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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **ROBERT WESLEY COWAN,** Defendant and Appellant.	**CAPITAL CASE** S055415

Kern County Superior Court No. 059675A
The Honorable Lee P. Felice, Judge

RESPONDENT'S BRIEF

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

JULIE A. HOKANS
Supervising Deputy Attorney General

ERIC L. CHRISTOFFERSEN
Deputy Attorney General

JOHN A. THAWLEY
Deputy Attorney General
State Bar No. 172452

1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-6879
Fax: (916) 324-2690
Attorneys for Respondent

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STATEMENT OF THE CASE

On September 23, 1994, an information was filed in Kern County Superior Court case number 59675A charging appellant, Robert Wesley Cowan, with three counts of first degree murder (Pen. Code,[1/] § 187, subd. (a)), each of which was alleged to have occurred between August 31, 1984, and September 7, 1984. (CT 647-655.)[2/] As to counts 1 and 2, the information also alleged that appellant personally used a firearm (§ 12022.5, subd. (a)) and that a principal was armed with a handgun (§ 12022, subd. (a)(1)). As to count 3, the information alleged that appellant personally used a knife (§ 12022, subd. (b)). The information alleged three special circumstances as to all three counts: that appellant committed multiple murders (§ 190.2, subd. (a)(3)); and that appellant committed the murders while in the commission or attempted commission of robbery (§§ 212.5, subd. (a); 190.2, subd. (a)(17)(I)) and burglary (§§ 460.1; 190.2, subd. (a)(17)(VII)). The information also alleged,

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1. Hereinafter, all statutory references will be to the Penal Code, unless specifically noted otherwise.

2. The information also alleged charges against a co-defendant, Gerald Thomas Cowan (appellant's brother). However, the instant appeal is only as to appellant Robert Wesley Cowan.

as to all three counts, that appellant had suffered a prior serious felony conviction (§ 667, subd. (a)), and had served a prior prison term (§ 667.5, subd. (b)).[3/] On September 26, 1994, appellant pled not guilty and denied all the allegations. (CT 663-664.)

On November 3, 1994, appellant filed a motion to dismiss the information for prejudicial pre-arrest delay or, alternatively, to dismiss the information pursuant to section 995. (CT 694-745.) On November 28, 1994, the prosecutor opposed appellant's motion to dismiss. (CT 774-795.) On December 28, 1994, appellant supplemented his motion. (CT 847-864.) On December 30, 1994, the court denied the portion of appellant's motion based on section 995. (CT 865.) On January 26, 1995, the prosecutor filed supplemental points and authorities in opposition to appellant's motion to dismiss. (CT 873-892.) On September 11, 1995, the court clarified that it had denied all the motions to dismiss, both statutory and non-statutory. (CT 1051.)

On December 1, 1995, the prosecutor filed a motion to introduce victim impact statements and evidence in aggravation at the penalty phase of the trial. (CT 1056-1062, 1063-1065, respectively.) On January 26, 1996, appellant filed a notice of joinder in various motions filed by his co-defendant, including a motion to dismiss. (CT 1096-1097.) On February 22, 1996, during a hearing on another issue, appellant renewed his motion to dismiss for pre-arrest delay, and the court denied the motion. (CT 1114, 1134-1137.)

On March 14, 1996, appellant filed a supplemental motion to dismiss for pre-arrest delay, as well as a motion to exclude post-mortem photographs of the

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3. In August 1994, appellant had demurred to the complaint (CT 464-465), and he had filed a motion to dismiss based on prejudicial pre-arrest delay (CT 491-500). The prosecutor filed opposition to both motions. (CT 501-504, 513-520.) The hearing of those motions was consolidated with the preliminary hearing, which began on September 6, 1994. (CT 524-638.) The court denied the motions at the close of the combined hearing on September 12, 1994. (CT 21; 9/12/94 RT 116-117.)

victims. (CT 1202-1214.) Later he supplemented his motion to dismiss. (CT 1268-1273.)

On about March 25, 1996, the pretrial hearing of in limine motions began. (CT 1219, 1274-1276.) The next day, the court denied appellant's motion to exclude pictures of the victims. (CT 1278.) On March 27, 1996, the court denied appellant's motion to dismiss. (CT 1281.) The court also denied a motion for a two-month continuance so that appellant could prepare a motion for change of venue due to recent publicity. (*Ibid.*)

On May 7, 1996, a jury was empaneled to try the case. (CT 1321.) On May 10, 1996, appellant filed a motion to sever count 3 from the trial on counts 1 and 2. (CT 1323-1329.) On May 13, 1996, the court heard and denied the motion to sever. (CT 1330.)

On May 15, 1996, the court informed both parties that two of the witnesses were friends of the court. Appellant moved for a mistrial, which the court heard and ordered submitted. The court then ordered the trial to continue over appellant's objection. (CT 1340; RT 1696-1710.) On May 16, 1996, appellant renewed his motion for mistrial. The court denied the motion, recused itself, and then the trial was transferred to another court. (CT 1343; RT 1760-1763.) On May 28, 1996, the court denied appellant's motion for a mistrial. (CT 1358.)

On June 6, 1996, the jury announced that it was hopelessly deadlocked on count 3. The court declared a mistrial as to that count. (CT 1459.) After brief additional deliberation, the jury convicted appellant on counts 1 and 2, found that a principle had been armed with a firearm, and found true as to both counts all of the special circumstances allegations. (CT 1459-1476.)

On June 10, 1996, the court found to be true the prior serious felony conviction allegation, but found to be untrue the prior prison term allegation. (CT 1477-1478; RT 2802-2805.) The court also struck, as to both counts, the

allegation that appellant personally used a firearm, because that allegation had mistakenly not been presented to the jury via the verdict forms. (CT 1478; RT 2805.) The court denied appellant's request that a second jury be impaneled to try the penalty phase because of the mistrial on count 3. (CT 1478; RT 2806.)

On June 11, 1996, the penalty phase began. (CT 1479.) The court denied appellant's motion for a mistrial based on the emotional nature of the victim impact testimony. (CT 1480; RT 2861-2862.) On June 12, 1996, the court denied appellant's motion regarding prosecutorial misconduct (based on an allegation, which the court ruled was unfounded, that the prosecutor had been seen speaking to a juror). (CT 1479, 1482; RT 2836-2838, 2877-2885.)

On June 14, 1996, the court denied appellant's motion for a mistrial based on the jury's inability to make a finding as to the victim in count 3; the jury subsequently found that the sentence on count 2 should be death, and that the sentence on count 1 should be life without the possibility of parole. (CT 1574, 1582-1583.) On July 23, 1996, appellant filed a section 1181.5 motion for a new penalty phase trial on count 2, or in the alternative to reduce the capital verdict pursuant to section 1118.7 and 190.4, subdivision (E). (CT 1586-1608.) On July 31, 1996, the prosecutor opposed the motion. (CT 1609-1612.) On August 5, 1996, the court denied appellant's motion for a new penalty phase trial. (CT 1614.)

On August 5, 1996, the court sentenced appellant to death on count 2, plus the one-year arming enhancement, plus a consecutive term of life without the possibility of parole on count 1, plus the one-year arming enhancement, plus the five-year enhancement for a prior serious felony conviction. (CT 1615, 1644-1649.) The court granted the prosecutor's motion to dismiss count 3, and the court struck the allegations as to that count. (CT 1616.)

On August 5, 1996, appellant filed a timely notice of appeal as to count 1. (CT 1650.) In any event, this appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

The Guilt Phase

The Merck Murder Scene And Initial Investigation

At the time of trial in 1996, Margarita Macias had lived at 738 McClean Street in Bakersfield for 31 years. (RT 1481.) Clifford and Alma Merck,[4/] an elderly couple, lived across the street. (*Ibid.*) Macias, who talked to the Mercks and waved when she saw them, considered herself to be their friend, even though they were private people who kept their front door locked and were careful whom they let into their house. (RT 1482, 1484, 1486.) Clifford was blind in one eye and had very thick glasses, so Macias took him to the bank and provided medical attention to Alma when necessary. (RT 1483, 1486.)

On Saturday, September 1, 1984, during the Labor Day weekend, Macias's son, Victor, and his wife visited Macias with their new baby. (RT 1482.) The Mercks were sitting on their porch at about 10:00 a.m. (*Ibid.*) Alma waved for them to come over so that she could see the baby, and they did. (*Ibid.*) Macias also saw Clifford between 1:00 p.m. and 2:00 p.m., when the mailman delivered the mail. (RT 1483.) However, she never saw the Mercks go into or out of their house at any time after that. (*Ibid.*)

Robert Johnson, who lived in Fresno, was Alma's son. (RT 1492.) Alma had married Clifford Merck about 25 to 30 years earlier. (*Ibid.*) Johnson and his wife had called the Mercks on the Friday before Labor Day, which Johnson believed was August 31, 1984, to say that they would come down to visit on Tuesday morning. (RT 1493.)

On the Tuesday after Labor Day weekend, Johnson and his wife went to Bakersfield to visit the Mercks. (RT 1493.) Johnson walked to the back

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4. Hereinafter, for simplicity of reference, respondent will use the victims' first names.

door and knocked, but no one answered. (*Ibid.*) Then he went to the front door and knocked, but again no one answered. (*Ibid.*) He heard a dog barking inside, but he could not see anything through the window. (*Ibid.*)

Johnson returned to the back door, opened it, and looked into the service porch and laundry area. (RT 1493.) The Mercks did not always keep the back door locked, but the front door was always locked. (RT 1495, 1497.) Johnson could see items lined up from the back door to the kitchen, so he told his wife that something was wrong. (RT 1493.) He went to the south side of the house and tried to look into the window, but there were a lot of flies, almost like a "swarm of bees," around the window. (*Ibid.*) He told his wife to go across the street and call the sheriff's office, which she did. (*Ibid.*) Johnson did not notice any signs of a forced entry.[5] (RT 1502.)

Gregory Laskowski was a criminalist with the Homicide Section of the Kern County Regional Criminalistics Laboratory in Bakersfield. (RT 1598-1599.) On September 4, 1984, he went to the Merck house and was briefed at about 11:00 a.m. (RT 1600.) In general, the house looked liked it had been searched or ransacked, with large items of furniture overturned, drawers out of place, and items in disarray. (RT 1603-1606; Def.'s Ex. Nos. D, G, H & Q; People's Ex. No. 29 [diagram drawn by Laskowski].) In the laundry or utility room he saw a large, console television in front of the washing machine, as well as boxes and sacks. (RT 1602.) In the middle of the hallway floor there were purses, a slipper, articles of clothing and a number of other items. (RT 1603.) On a shelf by the kitchen window there was a small pocket knife with its blade

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5. Later, when the Johnson family cleaned out the Mercks' house to determine what had been taken, Johnson described the house as "trashed." (RT 1504.) Also, the Johnsons noticed and reported to the Social Security office that the Mercks' Social Security checks, which the Mercks had received at their house, were missing. (RT 1503-1505.)

open. (RT 1605; People's Ex. No. 9.) A number of lamps in the house had had their power cords severed. (RT 1606; People's Ex. Nos. 10 & 11.) Likewise, the wall telephone was missing its receiver and cord. (RT 1605; People's Ex. No. 8.) But Laskowski did not recall finding any indications of a forced entry. (RT 1617-1619.)

Laskowski saw the body of Clifford lying prone across a bed in one of the bedrooms. (RT 1606; People's Ex. No. 13.) Clifford's legs and hands were bound, and his head was under a pillow. (RT 1606; People's Ex. No. 14.) Clifford's ankles, which had flies on them, were bound with knotted power cords from the lamps. (RT 1607; People's Ex. No. 15.) An orange throw pillow was near Clifford's abdomen, and the pillow had a bullet hole through it. (RT 1608-1609; People's Ex. No. 17.) Another pillow, normally used for sleeping, was over Clifford's head, and also had a bullet hole through it. (RT 1609-1610; People's Ex. No. 16.) But no spent cartridges were found in the house. (RT 1618.) In Laskowski's training and experience in ballistics and firearms, the purpose of a contact gunshot into pillows is to deaden or muffle the sound of the discharge of the firearm. (RT 1609.) Basically all of Clifford's blood had drained onto the wooden floor. (RT 1610; People's Ex. No. 19.)

Quintin Nerida had worked for about 12 years in the Kern County Sheriff's Department (hereinafter "KCSD") Technical Investigation Section, and his primary responsibility was to investigate crime scenes for fingerprints, and to file and compare fingerprints upon request. (RT 1508-1511.) He had received extensive training in fingerprints, and had qualified as an expert about 300 times in the Kern County courts on the lifting and comparing of latent fingerprints. (RT 1509-1511.)

On September 4, 1984, Nerida went to the Merck house with two members of his section, Helen Sparks and Jim Smith. (RT 1516.) They briefly

walked through the house, and Nerida saw Clifford's body in a bedroom off a short hallway from the living room. (RT 1517.) Then the team began their work. (*Ibid.*) Nerida started processing fingerprints at the back door, which led to the service porch, since that was the suspected point of entry. (*Ibid.*) At trial, Nerida identified People's Exhibit No. 6, which was a latent fingerprint lift card of a print he had lifted from above the door knob on the inside edge of the back service porch door. (RT 1517-1518.)

As Nerida worked his way through the portions of the house that he had been assigned to investigate, he eventually came to a bedroom that was used as a sewing room. (RT 1519-1520.) At the time, Alma had not yet been found. (RT 1520.) Nerida found nothing under the bed in the sewing room, so he processed the wooden sliding doors on the closet for latent fingerprints. (*Ibid.*) Then he slid the doors open. (*Ibid.*) One of the doors lodged at a certain point, and when Nerida pushed it farther, Alma's body fell onto the floor in front of him. (*Ibid.*)

Meanwhile, Laskowski saw that the other two bedrooms of the house were in disarray. (RT 1610-1612; People's Ex. Nos. 21, 22, 23, 25 & 26.) He subsequently learned that Alma's body had been found in the closet of one of those bedrooms. (*Ibid.*) A black appliance cord was wrapped around a portion of Alma's body. (RT 1607-1608.) A telephone cord was wrapped around her neck and mouth, and the receiver was still hanging from the cord. (RT 1612; People's Ex. No. 27.) Alma's hands were bound with a lamp cord. (RT 1612; People's Ex. No. 26.)

Sparks, who had been a crime scene investigator in Kern County for seven years and who had qualified as an expert in Kern County courts on the lifting of latent prints, took pictures of the scene, and Smith took notes. (RT 1571-1573.) Then Sparks attempted to lift prints from the scene. (RT 1574.) Sparks lifted prints from the bottom of one of the plastic sewing trays from a

sewing kit that was on the dining room table (People's Ex. No. 7; see also Def.'s Ex. No. H). (RT 1575.)

The KCSD policy was to create a crime scene report, which listed the photographs taken and the prints lifted from a crime scene. (RT 1540.) In the instant action, the crime scene report showed that 41 prints were originally lifted from the Merck house, and three additional latent prints were lifted during further investigation.[6] (RT 1540-1542; Def.'s Ex. No. V.)

Deputy Sheriff Jim Christopherson, who was assigned to patrol East Bakersfield, including McClean Street, was familiar with appellant, who had been raised at his family's house at 514 Easter Street, about four blocks from the Mercks. (RT 1886-1887, 1890, 1896, 1914; People's Ex. No. 40.) Christopherson helped to secure the crime scene at the Mercks' house and to search for possible witnesses, and he also conducted a preliminary investigation. (RT 1890, 1895.) But no one was arrested for the crime until 1994. (RT 1890.)

The Autopsy Of The Mercks

On September 5, 1984, Doctor Armand Dollinger, a forensic pathologist with the Kern County Coroner's Office, conducted the post-mortem examinations of Clifford and Alma Merck. (RT 2257-2259.) After each body bag was opened, the bodies were photographed, and then Laskowski seized any "trace evidence" on the body or in the body bag. (RT 1615, 2259-2260, 2264.) Laskowski also seized the cords used to bind the bodies, and matched those cords to the lamps and phone in the Merck house. (RT 1615-1616; Item Nos.

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6. Defense Exhibit No. W was a December 20, 1984, request from Craig Fraley, the investigating officer, for the comparison of fingerprints of two men (Rob Lutts and Danny Phinney) with the prints lifted from the Merck's house. (RT 1561-1563.) Smith and Sparks completed the comparison on January 16, 1985, with a negative result. (RT 1562-1563.)

3-3, 1-6, 1-25, and 4-6.) Dollinger ascertained that a sharp, single-bladed object had been used to cut the cords. (RT 1617.)

Dollinger estimated that Clifford had been dead for several days, based on the body's discoloration and the advanced state of decomposition. (RT 2261, 2263.) Clifford's hands had been bound with electrical cord. (RT 2261.) A bullet had entered above and slightly in front of Clifford's left ear, had gone through the head, and had terminated above and behind the right ear. (RT 2261-2262.) Another bullet had entered the left base at the back of Clifford's neck, had traveled slightly upward to the right, and was found in the spinal canal. (RT 2261-2263.) Dollinger opined that "perforating lacerations of the brain and of the spinal cord due to penetrating gunshot wounds" would have resulted in "near[ly] instantaneous" death for Clifford. (RT 2263-2264.)

Alma's body was also discolored and in an advanced state of decomposition. (RT 2264, 2266.) Her wrists had been bound with electrical cord behind her back, and her ankles had also been bound. (RT 2264.) A telephone cord, with the handset still attached, was wrapped around her neck. (RT 2264-2265.) Dollinger opined that the cause of death was strangulation by the phone cord, and that death occurred, at most, four to five minutes after the phone cord was tight enough to constrict the blood flow. (RT 2265.)

The Follow-Up Investigation

Clifford's .25-Caliber Colt Automatic Pistol

On October 14, 1984, Bakersfield Police Officer Tam Hodgson, as well as other officers (RT 2319-2321), went to the Caravan Inn in Bakersfield based on a report of narcotics activity. (RT 2297-2302, 2313-2314.) Hodgson went into adjoining rooms, numbers 123 and 124, and arrested Robb Lutts (to whom room number 124 was registered), Danny Phinney, Delia Goodrum, and two

other people. (RT 2300-2302.) Hodgson found nine rounds of .25-caliber ammunition in Lutts's pocket. (RT 2315.) The officers seized property from the rooms, including a loaded Colt .25-caliber automatic pistol (that was in a plastic bag in the trash can in room number 123), as well as property from Phinney's van, including a .38-caliber revolver with ammunition, a small, beaded, white coin purse containing jewelry, a Ford key, scales, and "a significant street amount of methamphetamine" that was packaged for sale. (RT 2301-2302, 2316-2318.) Hodgson booked the Colt pistol into evidence. (RT 2304.) In Hodgson's experience and training, drug dealers often accept stolen property in exchange for drugs.[7] (RT 2303-2306, 2322-2323.)

On October 17, 1984, Laskowski received a request from Deputy Sheriff Del Ray to do a comparison on two .25-caliber bullets removed from the body of Clifford Merck.[8] (RT 2186-2189; see also People's Ex. No. 68.) People's Exhibit No. 30, the old .25-caliber Colt pistol seized from Lutts's room, had also been submitted to the laboratory. (RT 2187.) Laskowski conducted a routine initial examination of the Colt's barrel with a small bore light scope, looking for powder residue and damage, and noted that the rifling "look[ed] good." (RT 2191-2192, 2215-2217.) At one point, Laskowski took the grips off the Colt and saw the letters "C" and "M" or "W" carved into the grips. (RT

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7. Also in Hodgson's experience, heroin addicts suffer from "severe" withdrawal symptoms that last for a number of hours (in a window of time about 48 to 96 hours after not using heroin). (RT 2306-2309.) A heroin addict that is arrested and put into jail will want to get back on the streets as soon as possible in order to get more heroin, so he or she will usually cooperate with the police, and will provide good information. (RT 2309-2311.)

8. Laskowski was found by the court to be an expert in the field of ballistics, based on his extensive experience and training. (RT 2174-2177.) Laskowski provided detailed testimony on the working of firearms, including the rifling of a firearm barrel that leaves markings on bullets fired from that particular firearm, as well as the methods and equipment used to analyze firearms and bullets. (RT 2177-2186.)

2198.) After he test-fired the Colt and performed the comparisons, he excluded the Colt as having fired the two bullets because of the markings on the bullets.[9] (*Ibid.*)

Lutts testified at trial that, in 1984, he sold methamphetamine to support his heavy methamphetamine habit of about a gram per day, which cost $135 to $150.[10] (RT 1628-1630, 1638-1639.) The drug made Lutts paranoid at times, and affected his memory and thinking processes. (RT 1638-1639.) A large portion of the items that Lutts took in trade for drugs, such as most of the clothing and jewelry seized from his room on October 14, 1984, were stolen. (RT 1642-1645.)

Lutts, who lived in Bakersfield, had met Danny Phinney, a mechanic, in 1984, and had given Phinney drugs in exchange for working on his (Lutts's) car and running errands. (RT 1627, 1630.) Lutts also gave food and an occasional place to stay to Phinney and his girlfriend Delia. (RT 1630.) Appellant, and his girlfriend, whom Lutts knew as "Gerry," were both drug customers of Lutts.[11] (RT 1629-1630.)

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9. Over a period of time going into 1985, Laskowski received 17 weapons to test in order to determine if they were the murder weapon. (RT 2190.) However, he excluded each of the 17 weapons. (*Ibid.*) After that, a period of time went by when there was no more activity as to the two Merck bullets, and the bullets were returned to the KCSD Property Department. (*Ibid.*)

10. Lutts admitted his lengthy criminal record, including many misdemeanor convictions and felony convictions for robbery and the possession for sale of cocaine and methamphetamine. (RT 1627-1628.) But when he reluctantly testified at trial, Lutts had been out of prison for about three and a half years and had had no problems with the law during that time. (RT 1628.)

11. At trial, Lutts did not immediately recognize appellant, because he had not seen appellant in about 12 years. (RT 1629, 1636, 1649.) Appellant was older, had shorter hair, and wore glasses and different clothes at trial than he had previously worn. (*Ibid.*)

At trial, Lutts remembered the Colt pistol, as well as the other items that the police had seized when he was arrested. (RT 1630-1631, 1636, 1642-1647.) Although Lutts had no clear recollection, he believed that: the Colt pistol came from appellant; Phinney was involved in drugs being traded for the pistol; and Lutts might have obtained the pistol about three weeks to a month before he was arrested. (RT 1631, 1635, 1648.) The pistol that was in evidence looked like the one that was seized from him and, when he was shown a series of pictures, he was sure that it was the gun because it had the initials "C.M." on the inside of the grips.[12/] (RT 1631-1633; People's Ex. Nos. 30-35.) Lutts and Phinney had noticed the initials "C.M." on the inside of the grips while the pistol was disassembled for cleaning. (RT 1633-1635, 1662.) They tried to file the initials off of the grips. (RT 1634, 1663-1664.) Lutts testified that he did not do anything to the inside of the gun's barrel, nor did he see Phinney do anything to the inside of the barrel. (RT 1634.) But Phinney thought that a larger-caliber barrel brush was used on the Colt's barrel, both because they did not have a .25-caliber barrel brush, and in order to hide the rifling of the Colt because they did not know where it had come from. (RT 1662.) Lutts believed that several people had possession of the gun at one time or another, but only he and Phinney took it apart. (RT 1643.)

Phinney was a drug addict; for a while he used "just about anything that was out there for the weekend," including barbituates, amphetamines, acids, and mescaline. (RT 1681-1690.) But he reduced his drug use when he got married and took on additional responsibilities. (RT 1683.) By September and October

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12. Clifford had told Jerry Jones, whose wife Terri Jones was Alma's granddaughter, about his habit of marking his property by engraving it, and Jerry had seen the engraved initials "C.M." on some items of property. (RT 2056-2057.) Jerry knew that Clifford marked his pistol on the inside of the grips, and Jerry believed that Clifford tried to place the markings so that they would be at least partially concealed. (RT 2059.)

1984, Phinney was only using methamphetamine, a habit he had had for about 17 years; he had begun using intravenously about two years earlier; he was delusional at times; he was under the influence most of the time; and much of his effort was spent on providing for his drug habit. (RT 1677-1680, 1689, 1713, 1741.) But it was "kind of a dry time," because his methamphetamine supply was limited to what he got from Lutts. (RT 1741.) Phinney controlled his methamphetamine use because he had to make a living as a mechanic and as a house-sitter for several people, including drug dealers. (RT 1686-1687, 1689-1690.)

