Agent Cross got out of the car. (RT 4789.) Agent Cross walked toward the back of the car with her pistol at waist level, while Agent Bulman tried to watch through the rear passenger window. (RT 4790.) Agent Bulman turned to get out of the car, and as he did so he looked over his left shoulder and saw a black male approaching the driver's side while reaching toward his waist. As Agent Bulman grabbed the door handle, the black male pulled open the door and pointed a revolver a foot from Agent Bulman's head. (RT 4790-4792.) The man was crouched below the level of the roof of the car and told Agent Bulman to put his hands up. (RT 4793.) Agent Bulman started to bring up his pistol, then set it down on the seat next to him. (RT 4793.) Agent Bulman was able to see the man and described him as a neatly groomed black male with a thick mustache and short hair, who was wearing a dark jacket, a dark sweater or turtleneck and dark slacks. The intruder had been driving the brown car that had driven by twice before. (RT 4793-4794.)

The man told Agent Bulman to put his hands up, and Agent Bulman complied. Agent Bulman identified himself as a police officer, to which the

man responded, "I'm a police officer too." Agent Bulman said, "Well, let me show you my badge and you show me your badge. Let me out of the car and we'll get this thing straightened out." (RT 4794.) The man said something to the effect of, "Shut up. You're not getting out of the car. Tell your partner to drop her weapon." (RT 4795.) Agent Bulman refused, saying, "I'm not going to tell her to drop her weapon. What we've got here is a Mexican stand-off. You've got me. My partner is on the other side of the car with your partner. I'm not going to tell her to drop her weapon." The man pressed his gun into Agent Bulman's left temple, pushing him over the car seat. (RT 4795.) Agent Bulman tried to key the microphone on his police radio, but the radio was off. (RT 4799.) The man said, "Tell your partner to drop her weapon or I'll blow your head off." Agent Bulman responded, "Julie, he wants you to drop your weapon but don't do it. We need to get this straightened out." Agent Bulman was not able to see what was happening on the other side of the car with Agent Cross. (RT 4795, 4942.) Agent Bulman heard Agent Cross say, "What are you doing? Get your hands back up on the car." A few seconds later, the other black male from the brown car came over to the driver's side and leaned in to look at Agent Bulman. Agent Bulman said, "Look, I'm a police officer. We need to get this thing straightened out. I have this microphone that will show you this is a police car." (RT 4799.) The new intruder said, "He's got a radio," then reached into the car, pulled the keys out of the ignition, and knocked the microphone from Agent Bulman's hand. (RT 4800.)

Noticing the shotgun on the floorboard, the new intruder said, "What do we have here," and reached into the car and took the shotgun. The new intruder then walked around to the back of the car. (RT 4800, 4941.) Suddenly, Agent Cross jumped into the passenger side with a look of panic on her face and dove into the back of the car. (RT 4800-4801.) A shotgun blast came through the passenger side door across Agent Bulman's lap. (RT 4801.)

Agent Bulman grabbed the gun hand of his assailant and pushed it away from his head. The assailant's gun fired toward the front of the car. Agent Bulman wrestled the man out of the car and into the middle of Interceptor Street where the gun discharged a few more times. (RT 4802-4803, 4834-4836.) As Agent Bulman wrestled with his assailant, they each had both of their hands on the assailant's gun and were trying to take control of it. (RT 4803.) Agent Bulman's gun was still on the front seat of the car. (RT 4803.) Agent Bulman heard two shotgun blasts coming from the area of the car as he wrestled for control of the pistol with his assailant. (RT 4938.)

As Agent Bulman wrestled with his assailant, his assailant said, "Shoot the son of a bitch," to which the man holding the shotgun replied, "I can't. You're in the way." (RT 4804.) The man holding the shotgun was now pointing it toward Agent Bulman and his assailant. (RT 4804.) Agent Bulman was able to see that the man holding the shotgun had been the passenger in the brown car, based on his stocking cap and the shape of the man's mustache. (RT 4805.) Agent Bulman identified a stocking cap (People's Exhibit 9) as looking like the one worn by the man with the shotgun. (RT 4805.)

The man with the shotgun was standing on the curb and holding the shotgun with his right hand on the pistol grip and his left hand on the stock. (RT 4897.) Agent Bulman continued to wrestle with his assailant, trying to keep the assailant's body between him and the man with the shotgun. (RT 4807.) However, the man with the shotgun tried to circle around Agent Bulman and his assailant in order to get Agent Bulman into the sight of the shotgun. (RT 4808.) As Agent Bulman and his assailant turned in circles, the three of them moved back toward the Secret Service car. (RT 4808.)

Agent Bulman eventually lost his balance and let go of his assailant as he fell. Agent Bulman was on the ground and was pushing himself back up with his hands when the man with the shotgun ran up to him, pointed the

shotgun about six inches from Agent Bulman's head and fired. (RT 4809-4812.) Agent Bulman flinched and turned away as the shotgun fired. Gravel from the street flew up into Agent Bulman's face, temporarily blinding him, and making Agent Bulman think he had been shot in the face. (RT 4813.) Agent Bulman heard the two men run northbound on Belford Avenue. (RT 4813.) Agent Bulman felt his face for damage, and when he realized the shot had missed him, he got up and ran back to the Secret Service car. (RT 4813.)

Agent Bulman got his pistol from the front seat of the car, but did not see Agent Cross's pistol anywhere. (RT 4813-4814.) Agent Cross was lying in the back seat, and Agent Bulman was unable to feel a pulse in her neck. (RT 4814.) Agent Bulman ran down to the corner of Interceptor and Belford and headed north on Belford to get help from the surveillance van. (RT 4814-4815.) Along the way, Agent Bulman stopped to talk to Harry Zisko, a bystander from an apartment building on Belford Avenue. (RT 4815.)

Around the same time, Agent Torrey in the surveillance van had seen a medium to dark-colored car, similar to a 1976 Pontiac Grand Prix, loudly speeding towards him on Belford with its headlights off. (RT 5190-5193.) Within minutes, Agent Bulman ran up to the van. Agent Bulman jumped into the surveillance van, where Agent Torrey was stationed. (RT 4815.) Agent Bulman told Agent Torrey that Agent Cross had been shot, and the two drove back to the location of the shooting in the surveillance van. (RT 4816, 5194.) Agent Bulman never saw the shotgun, Agent Cross's gun, or the keys to the secret service car again. (RT 4937-4938.)

At approximately 9:00 p.m. on June 4, 1980, Wayne Dahler drove westbound on Interceptor past a black car. The driver and passenger doors of the car were open. Dahler saw two men, one wearing a lighter colored brown or tan jacket, leaning in to the driver's side. Someone was getting into the passenger side door as well. (RT 4954-4960.) Just after 9:00 p.m., Alvin

Borges was driving south on Belford. As Borges turned right onto Interceptor he saw two black males fighting another man who was on the ground. The man on the ground appeared to be pleading for his life. (RT 4968-4970, 4973.) One of the black men shot the man on the ground at almost point-blank range with a shotgun. The shooter was wearing jeans and a brown, waist-length leather jacket, and was between five feet ten inches tall and six feet tall. (RT 4971-4973, 4976-4979.) The shooter used his right hand to pull the trigger and his left hand to hold the front of the shotgun. (RT 4974-4975.) Defense Exhibit F, a jacket, "could be" consistent with the jacket Borges saw on the man with the shotgun. (RT 4975-4976.)

At approximately 9:00 p.m., Harry Zisko was in his apartment at 8817 ½ Belford when he heard two or three gunshots from the direction of Interceptor. Five to ten seconds later, Zisko looked out the east-facing window of his second floor apartment and saw two men sprinting north on Belford. (RT 5015-5019.) The shorter of the two men was carrying a two inch diameter cylinder that was a foot or foot and a half long. (RT 5019-5021.) Zisko heard a metallic clanking sound that accompanied the men running. (RT 5021.) Zisko lost sight of the men near 88th Street, however, 10 to 20 seconds later, a car that had been waiting near the curb with its lights on pulled into the street, appeared to briefly lose control, and after getting moving on the street, the car's lights were shut off. (RT 5021- 5024.) Zisko heard a call for help and ran into the street. There, a man holding a gun who identified himself as a police officer, told Zisko that an officer had been shot and asked Zisko to call the police. (RT 5024-5025.) Zisko called the police from his apartment. (RT 5025.)

At approximately 9:00 p.m. Frank Kerr, a special operations inspector for the Immigration and Naturalization Service was in his ground floor apartment on 8819 Belford when he heard loud shouting in the street, and three

or four handgun shots. (RT 5032-5034, 5036, 5044.) In the next 30 to 40 seconds, Kerr dressed, grabbed his service pistol and identification, and asked his wife to call "911." Kerr then heard a volley of shotgun blasts. (RT 5052-5053.) When Kerr went outside to see what was happening, he heard two people running north on Belford. (RT 5035.) Kerr moved in the direction of the shots, and saw Agent Bulman standing next to the Secret Service car holding the microphone of the police radio. (RT 5037-5038.) Agent Bulman was distraught and repeatedly said, "they shot me." (RT 5039.) Kerr determined that Agent Bulman had not been seriously injured. (RT 5040.) Agent Bulman told Kerr that "they got my partner, she's in the back seat." (RT 5041.) Agent Bulman then ran north on Belford in pursuit. (RT 5041.) The front passenger door of the Secret Service car was open, but the rear door was closed. When Kerr opened the rear passenger door, Agent Cross's head and hand came out of the door. (RT 5041-5042.) Kerr could see that Agent Cross had been shot in the chest and smoke from burning gunpowder was coming from a hole in her sweater. (RT 5042-5044.) Kerr estimates he heard eight or nine shots total. (RT 5053.)

After midnight on June 4, 1980, Agent Bulman returned to the Secret Service office and gave a 30 to 45 minute statement to Special Agent Renzi and Los Angeles Police Department Detective Thies. (RT 4828-4829.) At the time, Agent Bulman described the driver of the brown car who accosted him with the gun as a black male, approximately six feet tall, 195 pounds, with a mustache, neatly combed hair, a stocky build, and wearing a dark jacket. (RT 4829-4830, 4939.) The passenger in the brown car that eventually got hold of the shotgun was described as a black male, approximately five feet, ten inches to five feet, eleven inches tall, with a mustache, a thinner build, and wearing a dark knit hat and dark jacket. (RT 4830.) Agent Bulman also returned to the crime scene with Thies and Renzi and walked around with them. (RT 4829.)

Agent Bulman returned to the Secret Service office at 9:00 a.m. on June 6, 1980, in order to meet with composite sketch artist Fernando Ponce. (RT 4830.) Agent Bulman worked with Ponce to develop an accurate sketch of the two men Agent Bulman had seen the night of June 4. (RT 4831.) Bulman described the mustaches and faces of the two assailants in detail, and related to Ponce that the man with the shotgun had a thinner mustache. (RT 4934-4935.) Agent Bulman did not recall either suspect having tattoos or scars. (RT 4862.) After the two sketches were completed, an attempt was made to hypnotize Agent Bulman before making another composite. (RT 4832.) Agent Bulman did not feel like he had been hypnotized. (RT 4832.) Agent Bulman did not request any changes to the composites (People's Exhibit 12) after the attempted hypnosis session. (RT 4833-4834, 4935.)

On June 9, 1980, Agent Bulman attended a live lineup (People's Exhibit 13) at which he did not identify any of the six subjects as being involved in the June 4, 1980 incident. (RT 4838-4839, 4943-4945.) On June 27, 1980, Agent Bulman attended another live lineup (People's Exhibit 14) at which he indicated that number four, Terry Brock, "looks similar to the person [armed with a pistol] but I do not recall a beard." The "beard" was a little goatee that Agent Bulman did not recall from the night of the crime. (RT 4840-4841.)

On August 7, 1980, Agent Bulman attended another live line-up (People's Exhibit 15) at which he indicated subject number one looked similar to the suspect armed with a pistol "if he had a mustache and no beard. . . ." (RT 4842-4843.) On November 17, 1980, Agent Bulman attended another live lineup (People's Exhibit 15) at which he indicated, "No. 4 [was] similar [to the man armed with a pistol], but has a beard now. Did not have one then." (RT 4843-4845.)

In 1987, Agent Bulman met with Dr. Stock, and hypnosis was attempted again, as well as a crime scene reenactment. Agent Bulman felt he may have been hypnotized at this session because he felt his arm raise at the request of Dr. Stock, and also experienced a flashback of his assailant pulling the trigger. (RT 4936-4937.) Bulman did not feel that his statements or recollection about the crime changed after the session with Dr. Stock, or over the years. (RT 4937.)

On April 3, 1990, Agent Bulman was scheduled to see a live lineup containing appellant. Appellant refused to stand in the lineup. (RT 5894.) On April 19, 1990, Agent Bulman attended another live lineup at which he was looking for the suspect who had been armed with the pistol. Agent Bulman indicated subject number six looked like the person armed with the pistol. (RT 4845-4846, 5896-5897.) Pursuant to a court order, appellant stood in the lineup as subject number three. (RT 4846, 5894-5896.)

Agent Bulman did not recall any subsequent interviews with Detective Thies or Special Agent Renzi, nor did he recall giving any new information to any police officer after the composite drawings were completed. (RT 4836.) Agent Bulman was re-interviewed a number of times between 1980 and 1991, and at one point spoke with Detective Buck Henry of the Los Angeles Police Department. (RT 4836.) Agent Bulman did not change his statement over the years, nor feel that his memory of the events of June 4, 1980, had changed at all despite the attempt to hypnotize him and reenact the crime scene in 1987. (RT 4837.)

At trial, Agent Bulman could not identify appellant as one of the assailants from June 4, 1980. (RT 4850.) However, Agent Bulman described the composite drawings from June 6, 1980, as the best description he could give. (RT 4850.) Agent Bulman was shown five photographs (People's Exhibits 18, 19, 20, 21, 22) the night before he testified, and identified People's

Exhibit 18 (Terry Brock) as depicting the man who held a pistol to him, who was depicted on the right side of the composite drawing (People's Exhibit 12). (RT 4860-4861.) Agent Bulman also identified People's Exhibit 19 (a photograph of appellant), as depicting the man who fired the shotgun, who was also depicted on the left side of the composite drawing (People's Exhibit 12.) (RT 4861.) Agent Bulman described People's Exhibit 20 (a photograph of appellant) as looking similar to the person on the left of the composite drawing except without facial hair. (RT 4861.) People's Exhibit 21 (a photograph of Terry Brock) was described as looking like the person on the right of the composite drawing except with longer hair and a beard. (RT 4861-4862.) Agent Bulman did not recognize People's Exhibit 22, which depicted Charles "Chino" Brock. (RT 4862.)

Los Angeles Police Department Homicide Detective Marvin Engquist responded to the crime scene at approximately 11:00 p.m. on June 4, 1980. (RT 5058.) The rear doors of the Secret Service car were closed and Agent Cross's body was still lying on the bloody back seat of the car. (RT 5062, 5067-5069.) There were two bullet holes in the Secret Service car, one in the windshield above the steering wheel, and another, larger hole entering the inside driver's door panel and exiting to the outside. (RT 5063-5065.) Detective Engquist saw a fine mist blood splatter on the rear of the front seats that was not captured by the crime scene photographs. (RT 5068, 5070-5071, 5103, 5130-5132.) One shotgun cartridge was recovered near the passenger side door, another was recovered near the rear bumper, and another was recovered from the area between the Secret Service car and the intersection of Belford and Interceptor (RT 5072-5078.) An expended shotgun slug was recovered near the right rear wheel of the Secret Service car, and metallic shotgun pellets were recovered near the intersection of Belford and Interceptor. (RT 5083-5088, 5101-5102.) Where the metallic shotgun pellets were found, there was an area of the street

that was "hollowed out or dished out." (RT 5090-5091.)

Fifty-seven feet in front of the Secret Service car, Detective Engquist recovered from the street a pair of eyeglass frames, a broken eyeglass lens and an eyeglass case (all contained in People's Exhibit 41). (RT 5078- 5079, 5081-5082, 5089-5090, 5100.) Between June 14, 1980 and June 27, 1980, Agent Torrey canvassed the apartment buildings near the crime scene, but was unable to find anyone who owned the eyeglasses that were recovered from the street (People's Exhibit 41). (RT 5856-5858.)

Los Angeles Police Department Firearms analyst Purcell Dwayne Schube examined the three shotgun shells recovered at the crime scene (People's Exhibit 38), and determined that two of the shells once held slugs and the other had once held 27, number four shotgun pellets. All three shells were consistent with ammunition used in a .12 gauge Remington shotgun. (RT 5136-5138.) The slug recovered from near the rear wheel of the Secret Service car was the type that would have come from one of the recovered shells. (RT 5139.) The shotgun used at the scene ejected shells to the right when pumped after being fired. (RT 5142.)

Schube examined the Secret Service car and determined that three shotgun blasts had been fired into it from the passenger side. (RT 5143.) There was also a gunshot through the windshield, which appeared to have been fired from inside the car near the front driver door area. (RT 5143-5146, 5148.) A projectile consistent with a rifle slug had been fired from the passenger side at a slightly downward angle and had hit the inside of the driver's door before exiting the car. (RT 5146-5149, 5157.) Schube found that a shotgun slug had been fired from the front seat into the rear seat area, leaving some plastic shotgun wadding in the seat before penetrating the floorboard. (RT 5150-5153, 5155, 5157.) Schube also recovered two No. 4 buckshot pellets from the rear of the car. (RT 5154.) On June 20, 1980, a .38 caliber expended bullet

showing signs of impact damage was found on a slope on Interceptor, in front of where the Secret Service Car had been parked. (RT 5386-5391.)

In Schube's opinion, the shotgun-wielding assailant first fired the rifle slug that went across the driver and into the driver's side door. The next shot from the shotgun was a No. 4 buckshot cartridge fired from just outside the passenger side door into the backseat of the car and into Agent Cross's back. The final shotgun blast was a rifle slug cartridge that was fired from inside the car as the shooter leaned over the front seat into the back seat. (RT 5155-5165.) Pellets and shotgun wadding consistent with the shotgun shells found at the scene were removed from Agent Cross's body, indicating that she had been shot from a distance of less than ten feet. (RT 5165.) Examination of Agent Cross's clothing showed that she had been shot in the back from a distance of less than ten feet with the buckshot cartridge that was aimed towards the back seat. Agent Cross had also been shot in the chest with a rifle slug fired while the shooter was leaning over the front seat into the back seat at a distance of less than one foot from Agent Cross. The rifle slug entered Agent Cross's chest and exited her lower back. (RT 5166-5173.)

In the late 1970's and early 1980's, Arthur Jackson drove trucks with appellant at Swift Foods. (RT 5197-5199.) Around 1980, appellant would drive trucks to San Francisco. (RT 5199.) On a few occasions, Jackson saw that the truck appellant drove to San Francisco would be gone from Swift Foods from early Monday morning and would return by Tuesday evening, and then would be gone again from early Thursday morning until Friday evening. (RT 5204.) Around 1980, Jackson saw appellant driving a loud-sounding, medium-size car that was faded brown in color with a lighter-colored top. (RT 5206-5208.)

Yvette Curtis was Terry Brock's girlfriend in 1980, and met appellant through Brock around 1978. (RT 5235-5238.) Curtis identified photographs

as depicting Brock (People's Exhibits 18 and 21) and appellant (People's Exhibits 19 and 20) the way they looked around 1978. (RT 5238-5239, 5248-5249.) Prior to June 4, 1980, Curtis had an affair with appellant. Around 1978 or 1979, Curtis accompanied appellant on a trip to Northern California in a tractor-trailer truck. (RT 5241-5242.) Appellant wore glasses while driving at night, which he removed from a black glasses case. (RT 5243-5244.) Appellant's glasses were the same type as those recovered from Interceptor after the shooting (People's Exhibit 41). (RT 5245, 5247-5248.)

Just before 11:00 p.m. on June 4, 1980, Brock came to Curtis's house. Brock said, "I need to watch the news," and was nervous or excited about something. (RT 5246-5247, 5249, 5334.) When asked why he needed to watch the news, Brock said something like, "Because she was investigating a counterfeiting ring," and also mentioned "Westchester," "by Venice" or "by the airport." (RT 5249-5251.) Two weeks prior to the murder, Curtis had seen Brock with a .38 caliber revolver. (RT 5334-5335.)

Deputy Medical Examiner William Sherry performed an autopsy on Agent Cross's body. (RT 5366- 5368.) Agent Cross had suffered a gunshot wound consistent with a rifle slug from 12-gauge shotgun that entered the middle of her upper chest that exited her right back. (RT 5369-5370.) The wound damaged Agent Cross's aorta, pulmonary artery, pulmonary vein, the right atrium of the heart, and the right lower lung. (RT 7371-5372.) Agent Cross had also suffered a shotgun wound that resulted in shotgun pellets in her left back, shotgun pellets perforating her left lung, spleen, stomach, intestine, left kidney, abdominal aorta, spine, and left lobe of the liver. (RT 5373, 5376-5377.) Sherry estimated that the rifle slug wound had been fired from less than two feet away. (RT 5375.) The cause of Agent Cross's death was the two shotgun wounds, either of which alone would have been fatal. (RT 5379.)

Rod Englert, an expert in crime scene reconstruction and blood stain interpretation, testified that gunshot wounds create high velocity impact spatter, which is a fine spray or mist that travels up to four feet from the wound, back toward the source of the shot. (RT 5432-5439.) Larger drops of blood from a gunshot travel farther than four feet. (RT 5442.) In contrast, when someone is injured with a blunt object, blood does not spatter back on the assailant. (RT 5439-5440.) Englert examined photographs of the crime scene and Agent Cross's clothing, and determined that high velocity spatter was evident on the sleeves of Agent Cross's sweater. (RT 5443-5450.) Englert would expect that if the person who shot Agent Cross fired from a distance of two feet, they would have gotten blood on themselves and the barrel of the gun from high velocity spatter. (RT 5451-5452.) A person wearing a jacket under the same circumstances would have a blood spatter pattern on their shirt and then a "void" on the part of the shirt that was covered by the jacket. (RT 5452-5455.)

Englert also examined crime scene photographs of the backseat of the Secret Service Car. In Englert's opinion, the presence of white packing material from a shotgun over the bloodstains on the rear seat indicated that Agent Cross had been wounded in the back before jumping in the backseat, sliding along the backrest and assuming a defensive position against the passenger door before being shot again. The wadding from the second shot then coated the original blood stain. (RT 5457-5460.) Based on an examination of crime scene photographs showing the trajectory of the rifle slug, the rifle slug was fired by someone leaning over the back seat and shooting almost straight down onto Agent Cross. (RT 5461-5464.)

Optometrist Harold Ross examined appellant in 1987. Appellant stated he had lost his glasses and needed help seeing distant objects. Ross determined appellant needed right eye correction of "minus .75" and left eye correction for astygmatism of "minus .75, minus .25, Axis 90." (RT 5540.) It

would be typical for a person who had a correction of minus .37 in 1980 at age 28, to have a correction of minus .75 seven years later at age 35. (RT 5541-5542.) Optometrist Richard Hopping examined the glasses frames and lenses recovered at the crime scene (People's Exhibit 41) and determined that the glass came from a rimmed-edged, nearsighted prescription of minus .37. (RT 5553-5554, 5563.) In Hopping's opinion, a change of prescription from minus .37 at age 28 to minus .75 at age 35 would not be unusual. (RT 5555.) A minus .37 prescription would be useful for night driving. (RT 5561.)

Secret Service armorer Michael Zeffiro explained that in 1980, the Secret Service used modified Remington 870 shotguns (People's Exhibit 7). The modified shotguns had a pistol grip and a forearm safety stop on the barrel which prevented the user from getting his or her hand in front of the muzzle when the trigger was pulled. (RT 5598-5602.)

On November 12, 1990, Detective Richard Henry served a search warrant at the home of appellant's parents in Inglewood. (RT 5903.) During the search, Detective Henry advised Eileen Smith that the warrant pertained to the investigation into the murder of Agent Cross. (RT 5904.) Appellant's mother directed Detective Henry to where appellant's personal effects were located. (RT 5905.) Detective Henry seized a leather jacket (Defense Exhibit F), men's clothing, a knit cap, and bankruptcy papers in appellant's name filed April 15, 1980 (People's Exhibit 78). (RT 5905-5908.) Detective Henry also found a postcard addressed to appellant in 1987 reminding him to pick up eyeglasses from Doctor Ross at the Del Amo shopping center in Torrance. (RT 5908-5909.)

In November of 1991, Los Angeles Police Department forensic chemist Gregory Matheson examined a knit sweater, a knit watch cap, and a brown leather jacket that had been recovered from appellant's belongings. (RT 5647-5651.) Matheson's visual observation indicated that the sweater was

stained with a substance that appeared to be blood. (RT 5651-5652.) The sweater was then placed on a mannequin and presumptively tested for blood using luminol and phenolphthalein. The testing revealed that blood had soaked into the sweater fibers on the back and front, and that blood had spattered on the arms. (RT 5653-5658.) The watch cap tested negative for blood. (RT 5660-5661.) As to the jacket (Defense Exhibit F), Matheson saw a stain on the left cuff lining of the jacket that required further examination. (RT 5652-5653.) The jacket cuff presumptively tested positive for blood. (RT 5662.) When tested with luminol, the left sleeve area of the jacket was positive for blood, and the front chest area revealed "small pinpoints" of blood. The chest area was also presumptively positive for blood using the phenolphthalein test. (RT 5663-5664.) Matheson was unfamiliar with any other substance that reacted positively to both luminol and phenolphthalein. (RT 5664-5665.) The luminol reaction on the sweater and jacket was photographed by Steven Ohanesian, however, the photographs of the jacket became fogged in the developing process. (RT 5683-5691.)

Subsequent blood testing in December of 1991, by Tom Wahl of the Analytical Genetic Testing Center was unable to confirm that the substance on the jacket was human blood. According to Wahl, confirmatory blood tests are not as sensitive as presumptive tests and require more blood to obtain a result. Negative confirmatory tests could mean: 1) there was insufficient blood for the confirmatory test; 2) there was blood, but not of human origin; 3) there was no blood. (RT 7130-7133.)

A leather jacket (Exhibit F) was identified by Joel Klane as having been manufactured by his company in 1976 at the latest. (RT 5734-5738.) On October 10, 1995, DNA Analyst Melissa Smrz of the Federal Bureau of Investigation examined the brown leather jacket (Defense Exhibit F) for possible DNA analysis. Smrz determined that there was insufficient DNA for

testing, and returned the jacket to the Los Angeles Police Department. (RT 7133-7134.)

On April 3, 1990, Los Angeles County Deputy Sheriff William Hartwell asked appellant to stand in a live line-up in response to a request from another agency. (RT 5727-5728.) Appellant became "boisterous" and "belligerent" and refused to stand in the lineup. (RT 5728-5729.) Appellant filled out and signed a "lineup refusal form" which advised appellant that his refusal to participate could be used against him to indicate "guilty knowledge" and which also provided a space for appellant to explain his refusal. (RT 5729-5732.)

Between 1977 and 1979, when Richard Lamirande was the warehouse manager at Swift Foods, appellant was the only truck driver who drove to San Francisco. Appellant would leave Sunday night and return Tuesday afternoon, then would leave on Thursday morning and return late Friday afternoon. (RT 5740-5742.) Lamarinde identified the Exhibit F jacket as looking similar to one worn by appellant while the two worked together. (RT 5743-5744.)

On March 30, 1990, appellant's attorney Bernard Rosen learned that appellant was being asked to stand in a lineup in connection with this case. (RT 5804-5805.) Rosen was told by Detective Kwoch of the Los Angeles Police Department that the witness or witnesses who were supposed to see the lineup had not been shown photographs of appellant. (RT 5806.) Rosen met with appellant on April 2, 1990. (RT 5808.) Rosen was sure that prior to the lineup he advised appellant not to participate in the lineup because of the length of time that had elapsed since Agent Cross was murdered. (RT 5810-5812.) Rosen also probably advised appellant that if he refused to stand in a lineup, it might be used against him unless the refusal was on the advice of an attorney. (RT 5815.) Rosen advised appellant that if a court order was issued requiring appellant's participation, then appellant would have to do it because his refusal

could be admitted as evidence of consciousness of guilt. (RT 5821-5822.) When Rosen arrived at the jail for the lineup on April 3, 1990, appellant had apparently already signed a form indicating his refusal to stand in the lineup. (RT 5808, 5813.) Rosen was present when appellant participated in a lineup on April 19, 1990, under a court order. (RT 5818-5819.)

Appellant's sister, Darcel Taylor, knew Terry Brock, who associated with appellant. (RT 5861, 5864.) Appellant had a child by Terry Brock's sister, Jessica Brock. Taylor saw Terry Brock occasionally because of this relationship. (RT 5865.) On February 1, 1991, Taylor wrote a letter to Terry Brock because she had heard from appellant's attorneys and appellant that Terry Brock had been making statements to the Los Angles Police Department. (RT 5866, 5869, 5872-5873, 5878-5879.)

In the letter, Taylor asked Terry Brock to tell her "what's up?" with him talking to the Los Angeles Police Department. (RT 5877.) Taylor was concerned that Terry Brock was making statements about appellant, and knew appellant was being investigated by Detective Henry regarding the murder of Agent Cross. (RT 5878-5879, 5885-5887.) Taylor's letter to Terry Brock stated, "I know you didn't [sell] out but, you know, if that is how it went, let me know what to look for. [Appellant is] doing okay. He was wondering what was going on with you and if you were all right. So if there [is] anything [to] be concern[ed] about, let me know." (RT 5887-5888.) Taylor specifically wanted to know if Terry Brock had made statements to the police about appellant. (RT 5888-5889.)

Taylor had made telephone calls about a month prior to the letter in order to locate Terry Brock. (RT 5870-5874.) Prior to writing the letter, Taylor had spoken to appellant and appellant had told her that he wanted to know what was going on with Terry Brock. (RT 5867-5868, 5885-5886, 5888.) Appellant's parents were also "upset" that information about appellant was

possibly coming from Terry Brock. (RT 5891.)

April Watson was Terry Brock's girlfriend from 1986 to 1992, with a break in the relationship in 1990. Watson knew appellant through Terry Brock's sister Jessica Brock. (RT 5844-5846, 5848.) On September 27, 1990, Watson told Detective Henry that in August of 1990 she had received a telephone call from appellant. Appellant stated that Terry Brock had been seen being taken out of the county jail by Detective Henry, and other guys wearing suits, and appellant wanted to know what was going on with Terry Brock. (RT 5849-5855, 5901.) Appellant told Watson to tell Terry Brock, "to stay strong. I heard some things that wasn't right." (RT 5901.) Watson told Detective Henry at the time that she did not understand what appellant was talking about. (RT 5901.) On November 1, 1990, Watson called Detective Henry to tell him that she had received a telephone call from appellant on October 22, 1990, wanting to know where Terry Brock was being housed. (RT 5901-5902.) Detective Henry, in the company of his partner Roger Niles, or Special Agent Beeson, had removed Terry Brock from the county jail on August 17, 1990, September 6, 1990, September 13, 1990, and September 14, 1990. (RT 5902.)

On April 15, 1991, Detective Henry received a letter from Terry Brock that was dated February 1, 1991 (People's Exhibit 75). (RT 5910-5911.) Appellant's address book was recovered on May 10, 1991. The address book contained a phone number for Terry Brock and April Watson. (RT 5912.)

On October 23, 1991, Detective Henry interviewed Agent Bulman at his office in Denver. (RT 5912-5913.) Agent Bulman was shown a photograph of a live lineup conducted on June 9, 1980 (People's Exhibit 13), and asked if the photograph definitely did not depict the suspects. (RT 5914.) Agent Bulman stated he did not believe that anyone in the June 9, 1980, lineup was involved in this case. (RT 5915.) Agent Bulman was shown a photograph of a lineup that occurred on June 27, 1980 (People's Exhibit 14). Agent

Bulman stated that in 1980 he had identified Terry Brock in the lineup as "looking like the guy that was on my side of the police car" except for a beard or goatee. (RT 4847-4848, 5915-5916.) Agent Bulman was then shown a snapshot of a clean-shaven Terry Brock (People's Exhibit 18), which Agent Bulman described as looking "most like the guy I was fighting with on my side of the car. He doesn't have the beard. That looks like him." Agent Bulman also described the photograph of Terry Brock (People's Exhibit 18) as the "closest photo that I had seen yet" of the man with the pistol. (RT 4849-4850, 5916-5918.)

During the visit from Detective Henry in 1991, Agent Bulman was given an opportunity to read the statements taken from him on the night of the murder by Detective Thies and Agent Renzi. Agent Bulman had not had a chance to review the statements before, and pointed out some areas he felt were inaccurate. (RT 5919.) For example, contrary to the report, Agent Bulman had not seen the suspect on the passenger side as he approached, and Agent Bulman's weapon was in his hand, not on the front seat, when the suspect on his side of the car approached. (RT 5919.) Agent Bulman described fighting with the suspect on his side of the car and shots going off. As Agent Bulman struggled into the street in front of the car with the suspect, the suspect on the passenger side approached with a shotgun and circled around him. Agent Bulman described trying to use the suspect he was struggling with as a shield. When Agent Bulman fell down near the corner of Interceptor and Belford, the suspect with the shot gun moved in and fired at Agent Bulman's head. (RT 5921-5922, 5924.) Agent Bulman made a diagram (People's Exhibit 82) while discussing the crime with Detective Henry. (RT 5922-5223.) On May 19, 1993, Agent Bulman accompanied Detective Henry to the crime scene to show him where the events of June 4, 1980, had occurred. Detective Henry placed his police car where the Secret Service car had been parked and then took

measurements as Agent Bulman demonstrated the positions of himself and the two suspects. (RT 5926-5928.)

Of the ten fingerprints lifted from the Secret Service car, six were connected to the secret service, three were unusable, and one remained unidentified at the time of trial. (RT 5928-5933.) None of the fingerprints lifted from the Secret Service car matched Terry Brock, his brother Charles, or appellant. (RT 5934-5935.)

Jessica Brock had a relationship with appellant between 1977 and 1980, which produced a child. Appellant was a friend of Jessica Brock's brother Terry Brock. (RT 6050-6052.) It was difficult for Jessica Brock to testify, to the point where she asked to be placed in a witness relocation program, because of pressure from appellant's family and from her own family not to testify. (RT 6073-6076, 6092, 6155-6157.) Appellant's mother specifically told Jessica Brock that if she did not testify, the prosecution would not have a case. (RT 6156.)

In June of 1980, appellant would visit Jessica Brock at her apartment at 3837 Montclair in Los Angeles. (RT 6052.) In September of 1990, Jessica Brock told attorney Marcia Morrissey and Detective Henry that the night of Agent Cross's murder, after a television news report had aired regarding the incident, appellant had come to her apartment.[3/] (RT 6053-6055, 6077, 6298-6299.) Appellant appeared to Jessica Brock as if he had been in a fight and was

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3. Although Jessica Brock had a pending case against her and a warrant for her arrest, this fact was not discussed with the police or District Attorney's office at the time Brock made her statements. (RT 6302-6305.) Jessica Brock's statements were not part of the plea bargain entered by her brother, Terry Brock, and Terry entered his plea bargain because of other events. (RT 6315, 6325.) Although Jessica Brock remembered another incident where appellant visited her in the company of Terry Brock, Jessica Brock clarified that after Agent Cross's murder, appellant visited her alone. (RT 6351-6354, 6369-6370.)

carrying a laundry bag containing an object that looked like a crowbar. (RT 6057.) Inside the laundry bag, Jessica Brock also saw a wooden handle that could have been the grip of a gun. (RT 6065.) At an outdoor spigot, appellant washed blood off the object that looked like a crowbar. (RT 6058, 6060, 6064, 6089, 6301.) The metal object being washed was the same as the barrel of a Secret Service shotgun (People's Exhibit 7). (RT 6061-6063, 6089-6090, 6166-6167.)

Appellant had small spatters of blood on his chest area, and there was blood on his left arm. (RT 6058-6059, 6086-6088, 6166.) Appellant told Jessica Brock, that near the airport, "he had to take somebody out. It was either them or him." (RT 6063, 6166, 6301.) While at Jessica Brock's, appellant was "kind of nervous" and repeatedly asked her to look out the window to see if the police were there. (RT 6067, 6085-6086.) In 1980, appellant frequently wore knit beanie caps at night. (RT 6068-6069, 6302.) According to the records of the Los Angeles County Coroner's Office, no other homicides occurred near the airport on June 4, 5, or 6 of 1980. (RT 5386.)

On November 5, 1990, Los Angeles Police Detective Ewing Kwoch and Detective Henry interviewed Jessica Brock at her mother's house regarding the night appellant came to her house on June 4, 1980. (RT 6328-6329.) When Detective Henry showed Jessica Brock the barrel of a Secret Service shotgun (People's Exhibit 7), Jessica Brock said, "That's exactly what I saw. It is the same length," and "that [appellant] was bent over or kneeling down cleaning the blood off of it." (RT 6330.)

Two telephone bills in appellant's name were recovered from Jessica Brock's apartment on Montclair Avenue on June 10, 1980. (RT 7128.) Appellant lived at 821 Osage in Inglewood from 1977 until approximately July of 1980. (RT 7128-7129, 7902-7903.) Appellant's residence at 821 Osage was near the crime scene. (RT 6945.)

In anticipation of defense evidence regarding Terry and Charles Brock being present at Steve Falkner's house with a shotgun on the night of the murder, evidence was introduced that Steve Falkner was arrested for driving under the influence on June 4, 1980, at 6:45 p.m. and was released from custody at 12:10 a.m. on June 5, 1980. (RT 7129.) At the time, Steve Falkner lived at 5725 Corbett in Los Angeles. (RT 7130.)

To prove the multiple murder special circumstance, evidence was presented demonstrating that appellant's fingerprints matched those on certified prison records (People's Exhibit 96) showing that on July 19, 1990, appellant had been convicted of three counts of first degree murder. (RT 7705-7706, 7709-7713, 7719-7721.)

2. Defense Evidence

Swift Foods employees Beverly Perry, Luis Antonio Jimenez and Carlos Jimenez had not seen appellant wearing eyeglasses while he worked at Swift Foods prior to Agent Cross's murder. (RT 6388-6389, 6394-6396, 6403.) Luis Jimenez did not see appellant wear eyeglasses during three night drives with appellant to San Francisco. (RT 6395-6396.)

Eileen Smith had a relationship with appellant and lived with him between 1980 and 1987. (RT 6516-6517.) Smith sometimes accompanied appellant when he drove the truck for Swift Foods. (RT 6517-6518.) In 1981 Smith accompanied appellant when he went to an eye doctor in Van Nuys and obtained glasses, however, prior to that time, she had not seen appellant wear prescription glasses. (RT 6519-6521.) Smith was present when the search warrant was served on the home of appellant's parents. Not all of the jackets in the closet were taken by police. (RT 6523-6528.) At one point, Terry Brock beat appellant's head in with the butt of a gun, after which Smith did not see appellant associate with Terry Brock. (RT 6615-6616.)

Nina Miller was the girlfriend of Charles "Chino" Brock, who was Terry Brock's brother. (RT 6405.) One night after Steve Falkner had gotten out of jail, Miller was at Falkner's house with Charles Brock, Terry Brock, and Kathy Boyce. Terry Brock and Falkner sawed off a shotgun. Terry Brock said, "this is how I shot it," then mimed shooting and feeling the recoil. (RT 6405-6412.)

Jessica Brock had told appellant's father, Clifton Alexander, that Detective Henry had lied to her and threatened to take her children away and that she intended to testify truthfully in this trial that her previous statements were a lie. (RT 6697-6698.)

Los Angeles Police Department Detective Michael Thies was the investigating officer in 1980. (RT 6845.) On June 4, 1980, Detective Thies responded to the crime scene, interviewed Agent Bulman at a police station, and then returned to the crime scene with Agent Bulman. (RT 6846.) Detective Thies prepared a report of his interview with Agent Bulman, which was not reviewed by Agent Bulman. (RT 6847-6848.) The report does not contain a reference to which side of the Secret Service car the assailant with the shotgun approached from. (RT 6850.) Detective Thies's report reflects that as Agent Bulman struggled with the assailant with the revolver, the two moved toward the rear of the Secret Service car, not towards the front. (RT 6851.) Detective Thies's report does not describe the shotgun-wielding suspect as having a mustache, however, Agent Bulman did describe the mustache to Detective Thies prior to being hypnotized. (RT 6852-6853, 6858.) A shotgun case was recovered from the Secret Service car. (RT 6853.)

On June 4, 1980, Secret Service Agent Frank Renzi took notes during Agent Bulman's interview with Detective Thies at the police station. (RT 6875-6876.) Agent Renzi's notes were typed into a report that was not reviewed by Agent Bulman. (RT 6877.) Agent Renzi's report did not describe

the shotgun-wielding assailant as having a mustache. (RT 6878.)

The tape recordings of three 1980 hypnosis sessions with Agent Bulman were destroyed in 1984 because Los Angeles Police Department Captain Mike Neilsen evaluated the tapes as having no evidentiary value. The tapes, along with hundreds of tapes from unrelated cases were recycled. (RT 6912-6913.)

Los Angeles Police Detective William H. Williams interviewed Nina Miller two times during June and July of 1980. (RT 7083-7084.) Miller told Detective Williams that during a conversation in her bedroom, Charles Brock told Terry Shelton that the male agent must have played dead because when Charles Brock was at a lineup, the surviving Secret Service agent did not identify him. (RT 7084-7085.) In the same conversation, Charles Brock described a shotgun with a folding stock, like the type used by the Secret Service. (RT 7085.) Miller told Detective Williams that the night she saw Terry Brock and Steve Falkner saw off a shotgun, she interpreted Terry Brock's statement of, "this is how I shot it," to be referring to the Secret Service agent "as if she was some type of garbage.[4/] (RT 7092.)

Prior to Jessica Brock's December 21, 1990, interview with Detective Henry, she had not been in touch with her brother Terry Brock "in a long time," and had not communicated with him about the case prior to being interviewed. (RT 7096-7097, 7100.)

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4. On cross-examination by the prosecution, Detective Williams clarified that Miller's description of the shotgun with the folding stock was different from the night she saw Terry Brock and Steve Falkner saw off a long-barreled shotgun. The night the long-barreled shotgun was sawed off, Terry Brock said, "this is how I shot it," but never directly referred to "her." Terry Brock also stated he would have to learn how to shoot this gun because he was used to shooting an "automatic" shotgun. (RT 7087-7092, 7094.)