While Phinney and Lutts were in jail following their arrest at the Caravan Inn, Lutts showed Phinney an article from the Bakersfield Californian newspaper that referred to the search for information about the killing of the Mercks and sought confidential witnesses. (RT 1665-1667.) Phinney was thinking about the drug charges he was facing, so he did not make any mental connections until Lutts reminded him of the initials, and Phinney realized that the initials were those on the Colt.[13/] (RT 1666.)

Phinney was in Judge Gary Friedman's chambers for a pretrial hearing when he first said that he wanted to talk to police officers. (RT 1667-1669.) A representative from the district attorney's office was present, as well as a court reporter and a non-lawyer named Glen Nakanishi that Phinney believed was representing his interests. (RT 1668.) As a drug addict, his thoughts were "scrambled and a little bit disoriented." (RT 1669.) He was having withdrawals and wanted to get back to the street to use drugs. (RT 1723-1724.)

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13. The article offered a $5,000 reward, and listed the names and address of the victims, but it did not go into detail about the items that were stolen from the Mercks' house. (RT 1725-1733, 1738; Def.'s Ex. No. Z.) The article did not mention a jewelry box, Social Security checks, silver dollars, or Colt pistol with initials carved into the grips, all of which Phinney knew about because he had seen the items at the house of Gerald Cowan, appellant's brother (as discussed *infra*). (RT 1738-1739, 1742-1743.)

Also, he was in protective custody (and would have done anything to get released from it) because his co-defendants had taken seriously his joke about taking a plea bargain. (RT 1721-1724.)

On December 21, 1984, Phinney talked to Deputy Sheriffs John Diederich and Craig Fraley, who had been assigned to do the follow-up investigation in the Merck case (RT 1841, 2161-2162), in an upstairs room at the jail. (RT 1667, 1734-1736.) Phinney mentioned the initials carved into the Colt's grips; and he told Diederich about the gun-for-drugs transaction because he was trying to clear himself of anything to do with the pistol, which he believed people were trying to "push off" on him. (RT 1660.) He also told Diederich and Fraley that he was confused and could not remember how he had gotten the pistol; but he explained that he was scared because he had handled the pistol and because it might have been involved in the murders of the Mercks.[14/] (RT 1737-1738.)

Diederich's interview of Phinney on December 21, 1984, was recorded on tape and transcribed. (RT 1841, 1843, 1850.) Phinney was nervous, so at first Diederich allowed him to talk. (*Ibid.*) Phinney initially told a fragmented

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14. While Phinney believed that he had gotten a plea bargain deal in exchange for the information, he insisted that he told Diederich the truth. (RT 1667.) At another point, however, Phinney said that he might have lied to the officer, and that he basically told the officers enough to give them something to investigate and to earn a break on the amount of time he was incarcerated. (RT 1734-1737.) He ultimately pled guilty to the possession of methamphetamine for sale, but he did not remember pleading to the possession of cocaine for sale. (RT 1720.)

In 1985, about eight months after Phinney was arrested and after his release from jail, he saw appellant at a mutual friend's house in the area of 35th and M Streets. (RT 1671.) Appellant told Phinney that he (appellant) had been questioned about some stolen merchandise, and appellant knew how the information was obtained. (*Ibid.*) Appellant said that Phinney had no reason to worry because they were still friends; they would have no problems as long as Phinney never took the witness stand and testified against him. (RT 1671-1672.) Phinney promised that he would not take the stand. (RT 1672.)

story, but then settled down and seemed to be fine. (*Ibid.*) In Diederich's opinion, Phinney was not under the influence of any drugs, nor was he in any type of withdrawal or suffering from delusions during the interview. (RT 1843, 1845.) However, Diederich never asked Phinney about drug use, nor did Diederich perform any tests to determine Phinney's sobriety or drug use. (RT 1848.) Phinney never asked for a break or to get out of protective custody, nor did Diederich make any such promises to him. (RT 1847.) They never discussed the reward in the case. (RT 1862.)

Phinney told Diederich that he had read something in the newspaper about the case, and that he was lying on his bunk watching Barnaby Jones on television when something on the show about coins triggered his memory and made him start thinking about the case. (RT 1851.) The newspaper article's mention of McClean Street made Phinney afraid, because he remembered the Social Security checks he had seen at the home of Gerald Cowan, appellant's brother. (RT 1857, 1864.) Phinney was afraid that Lutts had already talked to the police; Phinney had thought about what he was going to say and had written things down. (RT 1858-1859.)

Phinney told Diederich that he had seen appellant during the first week of September 1984, and that he had gone with appellant to Gerald Cowan's house.[15/] (RT 1844-1847, 1852-1854, 1863-1869.) Phinney told Diederich that he had seen numerous items at Gerald's house, including a bag of coins that contained a 1922 D silver dollar that Phinney thought was pretty valuable; costume jewelry, some of which was "like a grandmother would wear"

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15. The officers subsequently gave Phinney a ride, and he pointed out the house at 1530½ Pearl Street in Bakersfield as the place where he had gone with appellant during the first week of September 1984. (RT 1867.)

(including a necklace that had the name "Dolly" or "Dotty" on it)[16]; a 1938 Shafter High School ring; a music box with a mirror upon which a swan would dance; a couple of Social Security checks–totaling about $600–in a government envelope, in the name of "Merck" at a three-digit address on McClean Street; and a man's worn billfold with some carving on it and several cards inside (a driver's license for a man about six feet three inches tall, weighing about 147 pounds, and born in 1911 or 1914, Blue Cross and Blue Shield, Social Security, etc.). (*Ibid.*)

Phinney also mentioned the Colt pistol; he connected it with the case as a result of reading the article and remembering the initials in the Colt's grips (which he said Lutts had tried to file off). (RT 1855-1858, 1865, 1869.) Phinney had heard that appellant had sold such a gun to Lutts, and appellant had warned Phinney not to get caught with the Colt. (RT 1867-1868, 1870.) Phinney thought that appellant had been committing robberies with the gun, and he did not think about the gun being used to murder someone until he read the newspaper article. (RT 1871.) Diederich showed the Colt to Phinney during the interview and the grips were removed to reveal the initials. (RT 1859-1860.) But Phinney never indicated that either he or Lutts put things down the barrel of the Colt to change the appearance of the barrel's rifling. (RT 1855-1856, 1861-1862, 1869.)

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16. Diederich was not sure whether at the time, he was aware that a woman named Daisy had lived at the Merck house for a while. (RT 1869.) But Betty Turner, Alma's daughter, testified that a woman named "Daisy" lived with the Mercks for a while; she died in about 1983. (RT 2171.) At that time, Daisy's property was removed from the Mercks' house except for some jewelry and other items Daisy had given to Alma. (RT 2172.) (RT 1869.) Terri Jones, Alma's granddaughter, also testified that an elderly woman named Daisy Hampton lived with the Mercks for a number of years. (RT 2062.) The only turquoise jewelry that belonged to Daisy was what she wore. (*Ibid*)

On August 23, 1994, at about the time of appellant's preliminary hearing, Deputy Christopherson talked with Phinney in the office of Cindy Zimmer, a deputy district attorney. (RT 1894, 1902.) Phinney said that he had gotten the Colt from appellant for Lutts in a trade for drugs or sale. (*Ibid.*) Lutts took the Colt apart when appellant was not present, and Phinney and Lutts saw the initials "C.M." on the inside of the Colt's grips. (RT 1902.) Phinney also told Christopherson that Lutts had put things down the Colt's barrel to alter the rifling because the gun had been used in a murder. (RT 1894, 1902-1904.)

At trial, Phinney testified that appellant had traded the .25-caliber Colt pistol for drugs, with Phinney acting as a middle man for Lutts one day while they were at the Bakersfield Inn. (RT 1660-1661, 1663; People's Ex. No. 30.) Appellant told Phinney not to get caught with the gun. (RT 1662.)

Quentin Watts testified that he had visited Clifford, his father-in-law, about once a month. (RT 1881-1882.) He had seen Clifford with a handgun and a shotgun in approximately 1977 or 1978. (RT 1882-1884; see also RT 1500-1501 [Robert Johnson, Alma's son, had also seen Clifford's revolver which had white grips].) On January 30, 1985, Quentin told Detective Fraley that Clifford might have used one of the pocket knives from his collection to carve his initials on the Colt's grips. (RT 1885-1886.) According to Quentin's testimony at trial, People's Exhibit No. 30 looked like Clifford's pistol; Quentin identified Clifford's initials on the Colt's grips; and Clifford had an engraving tool that he used to put initials on things. (RT 1883.)

On or a little before April 15, 1996, Christopherson talked to Laskowski at a weekly homicide investigators' meeting and told him that the barrel of the Colt pistol (that Laskowski had earlier examined) might have been damaged. (RT 1894, 1904-1906, 2190-2191, 2218.) Laskowski knew that the Colt's barrel could have been damaged by someone inserting various items into it, including metal objects, a brush, or a screwdriver, which would make it

impossible to match the Merck bullets to the Colt using traditional methods. (RT 2191.) However, Laskowski was aware of methods to match, or attempt to match, a damaged barrel with bullets. (*Ibid.*) Christopherson followed Laskowski's request and re-submitted the Colt and the two bullets that had been recovered from Clifford's body for further examination. (RT 1904-1905, 2191.)

When Laskowski received the Colt from the KCSD Property Room, he reexamined the weapon, paying close attention to the interior of the barrel. (RT 2191, 2219.) He used a stereo-zoom microscope, which can magnify from half power to forty power, and noticed damage, particularly in the crown area of the barrel. (RT 2192.) Laskowski photographed the damage, and then used microsil, a silicone rubber compound, to make a mold of the barrel. (RT 2193-2198, 2220-2226, 2233.)

Even though the Colt's barrel was less than two inches in length, microsil is easier to work with when sliced into sections, so Laskowski used a scalpel to slice the mold into sections. (RT 2196.) He then placed the sections onto the universal forensic light microscope for comparison with the evidence bullets, and concluded that the evidence bullets had been fired from the Colt. (RT 2196-2197.) While the evidence bullets were damaged as a result of penetrating Clifford's skull, and were corroded as a result of having been in that tissue for a period of time, the bullets still bore enough markings in enough areas to allow him to make the match. (RT 2198.) Also, on April 23, 1996, Laskowski again test-fired the Colt, and he matched a test-fired bullet to a bullet that had been test-fired from the Colt on October 18, 1994. (RT 2201.)

Once Laskowski had reached the conclusion that the bullets were fired from the Colt, he contacted Colt and told them the situation that he was dealing with in order to determine whether the barrel damage was something that could have occurred during the manufacturing process. (RT 2200-2201, 2209-2213,

2234.) Colt informed him that the damage was not reflective of their manufacturing process and would not have occurred at the factory. (*Ibid.*) From the information that Laskowski received from Colt, he was able to confirm that the evidence bullets were fired from a Colt firearm, given the manufacturer's barrel specifications. (RT 2199-2201.)

Appellant's Fingerprints

Jerry Roper, a seven-year KCSD crime scene investigator who had qualified as an expert in the Kern County courts on the comparison of latent and known prints, was asked in November 1984 to compare the latent prints from the Merck house with many known prints, including those of appellant. (RT 1587-1593; Def.'s Ex. No. X.) Roper rolled appellant's fingers for prints, but he never found any print matches. (RT 1590, 1594-1595; Def.'s Ex. No. Y).

Roper admitted that, even with his expertise, he did make mistakes in print comparisons. (RT 1596-1597.) Usually another person would do a follow-up comparison, but he did not remember if that was done in the instant action. (*Ibid.*) Roper left the Technical Investigation Section in 1987 because his eyesight was getting too bad to do comparisons, and because he was under a lot of stress. (RT 1589.)

Thomas Jones first received training on fingerprints in 1955, began working in the KCSD Technical Investigation Section in 1980, and became the senior member of the section in 1984. (RT 1990-1992, 2004.) At one point the section policy was that negative comparisons did not have to be verified, but instead were entered into a log. (RT 2103.) But eventually everyone knew that the policy changed to require that every fingerprint comparison be double-checked. (RT 1997.) Positive matches were "worked up:" (1) the latent print was photographed and enlarged; (2) a new rolled print was done; (3) the two were compared a second time; and (4) the positive match had to be verified by

a more experienced person. (RT 2104-2106.) Apparently not everyone obeyed the policy, because Jones knew that Roper did not add the name of anyone to the Merck fingerprint comparison request to verify his conclusion, and no one signed the request. (RT 1998, 2023.)

"[L]ong before 1984," Jones came to believe that Roper was "incompetent in the area of latent print examination."[17] (RT 1999, 2008.) But Roper's incompetence was not a matter of wrongdoing, such as stating that a negative was actually a positive match, which would have led Jones to report the situation to his superiors. (RT 2007-2009, 2021.) Instead, it was a matter of not being able to properly identify a positive match, which allowed guilty people to go free. (*Ibid.*) Based on a request by Acting Lieutenant Jerry Grimes, who supervised KCSD Technical Investigation Section in 1984, Jones checked a number of the files that Roper had worked on in the previous two to three years and, while he never found a misidentification, he "continue[d] to find these problems." (RT 1999, 2006, 2014, 2024, 2088-2089, 2099.) Jones

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17. Jones based his opinion of Roper in part on an incident that occurred and the fallout from that incident. (RT 1999-2001, 2106-2107, 2111-2112.) Quintin Nerida, who had obtained a latent fingerprint from the door of the Mercks' back service porch, had been sent, shortly thereafter, to the FBI Academy. (RT 1514-1515.) Upon Nerida's return, he had been assigned to the Mojave Desert area as a crime scene investigator. (*Ibid.*) Nerida identified a palm print in a desert homicide, put the latent print in an envelope, and labeled the envelope to indicate that it contained the print of the suspect. (RT 1999-2991, 2024.) Roper compared the print to those of the suspect and found that they did not match. (RT 1999-2000.) Acting Lieutenant Jerry Grimes handed the suspect's prints and the latent palm print to Jones and told him that there was a problem, since Nerida had matched the prints and Roper had found no match. (RT 2000.) Grimes asked Jones to do another comparison, and Jones verified the positive match found by Nerida. (*Ibid.*) Jones then sent the prints to the Department of Justice in Sacramento for comparison, and the results confirmed the comparisons of Nerida and Jones. (RT 2000-2001.) As a result, Grimes told Jones to reappraise all of the fingerprint and palm print comparisons done by Roper. (RT 1999, 2107-2108.)

reported his evaluation of Roper to several superiors over the course of time, the problems were discussed, and Roper was eventually fired or left the Technical Investigation Section. (RT 2009-2013, 2101-2103.)

In 1994, a few months before Deputy Christopherson was assigned to the KCSD Robbery-Homicide Section, he got permission to take another look at the Merck case, which was "in limbo" at the time. (RT 1899-1990.) He re-read all of the original reports of the murders, as well as the reports of the officers who had worked on the case in the interim. (RT 1891-1892, 1897.) As a result, he served as the Chief Investigating Officer when the investigation was re-opened. (RT 1892, 1896.) Christopherson personally went to the fingerprint section on May 12, 1994, and spoke to the supervisor, Tom Jones, as well as to Sharon Pierce, and asked that the fingerprints lifted from the Mercks' house be re-checked.[18] (RT 1892, 1901.)

Pierce compared the Merck latent prints with the prints of appellant, his brother Gerald, and several other people, taken from KCSD's fingerprint files.[19] (RT 1946-1947, 1949, 1956.) Latent Lifted Print No. 10 matched appellant's left thumb, and Latent Lifted Print No. 44 matched appellant's left middle finger. (RT 1957-1959; People's Ex. Nos. 6 [lifted from the inside edge of the Mercks' service porch back door] & 7 [lifted from the plastic sewing tray from dining area].) None of the other prints matched any of the other fingers on appellant's left hand. (RT 1965-1967.) Jones subsequently verified Pierce's conclusions and signed the report. (RT 1960, 1994-1995, 2003-2004.)

On August 8, 1994, Christopherson and Detective Fiddler interviewed

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18. Jones had become the senior latent print examiner in 1989 or 1990. (RT 1991, 2005.) He described his position as one of teaching and verifying, since the investigator who lifts the latent prints is required to do the initial comparison before Jones verifies the comparison. (RT 1992-1993.)

19. Appellant stipulated that it was his fingerprints that Pierce compared to the prints lifted from the Mercks' house. (RT 1955-1956.)

appellant at the KCSD, after the officers had used a card to advise appellant of his rights pursuant to *Miranda v. Arizona* (1966) 348 U.S. 436. (RT 1892, 1906.) Appellant agreed to talk. (RT 1893, 1906-1907.) He repeatedly said that: he was not involved with the murder of the Mercks; he had never been to the house at 713 McClean Street; and he did not know how his fingerprints could have gotten there. (*Ibid.*) When Christopherson took appellant to the house to point out the fingerprints, appellant reiterated that he had never been to the house. (RT 1894.)

On September 11, 1994, Jones took all of the latent prints in the instant action and appellant's rolled prints to Sacramento for a comparison by the Department of Justice. (RT 2001-2002, 2015-2016.) He delivered the prints to Martin Collins, the Latent Print Supervisor of the California Department of Justice Forensic Services Section, and told Collins that a comparison in 1984 was negative, but that he had recently verified a match made by Pierce. (RT 2016-2017, 2026-2048.) Jones waited for the results, which took less than two hours. (RT 2016-2017, 2034.)

Collins did the print comparison in about five minutes using a magnifying glass. (RT 2029.) The lift card that was People's Exhibit No. 6 contained two prints (Latent Lifted Print Nos. 9 & 10); one was a palm print that Collins did not match (Latent Lifted Print No. 9), and the other print Collins matched with appellant (Latent Lifted Print No. 10). (RT 2036.) People's Exhibit No. 7 only contained Latent Lifted Print No. 44, which Collins matched to appellant. (RT 2036-2037.) There was another usable print, but Collins was not able to match it to appellant. (RT 2037.) Collins had another person in his section verify his conclusions. (RT 2031.) By the end of the analysis, Collins was "absolutely positive" that the latent prints taken from the Mercks' house belonged to appellant. (*Ibid.*)

Alma's Turquoise Ring

Although Phinney's recollection at trial was not clear, he told the truth to the KCSD investigators about seeing appellant during the first week of September 1984, and about his connection to appellant.[20] (RT 1652-1654.) In 1984, Phinney had known appellant for about 12 to 15 years, and he saw appellant on a regular basis. (RT 1652, 1714.) The week after Labor Day 1984, Phinney saw appellant at the Chief Auto Parts store on Niles Street. (RT 1652-1653.) Phinney talked with appellant about a problem that appellant was having with his car, and Phinney also thought that appellant owed him money. (RT 1654.)

As a result of the conversation, Phinney went to Gerald Cowan's house in East Bakersfield near Flower Street. (RT 1654.) While Phinney, appellant, and Gerry Tags, appellant's girlfriend, were talking, Tags showed Phinney two jewelry boxes–one large and one small. (RT 1655, 1742.) One of the boxes had a wind-up music box and a figurine that would dance around a mirror with a magnet under it. (RT 1655.) The three of them went through a lot of junk jewelry, including a lot of moose or elk pins, lapel pins, tie tacks, and a Wasco or Taft high school senior ring. (RT 1655, 1658.) Phinney said that there was

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20. At trial, Phinney admitted that he had a lengthy criminal record, most of which involved his addiction to drugs and alcohol; but he had never been to prison, instead spending time in the county jail. (RT 1651-1652.) He had never killed anyone, and he insisted that stealing was one thing that he would not do. (RT 1660, 1690, 1739.) His testimony was true in spite of his being scared. (RT 1669.) He had not been threatened, but a woman whom he did not know, and who was not connected to appellant, told him on the Saturday night before his testimony that it would do no good. (RT 1669-1671.) He was not a good liar, and he did not know what else to do but testify. (RT 1669.) Phinney suffered from bipolar disorder, which sometimes jumbled his thoughts. (RT 1672-1675.) He would always be addicted to drugs and alcohol; he still used both speed and alcohol from time to time. (RT 1676.) He received Social Security disability payments for his bipolar disorder and drug addiction at the time of trial. (*Ibid.*)

a lot of jewelry of the style that an older woman would wear, including fake pearls, and Tags put some of the pearls into a jar so that she could keep them. (RT 1742.)

Appellant showed Phinney an old leather wallet that had a design tooled into it. (RT 1655-1657.) Phinney recalled that the wallet contained a driver's license, with a birth date from the early 1900s, that belonged to someone named "Mirck" or "Merck," because he had a neighbor named "Mirck" and he remembered the similar spelling of the name on the driver's license. (RT 1657.) Phinney, appellant, and Tags also looked at some coins, one of which Phinney specifically remembered was a 1922 S silver dollar, because his uncle had given him such a coin when he was young. (RT 1658, 1717.) Appellant had a lot of coins that he rarely showed to people. (RT 1717.) There were also two Social Security retirement checks, both of which were in the name of "Merck."[21/] (RT 1658-1659.)

Betty Turner was Alma's daughter, and had a normal family relationship with her mother and stepfather, Clifford. (RT 2168-2169.) Turner did not live in Bakersfield, so when she visited the Mercks she would usually stay all day or overnight. (RT 2169.) Clifford kept his driver's license in his single-fold wallet, which was hand-tooled with figures or designs and the initials "C.M." (RT 2169-2170.) Turner had also seen, in Alma's bedroom, the jewelry boxes that held Alma's costume jewelry collection. (*Ibid.*) One of the boxes had a ballerina standing on a round mirror, and when it was wound up the ballerina and mirror would turn. (RT 2170, 2173.) Alma had one ring that was silver

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21. Phinney would not have been able to remember these events if it had not been for seeing a copy of the declaration that he gave to the police in 1984 or 1985, but everything in the declaration was true. (RT 1657.) Also, Phinney was not delusional when he saw the wallet, or the Social Security checks. (RT 1740.) His usual delusions were paranoid, e.g., he would think that trash cans were police officers that were after him. (RT 1678-1680, 1740.)

and turquoise. (RT 2171.)

Deputy Fraley investigated the murders of the Mercks from December 12, 1984, to September 1987. (RT 2161-2162.) During that time, Fraley received information that a woman named Catherine Glass had a particular ring. (RT 2161-2162.) In 1985, Fraley talked to Glass at her house, and she told him that she was appellant's sister and that she had purchased from appellant a turquoise ring made of silver or white metal. (RT 2161-2163; People's Ex. No. 39; see also RT 1940-1942 [testimony of Glass].) However, Glass told Fraley that her husband was wearing the ring at that time. (RT 2163; see also RT 1942.) Fraley left Glass's house, but returned when she contacted him a couple of hours later. (RT 2163.) Glass then gave the ring to Fraley. (*Ibid.*; see also RT 1940, 1943.)

Mary Watts, Alma's daughter, testified that the Mercks had a ring made of white metal with a turquoise stone. (RT 1872.) During the investigation, Watts was shown a ring that the police had seized, and she recognized the ring. (RT 1872-1873; People's Ex. Nos. 36-39.) At trial, Watts identified pictures of Alma wearing the ring. (RT 1873; see also Def.'s Ex. No. A.) Watts also identified the ring itself, saying that it looked like the ring her mother had purchased in New Mexico. (RT 1873, 1879-1880.) Watts testified that her mother "used to wear it all the time." (RT 1874.) There appeared to be a letter "M" scratched into the ring.[22/] (*Ibid.*) The other marking on the back of the ring appeared to be an "X." (RT 1876; Def.'s Ex. No. 38.)

Terri Jones, Alma's granddaughter, spent quite a bit of time in the Mercks' house as she was growing up, and over the years she had conversations with Alma in Alma's bedroom. (RT 2059-2060.) Alma had mostly costume-

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22. Watts testified that Clifford, her stepfather, had a habit of using an electric needle to mark things. (RT 1873-1874.) Watts never personally saw him mark things, but everything that he had had initials on it, and Alma told her that Clifford had marked things. (RT 1875.)

type jewelry, including a diamond watch, a pearl bracelet, and some earrings, but only one ring of a turquoise-and-silver type. (RT 2060-2061.) People's Exhibit No. 39 looked like the ring that Alma used to wear. (RT 2060.) In addition, the picture (that her husband Jerry mentioned during his trial testimony) of Alma wearing the ring, which she (Terri) had given to the defense, was Defendant's Exhibit No. A. (RT 2061.) Terri remembered that, in January 1985, Fraley showed her a ring or a picture of a ring, but she was not familiar with the ring, or did not think that it was her grandmother's ring. (RT 2062-2063.)