Jessica Brock was interviewed by appellant's trial counsel on September 14, 1995.[5] (Ex. 90A at 1.) In that interview, Jessica Brock stated that she recalled hearing about the murder of Agent Cross on television the night of the murder and that earlier that evening, her brother Chino had stopped by with barbecue. (Ex. 90A at 2-3.) Appellant did not come by her apartment the night Agent Cross was murdered. Instead, the incident with appellant and the laundry bag occurred when Jessica Brock lived at 19th Street and Santa Monica Boulevard, prior to the murder of Agent Cross. (Ex. 90A at 3-4.) Appellant and Terry Brock had come by with a white bag that had something black in it. Appellant asked Jessica Brock to help him rinse off the object in the bag. (Ex. 90A at 4.) Jessica Brock's brother Terry had asked her to speak to the district attorney in 1990 in the presence of attorney Morrissey, and had told her what to say. When she gave that interview, she was basically telling the truth, only the dates had been changed. The incident with appellant washing something off had occurred a few years prior to the murder of Agent Cross. (Ex. 90A at 5-7.) When Jessica Brock first went to the police, she was intending to try to get help with her own legal problems, but she never told the police about them. (Ex. 90A at 8-9.) Jessica Brock had repeatedly stated to the police that appellant had never given her a gun to dispose of. (Ex. 90A at 7, 10.) Jessica Brock's residence at 19th and Santa Monica Boulevard, where she described seeing appellant and Terry Brock on a night other than June 4, 1980, was now a vacant lot. (RT 7134.)

In an October 4, 1995, interview with Detective Henry and Deputy District Attorney Lester Kuriyama, Jessica Brock stated that her 1990 statement

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5. The admission of Jessica Brock's September 14, 1995, interview with appellant's trial counsel, and the tape of her Ocotber 4, 1995 interview with the prosecutor was apparently sought by appellant's trial counsel, however, the tape was played for the jury at the close of the prosecution's rebuttal case. (*See* RT 7114-7126.)

was truthful, however, "the date was wrong" about when appellant had come to her apartment and asked for help washing something off. (Ex. 91A at 2-3, 8, 12, 14-15.)

3. Prosecution Rebuttal

Kevin McHugh worked for Swift Foods in South San Francisco until November of 1980. During the time appellant was employed as a truck driver, McHugh saw appellant wearing prescription eyeglasses. On two occasions appellant was accompanied by a black female. (RT 6915-6917, 6919.)

Detective Henry identified a tape recording of a January 12, 1996, telephone conversation between Eileen Smith and appellant's mother, Emma Alexander. The tape recording was obtained under a court-approved wiretap. (RT 6921-6923.) At the time of the telephone call, the trial court was considering whether to admit evidence of appellant's drug use. (RT 6923.) The hearing regarding the admissibility of drug evidence against appellant began on January 10, 1996, and a final ruling was rendered on February 6, 1996. (RT 7130.) In the telephone conversation, Emma Alexander states that appellant asked her to get in touch with Eileen Smith to make Smith aware of the potential admissibility of appellant's drug use. Emma Alexander also asked Eileen Smith to try to remember things that would be helpful in defeating the admission of drug abuse evidence. Eileen Smith then agreed to meet Emma Alexander in person to further discuss what Smith would be asked about in court. (RT 6924-6925.) Appellant's family members had been present in court during January of 1996. (RT 6926.)

Detective Henry served the search warrant on the home of appellant's parents in November of 1990. Detective Henry found no other jackets in the closet he was directed to, other than Defense Exhibit F. (RT 6926-6927.) Had Detective Henry seen any other leather jackets, he would have seized them.

(RT 6927.) Detective Henry did not search the rest of the Alexander home, even though it was within the scope of the warrant, in order not to disturb other people in the home. The closet searched by Detective Henry did not contain women's clothes, and appeared limited to appellant's effects. (RT 6928.) Appellant's expert had examined the leather jacket recovered from the closet at the home of appellant's parents. (RT 6938.)

Detective Henry was present on November 5, 1990, the day Detective Kwoch showed Jessica Brock parts of a shotgun. (RT 6930.) Jessica Brock identified the barrel of a Secret Service shotgun as being like the item washed off by appellant on the night Agent Cross was murdered. Jessica Brock also stated that inside the bag appellant brought to her home, she saw a wooden gun handle that was squared off at the end. (RT 6930-6934.)

On October 11, 1995, Jessica Brock told Detective Henry that appellant's mother had telephoned her. Appellant's mother wanted to know if Jessica Brock had spoken to Detective Henry, whether she intended to testify in court, and whether she had changed her statement to Detective Henry. (RT 6935.) On December 13, 1995, Jessica Brock told Detective Henry that appellant's mother had told her in a telephone conversation that she was "their star witness. And if you hadn't given them that statement about the barrel and the part of the gun in the bag, they wouldn't have a case" against appellant. (RT 6937.) Appellant's mother repeatedly told Jessica Brock that there was no case against appellant without her testimony. (RT 6938.)

Appellant was identified as having taken coins, checks, a purse and a wallet from the home of Dorothy Tyre on December 17, 1972. (RT 7108-7109.) The next day, appellant's mother, whom Tyre had never met before, visited Tyre. Appellant's mother asked Tyre not to press charges against her son, and when told it was up to the District Attorney, said, "just don't appear in court." (RT 71109-7111.) Later that day, appellant's father, who was also

a stranger to Tyre, visited her. Appellant's father told Tyre that, "I will guarantee you will get back everything if you don't appear against my son." (RT 7110-7112.) Tyre stated she would not drop the charges, to which appellant's father replied that he would make it worth her while if she did not prosecute his son. (RT 7112.) The next day, appellant's father called Tyre and wanted to talk to her again when Tyre's husband was not home. Tyre refused. (RT 7112-7113.)

A redacted tape of Jessica Brock's September 26, 1990, interview with Detective Henry, Lester Kuriyama, DDA, and attorney Marcia Morressy (People's Exhibits 88 and 88A) was played for the jury. (RT 7114-7126.) In 1980, Jessica Brock was living at 3837 Montclair. Jessica Brock heard about the murder of the Secret Service agent on television the night of the murder because regular television programming had been interrupted. Later that night, appellant came to her apartment at around 1:00 or 2:00 a.m. in a black Buick Park Avenue. Appellant looked like he had been in a fight. Appellant was carrying a cloth laundry bag and wanted Jessica Brock to help him clean off the things he was carrying in the laundry bag. When asked what he had done, appellant told Jessica Brock that, "he had to take somebody out . . . at the airport . . . It was either me or them." Appellant then went to the front of the building where he used a hose to wash off a "dark metal bar" like a two-inch diameter gun barrel that was curved at one end. Jessica Brock could also see the curved wooden grip of a gun inside the bag. When appellant was at the hose, Jessica saw that he had splatters of blood on his chest and left sleeve. Jessica left and went back inside her apartment. When appellant came into Jessica's apartment about ten or fifteen minutes later, he no longer had the bag. Appellant was "talking in circles," and would run to the window looking for the police. (Ex. 88A 2180-2182, 2184-2196, 2198-2199.) Appellant was acting paranoid and asked Jessica if she saw the police coming. Jessica got angry with

appellant and went to bed, but heard him leave about an hour later. (Ex. 88A 2197-2198.) Appellant asked Jessica if she had seen her brother Terry Brock, but Jessica had not talked to Terry since earlier that day. (Ex. 88A 2183)

Jessica's brother Charles "Chino" Brock had been at her apartment earlier that evening at around 10:00 p.m. Chino was well-dressed, and sat and ate barbecue. (Ex. 88A 2182-2183, 2215-2216.) Chino Brock and appellant hardly ever talked and were "never really affiliated." (Ex. 88A 2210-2211.) Appellant and Terry Brock were close until around 1979, when appellant was "messing" with Terry's girlfriend Yvette. Terry "popped [appellant] upside the head," after which the two had a falling out. (Ex. 88A 2211, 2215.)

The day after Agent Cross's murder, Jessica Brock told her brother Terry Brock about what she had seen the night before. Jessica Brock did not associate appellant with the murder of Agent Cross until days later when the police served a search warrant regarding Terry Brock. (Ex. 88A 2201-2203.) Jessica Brock did not talk to the police about appellant because the police did not ask, and at the time she would not have volunteered information about the father of her child. (Ex. 88A at 2204-2205.) Jessica Brock recalled that appellant frequently wore black beanies or knit caps at night. (Ex. 88A at 2207.)

In a June 25, 1993, interview with Detective Henry (People's Exhibits 89 and 89A), Jessica Brock stated that she was having a hard time. Jessica Brock's brothers David and Lamont were telling her that she should not testify and should not be talking to the police. David also told her that he would no longer provide her with money like he had been. (Ex. 89A 2-4, 6, 11, 13.)

B. PENALTY PHASE

1. Prosecution Penalty Phase Evidence

On April 8, 1970, appellant was stopped by Los Angeles Police

Department Officer Norman Mikkelson for driving an unsafe car that was too low. (RT 7777-7780.) Appellant exited the car and challenged Officer Mikkelson by saying, "Take off that gun. I'll do you in." Appellant also made statements to the effect of, "you're not going to give me a mother fucking ticket, you pig" and "you are not going to take me to jail." (RT 7780-7781.) When Officer Mikkelson and his partner continued talking to appellant and tried to give him a traffic ticket, appellant said, "Fuck you. I'm not signing the mother fucking ticket, you pig" and then tried to run away. Appellant was arrested. (RT 7782-7785.)

On May 30, 1977, when Detective Dale Barraclough was working as a patrol officer, he was called to provide backup to other officers in Griffith Park. (RT 7787-7788.) When Barraclough arrived, he saw three police cars, a park ranger vehicle and several motorcycles. Barraclough and his partner took charge of two men who were already in custody. Out of a crowd that was forming, three males approached Barraclough and his partner. The three males started saying things like, "Why are you arresting these guy? They didn't do anything. Let them go, you fucking pigs;" "Fucking Pigs," and "I'm going to kick your ass." (RT 7790-7791.) The three males repeatedly got between Barraclough and his partner and the two subjects who were in custody, and continued threatening Barraclough and his partner. (RT 7791-7792.) Because an angry crowd was forming, the three males were handcuffed, with the intention that they and the two original subjects would be taken elsewhere. One of the original subjects had to be forced into a patrol car. One of the three men kneed Barraclough in the groin, and then tried to trip Barraclough as a park ranger struggled to control him. (RT 7792-7793.) Appellant was one of the three men who had interfered with the police. After appellant was placed inside a patrol car he started yelling to the crowd to get him out, and get him away from the police. In response to appellant's yells, a female opened one of the

doors of the patrol car. The female then attacked a uniformed officer. (RT 7793-7795.)

Former Los Angeles County Sheriff's Deputy Michael Loarie was working in the Men's Central Jail on April 9, 1988. (RT 7801-7802.) Appellant, who was in custody, asked Deputy Loarie for a lightbulb. When told they would have to be ordered, appellant raised his voice and yelled, "Fuck you Deputy. If you're not going to get me any lightbulbs, just tell me." (RT 7802-7804.) A decision was made to remove appellant from the jail module to prevent the other inmates from getting riled up. (RT 7804.) When appellant was removed to a hallway, he was told to put his hands in his pockets and face the wall, which is standard procedure for officer safety. Appellant did not comply, and when Deputy Loarie attempted to handcuff appellant for safety, appellant turned and punched Deputy Loarie in the face. (RT 7804-7805.) Appellant put his left arm around Deputy Loarie's neck in chock hold, and Deputy Loarie started feeling dizzy as he struggled. Appellant would not release Deputy Loarie, and did not do so until other deputies struck appellant in the torso. (RT 7805-7807.)

In July of 1984, James Williams lived in the same apartment complex as appellant in Van Nuys, and the two sometimes visited each other's apartments.[6] (RT 7838-7839.) At 4:30 a.m. on July 25, 1984, appellant knocked on Williams' door, and was admitted. Williams had been awake, packing to leave that morning for distant job interviews. (RT 7840-7841.) The television was on and appellant sat down for a few minutes before leaving and saying he would be back. Appellant returned with his girlfriend Eileen Smith and Williams resumed packing. Appellant said, "come out of them," which

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6. On cross-examination, Williams stated that he and appellant sometimes smoked marijuana or inhaled cocaine, but had not done so for about a month. (RT 7847-7848.)

Williams interpreted as stop packing. When Williams turned, he saw that appellant was pointing a gun at him from about six feet away. (RT 7843.) Williams asked, "Come out of what?" and was shot by appellant in the upper left arm. (RT 7844.) Appellant and Smith fled, after which Williams went to the apartment manager for help. (RT 7844-7845.) To this day, Williams had no idea why appellant pulled a gun on him that night. (RT 7843.)

At approximately 11:30 p.m. on December 17, 1972, Dorothy Tyre was talking on the telephone with a neighbor while her husband slept. There was a knock at the door, and Tyre's fourteen-year-old son Howard answered it. (RT 7852-7853.) Tyre saw her son walk backward into the house, after which appellant and another young man entered, each armed with a revolver. (RT 7854, 7869.) While appellant closed the door the other gunman ordered Tyre to hang up. (RT 7855.) Tyre and her son were ordered to lie on the floor while appellant and the other intruder went into Tyre's bedroom where her husband remained sleeping. Appellant emerged with Tyre's husband's pants and wallet. Tyre's purse was taken, which contained cash from her milk delivery business. (RT 7856.) In addition, appellant and his accomplice appeared to have knowledge of Tyre's business because the accomplice demanded the key to a file cabinet in the kitchen that contained money from the business. Appellant's accomplice took all of the business proceeds from the file cabinet in the kitchen. (RT 7856-7859.) Before appellant and his accomplice fled, Tyre was warned not to move from the floor for ten minutes. (RT 7860.)

The next day, Tyre got a telephone call, and then a visit from appellant's mother, who wanted Tyre to drop the charges. Later, appellant's father visited Tyre and told her he would pay her if she did not testify. Tyre refused and subsequently testified at appellant's trial. (RT 7862.) Appellant was convicted of one count of first degree robbery and one count of first degree burglary with a true finding that he was armed in the commission of the

offenses. (RT 7901-7902.)

According to Detective Henry, the victims of appellant's 1978 triple murder, Garland Gilbert, James Andrews, and Roberta Armor had all been beaten and strangled. Roberta Armor and Garland Gilbert had also been shot in the head. Photographs of the victim's bodies at the crime scene (People's Exhibits 99 to 101) and of the victims when they were alive (People's Exhibits 105 to 107) were admitted into evidence. (RT 7871-7875.)

Captain Cheryl Meyers of the San Diego Police Department became close friends with Agent Cross when the two attended the police academy together in 1977. (RT 7877-7878.) The two remained friends when they worked together as police officers in the same division, and until Agent Cross's death. Meyers described Agent Cross as being a "fresh, lively person" who "had so much life to her even under the sad circumstances of losing her parents early in life." Agent Cross was full of enthusiasm and energy, and was a warm person, whom people gravitated to. Agent Cross was an "outstanding" police academy recruit and police officer, who dedicated a large portion of her life to law enforcement. Agent Cross was "on cloud nine" when she left the San Diego Police Department for the Secret Service and was looking forward to her first assignment. Agent Cross was killed ten days after starting her assignment in Los Angeles. (RT 7878-7882.)

Peter Cross was Agent Cross's older brother and only sibling. Their father died when Agent Cross was three years old, and their mother died when she was ten and Peter Cross was nineteen. Peter Cross worked his way through college and during that time Agent Cross lived with an uncle. After Peter Cross finished college, Agent Cross moved back in with him and his young family in San Diego until she turned 19. Agent Cross even called her brother "Dad." After attending college, Agent Cross became interested in police work out of a desire to help other people, particularly those who were "down and out" or

taken advantage of. As a San Diego police officer, Agent Cross even received a commendation for saving someone's life. The experience of losing his sister, who had to struggle to make something of her life was "crushing" to Peter Cross. Agent Cross was only 26 years old when she was killed. (RT 7883-7889.)

Agent Bulman had only known Agent Cross for approximately three and a half weeks before she was killed. However, in that time, he had observed that she was a conscientious and skilled agent. (RT 7904-7905.) When the gunman on Agent Bulman's side of the car put a gun to him while he was in the driver's seat, he knew things were not going to go well and he feared for Agent Cross's safety on the other side of the car. Agent Bulman felt he had no choice but to try and talk his way out of the car. (RT 7905-7907.) When Agent Cross jumped back in to the car and appellant fired the shotgun at him across the car, Agent Bulman knew that if he did not fight he would be killed. When Agent Bulman heard the two shotgun blasts from the car as he struggled with his own assailant, he knew Agent Cross had probably been killed. During the struggle outside the car, when Agent Bulman was on the ground and appellant held a shotgun to his head, Agent Bulman's last thought was that he would be killed and would never get to see his two year old son again. (RT 7907.) Agent Bulman felt responsible for Agent Cross's death because he felt he could have done more to prevent it. Afterwards, Agent Bulman experienced depression, paranoia and flashbacks of the shotgun being fired at his face. Agent Bulman's personal relationships suffered, and he lost his drive to work his way up in the ranks of the Secret Service. (RT 7907-7910.)

2. Defense Penalty Phase Evidence

Los Angeles County Sheriff's Department Deputy Dave Sherr had daily contact with appellant when appellant was housed in the "high power"

module at the Men's Central Jail, a unit where dangerous or high profile inmates are kept out of contact with other inmates. Appellant occupied the cell closest to the front of the module and acted as the spokesperson for the other inmates. Appellant was helpful to Deputy Sherr because the other inmates respected appellant based on his long incarceration at the facility. (RT 7955-7957.)

Lazaro Simone knew appellant from being incarcerated with him for eight or nine years at the Los Angeles County Jail. Simone described appellant as being generous and helpful to other inmates, which is rare in prison, and also stated that appellant had a good rapport with the jail staff. (RT 8061-8065.)

Appellant's mother, Emma Alexander, raised appellant in Santa Monica and Venice until he was in high school when the family moved to Los Angeles. Appellant mostly attended religious schools until he was in high school. Appellant finished high school while incarcerated for the robbery of Dorothy Tyre. (RT 7969-7972.) After appellant was released from prison, he always held jobs unless he was laid off. (RT 7973.)

Emma Alexander never saw appellant use drugs, but had heard from other people that he abused drugs. (RT 7972.) Around 1984, Emma Alexander and appellant's father became aware that appellant had a drug problem, and helped him get into counseling. (RT 7975.) After appellant's arrest in 1984, appellant chose to go to prison rather than be on probation. Upon his release, he pursued cross-country truck driving until he was arrested in 1987. Appellant was a good son and Emma Alexander just wanted his life to be spared. (RT 7975- 7978.)

Appellant's father, Clifton Alexander, had a good relationship with appellant. Appellant was a good worker for Safeway Markets in 1973, and had been doing really well working for "Roadrunners" trucking prior to his arrest in 1987. (RT 7994.) At one point, appellant asked his father for help getting

into drug rehabilitation, which made a big change in appellant. (RT 7995.) Appellant got into trouble because of the "people that he was associating with" and "peer pressure." (RT 7996.) Clifton Alexander wanted appellant's life to be spared because appellant was a good person from a good family, who could do good. (RT 7998.)

Appellant's younger sister Darcel Taylor described appellant as a "good," "kindhearted" person, who has "contributed to society." Taylor did not believe appellant did this crime. (RT 8004-8005.) Appellant's younger brother Corbin Alexander looked to appellant as an example of how to be successful through hard work. Appellant had a "lot of good to give," and was needed by his family. (RT 8008-8010.)

Ronald Nissenson was an officer of Swift Foods from the mid 1970's until 1984. Nissenson knew appellant as a truck driver for the company and described appellant as "a very good," "conscientious" employee, who would offer suggestions on how to improve things at work. (RT 8018-8020, 8024.)

Debra Edwards met appellant in 1976 and had a son by him named Lismiba Alexander in 1978. Edwards has encouraged Lismiba to have a relationship with appellant because he needs his father. Edwards does not believe appellant committed the crime and does not believe in the death penalty. (RT 8029-8032.) Lismiba Alexander needed appellant's guidance to encourage him to do the right things in life. (RT 8089-8091.)

Anna Charles was a long-time friend of appellant's family whose brother ran a live-in drug program for women with children. In the 1980's, Charles's brother accepted appellant into the program as a favor to appellant's family. Appellant attended the drug rehabilitation program until Charles's brother felt appellant was ready to leave. (RT 8037-8039.)

Andre Alexander, Jr. was the son of Jessica Brock and appellant. He often talked to appellant about what to do after high school, and appellant

encouraged him to do positive things. (RT 8092-8094.) Brandi Alexander was the daughter of Sherol Alexander and appellant. Brandi Alexander spoke to appellant frequently, particularly around the time she was graduating from high school. Brandi Alexander loved appellant and needed him as a father. (RT 8095-8096.)

In 1985, Eileen Smith had a son by appellant named Princeton Alexander. Princeton was premature, and appellant was really supportive during the four to five months his son was in intensive care. Appellant remains in contact with his son and encourages him to behave and do well in school. Appellant does not deserve the death penalty because he is a very good, nice person who cares about people. (RT 8076-8078.) According to Smith, appellant shot Williams in 1984 as the two wrestled for a gun that Williams had pulled. (RT 8082-8083.) Princeton Alexander talked to his father on the phone about school and sports and described his father as a kind, loving man. (RT 8087-8088.)

Appellant testified that while incarcerated for the robbery of Dorothy Tyre and her family, he finished high school and trained to be a butcher. After serving his sentence, appellant got a job with "Teen Post" which involved taking children from housing projects on field trips. (RT 81111, 8115-8116.) Between 1976 and 1980, appellant worked at Swift Foods. During this time he move in with his common-law wife Sherol on Osage in Inglewood, got a license to drive tractor trailers, and began a relationship with Jessica Brock. (RT 8117-8120.) Appellant drove a Buick Park Avenue in 1978. (RT 8121.) In June of 1980, appellant's schedule of driving to San Francisco was flexible, such that he would drive on Mondays and Thursdays, and sometimes leave Sunday night. (RT 8125-8126.)

Appellant described his 1970 arrest for resisting arrest as resulting from him "trying to be smart" to the police and walking away from them when

they attempted to ticket him. (RT 8117.) As to his 1978 arrest in Griffith Park, appellant did not remember any details, only that "things just got out of hand." (RT 8121.)

Appellant was upset and angered when he heard about the murders of Howard Andrews, Garland Gilbert and Roberta Armor and despite his conviction for these crimes, denied any involvement. (RT 8121-8125, 8149.) Although police initially contacted appellant regarding these murders in 1978, he was not arrested until 1987. (RT 8126-8130.)

As to the murder of Agent Cross, appellant read about it in the newspaper the morning after it happened. (RT 8130.) Although he was questioned by police in 1980 and arranged for the police to check his work records at that time, he was not arrested. Appellant subsequently turned himself in to police in various jurisdictions to take care of outstanding warrants he had at the time. (RT 8131-8137.) When he was subsequently arrested in 1987 for the murders of Andrews, Gilbert and Armor, appellant had no information to provide regarding the murder of Agent Cross. (RT 8148-8149.)

By September of 1980, appellant no longer worked for Swift Foods, had moved in with Eileen Smith in Van Nuys, and worked for another trucking company. (RT 8137.) Appellant first got glasses in February of 1981. (RT 8138.) By 1983 and 1984, appellant had a drug problem and was no longer working. (RT 8139.) The 1984 shooting of James Williams was in self-defense following a dispute over drugs. (RT 8139-8140.) Appellant entered a drug rehabilitation program after the James Williams shooting, until he went to prison following his conviction. (RT 8141-8142.) After serving his time for the Williams shooting, appellant moved in with his parents and returned to truck driving. (RT 8142-8143.) When appellant's son Princeton was born prematurely in 1985, appellant was at the hospital every day. (RT 8144.)

The incident with Deputy Loarie in county jail resulted from appellant saying things he should not have to the Deputy, and then fighting with deputies who were trying to discipline him. (RT 8150-8153.) On November 6, 1990, appellant began serving his time for the triple murder at Jamestown prison. While there, he was not on the highest level of security and did a vocational training program. (RT 8153-8154.) At Jamestown, appellant was visited by Detective Henry and Agent Beeson, and his cell was searched. Appellant had no information to provide regarding the murder of Agent Cross. (RT 8154-81565.)

Appellant was charged with the murder of Agent Cross in September of 1992. (RT 8156.) Appellant did not testify in the guilt phase of this trial because he would have been impeached with the fact of his triple murder conviction. (RT 8161.) Appellant denied committing the murder of Agent Cross, and denied ever going to Jessica Brock's apartment to wash blood from himself or a weapon, either on Montclair in Los Angeles or when she lived in Santa Monica. (RT 8161.) Appellant felt bad for Agent Cross and described her murder as "cold." (RT 8161.)

Appellant loved and respected his parents, and loved his sister and brother very much. Appellant's parent were "kids" when they had him, so the family "gr[e]w up together." (RT 8162.) Appellant would continue to try and guide his children and encourage them to do well in school even while in prison. (RT 8163-8164.) Appellant wanted to live. (RT 8164-8165.)

APPELLANT'S CONTENTIONS

1. Agent Bulman's identification of two photographs of appellant violated appellant's right to due process under the state and federal constitutions. (AOB 182-210.)

2. Appellant was deprived of his right to counsel under the state and federal constitutions because attorney Kopple was not appointed to represent him. (AOB 210-234.)

3. Appellant was prejudiced by references during voir dire to the special circumstance allegation of murder of a peace officer. (AOB 234-237.)

4. The trial court prejudicially erred by denying appellant's *Wheeler* motion. (AOB 237-243.)

5. Pre-arrest delay that resulted in destruction of some evidence violated appellant's right to due process under the state and federal constitutions. (AOB 243-253.)

6. The trial court prejudicially erred by ruling that the state did not have a duty to preserve a tape recording of a hypnosis session, original composite drawings, blood test swabs and photographs of blood testing. (AOB 254-258.)

7. The failure to apply Evidence Code section 795 to bar Agent Bulman's testimony deprived appellant of his right to equal protection under the state and federal constitutions. (AOB 258-264.)

8. Agent Bulman's testimony should have been barred by application of Evidence Code section 795, which was violated during a May of 1987 hypnosis session. (AOB 264-268.)

9. The trial court prejudicially erred by allowing expert testimony regarding blood tests on appellant's jacket because the testimony was based on factors that were speculative, remote and conjectural. (AOB 268-273.)

10. April Watson's testimony was inadmissible because it was

irrelevant, Detective Henry's testimony regarding Watson's statements was inadmissible hearsay, and error in admitting Watson's statements was prejudicial and resulted in a violation of appellant's right to due process under the state and federal constitutions. (AOB 273-279.)

11. The trial court prejudicially erred by admitting evidence that appellant had refused to stand in a lineup during the investigation of this case. (AOB 279-281.)

12. The trial court erred, in violation of appellant's federal constitutional right to present a defense, by excluding Jaqueline Sherow's testimony that Charles Brock had made statements inculpating himself in Julie Cross's murder. (AOB 282-286.)

13. The trial court prejudicially erred, in violation of appellant's right to due process by instructing the jury with CALJIC No. 2.04 (efforts by defendant to fabricate evidence) and CALJIC No. 2.05 (effort by someone other than defendant to fabricate evidence). (AOB 286-289.)

14. The trial court prejudicially erred, in violation of appellant's federal constitutional right to due process, by instructing the jury regarding aiding and abetting during the guilt phase of the trial. (AOB 289-300.)

15. The trial court prejudicially erred, in violation of appellant's federal constitutional right to due process, by permitting the prosecution to elicit from Jessica Brock that appellant had committed a criminal offense in 1978. (AOB 300-307.)

16. Appellant's federal constitutional rights to due process and a reliable determination of guilt were violated because Jessica's Brock's reference to "the triple murder," should have resulted in a mistrial. (AOB 307-311.)

17. Insufficient evidence supports the jury's special circumstance finding that Julie Cross was murdered during the commission or attempted commission of a robbery. (AOB 311-315.)

18. Appellant was denied his right to due process under the state and federal constitutions because the trial court denied him a continuance to make a new trial motion and denied a new trial motion that the trial court had "deemed" filed. (AOB 316-330.)

19. The trial court' refusal to instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt and may be found no matter how weak the evidence is, violated appellant's right to a reliable sentencing determination under the Eighth Amendment to the United States Constitution. (AOB 330-332.)

20. The trial court' refusal to instruct the jury that any mitigating circumstance, including those not listed in the jury instructions, could support a decision that a death sentence was inappropriate, violated appellant's right to a reliable sentencing determination under the Eighth Amendment of the United States Constitution. (AOB 332-334.)

21. Appellant's conviction should be reversed because of prejudicial cumulative error that violated appellant's rights to due process, a fair trial, and a reliable conviction and sentence under the Eighth and Fourteenth Amendments of the United States Constitution. (AOB 334-336.)

22. Insufficient evidence supports appellant's conviction. (AOB 337-341.)

23. This matter should be remanded for a hearing on the automatic application for a modification of the verdict under Penal Code section 190.4, subdivision (e). (AOB 341-343.)

24. California's death penalty statute violates the Eighth and Fourteenth Amendments of the United States Constitution. (AOB 344-361.)

RESPONDENT'S ARGUMENT

1. Agent Bulman's identification of photographs of appellant did not violate due process.

A. Relevant facts.

B. The identification procedure was not impermissibly suggestive and agent Bulman's identification of the photographs was reliable in the totality of the circumstances.

C. Any error was harmless.

2. The trial court did not abuse its discretion by denying appellant's request for appointment of particular counsel; moreover, appellant's constitutional rights to counsel and equal protection were not violated.

A. Factual background.

B. Review of this claim is barred by the doctrine of law of the case; moreover, appellant's contention is meritless.

C. Any error was harmless.

D. Appellant's equal protection claim is meritless.

3. Discussing the murder of a peace officer special circumstance in voir dire was proper; moreover, appellant was not prejudiced.

4. Appellant's wheeler motion was properly denied; moreover, any error was harmless.

A. Background facts.

B. The trial court properly determined that appellant had failed to show a prima facie case of group bias in the use of peremptory challenges.

C. Even if the trial court is considered to have made a finding of a prima facie showing, appellant's contention fails.

5. Appellant's right to due process under the state and federal constitutions was not violated by a twelve-year delay between the crime and his

arrest.

A. Relevant facts.

B. Substantial evidence supported the trial court's finding that appellant had not been prejudiced by the delay.

6. Appellant's motion to dismiss under *Trombetta* and *Youngblood* was properly denied.

A. Relevant facts.

B. Substantial evidence supported the trial court's ruling that the evidence had no apparent exculpatory value.

7. The application of Evidence Code section 795 only to hypnosis sessions occurring after its effective date does not violate equal protection.

A. This contention has been waived because it was not made at trial.

B. Limitation of Evidence Code section 795 to hypnosis conducted prior to January 1, 1985, did not violate appellant's constitutional right to equal protection.

8. The trial court's finding that agent Bulman was not hypnotized in may of 1987, such that Evidence Code section 795 did not bar his testimony, is supported by substantial evidence.

9. Matheson's testimony regarding the presumptive blood tests on appellant's jacket was properly admitted; moreover, any error was harmless.

A. Background facts.

B. The constitutional claims have been waived.

C. The trial court did not abuse its discretion.

D. Any error was harmless.

10. The trial court did not abuse its discretion by admitting the testimony of April Watson and Detective Henry.

A. Watson's testimony was properly admitted over appellant's

relevance objection; moreover, any error was harmless.

B. Appellant waived any hearsay objection to Detective Henry's testimony; the testimony was properly admitted; and, moreover, any error was harmless.

11. Appellant's refusal to stand in a lineup was properly admitted into evidence.

12. Jacqueline Sherow's testimony regarding statements made by Charles Brock was properly excluded.

13. The jury was properly instructed with CALJIC Nos. 2.04 and 2.05.

14. The jury was properly instructed regarding aiding and abetting; moreover, any error was harmless.

A. Background facts.

B. Appellant waived any contention that his right to due process was violated; moreover, this contention is meritless.

C. The jury was properly instructed.

D. Any error was harmless.

15. Jessica Brock was properly questioned regarding whether appellant had committed a criminal offense in 1978.

A. Background facts.

B. The trial court did not abuse its discretion to admit evidence under evidence code sections 1101 and 352.

C. Any error was harmless.

16. The motion for a mistrial was properly denied.

A. Background facts.

B. The mistrial motion was properly denied.

C. Any error was harmless.

17. Substantial evidence supported the robbery murder special

circumstance.

18. The trial court properly denied appellant's motion for a continuance to file a new trial motion and properly made a record of its rulings had such a motion been filed.

A. Background facts.

B. The trial court did not abuse its discretion or violate appellant's right to due process, by denying the continuance motion.

C. Appellant waived any objection to a new trial motion being "deemed" filed; moreover, the trial court properly made a record of its ruling.

D. Any error was harmless.

19. The jury was properly instructed regarding how to view mitigating evidence at the penalty phase; moreover, any error was harmless.

20. The trial court properly refused appellant's request that the jury be instructed that any one mitigating factor, even if not listed in the jury instructions, could support a determination that death was not the appropriate penalty.

21. Cumulative error does not justify reversal.

22. Substantial evidence supports appellant's conviction.

23. The trial court properly ruled on the automatic application for modification of the verdict; moreover, any error was harmless.

24. California's death penalty statute does not violate the federal constitution on its face, or as applied at trial.

A. Section 190.2 is not impermissibly broad.

B. Section 190.3 is not impermissibly vague.

C. California's death penalty statute contains adequate safeguards against arbitrary and capricious sentencing.

D. The failure to have a penalty phase instruction on the burden of proof does not violate the united states constitution.

E. The United States Constitution does not require unanimous, written jury findings regarding aggravating factors.

F. Intercase proportionality review of death sentences is not required by the federal constitution.

G. Not specifically instructing the jury regarding which sentencing factors were mitigating and which were aggravating did not result in an unfair capital sentence.

H. The verdict of death need not be based on unanimous findings beyond a reasonable doubt.

ARGUMENT

I.

AGENT BULMAN'S IDENTIFICATION OF PHOTOGRAPHS OF APPELLANT DID NOT VIOLATE DUE PROCESS

Appellant contends that Agent Bulman's identification of two photographs of appellant violated appellant's right to due process under the state (Art. I, §§ 7(a) and 15) and federal (U.S. Const., amend. XIV) constitutions. Specifically, appellant contends that Agent Bulman's identification of photographs of appellant (People's Exhibits 19 and 20) as depicting the person who shot Julie Cross was the result of an impermissibly suggestive meeting with prosecutors on the night prior to Agent Bulman's testimony. According to appellant, showing Agent Bulman photographs of appellant along with photographs of Terry Brock, whom Agent Bulman had identified as a suspect, and Charles Brock, whom Agent Bulman had eliminated as a suspect, was the functional equivalent of suggestively showing Agent Bulman a single photograph of a suspect. (AOB 182-210.) Appellant is incorrect. There was nothing improper about the prosecutor showing Agent Bulman the photographs the night before his testimony and moreover, any error was harmless.

A. Relevant Facts

During the prosecution's direct examination of Agent Bulman, he was unable to identify appellant in court as one of the people involved in the killing of Julie Cross. (RT 4850.) The prosecutor then showed Agent Bulman five photographs depicting Terry Brock (Exs. 18 and 21), appellant (Exs. 19 and 20), and Charles Brock (Ex. 22). (RT 4851-4853.)

At side bar, appellant's trial counsel objected on the grounds that he had not been told in advance that Bulman was prepared to identify Exhibits 19 and 20 as the shooter and on the ground that "I want the court to rule on whether or not [the manner of showing Agent Bulman the photographs] was constitutionally fair." (RT 4855-4856.) The trial court ruled that Agent Bulman could testify regarding his identification of the photographs the night before and stated, "If there is an objection to the fact that the witness was shown these photos, I don't know of any legal authority for such an objection. I think that anybody is entitled to do that." (RT 4856-4857.)

Agent Bulman resumed testifying before the jury and stated that the night before his testimony, he had looked at the five photographs. At that time, Agent Bulman had identified the photographs of Terry Brock as looking like the assailant that had approached his side of the car with the revolver. Agent Bulman identified Exhibits 19 and 20 (photographs of appellant from 1984 and 1978, respectively), as looking like the person who shot Julie Cross with the shotgun. (RT 4852, 4860-4862.)

Appellant's counsel was given the opportunity to interview Agent Bulman and the prosecutors about the circumstances surrounding Agent Bulman's identification of the photographs prior to cross-examination and to renew any objections at that time. (RT 4857-4859, 4863-4865.) Appellant's trial counsel did not renew his objections. On cross-examination, appellant elicited from Agent Bulman that when he was shown the five photographs, the composite drawings of the two suspects (Ex. 12) were on the wall and that Agent Bulman had never identified appellant at any time in a live lineup or in court. (RT 4927-4933.)

B. The Identification Procedure Was Not Impermissibly Suggestive And Agent Bulman's Identification Of The Photographs Was Reliable In The Totality Of The Circumstances

Convictions based on eyewitness identifications of photographs of a defendant may violate due process if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. (*Neil v. Biggers* (1972) 409 U.S. 188, 198 [93 S.Ct. 375, 34 L.Ed.2d 401] [applying precedent regarding in-court identifications that followed out-of-court photographic identifications to determination of whether out-of-court identification was impermissibly suggestive in violation of due process]; *Simmons v. United States* (1968) 390 U.S. 377, 384 [88 S.Ct. 967, 19 L.Ed.2d 1247] [finding pre-trial photographic identification not impermissibly suggestive such that subsequent in-court identification of defendant did not violate due process].) Claims that identification procedures were so suggestive as to violate due process are determined by examining the totality of the circumstances surrounding the identification. (*Manson v. Braithwaite* (1977) 432 U.S. 98, 114 [97 S.Ct. 2243, 53 L.Ed.2d 140; *Simmons v. United States, supra,* 390 U.S. at p. 383; *Stovall v. Denno* (1967) 388 U.S. 293, 299, 302 [87 S.Ct. 1967, 18 L.Ed.2d 1199] (single person identification procedure not inherently suggestive and must be viewed in the totality of the circumstances); *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387.) Factors to be considered in determining the admissibility of identification testimony include: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." (*Manson v. Brathwaite, supra,* 432 U.S. at p. 114.) The above factors are "to be weighed against the corrupting effect of the suggestive identification itself." (*Ibid.*)

However, as noted by the United States Supreme Court:

> eyewitness identification evidence, is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

(*Manson v. Brathwaite, supra,* 432 U.S. at p. 116.) Any danger of misidentification resulting from a particular identification technique is substantially lessened by cross-examination at trial that exposes to the jury the method's potential for error. (*Simmons v. United States, supra,* 390 U.S. at p. 384.)

The United States Supreme Court in *Simmons* found no due process violation where prior to making in-court identifications of the defendant, witnesses were shown group snapshots containing the defendant. *Simmons* noted that the crime was a daylight robbery by unmasked perpetrators and that all of the witnesses had seen the defendant for at least five minutes during the crime. Moreover, the witnesses were not told about the progress of the investigation, were alone when shown the photographs, and there was nothing in the record indicating that federal agents had suggested which person in the photograph was under suspicion. (*Simmons v. United States, supra,* 390 U.S. at pp. 384-386.)

This Court has applied *Manson v. Brathwaite, supra,* 432 U.S. 98, to claims that an extrajudicial identification admitted at trial is so unreliable as to violate a criminal defendant's right to due process of law under the Fourteenth Amendment. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242, overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787.) According to *Gordon*:

> The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive

> and unnecessary (*Manson v. Brathwaite, supra,* 432 U.S. at pp. 104-107 []); and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation (*[I]d.* at pp. 109-114 []). If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable. (*Id.* at pp. 104-107, 109-114 [].)

(*Id.* at p. 1242.)

In *Gordon*, a store employee named Gomez noticed a man acting suspiciously. Gomez saw the man put a gun to the side of an armored car courier and, with the help of another man, shoot him. Although Gomez concentrated her attention on the gun, she could see the face of the armed man and the store was well-lit. Gomez gave a "somewhat vague" description of the shooter as looking "like a football player," and had been unable to identify the defendant in a photographic lineup. Eventually, Gomez was shown three in-person lineups and during the last lineup identified the defendant as "looks familiar, but I am not certain." On her way home, Gomez expressed to her husband that she was certain the "familiar" man in the last lineup was the shooter. After arriving home, Gomez received a call from a detective indicating she had "picked the right person." (*People v. Gordon, supra,* 50 Cal.3d at pp. 1240-1241.) This Court found that the lineup procedure, in which the defendant had been used in the second and third lineups in different positions was not unduly suggestive, despite the defendant being slightly taller than the other participants, and any comment by the detective came after Gomez had determined with certainty that she had identified the shooter. Moreover, no due process violation occurred because the reliability of Gomez's identification was subject to vigorous cross-examination and argument. (*Id.* at pp. 1242-1244.)

In *Manson*, the United State Supreme Court found that admission of evidence of identification of a single photograph did not violate due process. There, an undercover police officer named Glover went to a known drug sale location to purchase narcotics. Although the usual seller was not there, Glover purchased two bags of heroin from "'a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones and a heavy build [who] was wearing at the time blue pants and a plaid shirt.'" During the purchase, Glover had gotten within two feet of the suspect, and the door had been illuminated from natural light. (*Manson v. Braithwaite, supra,* 432 U.S. at pp. 100-101.) In response to the above description, a fellow police officer left Glover a single photograph of the defendant. When Glover saw the photograph, he identified the man depicted as the person who had sold him narcotics. (*Id.* at p. 101.) Although the parties in *Manson* agreed that the use of a single photograph was suggestive, something which respondent does not concede in this case, the United States Supreme Court concluded that the procedure used did not give rise to the substantial likelihood of irreparable misidentification. (*Manson v. Braithwaite, supra,* 432 U.S. at pp. 109, 114-117.) Specifically, the United States Supreme Court found that Glover had an opportunity to view the defendant, despite it being nearing sunset, that Glover was not just a casual observer, but was a trained police officer who was on duty, such that he could be expected to pay attention to detail, Glover provided an accurate description of the suspect that included clothing type, Glover was certain of his identification, and Glover provided a description of the suspect within minutes after the narcotics sale. As to the "corrupting effect" of the identification, the *Manson* court noted that Glover was under no time pressure to identify the photograph and was alone, such that there was no coercive pressure from the presence of another person. In light of the above factors, although a different identification procedure would

have been preferable, the defendant's right to due process had not been violated. (*Manson v. Braithwaite, supra,* 432 U.S. at pp. 109, 114-117.)

Here, appellant cannot demonstrate the threshold requirement that the photographic identification procedure was "unduly suggestive and unnecessary." (See *People v. Gordon, supra,* 50 Cal.3d at p. 1242.) Appellant's contention rests on his assumption that the procedure used with Agent Bulman was the de facto equivalent of showing Agent Bulman a single photograph. However, appellant's premise is not supported by the record. When Agent Bulman was shown the photographs, he was handed all five photographs at once and asked if he recognized any of the individuals depicted. (RT 4859, 4928.) It appears only one of the photographs of Terry Brock (People's Exhibit 18) had been previously shown to Agent Bulman by Detective Henry. The remaining photographs were a 1984 "booking photo" of appellant (People's Exhibit 19), a 1978 driver's license photograph of appellant (People's Exhibit 20), a 1980 "booking photo" of Terry Brock, and a 1980 "booking photo" of Charles Brock. (RT 4849-4850, 4852-4853, 4928-4931.) Agent Bulman was able to eliminate Charles Brock (People's Exhibit 21) as being someone he did not recognize. (RT 4862, 4928, 4931.) Thus, the record shows that Agent Bulman was not subjected to the de facto equivalent of a single photograph lineup, but instead was given an array of photographs of different individuals taken at different time periods. In addition, the lineup contained at least one photograph of a person, Charles Brock, who was not presently a suspect.

Moreover, there was nothing improper about showing Agent Bulman one mugshot of appellant as part of the five photographs. As recognized by appellant, the use of a mugshot in a photographic lineup does not inherently result in a violation of due process. (See AOB 199-200.) There is nothing impermissible about using mugshots in a photographic lineup, or even telling

a witness that a suspect or their accomplices are in custody. (See *People v. Contreras* (1993) 17 Cal.App.4th 813, 820; 2 Witkin, Cal. Evid. (4th ed. 2000), § 411, p. 412, citing *Simmons v. United States, supra,* 390 U.S. at pp. 383-384 and *People v. Lawrence* (1971) 4 Cal.3d 273, 279.)

Here, as a trained law enforcement officer, Agent Bulman cannot be said to be susceptible to any suggestion that because a person was depicted in a mugshot they must have committed the instant crime. This is particularly true where Agent Bulman was being shown the photograph long after a suspect was already in custody and on trial. It appears the booking photograph of appellant (People's Exhibit 19) was taken in 1984, whereas the driver's license photograph of appellant (People's Exhibit 20), was from appellant's 1983 driver's license but may have been taken in 1978. (RT 4852.) In other words, both photographs of appellant were roughly contemporaneous to the date of the crime and provided a range of possible changes in appellant's appearance such that if anything, a subsequent identification would be more reliable. Moreover, the array of photographs shown to Agent Bulman included booking photos of both Terry Brock and Charles Brock, lessening any impact of Agent Bulman being shown a single booking photo of appellant. Thus, in the instant case, the fact that one of two photographs of appellant shown to Agent Bulman depicted a booking photo did not render the procedure so suggestive as to violate due process.

Regardless, even if the identification procedure used by the prosecutors is considered suggestive, the identification was reliable in light of the totality of the circumstances looking to the factors identified in *Manson v. Braithwaite, supra,* 432 U.S. at pp. 109-114 and *People v. Gordon, supra,* 50 Cal.3d at p. 1242. Thus, as discussed below, the identification procedure cannot be said to have given rise to a substantial likelihood of misidentification.

First, Agent Bulman had an ample opportunity to view appellant at the scene of the crime. Prior to it getting dark on the night of June 4, 1980, Agent Bulman observed two black males in brown, two-door car drive past and look at Agents Bulman and Cross. (RT 4777-4778.) The passenger, i.e., appellant, turned his head and looked back at Agent Bulman for two or three car lengths as the car drove past. (RT 4778.) Three to five minutes later, the same car drove past and again, the occupants looked at Agents Bulman and Cross. Agent Bulman then watched the occupants of the brown car as they got out, walked between an apartment building and garage and returned two or three minutes later. (RT 4782-4785.)

Later, when the driver of the car and appellant accosted Agents Bulman and Cross, Agent Bulman had further opportunities to observe appellant. During the confrontation, appellant leaned in from the passenger side to look at Agent Bulman, knocked the microphone from Agent Bulman's hand and grabbed the shotgun while saying, "What do we have here?" (RT 4800, 4941.) After appellant shot Julie Cross, Agent Bulman was struggling with the assailant on his side of the car for control of the assailant's gun. The struggle continued into the street where Agent Bulman had an opportunity to observe appellant pointing the shotgun at him during the struggle. (RT 4804.) Agent Bulman had gotten a good enough look at the passenger in the brown car to recognize that the assailant on the passenger side was the same person who was now pointing a shotgun at him, i.e., appellant. (RT 4805.) Ultimately, Agent Bulman was in a position to observe appellant from point-blank range because appellant ran up to Agent Bulman and pointed the shotgun at his face. (RT 4809-4813.) Thus, contrary to appellant's contentions (AOB 190-191), Agent Bulman had a sufficient opportunity to observe appellant before and during the crime. Further, although Agent Bulman may have stated that he had not seen appellant clearly when appellant approached the driver's side of the Secret

Service car because it was dark (see AOB 192, citing RT 4797), the record demonstrates that Agent Bulman was paying sufficient attention and had ample opportunity to observe appellant at other times during the crime.

Agent Bulman's identification was also supported by an accurate prior description. The night of the shooting, Agent Bulman was able to provide the police with a detailed description of the shotgun wielding assailant as a black male, five feet, eleven inches tall, with a mustache, dark knit hat and dark jacket. (RT 4830.) Two days later, Agent Bulman was able to provide sufficient details to develop what Agent Bulman considered to be an accurate sketch of the suspect. (RT 4830-4835.) Contrary to appellant's argument, the fact that Agent Bulman did not identify appellant in court does not prove that Agent Bulman was unable to provide an accurate description. (See AOB 192.) Instead, the fact that Agent Bulman did not identify appellant in court is explained by Agent Bulman having provided descriptions of appellant as he appeared in 1980, not in the early 1990's at the time trial proceedings began.

Moreover, Agent Bulman was not a civilian crime victim, but instead was a trained law enforcement officer with many years of experience who was on duty at the time of the incident. Thus, like the officer in *Manson v. Braithwaite, supra,* 432 U.S. at pp. 114-117, Agent Bulman could be expected to have paid attention to detail. Thus, the third factor supports admission of Agent Bulman's identification.

Fourth, the record shows that Agent Bulman was certain of his identification of appellant in photographs of appellant taken around the time of the crime. Appellant is correct that Agent Bulman never identified appellant in court as the shotgun-wielding assailant. (See AOB 193; RT 4850.) However, the issue here is whether Agent Bulman was certain of his identification of two photographs of appellant taken closely in time to the date of the crime. The record shows Agent Bulman expressed no hesitancy and was certain in his

identification of the photographs. (RT 4860-4861.) Obviously, appellant's appearance would have changed over fifteen years. Thus, contrary to appellant's contention, Agent Bulman's refusal to identify appellant in court despite having identified appellant in older photographs demonstrates that Agent Bulman's identification of the photographs was reliable.

Finally, the passage of over fifteen years between the date of the crime and Agent Bulman's identification does not render Agent Bulman's identification of the photographs unreliable. As repeatedly discussed above, Agent Bulman was shown photographs of appellant taken close to the date of the crime that mitigated the possibility of misidentification. Thus, the passage of time does not render Agent Bulman's identification so unreliable as to be inadmissible.

Appellant's reliance on *In re Hill* (1969) 71 Cal.2d 997 (AOB 201-202), is misplaced. In *Hill*, two murder defendants contended that their right to due process had been violated because the victim of an uncharged prior robbery[7] identified them in-court after an impermissibly suggestive police show-up. According to witness Spero, the two defendants entered his liquor store and asked for a six-pack of tonic. Spero turned his back on one of the defendants, Saunders, whom he had observed for only thirty seconds. The other defendant, Hill, confronted Spero with a gun, announced a hold-up, and then struck Spero over the head with the gun. Spero was then shot in the leg and crawled to a corner of the store where he observed the defendants take money from the cash register and flee. Spero described the suspects to the police when they arrived and again the next morning. On the day of the preliminary hearing, Spero was taken to a holding cell containing only the two

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7. The testimony regarding the prior robbery was admitted to show a common plan or scheme in order to prove that all three of the robbery participants had knowledge that lethal force might be used. (*In re Hill, supra,* 71 Cal.2d at p. 1002.)

defendants, Hill and Saunders, and asked if he could identify them. Spero identified both Hill and Saunders as the men who robbed him. (*Id.* at pp. 1002-1003.) *Hill* concluded that under the totality of the circumstances, including the fact that Spero was being asked to identify the defendants for an uncharged crime, and the lack of any exigency, the pre-trial identification procedure was impermissibly suggestive. (*Id.* at pp. 1005-1006.) However, *Hill* found that Spero's *in-court* identification was nonetheless admissible because prior to being struck on the head, Spero had observed Saunders for more than enough time to be able to recognize him, Spero did not lose consciousness from being struck, Spero continued to observe Saunders and Hill even after being shot in the leg, and Spero was able to provide a detailed description of the two men to the police. (*Id.* at pp. 1006-1007.)

Here, as discussed above and unlike the witness in *Hill*, Agent Bulman was not subjected to an unduly suggestive identification procedure. Moreover, the totality of the circumstances in this case demonstrates that Agent Bulman did not identify appellant in the more highly suggestive context of trial, where it is obvious who the accused is, but instead, reliably selected photographs of appellant from an array of three people. Thus, as previously discussed, *In re Hill, supra,* 71 Cal.2d at pp. 1002-1003, does not entitle appellant to reversal.

Appellant's reliance on *In re Cindy E.* (1978) 83 Cal.App.3d 393 (AOB 203-204), is also misplaced. There, hours before a juvenile court jurisdictional hearing, a robbery victim was shown a single photograph of the perpetrator and asked if the photograph depicted the person who forcibly took her property. While noting that in general, a single-photograph identification is a "suggestive procedure," the Court of Appeal found that no due process violation occurred in the totality of the circumstances. In particular, the victim had been involved in a tense conversation with the perpetrator for three to five minutes in broad daylight and had physically struggled over her property for

approximately thirty seconds. In addition, long before being shown the single photograph, the victim had previously identified the perpetrator from a yearbook. (*Id.* at pp. 401-402.) Here, Agent Bulman was shown photographs of three people, not one. Moreover, similar to the witness in *Cindy E.*, Agent Bulman had the opportunity to observe appellant with sufficient detail to enable a composite sketch. Thus, like in *Cindy E.*, Agent Bulman's identification testimony was sufficiently reliable to be admissible regardless of the identification procedure employed.

In *People v. Contreras, supra,* 17 Cal.App.4th 813, relied on by appellant (AOB 204-205), an assault victim was shown photographic lineups in the hospital. The victim identified one of the two suspects, but did not identify Contreras. Two days prior to the preliminary hearing, the witness was shown a single, clear photograph of Contreras, but did not identify him. However, the witness subsequently identified Contreras in court as his assailant. The Court of Appeal noted that under the circumstances, where the witness knew one of the two assailants was already in custody, showing the single photograph of Contreras was suggestive. However, the Court of Appeal upheld the trial court's finding that the subsequent in-court identification had not been the product of the photographic procedure, i.e., there was no causal connection between the photographic procedure and what the trial court believed was a credible in-court identification, and noted that ultimately, the issue of the credibility of an identification was for the jury to resolve. (*Id.* at pp. 820-824.) Notably, the single photograph procedure in *Contreras did not* result in an identification, and instead the gravamen of the case was whether an in-court identification was sufficiently reliable. The reviewing court found no constitutional impediment to invalidate the trial court's ruling allowing the jury to determine the reliability of Lopez's in-court identificaiton. (*Id.* at pp. 823-824.) Thus, *Contreras* is unhelpful to appellant.

In *United States v. Washington* (D.C. Dist. 1968) 292 F.Supp. 284, also relied on by appellant (AOB 206-208) three jewelry store employees in Washington, D.C., were robbed by four men. Two months later, four men were arrested for robbery in Alexandria, Virginia. One of the witnesses to the Washington, D.C., jewelry store robbery were shown a group of four pictures depicting the men arrested in Alexandria. The photographs were all labeled, "Alexandria Virginia Police Department." Under these facts, the District Court found the photographic identification procedure alone resulted in a due process violation. (*Id.* at pp. 288-289.)

California courts "are not bound by the decisions of lower federal courts, even on federal questions. Such decisions are persuasive and entitled to great weight, but they do not bind California courts. [Citation.]" (*People v. Superior Court (Moore)* (1996) 50 Cal.App.4th 1202, 1211.) Moreover, *Washington* is distinguishable. In the instant case there were two accomplices and Agent Bulman was shown photographs of three people after a suspect had already been charged. In contrast, *Washington* did not involve an identification by a law enforcement professional, but instead involved a civilian witness who had described four suspects being shown a display of four perpetrators who appeared to have been arrested together. Further, as discussed above, there was nothing improper about using one mugshot of appellant in the photographs shown to Agent Bulman. In light of the above, *United States v. Washington, supra,* 292 F.Supp. 284, does not entitle appellant to reversal.

In sum, showing Agent Bulman a total of five photographs of Terry Brock, Charles Brock and appellant, which the prosecution intended to use as exhibits at trial, was not unduly suggestive. Moreover, in the totality of the circumstances Agent Bulman's identification of People's Exhibits 19 and 20 was reliable considering his opportunity to observe appellant, the degree of certainty of the identification, the accuracy of the prior description and that the

passage of time did not impact Agent Bulman's ability to identify depictions of appellant taken around the time of the crime. Agent Bulman's inability to identify appellant in live contexts, or the fact that the identification came fifteen years after the crime occurred are facts which appellant had every opportunity to cross-examine Agent Bulman about and argue to the jury, but do not render Agent Bulman's identification inadmissible on the ground it violated due process. (*See Manson v. Brathwaite, supra,* 432 U.S. at pp. 113-114, fn. 14, 116; *People v. Gordon, supra,* 50 Cal.3d at pp. 1243-1244.) No error occurred.

C. Any Error Was Harmless

Assuming, without conceding, that error occurred, it was harmless regardless of whether the *Watson* or *Chapman* standards of prejudice are applied. (See *Chapman v. California* (1966) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [federal constitutional error is harmless if the reviewing court finds it to be harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error is harmless if, it is reasonably probable that absent the error, the appealing party would have obtained a more favorable result].) Contrary to appellant's characterization (AOB 209), strong evidence supported appellant's guilt regardless of the admission of Agent Bulman's identification of People's Exhibits 19 and 20.

Most importantly, Jessica Brock's testimony placed appellant at the scene in his own words. According to Jessica Brock, on the night of Julie Cross's murder, appellant came to her apartment looking like he had been in a fight and with small spatters of blood on his chest and left arm. Appellant carried a laundry bag containing a metal object like the barrel of a Secret Service shotgun and a wooden object that looked like the grip of a gun. Appellant washed blood off the metal object at an outdoor spigot. Inside Jessica Brock's apartment, appellant was nervous and kept looking for the

police. Appellant admitted to Jessica Brock that near the airport, "he had to take somebody out. It was either them or him." Jessica Brock's testimony was not "implausible," particularly where she clarified that appellant's admission to his participation in the murder of Agent Cross was a separate incident from appellant and Terry Brock visiting her in Santa Monica. (RT 6053-6069, 6077, 6085-6090, 6298-6299, 6328-6330.)

Moreover, appellant demonstrated consciousness of guilt by his refusal to stand in a lineup. Similarly, appellant demonstrated consciousness of guilt by directing his sister, Darcel Taylor, to find out what, if anything, Terry Brock had told the police and by directing April Watson to convey a message to Terry Brock in jail to "stay strong," i.e., silent. Similarly, appellant's family pressured Jessica Brock not to testify, and even told her that if she did not testify, the prosecution would not have a case. The attempts to influence her testimony were so severe that Jessica Brock had to be placed in a witness relocation program. (RT 5727-5732, 5849-5855, 5867-5868, 5877-5891, 5894-5896, 5901-5902, 6073-6076, 6092, 6155-6157.)

Finally, suspect number one on the left side of the composite sketch (People's Exhibit 12), resembles appellant as depicted in photographs dating from around the time the time of Agent Cross's murder (People's Exhibits 19 and 20). In particular, the composite accurately depicts the rounded shape of appellant's eyes, the shape of his eyebrows, the shape of his lips and ears and the thin mustache worn by appellant around 1980. (Compare People's Exhibits 12, 19 and 20.) Moreover, suspect number 2, depicted on the right side of the composite sketch (People's Exhibit 12), closely resembles a photograph of Terry Brock (People's Exhibit 18), who was identified by Agent Bulman as being the gunman who approached his side of the car. (See RT 4850, 4860-4862.) Given the close resemblance, even if Agent Bulman's identification of appellant, as depicted in People's Exhibits 19 and 20, was inadmissible, the jury

would readily conclude that appellant was the person depicted on the left side of the composite sketch (People's Exhibit 12).

In light of the above, the admission of Agent Bulman's identification of the photographs was harmless regardless of the standard of prejudice that is applied.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S REQUEST FOR APPOINTMENT OF PARTICULAR COUNSEL; MOREOVER, APPELLANT'S CONSTITUTIONAL RIGHTS TO COUNSEL AND EQUAL PROTECTION WERE NOT VIOLATED

Appellant contends that the trial court's denial of his request that attorney Kopple be appointed to represent him after his arraignment was an abuse of discretion that violated his constitutional right to counsel and deprived him of his constitutional right to equal protection. Specifically, appellant contends that this Court is not barred from ruling on this contention by the doctrine of law of the case, despite appellant having unsuccessfully pursued a writ of mandate on this issue during trial that resulted in a published Court of Appeal opinion rejecting this same contention. Appellant contends that the trial court prejudicially abused its discretion by not appointing attorney Kopple and that the trial court's failure to appoint attorney Kopple resulted in a reversible per se violation of appellant's constitutional rights to counsel and equal protection because, as an indigent defendant, he was treated differently than defendants who could afford to retain the counsel of their choice. (AOB 210-234.) All of appellant's contentions are meritless. The doctrine of law of the case should bar this Court from consideration of this claim, particularly where this issue was raised and resolved in a published Court of Appeal opnion prior to trial. Even if this Court considers this issue, no prejudicial abuse of discretion occurred. Finally, appellant's right to counsel and equal protection claims based on economic status are meritless.

A. Factual Background

On October 1, 1992, in the Municipal Court, appellant was remanded into custody for the murder of Julie Cross. That same day, appellant was granted pro per status and attorney Kopple was appointed as advisory counsel. (CT 604-607, 636.)

On March 10, 1993, attorney Kopple presented the Municipal Court with a "substitution of attorney form" by which she sought to be appointed as appellant's counsel. Attorney Kopple was advised that she could not be appointed because the court had to first seek to appoint the Public Defender, then the Alternate Defense Counsel, and only after both declined could an attorney be appointed from the panel of attorneys who were considered qualified to handle capital cases. Attorney Kopple withdrew her request and asked to stay on as advisory counsel. (CT 660; RT 2-4.)

On July 7, 1993, attorney Kopple appeared before Municipal Court Judge Waters and stated that appellant would be moving to substitute attorney Kopple into the case as lead counsel. Municipal Court Judge Waters stated that although she personally did not have any objection to attorney Kopple, there was a question as to whether attorney Kopple was on the list of attorneys who could be appointed for capital cases. Attorney Kopple stated that under *Harris v. Superior Court* (1977) 19 Cal.3d 786, "it is mandatory that the court appoint me . . . ." (CT 652; RT 18-21.)

On July 12, 1993, appellant filed a motion to relinquish pro per status and to substitute attorney Kopple as his counsel. (CT 751-764.) On July 13, 1993, the morning of the preliminary hearing, Municipal Court Judge Waters appointed attorney Kopple to represent appellant. (CT 653; RT 40-41.) Attorney Kopple represented appellant during the three-day preliminary hearing, after which appellant was bound over for trial in the Superior Court. (See CT 40-584.)

On July 26, 1993, Municipal Court Judge Waters wrote a letter to the presiding judge of the Los Angeles County Superior Court praising attorney Kopple's performance and professionalism at the preliminary hearing. (CT 868.)

On August 2, 1993, appellant was arraigned in Superior Court before Judge Ito. Attorney Kopple did not mention that she had been appointed for the preliminary hearing, and instead stated she was "appearing with [appellant]." The case was then sent to Judge Horan for trial. (CT 879; RT 1-4.) Judge Horan immediately inquired of attorney Kopple as to whether she had been appointed by the Superior Court. According to attorney Kopple, she assumed that in the absence of an order to the contrary by the Superior Court, she was appointed to the case. The matter was ordered back to Judge Ito because Judge Horan was not authorized to appoint counsel and attorney Kopple was not on the approved panel of capital defense attorneys. (CT 880; RT 5-6.) Judge Ito explained that he thought that attorney Kopple had been retained because she had not indicated to the court when she made her appearance that this was an appointed case. Judge Ito noted that because this was a capital case, the appointment would have to be done through the Superior Court's contract. Attorney Kopple was relieved from further participation, at which time she filed a motion objecting to her removal. The matter was taken under submission and a hearing was set for the next day, August 3, 1993. (CT 881; RT 106-109.)

At the August 3, 2003, hearing, Judge Ito stated that he understood that attorney Kopple had not been placed on the list of attorneys eligible for special circumstances cases because of concern for her "padded" billing and billing for services that were unnecessary or beyond the scope of her employment. Judge Ito noted that in the instant case, despite being appointed as advisory counsel, it appeared that attorney Kopple had acted as counsel by filing the majority of the motions in the case. In addition, attorney Kopple had

billed the "extraordinary" sum of $50,000, merely to act as appellant's advisory counsel prior to the preliminary hearing. (CT 882; RT 114-116.) Appellant stated that he wanted attorney Kopple as his counsel because he had "faith and confidence" in her and felt that his counsel during his previous murder trial would have abandoned him based on his desire to take the witness stand.[8/] (RT 117-119.) Attorney Kopple explained that she had been involved in a heated disagreement in another case regarding a judge's ruling on a discovery issue and denied having threatened another judge. Attorney Kopple also stated that she had not been acting as appellant's counsel because he had actually handwritten all of the motions that had been filed. Attorney Kopple felt that all of her billing in the instant case had been justified. (RT 119-136.) Judge Ito took the matter under submission. Attorney Watson was appointed to begin evaluating the case so that in the event attorney Kopple was not appointed, any delay would be minimized. (CT 882, 885; RT 137-140.)

In a written order dated August 13, 1993, Judge Ito found that there was good cause not to appoint attorney Kopple. Specifically, Judge Ito found that despite not being on the list of attorneys considered qualified for capital case appointment in the Superior Court, attorney Kopple had appeared for arraignment and announced that she was ready to proceed without requesting to be appointed. Attorney Kopple was aware that her appointment was not assured, as she had prepared in advance a motion objecting to her removal from appellant's representation. Further, a review of the billing in this matter demonstrated that if, as attorney Kopple had explained, appellant had actually

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8. On appeal from his prior murder conviction, appellant contended that the trial court erred by denying his motion for a new trial, which was made on the ground that he been deprived of the opportunity to testify in his own defense. As noted by the Court of Appeal, the record reflected that appellant was fully aware of his right to testify, regardless of the advice of his counsel, and had acknowledged that the decision not to testify was his own. (CT 821-823.)

written the motions that had been filed prior to the preliminary hearing, then attorney Kopple had billed the county an enormous sum for what amounted to typing and cite checking. In addition, attorney Kopple's billing exceeded the scope of her employment as advisory counsel prior to the preliminary hearing because she had begun preparing for trial and had billed the county for an inordinate amount of time spent preparing a motion to strike the multiple murder special circumstance allegation. Not only was the special circumstance motion premature, it repeated an issue rejected by the Court of Appeal, such that the motion was properly not considered by the Municipal Court. It also appeared from the record that attorney Kopple was acting as counsel rather than as "advisory counsel," such that appellant unjustly received "pro per" privileges. (CT 886-888.)

Judge Ito also specifically considered the relationship between appellant and attorney Kopple for purposes of analysis under *Harris v. Superior Court*. Unlike the attorney relationship in *Harris*, attorney Kopple's involvement in this case had arisen as a result of a random appointment. Moreover, other than appellant's "trust and confidence," there was nothing in the record demonstrating that attorney Kopple alone possessed any quality or talent necessary to represent appellant. Appellant's protestation that he could not be represented by any other appointed attorney was undermined by his simultaneous request that an additional attorney who had never been involved in the case be appointed to assist attorney Kopple. (CT 887-888.) Finally, Judge Ito noted that his decision was not based on the application of an arbitrary and routine policy to limit appointment of attorneys to the court's list of approved death penalty counsel, but instead was based on reviewing the entire record in the case, the oral and written arguments of attorney Kopple and appellant, and Judge Ito's own inquiries into attorney Kopple's qualifications. Attorney Watson, who had been contacted from the Superior Court's list of

approved counsel, was appointed to represent appellant. (CT 887-889.)

Appellant filed a petition for writ of mandate in the Court of Appeal that sought appointment of attorney Kopple. The Court of Appeal denied the petition on the ground that the record supplied by appellant was insufficient and on the merits. Attorney Gerstein was appointed to represent appellant for purposes of filing a petition for review to this Court from the denial of the petition for writ of mandate. This Court granted the petition for review and transferred the matter to the Court of Appeal with directions to vacate its order denying mandate and to issue an alternative writ to be heard on the Court of Appeal's regular calendar. (CT 891-893, 897-920, 1034, 1045, 1109-1110.) The Superior Court filed a return to the petition for writ of mandate, and appellant filed a traverse. (CT 1120-1211, 1215-1240.) In a published opinion filed on February 17, 1994, the Court of Appeal denied the petition for writ of mandate. (CT 1350-1378; See *Alexander v. Superior Court* (1994) 22 Cal.App.4th 901.) The Court of Appeal denied appellant's petition for rehearing and this Court denied appellant's petition for review from the published opinion of the Court of Appeal. (CT 1443-1471, 1477; see *Alexander v. Superior Court, supra,* 22 Cal.App.4th 901.)

Appellant filed an "Ex Parte Motion for Reconsideration of Appointment of Counsel." (CT 1602-1633, 1639-1640, 1679-1700.) The motion for reconsideration was denied because: 1) attorney Kopple had made unprofessional comments about Judge Ito and the Court of Appeal regarding the rulings in this case; 2) attorney Kopple's application to be on the Orange County Superior Court's capital defense panel had been rejected; and 3) Samuel Miles, M.D., had not provided evidence of any mental condition justifying appointment of attorney Kopple, but instead had reiterated the arguments previously made to the court. (CT 1702.)

B. Review Of This Claim Is Barred By The Doctrine Of Law Of The Case; Moreover, Appellant's Contention is Meritless

The doctrine of law of the case provides that when a reviewing court in an interlocutory appeal states a principle or rule of law that is necessary to the reviewing court's decision, that principle of rule of law must be applied in subsequent proceedings. The doctrine of law of the case applies in criminal matters and applies in the California Supreme Court even if the prior appeal was decided in the Court of Appeal. The primary rationale for the doctrine of law of the case is to promote judicial economy. (*People v. Stanley* (1995) 10 Cal.4th 764, 786 .)

Prior to trial, in August of 1993, appellant raised this exact issue by writ of mandate to the Court of Appeal. The Court of Appeal summarily denied the mandate petition on September 7, 1993. On October 27, 1993, this Court granted appellant's petition for review and transferred the matter to the Court of Appeal with an order to issue an alternative writ of mandate. The Court of Appeal issued an alternative writ on November 18, 1993. The parties briefed the issues and oral argument was heard in December of 1993. (CT 891-893, 897-920, 1034, 1045, 1109-1110, 1120-1211, 1215-1240.)

In a written opinion filed on February 17, 1994, the Court of Appeal rejected appellant's contention that the trial court had abused its discretion by not appointing attorney Kopple to represent appellant after the preliminary hearing. (*Alexander v. Superior Court, supra,* 22 Cal.App.4th at pp. 915-919.) Appellant filed a petition for rehearing in the Court of Appeal, which was denied on March 10, 1994. Appellant filed a petition for review in this Court, which was denied on May 19, 1994. (CT 1443-1471, 1477.)

Appellant urges this Court to re-consider this issue under an exception to the doctrine of law of the case that provides that the doctrine does not apply when there are "exceptional circumstances" and application of the doctrine

would result in a "in a manifestly unjust decision." (AOB 210-211, citing *England v. Hospital of the Good Samaritan* (1939) 14 Cal.2d 791, 795.) More recently, a "manifestly unjust decision" has been defined as a "manifest misapplication of existing principles resulting in substantial injustice . . . or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations." (*People v. Martinez* (2003) 31 Cal.4th 673, 683, quoting *People v. Stanley, supra,* 10 Cal.4th at p. 787 [internal quotation marks omitted].)

The above exception was applied in *England.* There, a medical malpractice plaintiff had been through three trials and appeals during which time the California Supreme Court had not ruled one way or the other as to whether a charitable organization was liable in tort. In the previous appeal, the Court of Appeal had ruled that charitable organizations were immune. Subsequently, the California Supreme Court decided that charitable organizations were *not* immune from tort suits. Under these circumstances, where the law had been unsettled at the time of the Court of Appeal decision that became "law of the case," application of the doctrine would, "exalt form above substance." (*England v. Hospital of the Good Samaritan, supra,* 14 Cal.2d at pp. 795-796.)

In contrast, the doctrine of law of the case barred reconsideration of an issue in *Martinez.* There, during the trial of a capital murder defendant, the defendant had succeeded in having a special circumstance allegation dismissed by the trial court on the ground that the defendant's Texas murder conviction did not qualify because it did not require the same elements as first or second degree murder in California. The Court of Appeal subsequently reversed the trial court, this Court unanimously denied a petition for review, and the special circumstance allegation was reinstated. On automatic appeal from his death judgment, the defendant in *Martinez* reasserted his contention that the special

circumstance should be dismissed. (*People v. Martinez, supra,* 31 Cal.4th at pp. 678, 680-681.) After determining that the Court of Appeal had not misapplied existing law, and after finding that no intervening decisions had clarified the law since the Court of Appeal's decision, this Court applied the doctrine of law of the case to bar reconsideration of the special circumstances issue. (*People v. Martinez, supra,* 31 Cal.4th at pp. 683-688.)

Here, the exception to the doctrine of law of the case does not apply. First, unlike in *England*, and like in *Martinez*, there has been no change in the law since the Court of Appeal's opinion in *Alexander v. Superior Court, supra,* 22 Cal.App.4th 901. To the contrary, appellant does not even argue that there has been a change in the law but instead argues that this Court should apply *Harris v. Superior Court, supra,* 19 Cal.3d 786. *Harris* is the same authority considered by the Court of Appeal when it rejected this contention in *Alexander v. Superior Court, supra,* 22 Cal.App.4th 901. (Compare AOB 223-227 with *Alexander v. Superior Court, supra,* 22 Cal. App.4th at pp. 915-919.) Thus, appellant cannot show an exception to the doctrine of law of the case based on a change in the law.

Moreover, the "exceptional circumstances" identified by appellant are that the Court of Appeal did not fully appreciate the quality of attorney Kopple's representation at the preliminary hearing and did not fully appreciate the level of appellant's trust and confidence in attorney Kopple. (AOB 223-227.) In other words, the exceptional circumstance identified by appellant is that he disagrees with the Court of Appeal's published opinion and this Court's previous rejection of his petition for review.

However, the Court of Appeal's decision in *Alexander v. Superior Court, supra,* 22 Cal.App.4th 901, did not result in a "manifest misapplication of existing principles resulting in substantial injustice" such that reconsideration

of this issue is barred by the doctrine of law of the case.[9] (See *People v. Martinez, supra,* 31 Cal.4th at p. 683.) Even in a capital case, an indigent defendant cannot force the trial court to appoint a particular attorney. (*Drumgo v. Superior Court* (1973) 8 Cal.3d 930, 933-934.) Specifically, appointment of a requested attorney is not compelled merely because the defendant has trust and confidence in the requested attorney. (*Id.* at p. 934.)

Instead, the appointment of counsel to represent an indigent defendant rests in the sound discretion of the trial court. (*Harris v. Superior Court, supra,* 19 Cal.3d at pp. 795-796.) In exercising its discretion, the trial court should take into account: 1) subjective factors such as the willingness of the requested attorney to be appointed, whether the defendant has trust and confidence in the requested attorney, and whether the defendant unexplainedly does not trust other attorneys; and 2) objective factors such as previous representation of the defendant by the requested attorney, any extended relationship between the defendant and the requested attorney, the familiarity of the requested attorney with the issues and witnesses, the duplication of time and expense to the county of appointing a different attorney, and the timeliness of the request. (*People v. Daniels* (1991) 52 Cal.3d 815, 843; *People v. Chavez* (1980) 26 Cal.3d 334, 346; *Harris v. Superior Court, supra,* 19 Cal.3d at pp. 797-799; see *Alexander v. Superior Court, supra,* 22 Cal.App.4th at pp. 915-916.) There is no abuse of that discretion when the court appoints competent counsel who is uncommitted to any position or interest which would conflict with providing an effective defense. (*Drumgo v. Superior Court, supra,* 8 Cal.3d at pp. 934-935.)

Here, appellant contends that pursuant to *Harris*, attorney Kopple should have been appointed based on the depth of appellant's trust and

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9. Alternatively, should this Court address the merits, appellant's contention fails for the reasons set forth below. (See *People v. Martinez, supra,* 31 Cal.4th at pp. 683-688 [Analysis of issue of whether there had been a manifest misapplication of existing law included merits analysis].)

confidence in her and the quality of attorney Kopple's prior performance. (AOB 223-227.) However, as noted by the Court of Appeal in *Alexander v. Superior Court*, the instant case is distinguishable from *Harris* and is more closely analogous to *Drumgo* and *Daniels*. (See *Alexander v. Superior Court, supra,* 22 Cal.App.4th at p. 918.)

In essence, the facts favoring attorney Kopple's appointment were: 1) appellant's trust of her, 2) her willingness to be appointed and 3) her knowledge of the case gained from her representation of appellant at his preliminary hearing. The facts disfavoring attorney Kopple's appointment were: 1) that attorney Kopple had no previous extended relationship with appellant other than the instant case, 2) attorney Kopple was not on the panel of approved capital case attorneys, 3) attorney Kopple had excessively billed the county for her services, 4) attorney Kopple had not been candid with the courts regarding her status as appellant's counsel, and 5) a qualified attorney was willing to accept the appointment at an appropriately reduced fee. (see *Alexander v. Superior Court, supra,* 22 Cal.App.4th at pp. 918-919.)

Appellant makes much of attorney Kopple's knowledge of appellant's case as being the overwhelming factor favoring her appointment. (See AOB 226.) However, it is this factor that distinguishes the instant case from *Harris*. In *Harris*, the defendants were charged with multiple felony counts related to the activities of the so-called Symbionese Liberation Army, an organization whose multiple members had committed a series of crimes over a period of years. The attorneys being requested by the defendants in *Harris* had represented the defendants at trial and were currently representing the defendants on appeal in another case related to the Symbionese Liberation Army. Thus, the attorneys preferred by the defendants in *Harris* had a substantial advantage over newly appointed counsel in understanding the possible witnesses and defenses related to the activities of the Symbionese

Liberation Army. This advantage was acknowledged by the attorneys who were appointed against the wishes of the *Harris* defendants, who also acknowledged that they would need to spend considerable time and energy to achieve a similar level of knowledge. (*Harris v. Superior Court, supra,* 19 Cal.3d at pp. 797-799.) Thus, in *Harris*, the court concluded that because there were no countervailing considerations of equal weight, the trial court had abused its discretion by not appointing the attorneys requested by the defendants. (*Id.* at p. 799.)

In contrast, in *Daniels*, no abuse of discretion was found where the trial court refused to appoint the counsel requested by the defendant. (*People v. Daniels, supra,* 52 Cal.3d at p. 845.) In *Daniels*, a defendant who was on bail while his appeal from robbery charges was pending, shot and killed the two police officers who attempted to apprehend him after his conviction was affirmed. The trial court denied the defendant's requested that Roth, the attorney who had represented him on the robbery charge, be appointed to represent him in the murder case. On appeal, the defendant argued that under *Harris*, the trial court should have appointed Roth. This contention was rejected on the ground that unlike *Harris*, Roth's prior relationship with the defendant had no relationship to the murder charges. (*Id.* at pp. 844-845.)

Here, unlike in *Harris*, attorney Kopple's relationship with appellant and knowledge of his case came only from her appointment as appellant's advisory counsel and did not constitute the type of knowledge that another appointed attorney could not easily acquire. Moreover, unlike *Harris*, appellant's case did not involve complex, long-running criminal activities by a large group of defendants. Instead, like in *Daniels*, attorney Kopple's experience as appellant's stand-by counsel, and brief representation of appellant at the preliminary hearing stage, was not a compelling factor favoring her appointment as appellant's counsel.

Further, as discussed in *Alexander v. Superior Court, supra,* 22 Cal.App.4th at pp. 917-918, attorney Kopple's work as appellant's stand-by counsel, and the brief period during which she represented appellant at the preliminary hearing, consisted of assisting appellant with the appeal of his other murder conviction (for which he had appointed counsel), preparing appellant's pro per motions, preparing a motion that repeated the issues raised by appellant in the appeal of his other murder conviction, and reading the transcripts from appellant's other murder conviction. Thus, contrary to appellant's contentions that attorney Kopple's billing was justified and demonstrated appropriate preparation (AOB 226), it proves instead that attorney Kopple spent an inordinate amount of time on work that put her in no better position to defend appellant than any other appointed counsel. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1100 [despite defendant's expression of trust and confidence in his desired counsel, and preparation of preferred counsel prior to preliminary hearing, no abuse of discretion shown where record failed to demonstrate that newly appointed counsel could only achieve similar level of preparation with considerable duplication of time and effort].)

In sum, all of the above factors were carefully weighed by the Superior Court before it rendered a reasoned decision regarding the appointment of counsel. Thus, appellant cannot say that the Superior Court's decision was so arbitrary and capricious as to constitute an abuse of discretion. For the reasons set forth above, no "manifest misapplication of existing principles resulting in substantial injustice" occurred in *Alexander v. Superior Court, supra,* 22 Cal.App.4th 901. Thus, not only is consideration of this issue barred by the doctrine of law of the case, it also fails on the merits. (See *People v. Martinez, supra,* 31 Cal.4th at p. 683-688.)

C. Any Error Was Harmless

Appellant contends that the failure to appoint attorney Kopple was prejudicial error. Specifically, appellant contends that had attorney Kopple been appointed, she would have asserted three *potentially* successful arguments in a motion to set aside the information pursuant to section 995: 1) that the California Peace Office special circumstance under section 190.2, subdivision (a)(7), was not supported by sufficient evidence; 2) that there was insufficient evidence of appellant's identity as a participant in the crime; and 3) that Agent Bulman's testimony should be stricken under *People v. Shirley* (1982) 31 Cal.3d 18, 67-68. Appellant further contends that had attorney Kopple been appointed, potential defense witness Ellis's testimony might not have been lost by his death. (AOB 227-231.) This contention is mertiless.

An information will only be set aside under section 995 where there is no evidence that a crime has been committed or there is no evidence to connect the defendant with a crime shown to have been committed. (*People v. Superior Court (Lujan)* (1999) 73 Cal.App.4th 1123, 1127.) In ruling on a section 995 motion, every legitimate inference must be drawn in favor of the information. (*Ibid.*) Here, had attorney Kopple been appointed and brought a motion pursuant to section 995 on the three grounds identified by appellant, appellant would not have achieved a more favorable result.

As to the California Peace Officer special circumstance allegation under section 190.2, subdivision (a)(7), a section 995 motion at most would have resulted in the prosecutor amending the information to conform to the proof elicited at the preliminary hearing. This is particularly true where attorney Watson had been unsuccessful in having the murder of a peace officer special circumstance stricken in its entirety on the ground that because Agents Bulman and Cross were sitting in plain clothes in an unmarked car, there was insufficient evidence to support any special circumstance on this ground. (CT

64-76, 991-999; see Argument III, below.) Alternatively, even if a section 995 motion had succeeded in eliminating the peace officer special circumstance, it would not have changed the conduct of voir dire considering that both the defense and prosecution would still have wanted to question potential jurors to determine if their attitudes about the death penalty when the victim was a peace officer. (See Argument III, below.)

Further, despite Agent Bulman's failure to identify appellant prior to trial as Agent Cross's assailant, there was substantial evidence produced at the preliminary hearing demonstrating that appellant had admitted his participation in the murder to Jessica Brock. Appellant's admission to Jessica Brock was corroborated by the other evidence, such that a motion under section 995 would have failed. (See CT 48, 95-96, 184-203, 317-320, 324-325, 340-342, 351, 383-391.)

Finally, appellant fails to identify how attorney Kopple could have succeeded in arguing that Agent Bulman's testimony was inadmissible under *People v. Shirley, supra,* 31 Cal.3d at pp. 67-68. Notably, prior to the preliminary hearing, attorney Kopple *unsuccessfully* filed a motion seeking to suppress the testimony of Agent Bulman, Agent Torrey and composite artist Ponce as being improperly influenced by hypnosis. (CT 652-653, 737-748.) Ultimately during trial, when attorney Klein was representing appellant, the trial court concluded that Agent Bulman had not been hypnotized, such that rules limiting the admissibility of testimony from witnesses who had been hypnotized did not apply. (See Argument VIII, below.)

In addition, appellant speculates that had trial not been delayed due to the appointment of attorney Watson instead of attorney Kopple, then the testimony of potential defense witness Ellis, who died in 1995, would not have been lost. (AOB 230.) However, regardless of any delay, there is nothing in the record demonstrating that attorney Kopple, appellant acting in pro per, or

any other defense attorney, could somehow have predicted the demise of Ellis and made an effort to preserve his testimony in admissible form.

Finally, appellant contends he was prejudiced because attorney Kopple was "effective" and "hardworking." Appellant does not, and cannot demonstrate that either attorney Watson, or attorney Klein, who was ultimately appointed after appellant sought and then abandoned pro per status, were not "effective" or "hardworking." Obviously, appellant has continued confidence in attorney Kopple. However, this does not translate into a showing that failure to appoint attorney Kopple was prejudicial, particularly where substantial evidence supported the jury's guilt and penalty phase verdicts. (See Arguments XVII, XXII, and XXIII.) Reversal is not warranted.

D. Appellant's Equal Protection Claim Is Meritless

Appellant's final contention is that if the trial court erred by not appointing the counsel of appellant's choice, then the trial court's error is reversible per se. According to appellant, because he has demonstrated that he was entitled to the appointment of counsel of his choice, and it is reversible per se to deny a defendant retained counsel of his choice, the trial court's ruling deprived him of his right to counsel and equal protection because he was treated differently than those who could afford to retain counsel. (AOB 231-234.) Appellant's contention is meritless.