Clifford's Cigarette Lighter

As part of the investigation into the Merck murders, Deputy Fraley met with Ronnie Woodin, a friend of appellant's since childhood, about a cigarette lighter. (RT 2164; Def.'s Ex. No. AA(1).) Woodin showed Fraley a cigarette lighter cover that he said he had bought from appellant around the middle of September 1984 (about the 12th or 13th of the month, because his payday was on the 10th). (RT 1926, 1938, 2164.) As Woodin explained at trial, appellant showed him a bag of things that he was trying to sell. (RT 1924-1927.) Woodin liked a cigarette lighter cover in the bag and paid appellant five dollars for it.[23/] (RT 1925-1926; Def.'s Ex. No. AA(1).) Fraley seized the lighter cover. (*Ibid.*)

At trial, Woodin believed that he told Fraley that he did not know where appellant had obtained the lighter cover. (RT 1927-1928.) But Woodin also seemed to remember telling Fraley that, when he asked appellant where appellant had obtained the lighter, appellant had told him "never mind" or

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23. Woodin did not pay much attention to the other items in the bag, but he believed that there may have been beads or pearls in the bag. (RT 1926-1927.)

words to that effect.[24] (*Ibid.*)

On January 30, 1985, Fraley took the lighter to Jerry Jones, whose wife, Terri Jones, was Alma's granddaughter. (RT 2052-2053, 2165.) The Joneses and Mercks had visited each other many times. (RT 2053.) Jerry told Fraley that he had seen the lighter on a table in the Mercks' house many times. (RT 2166; see also RT 1499 [Robert Johnson, Alma's son, testified that Clifford used a lighter to smoke].) Often, when Jerry and Clifford would sneak out into the backyard of the Jones's house to smoke, Jerry had used the lighter, and he had seen Clifford use the lighter. (RT 2165.)

At trial, Jerry could not tell, due to the passage of years, whether the lighter in evidence was Clifford's lighter. (RT 2054; Def.'s Ex. No. AA(1).) But he was "absolutely sure" that it was his grandfather-in-law's lighter when he said that to Fraley. (*Ibid.*)

Other Evidence

Testimony Of Mitzi Culberston Cowan

In September 1984, Mitzi Cowan (nee Culbertson) was dating and living with appellant's brother, Gerald (whom she subsequently married). (RT 2425-2426.) Mitzi was using methamphetamine, at times with Gerald, and she tried cocaine with Gerald, who was using it heavily at the time. (RT 2443-2445.) Mitzi had also used drugs with Gerry Tags, appellant's girlfriend. (*Ibid.*)

Sometime between September 1, 1984, and September 5, 1984, appellant and Tags visited Mitzi and Gerald. (RT 2426.) Appellant walked in carrying a box of things, including clothing and jewelry. (RT 2427.) Mitzi remembered

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24. Woodin believed that he had smoked marijuana basically on a daily basis from the time he bought the lighter until the interview, and admitted that he was "probably" a little bit high during the interview. (RT 1936-1937.) But he told the truth when he was talking to Fraley. (RT 1927-1928, 1937.)

an older silver wrist watch, and a heart-shaped silver necklace watch. (RT 2427-2428, 2446-2448.) Gerald put the necklace watch into his pocket, but later, as they were driving to his mother's house, he threw the necklace watch into a vacant, overgrown field. (RT 2427-2429.)

Mitzi was the daughter of Jewell Francis Russell, nicknamed "Shafter Bobby." (RT 2429.) On September 7, 1984, Shafter Police Officer Paul Petersen was dispatched to a house in Shafter where he found Russell's body lying under a bed. (RT 2074-2085.) Russell's throat had been slit, and his pockets were turned inside out. (RT 2085.)

Mitzi talked to several law enforcement agencies over the course of time, including the Shafter Police Department, the KCSD, and the prosecutor's office. (RT 2447.) In October 1984, an investigator talked to Mitzi, but the investigator only asked questions about her father's death, so Mitzi was not sure that she mentioned the necklace watch. (RT 2449.) In July 1986, Kern County Investigator Chris Hillis questioned Mitzi only about her father's death; she did not tell him about the necklace watch. (RT 2450.) On another occasion, Hillis taped an interview with her, but she did not think that she mentioned the necklace watch. (RT 2451.)

In January 1990, Mitzi was interviewed by Shafter Police Department Detectives Porter and Buoni, but she did not believe that she mentioned the necklace watch. (RT 2451.) Likewise at the preliminary hearing, Mitzi never mentioned, and she was not asked about, the necklace watch. (RT 2452.) She mentioned the necklace watch to Gerald's detective, and his lawyer, and she told the prosecutor about the necklace watch about a week before she testified at trial. (RT 2453, 2464.) Mitzi had never seen appellant with any property belonging to her father, nor did he ever indicate to her that he had anything to do with her father's death. (RT 2456.)

Testimony Of Emma Davidson (nee Foreman)

In1984, Emma Davidson (nee Foreman) lived on Edison Highway, and had known appellant for about two years. (RT 2242-2243.) Her daughter, Gerry Lynn Tags, lived with appellant prior to 1984, and was living with appellant between August and October 1984. (RT 2243-2244.) Foreman sold Tags a car for $40, and occasionally Tags and appellant lived in that car, sometimes near Foreman's apartment on Edison Highway, sometimes by appellant's mother's house, and sometimes in various other locations. (RT 2243.)

Foreman on at least one occasion heard Tags and appellant arguing because appellant wanted Tags to prostitute herself, as she had done before. (RT 2245-2246.) In addition, Foreman once heard appellant say something to Tags about harming some elderly people, and appellant told Tags that he would "cut her mother-fucking throat." (RT 2246-2247.)

On one occasion, Tags went to her car to get some clothes. (RT 2247.) At the same time, Foreman went to the mailbox. (*Ibid.*) As Foreman walked by the car, she saw in the trunk a jewelry box, another black box, and bloody clothes. (*Ibid.*) However, at the time she did not pay much attention to the bloody clothes because appellant had been working on the car and had hurt his hands. (RT 2248.)

Detective Porter interviewed Foreman in January 1992. (RT 2324, 2391.) She said that when she had asked appellant about killing an elderly couple in Bakersfield, he told her that he had found them in a bedroom, and that he had beaten them to death. (RT 2392.)

Previous Testimony Of Gerry Tags

By the time of trial, Gerry Tags, appellant's girlfriend in 1984, had died of cancer. (RT 2244, 2330; CT 1267 [certificate of death].) Her testimony,

from appellant's preliminary hearing in about September 1994, was read into the record. (RT 2330-2403.)

Tags and appellant lived together for about three to four years, until 1986. (RT 2331-2332.) In 1984, appellant was using "quite a bit" of methamphetamine on a daily basis. (RT 2331-2333.) He did not have a regular job; instead, he used Tags as a prostitute at truck stops and on Union Avenue to make money. (RT 2333-2334, 2359.)

Tags, who had been using drugs for about 12 years, testified that her heaviest drug use occurred during the time that she lived with appellant. (RT 2333, 2351-2355, 2376-2380.) She primarily used methamphetamine, but she also used any other drug that she could get. (*Ibid.*) She was high most of the time, to the point that it made her do things that she did not really want to do (like being a prostitute). (RT 2352-2353.)

Tags attended Russell's funeral. (RT 2347.) Not long after that she left California for Oklahoma, along with appellant and Gerald. (RT 2347-2349.) Tags wondered why they were leaving California; it seemed as if appellant and Gerald were "running from something." (RT 2361.) Tags supplied most of the money for the trip by working as a prostitute during the trip. (RT 2359-2360, 2378-2379.) The trio also went to Florida. (RT 2348.)

During the trip, they did not talk about what had happened to Russell, or the elderly couple that had been killed, because neither appellant nor Gerald wanted to talk about it. (RT 2349.) Tags never saw appellant kill anyone. (RT 2360-2361.) But, while they were at the house of Tags's sister in Oklahoma, Tags asked appellant if he had killed Russell. (RT 2349, 2362.) He told her that he did, and that, if she said anything, he would cut her throat (as he had done to Russell). (*Ibid.*) At the time, appellant had been drinking.[25] (RT

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25. Hillis, from the prosecutor's office, talked to Tags, and she told him what appellant had said. (RT 2362-2365.) When asked about Hillis's report

2364-2366.)

Eventually they returned to California. (RT 2356-2357, 2383-2384.) Tags believed that they had been gone for two to three weeks. (RT 2386.) Mitzi, Russell's daughter, told Tags what had happened to Russell. (RT 2335, 2355-2357.) When Tags again asked appellant about the murder, he told her the same thing that he had said before, so she never brought it up again. (RT 2385-2386.)

At the time of the preliminary hearing, Tags hated appellant because he had beaten her, because he had made her a prostitute, and because of the things that she believed he had done (including the murders). (RT 2372, 2385.) She began to hate him when she saw that he "had a different person inside." (RT 2372.) But at another point Tags testified that she had once asked appellant if he had killed the elderly couple on McClean Street, and he had told her that he had not. (RT 2403.) At the time of her testimony, Tags testified that she had not used drugs in about six or seven months, because she was receiving treatments for cancer and was scared. (RT 2352, 2375.)

Defense

Ruth and Robert Scott worked for companies in the Indian jewelry business in Albuquerque, New Mexico (Najhae, Inc., from 1971 until its closure in 1981, and then when it reopened in 1983 as Indian Jewelry Supply Findings Company until 1994). (RT 2472-2473.) The companies made and sold (on a wholesale basis) all of the components for Indian jewelry. (RT 2473-2474.) From 1971 to 1974, the Scotts also had their own Indian jewelry

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at the preliminary hearing, Tags did not remember having asked appellant about the murder the morning after he had threatened to cut her throat while he was drinking; nor did she remember telling Hillis that, that morning, appellant said that he would not do something like that (murdering someone), and that he had been drunk the night before. (RT 2365-2368.)

business, Four S Indian Crafts, and they dealt with the Navajo and Zune Indians. (RT 2475-2476.) They also attended some jewelry shows. (RT 2476.)

From 1976 to 1981, Najhae, Inc. made a case for a Bic cigarette lighter, and put onto the case a kachina or rainbow dancer emblem (the most popular lighter case emblem, Def.'s Ex. No. AA or AA(1)) bought from another company. (RT 2476-2479.) The company also made plain lighter cases. (RT 2479.) About 50,000 of the kachina lighter cases were made, and they were sold in Arizona and California. (RT 2477-2478.) After the company re-opened in 1983, the company only made the lighter case. (RT 2477.) One or two competitors in Albuquerque also made the same type of lighter case. (*Ibid.*)

Ruth Scott recognized Alma's turquoise ring as a low-cost "tourist item." (RT 2481-2484 [presumably People's Ex. No. 39, referred to as "Item 10"].) She believed that the markings on the back of the ring indicated a wholesale cost of $3.00. (*Ibid.*) But Ruth Scott did not know what happened to the lighter cases, or to the components of the rings, once they left the company where she worked; nor did she know the Mercks. (RT 2484-2486.)

Damon Taylor opened The Cigarette Store, selling cigarettes, lighters, lighter fluid, etc., in February 1984. (RT 2508-2509.) The Indian cigarette lighter case was "common"; he ordered about 50 to 100 of the cases each week, and sold them for about $1.00 to $1.50. (RT 2510.) The lighter cases could be bought "at practically any store that sold cigarettes in Bakersfield," as well as jewelry stores in the mall. (RT 2511.)

Hillis testified that he interviewed Tags on June 18, 1986. (RT 2490-2493.) Tags told Hillis about appellant's response to her question of whether he had murdered Russell (including his threat to cut her throat, as he did to Russell, if she said anything). (RT 2496.) Tags told Hillis she repeated her question to appellant the next morning, and appellant said that he would not have done something like that, and that he had made the statement the previous

night because he had been drinking. (RT 2497.) But Tags also told Hillis that, when she repeated the question after they had returned to California, appellant repeated his original response (including the threat). (RT 2499-2500.)

Bakersfield Police Officer Kevin Clerico was part of the team of officers who arrested Phinney at the Caravan Inn on October 14, 1984. (RT 2500-2501.) When asked, Phinney said that the pistols (including the Colt) belonged to Lutts, and that most of the property that Lutts dealt with was stolen. (RT 2501-2502.) Phinney could not provide any more information about the pistols or the property found in the room. (RT 2502.)

Fraley conducted a taped interview of Emma Foreman (aka Davidson) on February 14, 1985. (RT 2512-2513.) Johnnie Davidson was also there. (RT 2513.) Foreman said that she "hate[d]" appellant "with a purple passion." (RT 2514.) Fraley did not recall Foreman saying that appellant had told her that he had found an elderly couple in their bedroom and had beaten them to death. (RT 2515-2516.)

Shafter Police Detective Porter interviewed Emma Davidson (nee Foreman) in January 1990. (RT 2489.) She told him that, about a month either before or after the murder of Russell, appellant had made some statements about an elderly couple. (RT 2490.)

On October 10, 1986, Fraley came into contact for the first time with Roy Davidson in the Kern County Jail. (RT 2516-2517.) Fraley took Davidson to the interview room and taped an interview with him. (RT 2517.) One of the first things that Davidson said was that, if he could get out of jail, he could get information from Tags and another person -- that he (Davidson) could get Tags and the other person to "talk." (*Ibid.*) Fraley knew at the time that Davidson abused drugs. (RT 2518.)

David Bird, Ph.D., a clinical psychologist who received his Doctor of Philosophy in 1973, had received training and experience on drug abuse

(including working in various positions in the prison system). (RT 2518-2521.) According to Dr. Bird, methamphetamine produces a sense of euphoria, and "general increased sensitivity to everything that is going on around" the user. (RT 2521.) But continued use of methamphetamine causes damage to the user's language comprehension, memory, and accuracy of perception, as well as loss of visual motor control. (RT 2521-2522.) Over the course of years, methamphetamine will dull the user's perception and comprehension, to the point that the user will lose track of "hours, days, or even weeks at a time . . . and either have no recall of that time period or they will have a fragment of recall . . . ." (RT 2522.) The user will also steadily withdraw from their usual work, family, and social activities, and will instead spend more time trying to find more of the drug. (*Ibid.*) The user will also get confused between what they actually experienced, and what they read or heard. (RT 2523.)

Also according to Dr. Bird, methamphetamine will cause or allow a user to stay awake for days at a time, but with "greatly reduced" abilities; such a person will be in a "psychotic" or "quasi-psychotic" state, in that they will be dealing with perceptions that are like hallucinations (some of which will be recorded in their memory). (RT 2524-2525.) In such a condition, the user is "over amped" because the liver cannot process the drug quickly enough. (RT 2526.) As a result, the brain's cortex, the source of rational thinking that translates the sensory experiences into language expressions, gets damaged, which causes problems with perception and comprehension. (*Ibid.*) When some users come down from such a high, they cannot tell what is real in their memories. (RT 2525.) Dr. Bird doubted, however, that two people would have identical delusions. (RT 2541.)

Dr. Bird opined that Tags was a methamphetamine addict based on his review of the transcript of her preliminary hearing testimony. (RT 2525-2526, 2543.) She had difficulty understanding some of the questions; she repeated

some questions to herself; she asked the questioner to repeat some of the questions; and she appeared to mix up facts. (RT 2527, 2542.) Dr. Bird believed that, given the fact that Tags said at the preliminary hearing that she had not used methamphetamine for six to seven months, Tags was "displaying an acute brain damage syndrome" which would last for six months to a year before there would be some, but not total, recovery.[26] (RT 2528-2529.)

Dr. Bird opined that, if a brain-damaged user hated a person, a "paranoid schizophrenic personality syndrome" would begin to develop that would cause the user to project paranoia onto the hated person. (RT 2529-2530.) As a result, the user could tend to imagine statements or actions of the hated person toward the user or others. (RT 2530.)

Dr. Bird also had experience dealing with heroin abusers. (RT 2530.) According to Dr. Bird, heroin is essentially a pain reliever; it induces "stuporous euphoria," feelings of well-being, grandeur, floating, and mastery of the environment. (RT 2530-2532.) But, because the feelings usually cause the user to focus inward for several hours, the user has a "greatly reduced attention to the outside world." (RT 2532.) Afterwards, feelings of unease can develop as the user begins to try to figure out where to find their next dose. (RT 2533.) Withdrawal symptoms, which can occur after only 30 days of heroin abuse, would include nausea, rapid heartbeat, profuse sweating, body aches, and headache. (RT 2530-2531, 2534.) During withdrawal, the user will do "anything" to acquire more of the drug. (RT 2535-2536.)

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26. But Dr. Bird had never interviewed Tags and, after being shown some of the transcript of her testimony, Dr. Bird realized that he had confused part of Phinney's testimony with that of Tags. (RT 2535-2537, 2539, 2544.)

The Penalty Phase

The Prosecution's Evidence

Shelley Cox, Alma's granddaughter, saw Alma often when she was growing up, and about once or twice a year after Cox had moved away from Bakersfield. (RT 2844.) Cox and her husband were in bed, and their 18-month-old son was in his crib, when Cox's parents came to their house and told them that the Mercks had been murdered. (RT 2845.) It was "very difficult to put into words the emotion that we have all experienced." (*Ibid.*) It was "extremely difficult" for Cox and her husband to help clean out the Merck's house. (*Ibid.*) She said, "I will never forget the smell in the house, the smell of death and blood was everywhere." (*Ibid.*) Alma had been suffering from Parkinson's disease. (*Ibid.*) Cox imagined what her grandmother's last few minutes of life were like, the fear and terror, pleading for her life, and perhaps hearing her husband being murdered. (RT 2845-2846.) She could not understand why anyone would "brutally murder" her grandparents, because they could not hear or see well and were "defenseless." (RT 2846.) It had affected her whole family, as well as their friends. (*Ibid.*) The family wanted the jury to impose the death penalty, so that appellant could suffer the consequences of the choice that he made to kill the Mercks. (RT 2847.)

Betty Turner was the youngest of Alma's four children. (RT 2848.) Alma married Clifford later, after she had had her children. (*Ibid.*) But Clifford and Alma had been married for nearly 33 years; Clifford was regarded as part of the family, rather than as a step-relative. (RT 2849.) Turner remembered that Clifford "love[d] to tell stories from when he was growing up." (*Ibid.*) Clifford and Alma were "loving people, very quiet and [they] stayed to themselves." (*Ibid.*) Turner would never forget the day they were murdered; she did not understand why their lives were taken. (*Ibid.*) She believed that Clifford and Alma "must have gone through pure hell"; she had "no sympathy"

for anyone who takes an innocent life. (RT 2850.) She hoped that her family could begin to move on. (*Ibid.*)

Terri Jones, another of Alma's granddaughters, spent a lot of time with the Mercks, and they would baby-sit her when she was growing up. (RT 2851.) She continued this close relationship as she grew up. (*Ibid.*) Jones visited the Mercks once a week to run errands for them and, in later years, she drove the Mercks to the family Christmas celebration. (RT 2851-2852.) She would never forget the pain of losing them. (RT 2851.) The last time they talked, Alma was crying because she was recovering from a broken hip. (*Ibid.*) Jones "went into shock" when she heard about the murders; she could not attend the funeral; she thought about it every day; and the loss was "very hard" on her mother. (RT 2582.) Jones waited for her children to get older before she told them the details of what had happened to their great-grandparents. (*Ibid.*) Her children were "shocked," and it was "horrible." (RT 2853.)

On October 24, 1985, James Foster, Jr., who was working for Haliburton Services, lived in an apartment in the 2400 block of Olive Street. (RT 2853-2854.) Foster had his driver, Jessie Cruz, take him to his apartment just before noon so that he could change his clothes, which were dirty from cleaning tanks. (RT 2854.) Cruz waited outside while Foster went into his bedroom. (RT 2855.) But when Foster noticed that the sliding glass door in his bedroom was slightly ajar, and that there was a tree branch stuck through the opening, he turned around to leave. (*Ibid.*) Appellant came out of the closet, pointed a blue steel revolver at Foster's head, and told him not to move or he (appellant) would kill him. (RT 2855-2856.)

Appellant had Foster call Cruz inside. (RT 2856.) Appellant pointed the gun at Cruz, and had both Cruz and Foster lie face-down on the floor. (*Ibid.*) Foster believed that appellant used his belt, as well as cords and clothing from the room, to bind their hands and feet. (*Ibid.*) Foster heard appellant going

through the room; he also heard appellant pull out the phone cord, and cock and un-cock the revolver (while he told them that he was going to kill them). (RT 2857.) Foster "absolutely" feared for his life. (*Ibid.*) Eventually, appellant left via the sliding glass door, which faced a levee that had a bike path on top of it. (*Ibid.*)

Foster was able to free his feet; he got a knife and used it to free Cruz's feet (but he did not want to disturb the knot that appellant had made in tying Cruz's hands). (RT 2857-2858.) Foster believed that appellant had taken all of the phones, so they called the police from the next-door neighbor's apartment. (*Ibid.*)

Later that day, the police took Foster to look at someone in the area near the bike path and the Golden State Highway. (RT 2858.) He identified appellant.[27] (*Ibid.*) Later, Foster received a couple of the items that appellant had taken from his apartment, but the rest (belt buckles, a Sony Walkman, a telephone, some change, etc.) were all kept for the trial. (RT 2858-2859.)

Betty Jean Abney lived at 840 Hudson Drive in Greenfield, next door to appellant and Brenda Hunt. (RT 2864, 2921.) On April 9, 1993, Abney was across the street visiting Linday Bryson when Bryson called her to the window. (RT 2865.) Abney saw appellant standing in front of a little boy who lived with appellant and Hunt; then appellant lifted the boy up by his hair and threw him onto the ground. (RT 2866-2867.) Abney told Bryson to call the police; then Abney went outside, yelled at appellant to stop it, and told him that she was going to call the police. (RT 2867.) Abney went back into the house; appellant and the boy came across the street; and the police then arrived. (*Ibid.*) The police briefly talked with the boy, as well as with Michael, a younger boy who lived with appellant and Hunt, outside of Abney's hearing range. (RT 2868.)

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27. The parties stipulated that appellant committed the crimes as to Foster and Cruz. (RT 2874-2875.)

Then the police arrested appellant. (*Ibid.*) As the police were taking appellant away, Hunt came out of their house. (*Ibid.*)

Abney once saw appellant grab Hunt by the hair and jerk her head, as they were arguing while walking down the street. (RT 2869.) Another time, Abney was in her yard with her son, cleaning up their yard, and appellant was cleaning up his yard with Michael. (*Ibid.*) Apparently Michael did not do what he was supposed to do; appellant grabbed Michael and threw him. (*Ibid.*) Then appellant "calmly" came over to the fence, asked Abney and her son how they were doing, and told Michael to go into the house. (*Ibid.*)

Appellant's Mitigation Evidence

Appellant was Selma Yates's nephew. (RT 2887-2889.) Yates married Leroy and had four children. (RT 2887-2889, 2892.) Betty, Yates's younger sister and appellant's mother, married Wes, Leroy's brother, and had eight children. (*Ibid.*) In 1952, before his youngest son was born, Leroy was killed in a motorcycle accident that involved drinking. (RT 2891, 2894.)

Wes was "a very good guy" when he was sober. (RT 2889.) But he drank a lot, and when he drank he "always want[ed] to fight." (*Ibid.*) According to Yates, all of Wes's brothers behaved the same way, and their father, George (appellant's grandfather), was a violent man even when he was not drinking. (*Ibid.*) George broke his wife's arm and leg, and she was "constantly black and blue." (RT 2890.)

Yates and Leroy lived near Wes and Betty when appellant was born. (RT 2890.) When appellant was about two years old, Wes started beating him "[f]or no reason at all." (RT 2891.) Sometimes Yates would have Betty's family come to her house so that they would not be around Wes when he was drinking (which was every weekend, sometimes all weekend). (RT 2894.) Wes would spend all of his family's money, so Yates and Betty at times had to pool

their food to feed everyone; sometimes there was not enough, and the children would go hungry. (RT 2895.)