A trial court's abuse of discretion in denying a defendant's request for appointment of particular counsel is not reversible per se, but instead is subject to harmless error review. (See *People v. Chavez, supra,* 26 Cal.3d at pp. 348-349 [defendant unsuccessfully argued that the per se reversal rule applicable to inadequate hearings under *People v. Marsden* (1970) 2 Cal.3d 118, should apply to trial court's abuse of discretion in ruling on request for appointment of particular counsel].) Further, a nearly identical claim to that made by appellant

was rejected in *People v. Taylor* (1968) 259 Cal.App.2d 448, 450-451. In *Taylor*, a defendant contended that he was denied his right to equal protection because the trial court was unwilling to appoint counsel other than the public defender, whereas a defendant with means could change counsel at will. The Court of Appeal in *Taylor* tersely rejected the defendant's claim as meritless. Appellant's claim is equally meritless.

This Court has "repeatedly held that constitutional and statutory guarantees are not violated by the appointment of an attorney other than one requested by a defendant. (*People v. Hughes* (1961) 57 Cal.2d 89, 98-99 []; see, e.g., *People v. Aikens* (1969), 70 Cal.2d 369, 378 []; *People v. Massie* (1967) 66 Cal.2d 899, 910 []. See also *People v. Taylor, supra,* 259 Cal.App.2d 448, 450-451[].)" (*Drumgo v. Superior Court, supra,* 8 Cal.3d at p. 934.) Moreover, it is well established that for purposes of the Equal Protection Clause of the Fourteenth Amendment, financial need is not a "suspect class." (See *Harris v. McRae* (1980) 448 U.S. 297, 322-323 [100 S.Ct. 2671, 65 L.Ed.2d 784] [government regulation limiting abortion funding not subject to strict scrutiny test even though disparate impact of legislation is on the indigent].

Further, a defendant who alleges an equal protection violation based on membership in a suspect class has the burden of proving "the existence of purposeful discrimination," that had a discriminatory effect on him or her. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 292 [107 S.Ct. 1756, 95 L.Ed.2d 262].) Thus, a defendant making an equal protection challenge must prove that the decisionmaker in his case acted with discriminatory purpose. (*Ibid.*) Here, not only can appellant not show that he is a member of a suspect class, there is nothing in the record demonstrating that the trial court purposefully discriminated against him because he was a person who could not afford to retain counsel.

In sum, appellant's equal protection contention is based on the faulty premise that "Defendants who have retained lawyers and [indigent] defendants who have shown that they are entitled to the appointment of the lawyer of their choice are persons who are similarly situated." (AOB 233.) As discussed above, this is not the state of the law. Although appellant had a constitutional right to counsel in general, at no time did he have a constitutional right to counsel of his choice. As acknowledged in *People v. Crovedi* (1966) 65 Cal.2d 199, relied on by appellant (AOB 233), even where a defendant can afford to retain counsel, "it is clear that a defendant has no absolute right to be represented by a particular attorney." (*Id.* at p. 207.) Appellant cannot demonstrate that he was treated differently than other similarly situated indigent defendants. Thus, even if error occurred, it was not reversible per se and did not constitute a violation of appellant's constitutional right to counsel or equal protection.

III.

DISCUSSING THE MURDER OF A PEACE OFFICER SPECIAL CIRCUMSTANCE IN VOIR DIRE WAS PROPER; MOREOVER, APPELLANT WAS NOT PREJUDICED

Appellant contends that asking prospective jurors voir dire questions regarding the murder of a California peace officer special circumstance resulted in prejudicial error. Specifically, appellant contends that because the information was ultimately amended to allege the special circumstance of murder of a *federal* law enforcment officer, and as amended, the special circumstance was ultimately dismissed after the presentation of evidence, his jury was "tainted" by the knowledge that appellant faced a charge so serious that it warranted the death penalty. Appellant waived any contention of error by failing to object during voir dire proceedings. Moreover, this contention is meritless.

Here, the original information charged, in part, that:

> the murder of Agent Julie Cross was committed by [appellant] and that Agent Julie Cross was a peace officer who was intentionally killed while engaged in the performance of her duties, and that [appellant] knew and reasonably should have known that Agent Julie Cross was a peace officer engaged in the performance of her duties within the meaning of Penal Code Section 190.2(a)(7).

(CT 597.) This allegation was amended after the close of the prosecution's case to allege that "Agent Julie Cross was a federal law enforcement officer and agent" within the meaning of section 190.2, subdivision (a)(8). (See CT 590; RT 7644.) Appellant's motion to dismiss this special circumstance under section 1118.1 was granted on the ground that while the evidence produced at trial could support a finding that Julie Cross was a peace officer of some kind, the evidence produced at trial would not support a finding that appellant knew or should have known that she was a *federal* peace officer. (RT 7654-7662.)

The record shows that appellant's trial counsel, Rowan Klein, was the attorney who proposed that the jury questionnaire include a question to the effect of whether the prospective jurors thought that a person who killed a law enforcement officer should receive the death penalty. (See AOB 235; CT 1916, 2053; Supp. CT 3013; RT 2043-2044 [demonstrating that the question that became question 50 on the January 8, 1995 juror questionnaire was proposed by attorney Klein as his proposed jury instruction number 68, and was subsequently discussed and adopted as modified without objection].) Moreover, attorney Klein had no objection to two similar questions that sought to determine whether the prospective jurors thought that a person who murdered a law enforcement officer should *automatically* receive the death penalty, or whether under that circumstance, the juror would refuse to find the person guilty to avoid imposing the death penalty. (CT 2055; Supp. CT 3014; RT 2027-2029.) During voir dire, attorney Klein did not object to any of the trial court's references to the murder of a peace officer or the fact that murder of a peace officer was alleged as a special circumstance. (See RT 3988-3989, 3992-3993, 4038-4039, 4177-4178, 4208, 4325, 4337, 4368-4369, 4399-4400, 4469.) In light of the above, appellant has waived any contention of error and/or any error was invited. (See *People v. Cooper* (1991) 53 Cal.3d 771, 831 [invited error precludes the reversal of a criminal conviction where the record shows that defense counsel's inducement of error was deliberate and motivated by a tactical decision]; *People v. Walker* (1988) 47 Cal.3d 605, 626 [failure to object to voir dire questions waives any contention of error on appeal].)

Moreover, appellant's argument that he was somehow prejudiced by the conduct of voir dire is meritless. Regardless of how the peace officer special circumstance allegation was pleaded, appellant's jury would hear testimony in the guilt phase that related to Julie Cross being an agent for the United States Secret Service. Appellant does not contend that somehow the

facts explaining what Agents Bulman and Cross were doing on the night of the crime, why they were heavily armed such that Julie Cross was shot with a Secret Service weapon, why Agent Torrey was down the street, and why the Secret Service was involved in the investigation could somehow have been withheld from the jury. Thus, the jury could hardly have been influenced by a handful of references in voir dire to the essential facts of the case.

Further, examination of the voir dire questions and statements by the trial court to the jurors demonstrates that for the most part, the mention of law enforcement officers during voir dire was intended to determine whether the prospective jurors would automatically be influenced towards a death verdict by Julie Cross's status, without regard to the fact that a special circumstance had been charged. Any references to the fact that murder of a peace officer was alleged as a special circumstance were done in passing. (RT 3988-3989, 3992-3993, 4038-4039, 4177-4178, 4208, 4325, 4337, 4368-4369, 4399-4400, 4469, 4526.) For example, almost all of appellant's citations to voir dire discussion regarding the peace officer special circumstance demonstrate that the trial court was clarifying to prospective jurors that not only would the jury be required to find that the special circumstance had been proven, but that the death penalty was not automatic such that the jury would also have to weigh whether the death penalty was appropriate by examining aggravating and mitigating factors. (RT 3988-3989, 3992-3993, 4038-4039, 4177-4178, 4208, 4337, 4368-4369, 4399-4400, 4469, 4526.) Thus, in context, the juror questionnaires and the trial court's remarks demonstrate that the intent was to educate the jurors that the death penalty was not automatic based on the allegations and that even if the special circumstances were found true, the jury had the duty of independently determining the penalty.

Finally, appellant repeats his argument (see AOB 236; Argument II, above) that he was prejudiced because, if attorney Kopple had been his attorney

after the preliminary hearing rather than attorney Watson, the peace officer special circumstance would have been stricken, such that the jury would never have heard about it. However, the fact that *after the presentation of evidence*, the special circumstance of murder of a federal law enforcement officer or agent (§ 190.2, subd. (a)(8)) was dismissed pursuant to section 1118.1, is irrelevant. Given the evidence produced at the preliminary hearing, the fact that the original information alleged a violation of section 190.2, subdivision (a)(7) (murder of a "peace officer"), rather than a violation of section 190.2, subdivision (a)(8) (murder of a federal law enforcement officer), was the type of error that the trial court would have allowed to be corrected by amending the information. (See § 995a, subd. (b)(1); *People v. Boyd* (1987) 43 Cal.3d 333, 361-362 [technical error in pleading a special circumstance is not prejudicial where the defendant is not misled].)

In sum, any contention of error has been waived and/or invited by attorney Klein's failure to object on this ground during the voir dire process and attorney Klein's proposal of voir dire questions related to Julie Cross's status as a peace officer. Moreover, no error occurred. Appellant cannot possibly have been prejudiced by voir dire references to whether the murder of a law enforcement officer might justify the death penalty where Julie Cross's status as a federal officer would be presented to the jury regardless of the particular special circumstances allegations. Further, the record of the voir dire process demonstrates that the references appellant complains of were designed to elicit whether prospective jurors could be fair given the facts of this case. Reversal on this ground is not warranted.

IV.

APPELLANT'S *WHEELER* MOTION WAS PROPERLY DENIED; MOREOVER, ANY ERROR WAS HARMLESS

Appellant contends that the trial court prejudicially erred by denying his motion under *People v. Wheeler* (1978) 22 Cal.3d 258, which was made on the ground that the prosecution had exercised peremptory challenges against five Black females and four Black males. Specifically, appellant contends that he had made a prima facie showing of group bias. Moreover, although the trial court found that appellant had not made a prima facie case, appellant contends he is still entitled to review of the entire record of voir dire because the trial court gave the prosecutor the opportunity to "make a statement for the record." Finally, appellant contends that the record does not support the prosecutor's peremptory challenges to four specific Black female jurors. All of appellant's contentions are meritless.

A. Background Facts

During jury selection, appellant's trial counsel stated:

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

(RT 4321.) The prosecutor pointed out that he had also used peremptory challenges against numerous White males and the trial court took the motion under submission. (RT 4322.) Later, appellant's trial counsel stated he would "like to broaden my motion . . . so it is directed towards both Black males and

females" and the motion was again taken under submission. (RT 4371.)

Appellant's trial counsel offered no further argument other than, "on the jury that was selected, there are three Blacks and maybe one left in the audience." (RT 4384.) The prosecutor offered no argument. The trial court then ruled as follows:

> Out of an abundance of caution, the court will require the people to offer reasons for the following: ¶ The court will find again that there is no prima facie showing, but the court feels that the record is not clear as to the following: ¶ I will give the People the opportunity, if they wish, to make a statement for the record. ¶ I don't think a prima facie case has been made. I will allow counsel to comment . . . .

(RT 4385.)

B. The Trial Court Properly Determined That Appellant Had Failed To Show A Prima Facie Case Of Group Bias In The Use Of Peremptory Challenges

In *People v. Box* (2000) 23 Cal.4th 1153, this Court reiterated the applicable principles regarding the discriminatory use of peremptory challenges as follows:

> "It is well settled that the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates both the state and federal Constitutions." (*People v. Turner* [(1994) 8 Cal.4th 137, 164]; *People v. Wheeler, supra,* 22 Cal.3d at pp. 276-277; *Batson v. Kentucky* (1986) 476 U.S. 79, 89 [106 S.Ct. 1712, 1719, 90 L.Ed.2d 69].) Under *Wheeler* and *Batson*, "[i]f a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, ... he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case

> he must show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association ...." (*People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154 []; italics omitted; *People v. Turner, supra*, 8 Cal.4th at p. 164; *People v. Wheeler, supra,* 22 Cal.3d at pp. 280-281.)

(*People v. Box, supra,* 23 Cal.4th at pp. 1187-1188.)

The phrases "strong likelihood" and "reasonable inference" as used in *Wheeler* mean the same thing and are consistent with the term, "inference of discriminatory purpose" that the United States Supreme Court applied in *Batson, supra,* 476 U.S. at p. 94. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1306, 1313-1318; *People v. Box, supra,* 23 Cal.4th at p. 1188, fn. 7.) When a trial court denies a *Wheeler* motion without finding a prima facie case of group bias, the appellate court reviews the record of voir dire for evidence to support the trial court's ruling and will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question. (*People v. Farnam* (2002) 28 Cal.4th 107, 135.) If the reviewing court finds that the trial court properly determined that no prima facie case was made, it need not review the adequacy of the prosecution's justifications, if any, for the peremptory challenges. (*Id.* at p. 135, citing *People v. Turner* (1994) 8 Cal.4th 137, 167.) Although appellant did not specifically invoke *Batson* in his objection at trial, this Court has recognized that an objection under *Wheeler* preserves a federal constitutional objection because the legal principle that is applied is ultimately the same. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Here, appellant contends that despite having expressly found that appellant had not made a prima facie showing of group bias, the trial court's invitation to the prosecutor to "make a statement for the record" regarding its use of peremptory challenges resulted in a de facto ruling that appellant *had* made the required prima facie showing. (AOB 238.) Appellant is incorrect.

In *People v. Farnam, supra,* 28 Cal.4th at p. 136, this Court rejected a similar argument. The trial court in *Farnam* ruled that the defense had not met its burden of demonstrating a prima facie case but permitted the prosecution "out of an abundance of caution" to make whatever record it wished, despite it being unnecessary. (*Ibid.*) This Court found that, "[o]n this record, there is no basis for concluding that a prima facie case of racial bias had been found, implicitly or otherwise." (*Ibid.*)

Appellant's reliance on *People v. Davenport* (1995) 11 Cal.4th 1171, 1200 (AOB 238, fn. 104), is misplaced. In *Davenport*, as in *Farnam*, this Court held that when the record demonstrates that the trial court unequivocally found no prima facie case, yet the prosecutor was permitted to make a record regarding his or her reasons for exercising peremptory challenges, the trial court's finding of no prima facie case is reviewed on appeal without regard to the reasons offered by the prosecutor to justify the peremptory challenges. (*People v. Davenport, supra,* 11 Cal.4th at pp. 1200-1201.)

In the instant case, as in *Farnam* and *Davenport*, there is nothing in the record to justify a conclusion that the trial court explicitly or implicity found a prima facie case of group bias. To the contrary, like in *Farnam*, the trial court expressly found no prima facie showing of group bias and "out of an abundance of caution" gave the "People the opportunity, *if they wish*, to make a statement for the record." (RT 4385 [italics added]; 4488.) Thus, this Court need only analyze whether the trial court properly ruled that no prima facie case had been made, without reference to the prosecutor's optional justifications. (See *People v. Farnam, supra,* 28 Cal.4th at p. 135; *People v. Davenport, supra,* 11 Cal.4th at pp. 1200-1201.)

Here, appellant argued at trial that he had made his prima facie showing on the ground that five Black females and four Black males had been the subject of peremptory challenges and only three Blacks were seated on the

final jury panel. (See RT 4321, 4384.) A prima facie showing is not supported merely by arguing that peremptory challenges were used against members of a cognizable group or that the resulting jury contained only a small number of members of the cognizable group. (See *People v. Farnam, supra,* 28 Cal.4th at pp. 134-135 [assertion that use of peremptory challenges against four Black jurors did not demonstrate prima facie case, particularly where resulting jury had six Black members]; *People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 15 [assertion of group bias based solely on number and order of exclusion of protected group members and final jury composition not sufficient to establish prima facie case].) Moreover, assertion of group bias based on exercising peremptory challenges against a protected class who in some respect appeared to favor the prosecution does not establish a prima facie case. (*People v. Turner, supra,* 8 Cal.4th 137, 167.) Here, like in *Farnam*, *Arias* and *Turner*, the record shows that appellant failed to meet his burden of establishing a prima facie case of group bias by arguing only that some Black prospective jurors had been the subject of peremptory challenges, that some of the excused jurors may have favored the prosecution and that only three Blacks were ultimately impaneled on the jury. (See *People v. Box, supra,* 23 Cal.4th at pp. 1188-1189 [insufficient showing of prima facie case where "the only basis . . . cited by defense counsel was that the prospective jurors - like defendant - were Black"].)

Further, appellant's contention appears limited to arguing that the prosecutor's peremptory challenges were unjustified as to only four out of nine Black prospective jurors to whom peremptory challenges were exercised. Thus, in this appeal, appellant implicitly concedes that as to all but four Black female jurors, the record demonstrates that the prosecutor's peremptory challenges were justified. (See AOB 237-243.) Appellant cannot demonstrate a pattern of discrimination where adequate reasons supported the exercise of peremptory challenges against all of the Black males and one of the Black females. Further,

as discussed in section IV.C., below, the record demonstrates that race and gender neutral reasons supported the exercise of peremptory challenges against each of the four Black female jurors that appellant now argues were improperly excused. Thus, appellant's contention fails.

C. Even If The Trial Court Is Considered To Have Made A Finding Of A Prima Facie Showing, Appellant's Contention Fails

Appellant's contention fails even if this Court finds that the trial court made a prima facie showing of group bias in the exercise of the prosecution's peremptory challenges. If the trial court has found a prima facie case of group bias, then the prosecutor must state adequate, race-neutral reasons for the peremptory challenges. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197.) These reasons must relate to the particular individual jurors and to the case at issue. (*Ibid.*) "'[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Williams* [(1997) 16 Cal.4th 635, 664], quoting *Batson v. Kentucky, supra,* 476 U.S. at p. 97.) "Rather, adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation omitted], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*People v. Williams, supra,* 16 Cal.4th at p. 664.)

Peremptory challenges may be based on a juror's manner of dress, a juror's unconventional lifestyle, a juror's experiences with crime or with law enforcement, or simply because a juror's answers on voir dire suggested potential bias. (*People v. Wheeler, supra,* 22 Cal.3d at p. 275.) Peremptory challenges may be predicated on evidence suggestive of juror partiality that ranges from "the virtually certain to the highly speculative." (*People v. Wheeler, supra,* 22 Cal.3d at p. 275.)

Here, appellant contends that the prosecution's exercise of peremptory challenges against Juror Numbers 11, 42, 76 and 89, were not supported by adequate, race-neutral reasons. (AOB 240-243.) Appellant is incorrect.

As to Juror Number 11, the prosecutor stated that he exercised a peremptory challenge because, as reflected in the answers to the written juror questionnaire, Juror Number 11 had visited an ex-boyfriend in jail, had a sister who was arrested for a theft offense, had an ex-sister in-law who served time in prison, who felt that the defense had done a better job than the prosecutor in the high-profile Menendez case, who also felt that the Los Angeles Police Department needed to do a better job handling evidence and that some police officers treated African-Americans differently. (Supp. CT 3182, 3184; RT 4488-4489.) It is permissible to surmise that a close relative's adversary contact with the criminal justice system might make a juror unsympathetic to the prosecution, and a peremptory challenge may be proper on that basis. (*People v. Arias, supra,* 13 Cal.4th at p. 138; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Allen* (1989) 212 Cal.App.3d 306, 312.) Moreover, this court has repeatedly upheld the exercise of peremptory challenges to jurors who have expressed a negative experience with law enforcement. (*People v. Turner, supra,* 8 Cal.4th at p. 171, citing *People v. Walker, supra,* 47 Cal.3d 605, 625-626; *People v. Wheeler, supra,* 22 Cal.3d at pp. 275, 277, fn. 18.) Thus, the prosecutor's reasons for exercising a peremptory challenge against Juror Number 11 were proper based on Juror Number 11's express and implied bias against law enforcement.

As to Juror Number 11, appellant also argues that this Court should compare Juror Number 11's responses with those of other jurors, i.e., engage in comparative juror analysis for the first time on appeal. (AOB 242.) However, the comparative analysis now argued by appellant was never made in the trial

court. (RT 4321, 4371, 4384, 4496.) This Court has expressly rejected the use of comparative juror analysis for the first time on appeal when reviewing the trial court's decision that a prima facie case has not been shown and in reviewing the reason for a peremptory challenge after a prima facie case has been shown. (*People v. Johnson, supra,* 30 Cal.4th at pp. 1319-1325.) In light of this Court's decision in *Johnson*, appellant's attempt to engage in a comparative analysis of the responses of other jurors to the jury questionnaire cannot be considered to demonstrate that a discriminatory peremptory challenge was used by the prosecution as to Juror Number 11.

As to Juror Number 42, the prosecutor justified his peremptory challenge on the ground that Juror Number 42 had indicated that in the O.J. Simpson trial there had been reasonable doubt and the prosecution had not proved its case, the Los Angeles Police Department "need to clean up the crime lab," the Los Angles Police Department treats minorities differently than Caucasians, and that she could impose the death penalty only "if there was *no doubt.*" (Supp. CT 3354, 3358; RT 4489 [italicas added].) Because the record demonstrated that Juror Number 42 had expressed potential bias against the Los Angeles Police Department, a peremptory challenge to Juror Number 42 was proper. (See *People v. Turner, supra,* 8 Cal.4th at p. 171; *People v. Wheeler, supra,* 22 Cal.3d at p. 275.)

As to Juror Number 76, the prosecutor explained that his peremptory challenge was based on Juror Number 76 having been in court for a bankruptcy, having visited friends and relatives in prison, having a brother who had been in prison for robbery and kidnaping, having nephews who had been imprisoned for drug possession, and who had indicated she did not want to be a juror on this case. (Supp. CT 3521-3522, 3529; RT 4491-4492.) A peremptory challenge as to Juror Number 76 was proper based on her close relative's contacts with the criminal justice system. (*People v. Arias, supra,* 13 Cal.4th

at p. 138; *People v. Douglas, supra,* 36 Cal.App.4th at p. 1690; *People v. Allen, supra,* 212 Cal.App.3d at p. 312.) In addition, Juror Number 76 was involved in a bankruptcy and the prosecutor indicated he might be introducing evidence of appellant's bankruptcy. Moreover, Juror Number 76 expressly stated she did not want to be a juror on this case because "it is a very serious business to make decisions on life or death." Thus, Juror Number 76 was properly the subject of a peremptory challenged based on her reluctance to become involved in a case involving the death penalty. (See *People v. Turner, supra,* 8 Cal.4th at p. 171 [peremptory challenge against death penalty skeptic who is otherwise not excusable for cause is proper].

As to Juror Number 89, the prosecutor justified his peremptory challenge on the ground that Juror Number 89 thought that O.J. Simpson had not been proven guilty beyond a reasonable doubt, that some Los Angeles Police Department officers treat African-Americans as "lesser human beings," that "it is a big job to determine that someone should be put to death," that the types of killers who should receive the death penalty are killers of children, and that her step-sister was employed by prominent defense lawyer Johnnie Cochrane.[10/] (Supp. CT 3627, 3630, 3633; RT 4489-4490.) A peremptory challenge to Juror Number 89 was proper because she demonstrated a potential bias against law enforcement by expressing that the police treat African-Americans differently and by the fact that her step-sister was employed by defense attorney Johnnie Cochran. (See *People v. Turner, supra,* 8 Cal.4th at p. 171; *People v. Wheeler, supra,* 22 Cal.3d at p. 275.) Moreover, the peremptory challenge was also proper based on Juror Number 89's view that the death penalty was appropriate for killers of children, which was not at issue in

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10. Contrary to appellant's contention that "defense lawyer" can mean any lawyer, Juror Number 89 specifically identified her step-sister's employer as Johnnie Cochran in response to question number 21 in the juror questionnaire. (See AOB 240; Supp. CT 3627.)

this case. (See *People v. Arias, supra,* 13 Cal.4th at p. 137-139; *People v. Turner, supra,* 8 Cal.4th at pp. 169, 171.)

In sum, as discussed in Argument IV.B., the trial court properly determined that appellant had failed to demonstrate a prima facie case of group bias. Moreover, as to appellant's specific challenge to the prosecutor's reasons for his peremptory challenges to Juror Numbers 11, 42, 76 and 89, the record shows that each of the peremptory challenges was properly exercised for a race and gender neutral reason. Appellant is not entitled to reversal.

V.

APPELLANT'S RIGHT TO DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS WAS NOT VIOLATED BY A TWELVE-YEAR DELAY BETWEEN THE CRIME AND HIS ARREST

Appellant contends that his right to due process under the state and federal constitutions was violated by the twelve-year delay between the commission of the crime and his arrest. According to appellant, the trial court erred by denying his motion to dismiss on this basis. Specifically, appellant contends that he was prejudiced by the delay, which resulted in: 1) the destruction of tape recordings of 1980 hypnosis sessions conducted with Agent Bulman, Agent Torrey, Nina Miller, William Ellis and Mary Bush; 2) appellant's inability to obtain his eye examination records from 1982; and 3) the destruction of swabs used to test appellant's jacket for the presence of blood. (AOB 243-253.) Appellant is incorrect. Substantial evidence supported the trial court's finding that appellant was not prejudiced by the delay and resulting loss of the above items.

A. Relevant Facts

Prior to trial, appellant filed a "Motion To Dismiss For Due Process Violation." In the motion, appellant argued that the charges against him should be dismissed for pre-indictment delay of twelve years. (CT 1932-1960.) Specifically, appellant argued that he had been prejudiced by the destruction of tape recordings of 1980 hypnosis sessions conducted with Agent Bulman because the tapes contained critical information given by Agent Bulman when the events were fresh in his mind, appellant was precluded from conducting meaningful cross-examination regarding the hypnosis sessions and appellant was precluded from demonstrating "what statements by Bulman are based solely on his pre-hypnosis testimony." (CT 1942-1943.)

As to the Agent Torrey tape, appellant argued that "the defense is deprived of key evidence from an eyewitness regarding the description of the vehicle driven by the assailants." (CT 1942.) As to the Nina Miller tape, appellant argued that the tape had been erased, and she could not be located at the time of the motion. (CT 1943.) As to the William Ellis tape, appellant argued that on the tape, Ellis had given a detailed description of the suspect's car and had given a description of one suspect having a large scar on his cheek, and the other suspect wearing a ripped, black leather jacket, which would have proven that appellant's jacket could not have been the one worn by the shooter. (CT 1943.) As to the Mary Bush tape, appellant argued that this witness saw the getaway car, her description of a male Black did not match Agent Bulman's descriptions of the suspects, and this witness did not identify Terry Brock in a photographic lineup, yet it was unknown what this witness had said under hypnosis. (CT 1944.)

As to appellant's inability to obtain optometry records from 1982, appellant argued that the prosecution's evidence connecting appellant to the glasses found at the scene could have been rebutted because the unavailable records would have shown that appellant did not wear glasses in 1980. (CT 1945.) As to the destruction of swabs used by Matheson to perform a phenolphthalein presumptive blood test on appellant's jacket, appellant argued that "there is no way to determine if the presumptive tests for blood were accurate." (RT 1946-1947.)

The prosecution filed an opposition addressing both appellant's pre-trial delay claims and his loss/destruction of evidence claims. (CT 2576-3131.) The trial court denied the motion on the ground that appellant had not made a "credible showing of prejudice." (RT 2814.)

B. Substantial Evidence Supported The Trial Court's Finding That Appellant Had Not Been Prejudiced By The Delay

Claims related to post-accusation delay are governed by the Sixth Amendment right to a speedy trial, whereas pre-accusation delay is regulated by the general right to due process afforded under the state and federal constitutions. (See *United States v. MacDonald* (1982) 456 U.S. 1, 7 [102 S.Ct. 1497, 71 L.Ed.2d 696]; *United States v. Marion* (1971) 404 U.S. 307, 321 [92 S.Ct. 455, 30 L.Ed.2d 468]; *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 504; *People v. Archerd* (1970) 3 Cal.3d 615, 639; *Butler v. Superior Court* (1995) 36 Cal.App.4th 455, 464.) The due process clause provides only limited protection against pre-accusation delay. (See *United States v. Lovasco* (1977) 431 U.S. 783, 789 [97 S.Ct. 2044, 52 L.Ed.2d 752]; *People v. Frazier* (1999) 21 Cal.4th 737, 774.) Under both the federal and state constitutions, a claim of pre-accusation delay requires proof that the delay actually prejudiced the defendant. (See *United States v. Lovasco, supra,* 431 U.S. at p. 790; *People v. Martinez* (2000) 22 Cal.4th 750, 765, citing *United States v. Marion, supra,* 404 U.S. at p. 324.) Absent a showing of actual prejudice, the trial court need not inquire into the prosecution's motivations for the delay. (*United States v. Lovasco, supra,* 431 U.S. at pp. 789-790; *People v. Morris* (1988) 46 Cal.3d 1, 37, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5; *Scherling v. Superior Court, supra,* 22 Cal.3d at p. 506; *People v. Archerd, supra,* 3 Cal.3d at p. 639.)

Prejudice may be shown by the loss of material witnesses due to lapse of time or the loss of evidence because of fading memory attributable to the delay. (*People v. Morris, supra,* 46 Cal.3d at p. 37.) The claimed deprivations must be genuine, and they must be such as could make a difference in the defense of the case, or in other words, result in the denial of a fair trial. (*Scherling v. Superior Court, supra,* 22 Cal.3d at p. 507.) Claims of "faded

memory" may be disproved by evidence showing that a witness does in fact have specific memory of relevant details. Similarly, claims that a witness is unavailable are not prejudicial if the testimony would be cumulative to the available evidence. (*Scherling v. Superior Court, supra,* 22 Cal.3d at p. 506.) The existence of interview reports and other evidence contemporaneous to the crime which may be used to refresh recollection can also defeat any claim of prejudice due to faded memories. (*Ibid.*) Finally, the claimed prejudice must relate to a genuine, disputed issue at trial, and not to a fact which "was not at all a real issue in the case." (*Scherling v. Superior Court, supra,* 22 Cal.3d at p. 506 [defendant's alleged memory loss not related to matters of "crucial significance"].)

Whether pre-filing delay is prejudicial is a question of fact for the trial court. (*People v. Hill* (1984) 37 Cal.3d 491, 499.) On appeal, the trial court's determination must be upheld if supported by substantial evidence. (*Ibid.*; see also *People v. Mitchell* (1972) 8 Cal.3d 164, 167.) Here, ample evidence supported the trial court's determination that appellant did not suffer actual prejudice from the delay despite the destruction of hypnosis tapes, appellant's inability to obtain optometry records from 1982 and the destruction of swabs used for presumptive phenolphthalein blood tests on appellant's jacket.

First, appellant contends that he was prejudiced by the loss of tape recordings of hypnosis sessions conducted with Agent Bulman, Agent Torrey, Nina Miller, William Ellis and Mary Bush. (AOB 246-250.) As an initial matter, the following audiotapes were not erased, but were listed as "no audio," i.e., were never properly recorded: the June 19, 1980, hypnosis session with Agent Bulman and the July 25, 1980, hypnosis session with Mary Lou Bush. (CT 2738-2740.) Thus, as to these tapes, appellant's claim fails because the evidence never existed.

As to the remainder of the tapes regarding Agent Bulman, despite the loss of the tapes, he was competent to testify, and did ultimately testify about his statements to police prior to the hypnosis sessions and what happened during the hypnosis sessions. (RT 2244-2253, 4832-4835, 4935.) According to Agent Bulman, the composite drawings did not change as a result of the June 6, 1980, hypnosis session. (RT 2251.) Detective Thies and Agent Renzi interviewed Agent Bulman prior to the first hypnosis session and after, and each noted that no new evidence was obtained from the June 6, 1980, hypnosis session. (CT 2175, 2179.) Captain King, who performed the attempted hypnosis, described the session as futile. (CT 2165.) Captain Neilson, who authorized the destruction of the tapes after reviewing the files, stated that he did so because they had not resulted in new information. (CT 2739-2740.)

To the extent appellant argues that the tapes would have somehow bolstered his argument that the suspect sketch created by Ponce was somehow changed during the June 6, 1980, hypnosis session, Ponce was available to testify about what happened. At best, appellant's argument is that the audio tapes of the attempts to hypnotize Agent Bulman *possibly* had impeachment value. Appellant's claim is both speculative and unsupported by the testimony of the people who were present at the sessions. (See Argument VI, below.) Thus, substantial evidence supports the trial court's finding that appellant was not prejudiced by the loss of the hypnosis session tapes with Agent Bulman.

Similarly, substantial evidence shows that appellant was not prejudiced by the loss of a tape-recording of a hypnosis session with Agent Torrey. Agent Torrey was available to testify and at no time did appellant demonstrate that Agent Torrey professed a lack of memory. Moreover, Agent Torrey did not witness the shooting, and at most described seeing a car speeding by after the shooting. (RT 5190-5193.) Agent Torrey's testimony regarding the car had little relevance to the question of the shooter's identity,

and at most corroborated other eyewitnesses, who saw a car speeding away. Appellant cannot have been prejudiced by the loss of the tape where Agent Torrey was otherwise available to testify and his testimony contributed little to the identification of appellant as a suspect.

As to Nina Miller, not only did she testify in appellant's defense, appellant introduced statements made by her to police detectives that would support a third-party culpability defense of placing the blame on the now-deceased Charles Brock. (RT 7084-7085.) It is unfathomable that loss of a tape recording of a hypnosis session of a witness helpful to appellant would prejudice appellant where the witness was otherwise available to offer evidence at trial.

As to witnesses William Ellis and Mary Bush, appellant argues that both of these witnesses described the shooting suspect differently than Agent Bulman such that their testimony had exculpatory value. (AOB 249.) As to both Ellis and Bush (assuming, but not conceding, that the tape was erased, not "no audio"), this contention is meritless. Appellant offers no reasoning, and respondent can think of none, for how the tape recordings would be admissible in and of themselves for their truth at trial. The statements to police that appellant attributes to Ellis and Bush *were helpful* to the defense even without evidence of what occurred during their hypnosis sessions. Thus, substantial evidence shows that the loss of hypnosis tapes of Ellis and Bush did not prejudice appellant.

Finally, the fact that the tapes were destroyed was presented to the jury as part of appellant's defense. Thus, despite the prosecution evidence to the contrary, appellant was able to argue to the jury that Agent Bulman's description of the suspect had in fact changed. (See RT 6912-6913.) While appellant may not be satisfied with the police explanation that the tapes were destroyed as part of routine recycling, substantial evidence demonstrates that he

was not prejudiced by their destruction.

As to the optometry records, appellant contends that had he been able to obtain optometry records from 1982, the records would have provided conclusive proof that he did not wear glasses in 1980, the year of the crime. Without citation to any evidence, appellant contends that his 1982 optometry prescription would have stated that it was a first prescription. (AOB.250-251.) Even if appellant could have found an eyeglasses prescription from 1982 that said it was a "first" prescription, its loss was not so prejudicial as to violate due process. Yvette Curtis identified appellant as having worn glasses to drive at night in 1979, and identified the glasses found at the crime scene as looking like the glasses worn by appellant. (RT 5243-5245, 5247-5248.) Appellant presented two witnesses who did not see appellant wear glasses to drive at night. (RT 6395-6396, 6519-6521.) Appellant's expert was permitted to examine and test the eyeglass remnants that the prosecution intended to introduce into evidence. (See CT 1884-1888, 1900-1901; RT 1408-1409.) In light of the slight probative value of the evidence, the availability of witnesses to testify to the same fact for appellant, and appellant's ability to physically examine the eyeglasses sought to be introduced by the prosecutor, substantial evidence shows that appellant was not prejudiced.

Finally, as to the blood test swabs, appellant contends that he was prejudiced because he could have performed some kind of test on the swabs after they had been used that "could" have shown that the substance on the jacket was not blood. (AOB 252.) However, appellant offered no evidence in support of his motion that such a test was even possible. To the contrary, during a hearing in support of appellant's due process motion, criminalist Matheson testified that the swabs used in presumptive phenolphthalein testing were not saved because they had no value for future testing. Not only did the test itself destroy the blood sample, after five minutes a "negative" result swab

and a "positive" result swab would have the same appearance. The test was performed by seeing whether there was an *immediate* reaction, not a reaction over time. (RT 2754-2755, 2759-2760.) Moreover, the jacket itself was available for defense testing and was examined by a defense expert. (See CT 1884-1888, 1900-1901; RT 1405-1407, 1412-1415, 1496.) Thus, contrary to appellant's contention, the record shows that appellant cannot have been prejudiced by the loss of the swabs because they had no evidentiary value, and the jacket itself was otherwise still available for defense testing.

In sum, as to the loss of each item that appellant contends resulted in a violation of due process, substantial evidence supports the trial court's finding that appellant did not suffer actual prejudice. Reversal on this ground is not warranted.

VI.

APPELLANT'S MOTION TO DISMISS UNDER *TROMBETTA* AND *YOUNGBLOOD* WAS PROPERLY DENIED

Appellant contends that the trial court erred by denying his motion to dismiss under *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413] and *Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281]. Specifically, appellant contends that the following evidence should have been preserved because it had exculpatory value that was apparent to the police and could not be replaced by comparable evidence: 1) the audiotape of the June 6, 1980, hypnosis session with Agent Bulman; 2) the originals of composite drawings based on Bulman's description of the suspects; and 3) swabs from presumptive phenolphthalein testing of appellant's jacket and photographs of the presumptive testing. (AOB 254-258.) Appellant is incorrect. The record shows that each of the above items had no apparent exculpatory value and regardless, appellant was able to present comparable evidence. Moreover, as to appellant's contention regarding the failure to preserve swabs for defense testing, appellant cannot demonstrate bad faith on the part of the police.

A. Relevant Facts

Prior to trial, appellant filed a motion to dismiss because of the loss and/or destruction of evidence. Specifically, appellant argued that the police had a duty under *California v. Trombetta, supra,* 467 U.S. 479, and *Arizona v. Youngblood, supra,* 488 U.S. 51, to preserve the June 6, 1980, audiotape of Agent Bulman's hypnosis session, Ponce's-original composite drawing of the suspect, and swabs and photographs of the presumptive blood tests performed on appellant's jacket. (CT 2020-2029.) The prosecution filed an opposition

addressing both appellant's pre-trial delay claims and his loss/destruction of evidence claims. (CT 2576-3131.)

In arguing the motion, appellant's counsel Klein noted that as to the tapes of the hypnosis sessions with Agent Bulman, "the record indicates that every time Agent Bulman recounted the story, it was basically the same." However, appellant's trial counsel argued that the tape of the June 6, 1980, hypnosis session may have shown that the original composites of the suspects were altered, such that a mustache was added to the composite of the shotgun-wielding assailant. (RT 2780-2782.) Appellant further argued that the original composite sketches should have been preserved because like the June 6, 1980, tape recording, they would have demonstrated that the composite sketch had been modified to add a mustache following the hypnosis session. (RT 2784-2785.) As to the blood evidence, appellant argued that the presumptive test swabs should have been saved because he had no way to refute the results of the presumptive test. (RT 2785, 2788.)

The trial court denied the motion on the ground that none of the items referenced by appellant had any exculpatory value, particular not in the year 1980. (RT 2796-2797.)

B. Substantial Evidence Supported The Trial Court's Ruling That The Evidence Had No Apparent Exculpatory Value

The federal constitutional guarantee of due process imposes a duty on the state to preserve only evidence that possess an exculpatory value that was apparent before the evidence was destroyed, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (*People v. Beeler* (1995) 9 Cal.4th 953, 976-977, citing *California v. Trombetta, supra,* 467 U.S. at pp. 488-489; *People v. Webb* (1993) 6 Cal.4th 494, 519-520; *People v. Johnson* (1989) 47 Cal.3d 1194,

1233.) The state's responsibility is further limited when a defendant challenges the failure of the State to preserve evidence that could have been subjected to tests that might have exonerated the defendant. In this circumstance, unless a defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. (*People v. Beeler, supra,* 9 Cal.4th at p. 976, citing *Arizona v. Youngblood, supra,* 488 U.S. at pp. 57-58.) A trial court's finding of whether evidence was destroyed in good faith or bad faith is essentially factual such that the proper standard of review is substantial evidence. (*People v. Memro* (1995) 11 Cal.4th 786, 831.)

Appellant first contends that the trial court erred by ruling that the tape of June 6, 1980, hypnosis session had no apparent exculpatory value and further contends that the tape was irreplaceable. Appellant is incorrect. Contrary to appellant's contentions, the record demonstrates that the June 6, 1980, hypnosis session did not result in Agent Bulman being hypnotized, let alone a change in the composite drawing prepared by Ponce or a change in Agent Bulman's statements. (See AOB 255.) At the time of the hypnosis session, Captain King, who conducted the session, described Agent Bulman as being "unfit for a hypnosis session," with "very poor concentration," such that the hypnosis session was "a good example of the futility of conducting a hypnosis session within hours after a tragic event occurs." (CT 2164-2165.) Moreover, according to Ponce's procedure, a photocopy of his first sketch was saved "for our records," and then the original was subject to potential modification under hypnosis. However, when asked by appellant's counsel about whether the original composite drawings based on Agent Bulman's descriptions (People's Exhibits 26 and 27) in this case were altered after the June 6, 1980, hypnosis session, Ponce responded:

> To the best of my knowledge ma'am. And I'm pretty sure if there was modifications, the modifications were so

> minimal practically there was no structural change. For example, there was no change in the shape of the nose, for example. The shape was intact, no change. Ma'am, I think the changes were so minimal. As I said before, after the hypnosis session there was some joking around that practically there was no changes.

(CT 439.) Similarly, reports created by Captain King (who performed the attempted hypnosis), Detective Thies and Agent Renzi noted that the session had been unproductive such that no new significant details were obtained. (CT 2165, 2175, 2179.)

Later, at trial, Agent Bulman testified that he had described both suspects as having mustaches when helping Ponce draw the original composites on June 4, 1980, and that he had not felt hypnotized and had not requested any changes to the composites after the June 6, 1980, hypnosis session. (RT 4832-4834, 4934-4935.) As noted by the trial court, the purported pre-hypnosis composite presented by appellant had no chin, or section under the nose, let alone a mustache, which supported the prosecutor's explanation that what defendant was proffering was merely a bad photocopy. (CT 2124-2125, 2171; RT 2796.) Thus, the evidence shows Agent Bulman's statements regarding the crime did not change despite the hypnosis sessions.

Further, appellant was not a suspect at the time the tape was destroyed in 1984, and emerged as a suspect in late 1990 after Jessica Brock came forward with her recollection of appellant having come to her apartment the night of Julie Cross's murder. (See RT 6053-6060, 6077, 6298-6299. 6301, 6328-6330.) In light of the above, substantial evidence supported the trial court's finding that the audiotape of the June 6, 1980, hypnosis session had no apparent exculpatory value at time it was destroyed. (See RT 2783, 2796-2797.)