Once, Betty and her children came over to Yates's house for Christmas. (RT 2892-2893.) Wes had been gone, drinking, for two days. (*Ibid.*) On Christmas Eve, while the children were playing, Wes broke into the house and began beating Betty. (*Ibid.*) Yates's oldest daughter gathered all of the children into a back bedroom, but appellant and Yates's son, Leroy, grabbed Wes's leg and tried to stop him. (*Ibid.*) Yates used her rolling pin to knock out Wes, and then called the police. (*Ibid.*) The police arrived and, as Wes began to regain consciousness, he started cursing and said that he was going to kill them all when he was released from jail. (RT 2893-2894.) The police took Wes away, and told Yates that he would not bother them for the rest of the night, or on Christmas Day. (*Ibid.*)

Betty and her family were living in Bakersfield when Betty was pregnant with her youngest son. (RT 2896.) Yates, who lived in Richmond at the time, took her children out of school and went to Bakersfield to be with Betty. (*Ibid.*) Appellant had been having behavioral problems at school, but his performance improved so dramatically while his cousin Leroy was going to school with him that the teachers wanted Leroy to stay there. (*Ibid.*) But Yates did not allow Leroy to stay, because she knew that Wes was drinking and beating the children. (RT 2896-2897.) Yates read the Bible to her children; they were good children. (*Ibid.*) She wished she would have brought appellant to Richmond but, with no support other than Leroy's Social Security, she did not have enough money. (*Ibid.*)

Yates moved her family around a few times, because her youngest son was very sick. (RT 2897-2898.) When Leroy was 12 (appellant would have been 14 or 15), Yates moved her family to Idaho. (RT 2898.) At the time, Wes was still beating appellant. (*Ibid.*) Yates and Betty kept in touch. (RT 2898-

2899.) Betty told Yates that Wes was "taking [appellant] to bars and getting him to drink," as appellant's grandfather had done with Wes. (RT 2898.) But Yates never contacted the welfare department to report that appellant was being beaten, because the welfare department would not do anything about it in those days. (RT 2900.)

From Yates's knowledge of appellant, she did not think that he was the kind of man who would kill two people. (RT 2899.) She only believed in the death penalty for someone like Ted Bundy, or the "Green River" killer. (*Ibid.*)

Leroy Cowan, Yates's son and appellant's cousin, had ownership interests in publishing and distribution companies that relate to education and literacy. (RT 2901-2902.) In 1990, he was selected to be one of the 10 representatives of the United States to travel to Russia to help put together the infrastructure needed for a free society; he was the only representative to stay for an extra month. (RT 2902.) His two brothers, as well as his sister, were also doing well. (RT 2903.)

Leroy remembered spending time with appellant, and appellant's family, before Leroy and his family moved to Idaho. (RT 2904, 2912-2913.) Leroy testified that, when his family moved to Idaho, it was like they were in "a whole new world" and he lost touch with appellant. (RT 2904, 2907, 2912-2913, 2918.)

Leroy's father died when he was two, so he had no memories of his own father, but Leroy had memories of Wes, appellant's father, who did not die until 1969. (RT 2904.) Wes was a good man when he was sober, but he was drunk a lot. (RT 2905.)

Once, when Leroy was young, he went to visit appellant's family, which was living in a World War II barracks building that had been refurbished into

apartments for the poor.[28] (RT 2904.) There were holes in the walls, as well as mice and rats. (RT 2905.) All of the boys slept in one bedroom, and the girls and women slept in the other bedroom. (*Ibid.*)

Wes was gone on a drinking binge during Leroy's visit. (RT 2905.) In the middle of the night, Leroy woke up when Wes jerked him out of bed and began hitting him with a belt. (RT 2906.) Then Wes noticed that he had grabbed Leroy; he threw Leroy aside and began beating appellant instead. (*Ibid.*) Appellant held up his hands, and the belt wrapped around his arm so that Wes could no longer swing it. (*Ibid.*) Appellant told Wes to stop, and asked Wes what he had done. (*Ibid.*) Wes began beating appellant with his fists. (*Ibid.*) When the women were unable to get Wes to stop beating appellant, one of them ran to the pay phone on the corner and called the police. (*Ibid.*) The police came, arrested Wes, and took him away. (*Ibid.*) Wes was released when he sobered up. (*Ibid.*) The same scenario happened five or six times when Leroy's family visited appellant's family at the various places where appellant's family lived. (RT 2907, 2913.) If Leroy and his family were visiting appellant's family and Wes came home drunk, they left–they hid or "stayed in the trees" until Wes fell asleep or left. (RT 2913.)

Sometimes when Wes came home he beat Betty instead of Leroy or appellant. (RT 2908.) Leroy remembered the Christmas beating at his family's house that Yates had testified about, and the time that he went to school with appellant (during which time appellant got the highest grades that he had ever received). (RT 2908-2910.) When appellant thought that Leroy was going to be able to go to school with him, appellant smiled and it seemed like he was happy; but when appellant found out that Leroy was not going to stay, "it was

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28. Leroy recalled that that was the first place that the boys had stolen anything; they stole some food from a little store, because all they had to eat was plain oatmeal (their mothers would eat a single piece of toast). (RT 2917-2918.)

as if a light had went [*sic*] out." (RT 2911.) Leroy thought that appellant was smart; appellant was "always faster in the thought process." (RT 2911.)

Sometimes Leroy, appellant, and appellant's older half-brother carried lumber for Wes on Wes's carpenter job sites. (RT 2914-2916.) On one such occasion, appellant's older half-brother left the site early. (*Ibid.*) Later, on the way home, Wes locked Leroy and appellant in his panel wagon while he went into a bar to drink. (*Ibid.*) The boys played with the tools for the rest of the afternoon while waiting for Wes to come back. (*Ibid.*) It was dark when Wes returned, and he was drunk enough that the boys were able to get away from him. (*Ibid.*) But that night, while the boys were sleeping, Wes came into the room and beat them (first Leroy, until he realized it was Leroy, and then appellant) until they were able to get away. (*Ibid.*)

The only time that Leroy saw appellant between 1962, when Leroy moved to Idaho, until the trial was at a 1976 family reunion. (RT 2916, 2929.) Nonetheless, Leroy believed that appellant would had to have been in some kind of altered state to kill someone. (RT 2916-2917.) He did not believe that appellant had gotten a "fair shake" in life, and he believed that the death penalty would not be just for appellant. (*Ibid.*) Testifying was hard for Leroy, because he had tried not to remember some of the events of his childhood. (RT 2918.)

Brenda Hunt met appellant in 1993 and became his girlfriend. (RT 2920.) They lived together with her five children at 850 Hudson Drive in Greenfield for about eight months. (RT 2921, 2928.) Their relationship was a "little" stormy at first; they were both using drugs at the time. (*Ibid.*) Appellant suggested that they stop using drugs, and that they stop the many people who were visiting them (related to drugs). (RT 2922.) Appellant contributed his "SSI" check to the household, and they paid the bills and took care of the children before "messing around." (RT 2923.) But they decided that even the "messing around" had to stop. (*Ibid.*) Since then, Hunt attended

a drug rehabilitation program, started attending church with her children, and got a job. (RT 2922.) When she testified, she had been clean of drugs for almost a year. (RT 2923.)

Hunt's sons had gotten into the habit of chasing and jumping onto the backs of moving cars and the ice cream truck. (RT 2923-2924.) One of her sons fell off and "got really skinned up bad." (RT 2924.) On the date of the incident in April 1993 described by Abney, Hunt had heard that her children were chasing cars. (*Ibid.*) She went onto the porch and called them, but they laughed and ran. (*Ibid.*) She asked appellant, who was in the living room, to get the boys. (*Ibid.*) He went after the boys, and she may have gone inside. (*Ibid.*) She heard Abney hollering and, when she went outside, Hunt said that it was "okay" when Abney said that the police had been called. (*Ibid.*) Appellant did not do what Abney had testified to; her son did not have any bruises or scrapes and he was upset that appellant was arrested and taken away. (RT 2925.)

Hunt testified that appellant never hurt her; he was kind to her children; he played the guitar and sang to her children; he took her children places; and he treated her children as if they were his own children. (RT 2925-2926.) Appellant was "real comfortable being a family person," and he changed as a result of acting like a father to her children. (RT 2926-2927.) She did not think that appellant should die, because he was loved (by her, her children, and his family). (RT 2927.) She would visit him in prison, and her children wanted to see him. (*Ibid.*) She would be "devastated" if he were sentenced to death. (RT 2928.)

Robert Hunt, Brenda's 12-year-old son, knew appellant as his mother's boyfriend. (RT 2929-2931.) Appellant treated him with respect, and in return Robert called appellant "Dad." (*Ibid.*) Appellant took care of him, helped him

with his schoolwork, took him camping and fishing (one time), sang to him almost every day, and taught him how to play the guitar. (RT 2932, 2935.) Appellant treated the other children the same way. (RT 2933, 2935.) Appellant did not beat him, but appellant did spank him because Robert got "in a lot of trouble." (*Ibid.*) According to Robert, in April 1993 he ran and tripped over a tree stump; appellant picked him up by his hand, grabbed his chin and said something to him. (RT 2933-2934.) Robert did not remember whether appellant picked him up by his hair, but appellant did not hurt him. (RT 2934.) Robert also got into trouble for chasing moving cars. (*Ibid.*) He missed appellant; he loved appellant; he would visit and write to appellant in prison. (RT 2936.)

Michael Hunt, Brenda's 10-year-old son, testified that he and all of his siblings called appellant "Dad." (RT 2938-2940.) Appellant treated him with respect, took him places (including fishing, camping, and the fair), and sang and taught him how to play the guitar. (RT 2940-2943.) Appellant was in the process of making a guitar for him when he was arrested. (RT 2942.) Appellant did not hurt him, but sometimes appellant spanked him on the bottom for failing to respect their mother. (RT 2941-2942.) Michael loved appellant; he would visit and write to appellant in prison. (RT 2944.)

Melody Hunt, Brenda's seven-year-old daughter, sometimes called appellant "Robert," and sometimes "Dad." (RT 2945-2948.) Appellant was "good" to her and her older sister Wendy; sometimes he liked to tell stories. (RT 2948.) He bought her presents, sang her songs, and once he gave her and Wendy a ride on his motorcycle. (RT 2948-2949.) He did not hurt her, and she never saw him hurt any of her family members. (RT 2949.) She and her family liked appellant; she would want to visit him if he were sent away. (RT 2949-2950.)

Rebuttal

At about 1:00 p.m. on April 9, 1993, Senior Deputy Sheriff Michael Rascoe responded to Abney's call at 850 Hudson Drive. (RT 2951-2952.) He talked to Abney; then he talked to a boy named Robert out by his patrol car. (RT 2952, 2958.) Robert was "very scared"; it looked like he had been crying; and he had been told he would be taken out of the home if he talked to Rascoe. (RT 2953, 2956.) Rascoe told Robert that that was not true. (*Ibid.*) Robert said that he, his brother, and some other children had been playing in the front yard, and they had been told to stay off of a van that was parked in front of the house. (*Ibid.*) Robert told his brother and the other children to get off of the van or they would get in trouble. (RT 2954.) Appellant came outside and was mad because he thought that Robert had been playing on the van. (*Ibid.*) Appellant grabbed him by his hair, shook him, and then threw or pushed him to the ground. (*Ibid.*) Robert said that his brother Michael had seen what happened. (RT 2958.)

Robert indicated to Rascoe that his neck and the top of his head hurt. (RT 2956-2957.) Brenda Hunt told Rascoe that she was going to have a doctor examine Robert. (RT 2957.)

Rascoe also talked to Michael, Robert's younger brother. (RT 2954-2956.) Michael said that appellant had grabbed Robert by his hair, picked him up off of the ground, and thrown Robert backwards, which had caused Robert to fall onto his back. (*Ibid.*)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S NUMEROUS MOTIONS TO DISMISS

Appellant claims that he was denied due process of law by the 10-year delay between commission of the charged offenses and his arrest. (AOB 72-115.) But the trial court properly denied appellant's numerous motions to dismiss on this basis. Therefore, this Court should reject appellant's claim.

A. The Proceedings Below

1. Appellant's First Motion To Dismiss And The Hearing On The Motion

Appellant's initial motion to dismiss based on prejudicial pre-arrest delay was filed on August 25, 1994. (CT 491-500.) On September 1, 1994, the prosecutor opposed that motion. (CT 513-520.) The hearing on that motion, as well as appellant's demurrer, was combined with the preliminary hearing.

At the hearing, Robert Johnson, Alma's son, could not remember the specifics of the description of his mother's watch, which was missing after she was murdered. (CT 526, 544.)[29] He also could not remember whether Clifford used a lighter. (CT 548.) He saw the Mercks only about two or three times a year. (CT 549.)

Quintin Nerida, a KCSD investigator specializing in fingerprints at the time of the Merck murders, processed the Merck house along with two other investigators, Helen Sparks and James Smith. (CT 558-564, 571-578.)

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29. The reporter's transcript of the September 6, 1994, proceedings was included in the clerk's transcript, while the reporter's transcripts for the subsequent days of the hearing were not. Respondent's cites are noted accordingly.

Fingerprints were lifted at more than 30 sites in the Merck house, including People's Exhibit Number 12, which Nerida lifted from the inside edge of the service porch back door, and People's Exhibit Number 13, which Sparks lifted from the bottom of a plastic sewing crate on a table in the dining area. (RT 566-568, 579-582, 599-600, 609-610.) Nerida believed that he was asked to compare the latent prints with those of one person; he could not remember the name, but he wrote a report on the comparison. (RT 594, 606, 610-611.) Nerida did not do any more work on the case because, in October 1984, he was sent to the FBI Academy, and when he returned he was immediately assigned to the Mojave Desert area. (RT 594-597.)

On October 27, 1984, Grimes requested a photograph of the latent prints for ALPS. (9/7/94 RT 14-15.) The file also reflected that, on October 31, 1984, Del Rey requested a comparison of the latent prints with the prints of appellant and Gerald Cowan. (RT 635; 9/7/94 RT 4, 41, 50.) The comparison was done by Roper, with a negative result. (RT 635-636; 9/7/94 RT 4, 43.) On December 21, 1984, Diederich requested a comparison as to Gerald Cowan, again with negative results. (9/7/94 RT 4, 50.) Pierce testified that the file did not reflect any additional comparison requests until she received the file in 1994. (9/7/94 RT 4-5.)

Also on October 31, 1984, Del Ray requested an ALPS comparison of the latent prints; the file indicated that the latent prints were mailed (presumably to the Department of Justice), but Pierce did not see any response from the DOJ in the file. (9/7/94 RT 16-17.) The file indicated that an ALPS comparison of latent print numbers 46 to 52 was done, with negative results, on April 28, 1987. (9/7/94 RT 18.) The next day, an ALPS comparison of latent print number 44 was negative. (*Ibid.*)

On December 19, 1984, Diederich was assigned to do the follow-up investigation on the Merck murders. (RT 9/7/94 178-179.) Also in December

1984, Fraley was assigned to take over the investigation from Diederich. (9/7/94 RT 199-200, 206; 9/8/94 RT 40-42.) Diederich and Fraley retrieved from the Bakersfield Police Department property room the Colt pistol that had been seized from Lutts. (9/7/94 RT 174-175.) Dietrich removed the grips from the pistol, and noticed that the letter "C" was engraved under one of the handles, and the letter "M" was engraved under the other handle. (9/7/94 RT 175-176.) The engraving was not professionally done; rather, it looked like a sharp object had been used to scratch the initials into the metal. (*Ibid.*) Diederich had the cigarette lighter that had been recovered from Ronnie Woodin tested for fingerprints. (9/8/94 RT 67.)

On December 20, 1984, Diederich spoke to Robert Bushman, the operations officer at the Social Security office in Bakersfield. (9/7/94 RT 177-178.) Bushman confirmed that the Mercks were receiving Social Security checks that would have arrived on about the third of each month. (*Ibid.*)

On December 21, 1984, Diederich interviewed Phinney. (9/7/94 RT 178-179.) Phinney told Diederich about property that he had seen in appellant's possession. (9/7/94 RT 179-187, 193-194.) Fraley attended Diederich's interviews of several people (including Phinney). (9/7/94 RT 200, 206; 9/8/94 RT 40-43.)

On December 26, 1984, Diederich talked to Mary Watts, Alma's daughter, and Terry Jones, Alma's granddaughter. (9/7/94 RT 188-191.) Watts and Jones described some of Alma's property that was missing from the Merck home. (*Ibid.*) Diederich wrote reports about his interviews. (9/7/94 RT 192.) He worked on the Merck case for about a month before he was promoted to sergeant and transferred. (9/7/94 RT 179, 191-192.)

On January 24, 1985, Fraley interviewed Woodin and appellant's niece, Patricia Sanchez. (9/7/94 RT 202, 212-214; 9/8/94 RT 91-93.) Woodin gave Fraley a silver cigarette lighter with a turquoise inset that appellant had sold to

him for $5 on about September 24, 1984, while he was at appellant's mother's house. (9/7/94 RT 203-205.) Woodin told Fraley that appellant was trying to sell costume jewelry, old coins, rings, and necklaces that appellant had in the trunk of a Pontiac parked in front of the house. (9/7/94 RT 204.) The next day, also at appellant's mother's house, Gerald Cowan saw Woodin pull out the lighter, and asked where Woodin had gotten it. (9/7/94 RT 210.) When Woodin said that he had gotten the lighter from appellant, Gerald told him to put it away and not let anyone see it. (9/7/94 RT 210-211.)

On January 26, 1985, Fraley interviewed Kathy Glass, appellant's sister. (9/8/94 RT 4-5, 37, 84-88.) Glass said that she had bought a ring from appellant about three or four months earlier, and that she had given the ring to her husband. (9/8/94 RT 9-11, 87-88.) Later that day, Glass gave the ring to Fraley and he booked it into evidence. (*Ibid.*) Inside the ring was a triangle-shaped inscription of the letter "A," over the letter "M." (9/8/94 RT 11-12.)

On January 30, 1985, Fraley interviewed Mary Watts, Alma's daughter. (RT 9/8/94 13, 38.) Watts said that Alma had gotten the ring (that Fraley had gotten from Glass) in Mexico about 15 years earlier. (*Ibid.*) That same day, Fraley interviewed Jerry Jones, who was married to Terry Jones, Alma's granddaughter. (9/8/94 RT 14-15.) Jones said that the lighter that Fraley had gotten from Woodin belonged to Clifford. (*Ibid.*) On February 6, 1985, Betty Turner, Alma's daughter, told Fraley that the lighter belonged to Clifford, and that the ring belonged to Alma. (9/8/94 RT 15-16.)

On February 8, 1985, Fraley interviewed Johnny Davidson, Tags's stepfather. (9/8/94 RT 16-18, 29-31.) Fraley told Davidson that he (Fraley) had gotten a ladies' watch from Davidson's wife, Maxine. (9/8/94 RT 16-18.) Davidson told Fraley he had loaned his car to appellant about three months earlier, and appellant had given him the watch when appellant returned the car. (*Ibid.*) Appellant and Gerald Cowan were trying to sell men's and women's

watches and rings, and Davidson saw Jewell Francis Russell wearing a ring that appellant was trying to sell. (9/8/94 RT 18-19.) Five days later, Davidson told Fraley that Tags had described Russell's murder to him on February 8, 1985. (9/8/94 RT 25-26.)

On February 14, 1985, Fraley went to a truck stop on Weedpatch Highway and talked to Tags. (9/8/94 RT 44.) Tags had denied any knowledge of the murders, but Fraley came to believe that appellant was a suspect. (*Ibid.*) Later that day, appellant called Fraley at Fraley's office. (9/8/94 RT 44, 72.) Appellant was upset at Fraley's treatment of Tags. (9/8/94 RT 45.) After they talked and appellant had calmed down, appellant volunteered to come in to Fraley's office and talk about the murders. (9/8/94 RT 45, 70-74.) But Fraley told appellant that he did not want to talk to him at that point in time, because Fraley was "not prepared to take him on . . . from an investigator's point of view."[30] (9/8/94 RT 25-26.)

During the time that Fraley worked on the case, no one was arrested, and the case was never submitted to the district attorney's office for a complaint. (9/7/94 RT 201.) Fraley was not aware of DNA testing in 1984; however, the

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30. Fraley explained:

> When you go into an interview situation, depending on what you are attempting to gain from that interview, you attempt to control an interview with knowledge as to whether you can, at least in your own mind, tell whether the person is or is not lying to you during the course of the interview, and you need as many factual things to base that information off of as you can get and there is a point in there where you decide it's then appropriate to take that person on tactically in an interview.

(9/8/94 RT 69.) Later, Christopherson said that he would not have interviewed appellant in those circumstances, because appellant was upset about Fraley's contact with Tags, and because Christopherson testified that there was "no way" to assume that appellant would waive his constitutional rights. (9/12/94 RT 30-31.)

knife found at the Merck home had been sent to the Kern County crime lab for analysis. (9/8/94 RT 66-67.) Also, before Fraley began working on the case there had been two requests for latent print comparisons (including on the cigarette lighter) that included the fingerprints of appellant and Gerald Cowan. (9/8/94 RT 62, 68.)

In late 1985 or early 1986, Fraley took the case to the district attorney's office, and he gave them copies of all of his reports, so that he would know what additional evidence was needed to get a complaint filed. (9/7/94 RT 201; 9/8/94 RT 52, 56, 59.) He did not believe that he had sufficient probable cause, at that time, to arrest appellant or Gerald Cowan. (9/8/94 RT 66.) A couple of prosecutors evaluated the materials and told Fraley that all of the evidence he had gathered was circumstantial, and that he needed to find a direct connection or evidence before they would issue the case. (9/8/94 RT 60-61.) Afterwards, the district attorney's office assigned an investigator (Hillis) to the case, who worked the case parallel to Fraley. (9/7/94 RT 201; 9/8/94 RT 52, 56.) But Fraley did not believe that there was a cooperative investigative effort between KCSD and the district attorney's office. (9/8/94 RT 57.)

On October 10, 1986, Fraley interviewed Roy Davidson, Johnny's brother, at the Kern County Jail. (9/8/94 RT 20-21, 39.) In August and September 1984, appellant, Tags, Gerald Cowan, and several other people had lived with Roy. (9/8/94 RT 20-21.) At one point appellant told Roy that "they" (appellant and Gerald Cowan) had "done" Russell. (9/8/94 RT 21-23.) Appellant also retrieved from his Pontiac car a box that contained men's and women's rings, as well as two or three men's watches and three or four gold necklaces. (9/8/94 RT 23.) Roy told Fraley that, after appellant and Gerald Cowan attended Russell's funeral, they left California and were gone for about two to two and a half months on a trip to Florida and back. (9/8/94 RT 24.)

Fraley talked to Hillis several times, and at some point he became aware that Hillis had interviewed Gerald Cowan, and that they had talked about forensic work that Hillis was having done. (9/8/94 RT 49, 58.) Fraley believed what Johnny and Roy Davidson had told him. (9/8/94 RT 51-52.) But Fraley never tried to interview appellant. (9/8/94 RT 47.) He felt that he was not prepared to talk to appellant. (9/8/94 RT 50.) In the last three to four months that he was assigned the case, Fraley did "very little" work on the case because he did not "have anything that was current" that he could "actively pursue." (9/8/94 RT 70.)

Fraley continued to work on the case until sometime between July and September 1987, when he was promoted to sergeant and transferred. (9/7/94 RT 200; 9/8/94 RT 34.) Fraley took the case file to his supervisor so that it could be reassigned. (9/8/94 RT 34-35.) After Fraley was transferred, he was "consulted" about the case several times–by Hillis, Porter (in about 1987, and in about 1990 or 1991), and Christopherson (in about the summer of 1994). (9/7/94 RT 202; 9/8/94 RT 6, 35-36.)

As previously discussed, in 1986, Hillis, an investigator with the district attorney's office, was assigned to the Merck case by Deputy District Attorney Bart Hegeler, as part of a review of old murder cases on which complaints had never been issued. (9/12/94 RT 78-80.) Hillis also worked on the Russell murder, because the belief was that the same person or persons had committed both murders. (9/12/94 RT 80-81.) Hillis reviewed the reports and physical evidence, and he interviewed several people, including Tags (whom Hegeler thought would be more cooperative at that time because appellant was in prison). (9/12/94 RT 80-81, 85.)