In addition, appellant cannot demonstrate that comparable evidence was unavailable. Documents reflecting Agent Bulman's statements prior to the

June 6, 1980, hypnosis session, as well as the results of the session were available at the time of trial. (CT 2115-2117, 2119-2122, 2124-2125, 2158-2165, 2173-2175, 21.) Moreover, the witnesses who had direct knowledge of whether a mustache was added to the composite drawing following the June 6, 1980, hypnosis session, Agent Bulman, Ponce, Captain King and Detective Thies, were available to testify at trial. Thus, appellant cannot demonstrate that he was unable to obtain comparable evidence of the results of the June 6, 1980, hypnosis session with Agent Bulman.

In a related contention, appellant contends that the police had a duty to preserve the original composite sketch of the shotgun-wielding assailant because it would have demonstrated that a mustache was added to the composite following the June 6, 1980, hypnosis session. According to appellant, the original composite was exculpatory because it would have lead to the exclusion of Agent Bulman's post-hypnosis testimony. (AOB 256.) Appellant is incorrect.

According to Ponce, in June of 1980, his procedure was to make a photocopy of his original sketch, then alter the *original* as necessary after the hypnosis session. (CT 432, 440.) Appellant relies on *People v. Shirley, supra,* 31 Cal.3d 18, 67-68 (AOB 256), for the proposition that if the pre-hypnosis composite sketch did not depict a mustache, then none of Agent Bulman's testimony would have been admissible because it could be shown that it was altered after hypnosis. *Shirley* was decided *two years after* Ponce failed to preserve his original, pre-hypnosis sketch. Thus, regardless of the applicability of *Shirley*, the decision in that case did not exist in 1980, such that the pre-hypnosis original composite sketch had no apparent exculpatory value.

Further, contrary to appellant's argument, when Agent Bulman ultimately testified at trial, he never "testified that the pre-hypnosis composite did not show a mustache while the second copy of this composite did show a

mustache." (AOB 256.) Instead, the record shows that the portion of the record relied on by appellant concerns Agent Bulman being asked to describe copies he was being shown by appellant's trial counsel and that Agent Bulman was not testifying to his independent recollection. Agent Bulman at all times described the shotgun-wielding suspect as having a mustache and attributed the differences in the copies being shown to him by defense counsel to poor photocopying. Agent Bulman's testimony is consistent with Ponce's explanation of his procedures and the fact that if any changes had been made to the composite sketch on June 6, 1980, they were so minor as to have been joked about after the hypnosis session. (See CT 439, RT 4832-4834, 4882-4883, 4934-4935.) Thus, the original composite sketch had no exculpatory value in 1980.

Finally, the original, pre-hypnosis session composite sketch is not of such a nature that appellant would have been unable to obtain comparable evidence by other reasonably available means. (See *People v. Beeler, supra,* 9 Cal.4th at pp. 976-977.) Like the audiotape of the June 6, 1980, hypnosis session, all of the participants in both the hypnosis session and the making of the composite sketch were available to testify. Further, photocopies of the composite sketches were available, such that Ponce and Bulman could be questioned about them. Under these circumstances, appellant cannot demonstrate the he was unable to obtain comparable evidence of the original composite drawing.

Finally, appellant contends that "[e]vidence of the *absence* of blood on the jacket was exculpatory," such that the police had a duty to preserve the swabs used in the phenolphthalein presumptive testing and photographs of the luminol presumptive test on the jacket. (AOB 257-258 [italics added].) First, the evidence appellant argues should have been preserved did not exist at all. The luminol reaction was observed, however, the attempt to photograph it

failed because the film did not reveal an image at all. (CT 2741-2742.) Moreover, the presumptive phenolphthalein test destroyed whatever blood was on the swabs, and following the immediate reaction, the swabs would be a uniform color regardless of whether the test result was positive or negative. (RT 2754-2755, 2759-2760.) Thus, there was no "[e]vidence of the absence of blood" to be preserved.

Further, appellant's contention fails for the obvious reason that the police presumptive blood-testing was inherently *inculpatory*, i.e., presumptively indicated the presence of blood on appellant's jacket that resembled that worn by the shooter. Thus, the useless swabs and blank photographs would have no apparent exculpatory value given the test results. Notably, the jacket and its lining were available for defense examination and testing at the time of trial. (See CT 1884-1888, 1900-1901; RT 1405-1407, 1412-1415, 1496.) Appellant does not, and cannot, based on the record, argue that any of the above items were lost as a result of bad faith destruction by the police. In light of the above, the trial court's finding that the swabs and photographs had no exculpatory value was supported by substantial evidence.

VII.

THE APPLICATION OF EVIDENCE CODE SECTION 795 ONLY TO HYPNOSIS SESSIONS OCCURRING AFTER ITS EFFECTIVE DATE DOES NOT VIOLATE EQUAL PROTECTION

Appellant contends that his right to equal protection under the state and federal constitutions was violated because Evidence Code section 795 was applied only to hypnosis sessions occurring after the January 1, 1985, effective date of the statute. Appellant further contends he was prejudiced under either the *Watson* or *Chapman* standards because had Evidence Code section 795 been applied to hypnosis sessions conducted with Agent Bulman prior to 1985, Agent Bulman's testimony would have been inadmissible. (AOB 258-264.) Appellant has waived this contention by not objecting on this basis at trial. Moreover, the prospective operation of Evidence Code section 795 does not violate equal protection. Finally, appellant suffered no prejudice even if Evidence Code section 795 had been applied.

A. This Contention Has Been Waived Because It Was Not Made At Trial

At trial, appellant filed a written motion seeking to prevent Agent Bulman from testifying because he had been hypnotized in 1980 and 1987. Both in his motion and his reply to the People's opposition, appellant argued that Agent Bulman's testimony was inadmissible because the hypnosis sessions conducted with Agent Bulman in 1980 violated *People v. Hayes* (1989) 49 Cal.3d 1260, and the hypnosis session with Agent Bulman conducted in 1987 was not performed in conformity with Evidence Code section 795. At all times, appellant conceded that Evidence Code section 795 did not apply to pre-1985 hypnosis sessions. At no time did appellant argue that his right to equal protection was violated by this Court's ruling in *Hayes* that Evidence Code

section 795 only applied to hypnosis sessions conducted after January 1, 1985. (CT 1961-1973, 3273-3278; RT 2952-2953, 2955-2960, 2972-2974.)

This Court has consistently held that constitutional objections must be made at trial in order to be preserved for appeal. (See e.g., *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Padilla* (1995) 11 Cal.4th 891, 971, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau* (1993) 6 Cal.4th 140, 173; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10.) Thus, this contention has been waived on appeal because it was never presented to the trial court.

B. Limitation Of Evidence Code Section 795 To Hypnosis Conducted Prior To January 1, 1985, Did Not Violate Appellant's Constitutional Right To Equal Protection

Appellant's contention fails even if considered on the merits. Appellant contends that the holding in *People v. Hayes, supra,* 49 Cal.3d at p. 1260, which resulted in the trial court not applying Evidence Code section 795 to analysis of the pre-1985 hypnosis sessions with Agent Bulman, violated his right to equal protection. As discussed below, appellant's contention is meritless.

In *Hayes*, the court held that Evidence Code section 795 did not apply retroactively, and instead was limited to prospective application from its effective date of January 1, 1985. Thus, the standard for admissibility of pre-hypnotic evidence set forth in *Hayes*[11] applied to hypnosis sessions conducted

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11. *Hayes* held that for questions of admissibility of testimony where a witness was hypnotized prior to January 1, 1985, "a witness is permitted to testify to events that the trial court finds the witness both recalled and related to others before undergoing hypnosis. In turn, the opposing party is permitted

prior to January 1, 1985, and Evidence Code section 795 applied only to hypnosis sessions conducted after that date. (*Ibid.*) In *People v. Alcala* (1992) 4 Cal.4th 742, 773, the court applied *Hayes* to summarily dispose of a claim that the testimony of a witness who was hypnotized prior to 1985 was inadmissible under Evidence Code section 795. Although *Hayes* did not address equal protection concerns, the interpretation of Evidence Code section 795 announced in *Hayes* does not violate equal protection.

The equal protection clause of the California Constitution (art. I, §§ 11, 21; art. IV, § 16) and the equal protection clause of the Fourteenth Amendment of the United States Constitution, require that classifications as "to whom the state accords benefits and those on whom it imposes burdens must be reasonably related to a legitimate public purpose." (*Hayes v. Superior Court* (1971) 6 Cal.3d 216, 223.) Phrased another way, the Equal Protection Clause of the Fourteenth Amendment directs that all persons similarly situated should be treated alike. (*Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 439 [105 S.Ct. 3249, 87 L.Ed.2d 313].) State legislation "is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." (*Id.* at p. 440.)

In general, a refusal to apply a statute retroactively does not violate the Fourteenth Amendment. The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between rights at an earlier and later time. (*Baker v. Superior Court* (1984) 35 Cal.3d 663, 668-669 [equal protection not violated by discontinuation of MDSO program in favor of determinate sentencing], citing *Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U.S. 502, 505 [31 S.Ct. 490, 55 L.Ed. 561].) For

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to introduce evidence of the fact and method of the hypnosis, and its potential effects on the witness's recollection." (*People v. Hayes, supra,* 49 Cal.3d at p. 1273.)

example, this Court recently rejected a claim that prospective application of a statute that reduced the punishment for an offense violated principles of equal protection under the state and federal constitution. (*People v. Floyd* (2003) 31 Cal.4th 179, 188-190.)

In *Floyd*, the defendant argued that the prospective application of a statute lessening the punishment for certain narcotics offenses violated equal protection because no compelling state interest justified the creation of two groups, one that would be subject to the lesser penalty, and one that would be subject to the greater. (*People v. Floyd, supra,* 31 Cal.4th at p. 189.) The defendant's claim in *Floyd* failed because the overwhelming weight of authority from California and other jurisdictions demonstrated that the legislature's decision as to penalty, and the effective date of that penalty statute, did not implicate a defendant's right to equal protection at all. Specifically, the legislature could reasonably determine that the former punishment needed to be carried out as written to maintain its deterrent effect. (*Id.* at pp. 189-190.)

Here, the legislative history of Evidence Code section 795 demonstrates that the legislature intended to create a uniform, "middle ground" rule regarding the admission of testimony from witnesses who had been subjected to hypnosis in light of the 1982 decision in *Shirley*, which limited admission of such evidence, and the passage of Proposition 8, which if literally applied made all evidence admissible. (See *People v. Burroughs* (1987) 188 Cal.App.3d 1162, 1168, overruled in *People v. Hayes, supra,* 49 Cal.3d at p. 1274, to extent *Burroughs* concluded that Evidence Code section 795 applied to any evidence of hypnosis introduced at a trial starting after January 1, 1985.) In *Hayes,* this Court found that there was nothing in the legislative history of Evidence Code section 795 indicating that the legislature intended the statute to be retroactive. Moreover, given the changes in the law regarding the admissibility of testimony by witnesses that had undergone hypnosis,

application of the statute to hypnosis sessions that pre-dated the effective date of the statute would be "manifestly unfair." (*People v. Hayes, supra,* 49 Cal.3d at p. 1274.)

In light of the rapid evolution of the rules governing the admission of evidence from hypnotized witnesses in the early 1980's, and the legislature's intention to create a new rule that established a middle ground, the legislature could rationally conclude that retroactive application of Evidence Code section 795 to hypnosis sessions conducted before its passage would unfairly limit the introduction of evidence that was otherwise thought to be admissible at the time it was gathered. Thus, the application of Evidence Code section 795 to hypnosis sessions occurring after its effective date rationally accomplishes a uniform and fair change in the law. Like in *Floyd*, the equal protection claim made by appellant must fail.

Appellant's reliance on *Vinson v. Superior Court* (1988) 44 Cal.3d 833, 843, fn.7 (AOB 261), which notes that procedural changes generally govern pending as well as future cases, is misplaced. Here, unlike *Vinson*, which involved a discovery rule applicable to all cases, this court has expressly held that Evidence Code section 795 by its terms was limited in application to hypnosis sessions occurring after the effective date. (See *People v. Hayes, supra,* 49 Cal.3d at p. 1274.) Thus, *Vinson*, and cases like it (see AOB 261-262), do not demonstrate that the prospective application of Evidence Code section 795 violated equal protection.

Similarly, appellant's citation to *People v. Seldomridge* (1984) 154 Cal.App.3d 362, 365 (AOB 262), does not demonstrate that an equal protection violation occurred in this case. *Seldomridge* was not a case involving an equal protection claim, but rather discussed an *ex post facto* claim. The Court of Appeal found no prejudice from the trial court's error in not allowing a defendant to present foundational scientific evidence regarding the admission

of polygraph results. Specifically, the Court of Appeal found that because evidence rules had changed such that polygraph evidence would be inadmissible, and the change in law did not violate the constitutional prohibition against *ex post facto* laws, the defendant was not entitled to a retrial. (*Id.* at p. 365.)

Finally, appellant argues that he was prejudiced under both the *Chapman* standard of prejudice applicable to errors of federal constitutional magnitude, and the *Watson* standard of prejudice applicable to errors in the application of the state constitution or laws. Specifically, appellant contends that hypnosis sessions conducted with Agent Bulman on June 6, 1980, June 19, 1980, and July 9, 1980, all violated Evidence Code section 795 because law enforcement personnel were present, the session was conducted by a police officer, and the audiotapes of the session were erased. Thus, according to appellant, Agent Bulman's later testimony in which he identified People's Exhibits 19 and 20 as looking like the shooter, would have been inadmissible, such that he would not have been convicted. (AOB 262-264.)

Whether an error in admitting testimony from a witness who had undergone hypnosis is prejudicial is determined under the *Watson* standard of whether it is reasonably probable the defendant would have obtained a more favorable result absent the error. (*People v. Alcala, supra,* 4 Cal.4th at p. 773; *People v. Caro* (1988) 46 Cal.3d 1035, 1048, fn. 4; *People v. Watson, supra,* 46 Cal.2d at p. 836.) Errors implicating federal constitutional rights are harmless if they can be said to be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Here, assuming, but not conceding error occurred, any error was harmless regardless of the standard of prejudice that is applied. After an extensive hearing involving both percipient witness and expert witness testimony, the trial court expressly found that Agent Bulman was *not*

hypnotized in any of the sessions that appellant now maintains render Agent Bulman's later testimony inadmissible under Evidence Code section 795. (See RT 2981-2982.) In the instant appeal, appellant does not, and cannot, based on the substantial evidence in the record, successfully challenge the trial court's ruling that Agent Bulman was not hypnotized in the 1980 sessions. (See AOB 263-268; *People v. Caro, supra,* 46 Cal.3d at p. 1049 [trial court's ruling that a witness was not hypnotized must be affirmed on appeal if, viewing the evidence in the light most favorable to the trial court's finding, substantial evidence supports the finding].) Thus, because Agent Bulman was not hypnotized in the 1980 sessions, Evidence Code section 795 would be inapplicable to bar his testimony, despite the contentions that law enforcement personnel were present, the session was conducted by a police officer, and the audiotapes of the session were erased. (See Argument VIII, below.) Thus, no prejudicial error occurred.

VIII.

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

Appellant contends that the trial court erred by ruling that Agent Bulman had not been hypnotized in May of 1987, such that Evidence Code section 795 did not apply to bar Agent Bulman's testimony. Specifically, appellant contends that Evidence Code section 795 bars testimony of witnesses who participated in attempts to hypnotize them, even if they were never "successfully" hypnotized. Appellant further contends that the trial court's finding that Agent Bulman had not been hypnotized in the May 1987 session is "contradicted by the record" such that Evidence Code section 795 should have applied to bar his testimony in its entirety. (AOB 264-268.) Appellant is incorrect as to both contentions.

At trial, appellant argued that Agent Bulman should not be permitted to testify because he had participated in a hypnosis session in 1987 that did not conform to the dictates of Evidence Code section 795. The trial court ruled that for purposes of Evidence Code section 795, *attempts* to hypnotize a witness did not prohibit that witness from testifying at trial; instead, the conditions of Evidence Code section 795 applied only if the witness was *successfully* hypnotized. (RT 2974-2979.) The trial court further found that Agent Bulman had not been hypnotized as a result of the 1987 session, i.e., put in the type of mental state of heightened attention, dissociation and heightened suggestibility that the court in *People v. Shirley, supra,* 31 Cal.3d 18, was concerned about. The trial court based its ruling on having listened to the expert testimony, including the conclusion of both defense and prosecution experts, that Agent Bulman scored a "zero" on tests designed to measure whether someone could

be hypnotized, having watched videotapes of the hypnosis session, and the testimony regarding what had occurred during the session. (RT 2980-2985.)

First, the trial court was correct that successful hypnosis is a pre-requisite to application of Evidence Code section 795. Appellant cites no authority for his contention that Evidence Code section 795 bars the testimony of witnesses who were never successfully hypnotized. (See AOB·265-267.) However, in two cases involving application of *Shirley*, *People v. Caro, supra,* 46 Cal.3d at pp. 1048-1049 and *People v. Johnson, supra,* 47 Cal.3d 1194, 1232, this Court has affirmed trial court rulings that allowed witnesses to testify despite there having been attempts at hypnosis because the record demonstrated that the witnesses were never actually hypnotized. Notably, in both *Caro* and *Johnson*, the trial court's finding of no hypnosis was supported in part by the testimony of Dr. David Spiegel (one of the experts who testified in this case), who upon review of the tapes of the hypnosis session and administration of the hypnotic induction profile to the witness, concluded that the witness had not been hypnotized. (*People v. Johnson, supra,* 47 Cal.3d at p. 1232; *People v. Caro, supra,* 46 Cal.3d at p. 1049.) Further, the trial court's finding of no hypnosis in both *Caro* and *Johnson* was found to have been supported by additional testimony from the witness who was the subject of the attempted hypnosis and/or the person who conducted the hypnosis session. (*People v. Johnson, supra,* 47 Cal.3d at p. 1232; *People v. Caro, supra,* 46 Cal.3d at p. 1049.)

One commentator has noted:

> whether in fact the witness had been hypnotized or was actively pretending to be hypnotized is a crucial first step in determining the admissibility of evidence given under hypnosis or of hypnotically refreshed evidence in criminal proceedings, since there are many jurisdictions which severely limit the admissibility of such evidence if the subject had been hypnotized, but would not do so if the hypnosis had been unsuccessful.

(Annot., Sufficiency of Evidence That Witness in Criminal Case Was Hypnotized, For Purposes of Determining Admissibility of Testimony Given Under Hypnosis or of Hypnotically Enhanced Testimony (1993) 16 A.L.R. 5th 841, 845-846, § 2(a).)

The express language of Evidence Code section 795 demonstrates that consistent with the above authority, this code section was intended to apply only to actually hypnotized witnesses. Evidence Code section 795 provides, in part, that, "[t]he testimony of a witness is not made inadmissible in a criminal proceeding by reason of the fact that the witness has previously undergone hypnosis for the purpose of recalling events which are the subject of the witness's testimony . . ." (Evid. Code, § 795, subd. (a).) Evidence Code section 795 does not refer to attempted hypnosis and repeatedly refers to "hypnosis." (See Evid. Code, § 795, subds. (a) and (b).) Thus, the plain meaning of the statute demonstrates that it applies only when a witness has been successfully hypnotized. (See *People v. Lawrence* (2000) 24 Cal.4th 219, 230-231 [in general, if there is no ambiguity in a statute, the legislature is presumed to have meant what it said and the plain meaning of the statute governs].)

Moreover, even if the Evidence Code section 795 is considered to be ambiguous, other evidence of the legislative history demonstrates that the legislature intended the statute to apply when a witness had actually been hypnotized. (See *People v. Sinohui* (2002) 28 Cal.4th 205, 211-212 [if the statutory language supports more than one reasonable construction, then the reviewing court may consider other evidence of legislative intent to determine the meaning that most closely comports with the legislature's intent].) Here, the staff comments to the analysis of Assembly Bill 2669, which became Evidence Code section 795, noted that:

> "[t]he purpose of the bill is to clarify the law as to when a witness may testify *after having been hypnotized* before trial. If the *Shirley* rule is followed, the witness may never

> testify. If Proposition 8 wholly overrules *Shirley*, a witness could testify in all cases after having been hypnotized. This bill would provide a middle ground and permit a witness to testify after having been hypnotized only if strict guidelines had been followed which would insure an adequate record upon which to judge whether hypnosis improperly contaminates the witness."

(*People v. Burroughs, supra,* 188 Cal.App.3d 1162, 1168, quoting Assembly Committee on Criminal Law and Public Safety, Analysis of Assembly Bill No. 2669 (1983-1984 Reg. Sess.).) Thus, the legislative history of Evidence Code section 795 demonstrates that it was intended to bar testimony only after a witness had successfully been hypnotized.

Further, as discussed above, Evidence Code section 795 sought to craft an exception to the rule in *Shirley* (barring post-hypnosis testimony) by setting forth conditions under which the integrity of the fact-finding process could be insured. (*People v. Burroughs, supra,* 188 Cal.App.3d at p. 1168.) In *Shirley*, the court noted that hypnotically induced recollection evidence was unreliable because of the danger that hypnosis might cause the witness to become susceptible to suggestion, such that false memories could be mistaken by the witness for actual memories. (*People v. Shirley, supra,* 31 Cal.3d at pp. 39-42, 57-58.) In particular, *Shirley* noted that the scientific community did not view memory as being like a videotape, that hypnosis induces the subject to become receptive to suggestions, that the person under hypnosis desires to please the hypnotist, that during the session the subject cannot distinguish between "memories and pseudomemories," and that a hypnotized subject may become convinced that the story told under hypnosis is correct. (*Id.* at pp. 62-67.) Obviously, none of the aspects of hypnosis that caused the *Shirley* court to rule that post-hypnotic testimony was inadmissible under *Frye v. United*

States (D.C. Cir. 1923) 293 F. 1013, 1014,[12] are present if the subject was never hypnotized. Thus, in light of the rationale of *Shirley* and the intent of Evidence Code section 795, the trial court correctly concluded that actual hypnosis is a prerequisite to the application of Evidence Code section 795.

Applying the above rule, Agent Bulman's testimony was properly admitted, despite the provisions of Evidence Code section 795. A trial court's finding as to whether a witness was actually hypnotized is reviewed for whether, viewing the evidence in the light most favorable to the trial court's finding, the finding was supported by substantial evidence. (*People v. Caro, supra,* 46 Cal.3d at p. 1049.) Here, the trial court's ruling was amply supported by the evidence.

Notably, like he had in *Caro* and *Johnson*, Dr. David Spiegel reviewed the videotape of the disputed hypnosis session and administered the hypnotic induction profile to the witness, in this case, Agent Bulman. Dr. Spiegel concluded that Agent Bulman had not been hypnotized. Specifically, not only did the videotape of the session show that Agent Bulman had not been hypnotized, Agent Bulman scored a "zero" on the hypnotic induction profile test, indicating he was not hypnotizable. (RT 2307-2309, 2314-2315, 2317-2319, 2321-2327, 2330-2334.) Appellant's expert, Dr. Karlin, administered the "Stanford A" test for hypnotizability to Agent Bulman, and Agent Bulman again scored a "zero." (RT 2918-2919.)

Further, Agent Bulman testified about the May of 1987 hypnosis sessions with Dr. Stock. According to Agent Bulman, even before the 1987 session, he had experienced between 20 to 25 "flashbacks" of the crime, which he described as a vivid recall of the incident that usually focused on the shotgun

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12. *Frye v. United States, supra,* 293 F. at p. 1014, established the rule that admission of evidence based on a new scientific technique requires a showing that the technique had been generally accepted in the relevant scientific community.

blast near his head. The "flashbacks" did not change Agent Bulman's recollection of the events (RT 2255-2257, 2264.) Thus, the fact that Agent Bulman experienced a "flashback" during the May of 1987 session did not necessarily indicate that he had been hypnotized, particularly where Agent Bulman had spent the day before the session visiting the crime scene, had little sleep, and while wanting to help, was under the stress of blaming himself for Julie Cross's death. (RT 2258-2260, 2262-2263.)

Agent Bulman did not feel he had been hypnotized, did not change his recollection of events, and described how he *concentrated* on raising his arm for Dr. Stock. (RT 2261-2262, 2264.) Although Dr. Stock described the arm-raising incident at the beginning of the session as giving the appearance that Agent Bulman was in an "altered state of consciousness," Dr. Stock was careful to distinguish that this was not the type of state where the subject was "internally focused" to try and recall the event. (RT 2613-2615.) Thus, the arm raising incident was shown to be a conscious attempt by Agent Bulman to cooperate, and not the product of hypnosis. In light of the above, the trial court's conclusion that Agent Bulman had not been hypnotized in May of 1987 was supported by substantial evidence such that Evidence Code section 795 did not apply.

Finally, assuming it was error to admit Agent Bulman's testimony, it is not reasonably probable appellant would have achieved a more favorable result. (See *People v. Alcala, supra,* 4 Cal.4th at p. 773; *People v. Caro, supra,* 46 Cal.3d at p. 1048, fn. 4; *People v. Watson, supra,* 46 Cal.2d at p. 836.) As discussed in Argument I.C., above, strong evidence supported appellant's guilt regardless of the admission of Agent Bulman's identification of People's Exhibits 19 and 20. Jessica Brock's credible testimony unequivocally placed appellant at the scene in his own words and established that after the crime appellant was in possession of a bloody metal item consistent with the Secret

Service shotgun that was used to shoot Agent Cross. Jessica Brock's version of events was corroborated by appellant's refusal to stand in a line-up, the efforts taken by appellant and his family to influence witness testimony, the broken glasses found on Interceptor, and Agent Bulman's pre-1987 identification of Terry Brock as the assailant that appeared on his side of the car. In light of the above, any error in not applying Evidence Code section 795 to bar Agent Bulman's testimony was harmless because it is not reasonably probable that appellant would have obtained a better result absent any error.

IX.

MATHESON'S TESTIMONY REGARDING THE PRESUMPTIVE BLOOD TESTS ON APPELLANT'S JACKET WAS PROPERLY ADMITTED; MOREOVER, ANY ERROR WAS HARMLESS

Appellant contends that the trial court prejudicially erred, by not excluding the testimony of prosecution witness Matheson, who testified regarding positive presumptive blood test results on a jacket recovered from the home of appellant's parents. Specifically, appellant contends that Matheson's testimony was "speculative, remote and conjectural" such that it had "no evidentiary value" because: 1) the presumptive test could also have revealed animal blood; 2) a later test could not confirm the presence of blood on the jacket; and 3) the exact whereabouts of the jacket were unknown between 1980 and 1990 when it was seized pursuant to a search warrant. Appellant also contends that his Eighth and Fourteenth Amendment rights to a reliable determination of his guilt were violated by the admission of Matheson's testimony. (AOB 268-273.) Appellant waived any contention that admission of Matheson's testimony violated appellant's constitutional rights by not objecting to Matheson's testimony on this basis at trial. Moreover, the trial court did not abuse its discretion by concluding that Matheson's testimony was relevant and not so unduly prejudicial as to be inadmissible.

A. Background Facts

Appellant objected to testimony regarding presumptive blood tests performed on appellant's jacket on the ground that the presumptive tests would not be "probative to prove that there was blood on the jacket in 1980." Appellant further objected that the trial court should exercise its discretion to exclude the evidence under Evidence Code section 352 because of the danger that scientific evidence would confuse the jury, other substances could yield

positive results in a presumptive test, and subsequent testing did not confirm the presumptive test results. Appellant did not object to the admission of the evidence under the Eighth and Fourteenth Amendments of the United States Constitution. (RT 5635.)

The trial court ruled that the evidence was relevant, i.e., had "some tendency in reason to prove a fact in dispute," despite not being overwhelming. Although the positive presumptive test results could have been caused by other substances, the fact that the jacket resembled one worn by the shooter and that the substance was found only in areas where one would expect blood to have been sprayed on someone firing a shotgun, made it relevant. The passage of time, and the lack of evidence as to where the jacket was exactly between 1980 and 1990, went to the weight of the evidence and not its admissibility. There was no danger of confusion because the scientific evidence regarding presumptive testing was straightforward and there was nothing too time consuming, inflammatory, misleading or prejudicial to preclude the evidence under Evidence Code section 352. (RT 5640-5646.)

B. The Constitutional Claims Have Been Waived

Failure to make specific constitutional objections at trial waives those contentions on appeal. (*People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Padilla, supra,* 11 Cal.4th at p. 971; *People v. Sanders* (1995) 11 Cal.4th 475, 539, fn. 27; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20.) To the extent appellant now contends that admission of Matheson's testimony violated his constitutional right to a reliable determination of guilt under the Eighth and Fourteenth Amendments to the United States Constitution (AOB 273), this contention has been waived. Moreover, to the extent appellant's constitutional claim is premised on improper application of state evidence rules, his claim fails for the reasons discussed below.

C. The Trial Court Did Not Abuse Its Discretion

"Only relevant evidence is admissible [citations] and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute." (*People v. Scheid* (1997) 16 Cal.4th 1, 13, citing Evid. Code, §§ 350, 351; *People v. Crittenden* (1994) 9 Cal.4th 83, 132; *People v. Garceau, supra,* 6 Cal.4th 140, 176-177; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

Evidence Code section 210 provides:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Evidence leading only to speculative inferences is irrelevant. (*People v. Kraft* (2000) 23 Cal.4th 978, 1035, citing *People v. De La Plane* (1979) 88 Cal.App.3d 223, 244.) The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. (*People v. Scheid, supra,* 16 Cal.4th at p. 14.)

Evidence Code section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

A finding as to the admissibility of evidence is left to the sound discretion of the trial court and will not be disturbed unless it constitutes a manifest abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 371; *People v. Mickey* (1991) 54 Cal.3d 612, 655; *People v. Karis* (1988) 46 Cal.3d 612, 637; *People v. Siripongs* (1988) 45 Cal.3d 548, 574 *People v. Stewart* (1985) 171

Cal.App.3d 59, 65 [discretion is abused only if court exceeds bounds of reason].) Appellate courts rarely find an abuse of discretion under Evidence Code section 352. (*People v. Ramos* (1982) 30 Cal.3d 553, 598, fn. 22, reversed on other grounds in *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171].)

Here, the trial court did not abuse its discretion by determining that Matheson's testimony regarding the presumptive blood tests was admissible under Evidence Code sections 210 and 352. First, the evidence was relevant. Appellant's ownership of a jacket that fit the description of the jacket worn by the shooter, which also presumptively tested positive for blood in areas one would expect to see blood spatter from shooting someone at close range with a shotgun, did have a tendency in reason to prove appellant's participation in the crime.

Although it was possible that substances other than human blood could yield positive presumptive test results, in this case there were two different presumptive tests bolstering the inference that blood was present rather than a substance that was not human blood. (RT 5662-5665.) Moreover, the substance was in a pattern consistent with blood spatter from shooting a person with a shotgun at close range. The fact that later attempts to perform tests confirming the presence of blood yielded only one presumptive positive result on the sleeve and no confirmatory tests goes to the weight the jury might give the evidence, not its admissibility. (See RT 7130-7133.) In other words, the inability to confirm the presence of human blood made Matheson's testimony less probative, but it did not demonstrate that Matheson's results were so speculative as to be inadmissible. This is particularly true where the limited amount of sample on the jacket was easily explained by the passage of time or attempts to clean the jacket.

In addition, the passage of time did not render evidence about the jacket so speculative as to be inadmissible. The jacket was established to have been manufactured around 1978 and was identified as looking like that worn by the shooter in 1980. The prosecutor could have proven that appellant was incarcerated during much of the middle to late 1980's, making it unlikely that the jacket was anywhere but in storage at the home of appellant's parents. (See RT 7801, 7838-7845, 7975-7978.) In sum, appellant has failed to demonstrate that the evidence about blood on the jacket was so speculative as to be irrelevant. Thus, the trial court did not abuse its discretion in ruling that the presumptive blood test evidence was relevant.

Moreover, the probative value of the presumptive blood test evidence was not substantially outweighed by the probability of undue consumption of time or a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (See Evid. Code, § 352.) While appellant argues that admission of the evidence was ultimately "prejudicial error," he does not specifically address the factors set forth in Evidence Code section 352. (See AOB 272-273.) Regardless, as noted by the trial court, the evidence regarding presumptive testing was straightforward and any deficiencies appellant attributed to the evidence due to possible false positives or the passage of time could be argued to the jury. Thus, the trial court did not abuse its discretion under Evidence Code section 352.

Appellant does not cite to any authority regarding whether evidence was properly *admitted* under Evidence Code sections 210 and 352. Instead, appellant relies on factually inapplicable cases, which mostly involve determinations of whether substantial evidence supported the findings at trial. (See AOB 270-271, citing *Leslie G. v. Perry & Assoc.* (1996) 43 Cal.App.4th 472, 483 [plaintiff in civil case cannot survive summary judgment based only on possible inference from circumstantial evidence]; *Pacific Gas & Elec. Co.*

v. Zuckerman (1987) 189 Cal.App.3d 1113, 1136 [determination that trial court's finding in eminent domain case not supported by substantial evidence]; *People v. Cantrell* (1973) 8 Cal.3d 672, 688 [question was whether jury believed a particular expert, not whether expert's testimony was properly admitted]; *People v. Houser* (1965) 238 Cal.App.2d 930, 932-933 [whether psychiatrist could properly rely on defendant's criminal history in forming opinions regarding sanity]; *People v. Mayo* (1961) 194 Cal.App.2d 527, 535 [whether circumstantial evidence was sufficient to support knowledge element of crime]; *People v. Berti* (1960) 178 Cal.App.2d 872, 876 [fact-finder properly inferred possession of marijuana thrown out window during police chase]; *San Joaquin Grocery Co. v. Trewhitt* (1926) 80 Cal.App. 371, 375 [discussing sufficiency of the evidence in civil negligence action].) Obviously, whether evidence properly supported a trial court's ruling or a verdict is an entirely different question from whether the evidence was relevant and admissible in the first place under Evidence Code sections 210 and 352. Appellant's citations are not on point and do nothing to demonstrate that the trial court erred in admitting Matheson's testimony in the first instance.

D. Any Error Was Harmless

Finally, assuming, but not conceding error occurred, it was harmless. Error in determining whether evidence is admissible as relevant evidence is subject to harmless error analysis of whether it is reasonably probable the jury would have reached a different result absent the error. (*People v. Scheid, supra,* 16 Cal.4th at p. 21, citing *People v. Watson, supra,* 46 Cal.2d at p. 836.) As noted by the trial court, although relevant, the presumptive blood test evidence did not have "overwhelming relevance." (RT 5644.) Had the evidence not been admitted, the result of the trial would be the same. Far more damaging to appellant was his admission to Jessica Brock that he had committed the crime

and Jessica's Brock's identification of appellant having washed blood off a metal object resembling the unique barrel of a Secret Service shotgun. Not only did Agent Bulman identify photographs of appellant taken around the time of the crime, Agent Bulman was able to identify appellant's associate, Terry Brock, as the assailant who first accosted Agent Bulman.

Appellant's participation was further proven circumstantially by evidence that he would not have been working on the night of the crime and that appellant wore glasses similar to those found at the scene of the struggle with Agent Bulman. Moreover, appellant's attempts to shift the blame for the crime to Charles Brock were not supported by the evidence. In particular, Nina Miller's story of seeing Terry Brock and Charles Brock saw off a shotgun did nothing to connect Charles Brock to the crime, particularly where the unique Secret Service shotgun that was taken was already so short-barreled that it could not have been sawed off. (See CT 3112.) In sum, even if evidence that appellant's jacket was found to presumptively test positive for blood had not been admitted, it is not reasonably probable appellant would have obtained a more favorable verdict. Reversal is not required.

X.

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

Appellant makes two related contentions. First, that the trial court prejudicially erred by admitting April Watson's testimony about a phone call she received from appellant regarding whether Terry Brock was talking to the police about the instant crime. Specifically, appellant contends that the evidence was irrelevant because it was equally plausible that Watson's conversations with appellant referred to appellant's triple murder conviction, rather than the instant case. Appellant further contends that the trial court prejudicially erred by overruling his "hearsay" objection to Detective Henry's testimony about statements Watson made to him. Appellant contends that his objection to eliciting "hearsay from the statement of Eileen [Smith]" should be construed as a hearsay objection as to all of Watson's statements as related by Detective Henry, such that he did not waive this contention and that Detective Henry's testimony was hearsay not subject to an exception. (AOB 273-279.) Appellant is incorrect. The trial court did not abuse its discretion by admitting Watson's testimony over appellant's relevance objection, and moreover, any error was harmless. As to the testimony of Detective Henry, appellant waived any objection regarding statements attributed to Watson, by objecting only to Watson's statements regarding Smith. Regardless, Watson's testimony was properly admitted and any error was harmless.

A. Watson's Testimony Was Properly Admitted Over Appellant's Relevance Objection; Moreover, Any Error Was Harmless

Appellant contends that April Watson's testimony regarding a telephone call with appellant should have been excluded for lack of relevance because it was equally plausible that Watson's conversations with appellant

referred to appellant's triple murder conviction, rather than the instant case. Appellant cites no authority for his contention, other than inapplicable civil cases regarding whether the facts have been *proven* for purposes of summary judgment (*Leslie G. v. Perry & Assoc., supra,* 43 Cal.App.4th at p.) or whether sufficient evidence supports a finding of negligence (*San Joaquin Grocery Co. v. Trewhitt, supra,* 80 Cal.App. at p. 375). Appellant's citation to 3 Witkin, California Evidence (4th Ed.), Presentation at Trial, section 139, p. 198, is similarly inapplicable in that it is concerned solely with sufficiency of the evidence in civil cases. (AOB 274-276.) Applying Evidence Code section 210 demonstrates that appellant's contention is meritless. Moreover, any error was harmless.

At trial, appellant objected to April Watson's testimony regarding a telephone call with appellant as irrelevant, absent proof that appellant was referring specifically to this case rather than the triple murder. (RT 5838-5839.) In the call, made after appellant had been convicted of the triple murder, appellant told Watson that he wanted to know what was going on with Terry Brock, that Terry Brock had been seen being taken out of jail by Detective Henry and guys wearing suits, that appellant wanted Watson to tell Terry Brock to "stay strong," and that appellant "heard some things that wasn't right." (RT 5839-5841.) The trial court ruled that the evidence was admissible, particularly because appellant's statements to Watson were made after his triple murder conviction, and there was no danger of confusion. The trial court noted that appellant was free to put on evidence that he had been talking about something other than the instant crime. (RT 5841-5842.)

After the trial court's ruling, Watson testified that she did not remember the content of any calls she got from appellant but it was "possible" appellant called her about his concerns regarding Terry Brock. Watson did remember talking to Detective Henry in the fall of 1990. (RT 5848-5855.)

Detective Henry testified that Watson had related to him the following: that appellant had called Watson in August of 1990; that appellant stated Terry Brock had been seen being taken out of the county jail by Detective Henry and men in suits; that appellant wanted to know what was going on with Terry Brock; that Watson should tell Terry Brock to "stay strong;" and that appellant "heard some things that wasn't right." (RT 5901.) Watson also told Detective Henry that appellant had called her in October of 1990, seeking information as to where Terry Brock was being incarcerated. (RT 5902.)

Relevant evidence is evidence that tends logically, naturally and by reasonable inference to establish a material fact. (Evid. Code, § 210; *People v. Scheid, supra,* 16 Cal.4th at pp. 13-14.) Here, appellant's call to Watson was made after he had already been convicted of the triple murders. The only reasonable inference was that appellant's concern about Terry Brock talking to the police was related to this case. Thus, the evidence was relevant to demonstrate consciousness of guilt.

Moreover, any error was harmless. Without any citation to authority, appellant argues that Watson's testimony was prejudicial because Watson testified that appellant had committed a criminal offense in 1978 and made "explicit reference to the triple murder." (AOB 276, citing RT 6288.) However, Watson's testimony never mentions any prior offense by appellant and never even references the fact that appellant called her from the county jail. (RT 5843-5855.) The fact that Jessica Brock testified later in the trial and despite being instructed not to do so, made reference to "the triple murder" (RT 6288), does nothing to demonstrate that admission of Watson's testimony was prejudicial. At most, Watson stated that it was "possible" appellant had made statements about wanting information about whether Terry Brock was talking to the police, but without any reference to any other crime. Thus, it is not reasonably probable appellant would have obtained a better result if Watson's

testimony had not been admitted. (Evid. Code, § 354; *People v. Scheid, supra,* 16 Cal.4th at p. 21, citing *People v. Watson, supra,* 46 Cal.2d at p. 836.) This contention is meritless.

B. Appellant Waived Any Hearsay Objection To Detective Henry's Testimony; The Testimony Was Properly Admitted; And, Moreover, Any Error Was Harmless

Appellant also contends that the trial court erred by admitting Detective Henry's testimony relating what Watson told him about telephone calls she had received from appellant. Specifically, appellant contends that his objection to eliciting "hearsay from the statement of Eileen [Smith]" should be construed as a hearsay objection as to all of Watson's statements as related by Detective Henry, such that he did not waive this contention. Appellant further contends that Detective Henry's testimony regarding Watson's telephone calls with appellant was inadmissible hearsay not subject to an exception, and that admission of this testimony violated his right to due process under the United States Constitution. (AOB 276-279.) Appellant has waived these contentions, and moreover, they are meritless.

Appellant's hearsay objection was limited to Detective Henry relating Watson's statements about telephone calls from Eileen Smith, to which Watson had not testified. The trial court's remarks following the objection demonstrate that the trial court was recalling whether Watson testified about calls from Eileen, not whether the trial court was considering a hearsay objection as to Watson's statements regarding phone calls from appellant. (RT 5899-5900.) In light of the above, appellant waived any objection to Detective Henry relating Watson's statements about the telephone calls from appellant by failing to make a specific and timely objection. (Evid. Code, § 353; see *People v. Fierro* (1991) 1 Cal.4th 173, 215 [specific hearsay objection required to preserve issue].)

Further, to the extent appellant contends that his due process rights under the United States constitution were violated by the trial court's ruling (AOB 279), appellant has waived this contention by failing to make a specific and timely due process objection at trial. (Evid. Code, § 353; *People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Padilla, supra,* 11 Cal.4th at p. 971; *People v. Sanders, supra,* 11 Cal.4th at p. 539, fn. 27; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20.) Moreover, appellant's contention that his right to due process was violated is premised on the trial court's alleged improper application of state rules of evidence. As discussed below, the admission of evidence regarding Watson's statements was proper, such that appellant's due process claim fails.

Here, Detective Henry could properly relate Watson's statements regarding telephone calls from appellant under exceptions to the hearsay rule. First, multiple hearsay is admissible if each of the statements meets an exception to the hearsay rule. (Evid. Code, § 1201.) Statements attributable to appellant were admissible under the hearsay exception for admissions of a party within the meaning of Evidence Code section 1220, which provides that "[e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ." (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1292, fn. 31 [statement of defendant to another was subject to Evidence Code section 1220 hearsay exception of statements of a party].)