When Hillis presented everything to Hegeler, Hegeler said that there was not enough evidence to present to a jury. (9/12/94 RT 82.) Hegeler did not want to proceed with the case until the evidence would support a conviction.

(*Ibid.*) Hillis, who had been an investigator for less than a year, was disappointed because he felt the evidence against appellant was "pretty strong." (9/12/94 RT 83, 86.) Hillis worked on the case for about two to three months, but then he stopped because 90 percent of his workload involved cases that had already been filed. (9/12/94 RT 84.) Later, he was transferred to the family support division of the district attorney's office. (*Ibid.*)

In September 1984, Christopherson was a patrol deputy in the Mercks' neighborhood. He went to the Merck house crime scene, and he was familiar with appellant (who lived about five blocks from the Mercks). (9/12/94 RT 11-15.) He felt some sense of responsibility to solve the crime, since it had occurred in his district, and he maintained contact with "street persons" to see if any new information developed. (9/12/94 RT 17.)

In about May 1994, the month before Christopherson was assigned to the KCSD Robbery-Homicide Section, he began reviewing the Merck case. (9/8/94 RT 184-185; 9/12/94 RT 18-21.) At the time, no one was assigned to the case. (*Ibid.*) Christopherson was in between cases, and he had "always had suspicions" that other people, beyond those initially investigated, were involved. (*Ibid.*) The last KCSD report in the file, which was dated July 27, 1987, was Fraley's report of his interview of Roy Davidson. (9/12/94 RT 23-25.) Christopherson asked some questions of Sergeant Glenn Johnson, who was in charge of the Robbery-Homicide Section, and by the next morning the case file had been put on his desk. (9/8/94 RT 186.) He read the reports and, after his transfer, Johnson gave him permission to pursue the case. (*Ibid.*)

On May 12, 1994, Christopherson asked Tom Jones, the chief fingerprint specialist, for a comparison of the latent prints found at the Merck house with three people (including appellant's other brother, Leslie). (9/8/94 RT 187-188; 9/12/94 RT 35-39.) He later included appellant and Gerald Cowan in his request. (9/8/94 RT 188.)

On May 12, 1994, Pierce, a KCSD evidence technician, received the case file with Christopherson's request to compare appellant's fingerprints with People's Exhibit Numbers 12 and 13. (RT 624-633, 9/7/94 RT 4, 44.) Pierce compared all of appellant's fingerprints with all of the latent prints from the Merck house.[31] (RT 58.) On June 27, 1994, Pierce concluded her fingerprint comparison (which included both the latents and an enlarged photograph of the latents as to Exhibit Numbers 12 and 13), and determined that Latent Print No. 10 on Exhibit Number 12 was made by appellant's left thumb, and that Latent Print No. 44 on Exhibit Number 13 was made by his left middle finger. (RT 633; 9/7/94 RT 33-38, 44-49.) Two other latent fingerprints from Latent Print No. 44 were too smudged for analysis. (9/7/94 RT 31-33.) Pierce reached a negative conclusion in both of her comparisons of Gerald Cowan's fingerprints to all of the latent prints found in the Merck house. (9/7/94 RT 55-57.)

On June 27, 1994, Christopherson received the results from his comparison request–a positive match of appellant as to two of the latent prints. (9/8/94 RT 188.) He reviewed the file again, including the information from the Shafter Police Department (based on interviews and investigation done by Detective Lynch in 1984 and 1985, and Sergeants Buoni and Porter in 1990). (9/8/94 RT 188-189, 192; 9/12/94 RT 25-27.) Christopherson also knew that Hillis had interviewed witnesses and contacts in both the Merck and Russell cases. (9/8/94 RT 192-193.) Then, based on Johnson's approval, Christopherson presented the case to the district attorney's office. (9/8/94 RT 189; 9/12/94 RT 66-67.)

In the meantime, Jones drove the latent prints to Sacramento, where the Department of Justice verified the fingerprint match. (9/8/94 RT 189-191.)

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31. The earliest fingerprints that Pierce saw from appellant were dated August 11, 1967, and were kept in the KCSD fingerprint file. (RT 9/7/94 8-9.) Another set of appellant's fingerprints was dated August 8, 1994. (*Ibid.*) The latent fingerprints were kept in the case file. (*Ibid.*)

Christopherson told the district attorney's office about the print verification, and he was told that the case would be filed against appellant and Gerald Cowan. (*Ibid.*) As a result, Chrisopherson arrested appellant and Gerald Cowan on August 8, 1994. (9/8/94 RT 191; 9/12/94 RT 5-6.)

Christopherson took appellant to an interview room, advised appellant of his constitutional rights, and appellant agreed to talk to him. (9/12/94 RT 5-7.) Appellant said that he had not killed two elderly people on McClean Street and, when Christopherson took appellant to the Merck's house, appellant said that he had never been in or near the house. (9/12/94 RT 8.) When asked a variety of questions, appellant replied that he did not know or could not remember. (9/12/94 RT 56-61.) But he repeatedly denied ever killing anyone. (9/12/94 RT 73.)

At the hearing on appellant's first motion to dismiss, appellant's defense counsel called Roper as a witness. (9/12/94 RT 91-92.) Roper had received training in fingerprint comparison, had begun comparing fingerprints in about August 1977, and had been a member of the Technical Investigation Section for about eight years as of about November 1984. (9/12/94 RT 93.) He had compared at least 2,000 latent prints and fingerprints, and he had testified regarding fingerprint comparison over 200 times each in superior court and municipal court. (9/12/94 RT 93-94, 106.) At the time of the hearing, he did not remember doing the fingerprint comparison in appellant's case. (9/12/94 RT 94.) He left the section in 1986, which ended his access to the files. (9/12/94 RT 94-95.)

Roper reviewed a fingerprint comparison request of the latent prints in appellant's case dated November 1, 1984, as well as other documents from appellant's case, and his initials were on the request, but he did not remember the request or the other documents due to the passage of time. (9/12/94 RT 96-97.) The request indicated that Roper was to compare several people's

fingerprints, including appellant, with the latent prints in the case. (9/12/94 RT 97-100.) But Roper's comparison was negative as to appellant. (*Ibid.*) Roper admitted that he "[c]ertainly" could have made a mistake, and that it was easy to make a mistake in a case with a lot of latent prints due to the fine detail involved, as well as the time pressure. (9/12/94 RT 102, 106.) At the time of the comparison, only one person was required to sign off on a negative finding, but a positive finding required two people to sign off on it. (9/12/94 RT 103.) At the time of the hearing, Roper's eyesight was too poor to re-do the comparison. (9/12/94 RT 107.)

On September 12, 1994, at the close of the combined hearing, the court ruled:

> I don't find any deliberate acts by law enforcement or the agencies not to bring this case to trial or to push forward with it as soon as they could. It would appear there was an inadvertent failure to detect a critical fingerprint analysis. It appears that even as late as '86, '87 there were other people seriously considered as suspects in the case that were being investigated at the time before then. And . . . the fingerprint connected Robert Cowan with the case certainly added [*sic*] substantial amount to the body of evidence against defendant.

(9/12/94 RT 116-117.)

2. Appellant's Second Motion To Dismiss And Appellant's Supplementation To That Motion

On November 3, 1994, appellant filed a motion to dismiss the information for prejudicial pre-arrest delay (based on the testimony from the preliminary hearing) or, alternatively, to dismiss the information pursuant to section 995. (CT 694-745.) On November 28, 1994, the prosecutor opposed appellant's motion to dismiss. (CT 774-795.) On December 28, 1994, appellant supplemented his motion, based on various items of evidence that were missing from the KCSD evidence room. (CT 847-864.) On December 30, 1994, the court denied the portion of appellant's motion based on section

995. (CT 865.)

On January 26, 1995, the prosecutor filed supplemental points and authorities in opposition to appellant's motion to dismiss, but acknowledged that some non-material items of evidence were missing and had probably been destroyed before July 1985. (CT 873-892.) On January 30, 1995, the court held a hearing and took the motion to dismiss under submission. (CT 893-894, 898-936 [the reporter's transcript of the hearing which is included in the clerk's transcript].)

At the hearing on January 30, 1995, William Thompson, who began working for the KCSD in March 1984 and who had been the KCSD Property Control Officer since about 1992, testified that various items of evidence collected from the Merck house were no longer in existence. (CT 903-904, 909-910.) The missing items were circled on the property cards. (CT 904.) But Thompson was not working in the property room when the items were brought in, so he did not know what had happened to the items. (CT 905-906.) Nor did he have records that indicated what had happened to the items; property records are shredded after about five years. (CT 906-911.) One column on the property card indicated the shelf unit on which the property had been placed; Thompson did not think, but could not say for sure, that the shelves had ever been renumbered. (CT 906-909.) The shelves had not been renumbered since 1992. (CT 913.) Thompson had reviewed the property log books, and noted that the Merck evidence was apparently not on the indicated shelf unit in July 1985, because at that time other property was put on the same shelf unit, and that evidence would not have been able to fit there had the Merck property been present. (CT 908-911.) Usually, records are kept as to the movement or destruction of property, but Thompson was unable to find any record of what happened to the Merck items. (CT 918-919.) Thompson was also unable to find the items anywhere in the property room. (CT 919.)

The property records showed that Laskowski checked out a small pocket knife, and returned it on March 4, 1985. (CT 915.) The knife was checked out again on June 12, 1986, and returned on July 7, 1987. (*Ibid.*) The knife was still in the property room. (*Ibid.*) But three pieces of cut electrical cord, which had been checked out by Laskowski on February 20, 1985, and returned on March 4, 1985, were missing. (CT 915-916.) Usually, items are stored in paper garbage-style bags, and any items that are checked out are, upon their return, stapled to the outside of the paper bags. (CT 916-917.)

According to an entry in the clerk's transcript from Gerald Cowan's case (with which appellant's case file has been augmented), the motion to dismiss was denied on February 10, 1995.[32/] (Aug. CT 205.) On September 11, 1995, the court clarified that it had denied all the motions to dismiss, both statutory and non-statutory. (CT 1051.)

3. Gerald Cowan's Motion To Dismiss, Which Was Joined By Appellant (Appellant's Third Motion)

On January 19, 1996, Gerald Cowan filed a motion to dismiss, based on allegedly prejudicial pre-arrest delay. (CT 1069-1095B.) On January 26, 1996, appellant filed a notice of joinder in various motions filed by Gerald Cowan, including the motion to dismiss. (CT 1096-1097.) The motions were set for hearing on the first day of trial. (CT 1098.)

4. Appellant's Fourth Motion To Dismiss

On February 22, 1996, during a hearing on another issue, appellant

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32. Respondent notes that no reporter is listed for the February 10, 1995 ruling. (See Aug. CT 205.) Also, the case files of appellant and Gerald Cowan do not contain a reporter's transcript of the February 10, 1995, hearing or ruling.

renewed his motion to dismiss for pre-arrest delay. (CT 1114, 1134-1137 [the reporter's transcript of the hearing which is included in the clerk's transcript].) The court denied the motion. (*Ibid.*) The previously-filed motions were set for hearing March 18, 1996, the first scheduled day of trial. (CT 1138-1141.)

5. Appellant's Fifth Motion To Dismiss And His Supplementation To That Motion

On March 14, 1996, appellant filed a supplemental motion to dismiss for pre-arrest delay, which was based on the inability to find two potential defense witnesses, and the destruction of appellant's pre-1984 prison records. (CT 1202-1210.) On March 25, 1996, appellant supplemented his motion, and there was some discussion of appellant's motions to dismiss during the pretrial hearing of in limine motions. (CT 1219, 1268-1276; RT 28-48.)

On March 27, 1996, after hearing additional argument, the court denied appellant's motion to dismiss. (CT 1281; RT 160-183.) The court cited *Butler v. Superior Court* (1995) 36 Cal.App.4th 455, 462, and stated its belief that prejudice was not automatically presumed. (RT 182-183.) The court found, based on the materials that had been submitted, that the prosecution had met its burden (presumably to rebut any prejudice suffered by appellant). (RT 183.)

B. The Applicable Law

A claim of unconstitutional pre-accusation delay is distinct from that of post-accusation delay. (See *United States v. MacDonald* (1982) 456 U.S. 1, 7; *Butler, supra,* 36 Cal.App.4th at p. 464.) While post-accusation delay is governed by the Sixth Amendment right to a speedy trial, pre-accusation delay is regulated only by the general right to due process afforded under the state and federal constitutions. (See *United States v. MacDonald, supra*, 456 U.S. at pp. 6-7, citing *United States v. Marion* (1971) 404 U.S. 307, 321; see also

Scherling v. Superior Court (1978) 22 Cal.3d 493, 504; *People v. Archerd* (1970) 3 Cal.3d 615, 639 [the court noted, "There is no general right to a prosecution speedier than that laid down by the statute of limitations," and "[t]here is no statute of limitations on murder."].) Accordingly, any test designed to balance interests under the Sixth Amendment right to a speedy trial has no application to pre-accusation delays. (*MacDonald, supra*, 456 U.S. at p. 7; *Butler, supra,* 36 Cal.App.4th at p. 464.)

The due process clause provides only limited protection against pre-accusation delay. (See *United States v. Lovasco* (1977) 431 U.S. 783, 789; *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 defendant's right to a fair trial. (See *Lovasco, supra,* 431 U.S. at p. 790; *People v. Martinez* (2000) 22 Cal.4th 750, 765, citing *Marion, supra*, 404 U.S. at p. 324; *Archerd, supra*, 3 Cal.3d at p. 640 ["The delay must be purposeful, oppressive, and even 'smack of deliberate obstruction on the part of the government,' before relief will be granted. [Citations.]"]; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911.)

Prejudice may not be presumed but must be affirmatively shown and supported by evidence. (*Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 911; *Shleffar v. Superior Court* (1986) 178 Cal.App.3d 937, 946.)[33/] For example,

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33. In *Shleffar*, the court stated:

> [U]nless a defendant can demonstrate specific prejudice flowing from the delay, the draconian remedy of dismissal should not be invoked merely because the accused was not arrested as quickly as would be possible in the best of all worlds. It is only . . . [when] a delay can infect the truth finding process by preventing the accused from mounting a viable defense that a dismissal is ever justified. [ ] Thus, speculation about prejudice because potential witnesses' memories have failed or because witnesses and evidence are now unavailable is insufficient to discharge defendant's burden. (See *Serna v. Superior Court* (1985) 40

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* (1988) 46 Cal.3d 1, 37, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5; *Archerd, supra*, 3 Cal.3d at p. 640; *People v. Hughes* (1974) 38 Cal.App.3d 670, 676-677.) But claims of "faded memory" may be disproved by evidence showing that a witness does in fact have specific memory of relevant details. (*Scherling, 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.*) Similarly, claims that a witness is unavailable are not prejudicial if the testimony would be cumulative to the available evidence. (*Ibid.*)

The claimed deprivations must be genuine, and they must be such as could make a difference in the defense of the case (in other words, the deprivations must have resulted in the denial of a fair trial). (*Scherling, supra*, 22 Cal.3d at p. 507.) The claimed prejudice must also relate to a genuine, disputed issue at trial, and not to a fact which "was not at all a real issue in the case." (*Id.* at p. 506 [defendant's alleged memory loss not related to matters of "crucial significance"].) Respondent notes that claims of prejudice regarding substantial delay have been repeatedly rejected. (See *Morris, supra*, 46 Cal.3d at pp. 37-38 [three-year pre-complaint delay in robbery-murder, caused when the case file was inadvertently placed into archives as a closed case, not prejudicial]; *Scherling, supra,* 22 Cal.3d at pp. 505-506 [nine-year delay in prosecuting burglaries not prejudicial]; *Dunn-Gonzalez, supra*, 47 Cal.App.4th at pp. 914-915 [almost two-year delay in bringing fraudulent appropriation

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> Cal.3d 239, 250.) A particular factual context must be established in which a specific claim of prejudice can be evaluated.

(*Shleffar, supra*, 178 Cal.App.3d at p. 946.)

charges reasonable]; *Butler, supra,* 36 Cal.App.4th at pp. 464-467 [40-month delay in bringing grant theft charge reasonable]; *Shleffar, supra*, 178 Cal.App.3d at pp. 946-947 [four to five month pre-complaint and twenty-seven month pre-arrest delay in prosecution for grand theft not prejudicial]; see also *People v. Appel* (1996) 51 Cal.App.4th 495, 507-508.)

Absent a showing of actual prejudice, the trial court need not inquire into the prosecution's motivations for the delay. (*Lovasco, supra,* 431 U.S. at pp. 789-790; *Morris, supra,* 46 Cal.3d at p. 37; *Scherling, supra,* 22 Cal.3d at p. 506; *Archerd, supra,* 3 Cal.3d at p. 639.) But if prejudice has been shown, the burden shifts to the prosecution to justify the delay. (*Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 911.) The court balances the harm to the defendant against the justification for the delay. (*Morris, supra*, 46 Cal.3d at p. 37; *Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 911; *Martinez, supra*, 37 Cal.App.4th at p. 1593.) In *Dunn-Gonzales*, the court held:

> The facts and circumstances must be viewed in light of (1) time involved; (2) who caused the delay; (3) the purposeful aspect of the delay; (4) prejudice to the defendant; and (5) waiver by the defendant. If the government deliberately uses delay to strengthen its position by weakening that of the defense or otherwise impairs a defendant's right to a fair trial, an inordinate preindictment delay may be shown to be prejudicial. However, a prosecutor is entitled to a reasonable time in which to investigate an offense for the purpose of determining whether a prosecution is warranted. (*People v. Archerd* (1970) 3 Cal.3d 615, 640.)

(*Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 991.)

The federal Constitution requires proof that the prejudicial delay was motivated by prosecutorial bad faith. (See *Lovasco, supra*, 431 U.S. at pp. 795-796.) While some cases suggest the state Constitution could support reversal merely upon a showing of negligent yet prejudicial delay, such a delay cannot support reversal unless the harm occasioned by the delay outweighs the prosecutor's justification. (See *Scherling, supra*, 22 Cal.3d at p. 505;

Dunn-Gonzalez, supra, 47 Cal.App.4th at p. 911.)

In *Dunn-Gonzalez, supra*, 47 Cal.App.4th at pages 913 to 915 (citing *Lovasco, supra,* 431 U.S. at pages 790 to 796), the court stated:

> A prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of orderly expedition to that of mere speed. In sum, to prosecute a defendant following investigative delay does not deprive the defendant of due process, even if his or her defense might have been somewhat prejudiced by the lapse of time. . . . Thus, the difficulty in allocating scarce prosecutorial resources (as opposed to clearly intentional or negligent conduct) was a valid justification for delay in the instant case.

A prosecutor is entitled to a reasonable time to investigate offenses and determine whether to file or which charges to file. (See *Archerd, supra*, 3 Cal.3d at p. 640.) "[I]nsisting on immediate prosecution once sufficient evidence is developed to obtain a conviction would pressure prosecutors into resolving doubtful cases in favor of early and possibly unwarranted prosecutions." (*Lovasco, supra,* 431 U.S. at p. 793.) Also, reasonable pre-complaint delay may be justified where the prosecuting agencies face resource constraints. (See *Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 915.) The due process clause does not permit a court to dismiss criminal prosecutions because it disagrees with the prosecutor's judgment on when to file charges. (*Lovasco, supra*, 431 U.S. at p. 791; *Dunn-Gonzalez, supra*, 47 Cal.App.4th at p. 914.) Rather, courts are to determine only whether the delay complained of violated those "`fundamental conceptions of justice which lie at the base of our civil and political institutions,' [citation], and which define `the community's sense of fair play and decency,' [citations]." (*Lovasco, supra*, 431 U.S. at p. 790.)

Whether pre-filing delay is prejudicial and unreasonable is a question of fact for the trial court. (*People v. Hill* (1984) 37 Cal.3d 491, 499;

Dunn-Gonzalez, supra, 47 Cal.App.4th at p. 912) On appeal, the trial court's determination must be upheld if supported by substantial evidence. (*Hill, supra*, 37 Cal.3d at p. 499; *People v. Mitchell* (1972) 8 Cal.3d 164, 167.)

C. The Trial Court Properly Denied Appellant's Motions To Dismiss

Respondent notes that it appears that appellant's first motion to dismiss was denied based on the trial court's finding that there was no intentional delay on the part of the prosecutor's office or any other law enforcement agency; rather, the fingerprint match was "inadvertent[ly]" missed and other individuals were being investigated as suspects in 1986 and 1987. (RT 9/12/94 116-117.) The trial court's ruling was correct; even the ALPS comparison of Latent Print No. 44 did not find a matching print in 1987. (RT 2019.) The record does not provide the reasoning for the denial of appellant's second motion to dismiss. (Aug. CT 205.) The third denial, after appellant discovered that some items of evidence had apparently been destroyed, was, from the trial court's language, based on the prosecution's rebuttal of the showing of prejudice made by appellant. (RT 182-183.)

Here, appellant's first claim of actual prejudice is that the failure of Roper's memory and eyesight over time prevented appellant from rebutting the prosecution's fingerprint evidence. But this claim is baseless. Appellant could have simply retained a fingerprint expert to re-compare the fingerprints found at the scene with appellant's known fingerprints, and to analyze the comparisons done by Pierce and the California Department of Justice. Also, it is clear from the testimony that Roper had problems finding positive fingerprint matches (as he admitted, RT 1596-1597), and eventually those problems led to his departure from the KCSD Technical Investigations Section in 1987 (a departure that was probably hastened by his erroneous negative comparison in the Mojave Desert palm print case, RT 1999-2002, 2106-2108, 2111-2112). (See, e.g., RT 1589 [Roper left in 1987 due to eyesight problems and stress],

2102-2103 [Grimes testified about the problems with Roper].) As appellant notes, the prosecutor in her closing argument essentially called Roper an incompetent fingerprint analyst. (See, e.g., RT 2657.) Hence it is not surprising that Roper was unable to find a fingerprint match but others, later, were able to conclusively match the fingerprints. Regardless, appellant's defense did not require that only Roper could be used to rebut the prosecution's fingerprint evidence. But even if appellant had been charged in 1986 or 1987 with the murders, it is unlikely that Roper would have been able to testify effectively about the basis for his negative finding–Jones came to believe that Roper was incompetent "long before" 1984 (RT 1999, 2008), and Roper left the section in 1987 based on his poor eyesight and stress (RT 1589).

Contrary to appellant's assertion, this situation is quite distinguishable from the loss of evidence in *People v. Hartman* (1985) 170 Cal.App.3d 572. There, a deputy coroner ruled that the victim had died from a type of heart attack, and a prosecutor declined to file a charge of murder based on the deputy coroner's report. (*Id.* at pp. 575-576.) Another prosecutor, after meeting with the deputy coroner and coroner, allowed Hartman (who had used the victim's identification and credit cards to cash a forged check drawn on the victim's account, and who had used the victim's credit card to buy a watch and airline tickets) to plead guilty to one count of forgery. (*Ibid.*) Over the course of nearly two years, the victim's widow had two additional autopsies done, both of which concluded that the victim had been killed (albeit by different causes), and the widow hired a cardiac pathologist whose findings did not specifically support any of the previous findings. (*Id.* at pp. 576-578.) But the victim's brain, bladder, and kidney were "lost" after the first autopsy, and the heart was "lost" after the second autopsy. (*Ibid.*) Eventually, about six years after the second autopsy, the widow's repeated efforts to have Hartman prosecuted were successful, and Hartman was convicted of second degree murder. (*Id.* at pp. 577-578.)

The appellate court reversed the conviction based on prejudicial delay for which there was no legitimate justification. (*Hartman, supra*, 170 Cal.App.3d at p. 579-580.) The court found actual prejudice based on: (1) both the deputy coroner and his supervisor had died just before the murder charge was filed; (2) the heart and brain had both been "lost" (which made it "impossible" to resolve the medical findings about whether the victim had died of a heart attack or had been beaten to death); (3) by the time of trial, the pictures of the second autopsy were missing; and (4) it was highly unlikely that another autopsy would reveal anything new, given the decomposition of the body after seven years. (*Ibid.*) The court concluded that, despite the widow's "tenacious" efforts to have Hartman prosecuted, the delay was not justified because the evidence used to prosecute Hartman was gathered about five and a half years before he was prosecuted. (*Id.* at pp. 581-582.)

Here, the new evidence that led to appellant's arrest for the Merck murders was the fingerprint match from June 1994. In addition, as discussed, *infra*, no critical evidence was lost that prevented appellant from conducting a thorough investigation and putting on a defense. Hence, appellant has failed to show prejudice based on Roper's inability to testify effectively regarding his 1984 comparison of the latent prints with appellant's fingerprints.

Appellant's second claim of actual prejudice is based on his asserted loss of memory as to his whereabouts at the time of the Merck murders, as well as his loss of memory as to whether he ever possessed any property belonging to the Mercks. (AOB 102-103.) But there is no statute of limitations on prosecutions for murder. (§ 799.) Appellant's claim would essentially render unconstitutional the unlimited statute of limitations on murder, and substitute in its place a statute of limitations that extends only as long as a defendant's memory may last. Clearly, such is not the law. (See discussion, *supra*, regarding the numerous cases where courts have upheld lengthy pre-arrest delays.) Appellant knew that he was a suspect in 1984 and 1985. In addition,

respondent notes that appellant's assertion of memory loss also applies to the prosecution–the passage of time dims the memories of witnesses and police officers, and perhaps renders stale some pieces of evidence. Hence, appellant has failed to show prejudice from his own dimmed memory; alternatively, any prejudice was properly rebutted, as found by the trial court.

Appellant's third claim of actual prejudice is based on the faded memories of the witnesses related to appellant's possession of property taken from the Mercks. (AOB 103-107.) But appellant's assertions are sheer speculation. Certainly, witnesses "may" have been able to provide more specific testimony about the cigarette lighter case or the ring. But they "may" also not have been able to provide more specific testimony. The cigarette lighter case and the ring were obviously common items. (RT 2477-2478, 2510-2511, 2481-2484.) The ring appeared to have Alma Merck's initials etched into it (RT 1873-1874), as was Clifford's habit (RT 1883-1886, 2056-2058). Further, the witnesses' memories were in part refreshed by the numerous police reports and records from the investigation; any uncertainty in their inability to more specifically recall appellant's connection to the Mercks' property only benefitted appellant by lending to his unsuccessful attempt to show reasonable doubt. Respondent also notes that the case appellant cites to support this claim, *Hill*, *supra*, 37 Cal.3d at pp. 498-499, is a post-arrest delay case; as discussed *supra*, post-arrest delay is evaluated under a more stringent test than pre-arrest delay. Hence, appellant has failed to show prejudice from the witnesses' faded memories regarding the Mercks' property in appellant's possession.

Appellant's fourth claim of prejudice is based on the faded memory of Emma Foreman regarding admissions that appellant made pertaining to the murder of the Mercks. (AOB 107-108.) But Foreman did not appear to have any memory problems during her brief testimony. (RT 2242-2249.) In addition, her brief testimony was not crucial to the Merck prosecution. (RT 2242-2247, 2391-2392; see also RT 2489-2490 [testimony of Porter regarding

Foreman's statement].) Hence, appellant has failed to show prejudice from Foreman's faded memory.

Appellant's fifth claim of prejudice is based on the loss of "material evidence" by the KCSD. (AOB 108-109.) But the evidence was apparently destroyed before July 1985. (CT 873-892.) Thus, appellant's claim of prejudicial delay is illogical, because even if appellant had been prematurely charged with the crime within a year of the murders, the evidence would have already been destroyed. In addition, as noted in the prosecution's opposition to the supplement that appellant filed to his second motion to dismiss, the evidence was not material evidence. (CT 873-892.) Hence, appellant has failed to show prejudice from the destruction of evidence.

For all these reasons, substantial evidence supported the trial court's finding (as to the first motion to dismiss) that appellant was not prejudiced (see *Appel, supra*, 51 Cal.App.4th at pp. 507-508), as well as the trial court's subsequent finding that the prosecutor had properly rebutted any showing of prejudice made by appellant. Therefore, this Court should reject appellant's claim.

II.

THE ORIGINAL TRIAL JUDGE PROPERLY RECUSED HIMSELF AFTER THOUGHTFULLY CONSIDERING THE SITUATION, AND THEN PROPERLY FOLLOWED SECTION 1053 BY SUBSTITUTING ANOTHER JUDGE TO PRESIDE OVER THE REST OF THE TRIAL

Appellant claims that, after the initial trial judge realized during the guilt phase that he was a friend of two prosecution witnesses who were related to Alma Merck, the judge erred by continuing to preside and then substituting another judge for himself rather than declaring a mistrial. (AOB 116-126.) But the original trial judge properly recused himself after thoughtfully considering the situation, and then properly followed section 1053 by substituting another judge to preside over the rest of the trial. Hence, this Court should reject appellant's claim.

A. The Proceedings Below

On May 15, 1996, the second day of guilt phase testimony, a brief hearing was held immediately after the lunch break and outside of the jury's presence. (RT 1696.) The trial judge told the parties that, as he was returning from the lunch break, he saw Jerry and Terry Jones, two close family friends, in the hallway. (*Ibid.*) Up to that point he had had no idea that the Jerry and Terry Jones listed on the prosecution's witness list were the same people as his family friends, particularly in light of the commonness of their names. (RT 1696-1697.) The judge had also been unaware that the Joneses were related to Alma, which the prosecutor immediately confirmed. (RT 1696.) The judge assured the parties that the only contact he had had with the Joneses was to ask them that they understood that he was the trial judge, to which they had replied, "Yes." (*Ibid.*) The judge pointed out that he had not judged anyone's credibility, and that he was not sure about his obligation in the situation. (RT

1697.)

The judge called a brief recess for defense counsel to talk about the situation. (RT 1698.) After the recess, defense counsel asked the court a few questions, and the judge confirmed that the Joneses had been close family friends for over 10 years. (RT 1698-1699.) Defense counsel noted that he had personally known the judge for "many, many years," and he thought that the judge "would make every effort to be fair." (RT 1699.) But appellant had expressed "serious reservations" and wanted counsel to move for a mistrial. (*Ibid.*)

The prosecutor confirmed that both Terry and Jerry Jones would testify to identify items from the Mercks that appellant had in his possession. (RT 1699.) There was some discussion of the anticipated testimony, and defense counsel pointed out that, as relatives, the Joneses could provide victim impact testimony at the penalty phase. (RT 1699-1701.) Defense counsel repeated his request for a mistrial. (RT 1701.) There was more discussion regarding the possible future instances in the case in which the judge would have to weigh the witnesses' credibility. (RT 1701-1702.) The judge said that he was not going to "precipitously rule" based on the events of the last half hour when the case had been ongoing for "a long time." (RT 1702.) The judge continued the lunch recess until 2:15 p.m. so that he could think about the situation. (*Ibid.*)

After the recess, the judge expressed a desire to think about the situation more, and the belief that his duty was to continue to preside over the trial–because he had been fair up to that point, and he could continue to be fair, to both sides. (RT 1703.) The judge was "unwilling at this point to grant the motion for a mistrial but it is chiefly because I am trying to buy some time, to be frank with you, to think about this a little bit more." (*Ibid.*) The judge stated his desire to bring the parties back the following morning, before the jury reported in, to consider the matter further. (RT 1704.) The judge also noted that he had been unable to think of a situation that might arise, during the

afternoon's proceedings and testimony, that would prejudice either side. (*Ibid.*) The judge pointed out that he was "extremely reluctant" to disrupt Phinney's cross-examination, in light of the fact that Phinney was "clearly hostile" when ordered back to court at the end of the previous session's testimony, which had been two days earlier.[34/] (RT 1705.)

Defense counsel objected to any further proceedings until the judge made his decision. (RT 1705-1707.) Defense counsel also reiterated that the motion for a mistrial would not be withdrawn "under any circumstances," and that appellant would only proceed because he was being ordered to do so by the judge. (*Ibid.*) The prosecutor said that she had known the judge for "a number of years" as being "very fair and very honest;" she objected to any mistrial; and she stated her belief that the judge could be fair. (RT 1707-1708.) The judge said that that was what he wanted to think about–whether he could put aside his personal feelings, if the situation required such. (RT 1708.) Defense counsel stated his belief that the Judicial Canon of Ethics required the judge to grant a mistrial. (*Ibid.*) The judge acknowledged that defense counsel could be correct, but the judge ordered the case to proceed. (RT 1708-1709.) The prosecutor told the judge that she would not call the Joneses as witnesses that afternoon. (RT 1709.)

At the end of the day's testimony, the judge held an additional hearing outside of the jury's presence. (RT 1745.) The judge noted that a new Code of Ethics had been approved exactly one month earlier, and the code required a judge to disqualify him-or herself where the interests of justice would be furthered, where there is a substantial doubt regarding the judge's capacity to

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34. Respondent notes that the jury was empaneled, admonished, and dismissed for the day at about 2:30 p.m. on May 7, 1996. (CT 1321.) The first day of testimony occurred as scheduled on May 13, 1996. (CT 1330-1332.) But the following day the trial was not able to resume because the child of an alternate juror was ill. (CT 1337.) Thus, when testimony resumed on May 15, 1996, it had been two days since testimony had been heard. (CT 1339-1340.)

be impartial, or where a person who knew the facts of the case "might reasonably entertain a doubt that the judge would be able to be impartial." (RT 1746.) The judge believed that he was required to recuse himself, but reiterated his intent to deny appellant's motion for a mistrial, since only the provision regarding the reasonable entertainment of a doubt was applicable to the situation. (*Ibid.*) Defense counsel agreed with the judge that double jeopardy was not applicable if the judge granted the mistrial motion, but the judge also pointed out that a mistrial was not necessary because the reason for the recusal was "legal necessity." (RT 1747-1748.) There was additional discussion before the jury was excused for the day, with the judge expressing his desire to come back the following morning. (RT 1748-1752.)

The next morning, Thursday, May 16, 1996, defense counsel cited section 1053, and again asked for a mistrial. (RT 1755.) The prosecutor objected to a mistrial, and argued that the judge need not do anything more than simply notify the parties of the judge's knowledge of the witnesses. (RT 1755-1756.) The prosecutor also argued that, if the judge was going to recuse himself, then section 1053 should apply, and a new judge should be substituted in. (RT 1756.) The prosecutor noted that the new trial judge could simply read the daily reporters' transcripts to become current with the case and the trial. (*Ibid.*)

The judge cited two cases, *Larios v. Superior Court* (1979) 24 Cal.3d 324, and *Curry v. Superior Court* (1970) 2 Cal.3d 707, while discussing his concern about how the motion for a mistrial related to potential double jeopardy. (RT 1757.) The judge believed that double jeopardy was not applicable, and denied the motion for a mistrial without prejudice. (*Ibid.*)

Next, the judge decided that section 1053 controlled; specifically, section 1053 required that a new trial judge be substituted into the case. (RT 1758.) The judge noted that Judge Felice had agreed to take the case, and that Judge Felice had previously spent a "substantial amount of time with both defendants

and made rulings in connection with the case." (*Ibid.*) The judge allowed the parties to comment. (RT 1759.) Because Judge Felice was not available at that time, the judge called the jurors in, explained that a new trial judge was being assigned, and recessed the trial until the following Monday. (RT 1758-1761.)

B. The Original Trial Judge Properly Recused Himself After Thoughtfully Considering The Situation

A criminal defendant has due process rights under the state and federal constitutions to be tried by an impartial judge. (*People v. Brown* (1993) 6 Cal.4th 322, 332; see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *In re Murchison* (1955) 349 U.S. 133, 136; *People v. Kipp* (2001) 26 Cal.4th 1100, 1140.) The Due Process Clause of the United States Constitution requires a "'fair trial in a fair tribunal' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." (*Bracy v. Gramley* (1997) 520 U.S. 899, 904, quoting *Withrow v. Larkin* (1975) 421 U.S. 35, 46.) It is also important to note that a trial judge has the duty to control all proceedings "with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 353.)

Here, it appears that the original trial judge was surprised to learn (as the parties were surprised by the judge's announcement)–as the lunch recess was ending on the second day of testimony–that the Joneses listed as prosecution witnesses were the same Joneses with whom the original trial judge was closely acquainted. (RT 1696-1697.) The judge properly stated that he was not going to "precipitously rule" based on the events of the last half hour when the case had been ongoing for "a long time." (RT 1702.) The judge properly called a brief recess, and kept the jury waiting during that recess, to contemplate and research the situation. (RT 1702.) After the brief recess, the original trial judge noted on the record, inter alia, that Phinney had been "openly hostile" after

previously being ordered to return to the courtroom after the previous day of trial, which had been two days earlier. (RT 1705.) For all these reasons, respondent submits that the original trial judge did not err in allowing Phinney's cross-examination to continue for about 80 minutes on the afternoon of May 15, 1996, while the judge contemplated and researched the proper course of action. (CT 1340.)

C. The Original Trial Judge Properly Followed Section 1053 By Substituting Another Judge To Preside Over The Rest Of The Trial

Section 1053 provides, in pertinent part:

> If after the commencement of the trial of a criminal action or proceeding in any court the judge or justice presiding at the trial shall die, become ill, or for any other reason be unable to proceed with the trial, any other judge or justice of the court in which the trial is proceeding may proceed with and finish the trial . . . . The judge or justice authorized by the provision of this section to proceed with and complete the trial shall have the same power, authority and jurisdiction as if the trial had been commenced before such judge or justice.

In *People v. Truman* (1992) 6 Cal.App.4th 1816, 1827, the court stated of section 1053:

> First, it is clear from the statutory language that the Legislature intended to provide administrative guidelines designed to eliminate or minimize delay which might result from a judge's unanticipated inability to finish a trial. Second, those guidelines are apparently intended to mitigate any unfairness to the defendant which may occur in such a circumstance. [Citation.]

Appellant properly concedes that this Court has already rejected an identical claim regarding the substitution of a new judge into a trial in *People v. Espinoza* (1992) 3 Cal.4th 806, 829.[35/] (AOB 122.) Then he argues that

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35. In *Espinoza,* the original trial judge, who was receiving chemotherapy treatments for cancer, became too ill to continue to preside during the guilt phase defense case. (*Espinoza, supra,* 3 Cal.4th at pp. 827-828 fn. 1.)

Espinoza was wrongly decided and should be overruled. But section 1053 has been the law in California for many years; there is no reason to change the law now (nor does appellant provide such a reason, despite his discussion of the caselaw in other states). (See, e.g., *People v. Moreda* (2004) 118 Cal.App.4th 507, 515-516, rev. den., Aug. 18, 2004; *People v. Stuller* (1970) 10 Cal.App.3d 582, 591; *People v. Lichenstein* (1913) 22 Cal.App. 592, 609-612.) Hence, there was no need to grant appellant's motion for a mistrial.

In *People v. Gonzales* (1990) 51 Cal.3d 1179, the court considered a claim very similar to that raised by appellant here–that substitution of a judge into his trial violated his constitutional rights to due process and a fair trial. (*Id.* at pp. 1211-1212.) The court noted that, while "some authorities provide abstract support" for such a claim (citing cases that appellant has cited, such as *Freeman v. United States* (2d Cir. 1915) 227 Fed. 732, and *Randel v. Beto* (5th Cir. 1965) 354 F.2d 496, 500), "when the original judge becomes unavailable during trial, prudent substitution may have no actual effect on fairness and is often manifestly preferable to a mistrial." (*Gonzales, supra*, 51 Cal.3d at pp. 1211-1212 [citing numerous cases that "confirm that a well-justified change of judges, even if technically erroneous, is no basis for reversal if the accused failed to object and no substantial prejudice resulted"].)

Furthermore, the *Espinoza* court addressed the *Freeman* case, which had held a defendant's right to a fair jury trial included the right to the same judge throughout the trial. (*Espinoza, supra*, 3 Cal.4th at pp. 828-829.) The *Espinoza* court pointed out that the premise underlying *Freeman* was that the Sixth Amendment preserved the right to a jury trial as that right had existed at English common law–including the common law's requirement that the same judge preside over the entire jury trial. (*Id.* at p. 829.) But the *Espinoza* court noted that that premise was faulty, because in *Williams v. Florida* (1970) 399 U.S. 78, 92-93, the United States Supreme Court "held that the Sixth Amendment did not preserve the common law right to a trial by a jury consisting of 12 persons,

rejecting the 'easy assumption' from its own past decisions that the federal Constitution necessarily had retained every feature of the common law jury trial." (*Espinoza, supra,* 3 Cal.4th at p. 829.) The court rejected *Espinoza*'s federal claim, and also characterized as "devoid of legal support" *Espinoza*'s claim that his state constitutional right to a jury trial had been violated by the substitution of trial judges. (*Ibid.*) Thus, appellant's assertion that *Espinoza* was wrongly decided is baseless.

Here, the original trial judge became "unable to proceed with the trial" within the meaning of section 1053 when he determined that he should recuse himself. As discussed *supra*, section 1053 properly preserved appellant's rights while allowing the trial to proceed. Thus, the original trial judge properly substituted another judge in his stead to carry on with the trial. Respondent notes that the substitution occurred fairly early in the trial. Therefore, this Court should reject appellant's claim regarding the substitution of another judge into the trial.

Appellant attempts to distinguish *Espinoza* by claiming that, unlike *Espinoza*, here there is "no indication in the record" that the new judge "read the transcript of the testimony given by the eight witnesses prior to his participation in the trial." (AOB 123.) But the original trial judge recessed the trial from Thursday afternoon until the following Monday afternoon, which provided time for the new trial judge to begin to get familiar with the case. (RT 1761-1762.) On Monday morning, the new trial judge heard and decided several motions by appellant. (RT 1762-1838.) The court ably and correctly did so (see discussion, *infra*), in spite of the fact that the court admitted that it had not read the entire record. (RT 1767.) The court also noted that there had been some off-the-record discussions regarding a number of subjects, including what the jury had been told and the new trial judge's schedule. (RT 1773-1774.)

During the Monday morning hearing, the new trial judge took a recess to locate the daily transcripts, and to review the record and those transcripts. (RT 1774-1775.) Afterwards, the judge acknowledged that he was "not as swift on the uptake" as he would have been had he presided over the earlier portion of the trial. (RT 1784.) The court heard additional argument, took a recess to do some research, and then noted that it had "once again reviewed certain portions of the transcript . . . of Phinney's testimony." (RT 1809.) The court heard and ruled on various requests. As discussed *infra*, and contrary to appellant's assertions (AOB 125), the new trial judge properly ruled on appellant's motions.[36/] Thus, the new trial judge was adequately prepared to preside over the case, and appellant's claim must fail.

D. Any Error Was Harmless

Furthermore, any error by the original trial judge was harmless. Appellant received a fair trial presided over by a neutral trial court. Accordingly, there was no structural error. (See *Arizona v. Fulminante, supra,* 499 U.S. at p. 309.) Nor has appellant shown substantial prejudice from the original trial judge's decision to hear about 80 minutes of testimony before finally determining that he should recuse himself, or from the original trial judge's decision to follow section 1053 by substituting in another judge to preside over the remainder of the trial. (*Gonzales, supra,* 51 Cal.3d at pp.

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36. Appellant also asserts that the new trial judge made future, additional errors based on his initial lack of preparedness. But appellant's assertion is baseless. The new trial judge, after assuming control of appellant's trial, presided over about two additional weeks of testimony, from a total of about 24 additional prosecution witnesses, and about six defense witnesses, in addition to further testimony by witnesses who had already testified, such as Laskowski (who testified at two different times during the prosecution's case), and Porter and Fraley (who testified both for the prosecution and the defense). (See, e.g., CT, Vol. I, Chronological Index of Witnesses.)

1211-1212.) Also, respondent notes that the evidence against appellant was strong, including his fingerprints found inside the Merck house and numerous witnesses who saw in his possession several items of property that originally belonged to the Mercks. Thus, appellant's claim must fail.

III.

THE TRIAL COURT PROPERLY EXCUSED TWO PROSPECTIVE JURORS FOR CAUSE, BASED ON THEIR WRITTEN AND VERBAL VOIR DIRE RESPONSES

Appellant claims that the trial court erred in excusing for cause Prospective Juror Nos. 041853 and 045969. (AOB 127-139.) But the trial court properly excused both of the prospective jurors for cause, based on their written and verbal voir dire responses. Therefore, appellant's claim must be rejected.

A. The Voir Dire Of Prospective Juror No. 041853

Prospective Juror No. 041853 filled out a questionnaire. (First Supp. CT 1124-1143.) In response to the question about how she felt about the death penalty, she wrote:

> It never really bothered me before yesterday, when I heard the judge mention it and pictured myself in the jury as one who handed such a verdict in. I really dont [*sic*] feel it's my right to decide weather [*sic*] or not somebody dies. It would bother me the rest of my life.

(First Supp. CT 1138.) In response to the question of whether she had ever held a different view of the death penalty, she wrote, "Like I said I was pretty much ok with it but I never gave it deep thought until yesterday[.] I dont [*sic*] feel it's the right thing. Life and death should be left in Gods [*sic*] hands not ours." (First Supp. CT 1139.) In response to another question, she stated that she believed that the death penalty was imposed too often, and wrote, "Along with down right guilty people who have received it there have been inocent [*sic*] ones as well and how those jurors live with theirselves [*sic*] I'll never know." (*Ibid.*) She noted that she was not a particularly religious person, but she did believe in God "and I've never seen or heard him say, we can take his place for the day and sentence someone to their death." (*Ibid.*) As to which

category would best describe her attitude as a trial juror, she checked the box beside the statement, "I could never vote to impose the death penalty in any case no matter what the facts and the circumstances of the case." (First Supp. CT 1140.)

During the courtroom portion of the voir dire, Prospective Juror No. 041853 agreed with the court that she was quite nervous. (RT 1056-1057.) Prospective Juror No. 041853 questioned whether or not she had to answer "Yes" or "No" when asked if she would refuse to vote for a special circumstances verdict because of her opinion or views regarding the death penalty. (RT 1057.) She testified that she had never been in that situation, and that she did not like either result–to vote in favor of, or against, the special circumstance(s). (*Ibid.*) She had been thinking about the subject and, when asked, stated, "I just personally wouldn't want to be the one to hand that judgment down." (RT 1058.)

When questioned by defense counsel, Prospective Juror No. 041853 agreed that she could be part of a jury that imposed the death penalty, even though she would be reluctant, and it would be unpleasant and sad. (RT 1060.) When questioned by the prosecutor, the prospective juror testified that she was conflicted, that she was "getting more onto [*sic*] the religious side lately, and I just–it is just hard. I am going through a lot." (RT 1061-1062.) Then the prosecutor asked the prospective juror a series of questions about her ability to impose the death penalty, and whether or not she would be able to do so, each time without allowing the prospective juror to fully answer the previous question. (RT 1062-1063.) But during her partial answers the prospective juror used phrases like "that's terrible" and "I really don't want to" and "I don't want to sit through this and see all that." (*Ibid.*) The court interrupted, "Counsel, I have seen enough on this." (RT 1063.) Then the court excused the prospective juror. (*Ibid.*)

After Prospective Juror No. 041853 left the courtroom, the court stated its desire to "fill the record out a little bit." (RT 1064.) The court stated:

> Toward the end of the questioning by Ms. Ryals [the prosecutor], 041853 was breaking down. She was crying. During the questioning, 041853's head would go back and forth from shoulder to shoulder, she would cover her mouth when she answered questions by Ms. Ryals, she was obviously–she's obviously given conflicting answers, she has been very candid that she is in conflict over this.
>
> She is going through some kind of personal change which is leading her toward a more religious view of her life, which it sounded to me that she's having real problems coming to terms with the responsibilities of a juror in a case such as this.
>
> For all those reasons and each of them, I concluded she was an inappropriate–I concluded I guess sua sponte that she was an inappropriate juror on this case.

(*Ibid.*) The prosecutor had no objection, and indicated that she thought the court had "covered it quite accurately." (*Ibid.*) Defense counsel stated, "Your Honor, because of the nature of the case, I would have the record show an objection by the defense." (RT 1065.)