As to Watson, Detective Henry could properly relate the substance of her statements under either of two exceptions to the hearsay rule. First, Detective Henry could properly relate Watson's statements under Evidence Code section 1237, the hearsay exception for past recollection recorded. Evidence Code section 1237 provides:

> (a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement

> would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:
>
> (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
>
> (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
>
> (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and
>
> (4) Is offered after the writing is authenticated as an accurate record of the statement.
>
> (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

In *People v. Cummings, supra,* 4 Cal.4th at pp. 1265, 1292-1293, this Court found that, despite a hearsay objection, the testimony of a detective relating his interview notes of a statement made by a jailhouse informant was properly admitted under Evidence Code section 1237. In *Cummings*, like in the instant case, a detective had taken notes of a conversation in which someone attributed statements to the defendant. At trial, the declarant professed not to remember the content of the statement, but acknowledged that the statements had been truthful. The detective then used his notes to testify to the content of the statement after testifying about how and when the conversation was recorded. (*Id.* at pp. 1265, 1293-1294.)

Here, like in *Cummings,* Watson professed a lack of memory, yet acknowledged that at the time she made her statements she was being truthful. (RT 5850-5855.) Although Watson did not state that the statements were made

when they were fresh in her mind, the record shows that they were. (See *People v. Miller* (1996) 46 Cal.App.4th 412, 424, fn. 5 [declarant need not say "magic words" that statement was made when it was fresh in his or her mind, so long as supported by record].) Detective Henry testified that he made notes of Watson's statements during his interview with her on September 27, 1990, which was close in time to Watson having received a telephone call from appellant. Moreover, Detective Henry was able to corroborate the substance of the calls because he, and other law enforcement officers wearing suits, had removed Terry Brock from the county jail on August 17, 1990, September 6, 1990, September 13, 1990, and September 14, 1990. (RT 5898, 5900-5903.) In light of the above, had appellant made a hearsay objection to Detective Henry relating Watson's statements, it would properly have been overruled by application of Evidence Code section 1237.

Alternatively, Evidence Code section 1235, provides that, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."[13/] For purposes of Evidence Code section 1235, when a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. (*People v. Ervin* (2000) 22 Cal.4th 48, 84-85; *People v. Arias, supra,* 13 Cal.4th 92, 152; *People v. Green* (1971) 3 Cal.3d 981, 988-989.) If there is a reasonable basis in the record for concluding that the

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13. Evidence Code section 770, provides:
Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
(b) The witness has not been excused from giving further testimony in the action.

witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper. (*Ibid.*)

Here, Watson's testimony could have supported a finding that she was being evasive. Initially, Watson stated she had met appellant through Jessica Brock. (RT 5846.) However, after identifying appellant's photograph (People's Exhibit 19), and identifying appellant in court, Watson claimed "I don't know if I ever formally met him." (RT 5848.) Although Watson verified that she went to the police station to make a statement, she initially testified, " I don't remember who I received the calls from." (RT 5849.) Almost immediately afterwards, Watson testified that she remembered receiving a call from appellant, but could not remember the substance of the call. (RT 5850-5851.) Watson would not acknowledge the common sense truth that her memory would have been fresher at the time of the calls in 1990. (RT 5849-5850.) Despite her statements to police being read back to her, Watson would only say that it was "possible" that she had made the statements. (RT 5852-5855.)

Assuming, but not conceding that the trial court was asked to rule on a hearsay objection as to Detective Henry relating Watson's statements, the record shows that there was a reasonable basis from which the trial court could have concluded that Watson was being evasive, such that Detective Henry could testify to Watson's statements as a prior inconsistent statement within the meaning of Evidence Code section 1235. (See *People v. Ervin, supra,* 22 Cal.4th at pp. 84-85.)

In sum, appellant waived any contention of error by failing to make a specific and timely hearsay and due process objection. Moreover, had appellant made a hearsay objection to Detective Henry relating Watson's statements to him regarding appellant's phone call, the objection would have been overruled under Evidence Code sections 1201, 1220, 1237 and/or 1235.

Thus, appellant's contention is mertiless.

Finally, assuming, but not conceding it was error to admit Detective Henry's testimony about April Watson's statements, any error was harmless. As discussed above, if any error occurred, it would be in the application of state evidence rules such that the *Watson* standard of prejudice should apply. Here, even if Detective Henry's testimony regarding Watson's statements had been excluded, it is not reasonably probable appellant would have obtained a better result. (See *People v. Watson, supra,* 46 Cal.2d at p. 836.)

Although relevant, Watson's testimony was not so important that without it appellant would have avoided conviction. Appellant admitted his participation in the murder to Jessica Brock, who also saw appellant washing blood off the uniquely-shaped barrel of a Secret Service shotgun on the night of the crime. Agent Bulman's identification of photographs of appellant taken near the date of the crime confirmed Jessica's Brock's version of events, as did the blood stains found on appellant's jacket. Further, Jessica Brock provided evidence that appellant was an associate of Terry Brock's, such that Agent Bulman's identification of Terry Brock and appellant as his assailants was bolstered. Finally, other evidence of appellant's consciousness of guilt was provided by his refusal to stand in a lineup, his letter to Darcel Taylor, and his efforts, as well as the efforts of his family, to influence Jessica Brock's testimony. In light of the above, it is not reasonably probable appellant would have obtained a better result if Detective Henry's testimony regarding April Watson's statements had not been admitted.

XI.

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

Appellant contends that the trial court prejudicially erred by admitting evidence that he had refused to stand in a lineup during the investigation of this case, despite appellant's objection that his refusal was based on the advice of his attorney. (AOB 279-281.) This contention fails because it is well established that the refusal to stand in a live lineup is admissible to show consciousness of guilt and appellant's jury appellant's explanation that he had refused on the advice of counsel. Moreover, any error was harmless.

Appellant objected to the lineup refusal evidence on the ground that he had refused on the advice of counsel. (RT 5711.) At the time of the lineup, on April 3, 1990, appellant was advised that his refusal could be used against him to show consciousness of guilt. Appellant was read and signed a lineup refusal form on which he was advised that his refusal could be used against him. Appellant wrote on the form that his reason for refusing was that:

> this lineup to my understanding has nothing to do with any charges that I am being tried on in front of Judge Jaqueline Connors [i.e., the triple murder case] . . . And on my attorney Mr. Bernard Rosen's advice not to stand in this lineup, I will take his advice and not stand in any lineup as such.

(RT 5713.)

The trial court ruled that if the prosecutor demonstrated that it was conveyed to appellant that the lineup related to the instant murder case and not to the triple murder, the evidence of appellant's refusal to stand in the lineup was relevant and admissible. However, it was up to the jury to resolve whether appellant's refusal was justified based on the advice of his counsel or whether he refused because his lawyer did not want him identified. (RT 5716.)

Los Angeles County Sheriff's Deputy Hartwell testified that appellant became belligerent and boisterous when asked to stand in a lineup on April 3, 1990, and that he advised appellant that his refusal could be used against him as proof of consciousness of guilt. (RT 5727-5732.) Appellant's attorney in the triple murder case, Bernard Rosen, had been advised that the lineup was related to the murder of Julie Cross. Rosen advised appellant not to stand in the lineup because of the passage of time, and advised appellant that a refusal to stand in the lineup could not be used against him if it was on the advice of counsel. (RT 5804-5806, 5808, 5810-5813, 5815, 5821-5822.)

A defendant's appearance in a lineup is non-testimonial, physical evidence that is not protected by the Fifth Amendment privilege against self-incrimination. (*People v. Johnson* (1993) 3 Cal.4th 1183, 1222, citing *United States v. Wade* (1967) 388 U.S. 218, 221-223 [87 S.Ct. 1926, 18 L.Ed.2d 1149].) Thus, a defendant's refusal to stand in a lineup may be admitted into evidence to prove consciousness of guilt. (*Id.* at pp. 1223-1224, 1235.)

Here, the essence of the trial court's ruling was that the jury could hear relevant evidence regarding a contested fact and decide for themselves whether the evidence yielded an inference of consciousness of guilt. Relevant evidence is evidence that tends logically, naturally and by reasonable inference to establish a material fact. (Evid. Code, § 210; *People v. Scheid, supra,* 16 Cal.4th at pp. 13-14.) Here, because refusal to stand in a lineup could properly be considered as proof of consciousness of guilt, the trial court did not abuse its discretion in ruling that relevant evidence regarding the circumstances under which appellant refused to stand in a lineup was admissible.

Notably, appellant cites no authority in support of his contention other than Evidence Code section 352. (AOB 279-281.) However, to the extent appellant contends that the lineup refusal evidence should not have been admitted under Evidence Code section 352 (AOB 281), this contention has

been waived. (See Evid. Code, § 353; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1014; *People v. Clark* (1992) 3 Cal.4th 41, 127-128.) Appellant never objected to the testimony of Deputy Hartwell under Evidence Code section 352, and instead invoked Evidence Code section 352 only as to the contents of his written refusal. (See RT 5711, 5718.) Regardless, there was no substantial danger of undue prejudice within the meaning of Evidence Code section 352 because the jury heard not just from Deputy Hartwell, but also from appellant's counsel Rosen regarding his advice to appellant. Thus, the jury could make a factual determination of whether appellant was justified in his refusal or whether appellant did in fact refuse to participate because of consciousness of guilt. In sum, appellant's contention is meritless.

Moreover, any error was harmless. Although relevant, the lineup refusal evidence was challenged by attorney Rosen's testimony that he had advised appellant not to stand in the lineup so that there was no danger the jury was misled about the circumstances of the refusal. In addition, other evidence such as the attempts by appellant and his family to influence witnesses provided evidence of consciousness of guilt. Combined with the other evidence of appellant's guilt, such as his incriminating statements and conduct with Jessica Brock on the night of the murder, it is not reasonably probable appellant would have achieved a better result if the lineup refusal evidence had not been admitted. (See *People v. Watson, supra,* 46 Cal.2d at p. 836.)

XII.

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

Appellant contends that the trial court erred by ruling that Jacqueline Sherow could not testify to statements made to her by Charles Brock that implicated him in the murder of Julie Cross. In particular, appellant contends that the trial court erred by not finding that the statements were admissible as declarations against interest within the meaning of Evidence Code section 1230. Appellant further contends that the trial court's ruling violated his right to present a defense under the Fourteenth Amendment to the United States Constitution. (AOB 282-286.) Appellant waived any claim that his due process right to present a defense was violated by not objecting on this basis at trial. Moreover, the trial court did not abuse its discretion in ruling that Sherow's testimony regarding Charles Brock was not subject to admission under Evidence Code section 1230. Appellant's contention is meritless. Further, any error was harmless.

Outside the presence of the jury, Sherow testified that at one point she had told Detective Henry that Charles Brock had said, "I had something to do with the killing of Julie Cross," or "I'm involved in the murder" and that he had "to get away from here." (RT 6631-6632.) Sherow knew that Charles Brock used heroin and he appeared high when they spoke. (RT 6632-6633.) Sherow clarified that Charles Brock had actually told her that he *knew* about the murder of the Secret Service agent, which Sherow believed meant that he had something to do with it or knew who did. Sherow never asked Charles Brock what his actual involvement was with the Secret Service agent murder. When Sherow spoke to Detective Henry she had elaborated on Charles Brock's statement that he knew about the murder. (RT 6635-6636.) Charles Brock had not given Sherow "any details" and when he had talked to Sherow, the two of

them had been alone in a car. (RT 6637-6638.) The conversation occurred after Charles Brock had been arrested in connection with the murder of Julie Cross and Charles Brock felt that the police were watching him. (RT 6639-6640.)

Appellant argued that Sherow's statements regarding Charles Brock, as reflected in Detective Henry's notes, were admissible under Evidence Code section 1230, as a declaration against penal interest. (RT 6641.) The trial court sustained the prosecutor's objection on the ground that although Charles Brock was unavailable, the statement was not a declaration against penal interest. Specifically, the statement was related by Sherow to Detective Henry over ten years after the crime. Charles Brock was talking to a close friend after he had been arrested in connection with the murder of Julie Cross. The statement "I'm involved," was not inculpatory considering that Charles Brock was "involved" by being arrested as a suspect. Further, the statement attributed to Charles Brock was *not* an admission like "I killed a Secret Service agent. I was there when it happened. I saw it happen." (RT 6642-6643.) Moreover, the trial court found that the purported statement was vague, misleading and inherently prejudicial considering that there was no inherent trustworthiness to the statement, Sherow testified that the statement was actually that Charles Brock "knew" about the murder, and the statement was not of a kind that would have been relayed to the police. (RT 6644.)

Appellant has waived any claim that the trial court's ruling violated his due process right to present a defense by failing to make a specific and timely objection at trial. The record shows that appellant never argued that excluding the statement under Evidence Code section 1230 would violate his right to present a defense under the Due Process Clause of the Fourteenth Amendment. (See RT 6640-6644.) Thus, appellant's constitutional contention has been waived. (See Evid. Code, § 353; *People v. Williams, supra,* 16

Cal.4th at p. 250; *People v. Padilla, supra,* 11 Cal.4th at p. 971; *People v. Sanders, supra,* 11 Cal.4th at p. 539, fn. 27; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20.) Moreover, as discussed below, the trial court's proper application of a state rule of evidence that is applicable to all parties did not constitute reversible error, let alone a violation of appellant's right to present a defense.

Evidence Code section 1230 provides, in relevant part:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

A trial court's decision as to whether a statement is against penal interest for purposes of Evidence Code section 1230 is reviewed for abuse of discretion. (*People v. Lawley* (2002) 27 Cal.4th 102, 153.) To qualify for the Evidence Code section 1230 exception to the hearsay rule, the proponent of the evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. (*Id.* at p. 153, citing *People v. Duarte* (2000) 24 Cal.4th 603, 610-611; *People v. Lucas* (1995) 12 Cal.4th 415, 462.) A court may not find a declarant's statement sufficiently reliable solely because it incorporates an admission of criminal culpability. (*Id.* at p. 153, citing *People v. Duarte, supra,* 24 Cal.4th at p. 611.)

Here, the trial court did not abuse its discretion because the testimony was neither inculpatory as a declaration against penal interest, nor was it reliable. Whether a statement is self-inculpatory can only be determined by reviewing the statement in context. (*People v. Duarte, supra,* 24 Cal.4th at p. 612.) In context, Charles Brock was making the statements just after he had

been arrested and released in connection with the investigation into Julie Cross's murder. Charles Brock made no other statements that would confirm that he actually participated or was even at the scene. Thus, in context, Charles Brock's statements at most demonstrate the true statement that he knew about or was "involved" in the Julie Cross murder to the extent he had been a suspect.

Moreover, under the circumstances, the statement was not of the type that would subject its declarant to criminal liability such that a reasonable person would not have made the statement without believing it to be true. (See *People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678 [question of whether statement is against penal interest can be resolved by objective test].) As discussed above, the statements were ambiguous and contain no detail actually linking Charles Brock to the commission of the crime. Moreover, Charles Brock was speaking to a trusted friend, who would not, and did not, run to the police to report his statement.

The instant case is distinguishable from the authority relied on by appellant. For example, unlike *People v. Jackson, supra,* 235 Cal.App.3d at pp. 1677-1678 (AOB 283), where the statement at issue included both an admission of having fired a gun, and a statement showing no concern if someone was actually hit, the Charles Brock statements at most used the vague expressions "involved" or "had something to do with." Similarly, *People v. Garner* (1989) 207 Cal.App.3d 935, 937 (AOB 284), does not support appellant's contention. There, the defendant intended to present a third-party culpability defense that Johnson had perpetrated the drive-by shooting using appellant's car. Johnson made statements to the police confirming that he had borrowed the car and had been in the car at the time and place of the murder. Under these facts, the Court of Appeal noted that although the evidence could have been excluded under Evidence Code section 352 or because it was not trustworthy, it appeared that Johnson's statements were statements against penal interest. (*Id.* at p. 943.) In

contrast, the statements attributed to Charles Brock are ambiguous and so unspecific that they do not even place him at the scene of the crime. Thus, *Garner* does not demonstrate that the trial court abused its discretion in the instant case.

Moreover, a statement that generally appears to be against the declarant's penal interest may be inadmissible because it lacks sufficient indicia of trustworthiness. (*People v. Duarte, supra,* 24 Cal.4th at p. 614.) To determine whether a particular declaration against penal interest is sufficiently trustworthy for purposes of Evidence Code section 1230, the trial court may take into account the words themselves, the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. (*Id.* at p. 614, citing *People v. Cudjo* (1993) 6 Cal.4th 585, 607.) Here, the trial court did not abuse its discretion when it determined that the statement lacked trustworthiness.

Sherow testified that Charles Brock had actually made statements to the effect that he *knew* about the Julie Cross murder. Sherow *believed* Charles Brock meant he was involved, and expounded on her belief when talking to Detective Henry. Sherow did not relate the statements to anybody until approximately ten years later, after Charles Brock had died. Further, even assuming that Detective Henry's notes correctly convey what Charles Brock stated to Sherow, the statements were untrustworthy. Charles Brock appeared to Sherow like he was on heroin when he made the statements. The statements attributed to Sherow in Detective Henry's notes are either "I had something to do with the killing of Julie Cross," *or* "I'm involved in the murder," such that it is not even ceratin which statement should be attributed to Charles Brock. Further, even if Charles Brock said he was "involved," the circumstances show that he was involved to the extent he was a suspect. Thus, under the circumstances, the trial court did not abuse its discretion by finding that the

statements were not against penal interest and were too unreliable to be admissible.

Moreover, no due process violation occurred. As recently noted by this Court, "the ordinary rules of evidence do not impermissibly infringe on the accused's constitutional right to present a defense" and courts retain "a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice." (*People v. Lawley, supra,* 27 Cal.4th at p. 155 [citations and internal quotation marks omitted].) Similarly, the United States Supreme Court has made clear that without violating the due process right to present a defense, trial judges have "'wide latitude' to exclude evidence that is 'repetitive . . ., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 689-690 [106 S.Ct. 2142, 90 L.Ed.2d 636], quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [106 S.Ct. 1431, 89 L. Ed. 2d 674].) Further, the United States Supreme Court has "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability--even if the defendant would prefer to see that evidence admitted." (*Id.* at p. 690, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [93 S.Ct. 1038, 35 L.Ed.2d 297].) Thus, appellant's constitutional contention is also meritless.

Finally, although not addressed by appellant (see AOB 282-286), any error was harmless. In *People v. Koontz* (2002) 27 Cal.4th 1041, 1077-1078, this Court applied the *Watson* standard of prejudice, i.e., whether it is reasonably probable the defendant would have obtained a more favorable result absent the error, to a defendant's claim that the trial court erred, in violation of his right to present a defense, by excluding evidence under the hearsay rule. Specifically, *Koontz* found that "in view of the minimal probative value of the

[evidence] and the absence of any conceivable prejudice resulting from [its] exclusion, any possible error would have been harmless under the circumstances." (*Id.* at p. 1078.)

Here, Charles Brock's statement to Sherow that he knew about the murder of Julie Cross, was of minimal probative value. As described by Sherow, Charles Brock appeared to be high on heroin when they spoke, and she understood his statement not to be a confession to his involvement in the crime, but merely that he *knew* about the murder. (RT 6631-6633, 6635-6643.) Obviously, Charles Brock knew about the murder because he had been a suspect and had been made to stand in a lineup before being released. In addition, as shown in appellant's trial, Charles Brock's brother, Terry Brock, was involved in the murder, making it reasonable that Charles Brock would know about it. Finally, there was nothing specific in Charles Brock's statements that would support a third-party culpability defense, such that like in *Koontz*, the evidence had such minimal probative value that any error was harmless. When compared to the totality of the evidence presented by the prosecution, it is not reasonably probable appellant would have obtained a better result if the evidence had been admitted. (See *People v. Watson, supra,* 46 Cal.2d at p. 836.) Reversal is not warranted.

XIII.

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

Appellant contends that the trial court prejudicially erred by instructing the jury with CALJIC No. 2.04 [Efforts By Defendant To Fabricate Evidence] and CALJIC No. 2.05 [Effort By Someone Other Than Defendant To Fabricate Evidence]. Specifically, appellant contends that the facts argued by the prosecutor in support of these instructions did not justify giving the instructions. (AOB 286-289.) Appellant is incorrect. The instructions were supported by the evidence adduced at trial. To the extent appellant contends his right to due process under the United States Constitution was violated, this contention has been waived and is nonetheless meritless. Moreover, any error was harmless.

The prosecutor requested that the jury be instructed with CALJIC No. 2.04 as follows:

> If you find that the defendant attempted to or did persuade a witness to testify falsely such conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are matters for your determination.

(CT 3924 [brackets omitted]; RT 7222-7226.)

On the trial court's own motion, the jury was instructed with CALJIC No. 2.05, as follows:

> If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized such effort. If you find defendant authorized that effort, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(CT 3925; RT 7222-7226.)

Prior to a jury being instructed that they can draw a particular inference, evidence must appear in the record which, if believed by the jury, supports the suggested inference. (*People v. Hannon* (1977) 19 Cal.3d 588, 597.) "Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law." (*Ibid.*) Thus, CALJIC Nos. 2.04 and 2.05 are appropriate if there is evidence from which a jury could infer that the defendant sought to fabricate evidence in anticipation of trial. (See *People v. Rodrigues, supra,* 8 Cal.4th at p. 1139 [CALJIC No. 2.04 proper where defendant asked brother to lie about defendant's arm injury prior to institution of judicial proceedings].)

Here, ample evidence supported giving both CALJIC Nos. 2.04 and 2.05. First, as to CALJIC No. 2.04, the trial court ruled that this instruction was supported by evidence that appellant had personally contacted Jessica Brock prior to her being interviewed by appellant's attorneys, at which time she appeared to change her story regarding appellant's visit to her after the murder. (RT 7223-7224.) The jury heard a tape recorded interview between appellant's attorney and Jessica Brock in which she stated the following:

> I don't know if this should be off the record or on the record, but, um, [appellant], when I talked to him yesterday, he wanted me to tell you guys about this particular day that his car had got wrecked, when we stayed on Woodworth. Oh, and he also wanted me to show you the apartments that we . . . That I used to stay in because I used to used to stay directly across from where I'm staying at now. And he wrecked his car down the street in front of Yvette's house, or something.

(RT 7122-7123; Ex. 90A at 14.)

In the interview with appellant's trial counsel, Jessica Brock not only back-pedaled from the clear recollection of the night of the murder that she had

related to the prosecution, but also, as shown above, admitted that appellant had contacted her the day before the defense interview and told her what to say. (RT 7122-7123; Ex. 90A at 3-14.) Thus, Jessica Brock's statements about appellant telling her what to say prior to her interview with appellant's defense attorney, if believed by the jury, supports an inference that appellant was attempting to influence Jessica Brock's testimony, such that the jury could infer consciousness of guilt.

As to CALJIC No. 2.05, the trial court found that this instruction was supported by Darcel Taylor's testimony that appellant had urged her to contact Terry Brock, and that she subsequently wrote a letter to Terry Brock urging him to "stay strong and not sale [sic] out to the dogs and assholes." (RT 7224-7226.) The jury had heard evidence that Darcel Taylor wrote to Terry Brock at appellant's urging in order to find out if Terry Brock had talked to the police so that appellant would know "what to look for." (RT 5866, 5872-5873, 5877-5879, 5885-5889.) CALJIC No. 2.05 was also supported by appellant's call to April Watson in which he sought information about whether Terry Brock was talking to police and wanted Watson to convey to Terry Brock to "stay strong," i.e., not talk to the police. (RT 5844-5846, 5848, 5901-5902.)

Giving CALJIC No. 2.05 was also supported by evidence that appellant had contacted his mother and had her telephone Eileen Smith to make her aware of the potential admissibility of appellant's prior drug use and to ask Smith to help by remembering things that would defeat introduction of the drug abuse evidence. (RT 6921-6926.) Similarly, appellant's mother contacted Jessica Brock to tell her that there was no case against appellant without Jessica Brock's testimony. (RT 6935, 6937-6938.)

In light of the above, the evidence supported the trial court's ruling that CALJIC Nos. 2.04 and 2.05 should be given. As to prejudice, this Court has held that the cautionary nature of consciousness of guilt instructions

"benefits the defense by admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224.) Moreover, consciousness of guilt instructions such as CALJIC No. 2.05 do not improperly endorse the prosecution's theory or lessen its burden of proof. (*Ibid.*) If the evidence does not support giving a consciousness of guilt instruction like CALJIC No. 2.04, then at worst, it is superfluous, such that reversal is not warranted if the conviction is otherwise supported by the evidence. (*People v. Pride* (1992) 3 Cal.4th 195, 248-249.) As discussed above, both instructions were amply supported by the evidence. Even if not, then by their nature, the instructions were not so prejudicial that appellant would have achieved a more favorable result absent the instructions. (See *People v. Watson, supra,* 46 Cal.2d at p. 836.)

Further, to the extent appellant contends that giving CALJIC Nos. 2.04 and 2.05 violated his right to due process because it permitted the jury to convict him on less than proof beyond a reasonable doubt (AOB 289, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 315-316 [99 S.Ct. 2781, 61 L.Ed.2d 560] and *In re Winship* (1970) 397 U.S. 358 [90 S.Ct. 1069, 25 L.Ed.2d 368]), this contention has been waived by appellant's failure to make a timely and specific objection on this ground. (See RT 7222-7226; Evid. Code, § 353; *People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Padilla, supra,* 11 Cal.4th at p. 971; *People v. Sanders, supra,* 11 Cal.4th at p. 539, fn. 27; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20.) Moreover, as discussed in Arguments XXI and XXII, below, appellant's conviction was supported by substantial evidence and is not otherwise reversible because of "cumulative error." This contention is meritless.

XIV.

THE JURY WAS PROPERLY INSTRUCTED REGARDING AIDING AND ABETTING; MOREOVER, ANY ERROR WAS HARMLESS

Appellant contends that the trial court committed prejudicial error, in violation of his right to due process, by instructing the jury regarding aiding and abetting as to whether appellant was guilty of first degree murder and whether the robbery murder special circumstance was true. Specifically, appellant contends that it was error to instruct the jury with CALJIC Nos. 3.00, 3.01 and 8.27, for purposes of whether he was guilty of first degree murder, because the prosecution's theory of the case was not that appellant aided and abetted robbery and murder, but rather was that appellant both took the items from the car and fatally shot Julie Cross. For the same reason, appellant contends it was error to instruct the jury with CALJIC Nos. 8.80 and 8.81.17, regarding the robbery murder special circumstance. (AOB 286-300.) Appellant is incorrect. Appellant waived any contention of federal constitutional error by failing to object at trial. Regardless, appellant's contention fails because the jury instructions were supported by the evidence. Moreover, any error was harmless.

A. Background Facts

Appellant did not object to CALJIC No. 3.00 [Principles - Defined][14/]

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14. CALJIC No. 3.00, as given, provides:
The persons concerned in the [commission] [or] [attempted commission] of a crime who are regarded by law as principals in the crime thus [committed] [or] [attempted] and equally guilty thereof include:
1. Those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime, or
2. Those who aid and abet the [commission] [or] [attempted

or CALJIC No. 3.01 [Aiding and Abetting - Defined][15] being given to the jury at the guilt phase. (RT 7160-7161.) Appellant objected to the jury being instructed with CALJIC No. 8.27 [First Degree Felony-Murder - Aider and Abettor][16] at the guilt phase on the ground that the prosecution's "theory of the case" was that appellant killed Julie Cross. The trial court overruled the objection on the ground that the jury could conclude based on the evidence that

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commission] of the crime.
(CT 3951.)

15. CALJIC No. 3.01, as given, provides:
A person aids and abets the [commission] [or] [attempted commission] of a crime when he or she:
(1) With knowledge of the unlawful purpose of the perpetrator, and
(2) With the intent or purpose of committing, encouraging or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime.
[A person who aids and abets the [commission] [or] [attempted commission] of a crime need not be personally present at the scene of the crime.]
[Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.]
[Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting.]
(CT 3952.)

16. CALJIC No. 8.27, as given, provides:
If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of robbery, all persons, who either directly and actively commit the act constituting such crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental.
(CT 3960.)

appellant participated in the crimes, but was not the person who fired the shotgun at Julie Cross. (RT 7166-7169.)

The parties and the trial court agreed that the special circumstances would be presented to the jury only if the jury had found appellant guilty and that the jury would be separately instructed as to the special circumstances at that time. (RT 7198-7199, 7239.) Appellant objected to CALJIC Nos. 8.80[17] and 8.81.17[18] being given regarding the special circumstances on the same

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17. CALJIC No. 8.80, as given, provides, in relevant part:

> You must now determine if [one or more of] the following special circumstance[s]: [are] true or not true: murder during commission or attempted commission of robbery and a prior conviction for first degree murder.
>
> The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true.
>
> [If you find beyond a reasonable doubt that the defendant was [either [the actual killer] or an aider or abettor, but you are unable to decide which], then you must also find beyond a reasonable doubt that the defendant with intent to kill [aided [and abetted]] an actor in commission of the murder in the first degree, in order to find the robbery murder special circumstance to be true.] [On the other hand, if you find beyond a reasonable doubt that the defendant was the actual killer, you need not find that the defendant intended to kill a human being in order to find the robbery murder special circumstance to be true. There is no "intent to kill" requirement for the prior murder special circumstance.
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> . . . . .

(CT 3908.)

18. CALJIC No. 8.81.17, as given, provides:

> To find that the special circumstance referred to in these instructions as murder in the commission of robbery or attempted robbery is true, it must be proved:
> [1a. The murder was committed while [the] defendant was [engaged in] in the [commission] [or] [attempted commission] of

grounds that he had raised in relation to the aiding and abetting instructions for first degree murder. As to CALJIC No. 8.81.17, appellant also objected on the ground that there was insufficient evidence of a robbery. All objections were overruled. (RT 7171-7173, 7175-7176, 7737-7738, 7740.)

B. Appellant Waived Any Contention That His Right To Due Process Was Violated; Moreover, This Contention Is Meritless

To the extent appellant contends that giving CALJIC Nos. 8.27, 8.80 and 8.81.17, violated his right to due process because it permitted the jury to convict him on less than proof beyond a reasonable doubt (AOB 299-300, citing *Jackson v. Virginia, supra,* 443 U.S. at p. 307 and *In re Winship* (1970) 397 U.S. at p. 359), this contention has been waived by appellant's failure to make a timely and specific objection on this ground. (See RT 7166-7169, 7171-7173, 7175-7176, 7737-7738, 7740; Evid. Code, § 353; *People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Padilla, supra,* 11 Cal.4th at p.

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a robbery;] [or]
[1b. The murder was committed during the immediate flight after the [commission] or [attempted commission] of a robbery.
[2. The murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [attempted] robbery was merely incidental to the commission of the murder.]

As stated earlier, if the defendant is the actual killer, no intent to kill need by shown under this special circumstance. However, if the defendant is not the actual killer, but rather an aider and abettor to a robbery or attempted robbery, or if you are unable to decide whether the defendant was the actual killer as opposed to an aider and abettor, the you must also find beyond a reasonable doubt that the defendant had the specific intent to kill in order to find this special circumstance true.

(CT 3911.)

971; *People v. Sanders, supra,* 11 Cal.4th at p. 539, fn. 27; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20.) Even if not considered waived, appellant's constitutional contention is meritless. As discussed below, appellant's jury was properly instructed such that no error, let alone an error of constitutional dimension, occurred. Moreover, as discussed in Arguments XVII and XXII, below, the robbery special circumstance and appellant's conviction as a whole were supported by substantial evidence within the meaning of *Jackson*, such that no due process violation could have occurred.

C. The Jury Was Properly Instructed

A trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case. (*People v. Cummings, supra,* 4 Cal.4th 1233, 1311; *People v. Sedeno* (1974) 10 Cal.3d 703, 715, disapproved on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) A trial court also has the duty "'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' [Citation.]" (*People v. Saddler* (1979) 24 Cal.3d 671, 681.)

When multiple theories of first degree murder are supported by the evidence, the jury need not unanimously agree on which theory of first degree murder applies. (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) "More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator." (*People v. Majors* (1998) 18 Cal.4th 385, 408, citing *People v. Beardslee* (1991) 53 Cal.3d 68, 92; *People v. Forbes* (1985) 175 Cal.App.3d 807, 816-817.) In *Majors*, this Court rejected a defendant's claim that the trial court erred by not instructing the jury that they

had to unanimously agree that the defendant committed the same acts for purposes of proving first degree murder and the felony murder special circumstance. (*People v. Majors, supra,* 18 Cal.4th at pp. 407-408.) "Sometimes . . . the jury simply cannot decide beyond a reasonable doubt exactly who did what. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other." (*People v. Santamaria* (1994) 8 Cal.4th 903, 918-919.) The federal constitution is not violated by state law rules that do not require juror unanimity. (*People v. Majors, supra,* 18 Cal.4th at p. 408, citing *Schad v. Arizona* (1991) 501 U.S. 624 [111 S.Ct. 2491, 115 L.Ed.2d 555]; *People v. Santamaria, supra,* 8 Cal.4th 903, 918-919.)

Here, appellant appears to contend that the jury instructions should be limited solely to the prosecution's theory of the case, even if other instructions are supported by the evidence. (AOB 294-295.) However, as discussed above, the trial court has a duty to instruct the jury on *issues raised by the evidence*, not just on the prosecution's theory of the case. As discussed below, the trial court correctly concluded that the evidence could support a finding that appellant participated in the crimes, without finding that he personally fired the fatal shotgun blasts at Julie Cross such that the jury instructions regarding aiding and abetting, first degree murder and aiding and abetting for purposes of the robbery murder special circumstance were proper.

As to first degree murder, CALJIC No. 8.27 instructed the jury that all participants in the crime of robbery where a death results, whether they directly commit the act or knowingly aid in its commission, are guilty of first degree murder. (CT 3960.) As to the robbery murder special circumstance, CALJIC Nos. 8.80 and 8.81.17, instructed the jury, among other things, that if they found that appellant was not the actual killer, they needed to find that appellant aided and abetted the crime of robbery *and* possessed the specific

intent to kill in order to find the special circumstance to be true. (CT 3908, 3911)

Contrary to appellant's contention (AOB 295-296), there was evidence from which the jury could infer that appellant aided and abetted a robbery. Just prior to the murder, the driver and passenger of a dark-colored car had repeatedly driven by and looked at the Secret Service car. The driver of the dark-colored car approached Agent Bulman with his gun drawn and held Agent Bulman at gunpoint in the driver's seat. Acting in concert, the passenger from the dark-colored car entered the Secret Service car from the passenger side and removed the car keys and shotgun. Julie Cross was shot soon after the property was taken. (RT 4774-4778, 4780-4794, 4799-4803.) Given the sequence of events, the evidence supported instructing the jury on first degree felony murder and the felony murder special circumstance.

Moreover, the evidence supported instructing the jury on aiding and abetting. As noted by the trial court, the jury heard evidence from Jessica Brock that appellant participated in the crime, however, while appellant admitted to Jessica Brock that he had been involved in killing someone near the airport, he did not specifically admit to personally doing the killing with a shotgun. The jury also heard evidence from Nina Miller from which it was possible to infer that Terry Brock had demonstrated to his friends how *he* had fired the shotgun. Agent Bulman had identified Terry Brock as being the pistol-wielding assailant on his side of the car, and had identified circa 1980 photographs of appellant as looking like the shotgun-wielding assailant but he did not make an in-court identification of appellant. The blood evidence on appellant's jacket was not conclusively inculpatory. Thus, under the facts presented at trial, the jury could conclude that appellant had actively participated in the robbery without necessarily concluding, beyond a reasonable doubt, that he personally pulled the trigger of the shotgun.

Moreover, the aiding and abetting instructions did not result in jury confusion. Appellant contends that the jury could somehow be confused about whether CALJIC No. 8.27 applied to aiding and abetting the robbery or aiding and abetting the shooting. (See AOB 296.) Appellant is incorrect. First, contrary to appellant's contention (AOB 296, citing RT 7166), the trial court never stated that the purpose of CALJIC No. 8.27 was to permit the jury to convict appellant of aiding and abetting the shooting. Instead, when read in context, the trial court is stating the obvious, that as an aider and abettor, a defendant can be guilty of felony murder without actually pulling the trigger. Further, CALJIC No. 8.27 cannot be more clear that all persons who either directly commit or aid and abet a *robbery* in which someone is killed, are guilty of first degree murder. The instruction specifically refers to when a human being is killed by one or more persons engaged in the commission of the crime of robbery. (CT 3960.) Moreover, CALJIC No. 8.27 at most repeats the general principles of aiding and abetting set forth in CALJIC Nos. 3.00 and 3.01, in the specific context of felony murder robbery. It simply cannot be said that the jury would be confused by a specific instruction limited to aiding and abetting a felony murder robbery.

Similarly, the jury would not have been confused by CALJIC Nos. 8.80 and 8.81.17. These instructions, given after the jury had already found appellant guilty of first degree murder, served to highlight for the jury that for purposes of the special circumstance allegation the murder had to have been committed in the commission of, or immediate flight from the robbery and more importantly, for the special circumstance to apply to an aider and abettor, the aider and abettor had to possess the specific intent to kill. (See CT 3908, 3911.) CALJIC Nos. 8.80 and 8.81.17 cannot be more clear in distinguishing between felony murder special circumstance liability as the actual shooter and the increased intent requirements for felony murder special circumstance liability

if the defendant was an aider and abettor to the robbery.

Moreover, to the extent appellant contends that CALJIC Nos. 8.80 and 8.81.17 were confusing because the jury was not reinstructed with CALJIC Nos. 3.00 and 3.01, his contention fails. (See AOB 297-298.) At the suggestion of appellant's trial counsel, the jury was expressly told that the instructions regarding the special circumstances were:

> to be taken as a whole along with the other instructions that the court has given you. I will not reread those to you again, but you are not to disregard those earlier instructions as they defined things such as proof beyond a reasonable doubt that is necessary here also. So consider each as a whole and in light of the other instructions.

(RT 7740-7742.) Thus, there was no possibility of jury confusion from the separate special circumstances instructions that included aiding and abetting theories.

In sum, instructing the jury regarding aiding and abetting for purposes of first degree felony murder and the robbery murder special circumstance was supported by the evidence and did nothing to confuse the jury. Appellant's contention is meritless.

D. Any Error Was Harmless

Assuming, without conceding, that the instructions were erroneous because the evidence was insufficient to establish appellant was an aider and abettor, any error was harmless because it is not reasonably probable appellant would have obtained a better result absent the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) As discussed above, there was nothing confusing or misleading about either CALJIC No. 8.27, or CALJIC Nos. 8.80 and 8.81.17. There is simply no requirement that a jury unanimously agree on whether a defendant was liable as an aider and abettor, or as the direct perpetrator of the

killing for purposes of first degree murder or the felony murder special circumstance. (See *People v. Nakahara, supra,* 30 Cal.4th at p. 712; *People v. Majors,* 18 Cal.4th at pp. 407-408.) For purposes of the first degree murder conviction and special circumstance finding, there was ample evidence from which the jury could conclude that the murder was committed during the commission of a robbery, such that the felony murder rule applied regardless of whether appellant was the perpetrator or an aider and abettor. (*People v. Santamaria, supra,* 8 Cal.4th at pp. 918-919.)

Further, the jury's verdict demonstrates that they did not convict appellant based on his "passive, subordinate role" in the crime. (See AOB 298) Instead, the jury made a separate unanimous finding that appellant personally used a firearm in the commission of the crimes. (CT 3855.) In light of the evidence, the only inference from this finding is that the jury unanimously found appellant to be the person who shot Julie Cross. In sum, even assuming error occurred, the jury's verdict was amply supported by the evidence such that there surely would have been no different result if the challenged instructions had been omitted.

XV.

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

Appellant contends that the trial court prejudicially erred, in violation of his federal constitutional right to due process, by ruling that the prosecutor could question Jessica Brock about whether she remembered that appellant and Terry Brock visited her apartment in 1978, not 1980, because the visit coincided with appellant and Terry Brock being charged with a serious offense unrelated to the instant case. Specifically, appellant contends that Evidence Code section 1101, subdivision (b), does not authorize admission of prior act evidence for purposes of bolstering or attacking a witness's credibility. (AOB 300-307.) Appellant is incorrect. The trial court properly ruled that the evidence was relevant, admissible under Evidence Code section 1101, and not unduly prejudicial under Evidence Code section 352. Thus, no due process violation occurred. Moreover, any error was harmless.

A. Background Facts

During the cross-examination of Jessica Brock, appellant's trial counsel questioned Jessica Brock about whether the incident she remembered where appellant came to her house and washed something off was actually an incident where both appellant and Terry Brock visited her at her apartment in Santa Monica. Appellant's trial counsel read at length from a defense interview with Jessica Brock in which she expressed uncertainty as to the date of appellant's visit. (RT 6118-6127, 6131-6132, 6142, 6144, 6180-6181.)

The prosecutor requested that he be able to question Jessica Brock about whether she remembered the visit to her apartment in Santa Monica in relation to the 1978 triple murder committed by appellant, which occurred

around the same time. (RT 6188-6191, 6232-6236.) Jessica Brock was questioned outside the presence of the jury. According to Jessica Brock, in her mind she associated appellant and Terry Brock's visit to her apartment in Santa Monica with the 1978 triple murder in which one of her childhood acquaintances, Howard Andrews, had been killed. (RT 6192-6204, 6224-6226.)

The trial court made the following ruling:

> In balancing the prejudicial effect, what I intend to do, against the probative value, the probative value is extreme, the prejudice is not insubstantial, but the probative value will greatly outweigh the prejudicial effect, the court will allow the following:
>
> This may put the defense at a certain disadvantage in that your cross-examination may be somewhat curtailed of necessity, but that again is your choice to make as it was your choice to bring this information before the jury in the first place about the potential juggling of dates by the witness.
>
> The court will allow the People to elicit from Ms. Brock this morning the following:
>
> That in 1978, to wit, October or shortly thereafter, she became aware of an offense that had been allegedly committed by her brother, Terry Brock, and [appellant]. And that was a serious charge that eventually resulted in a trial on that charge;
>
> And that she associates in her mind, and has since the incident associated in her mind, [appellant's] visit with Terry Brock to her home in '78 in Santa Monica. She has associated that with that particular offense, not the offense charged in this case. And that she does not wish to discuss that offense and has refused to divulge to the prosecution any knowledge she may have of the facts underlying that offense because that is a fact, according to her taped statement to the prosecution on that subject.

I will allow the People to elicit further from her that due to the nature of that offense, it made an impression on her and that, therefore, she is not confusing this [Julie] Cross homicide and a visit made by [appellant] alone to her home in 1980 with the visit by the defendant and Terry Brock in 1978, which I believe she testified occurred within – she learned of the offense within a matter of days after that visit.

I'm not going to let the People elicit at this point that the offense was a [murder].

I'm not going to allow the People at this point to elicit that her – that she knew one of the victims in the case.