B. The Voir Dire Of Prospective Juror No. 045969

Prospective Juror No. 045969 filled out a questionnaire. (First Supp. CT 1546-1565.) She believed that the death penalty was "good, if the jury is 110% sure without a doubt that the defendent [*sic*] is guilty of the crime." (RT 1560.) She did not believe that the death penalty was used too often or too seldom, provided that "the evidence is there and theres [*sic*] no doubt then the punishment should fit the crime." (RT 1561.) As for which category best described her attitude as a trial juror toward the death penalty, she checked the block by the statement, "I might be able to vote to impose the death penalty in an appropriate case depending on the facts and circumstances." (RT 1562.)

During the courtroom portion of the voir dire, Prospective Juror No. 045969 testified that she would not refuse to vote for guilt or special circumstances based on her views regarding the death penalty. (RT 944-945.) During questioning by defense counsel, the prospective juror testified that she was not opposed to the death penalty, and that she could impose the death penalty "[i]f there is no doubt in my mind whatsoever." (RT 945-946.) During questioning by the prosecutor, the prospective juror testified that the prosecutor would have to prove "that there is no doubt that you know that he did it." (RT 946.) After additional questioning by the prosecutor, as well as an explanation by the prosecutor that "there is always some doubt about something, in everything there is always some doubt . . .," the prospective juror responded, "That's true. I think it is impossible that you could prove it to me under 110 percent." (RT 946-947.) Then the prosecutor challenged the prospective juror for cause. (RT 947.)

The trial judge asked, "You are going to require the prosecution to prove completely the appropriateness of death as the proper punishment?" (RT 947.) The prospective juror responded, "Yes." (*Ibid.*) When the trial court asked her whether she understood that that was not what the law required, she said, "Yes." (*Ibid.*) The trial court asked whether that was what the prospective juror would require the prosecutor to do, even though that was not required by the law, she said, "Yes." (*Ibid.*) The court explained that there is no burden of proof at the penalty phase, and that the jurors simply listen to the evidence and decide the appropriate punishment. (RT 947-948.) The prospective juror testified that she could impose the death penalty, or a verdict of life, depending on what she believed was appropriate. (RT 948.)

Defense counsel voiced an objection to excusing the prospective juror. (RT 948.) But the trial court excused her. (RT 949.)

C. The Applicable Law

"A prospective juror may be challenged for cause based upon his or her views regarding capital punishment only if those views would '"prevent or substantially impair'" the performance of the juror's duties as defined by the court's instructions and the juror's oath." (*People v. Maury* (2003) 30 Cal.4th 342, 376,[37] quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424; accord, *Morgan v. Illinois* (1992) 504 U.S. 719, 728; *People v. Heard* (2003) 31 Cal.4th 946, 958; *People v. Smith* (2003) 30 Cal.4th 581, 601; *People v. Ochoa* (2001) 26 Cal.4th 398, 428-432; *People v. Jenkins* (2000) 22 Cal.4th 900, 987.) The court must evaluate whether a juror's opinion regarding capital punishment would prevent or impair the juror's ability to return a death penalty verdict *in the case before the juror*, not merely in the abstract. (*Heard, supra,*

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37. In *Maury*, this Court held that several prospective jurors were properly excused because the challenged jurors indicated either that they could not apply the death penalty under any circumstance or that they were not prepared to impose the death penalty and were undecided as to their ability to do so. (*Maury, supra*, 30 Cal.4th at p. 377.) This Court found that prospective juror Wyonne W. was properly excused because she did not think she could entertain the idea of putting the defendant to death after determining that he was guilty and listening to more evidence. (*Id.* at p. 378.) Prospective juror Curtis B. was properly excused because he "expressed uncertainty as to whether he could apply the law and impose the death penalty." (*Ibid.*) Prospective juror Joe T. was properly excused since he stated that "he could not envision any situation, as a juror, in which he could impose the death penalty." (*Id.* at pp. 378-379.) When prospective juror Lori D. was asked whether she could vote for death if, after listening to all the evidence, she determined that the aggravating circumstances were so substantial in comparison to the mitigating circumstances that it warranted death, she stated, "I don't think so." (*Id.* at p. 379.) While prospective juror Joe H. at first stated that he could not say if he had strong feelings about the death penalty since he had never been asked, he later explained that, upon reflection, he could not impose death. (*Ibid.*) This Court held that both Lori D. and Joe H. were also properly excused. (*Ibid.*)

31 Cal.4th at pp. 958-959; *Ochoa, supra*, 26 Cal.4th at p. 431.)[38/]

This standard does not require that a juror's bias be proved with "'unmistakable clarity'" because many prospective jurors may not be able to articulate or may wish to hide their true feelings, they may not know how they will react when faced with imposing the death sentence, or they cannot be asked enough questions where their bias has been made unmistakably clear. (*Wainwright, supra,* 469 U.S. at pp. 424-425.) "Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." (*Id.* at pp. 425-426.) Clearly, a prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate. (*People v. Cunningham* (2001) 25 Cal.4th 926, 975; *Jenkins, supra,* 22 Cal.4th at p. 987.)

On appeal, "the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record." (*Wainwright, supra*, 469 U.S. at p. 434.)

> [I]f the prospective juror's statements are equivocal or conflicting, that court's determination of the person's state of mind is binding. If there is no inconsistency, the reviewing court will uphold the court's ruling if substantial evidence supports it.

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38. In *Heard, supra,* 31 Cal.4th at page 960, this Court found that a prospective juror was improperly excused for cause because he had indicated in his questionnaire that he would consider prison instead of death if the "special circumstances are due to past psychological experiences." The prospective juror further stated that he did not think that he would automatically vote for either penalty without regard to the evidence. This Court found that there was not "substantial evidence to support a determination that [the prospective juror] harbored views that would prevent or substantially impair the performance of his duties so as to support his excusal for cause." (*Id.* at pp. 965-966.)

(*Maury*, *supra*, 30 Cal.4th at p. 376, quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 488; see also *People v. Navarette* (2003) 30 Cal.4th 458, 490; *People v. Jones* (2003) 29 Cal.4th 1229, 1246-1247; *People v. Boyette* (2003) 29 Cal.4th 381, 416.) To the extent that there was any conceivable ambiguity or equivocation in their answers, this Court defers to the assessment of the trial judge who saw and heard the prospective jurors, because determinations of demeanor and credibility are peculiarly within a trial judge's province. (*Wainwright*, *supra*, 469 U.S. at pp. 426, 428.)

D. The Trial Court Properly Excused Prospective Juror Nos. 041853 And 045969

Here, both prospective jurors were properly excused for cause based on their written and verbal answers in voir dire. Prospective Juror No. 041853's moral or religious views that the death of a human being was a decision exclusively for God to make, as well as her clearly-expressed reluctance and hesitation regarding whether or not she could impose the death penalty (which led to her crying, shaking her head and covering her mouth, as the unrefuted evidence shows, during the questioning by the prosecutor–during which questioning she gave partial answers that further illustrated her reluctance and hesitation), provided more than adequate justification to excuse her from the jury. Prospective Juror No. 045969's expressed belief that there would have to be "no doubt" about the guilt of appellant, and that the prosecutor would have to prove to "110 percent " that death was an appropriate punishment, provided more than adequate justification to excuse her from the jury. She also stated it would be impossible to prove it to her 110 percent, which means that she could never have voted for a sentence of death. It is true that both prospective jurors at one point testified that they could impose the death penalty in some circumstances. But at best their brief remarks to that effect further illustrated the difficulty the prospective jurors' beliefs would have posed during the case.

Obviously, the two prospective jurors' views would have prevented or substantially impaired their ability to perform their duties as outlined in the jury instructions. (See, e.g., *Heard, supra,* 31 Cal.4th at p. 958; *Smith, supra,* 30 Cal.4th at p. 601; *Maury, supra,* 30 Cal.4th at p. 376.)

In addition, this Court is bound by the trial court's determinations of the prospective jurors' states of mind. The brief remarks of the prospective jurors, that they would be able to impose the death penalty depending on the circumstances, further illustrated the conflicted and equivocal feelings of the prospective jurors. Thus, this Court should defer to the trial court's assessment of the two prospective jurors.

For all these reasons, appellant's claim is without merit. This Court should reject the claim.

IV.

THE TRIAL COURT PROPERLY FOUND THAT APPELLANT FAILED TO ESTABLISH A PRIMA FACIE CASE OF GROUP BIAS IN THE PROSECUTOR'S PEREMPTORY CHALLENGES OF THREE AFRICAN-AMERICAN PROSPECTIVE JURORS; IN ANY EVENT, THE PROSECUTOR PROPERLY EXPLAINED HER DISMISSAL OF THE PROSPECTIVE JURORS

Appellant claims that the prosecutor improperly exercised peremptory challenges based on a "bias against Black jurors." (AOB 140-151.) But the trial court properly found that appellant failed to establish a prima facie case of group bias; in any event, the prosecutor properly explained her dismissal of three African-American prospective jurors. Therefore, appellant's claim must be rejected.

A. The Proceedings Below

On May 7, 1996, as jury voir dire continued, 12 prospective jurors were called, including an African-American man (Prospective Juror No. 045921). (RT 1326-1332; First Supplemental CT (hereinafter "FSCT") 207-208, 1606-1608, 1625.) The prospective jurors were questioned by the court, defense counsel, and the prosecutor. (RT 1332-1386.) The court denied three defense challenges for cause. (RT 1386.)

Then the peremptory challenges began. After the defense excused a juror, the replacement was Prospective Juror No. 042519, an African-American woman. (RT 1389-1390; FSCT 1846-1865.) She was briefly questioned by both the prosecutor and defense counsel before being excused by the prosecutor. (RT 1389-1390.) The process continued, and eventually the prosecutor excused Prospective Juror No. 045921. (RT 1397.)

At the next recess, which was taken for lunch, defense counsel pointed out that two of the jurors the prosecutor had excused were African-American,

and defense counsel made a motion pursuant to *People v. Wheeler* (1978) 22 Cal.3d 258, 272 (hereinafter *Wheeler*).[39] (RT 1404-1405.) Defense counsel noted that the two African-American prospective jurors had been the only African-American jurors "chosen on this panel at this time." (RT 1405.) The prosecutor indicated that there were other African-American prospective jurors in the audience. (*Ibid.*)

The court found that appellant had not made a prima facie case of group bias but, in an abundance of caution to provide a clear record, the court allowed the prosecutor to explain her reasons for excusing the prospective jurors. (RT 1405.) The prosecutor noted that No. 042519's questionnaire indicated that she was a follower of Islam and could not sit in judgment of another person, but that, since completing the questionnaire, No. 042519 had changed her mind. (*Ibid.*) The prosecutor believed that the juror could change her mind back to her original position. (RT 1405-1406.) The prosecutor also pointed out that No. 042519 had been arrested for welfare fraud. (RT 1406.) The prosecutor did not believe that No. 042519 could be fair. (*Ibid.*) The prosecutor continued by noting that No. 045921's questionnaire indicated that he did not believe in the death penalty but that he could vote for it. (*Ibid.*) The prosecutor concluded, "It had nothing to do with either's race. It has to do with their feelings on the death penalty. I do not feel that that is subject to *Wheeler*." (*Ibid.*) The court accepted the prosecutor's explanations. (*Ibid.*)

After the noon recess, the process continued. (RT 1407.) After defense counsel excused a prospective juror, the replacement was Prospective Juror No.

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39. Defense counsel did not object pursuant to *Batson v. Kentucky* (1986) 476 U.S. 79, 93, 97-98 (hereinafter *Batson*). But this Court has noted that the *Wheeler* and *Batson* standards are identical, and has held that it is "more consistent with fairness and good appellate practice [to consider a defendant's *Batson* claim on the merits, even when the defendant only voiced a *Wheeler* objection] than to deny the claim as waived." (*People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

045787, an African-American woman. (RT 1435; FSCT 1766-1785.) She was briefly questioned by the court before the prosecutor excused her. (RT 1435-1436.) The process continued until the jury, and two alternates, were selected, sworn, and dismissed for the day. (RT 1436-1446.)

Then defense counsel renewed his *Wheeler* motion based on the prosecutor's dismissal of Prospective Juror No. 045787. (RT 1449.) Defense counsel commented that the prosecutor had excused all three of the African-American prospective jurors who had been seated. (*Ibid.*) The court noted that an African-American had been among the remaining prospective jurors, and ruled that defense counsel had not made a prima facie case. (*Ibid.*)

But, again in an abundance of caution, the court allowed the prosecutor to explain the dismissal. (RT 1450.) The prosecutor said that No. 045787's questionnaire indicated that: she believed the police had been unfair to her brother; she knew three people who had been falsely accused of crimes; she was not God; and she could not sit in judgment. (*Ibid.*) The prosecutor also noted that, in the span of a week (between completing the questionnaire and being called as a prospective juror), No. 045787 had changed her mind so that she could sit in judgment. (*Ibid.*) The prosecutor stated, "I cannot imagine that this woman would continue with one decision . . . ." (*Ibid.*) The prosecutor also explained that there was another African-American in the gallery whom the prosecutor "had no interest in kicking . . . ." (*Ibid.*) When given the opportunity, defense counsel did not pursue the motion. (*Ibid.*)

B. The Applicable Law

The right to a trial by a jury drawn from a fair or representative cross-section of the community is guaranteed by the Sixth Amendment of the federal Constitution and by article I, section 16 of the California Constitution. (*Wheeler, supra*, 22 Cal.3d at p. 272; see also *Taylor v. Louisiana* (1975) 419

U.S. 522, 530-531.) The equal protection clause of the federal Constitution guarantees to a defendant that the state will not exclude prospective jurors on the basis of race. Hence, peremptory challenges based solely on race violate the equal protection clause. (*Batson, supra*, 476 U.S. at pp. 93, 97-98 [equal protection violation found where excluded jurors and defendant of the same race]; see also *Powers v. Ohio* (1991) 499 U.S. 400, 404-416 [equal protection violation found where excluded jurors and defendant not of the same race].)

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

> "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.)

(*Box, supra*, 23 Cal.4th at pp. 1187-1188; see also *Miller-El v. Cockrell* (2003) 537 U.S. 322, 328-329.) 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 page 94. (*People v. Johnson* (2003) 30 Cal.4th 1302, 1306, 1313-1318; *Box, supra*, 23 Cal.4th at p. 1188, fn. 7; but see *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1195-1197 [court found

that "strong likelihood" test from *Wheeler* is impermissibly more stringent than the requirement to "raise a reasonable inference" from *Batson*].)

Courts presume that the party exercising the peremptory challenge did so on a constitutional basis. (*Wheeler, supra,* 22 Cal.3d at p. 278; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 114.) Thus, the burden is on the defendant to affirmatively establish a strong likelihood that the challenge was due to group association rather than specific bias. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 781, citing *People v. Granillo* (1987) 197 Cal.App.3d 110, 122.) *Wheeler* motions call upon the trial court to utilize personal observations in ruling on a claim of group bias. The court may consider all relevant circumstances, including matters that are merely subjective impressions, including "'bare looks and gestures.'" (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215-1217, quoting *Wheeler, supra*, 22 Cal.3d at p. 275; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1197; *People v. Montiel* (1993) 5 Cal.4th 877, 910, fn.9.)

A trial court's ruling on whether a prima facie case has been established is reviewed for an abuse of discretion. (*Johnson, supra,* 47 Cal.3d at p.1221.) In *People v. Reynoso* (2003) 31 Cal.4th 903, the California Supreme Court held that the trial court's ruling is entitled to "great deference," because the trial court is

> "in a good position to make such determinations, . . . on the basis of their knowledge of local conditions and of local prosecutors." [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience.

(*Id.* at pp. 915, 918; see also *People v. Sanders* (1990) 51 Cal.3d 471, 501.) 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; *Box, supra*, 23 Cal.4th at p. 1188; *People v. Davenport* (1995) 11 Cal.4th 1171, 1200.) 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. (*Farnam, supra,* 28 Cal.4th at p. 135, citing *People v. Turner* (1994) 8 Cal.4th 137, 167.)

If the trial court finds a prima facie case of group bias, then the prosecutor must state adequate, group-neutral reasons for each peremptory challenge. (*People v. McDermott* (2002) 28 Cal.4th 946, 970; *People v. Alvarez* (1996) 14 Cal.4th 155, 197.) These reasons must relate to the particular individual jurors and to the case at issue. (*Alvarez, supra*, 14 Cal.4th at p. 197.) "'[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Williams* (1997) 16 Cal.4th 635, 664, quoting *Batson, supra,* 476 U.S. at p. 97.) "Rather, adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*Williams, supra,* 16 Cal.4th at p. 664.) Peremptory challenges may be predicated on evidence suggestive of juror partiality that ranges from "the virtually certain to the highly speculative," including a juror's manner of dress, unconventional lifestyle, experiences with crime or law enforcement, or simply because a juror's answers on voir dire suggested potential bias. (*Wheeler, supra*, 22 Cal.3d at p. 275;[40] see also

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40. The *Wheeler* Court explained:

> Indeed, even less tangible evidence of potential bias may bring forth a peremptory challenge: either party may feel a mistrust of a juror's objectivity on no more than the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another" (4 Blackstone, Commentaries *353)--upon entering the box the juror may have smiled at the defendant, for instance, or glared at him.

(*Wheeler, supra*, 22 Cal.3d at p. 275.)

Reynoso, supra, 31 Cal.4th at pp. 924-925 & fn. 6 [a prospective juror's attitude and intellectual proclivities may be considered in exercising peremptory challenges without giving rise to an inference of discriminatory intent].) As noted by the *Reynoso* court, "'When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings.'" (*Reynoso, supra*, 31 Cal.4th. at p. 923, quoting *People v. Silva,* (2001) 25 Cal.4th 345, 385.) Furthermore, the trial court's determination that the prosecutor's explanations were credible and sufficient is entitled to "great deference." (*Reynosa, supra*, 31 Cal.4th at p.918 , quoting *Batson, supra*, 476 U.S. at p. 98, fn. 21.)

C. The Trial Court Properly Found That Appellant Did Not Make A Prima Facie Showing Of Group Bias; In Any Event, The Trial Court Properly Rejected Appellant's *Wheeler* Motion

First, appellant failed to make a prima facie showing of group bias on the part of the prosecutor, particularly in light of the presumption that the party exercising a peremptory challenge did so in a constitutional manner. While the three prospective jurors in question were African-American, there was no showing of a "strong likelihood" that the prosecutor's challenge was based on a reasonable inference of group bias. (See, e.g., *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154.) 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 *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 of group bias, 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]; *People*

v. Wright (1990) 52 Cal.3d 367, 399 [defendant failed to establish a prima facie case "solely by his observation that one prospective juror peremptorily challenged by the prosecutor was Black"].) Therefore, the trial court properly exercised its discretion in denying appellant's motion, because appellant did not establish a prima facie case of group bias.

Second, even if this Court finds that the trial court, by providing the prosecutor an opportunity to explain her peremptory challenges, somehow implicitly ruled that appellant had made a prima facie case, then respondent submits that the prosecutor properly explained the challenges with race-neutral reasons related to appellant's case. (See *Farnam, supra*, 28 Cal.4th at p. 136 [trial court allowed the prosecutor, "out of an abundance of caution," to make a record, although it was unnecessary].) As discussed *supra*, prosecutors are allowed to consider a wide variety of factors when exercising peremptory challenges, from body language [41] to views about the case or the criminal

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41. The *Reynoso* court noted:

> "Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors."

(*Reynoso, supra*, 31 Cal.4th at p. 918, quoting *Johnson, supra*, 47 Cal.3d at p.

justice system that would lead to a reasonable inference that the prospective juror could not be fair.[42/]

Here, the prosecutor noted that Prospective Juror No. 042519's questionnaire indicated that: she was a follower of Islam; she could not sit in judgment of another person; and she had been arrested for welfare fraud. (RT 1405-1406; see FSCT 1846-1865.) The prosecutor properly questioned both the prospective juror's ability to quickly change her mind about sitting in judgment of another person, as well as the juror's impartiality. (RT 1405-1406.) These were proper, race-neutral reasons that more than amply justified the prosecutor's dismissal of No. 042519.

In addition, No. 042519 admitted in her questionnaire that: (1) it would be "difficult" for her to "understand all of the legal procedures" (the highest educational level that she achieved was either fourth grade or sixth grade–her writing was unclear on this point, FSCT 1851); (2) she could not "convict or dismiss a person [based] on evidence presented by the prosecutor or defense" because she might be wrong; (3) for these reasons she could not be a fair and impartial juror; (4) she did "not wish to" serve on the jury; (5) she did not believe in the death penalty; and (6) "a lot of innocent people have been put to death." (FSCT 1847, 1850-1851, 1854, 1860-1861.) Futhermore, she marked the statement, "I could never vote to impose the death penalty in any case no matter what the facts and the circumstances of the case." (FSCT 1862.) Prospective Juror No. 042519 was properly dismissed from the jury.

1220.)

42. It is permissible to surmise that a close relative's adversarial contact with the criminal justice system might make a juror unsympathetic to the prosecution, and a peremptory challenge may be proper on that basis. (*Arias, supra,* 13 Cal.4th at p. 138; *People v. Cummings* (1993) 4 Cal.4th 1233, 1282 [fact that prospective juror's relative had been convicted of a crime was proper consideration justifying peremptory challenge]; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Allen* (1989) 212 Cal.App.3d 306, 312.)

As to No. 045921, the prosecutor properly pointed out that his questionnaire indicated that he did not believe in the death penalty but that he could vote for it. (RT 1406; see FSCT 1620.) Views about the death penalty are "a permissible race- and group-neutral basis for exercising a peremptory challenge in a capital case." (*McDermott, supra,* 28 Cal.4th at p. 970; accord *People v. Pride* (1992) 3 Cal.4th 195, 229-230; see also *Brown v. North Carolina* (1986) 479 U.S. 940 (conc. opn. of O'Connor, J.).) Thus, the prosecutor's reason(s) for dismissing No. 045921 were properly race-neutral.

As to No. 045787, the prosecutor properly noted that No. 045787's questionnaire indicated that: she believed the police had been unfair to her brother; she knew three people who had been falsely accused of crimes; she was not God; and she could not sit in judgment of another person. (RT 1450; see also FSCT 1776-1785.) The prosecutor also properly pointed out that, in the span of a week (between completing the questionnaire and being called onto the jury), No. 045787 had changed her mind to the point that she could sit in judgment. (RT 1450.) The prosecutor stated, "I cannot imagine that this woman would continue with one decision . . . ." (*Ibid.*) In addition, No. 045787 admitted in her questionnaire that: (1) she believed that jurors who did not want to serve should not have to; (2) she did not want to serve on the jury; and (3) she had been convicted of driving under the influence in 1984. (FSCT 1773-1775.) These were proper, race-neutral reasons that more than amply justified the prosecutor's dismissal of No. 045787. (See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124-1126.)

For all these reasons, the trial court properly rejected appellant's *Wheeler* motions based both on the fact that appellant failed to make a prima facie showing of group bias, and on the prosecutor's enunciated, properly race-neutral reasons for exercising peremptory challenges to dismiss Prospective Juror Nos. 042519, 045921, and 045787. The prosecutor's reasons were obviously supported by the record. Therefore, the trial court's determination

that the prosecutor's explanations were credible and sufficient is entitled to deference. (*Williams, supra,* 16 Cal.4th at p. 664; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1330.) This Court should reject appellant's claim.

V.

APPELLANT HAS WAIVED HIS CONSTITUTIONAL CLAIMS REGARDING THE TRIAL COURT'S ADMISSION INTO EVIDENCE OF FOREMAN'S PRIOR INCONSISTENT STATEMENT TO PORTER; IN ANY EVENT, THE TRIAL COURT PROPERLY ADMITTED THE STATEMENT INTO EVIDENCE

Appellant claims that Emma Foreman's extrajudicial statement that appellant admitted killing an elderly couple in Bakersfield was not inconsistent with her trial testimony and therefore was not admissible under Evidence Code section 1235. (AOB 152-163.) Appellant has waived his constitutional claims regarding the trial court's admission into evidence of Foreman's prior inconsistent statement to Porter; in any event, the trial court properly admitted the statement into evidence. Therefore, this Court should reject appellant's claim.