And I'm not going to allow the People obviously to elicit that [appellant] or her brother, for that matter, was convicted of homicide in that case.

So what I will do is allow you to elicit that there was a serious offense charged against her brother, [Terry] Brock, arising from the events around October of '78 and that that visit coincided with the timing of that charged offense and that offense resulted in a trial with [appellant] and her brother together. And that is how she knows there are two separate incidents.

. . . . .

So, again, [appellant's trial counsel] you are sort of in a Catch-22.

The witness – you have decided to put on this impeachment and you will have to live with some rebuttal as to what you elicited from her on tape.

(RT 6271-6273.) The trial court further noted that pursuant to Evidence Code section 1101, subdivision (b), evidence of other acts was admissible so long as it was relevant on some issue other than a person's propensity to commit a crime and not unduly prejudicial. (RT 6274.)

Outside the presence of the jury, Jessica Brock was admonished not to mention the nature of the 1978 crime that she associated with Terry Brock and appellant's visit to her apartment in Santa Monica. (RT 6279-6282.) In front of the jury, Jessica Brock disobeyed this admonition and stated "What are you referring to? The triple murder?" The jury was immediately admonished not to form any opinions and were sent to the jury room. (RT 6288.) Appellant moved for a mistrial, as set forth in Argument XVI, below.

When Jessica Brock returned to the stand, she testified that the incident where Terry Brock and appellant visited her at her apartment in Santa Monica was a separate incident that occurred two years prior to the night of the Julie Cross murder when appellant visited her alone. According to Jessica Brock, the visit from Terry Brock and appellant happened in 1978 based on the age of her son at the time and her association of the incident with Terry Brock and appellant being involved in another alleged offense. (RT 6351-6354, 6369-6371.)

Prior to deliberating, the jury was instructed pursuant to CALJIC No. 1.02, as follows:

> Statements made by the attorneys during the trial are not evidence . . . ¶ If an objection was sustained to a question, do not guess what the answer might have been. Do not speculate as to the reason for the objection. ¶ Do not assume to be true an insinuation suggested by a question asked a witness. A question is not evidence and may only be considered as it enables you to understand the answer. ¶ Do not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken by the court; treat it as though you had never heard of it.

(CT 3919; RT 7440.)

The jury was further instructed with a special instruction, which had been drafted by both parties, that provided:

> Evidence has been received indicating that the

defendant may have been involved in offenses other than the one for which he is here on trial. Such evidence was not received, and may not be considered by you, as proof that such offenses were in fact committed by the defendant. Further, such evidence was not received, and may not be considered by you, to prove that the defendant is a person of bad character, or that he has a disposition to commit crimes.

Such evidence was received, and may be considered by you only for the limited purpose of assisting you in your assessment of the credibility of Clifton Alexander, Eileen Smith, and Jessica Brock.

As to Jessica Brock, such evidence may also be used in resolving any conflict regarding whether the defendant visited the residence of Ms. Brock and if he did, how many such visits occurred, and the timing, location, and circumstances involved in such visit or visits.

For the limited purpose for which you may consider such evidence you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose.

(CT 3928; RT 7447-7449.)

B. The Trial Court Did Not Abuse Its Discretion To Admit Evidence Under Evidence Code sections 1101 and 352

The trial court did not abuse its discretion by permitting limited inquiry into whether Jessica Brock remembered when Terry Brock and appellant had visited her because it coincided with her learning of an alleged crime involving appellant and Terry Brock in 1978. As set forth below, the evidence was relevant and admissible under Evidence Code sections 1101, subdivision (b) and 352.

Evidence Code Section 1101, subdivision (b), provides, in part that, "Nothing in this section prohibits the admission of evidence that a person

committed a crime, civil wrong, or other act when relevant to prove some fact . . . other than his disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) If relevant to a matter other than the defendant's bad character or criminal disposition, uncharged misconduct evidence is admissible unless its probative value is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evid. Code, § 352;[19] *People v. Kipp, supra,* 18 Cal.4th 349, 371; *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) A finding as to the admissibility of evidence is left to the sound discretion of the trial court and will not be disturbed unless it constitutes a manifest abuse of discretion. (*People v. Kipp, supra,* 18 Cal.4th at p. 371; *People v. Mickey, supra,* 54 Cal.3d 612, 655; *People v. Karis, supra,* 46 Cal.3d 612, 637; *People v. Siripongs, supra,* 45 Cal.3d 548, 574 *People v. Stewart, supra,* 171 Cal.App.3d 59, 65 [discretion is abused only if court exceeds bounds of reason].)

Similarly, appellate courts rarely find an abuse of discretion under Evidence Code section 352. (*People v. Ramos, supra,* 30 Cal.3d 553, 598, fn. 22, reversed on other grounds in *California v. Ramos* (1983) 463 U.S. 992 [103 S.Ct. 3446, 77 L.Ed.2d 1171].) The prejudice which Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. (*People v. Harris* (1998) 60 Cal.App.4th 727, 737, citing *People v. Zapien* (1993) 4 Cal.4th 929, 958 .)

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19. Evidence Code section 352 provides:
The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Here, contrary to appellant's contention, the evidence was relevant to prove a fact other than appellant's propensity to commit crimes. Appellant's trial counsel had made the obvious tactical choice to attack the reliability of Jessica Brock's highly damaging testimony by attempting to confuse the timing of when appellant visited Jessica Brock to wash off the bloodied shotgun barrel. The questions asked by appellant's trial counsel in his pre-trial interview with Jessica Brock, and in his cross-examination, implied that there was only one incident. (RT 6118-6127, 6131-6132, 6142, 6144, 6180-6181; Ex. 90A 1-10.) Outside the presence of the jury, Jessica Brock unequivocally recalled the date of the visit by appellant and Terry Brock to her apartment in Santa Monica as being around the time her childhood friend was murdered in 1978, a crime she associated with appellant and Terry Brock. (RT 6192-6204, 6224-6226.) Thus, the evidence was relevant to establish the date of Terry Brock and appellant's visit and was not being offered to prove appellant had a propensity to commit crimes.

Further, the trial court balanced the high probative value with the potential for prejudice and limited the circumstances under which the evidence was to be admitted. There was to be no mention that Jessica Brock related the timing of the visit to the murder of her friend, but instead, the evidence was to be limited to whether Jessica Brock remembered the visit because it coincided with appellant and Terry Brock being accused of a different crime that occurred around the time of their visit. The trial court acted within its discretion when it concluded that a sanitized, non-specific reference to the prior incident, in conjunction with a specific admonition to the jury not to consider the evidence for improper propensity purposes or to prove the truth of the instant allegations, would not be unduly prejudicial. Appellant cannot demonstrate an abuse of discretion under these facts.

Appellant's reliance on *People v. Thompson* (1979) 98 Cal.App.3d 467, 470 (AOB 304-306), is mistaken. In *Thompson*, the defendant was charged with one felony count of oral copulation on a minor (§ 288a, subd. (b)(2)), and with one felony count of furnishing marijuana to the minor (Health and Safety Code, § 11361, subd. (a)), on the same date. (*Id.* at p. 469.) The victim testified that the defendant had invited him over to his apartment, given him liquor and marijuana, and orally copulated him. The defendant testified that the victim had been a guest at his apartment who had stolen money and marijuana, but that no sexual contact occurred. (*Id.* at pp. 470-471.) The victim and another minor were permitted to testify that the defendant had provided marijuana to the victim on earlier occasions and the jury was instructed that this testimony was to be used solely on the issue of determining the victim's credibility. (*Id.* at p. 472.) The Court of Appeal in *Thompson* concluded that under the circumstances, the testimony regarding the prior incidents in which the defendant provided marijuana to the victim was not probative of the victims's truthfulness, but instead was the equivalent of impermissible propensity evidence, i.e., the only relevance of the evidence was to prove that because the defendant furnished marijuana to the victim in the prior uncharged incidents, he was must have done so in the charged incident. (*People v. Thompson, supra,* 98 Cal.App.3d at pp. 473-482.)

Thompson is factually distinguishable. Here, unlike in *Thompson*, Jessica Brock's testimony was not in direct contradiction to another witness's, and the prior incident evidence was not offered to directly bolster Jessica Brock's eyewitness testimony about the Julie Cross murder because of similarities of appellant's conduct on both occasions. Instead, in the instant case, appellant's defense counsel had made the choice to question Jessica Brock in such a way that the jury would be left with the impression that Jessica Brock did not actually remember appellant visiting her on the night of the murders, but

instead was confusing the night of the Julie Cross murder with another night when both Terry Brock and appellant visited. However, according to Jessica Brock, she recalled that the visit from appellant and Terry Brock was a separate incident that pre-dated the night of the Julie Cross murder because she remembered the visit happened around the time the triple murder occurred. Thus, the trial court had correctly concluded that the evidence regarding appellant being accused of a serious crime that occurred in 1978 was relevant to establishing a timeline for Jessica Brock's version of events because that is how she recalled the earlier visit. *Thompson* is inapplicable to the instant facts because in that case, the *only* inference the jury could make from the victim's testimony was that the victim had to be telling the truth about the charged incident because the defendant had done the same behavior in the past. Here, in contrast, the jury was presented with the permissible inference that Jessica Brock remembered the approximate date of the visit because a significant event had occurred involving her brother and appellant. *Thompson* does not demonstrate that the trial court abused its discretion.

In sum, the trial court did not abuse its discretion by permitting the prosecution to elicit from Jessica Brock that she remembered that the visit from Terry Brock and appellant occurred around the time the two were accused of a different crime than the one for which appellant was on trial. Moreover, appellant has waived any contention of federal constitutional error by not making a timely and specific objection on this ground at trial. (Evid. Code, § 353; *People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Padilla, supra,* 11 Cal.4th at p. 971; *People v. Sanders, supra,* 11 Cal.4th at p. 539, fn. 27; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20.) Regardless, because the trial court properly applied state law rules of evidence, appellant cannot show that he was arbitrarily denied a state procedural right in violation of his federal constitutional right to due process. (See AOB 307, citing *Hicks v.*

Oklahoma (1980) 447 U.S. 343, 346 [100 S.Ct. 227, 100 L.Ed.2d 175] [holding that arbitrary denial of state law right to jury determination of sentence violated right to due process].) Appellant's contention is meritless.

C. Any Error Was Harmless

As discussed above, any contention of federal constitutional error was waived, and/or was meritless. Assuming, without conceding, that error in the application of Evidence Code sections 1101, subd. (b) and 352 occurred, any error was harmless.

The erroneous admission of prior misconduct evidence does not compel reversal unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded. (*People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Watson, supra,* 46 Cal.2d at p. 836.) The jury is presumed to have followed the court's instructions, such that the evidence only would have been considered for the limited purpose for which it was admitted. (See *People v. Morris* (1991) 53 Cal.3d 152, 194 [trial court's admonition, which the jury is presumed to have followed, cured any prejudice resulting from witness' improper statement]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1374 [jurors are presumed to adhere to the court's instructions absent evidence to the contrary]; *People v. Williamson* (1985) 172 Cal.App.3d 737, 750 ["We presume that the jury heeded the admonition and any error was cured."].)

Here, had the evidence been excluded, it is not reasonably probable appellant would have obtained a better result. Even without reference to the 1978 allegation involving Terry Brock and appellant, the prosecutor would have been able to establish that the incident referenced by appellant's trial counsel was a separate incident from the night of the Julie Cross murder when appellant visited Jessica Brock by himself. During re-direct examination,

Jessica Brock readily recalled that at the time Terry Brock and appellant visited her, her son was four or five months old and that her son had been born in May of 1978. (RT 6351-6353.) Although Jessica Brock expressed confusion, she was definite that there were two separate incidents and that the incident where appellant visited her alone occurred around the time of the Julie Cross murder. (See RT 6181, 618, 63713.) Nothing in the questioning of Jessica Brock by appellant's trial counsel contradicted her testimony that at the time appellant visited her alone he washed blood off an object that looked like the barrel of a Secret Service shotgun and told her that he had to "take somebody out" near the airport. Jessica Brock's version of events was corroborated by the fact that around June 4, 1980, there had only been one murder near the airport, the murder of Julie Cross.

Finally, appellant's jury was specifically admonished that the evidence of another possible criminal incident could only be used for the purpose of resolving any conflict in when and where appellant visited Jessica Brock. The jury was also admonished that it could not consider the evidence for purposes of proving that appellant had a bad character or disposition to commit crimes. (CT 3928; RT 7448-7449.) In light of the strong evidence of appellant's guilt and the jury instructions limiting the purpose to which the jury could consider the evidence, it is not reasonably probable appellant would have obtained a better result even if the evidence had not been admitted.

XVI.

THE MOTION FOR A MISTRIAL WAS PROPERLY DENIED

Appellant contends that the trial court erred, in violation of his right to due process under the United States Constitution, by denying his motion for a mistrial. Specifically, appellant contends that his mistrial motion should have been granted because Jessica Brock made reference to "the triple murder" in response to the prosecutor's question that sought to clarify whether appellant and Terry Brock had visited her at her apartment in Santa Monica in 1978, two years prior to the Julie Cross murder. (AOB 307-311.) Appellant is incorrect. The trial court did not abuse its discretion in denying appellant's motion and moreover, any error was harmless. Moreover, appellant waived any contention that his federal constitutional rights were violated, and regardless, this contention is meritless.

A. Background Facts

As discussed in Argument XV, above, the trial court had ruled that Jessica Brock could be questioned about whether she recalled the visit from Terry Brock and appellant in relation to an unspecified allegation against Terry Brock and appellant that occurred around the same time. Outside the presence of the jury, the trial court expressly instructed Jessica Brock that although she was going to be questioned about appellant's triple murder case, because she associated it with the visit by appellant and Terry Brock, she was not to refer to it as a murder case or the fact that she knew one of the victims. (RT 6279-6282.)

When Jessica Brock resumed her testimony in front of the jury, the prosecutor asked her if she associated the visit from appellant and Terry Brock "in Santa Monica with an offense that had been committed by both your brother

Terry Brock and [appellant] in 1978?" Jessica Brock replied, "What are you referring to? The triple murder?" The jury was immediately admonished not to form any opinions and sent to the jury room. (RT 6288.)

Appellant's counsel moved for a mistrial on the ground that Jessica Brock was under the influence, had disregarded the trial court's admonition, the prosecutor had asked an open-ended question, and there was no way to cure the problem because there was no way to sanitize the nature of the prior offense. (RT 6289.) The trial court found that Jessica Brock was feigning the degree to which she felt the effects of a sleeping pill and "for reasons of her own decided to blurt out that answer." The mistrial motion was denied. The trial court stated it would admonish the jury to disregard Jessica Brock's last answer. After determining that Jessica Brock had understood the trial court's order, but had disregarded it, the trial court had her removed from the courtroom. (RT 6291-6292.)

When the jury returned, they were immediately advised that another witness was going to be presented and that:

> . . . we will hear from [Jessica] Brock later. ¶ In the meantime, the court instructs you to disregard the last question asked of the witness and any response that you may have heard her give. ¶ The last answer given by the witness and the last question are stricken. ¶ You are admonished to disregard that and treat it as though you had never heard the last answer and question, assuming you did hear one. ¶ Everybody clear on that?

(RT 6296.)

Appellant renewed his mistrial motion on the same ground and the motion was taken under submission. (RT 6342, 6344.) The jurors were questioned individually about whether they heard the stricken question and answer and whether they could disregard it. Two of the jurors recalled that Jessica Brock had mentioned a "triple murder" but the remaining jurors and

alternates did not remember the question or the answer leading to the trial court's admonition. All of the jurors and alternates, including the two jurors that recalled the mention of a "triple murder," stated that they could follow the trial court's admonition to disregard the question and answer. (RT 6437-6474.) The jurors were admonished not to discuss the trial court's inquiry until after the conclusion of the case. (RT 6475.)

Having observed the jurors and conducted the questioning, the trial court found that it had no reason to doubt the juror's credibility regarding whether they remembered the question and answer. (RT 6479-6481.) Appellant was given the option of dismissing the two jurors who had recalled the question and answer and replacing them with alternates. Appellant declined this remedy and continued to assert that his mistrial motion should be granted. (RT 6481-6483.)

The trial court denied the mistrial motion on the ground that there was another, less drastic remedy available, i.e., replacing the two jurors who had heard the remark. (RT 6484-6486.) Appellant and his trial counsel went in camera without the prosecution and told the trial court the reason why they did not want to replace the two jurors who had heard the remark. (RT 7367-7368.) Although the prosecution requested that the two jurors be replaced in order to eliminate any potential appellate issues, the trial court denied the request on the ground that the two jurors would obey the trial court's admonition to disregard Jessica Brock's answer. (RT 7373-7374.)

B. The Mistrial Motion Was Properly Denied

A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 708.) Whether a particular incident is incurably prejudicial is a speculative matter, and the trial court has considerable discretion in ruling

on mistrial motions. (*People v. Hines* (1997) 15 Cal.4th 997, 1038; *People v. Haskett* (1982) 30 Cal.3d 841, 854.) For example, in *Hines,* the California Supreme Court found that a motion for mistrial was properly denied where hearsay testimony that a murder victim had identified the defendant as being present prior to the murder would have been cured by admonishing the jury. (*People v. Hines, supra,* 15 Cal.4th at p. 1038.)

Here, the trial court questioned the jurors and alternates and found that only two of the jurors even recalled Jessica Brock making reference to a "triple murder." Appellant's speculation that all of the other jurors were lying in response to the trial court's questioning (See AOB 308-309), is unsupported by the record. As to the jurors who did not remember the remark, any harm was cured by the trial court's admonition not to discuss the subject of the trial court's individual questioning with the other jurors. Thus, under the trial court's instructions, the two jurors who did recall the remark would not convey it to the other jurors. Moreover, appellant invited any error as to these jurors continuing to sit on the case, by rejecting the trial court's offer to dismiss them.

Any harm was further cured by the admonition to disregard both the question and answer. Both of the jurors who did recall the remark stated that they would be able to do so, and the trial court credited their statements. The jury was later reminded just prior to deliberations that questions and answers that had been stricken were not to be considered for any purpose. (CT 3919; RT 7440.) In light of the above, the trial court acted within its discretion when it concluded that any harm caused by Jessica Brock's mention of "the triple murder" was cured by the admonitions and jury instructions.

As to appellant's contention that his federal constitutional right to a reliable determination of guilt under the Eight and Fourteenth Amendments was violated (AOB 311), appellant has waived this contention by failing to make a timely and specific objection at trial. (See Evid. Code, § 353; *People v.*

Williams, supra, 16 Cal.4th at p. 250; *People v. Padilla, supra,* 11 Cal.4th at p. 971; *People v. Sanders, supra,* 11 Cal.4th at p. 539, fn. 27; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20.) Moreover, to the extent appellant's contention is premised upon alleged improper application of state law, this contention is mertiless where the trial court acted within its discretion.

C. Any Error Was Harmless

Because no error of constitutional dimension occurred, the appropriate standard of prejudice to apply to the denial of appellant's mistrial motion is whether it is reasonably probable appellant could have obtained a better result absent the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Harris* (1994) 22 Cal.App.4th 1575, 1581 [applying *Watson* standard to contention that trial court erred in denying a mistrial motion].) Here, assuming error occurred, appellant was not prejudiced.

Only two of the jurors even registered that Jessica Brock had made a reference to a "triple murder." The two jurors that heard the remark said they were capable of obeying the trial court's instructions to disregard the remark and refrain from conveying it to the other jurors. All of the jurors were admonished to disregard the remarks, were admonished not to discuss with each other the subject of the trial court's individual questioning of the jurors and were instructed that the evidence as to Jessica Brock was admissible solely to determine the date appellant and Terry Brock visited her. Because nothing in the record indicates the jury failed to comply with the trial court's admonitions, it is presumed any harm was cured because the jury understood and followed the trial court's admonition. (See *People v. Morris, supra,* 53 Cal.3d at p. 194 [trial court's admonition, which the jury is presumed to have followed, cured any prejudice resulting from witness's improper statement]; *People v. Olguin, supra,* 31 Cal.App.4th 1355, 1374 [jurors are presumed to adhere to the court's

instructions absent evidence to the contrary]; *People v. Williamson, supra,* 172 Cal.App.3d at p. 750 ["We presume that the jury heeded the admonition and any error was cured."].)

Under the circumstances, given the trial court's strong admonition to the jury, the fact that 10 of the jurors did not even hear the remark about the "triple murder," and that the remaining two jurors who had heard the remark presumably complied with the trial court's admonition and limiting instructions, it is not reasonably probable appellant would have achieved a better result. (See *People v. Watson, supra,* 46 Cal.2d at p. 836.) Reversal is not warranted.

XVII.

SUBSTANTIAL EVIDENCE SUPPORTED THE ROBBERY MURDER SPECIAL CIRCUMSTANCE

Appellant contends that the robbery murder special circumstance under section 190.2, subdivision (a)(17)(A), was not supported by sufficient evidence. Specifically, appellant contends that the evidence shows that a robbery was committed in the course of a murder, rather than a murder taking place during the course of a robbery, such that the special circumstance cannot apply. (AOB 311-315.) Appellant's contention is meritless.

In determining whether the evidence is sufficient to support a criminal conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 576; *Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319.) The same test is used to determine the sufficiency of the evidence for a special circumstance allegation. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790-791.)

For purposes of a robbery-murder special circumstance allegation, the jury is required to find that the murder was committed while the defendant was engaged in the commission of, attempted commission of, or immediate flight after committing or attempting to commit a robbery. (Pen. Code, § 190.2, subd. (a)(17).) Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (Pen. Code, § 211; *People v. Hill, supra,* 17 Cal.4th 800, 849.) A homicide is committed in the perpetration of the felony if the killing and the felony are parts of one continuous transaction. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1016.) An intent to rob will not support a conviction of felony murder if it arose after the infliction

of the fatal wound. (*People v. Morris, supra,* 46 Cal.3d 1, 23, fn. 9, citing *People v. Green* (1980) 27 Cal.3d 1, 54, fn. 44.) Similarly, the elements of a robbery-murder special circumstance are not present if theft of the victim's property was merely "incidental" to a murder. (*People v. Turner* (1990) 50 Cal.3d 668.)

Here, there was substantial evidence from which a rational trier of fact could have found the robbery murder special circumstance beyond a reasonable doubt. Just before dusk, as Agent Bulman and Agent Cross sat in their unmarked car, they saw appellant and another man drive by in a dark-colored car. Appellant looked at the agents as the car slowly drove past. (RT 4774-4778.) Three to five minutes later, appellant and the other man drove by again, and again looked at the agents as they passed. (RT 4780-4782, 4785.) After it was dark, appellant and the other man approached the Secret Service car from behind. Both agents drew their pistols and Agent Cross got out of the car to investigate. As appellant's companion reached Agent Bulman's side of the car, he pulled a revolver from his waistband and pointed it at Agent Bulman's head. (RT 4789-4794.)

Agent Bulman was ordered to put his hands up. Agent Bulman stated he was a police officer, after which his assailant claimed to be a police officer. When Agent Bulman suggested they show each other their badges, he was told to shut up. As a gun was put to his head, Agent Bulman was told to tell Agent Cross to drop her weapon. Appellant broke free of Agent Cross and came over to look in the car. Appellant saw the police radio and commented, "He's got a radio," after which he took the keys from the Secret Service car. Seeing the shotgun, appellant said, "What do we have here," and took the shotgun from the car. (RT 4794-4795, 4799-4800.)

Seconds later, Agent Cross jumped into the car. Appellant fired the shotgun through the car, missing Agent Bulman. Agent Bulman grabbed the

pistol of the assailant on his side of the car and began a struggle for control of the pistol that lead the two men into the street. While Agent Bulman was struggling for control of the pistol with his assailant, appellant shot Agent Cross two times with the shotgun while she tried to get cover in the back seat of the car. (RT 4800-4803, 4834-4836, 4938.) Appellant tried to shoot Agent Bulman after Agent Bulman fell to the ground, but the shotgun blast missed. Appellant and his accomplice ran away, taking the shotgun with them. (RT 4807-4813, 5019-5021 .) Agent Cross's pistol, the shotgun and the car keys were never recovered. (RT 4813-4814, 4937-4938.)

As discussed above, substantial evidence demonstrates that consistent with an intent to commit robbery, appellant and his accomplice "cased" the scene, checking out Agents Bulman and Cross two times before approaching from behind. Consistent with robbery, appellant and his accomplice held Agent Bulman at gunpoint and had him put his hands up rather than immediately shooting him. Appellant and his accomplice appeared surprised to learn that Agents Bulman and Cross were law enforcement officers, such that the only inference is that they had approached the car not to kill Agents Bulman and Cross, but for some other purpose. Finally, appellant took the car keys and shotgun *before* shooting Agent Cross, not after, as would be the case where robbery was incidental to a murder. These facts and circumstances are consistent with the perpetrators intending to rob their victims, and kill them to eliminate witnesses and affect their escape. In light of the above, substantial evidence supported the robbery-murder special circumstance finding.

All of the cases cited by appellant (AOB 313-314) for the proposition that the robbery in this case was "incidental" to the murder, are distinguishable, and not on point. For example, in *People v. Marshall* (1997) 15 Cal.4th 1, 41, the court found that insufficient evidence supported the robbery murder special circumstance because there was insufficient evidence of robbery. Specifically,

Marshall found insufficient evidence of the elements of force or intent to steal where, despite evidence that the defendant had forcibly killed the victim, the only property taken was a letter written by the victim to obtain a check cashing card. There was no evidence that force had been applied in order to obtain the letter, or that the defendant had intended to even take the letter prior to the murder. (*Id.* at pp. 34-35.) In contrast, in the instant case, appellant and his accomplice applied force and acted in a manner consistent with robbery prior to appellant taking the shotgun and prior to the murder of Agent Cross. Thus, *Marshall* is factually distinguishable and inapplicable.

Similarly, *People v. Thompson* (1980) 27 Cal.3d 303, 324, is distinguishable. There, the defendant entered the residence of a couple and demanded money at gunpoint. However, the defendant refused the valuables offered in response to his demand and announced that his true intent was to kill the victims. *After* killing the victim, the defendant took the victim's car. Under these circumstances, *Thompson* held that the robbery murder special circumstance was not supported by sufficient evidence because the defendant refused the valuables, made statements contradicting an intent to steal and took the car solely for purposes of escape. (*Ibid.*)

In contrast, in the instant case, had appellant's intent been to murder Agent Cross, he surely would have brought his own murder weapon and his accomplice would have shot both agents immediately upon contact. The behavior of appellant and his accomplice prior to the shooting demonstrated an intent to rob, not kill, particularly where the property in this case was taken prior to the shooting. Thus, *Thompson* is unhelpful to appellant.

Appellant's reliance on *People v. Green, supra,* 27 Cal.3d 1, 61-62 (AOB 314), is also misplaced. There, the sole object of the robbery was to conceal the crime of murder. The defendant took the victim's purse, clothes and rings in order to conceal her identity. (*Ibid.*) In the instant case, there was

nothing in the evidence demonstrating that appellant and his accomplice approached the agents intending to murder them with whatever weapon was found in the car. To the contrary, the evidence shows that appellant and his accomplice were surprised to learn that they had chosen law enforcement officers as a robbery target, and only then escalated their crimes to murder. Thus, *Green* is inapplicable.

In sum, substantial evidence supported the robbery murder special circumstance, particularly where Agent Cross was murdered after the shotgun was taken by force. To the extent appellant contends it was error to instruct the jury with CALJIC No. 8.81.17 [Special Circumstances - Murder in the Commission of a Robbery] (AOB 313), his contention fails. As discussed above, substantial evidence was presented from which the jury could conclude that Agent Cross was murdered during the commission of a robbery, such that the instruction was proper. (See *People v. Cummings, supra,* 4 Cal.4th at p. 1311; *People v. Sedeno, supra,* 10 Cal.3d at p. 715.) Appellant's contention is meritless.

XVIII.

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

Appellant makes three contentions relating to post-verdict motions. First, appellant contends that the trial court abused its discretion by denying him a continuance to file a motion for new trial. Appellant further contends that the trial court had no power to "deem" a new trial motion to have been filed. Finally, appellant contends that the above errors denied him due process because they resulted in an arbitrary deprivation of his statutory right to file a motion for new trial. (AOB 316-330.) Appellant's contentions are meritless. The trial court did not abuse its discretion by denying appellant's motion for a continuance and no due process violation occurred. To the extent appellant now objects to the trial court having "deemed" a motion for new trial to have been filed, appellant has waived this contention by failing to object on this basis at trial. Moreover, the record reflects that the trial court heard the grounds for new trial raised by appellant and then, understanding that its ruling denying appellant a continuance might be challenged, made a complete record of how it would have ruled had a motion for new trial been filed by appellant. In light of the above, no error occurred. Moreover, any error was harmless. Reversal on this ground is not warranted.

A. Background Facts

The jury reached its penalty phase verdict on March 18, 1996. Appellant's trial counsel requested that a new trial motion, the automatic motion for modification of the verdict, and any outstanding defense motions be heard on a single day and suggested April 15, 16, or 17. At the prosecutor's

request, due to the unavailability of Detective Henry, the trial court set April 23, 1996, as the date for hearing all post-trial defense motions and for sentencing. (CT 3985; RT 8429-8431.)

On March 22, 1996, appellant filed a "Motion For Personal Jury Identifying Information." According to appellant's trial counsel, the information was needed to investigate whether the jurors had properly followed the trial court's admonitions and instructions, and to determine if any other issues existed that could be raised in a new trial motion, because none of the jurors had remained after the trial to voluntarily speak to the trial attorneys. (CT 3990-3994.) The motion was denied on April 11, 1996, on the ground that the required good cause for disclosure had not been shown. (CT 4006.)

On April 12, 1996, appellant filed a motion to continue the sentencing hearing and hearing on the new trial motion. The reason given for the continuance was, "Due to the great amount of work that has been required to be done on *In re Hunt*, Case Number A090435, now pending in Department 101 and my health, I will not be able to complete the preparation of the motion for new trial." Appellant's trial counsel added that *if* the trial court reconsidered its ruling on his motion for juror personal information, then he also need more time to interview jurors. (CT 4007-4008.)

A hearing on the continuance motion was held on April 16, 1996. At the hearing, appellant's trial counsel argued that he had no time because as of March 29, 1996, he had been "working full time, every day" on a habeas matter in which he was co-counsel, to prepare for an evidentiary hearing scheduled for April 22, 1996. The only work done on a new trial motion was that appellant's trial counsel had "gone through some of the pertinent portions of the transcripts to start formulating what I might present in the form of a motion for new trial." The trial court found that there was not good cause to grant the continuance because the motion for juror information had been heard and denied and

appellant's trial counsel had decided to work on the habeas matter despite having assured the trial court that it would not interfere with the representation of appellant. (CT 4006, 4014; RT 8432-8438, 8443-8444.)

During the hearing on the motion to continue, appellant stated his intention to file his own motion for a new trial on the ground of ineffective assistance of counsel. The trial court did not change its ruling on the motion to continue but did state that any new trial motion drafted by appellant would be heard at the same time as any other motions on April 23, 1996. (RT 8438-8442, 8450.) Appellant subsequently filed his own written motion for a new trial in which he alleged trial counsel was ineffective for not properly investigating Charles Brock's statements to police, for stipulating that there was insufficient DNA on appellant's jacket to perform further testing and for failing to introduce evidence that there was a reward for information leading to appellant's arrest and conviction. (CT 4015-4057.)

At the hearing on April 23, 1996, appellant's trial counsel stated that he had not had time to prepare a new trial motion because of his work on another case and that he should be considered incompetent. (RT 8533.) The trial court stated that appellant's trial counsel had had ample time to prepare a motion, particularly where the grounds for the motion would be the issues resolved against appellant at trial, that the trial court would not be "blackmailed" into granting a continuance by trial counsel's claim of incompetence, that appellant's trial counsel had decided he did not want to go forward that date, that appellant's trial counsel was not incompetent and that his claim of incompetence was tactical, that appellant's trial counsel was on notice to be prepared after his motion for continuance was denied and that appellant's trial counsel had selected the date for the new trial motion to be heard. (RT 8533-8536.)

The trial court heard argument from appellant on his new trial motion based on incompetence of trial counsel. The motion was denied on the ground that as to each issue raised by appellant, his trial counsel had been competent. The trial court also denied appellant's request for counsel to prepare the motion, which was made orally during the argument, on the ground that the request was made for purposes of delay. (CT 4059; RT 8537-8552.)

The trial court made the following statement:

> [Trial counsel] has not seen fit to file a motion for new trial so the court will indicate the following:
>
> The defense is deemed to have made a motion for new trial based on each and every objection lodged by the defense throughout the trial, including a request for a mistrial made and including objections to any and all instructions given to the jury by the court, including those given pursuant to the request of the jury.
>
> I will further note that the defense has made a motion for a new trial – stop me if I am wrong or if you don't want to raise any grounds – but I will assume that you are making a motion for new trial based on the admissibility of testimony of what you claim are hypnotized witnesses in this case, including Agent Bulman.
>
> I will assume that you further added to that motion the failure of the court to allow certain testimony into evidence, certain declarations against interest as they were characterized by the defense.
>
> So Charles Brock and others.
>
> And I will further perceive that your motion for a new trial includes the fact that the court ruled [appellant] would be impeached with a prior murder conviction should [appellant] take the witness stand.
>
> And I will further perceive that you are now arguing that you were precluded from testifying in the guilt phase of this trial due to that ruling.

> And I will further add to that that you want a new trial because of the fact that the triple murder conviction was allowed to been made known to the jury as a special circumstance in the case not withstanding your claim that on that case also you had ineffective assistance of counsel.
>
> And, further, that you are complaining that I did not allow full litigation in this court of that matter based upon that allegation of misconduct.
>
> I will further deem that the motion was made based on my denial of your wiretap motion and under 1538.5 and any other authorities that you raised.
>
> I will further deem your motion to be made today based on my denial of a motion to dismiss the case based on what you have argued to be an impermissible interference with the attorney/client privilege.
>
> On each of those grounds your motion for new trial is denied.
>
> [Trial counsel], other than those and your complaint to the court that I did not grant your motion for continuance and did not grant your motion for juror identification information based on by finding that there was no good cause demonstrated under the statute, any other legal cause?

(CT 4059; RT 8552-8554.) Appellant conferred with his trial counsel, after which trial counsel added that appellant wanted the court to consider that it was ineffective assistance of counsel for trial counsel not to have take sought a writ of mandate after appellant's motion to excuse the trial judge was denied. (RT 8554-8555.) The trial court denied the new trial motion that had been filed on the additional grounds as well. (CT 4059; RT 8556-8557.)

Appellant's trial counsel objected that, "I have not seen in any other case that I have handled such as this that a continuance was not granted to allow the attorney to prepare a motion for new trial when the client was willing to waive time." The trial court reiterated that section 1050 applied, noted the

objection and moved on to sentencing. (RT 8557.)

B. The Trial Court Did Not Abuse Its Discretion Or Violate Appellant's Right To Due Process, By Denying The Continuance Motion

Appellant contends that the trial court abused its discretion by denying him a continuance (AOB 317-325), and that the trial court's error constituted a reversible per se deprivation of his right to due process (AOB 326-330). Appellant is incorrect as to both contentions.

Under section 1050,[20] continuances shall be granted only upon a showing of "good cause." (§ 1050, subd. (e).) The convenience of the parties is not "good cause" for purposes of section 1050. (§ 1050, subd. (e).) "The determination of whether a continuance should be granted rests within the sound discretion of the trial court, although that discretion may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare." (*People v. Sakarias* (2000) 22 Cal.4th 596, 646, citing *People v. Hawkins* (1995) 10 Cal.4th 920, 945, *People v. Maddox* (1967) 67 Cal.2d 647,

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20. Section 1050, provides, in relevant part:
(b) To continue any hearing in a criminal proceeding, including the trial, (1) a written notice shall be filed and served on all parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary . . .
. . . . .
(e) Continuances shall be granted only upon a showing of good cause. Neither the convenience of the parties nor a stipulation of the parties is in and of itself good cause.
(f) At the conclusion of the motion for continuance, the court shall make a finding whether good cause has been shown and, if it finds that there is good cause, shall state on the record the facts proved that justify its finding. A statement of facts proved shall be entered in the minutes.

652, *People v. Fontana* (1982) 139 Cal.App.3d 326, 333.) No abuse of discretion occurs when counsel is "clearly told when the motions would be heard and allowed a reasonable time to prepare." (*People v. Ketchel* (1963) 59 Cal.2d 503, 547 [seventeen days was considered reasonable time to prepare], disapproved on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2.) In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case, focusing on the reasons for the request and whether a continuance would be useful. (*People v. Frye* (1998) 18 Cal.4th 894, 1012-1013; *People v. Courts* (1985) 37 Cal.3d 784, 791.)

Here, no abuse of discretion or denial of due process occurred. On March 18, 1996, appellant's trial counsel was given approximately five weeks to prepare a motion for new trial, a week longer than he had requested. Appellant's trial counsel had previously assured the trial court that his other commitment, a habeas matter in which he was co-counsel, would not interfere with the trial in this matter. Although appellant's trial counsel filed a motion for juror personal information on March 22, 1996, at no time did he justify why he was unprepared to address the numerous other issues that had been raised by appellant during the trial. Appellant's counsel argued that as of March 29, 1996, he spent all of his time representing his habeas client, a fact which, even if true, does not explain why nothing was done to prepare for a new trial motion in this matter prior to that date.

Further, a continuance would not have resulted in appellant being able to prepare additional arguments based on juror interviews. (See AOB 321.) It appears that appellant's trial counsel was delayed for at most a few minutes after the jurors had been released from service. (RT 8429-8431.) No jurors approached appellant's trial counsel in the courthouse hallway after the conclusion of the trial. (CT 3992.) Obviously, the jurors were told they had an

opportunity to speak to trial counsel but chose not to. Appellant sought personal juror information to determine "if the jurors followed the court's orders" and whether "there were any violations of the court's instructions." (See CT 3992.) Appellant's motion was denied. Even if appellant had sought to interview the jurors, it is speculative whether any would have agreed to speak with appellant's trial counsel, and even so, questioning the jurors about how they understood and applied the trial court's instructions would not have yielded admissible evidence for purposes of a motion for a new trial. (See Evid. Code, § 1150, subd. (a) [evidence of juror thought processes is inadmissible in a motion for new trial]; *People v. Lewis* (2001) 26 Cal.4th 334, 388-389; *People v. Hedgecock* (1990) 51 Cal.3d 395, 419.)

At the time appellant moved for a continuance, his motion to reveal personal juror information had already been denied, such that reconsideration was highly unlikely. Moreover, as discussed above, the motion for juror personal information was based on speculation and the faulty premise that juror thought process evidence would be admissible. Thus, a continuance would not have been helpful in preparing issues related to the jury because the motion for juror information would not have been reconsidered and even so, would not have resulted in additional meritorious arguments for purposes of a motion for new trial.

Numerous cases have found no abuse of discretion under circumstances similar to those presented here. In *Sakarias*, capital sentencing and the automatic application to modify the verdict were scheduled 31 days after the jury returned a penalty phase verdict of death. On the date of the hearing, the defendant's counsel made an oral motion for a continuance in order to file a new trial motion. The defendant's counsel stated he had just returned from a two-week vacation, had spent the previous day reviewing the record in order to prepare for a new trial motion, and had just that morning begun

reviewing the probation report. (*People v. Sakarias*, 22 Cal.4th at p. 646.) Under these facts, the trial court was held not to have abused its discretion in denying the motion. The facts showed that the defendant's counsel had ample notice of the hearing, gave no reason why he did not use the available time to prepare, and had not requested a continuance prior to the date of the hearing. (*Id.* at p. 647.)

In *People v. Snow* (2003) 30 Cal.4th 43, 76-77, no abuse of discretion was found where, after one continuance to file a motion for new trial had been granted, the defendant requested an additional continuance to investigate new evidence. Under the circumstances, *Snow* found that the defendant had been afforded a "reasonable opportunity" to prepare and there had been no showing that a continuance would have resulted in useful information, such that no abuse of discretion occurred. (*Id.* at pp. 77, 92.)

In *People v. Smithey* (1999) 20 Cal.4th 936, a new trial motion was scheduled for two weeks after the verdict. At the hearing, the defendant's counsel requested a continuance to investigate an allegation of jury misconduct and the hearing was rescheduled for eleven days later. At the next hearing, the defendant's counsel orally requested another continuance to further investigate the allegation of jury misconduct. An additional eleven day continuance was granted. However, at the next hearing, eleven days later, the defendant requested an additional continuance to interview other jurors without explaining why no other work had been performed or why a declaration had not been obtained from a juror who had been interviewed. Under these circumstances, no abuse of discretion in denying the motion for continuance was found. (*Id.* at pp. 1010-1012.) Implicit in *Smithey* is the recognition that eleven days may be considered a reasonable time to prepare a motion for new trial, even when there is reason to believe jury misconduct occurred.

Here, appellant's counsel was initially given five weeks to prepare a new trial motion. According to appellant's counsel, there were ten days, between March 18, 1996, and March 29, 1996, the time he allegedly became fully engaged in his other case, in which he did little work on a new trial motion in this case. Appellant's motion for juror information was denied on April 11, 1996, twelve days prior to the date scheduled for the hearing on the motion for new trial. It appears appellant's trial counsel assumed, incorrectly, that he would be granted a continuance in this case as a matter of course. Only after his request for a continuance was denied in this case did he seek a continuance in his habeas matter. Thus, like in *Sakarias, Snow* and *Smithey*, no abuse of discretion occurred.

Appellant's reliance on *People v. Sarazzawski* (1945) 27 Cal.2d 7, 18 (AOB 326-329), is misplaced. In *Sarazzawski*, the trial court compelled oral argument on a motion for new trial three days after the jury's verdict despite having indicated that defense counsel would have 13 days to prepare. (*People v. Sarazzawski, supra,* 27 Cal.2d 7, 11-12.) Under the circumstances, the court in *Sarzzawski* found that the defendant's due process rights had been violated. As noted in *Ketchel*, the facts in *Sarazzawski* are entirely distinguishable from circumstances where defense counsel was given adequate notice and time to prepare prior to a request for a continuance being denied. (*People v. Ketchel, supra,* 59 Cal.2d at pp. 546-547.)

Here, unlike in *Sarazzawski*, appellant was given more time than his counsel originally asked for in which to file his motion for new trial. As discussed above, appellant's request for a continuance was not denied in an arbitrary manner, but instead was denied after the trial court considered the written motion and arguments of appellant's trial counsel that failed to explain why appellant's trial counsel was unprepared to go forward on a new trial motion even on grounds that required no investigation. In light of the above,

the denial of appellant's request for a continuance to file a new trial motion was not an abuse of discretion and was not so arbitrary as to deny due process.

C. Appellant Waived Any Objection To A New Trial Motion Being "Deemed" Filed; Moreover, The Trial Court Properly Made A Record Of Its Ruling

Appellant also contends that the trial court had no power to "deem" a new trial motion to have been filed, and the trial court's denial of such a motion contributed to the denial of appellant's right to due process. (AOB 325-330.) This contention has been waived, and moreover, the record shows that the trial court was merely preserving the record in the event appellant later attempted to claim ineffective assistance of counsel.

Appellant never objected to the trial court "deeming" a new trial motion to have been filed on grounds other than those raised in appellant's hand-written motion for a new trial. To the contrary, appellant was given an opportunity to add additional grounds, and did so. (RT 8537-8552, 8554-8555, 8557.) To preserve a claim for appeal, the defendant must object at trial on a specific ground. (Evid. Code, § 353; *People v. Zapien, supra,* 4 Cal.4th at p. 979; *People v. Morris, supra,* 53 Cal.3d at pp. 187-188, 190.) Generally, where a defendant does not raise an argument at trial, he may not do so on appeal. (*People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13; *People v. Mayfield* (1993) 5 Cal.4th 142, 172; *People v. Fauber* (1992) 2 Cal.4th 792, 854; *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.) Thus, to the extent appellant now contends that the trial court erred by "deeming" a new trial motion to have been filed, this contention has been waived by appellant's failure to object.

Moreover, it is well-established that a trial court may not grant a new trial on its own motion. (§ 1181 [court may, upon *defendant's* application, grant a new trial]; *People v. Rothrock* (1936) 8 Cal.2d 21, 24 ["the court may not grant a new trial of its own motion"]; *People v. Sanders* (1990) 221

Cal.App.3d 350, 353 [applying *Rothrock* to hold trial court could not make a motion for new trial sua sponte]; *People v. Lewis* (1977) 75 Cal.App.3d 513, 520 [same]; *People v. Skoff* (1933) 131 Cal.App. 235, 240-241 [trial court did not have authority to grant a new trial on grounds that had not been raised by the defendant].) In light of the above authority, the trial court "deeming" a new trial motion to have been filed was not the equivalent of a new trial motion. Instead, the record shows that the trial court was making a record in the event appellant attempted to argue ineffective assistance of counsel.

Despite having five weeks notice and having been denied a continuance seven days prior to the hearing date for the new trial motion, appellant's counsel arrived on April 23, 1996, with nothing to file. Appellant's trial counsel immediately stated that he should be considered incompetent, to which the trial court appropriately responded that it would not be "blackmailed" into granting a continuance by a claim of incompetence, which was obviously a tactical choice. (RT 8533-8536.) It was only in this context that the trial court stated that "[trial counsel] has not seen fit to file a motion for new trial so . . . [t]he defense is deemed to have made a motion for new trial" on all grounds and objections raised by appellant during the trial. (RT 8552-8554.) In context, the record shows that the trial court was merely making a record of how it would have ruled on a new trial motion should appellant later contend that the trial court prejudicially erred by denying his request for a continuance or, should appellant later claim ineffective assistance of counsel.

In sum, appellant cannot demonstrate that the trial court's denial of his counsel's request for a continuance was an abuse of discretion or an arbitrary deprivation of his right to due process. To the extent the trial court "deemed" a motion for new trial to have been filed, it was of no effect, other than to preserve a record demonstrating that appellant was not prejudiced by the denial of a continuance or by ineffective assistance of counsel. Appellant is not

entitled to reversal.

D. Any Error Was Harmless

Appellant contends that the trial court's error in not granting him a continuance and subsequent "deeming" of a motion for new trial to have been filed is reversible per se. (AOB 329.) However, appellant's argument is premised solely on the trial court's alleged error in denying his motion for a continuance considering that the trial court had no power to effectively deem a motion for new trial to have been filed. As discussed above, the trial court did not abuse its discretion and no constitutional violation occurred. Thus, the standard of prejudice applicable to errors in denying motions for a continuance under section 1050 should apply. Assuming, but not conceding, that it was error to deny the motion for a continuance, any error was harmless.

In the absence of a showing of an abuse of discretion and *prejudice* to the defendant, the denial of a motion for a continuance does not require reversal of a conviction. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1126, citing *People v. Zapien, supra,* 4 Cal.4th at p. 972; *People v. Samayoa* (1995) 15 Cal.4th 795, 840.) For example, in *Barnett*, the court found no prejudice where the defendant produced no evidence demonstrating that a continuance would have yielded relevant evidence that was helpful to the defense. (*People v. Barnett, supra,* 17 Cal.4th at p. 1126.)

Here, the trial court considered all of the errors that appellant alleged occurred at trial as well as the various grounds appellant had alleged entitled him to dismissal during trial and indicated that had a motion for a new trial been filed on those grounds, the motion would have been denied. (RT 8552-8557.) As to appellant's contention that he was somehow denied the ability to allege jury some type of jury misconduct, appellant's contention is based on pure speculation. The record shows that no juror contacted appellant's trial counsel

after trial and at most, appellant's trial counsel desired to speak to the individual jurors to determine if they had understood and followed the trial court's instructions. Appellant's motion for juror personal information had been denied prior to his requesting a continuance. (CT 3990-3994, 4006; RT 8432-8438, 8443-8444.) Considering that evidence of juror thought processes was inadmissible to attack appellant's conviction, and the trial court had already ruled that appellant could not have access to juror personal information, appellant cannot demonstrate that he could have prevailed had he been granted a continuance to file a motion for a new trial. (See Evid. Code, § 1150, subd. (a); *People v. Lewis, supra,* 26 Cal.4th at pp. 388-389.) Because it is not reasonably probable appellant would have obtained a better result had a continuance been granted, any error was harmless. (See *People v. Watson, supra,* 46 Cal.2d at p. 836.)

XIX.

THE JURY WAS PROPERLY INSTRUCTED REGARDING HOW TO VIEW MITIGATING EVIDENCE AT THE PENALTY PHASE; MOREOVER, ANY ERROR WAS HARMLESS

Appellant contends that the trial court prejudicially erred by refusing to instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt and that mitigating circumstances may be found no matter how weak the evidence is. Appellant further contends that the error deprived him of his right to a reliable capital sentencing determination in violation of the Eighth Amendment to the United States Constitution. (AOB 330-332.) Appellant's contention is meritless. Moreover, any error was harmless. As to appellant's constitutional contention, this issue was waived by appellant's failure to assert it at trial, and regardless, is meritless.

Prior to deliberations, appellant requested, in part, that that CALJIC No. 8.85, be modified to include the following:

> A mitigating circumstance does not have to be proven beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.

(CT 3870-3871.) The trial court denied appellant's request, and the jury was instructed with CALJIC No. 8.85, as follows:

> In determining which penalty is to be imposed the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

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

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

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

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

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

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

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

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

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

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the

> offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle].

(CT 3892-3893.) As to factor (c), the presence or absence of any prior felony conviction, the jury was instructed that appellant's conviction of such crimes had to be proven beyond a reasonable doubt. (CT 3901.)

The jury was further instructed under CALJIC No. 8.88, in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate considering the totality of the aggravating circumstances with the totality of the mitigating.

(RT 3902-3903.)

Appellant contends that the trial court erred because his proposed instructions were proper under *People v. Wharton* (1991) 53 Cal.3d 522, 600-601. (AOB 330.) However, appellant's reliance on *Wharton* is misplaced. In *Wharton*, the defendant requested an instruction like that requested by appellant and the instruction had been given. On appeal, the defendant challenged the instruction on the ground that it violated the Eighth Amendment by shifting a burden of proof to the defendant to prove mitigating factors by substantial evidence. *Wharton* held only that *if* such an instruction was given, it did not violate the Eighth Amendment. *Wharton* did not hold that instructions like those suggested by appellant *must* be given. (*Ibid.*) Thus, *Wharton* does not support appellant's contention.

This Court has repeatedly rejected the contention that it is error not to instruct a penalty phase jury that mitigating factors do not have to be proven beyond a reasonable doubt. For example, in *People v. Kraft, supra,* 23 Cal.4th 978, 1077, this Court rejected a proposed instruction similar to the one sought by appellant in the instant case, where the jury was otherwise properly instructed on how to consider mitigating factors.

Similarly, in rejecting a claim like that made by appellant in this case, this Court has rejected the contention that "in the absence of a specific instruction, the jury is likely to believe that it is bound by the reasonable doubt instruction given during the guilt phase in deciding whether evidence can count in defendant's favor as mitigating." (*People v. Welch* (1999) 20 Cal.4th 701, 768.) In *Welch*, like in the instant case, the jury was instructed that the reasonable doubt standard applied to some aggravating factors, while the trial court made no mention of mitigating factors. The *Welch* court concluded that under the circumstances, no reasonable juror would infer that the reasonable doubt standard applied to mitigating factors. Thus, like in *Kraft* and *Welch*, appellant's contention must be rejected.

Further, appellant's contention that "there was no valid reason" to refuse his proposed instructions also fails in light of *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418. In *Carpenter*, this Court clarified that during the penalty phase of a capital trial, instructions on the burden of proof are unnecessary because the decision-making process is inherently moral and normative rather than factual. Thus, except for other crimes evidence that is used as an aggravating factor, the trial court in *Carpenter* should not have instructed the jury on the burden of proof at all. (*Ibid.*) Applying *Carpenter* to the instant case, there was no need for a special instruction informing the jury that mitigating factors need not be proven beyond a reasonable doubt and that mitigating circumstances may be found no matter how weak the evidence is.

Appellant further contends that the trial court's refusal to instruct the jury as he requested violated his right to an individualized capital sentencing determination in violation of his rights under the Eighth Amendment to the United States Constitution. (AOB 332.) Appellant has waived this contention by failing to raise it at trial. (See Evid. Code, § 353; *People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Padilla, supra,* 11 Cal.4th at p. 971; *People v. Sanders, supra,* 11 Cal.4th at p. 539, fn. 27; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20.) Moreover, as discussed above, appellant's jury was properly instructed that they could find as mitigating circumstances "any other circumstance that extenuates the gravity of the crime . . . and any sympathetic or other aspect of the defendant's character or record . . . as a basis for a sentence less than death." (CT 3893.) The jury was further instructed, consistent with achieving an individualized capital sentencing determination, that they were "free to assign whatever moral or sympathetic value . . . to each and all of the factors you are permitted to consider." Further, as noted by this Court in *Carpenter*, a state's penalty phase scheme would not violate the constitution even it placed the burden of proving mitigating factors on the defendant by a preponderance of the evidence. (*People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418, citing *Delo v. Lashley* (1993) 507 U.S. 272, 276 [113 S.Ct. 1222, 122 L.Ed.2d 620]; *Walton v. Arizona* (1990) 497 U.S. 639, 649, 669-673 [110 S.Ct. 3047, 111 L.Ed.2d 511].) In light of the above, the trial court's refusal to instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt and that mitigating circumstances may be found no matter how weak the evidence, did not violate appellant's rights under the Eighth Amendment.

Finally, any error was harmless. In determining whether an error in instructing the jury at the penalty phase is harmless, the reviewing court must affirm the judgment unless it concludes there is a reasonable (i.e., realistic)

possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) The assessment of prejudice is based on the assumption that the jury was reasonably, conscientiously, and impartially applying the standards that govern their decision. (*Ibid.*)

Here, as discussed above, there was no possibility that the jury was somehow confused into thinking that mitigating circumstances had to be proven beyond a reasonable doubt or that they were not entitled to determine for themselves whether a mitigating circumstance had been shown. Regardless, assuming but not conceding error occurred, there is no reasonable possibility of a different verdict. The mitigating evidence presented by appellant's family consisted mainly of his family's assertions that he was a good son, father, or brother, who was loved by his family. However, the evidence presented in aggravation showed that: appellant had been convicted of murdering three other people; had been convicted of the home-invasion robbery of the Tyre family; had been convicted of shooting James Williams; had assaulted Deputy Loarie while in county jail; and had been involved in two incidents in which he threatened police officers with bodily harm. In light of the overwhelming evidence in aggravation, including the horrific and callous circumstances of Julie Cross's death, there is no reasonable possibility of a different result.

In sum, the instructions that were given to the jury properly conveyed to the jury how they could consider the mitigating evidence in determining the appropriate penalty. Thus, no error occurred, let alone an error of constitutional dimension. Moreover, any error was harmless. Reversal is not warranted.

XX.

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

Appellant contends that the trial court prejudicially erred, in violation of his right to a reliable, individualized capital sentence by refusing his requested jury that any one of the mitigating factors could support a decision that death was not the appropriate penalty and that the jury was not limited to the specific mitigating factors listed by the court. (AOB 332-334.) Appellant is incorrect because the substance of his requested instructions was contained in the other jury instructions given at the penalty phase. As to appellant's federal constitutional claim, it was waived, and moreover is meritless. Regardless, any error was harmless considering that the aggravating evidence was overwhelming when compared to the mitigation evidence presented by appellant.

At trial, appellant requested the following jury instruction, which was rejected by the trial court:

> The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors.

(CT 3871.)

The jury was instructed pursuant to CALJIC No. 8.85, in relevant part:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:
> . . .
>
> (k) *Any other circumstance which extenuates the gravity of the crime* even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle].
> . . .
>
> The permissible aggravating factors are limited to those factors upon which you have been instructed.

(CT 3892-3893 [italics added].) The jury was further instructed under CALJIC No. 8.88, in relevant part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. *You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.* In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate considering the totality of the aggravating circumstances with the totality of the mitigating.

(CT 3902-3903.)

Appellant's reliance on *People v. Wharton, supra,* 53 Cal.3d at p. 601, fn 23 (AOB 332-333), is misplaced. As discussed in section XIX, above, *Wharton* does not stand for the proposition that the penalty phase instructions

requested by appellant are required by California law or the federal constitution. Instead, *Wharton* merely held that it was not error if such an instruction had been given. (*People v. Wharton, supra,* 53 Cal.3d at p. 601, fn 23.) Thus, nothing in *Wharton* demonstrates that the trial court erred.

Moreover, contrary to appellant's contention, the instructions that were given to the jury contained the same substance as the rejected instruction, such that no error occurred. In *People v. Williams* (1988) 45 Cal.3d 1268, 1322, the defendant contended, as does appellant, that the trial court erred by refusing an instruction that a single mitigating circumstance may be sufficient to support a conclusion that death was not the appropriate penalty. *Williams* rejected this contention where the jury instructions and arguments ultimately presented to the jury accurately reflected the "qualitative" nature of the penalty decision. (*Ibid.*)

Similarly, in *People v. Lucero* (2000) 23 Cal.4th 692, 731, this Court rejected a defendant's contention that the jury should have been instructed that one mitigating factor was sufficient to outweigh all of the aggravating factors. *Lucero* found that the substance of the requested instruction was contained in a jury instruction that told the jury to "determine ... which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (*Ibid.*) In addition, *Lucero* found no error because had an instruction like that requested by appellant been given, it would have been argumentative without a corollary instruction to the effect that one aggravating factor was sufficient to outweigh all of the mitigating factors. (*Ibid.*)

Here, as in *Williams* and *Lucero*, the jury was properly instructed. First, contrary to appellant's contention (AOB 333), CALJIC No. 8.85 conveyed to the jury that "any other" mitigating circumstance could be taken into account, whereas aggravating factors were limited to those enumerated in

the instructions. (CT 3893.) Further, CALJIC No. 8.88 conveyed to the jury that a mitigating circumstance was "any fact, condition or event" that may be considered as an extenuating circumstance and that the jury was free to assign whatever moral or sympathetic value it chose to any one factor. The substance of the jury instructions given to appellant's jury was consistent with section 190.3, subdivision (k), which this Court has described as a "catch-all" provision. (See *People v. Carpenter, supra,* 15 Cal.4th at p. 421.) Further, when a jury was given instructions similar to CALJIC Nos. 8.85 and 8.88, which were given in this case, and which convey the substance of section 190.3, subdivision (k), "[t]here is no reasonable likelihood that the . . . instructions, considered as a whole, would have led a reasonable juror to believe he or she could not consider, in mitigation, *any* relevant evidence." (*People v. Roybal* (1998) 19 Cal.4th 481, 527-528 [italics in original].), Thus, CALJIC Nos. 8.85 and 8.88 properly conveyed to the jury that their consideration of mitigating factors was not limited to those set forth in the instructions and that a single mitigating factor could outweigh the aggravating factors. In light of the above, the trial court properly refused the requested instruction.

By failing to make a timely and specific objection under the United States Constitution, appellant has waived any claim of constitutional error. (See Evid. Code, § 353; *People v. Williams, supra,* 16 Cal.4th at p. 250; *People v. Padilla, supra,* 11 Cal.4th at p. 971; *People v. Sanders, supra,* 11 Cal.4th at p. 539, fn. 27; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20.) Moreover, appellant's federal constitutional claim is meritless because the jury was properly instructed that they could consider any evidence in mitigation and give it whatever weight they thought it deserved. (See *People v. Roybal, supra,* 19 Cal.4th at p. 528 [federal constitutional claims meritless where jury was instructed similarly to appellant's jury that any mitigating evidence could be considered].)

Finally, any error was harmless. The reviewing court must affirm a penalty phase determination unless it concludes there is a reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Brown, supra,* 46 Cal.3d at p. 448.) The reviewing court assumes that the jury was reasonably, conscientiously, and impartially applying the standards that govern their decision. (*Ibid.*) Here, there was no possibility that the jury was somehow confused by the instructions into thinking that one mitigating circumstance could not be sufficient in the weighing process to render the death penalty inappropriate. As discussed above, the instructions that were given to the jury accurately conveyed to the jurors that they could assign whatever "moral or sympathetic" value they thought appropriate to the mitigating evidence.

Further, appellant contends, without specifically naming or citing to the record (AOB 334), that there were factors in appellant's background and personal history that by themselves would have supported a life sentence. However, the record shows that the extent of the mitigating evidence was that appellant was a reliable employee when employed and that he was loved by his family. When weighed against appellant's violent criminal history and the circumstances of this crime, there was no possibility that appellant would have received any sentence less than death. Reversal is not warranted.

XXI.

CUMULATIVE ERROR DOES NOT JUSTIFY REVERSAL

Appellant contends that the cumulative effect of all of his contentions of error deprived him of a fair trial, such that he is entitled to reversal. (AOB 334-336.) Appellant is incorrect.

When a defendant invokes the cumulative error doctrine, "the litmus test is whether defendant received due process and a fair trial." (*People* v. *Kronmeyer* (1987) 189 Cal.App.3d 314, 349.) Therefore, any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*)

Here, appellant's contention should be rejected. As shown in this brief, appellant received a fair trial. Notwithstanding appellant's arguments to the contrary, the record contains few, if any, errors (and respondent concedes none), and no prejudicial error has been shown. Moreover, substantial evidence supported appellant's guilt. To the extent any error arguably occurred, the effect was harmless. Review of the record without the speculation and interpretation offered by appellant shows that he received a fair and untainted trial. Even when considered together, it is not reasonably probable that, absent the alleged errors, appellant would have received a more favorable result. (*People* v. *Kronmeyer, supra,* 189 Cal.App.3d at p. 349.) Reversal is not warranted.

XXII.

SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTION

Appellant contends that his conviction was not supported by sufficient evidence. Specifically, appellant argues that the evidence presented at trial was unreliable or should not have been admitted as set forth in the other contentions he has raised in his opening brief. (AOB 337-341.) Appellant is incorrect because substantial evidence supported his conviction.

When the sufficiency of the evidence to support a criminal conviction is challenged on appeal, the appellate court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – – evidence that is reasonable, credible, and of solid value – – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Osband* (1996) 13 Cal.4th 622, 690; see also *Jackson v. Virginia, supra,* 443 U.S. at p. 318.) The reviewing court presumes in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Osband, supra,* 13 Cal.4th at p. 690.) The reviewing court does not reweigh the evidence or evaluate the credibility of the witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same. (*People v. Thomas* (1992) 2 Cal.4th 489, 514; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

First, to the extent appellant repeats his arguments that Agent Bulman's identification of People's Exhibits 19 and 20 should have been excluded, this issue has been addressed in Arguments I, V, and VI, above. Similarly, to the extent appellant repeats his argument that evidence of positive presumptive blood tests results on appellant's jacket should have been excluded from evidence, this issue was addressed in Argument IX, above.

As to Agent Bulman's identification of appellant's photographs in People's Exhibits 19 and 20, appellant contends that the identification was unreliable because Agent Bulman did not identify appellant in a lineup on June 19, 1990, and because on August 20, 1980, Agent Bulman identified a photograph of another man as "closely resembling" the person on the passenger side of the car. (AOB 338, citing RT 2671.)

There is nothing in the record demonstrating that the *jury* heard any evidence about an August 20, 1980, identification of a photograph by Agent Bulman. Appellant appears to have erroneously cited to the Reporter's Transcript that reflects the pretrial testimony of Agent Torrey and which does not mention Agent Bulman. (See RT 2671.) It appears appellant intended to cite to the Clerk's Transcript that reflects the People's opposition to appellant's motion to dismiss for pretrial delay. An attachment to the motion reflects that as part of the investigation, a witness had identified someone named Curtis J. Jackson as looking like the suspect composite and that Agent Bulman had selected Curtis J. Jackson's photograph from a photographic lineup as, in the words of the police report, "closely resembling" the individual that approached Agent Cross's side of the car. (CT 2671.) However, the jury never heard any evidence about the August 20, 1980, interview with Agent Bulman. (See RT 4838-4850, 4859-4862, 4916-4923, 4931-4933, 4943-4946.) Because no evidence was presented to the jury regarding an August 20, 1980, interview with Agent Bulman in which he identified a photograph of someone who resembled his assailant, this fact cannot be considered for purposes of determining whether substantial evidence supported the jury's verdict.

Moreover, substantial evidence supported Agent Bulman's testimony. At all times, Agent Bulman candidly admitted that he had not identified appellant at the April 19, 1990 lineup and could not identify appellant in court. (RT 4845-4846, 4850, 4932-4933.) However, the photographs shown to

appellant as People's Exhibits 19 and 20, were photographs of appellant taken closer in time to the date of the crime that had not previously been shown to Agent Bulman. (RT 4859-4862.) Agent Bulman's inability to identify appellant in a lineup in 1990, or in court in 1995, is readily explained by the natural changes in appearance caused by the passage of time. Agent Bulman's refusal to identify appellant in court demonstrates that Agent Bulman was not willing to identify someone just because he was expected to. Thus, there was nothing inherently unreliable about Agent Bulman's identification of photographs of appellant taken near the date of crime.

Appellant also contends that the evidence regarding presumptive blood tests on appellant's jacket was "suspect." (AOB 338.) However, appellant fails to acknowledge that his jacket tested positive for blood using two presumptive tests, that when tested the jacket revealed a pattern consistent with a right handed person firing a shotgun at another person at close range and being spattered with blood, that appellant's jacket was proven to have been manufactured prior to 1980, and that appellant's parents had been storing the jacket for him in their home. (RT 4800-4801,4813-4814, 5068, 5070-5078, 5146-5173, 5375, 5432-5439, 5451-5452, 5662-5665, 5734-5738, 5905-5908.) When considered with the other evidence of appellant's role in the murder, the presumptive blood test evidence provided additional circumstantial evidence from which the jury could reasonably infer that appellant was the person who shot Julie Cross.

Similarly, the eyeglass evidence provided substantial circumstantial evidence linking appellant to the crime when considered in light of the other evidence. Appellant contends that there is insufficient evidence relating to the eyeglasses because Detective Henry testified that a report prepared by Detective Theis and Agent Renzi, that had never been reviewed and corrected by Agent Bulman, inaccurately reported that the struggle for the gun had occurred *east*

of the Secret Service car. (AOB 338, citing RT 5941.) However, substantial evidence demonstrates that the broken eyeglasses were found in a place that appellant stood on the night of the crime.

The broken eyeglasses and case were discovered in the street 57 feet *west* of where the Secret Service car had been parked. (RT 5078-5082, 5089-5090, 5100.) In 1978 or 1979, Yvette Curtis had seen appellant wearing glasses like those found at the crime scene to help him drive at night. (RT 5241-5245, 5247-5248.) The eyeglasses found in the street had a prescription that was consistent with the prescription appellant received in 1987. (RT 5540-5555.) At all times, Agent Bulman described his struggle for the gun during which appellant followed him with a shotgun as occurring in front of, or *west,* of the Secret Service car. When asked to recreate the crime scene Agent Bulman stated that appellant's maximum distance west of the Secret Service car as 55 to 60 feet. (RT 4802-4803, 4834-4836, 5919-5928.) Thus, there was substantial evidence from which the jury could conclude that appellant wore glasses in 1980 similar to those that were recovered from the very spot where appellant stood immediately after the murder of Julie Cross.

Finally, appellant contends that insufficient evidence supports his conviction because Jessica Brock's testimony was not credible. According to appellant, Jessica Brock's testimony is not reliable because under questioning from appellant's trial counsel both before and during trial, she made statements indicating that appellant had visited her at night to wash something off on only one occasion in approximately 1978, not 1980. (AOB 339-341.)

The authority cited by appellant favors respondent. (See AOB 340-341.) As noted by Witkin, "because credibility is for the jury or judge as trier of fact to determine, impeachment and inherent improbability are normally matters to be determined in the trial court . . . Inherent improbability, therefore, is recognized as a ground of reversal mainly by dicta." (6 Witkin, Cal. Criminal

Law (4th Ed. 2000), *Criminal Appeal*, § 151, p. 398.) Moreover, in *People v. Carvalho* (1952) 112 Cal.App.2d 482, 489, relied on by appellant (AOB 340), the court clarified that to find testimony "inherently improbable" such that it would not be credited on appeal, the testimony "must involve a claim that something has been done which it would not seem possible could be done under the circumstances described."

Here, Jessica Brock's explanation of events was not inherently improbable and provided substantial evidence supporting appellant's conviction. The record shows that Jessica Brock was under tremendous pressure to assist appellant because she had a child by appellant and was being pressured by appellant's family and her own family. (RT 6050-6052, 6073-6076, 6156.) However, at trial, Jessica Brock clearly and unequivocally distinguished between a 1978 visit from appellant and her brother when she lived in Santa Monica, and appellant's June 4, 1980, visit to her apartment during which he arrived alone, washed blood off a shotgun barrel and admitted to having "taken somebody out" near the airport. Jessica Brock was able to pinpoint the timing of appellant's earlier visit as 1978 based on the age of her son at the time and appellant's connection to a serious crime committed around the same time. (See RT 6053-6055, 6057-6058, 6060-6063, 6077, 6089-6090, 6166-6167, 6298-6299, 6301, 6330, 6351-6354, 6369-6370.)

In sum, appellant is asking this Court to do what it cannot, i.e., reweigh the evidence and evaluate the credibility of Agent Bulman and Jessica Brock. (See *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) Appellant's contention fails because evidence that was reasonable, credible and of solid value, supported the jury's verdict that appellant was guilty of murder beyond a reasonable doubt. (See *People v. Osband, supra,* 13 Cal.4th at p. 690; see also *Jackson v. Virginia, supra,* 443 U.S. at p. 318.)

XXIII.

THE TRIAL COURT PROPERLY RULED ON THE AUTOMATIC APPLICATION FOR MODIFICATION OF THE VERDICT; MOREOVER, ANY ERROR WAS HARMLESS

Appellant contends that the trial court erred in ruling on the automatic application for modification of the verdict under section 190.4, subdivision (e). Specifically, appellant contends that the trial court erred by considering the probation report in its ruling, such that appellant is entitled to remand for a new hearing. (AOB 341-343.) Appellant is incorrect because the record shows that although the trial court had read the probation report prior to ruling on the application pursuant to section 190.4, subdivision (e), the probation report was not considered for purposes of the trial court's ruling. Moreover, even if error occurred, it was harmless, such that appellant is not entitled to remand on this issue.

Prior to ruling on the automatic application for modification of the death verdict, the trial court stated that it had read the probation report. Appellant objected on the ground that the trial court should not have reviewed the probation report prior to ruling. The trial court clarified that it was unaware of any authority prohibiting the trial court from reviewing the probation report prior to the hearing but also clarified both in its oral and written ruling that appellant's probation report had not been considered in support of the trial court's ruling denying modification of the verdict. The trial court ruled that the judgment of death was appropriate in this case. (CT 4078-4085; RT 8557-8564.)

Section 190.4, subdivision (e), provides, in relevant part:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict . . . In ruling on the application, the judge shall

> review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented.

The preferable procedure is for the trial court to defer reading the probation report until after ruling on the automatic application under section 190.4, subdivision (e), because the probation report may contain material that was not presented to the jury. (*People v. Navarette* (2003) 30 Cal.4th 458, 526; *People v. Scott* (1997) 15 Cal.4th 1188, 1225; *People v. Lewis* (1990) 50 Cal.3d 262, 287.) However, even if the trial court has read the probation report prior to ruling, no prejudicial error occurs where the trial court's ruling demonstrates that the trial court did not consider the probation report and otherwise properly considered the aggravating and mitigating evidence presented to the jury. (See *People v. Navarette, supra,* 30 Cal.4th at p. 526; *People v. Scott, supra,* 15 Cal.4th at pp. 1225-1226.) In *Navarette*, no error was found where the trial court read the probation report in anticipation of the sentencing hearing, which was to occur on the same day as the automatic application for modification of the verdict, and the record demonstrated that the trial court's ruling was not based on the materials contained in the probation report when making its ruling. (*People v. Navarette, supra,* 30 Cal.4th at p. 526.)

Here, like in *Navarette*, the record shows that the trial court had read the probation report in anticipation of sentencing, but had not considered the probation report in ruling on the automatic application for modification of the verdict. The trial court expressly set forth the matters on which it relied in support of its ruling. (RT 8559-8560.) The trial court relied on the evidence produced at both the guilt and penalty phases, the testimony of all of the prosecution and defense witnesses, and the arguments made by appellant's counsel for a lesser penalty than death. (RT 8560-8561.) The trial court then

compared the above evidence to the aggravating and mitigating factors listed in section 190.3, before reaching the conclusion that the jury had reached the proper penalty determination. (RT 8561-8564.)

Appellant fails to pinpoint anything cited by the trial court in its ruling that came from the probation report rather than the evidence presented to the jury at trial. (See AOB 341-343.) Absent a contrary indication in the record, this Court assumes that the trial court properly set aside, and was not influenced by, any extraneous material contained in the probation report. (*People v. Samayoa, supra,* 15 Cal.4th at pp. 859-860.)

In light of the above, the trial court did not err in ruling under section 190.4, subdivision (e), that the penalty was appropriate. (See *People v. Navarette, supra,* 30 Cal.4th at p. 526; *People v. Samayoa, supra,* 15 Cal.4th at p. 860.) Remand is not required.

XXIV.

CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE FEDERAL CONSTITUTION ON ITS FACE, OR AS APPLIED AT TRIAL

Appellant contends on numerous grounds that California's death penalty statute violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, both on its face and as applied. (AOB 344-361.) As acknowledged by appellant (AOB 344), and as discussed below, this Court has resolved against appellant each of the contentions he now raises. Because appellant offers no compelling reason for this Court to reconsider its earlier decisions, appellant's claims are meritless and reversal is not required.

A. Section 190.2 Is Not Impermissibly Broad

Appellant contends that section 190.2, which sets forth the special circumstances that render a particular defendant eligible for the death penalty, violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because it does not meaningfully narrow the pool of murderers to those most deserving of consideration for the death penalty. Specifically, appellant contends that section 190.2 does not narrow the class of persons eligible for the death penalty because it encompasses nearly every type of first degree murder. (AOB 345-347.) This Court has repeatedly rejected similar claims. (See *People v. Snow, supra,* 30 Cal.4th at pp. 125-126; *People v. Boyette* (2002) 29 Cal.4th 381, 439-440, citing *California v. Brown* (1987) 479 U.S. 538, 541 [107 S.Ct. 837, 93 L.Ed.2d 934], *Zant v. Stephens* (1983) 462 U.S. 862, 877 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *People v. Sakarias, supra,* 22 Cal.4th at p. 632; *People v. Barnett, supra,* 17 Cal.4th at p. 1179.) In light of the above, and having offered no compelling reason for reconsideration, appellant's contention fails.

B. Section 190.3 Is Not Impermissibly Vague

Appellant contends that section 190.3, subdivision (a), which allows the jury to consider the circumstances of the crime in aggravation or mitigation when determining penalty, violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Specifically, appellant contends that section 190.3, subdivision (a), results in arbitrary and capricious consideration of facts that occurred in every homicide. (AOB 348-353.) As noted by appellant (AOB 348-349), in *Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750], the United States Supreme Court found that section 190.3, subdivision (a), was neither vague, nor violative of the Eighth Amendment. A capital jury should always consider the circumstances of the crime in determining the appropriate penalty, such that the United States Supreme Court has specifically stated, "We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires." (*Ibid.*) This Court has specifically found that a jury's "finding of aggravation based on the circumstances of a crime under section 190.3, factor (a), does not impermissibly permit consideration of a factor that is vague and overbroad." (*People v. Maury* (2003) 30 Cal.4th 342, 439.) In light of the above, and having offered no compelling reason for reconsideration, appellant's contention fails.

C. California's Death Penalty Statute Contains Adequate Safeguards Against Arbitrary And Capricious Sentencing

Appellant contends that California' death penalty statute violates the federal constitution because it lacks the following safeguards against arbitrary and capricious sentencing: written findings and juror unanimity as to aggravating circumstances; a requirement that aggravating circumstances be found beyond a reasonable doubt; a requirement of proof beyond a reasonable

doubt that the aggravating circumstances outweigh the mitigating circumstances; and inter-case proportionality review. Appellant cites no authority for his contentions. (AOB 353-354.) Appellant's contention is meritless because each of the purported "safeguards" identified by appellant has been rejected by this Court as not being constitutionally mandated.

When faced with a similar contention to that made by appellant, this Court recently held:

> The statute is not invalid for failing to require (1) written findings or unanimity as to aggravating factors, (2) proof of all aggravating factors beyond a reasonable doubt, (3) findings that aggravation outweighs mitigation beyond a reasonable doubt, or (4) findings that death is the appropriate penalty beyond a reasonable doubt.

(*People v. Snow, supra,* 30 Cal.4th at p. 126; see also *People v. Maury, supra,* 30 Cal.4th at p. 440 [juror unanimity is not required as to aggravating circumstances because they are not elements of the crime]; *People v. Box, supra,* 23 Cal.4th at p. 1216 [This Court has "consistently rejected" claims that the jury should have been instructed that all aggravating factors must be proved beyond a reasonable doubt, that to impose the death penalty, the jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and that death must be found to be the appropriate penalty beyond a reasonable doubt."].) Finally, this Court has repeatedly held that California's death penalty statute is not unconstitutional for failing to require inter-case proportionality review. (*People v. Snow, supra,* 30 Cal.4th at p. 126; *People v. Box, supra,* 23 Cal.4th at p. 1217; *People v. Jenkins* (2000) 22 Cal.4th 900, 1053.) In light of the above, and having offered no compelling reason for reconsideration, appellant's contention fails.

D. The Failure To Have A Penalty Phase Instruction On The Burden Of Proof Does Not Violate The United States Constitution

Appellant contends that his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated because the jury was not instructed in the penalty phase that all aggravating factors had to be proven by the prosecution beyond a reasonable doubt. (AOB 354-355.) This Court has consistently rejected similar contentions. (See *People v. Box, supra,* 23 Cal.4th at p. 1216; *People v. Fairbank* (1998) 16 Cal.4th 1223, 1255; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418 [because the penalty decision is "inherently moral and normative" rather than factual, instruction on the burden of proof is not required]; *People v. Osband, supra,* 13 Cal.4th at pp. 709-710 [rejecting claim that federal constitution required penalty phase jury to be instructed that all aggravating factors and decision to impose death penalty had to be supported by proof beyond a reasonable doubt].) In light of the above, and having offered no compelling reason for reconsideration, appellant's contention fails.

E. The United States Constitution Does Not Require Unanimous, Written Jury Findings Regarding Aggravating Factors

Appellant contends that California's death penalty sentencing procedure violates the Eighth and Fourteenth Amendments to the United States Constitution because, like in appellant's case, the jury was not instructed to make unanimous written findings as to which factors in aggravation had been proven. (AOB 356-357.) Appellant made the same contention in Argument XXIV.C. (AOB 354), and it has been addressed above. As discussed above, this Court has repeatedly rejected the claim that unanimous written findings regarding aggravating factors are constitutionally required. (See *People v. Snow, supra,* 30 Cal.4th at p. 126; *People v. Maury, supra,* 30 Cal.4th at p.

440.) Having offered no compelling reason for reconsideration, appellant's contention fails.

F. Intercase Proportionality Review Of Death Sentences Is Not Required By The Federal Constitution

Appellant contends that California death penalty statute violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution because section 190.3 neither forbids, nor requires, intercase proportionality review of sentences. (AOB 357-358.) Appellant made the same contention in Argument XXIV.C. (AOB 354), and it has been addressed above. As discussed above, this Court has repeatedly rejected the claim that the United States Constitution requires inter-case proportionality review of death sentences. (See *People v. Snow, supra,* 30 Cal.4th at p. 126; *People v. Box, supra,* 23 Cal.4th at p. 1217; *People v. Jenkins, supra,* 22 Cal.4th at p. 1053.) Having offered no compelling reason for reconsideration, appellant's contention fails.

G. Not Specifically Instructing The Jury Regarding Which Sentencing Factors Were Mitigating And Which Were Aggravating Did Not Result In An Unfair Capital Sentence

Appellant contends that section 190.3, subdivisions (a) through (k), and the jury instructions derived from this section, result in unreliable capital sentencing. Specifically, appellant contends that use of the phrase "whether or not" in the jury instructions derived from section 190.3, factors (d), (e), (f), (g), (h), and (j), without specifically instructing the jury as to which factors were aggravating and which were mitigating, could result in juries giving aggravating relevance to a finding that a specific factor was "not" present. (AOB 358-359.) This court and the United States Supreme Court have rejected similar claims, such that appellant's contention fails.

"A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." (*People v. Arias, supra,* 13 Cal.4th at p. 188, citing *Tuilaepa v. California, supra,* 512 U.S. at p. 979.) Thus, this Court has repeatedly held that trial courts are not required to identify particular sentencing factors as aggravating or mitigating and that the 1978 death penalty law is constitutional despite the absence of such a requirement. (*People v. Maury, supra,* 30 Cal.4th at pp. 443-444, citing *People v. Turner, surpa,* 8 Cal.4th 137, 208; *People v. Pinholster* (1992) 1 Cal.4th 865, 973; *People v. Arias, supra,* 13 Cal.4th at p. 188, citing *People v. Hawkins, supra,* 10 Cal.4th 920, 964; *People v. Turner, supra,* 8 Cal.4th 137, 208; *People v. Howard, supra,* 1 Cal.4th 1132, 1196.) For example, this Court recently rejected the contention that jurors should have been instructed that, among other things, factors (d), (e), (f), (g), (h), and (j) of section 190.3, could only be considered as mitigating factors. (*People v. Carter* (2003) 30 Cal.4th 1166, 1230-1231.) Moreover, this Court has found that "no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors" such that it was not error to instruct the jury in the language of section 190.3. (*People v. Arias, supra,* 13 Cal.4th at p. 188.)

Appellant's contention fails because the United States Constitution does not require that capital juries be instructed as to how to weigh any particular fact when making a sentencing decision. Moreover, despite the phrase "whether or not" prefacing factors (d), (e), (f), (g), (h), and (j), no reasonable juror would be misled into thinking these were aggravating factors. Appellant has not offered any compelling reason why this Court should reconsider its earlier decisions. Thus, appellant's contention fails.

H. The Verdict Of Death Need Not Be Based on Unanimous Findings Beyond A Reasonable Doubt

Appellant's final contention is that this Court should reconsider its decisions that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct 2428, 153 L.Ed.2d 556] do not mandate juror unanimity beyond a reasonable doubt as to the decision to impose the death penalty under California law. (AOB 360-361, citing *People v. Prieto* (2003) 30 Cal.4th 226, 263; *People v. Snow, supra,* 25 Cal.4th at p. 589; *People v. Anderson* (2001) 25 Cal.4th 543, 589.) Appellant's contention is meritless, and has repeatedly been rejected by this Court.

As noted by appellant (AOB 360), this Court has concluded on multiple occassions that *Apprendi* and *Ring* do not affect California's death penalty law at all. Specifically, unlike *Ring* and *Apprendi*, which involved judicial decisions that functioned to increase penalty, California's death penalty law requires that the jury unanimously agree beyond a reasonable doubt that a particular defendant is eligible for the maximum penalty by requiring a unanimous special circumstance finding. The subsequent penalty phase trial in California, coming after eligibility for the maximum penalty has already been determined by a unanimous jury beyond a reasonable doubt, is more akin to the trial court's traditional discretionary sentencing decision. Thus, *Ring* and *Apprendi* do not require that the jury unanimously find each aggravating factor beyond a reasonable doubt. (See *People v. Smith* (2003) 30 Cal.4th 581, 642; *People v. Prieto, supra,* 30 Cal.4th at pp. 262-263; *People v. Snow, supra,* 30 Cal.4th at p. 126, fn. 32.) Appellant has offered no compelling legal reason for this court to reconsider its earlier decisions. Reversal is not required.

CONCLUSION

For the reasons set forth above, respondent respectfully requests that the judgment be affirmed.

Dated: February 23, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

SHARLENE A. HONNAKA
Deputy Attorney General

RICHARD T. BREEN
Deputy Attorney General

Attorneys for Plaintiff-Respondent

RTB:lpn
LA1997XS0009

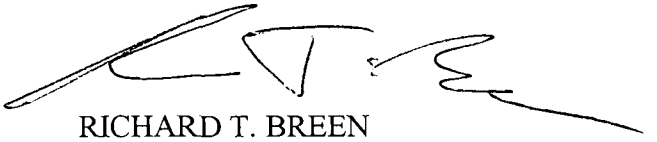
CERTIFICATE OF COMPLIANCE
(CALIFORNIA RULES OF COURT, RULE 36(b)(2))
CAPITAL CASE

I certify that the attached brief contains 68407 words.

Dated: February 23, 2004

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



RICHARD T. BREEN
Deputy Attorney General

Attorneys for Plaintiff-Respondent

RTB:lpn
LA1997XS0009

DECLARATION OF SERVICE

Case Name: People v. Andre Stephen Alexander Case No.: S053228

I declare:

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 18 years of age or older and not a party to the within entitled cause; 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 FEB 24 2004, I placed two (2) copies of the attached

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

THOMAS KALLAY
Attorney at Law
1317 N. San Fernando Boulevard, # 906
Burbank, California 91504-4272

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the case in the lower court and to a copy to the California Appellate Project .

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on FEB 24 2004, at Los Angeles, California.

LISA P. NG

RTB:lpn
LA1997XS0009