A. The Proceedings Below

Emma (Davidson) Foreman testified on direct examination:

Q. Did [appellant] every say anything to you about murdering anybody?

A. Not specifically to me, but I overheard the conversation between him and Gerry, my daughter.

Q. What did he say to Gerry about murdering anybody?

A. He kept on telling her that if she didn't do what he wanted her to do [prostitute herself], he would cut her mother-fucking throat.

Q. Did he ever mention any elderly people that he had harmed?

A. Well, one time he did.

Q. Did he say that to you or to your daughter?

A. It was to my daughter.

Q. What did he say then?

A. He said that he would–he said that he would cut her mother-

fucking throat.

(CT 2246-2247.) Later, the court discussed Foreman's testimony with the parties, in the context of Officer Porter being called as a witness to testify about a statement that Foreman had made to him. (RT 2388-2391.) The court pointed out that, in Foreman's statement to Porter, she said that appellant had told her about killing an elderly couple, while Foreman testified that appellant did not say anything to her about killing an elderly couple; instead she had overheard him make such a statement to Tags, her daughter. (RT 2389.) Defense counsel essentially objected to Porter's testimony by arguing that Foreman's testimony was not inconsistent with her statement to Porter; rather, her testimony was simply non-responsive. (RT 2390-2391.) The court noted that there had been no objection to Foreman's testimony, and overruled defense counsel's objection. (*Ibid.*) Porter subsequently testified as follows:

> Q. . . . Did you interview an Adele Foreman on January 26, 1992?
>
> A. Yes, I did.
>
> Q. During the interview you had with Ms. Foreman, did you ask her if [appellant] had ever told you anything about killing an old couple in Bakersfield?
>
> A. Yes.
>
> Q. What did she tell you?
>
> A. That he did tell her that he killed an old couple in Bakersfield.
>
> Q. Did she tell you more specifically what he said about killing an old couple in Bakersfield?
>
> A. That he found them in a bedroom, and I believe he beat them to death.

(RT 2391-2392.)

B. Appellant Has Waived His Constitutional Claims; In Any Event, The Trial Court Properly Admitted Foreman's Prior Inconsistent Statement To Porter

While appellant originally objected to the admission of Foreman's statement to Porter only on the basis that it was not an inconsistent prior statement, he now claims that the court admission of Foreman's statement to Porter violated his right to due process and his right of confrontation under article 1, sections 13 and 15, of the California Constitution and the Sixth and Fourteenth Amendments of the United States Constitution. But appellant's failure to raise these constitutional grounds below waives these claims on appeal. (See Evid. Code, § 353; *Heard, supra,* 31 Cal.4th at p. 972, fn. 12; *People v. Memro* (1995) 11 Cal.4th 786, 867.) 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 Foreman's statement to Porter was proper, such that appellant's due process claim fails.

Evidence Code section 1235 states, "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." Evidence Code section 770 requires the exclusion of extrinsic evidence of an inconsistent statement, except in situations where "the interests of justice otherwise require," unless the witness is given a chance, while testifying, to explain or deny the statement, or the witness has not been excused from providing additional testimony.

The "fundamental requirement" of Evidence Code section 1235 is that the statement in fact be inconsistent with the witness's trial testimony. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219.) The test for admitting a prior statement is inconsistency in effect, rather than contradiction in express terms and "the same principal governs the case of the forgetful witness." (*People v.*

Green (1971) 3 Cal.3d 981, 988; see also *Arias, supra,* 13 Cal.4th at p. 152.) A trial court's ruling on an evidentiary question will not be disturbed on appeal absent an abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955.)

Here, as the trial court pointed out, Foreman's statement to Porter was inconsistent with her trial testimony because in the former she said that appellant told her that he had killed an elderly couple in Bakersfield, while in the latter she said that appellant had not "specifically" made such a remark to her, but that she had overheard him make such a remark to Tags. Thus, the trial court properly admitted Foreman's statement to Porter as a prior inconsistent statement.

This Court has clearly held that a prior inconsistent statement used for impeachment of a witness at trial satisfies the confrontation clause where the declarant testifies as a witness at the trial, regardless of the circumstances in which the prior statement was made. (*Green, supra,* 3 Cal.3d at p. 985; see also *United States v. Owens* (1988) 484 U.S. 554, 559 ["[W]e agree with the answer suggested 18 years ago by Justice Harlan. '[T]he Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."'"].) Here, Foreman testified and was cross-examined at trial. (RT 2242-2250.)

Also, 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; *Arias, supra,* 13 Cal.4th 92, 152; *Green, supra,* 3 Cal.3d at pp. 988-989.) If for some reason the trial court believed that Foreman was being evasive in denying that appellant had not "specifically" made a statement to her about killing an elderly couple in Bakersfield, then the trial court properly admitted Foreman's statement to Porter on that basis.

For all these reasons, appellant's claim is meritless. This Court should reject the claim.

VI.

THE TRIAL COURT PROPERLY ADMITTED PHINNEY'S STATEMENTS TO DIEDERICH IN PART AS PRIOR INCONSISTENT STATEMENTS, AND IN PART AS PRIOR CONSISTENT STATEMENTS, AND BECAUSE THE STATEMENTS WERE PAST RECOLLECTIONS RECORDED PURSUANT TO EVIDENCE CODE SECTION 1237

Appellant claims that Danny Phinney's extrajudicial statements were not admissible as prior inconsistent statements, prior consistent statements or past recollections recorded. (AOB 164-185.) But the trial court properly admitted Phinney's statements to Diederich in part as prior inconsistent statements, and in part as prior consistent statements, and because the statements were past recollections recorded pursuant to Evidence Code section 1237. Hence, this Court should reject appellant's claim.

A. The Proceedings Below

On May 15, 1996, Phinney testified for the prosecution, as discussed *supra*. (RT 1651-1745.) Defense counsel's cross-examination of Phinney focused on three issues: first, Phinney's drug abuse and bipolar disorder; second, how his drug abuse and bipolar disorder affected his mental processes and functions (RT 1672-1689); and third, Phinney's direct examination testimony – including his statements to Diederich (RT 1689-1694, 1711-1738). Phinney was placed on "on-call" status at the conclusion of his testimony. (RT 1745.) The next day, as discussed *supra*, the initial trial court recused itself and the trial was transferred to a new trial court. (RT 1696-1710, 1745-1761.)

When the trial resumed, defense counsel objected, on foundational grounds, to the admission of any testimony by Officers Fraley and Diederich as to Phinney's statements to them. (RT 1764-1765.) The prosecutor responded that there were "three or four different theories" under which Phinney's

statements to the officers would be admissible, including as prior consistent statements and as prior inconsistent statements. (RT 1765-1767.) After reviewing Phinney's testimony, the court heard additional argument on the admissibility of the officers' testimony regarding Phinney's statements to them. (RT 1775-1781.)

The court ruled that Phinney's original statements regarding when he had seen appellant in 1984 were inconsistent with his testimony at trial, and the court noted that, when asked at trial, Phinney did not remember what he had told the officers. (RT 1781-1782.) The court ruled that Phinney's testimony regarding the jewelry and property that he had seen in appellant's possession was admissible as a prior consistent statement or as a past recollection recorded, in part because of the more recent discovery that the .25-caliber pistol was the murder weapon, which gave Phinney an even more powerful reason to fabricate testimony. (RT 1783-1798.) Defense counsel cited *People v. Simmons* (1981) 123 Cal.App.3d 677, and Phinney's admitted bi-polar disorder and long-term abuse of drugs, to argue that Phinney's statements to the officers did not have the necessary indicia of trustworthiness required under Evidence Code section 1237. (RT 1798-1806.) The court read *Cummings, supra,* 4 Cal.4th at pp. 1292-1294, which the court found more applicable to appellant's case than the *Simmons* case, and reaffirmed its ruling that Phinney's statements were admissible as past recollections recorded. (RT 1809-1815.)

Diederich testified, in part, about the statements Phinney had made to him during an interview on December 21, 1984. (RT 1839-1870.) In Diederich's opinion, during the interview Phinney was not under the influence of any drugs, nor was he in any type of withdrawal or suffering from delusions. (RT 1843, 1845.)

B. Appellant Has Waived A Portion Of His Claim By Failing To Object Below

Initially, respondent notes that appellant has waived a portion of his claim by failing to object below. Specifically, defense counsel objected to the admission of Phinney's statements to Diederich only on the bases of lack of foundation and hearsay (i.e., that the requirements for the various hearsay exceptions were not met). (RT 1764-1765, 1775-1780, 1783-1798.) But appellant here also claims that the admission of the testimony violated his constitutional rights to confront witnesses. (AOB 179-185.) Appellant's failure to object on the constitutional basis below is fatal to those portions of his claim here. (See, e.g., Evid. Code, § 353; *People v. Horning* (2004) 34 Cal.4th 871, ___ [22 Cal.Rptr.3d 305, 327], citing *People v. Carpenter* (1999) 21 Cal.4th 1016, 1049; *People v. Williams* (1988) 44 Cal.3d at 883, 906.)

C. The Trial Court Properly Admitted Some Portions Of Phinney's Statements To Diederich Because Those Statements Were Inconsistent With Phinney's Testimony

As to the merits of appellant's claim, statements made out of court that are offered for the truth asserted therein are generally inadmissible as hearsay. (Evid. Code, §§ 351, 1200.) This rule of exclusion does not apply if the out-of-court statement is inconsistent with any part of the declarant's in-court testimony and, at the time of its admission, the declarant has not been excused from giving further testimony. (Evid. Code, §§ 769, 1235.)

The prior statement is admissible if it tends to contradict or disprove the testimony or any inference to be deduced from it. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 566; see also *Johnson, supra,* 3 Cal.4th at p. 1219.) "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement . . . ." (*Green, supra,* 3 Cal.3d at p. 988.) Also, when a witness's claim of lack of memory amounts to deliberate

evasion, inconsistency is implied. (*Ervin, supra,* 22 Cal.4th at pp. 84-85; *Arias, supra*, 13 Cal.4th at p. 152; *Green, supra*, 3 Cal.3d at pp. 988-989.) "If there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper." (*Green, supra*, 3 Cal.3d at pp. 988-989.) A trial court's ruling on an evidentiary question will not be disturbed on appeal absent an abuse of discretion. (*Cox, supra,* 30 Cal.4th at p. 955.)

Here, Phinney testified that he did not remember telling the officers that he had seen appellant during the week after Labor Day, 1984, and that at that time, appellant possessed property (jewelry, jewelry boxes, a wallet, etc.) that (from other testimony at trial) appeared to belong to the Mercks. (RT 1652-1660.) Phinney testified, during cross-examination, that he "[p]ossibly" could have seen appellant as early as June 1984; he had "no idea" when he had seen appellant. (RT 1713-1714.) But Diederich remembered that, during Phinney's interview in December 1984, Phinney said that he had seen appellant during the first week of September 1984. (RT 1844-1847, 1852-1854, 1863-1869.) Obviously, Phinney's statement to Diederich was inconsistent with his trial testimony.

Several times Phinney testified that he could not recall various pieces of information. But, contrary to appellant's assertions (AOB 170 ["[T]here is no indication that Phinney was reluctant to testify against appellant."]), and as pointed out by the prosecutor (RT 1766), Phinney had been threatened prior to his testimony. Phinney testified that he saw appellant at the house of a mutual friend after Phinney had been released from jail in 1985. (RT 1671-1672.) Appellant said that: he had been questioned about some stolen property; he knew how the police had gotten the information; and Phinney had nothing to worry about provided that he never testified against appellant. (*Ibid.*) Phinney also testified that, the Saturday night before his testimony, a woman that he knew told him that his testimony would not "do any good." (RT 1669-1670.)

Phinney was "scared to death" during his testimony, although he claimed that he was "[n]ot really" afraid of appellant. (RT 1669.) Phinney also said that he had known appellant for years, and that he did not know what to do because he did not lie very well. (*Ibid.*)

At times, Phinney's memory seemed to work fairly well -- at one point Phinney remembered a silver dollar that his great uncle had given to him when he was eight years old. (RT 1717.) Yet, when defense counsel cross-examined Phinney regarding his statement to the officers, Phinney testified: he "may have lied" to the officers; there was a "possibility" that he "could have been very confused"; and he initially lied to Diederich and Fraley when he told them that he did not remember or was confused about how the gun had been acquired, because he had "never rolled over on a friend before. It looked like some real incriminating situation [*sic*] there." (RT 1734-1735.) Hence, there was a sufficient basis to find that Phinney's "faulty" recollection was impliedly inconsistent with his earlier statement on the basis of deliberate evasion.

Further, the requirements of Evidence Code section 770 are met. Phinney was subject to recall, but Diederich apparently was not. (RT 1745, 1871.) Given the length of the trial, Diederich presumably could have been subpoenaed for additional testimony, in light of the fact that appellant recalled several of the officers during his case. Also, both Phinney and Diederich were extensively cross-examined. (See discussion, *supra*.) Hence, the trial court properly admitted those portions of Diederich's testimony that provided Phinney's inconsistent statements.

Also, any claim that appellant's right to confront witnesses was violated is meritless. As noted *supra*, Phinney was subject to recall; Diederich presumably could have been subpoenaed for additional testimony; and both Phinney and Diederich were extensively cross-examined. In *People v. Zapien* (1993) 4 Cal.4th 929, this Court held, "The receipt in evidence of a prior inconsistent statement does not violate the confrontation clauses of the federal

and state Constitutions where the declarant testifies at trial and is subject to cross-examination." (*Id.* at p. 955, citing *California v. Green* (1970) 399 U.S. 149, 164, and *People v. Chavez* (1980) 26 Cal.3d 334, 361; see also *People v. Brown* (1995) 35 Cal.App.4th 1585, 1597.)

D. The Trial Court Properly Admitted Some Portions Of Phinney's Statements To Diederich Because Those Statements Were Consistent With Phinney's Testimony

Evidence Code section 1236 creates an exception to the hearsay exclusionary rule for the prior statement of a witness, if the statement is consistent with the witness's testimony at the hearing. The prior statement must also comply with Evidence Code section 791, which states:

> Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

The "offering of a prior inconsistent statement necessarily is an implied charge that the witness has fabricated his testimony since the time the inconsistent statement was made." (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1015.) The mere asking of questions by the defense may raise an implied charge of bias or fabrication thereby invoking the exception of Evidence Code section 791, subdivision (b). (*People v. Noguera* (1992) 4 Cal.4th 599, 629-630; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1209.) Thus, it is not surprising that California has been described as one of the most liberal states in allowing

the admission of prior consistent statements to rehabilitate the credibility of impeached witnesses. (*People v. Gentry* (1969) 270 Cal.App.2d 462, 474; see also *People v. Sanders* (1977) 75 Cal.App.3d 501, 508 [California is "*supra*-liberal in permitting the rehabilitation of witnesses by prior consistent statements"].)

Further, respondent notes that, in *Ainsworth, supra,* 45 Cal.3d at page 984, this Court held that where one party used a portion of a witness's statement to the police to impeach the witness's credibility, the other party was entitled to introduce the rest of the statement to rebut the charge of bias and recent fabrication. In *Ainsworth*, the prosecution impeached one of the co-defendants with portions of his statement to the police. The defense then introduced the co-defendant's statement in its entirety. This Court found by offering the portions of the statement that were inconsistent with the co-defendant's testimony, the prosecution made an "implied charge of recent fabrication or improper testimonial motive for purposes of Evidence Code section 791." (*Id.* at p. 1015.) Thus, the co-defendant's "*entire pretrial statement* to [the police], which was consistent with his trial testimony, . . . was properly admitted under Evidence Code section 791, subdivision (b) as relevant to rebutting the prosecution's implied charge of recent fabrication." (*Ibid.*, italics added.)

Evidence Code section 356 provides:

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

"It is well settled that where part of a conversation is put in evidence, the adverse party is ordinarily entitled to introduce the remainder of the conversation." (*Long v. California-Western States Life Insurance Co.* (1955)

43 Cal.2d 871, 881; see also *Zapien, supra,* 4 Cal.4th at p. 959; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174 ["'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence . . . .'"], quoting *Rosenberg v. Wittenborn* (1960) 178 Cal.App.2d 846, 852.) The purpose of Evidence Code section 356 is to prevent the use of selected aspects of a conversation "so as to create a misleading impression on the subjects addressed." (*Arias, supra,* 13 Cal.4th at p. 156.) Thus, when one party has introduced only a portion of a conversation, "the opposing party may admit any other part necessary to place the original excerpts in context." (*Pride, supra,* 3 Cal.4th at p. 235.) Finally, correct decision of a trial court must be affirmed on appeal even if it is based on erroneous reasons. (*Green v. Superior Court* (1985) 40 Cal.3d 126, 138-139; *People v. Braeseke* (1979) 25 Cal.3d 691, 700; *People v. Hobbs* (1987) 192 Cal.App.3d 959, 963.)

Here, appellant's defense was that Lutts and Phinney had killed the Mercks. Defense counsel began to lay out that defense by attacking the credibility of Lutts and Phinney in the first sentence of his opening statement. (RT 1475.) Counsel's cross-examination of Phinney emphasized, inter alia, that before Phinney made a statement to the police, he would have done "anything" to get out of protective custody and to get back onto the streets, where he could buy drugs to feed his habit. (RT 1720-1730.) Then counsel used Phinney's statement to question him about what he had said to the officers. (RT 1731-1737.) Contrary to appellant's assertions (AOB 172), defense counsel also attacked Phinney's credibility by asking him whether he had told the officers that he was confused and could not remember how he had obtained the pistol; Phinney responded, "I probably did say that." (RT 1736.) But Phinney's direct-examination testimony was clear – that he had helped Lutts acquire the

pistol by trading it for drugs to appellant, and that that was what he had told the officers. (RT 1660-1661, 1663.) Therefore, contrary to appellant's claims (AOB 172), the trial court properly admitted a portion of Phinney's statements to Diederich pursuant to Evidence Code section 1236, subdivision (a), because defense counsel used an allegedly prior inconsistent statement by Phinney (that he was confused and did not remember how he had obtained the pistol) to attack Phinney's testimony -- a statement that was presumably made before Phinney told the officers how Lutts had acquired the pistol.

Further, as discussed *supra*, defense counsel asked questions, including those about Phinney's statements to Diederich, to attack Phinney's credibility by emphasizing to the jury the numerous motives that Phinney had to be untruthful with the police. Defense counsel was trying to establish appellant's defense – that Phinney and Lutts had killed the Mercks. Therefore, the trial court properly admitted a portion of Phinney's statements to Diederich based on Evidence Code section 1236, subdivision (b), to establish that a portion of Phinney's statements to Diederich were consistent with his trial testimony.

Appellant insists that the Phinney's motivations or biases at trial were the same as when he spoke to the officers. (AOB 172-173.) Phinney admitted when he talked to Diederich, that he wanted to get out of protective custody, and to return to the streets to obtain drugs. (RT 1721-1724.) But, as appellant concedes (AOB 172), Phinney's motivations had changed by the time of trial. Obviously he was no longer in protective custody, nor was he driven to get back onto the streets to get more drugs. But more importantly, as the prosecutor pointed out in arguing for the admission of Phinney's statements to Diederich (RT 1785), the .25-caliber pistol had already been tested and excluded as the murder weapon by the time Phinney volunteered to talk to the police. (Compare RT 2186-2192 [Laskowski received the request to test the pistol on October 17, 1984; he tested the pistol and excluded it as the murder weapon], RT 1660-1667, 1734-1738, 1841-1869 [Phinny talked to Diederich and Fraley

on December 21, 1984].) Hence, the trial court's ruling was correct – the confirmation of the .25-caliber pistol as the murder weapon changed the calculus of the case and provided a concrete basis for Phinney's motivation or bias. The trial court did not abuse its discretion; this Court should affirm the admission of Phinney's statements to Diederich.

E. The Trial Court Properly Admitted Some Portions Of Phinney's Statements To Diederich Because Those Statements Were A Past Recollection Recorded

Appellant asserts that the trial court erred in admitting Phinney's statements to Diederich as a past recollection recorded. (AOB 174-179.) Appellant also claims that the past recollection recorded exception to the hearsay rule, codified in Evidence Code section 1237, is unconstitutional based on the United States Supreme Court's ruling in *Crawford v. Washington* (2004) __ U.S. __ [124 S.Ct. 1354]. (AOB 179-183.) Both of appellant's claims are wrong. Therefore, this Court should reject appellant's claims.

1. Phinney's Statements Were Past Recollections 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.

Trial courts are given wide latitude when determining the admissibility of evidence as an exception to the hearsay rule. (*People v. Edwards* (1991) 54 Cal.3d 787, 820; see also *People v. Kipp* (1998) 18 Cal.4th 349, 369, 371.)

Here, the trial court properly admitted Phinney's statements to Diederich and Fraley as a past recollection recorded. Specifically, Phinney's recollection at trial was occasionally spotty regarding his meeting with appellant in September 1984 (where he saw various items of the Mercks' property in appellant's possession), and regarding his statements to Diederich and Fraley. (See RT 1653-1654, 1657-1659, 1668-1669.) But Phinney clearly remembered his arrest, the .25-caliber pistol, and the initial meeting at the courthouse where he volunteered information about the Mercks' murders. (RT 1659-1663, 1666-1669, 1691.) In addition, Diederich recalled Phinney's statements, which were tape-recorded and transcribed. (RT 1657, 1668, 1731, 1744, 1842-1847, 1850.) Obviously, some time had passed between the September 1984 meeting of appellant and Phinney, and Phinney's December 1984 recounting of that meeting to Diederich and Fraley. But Phinney specifically said that, although his short-term memory was not good, he could remember things with the passing of time. (RT 1674 ["It takes a little bit of time to get [events] placed in my memory."].) Also, Phinney's statements to Diederich were fairly detailed, and Phinney was able to show Diederich and Fraley the house where he had seen appellant with the Mercks' property, so it would appear that the September 1984 meeting was still fresh in Phinney's mind in December 1984 when he met with Diederich. (RT 1843-1847; 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].)

Respondent notes that Phinney apparently first saw a newspaper article about the murder of the Mercks only about two weeks after he was arrested on October 14, 1984 (RT 2297-2302). (See RT 1726-1734. [Phinney estimated that he saw the newspaper article about the Merck murders two to four weeks after he was arrested].) Phinney initially and repeatedly testified that the told the truth to Diederich. (RT 1652, 1653, 1654, 1657, 1660.) Later, under cross-examination, Phinney contradicted his initial testimony and testified that: the meeting with appellant may have occurred earlier in 1984 than September; he wanted to be released from protective custody "real bad;" he "may have" lied to the officers; and he "could have been very confused" when he talked to the officers. (RT 1714, 1724, 1734-1735.) But, as noted *supra*, Phinney testified that he was "scared to death" to testify; it was the first time that he had testified against a friend; appellant had essentially threatened Phinney; and a woman had told Phinney that his testimony would do no good. (RT 1669-1672, 1736-1737.) Therefore, Phinney had reason to testify that his memory was spotty, and to provide some testimony that would be helpful to appellant. Moreover, Diederich knew that Phinney was in custody based on drug charges, and he learned during the interview that Phinney was a drug abuser, but Phinney gave Diederich no indications that he was under the influence of drugs or suffering from withdrawals. (RT 1842-1843, 1848-1852.) Respondent further notes that more of Phinney's statements to Diederich were admitted into evidence during appellant's cross-examination of Diederich than were admitted during Diederich's direct examination. (Compare RT 1840-1847 [direct examination] with RT 1848-1867 [cross-examination testimony].)

Contrary to appellant's assertions, *Simmons*, *supra*, 123 Cal.App.3d at p. 677, is not the "more apt" case under which to analyze this claim. (AOB 176-178.) There, the appellate court excluded a prior statement given to police by a witness who developed amnesia before the trial and could not recall having given the statement. (*Simmons, supra*, 123 Cal.App.3d at p. 682.) Because of

the amnesia, the witness was unable to affirm the truth of his statement, or to have that affirmation tested by cross-examination. (*Ibid.*) Here, unlike *Simmons* and as noted, *supra*, Phinney remembered a considerable amount of information, testified repeatedly as to the truth of his statements to Diederich, and defense counsel extensively cross-examined him regarding his statements.

Hence, Respondent submits that this Court's more recent ruling in *Cummings, supra*, 4 Cal.4th at page 1265, is the controlling authority. There, this Court found that the trial court properly admitted, over a hearsay objection and as past recollection recorded (Evid. Code, § 1237), a detective's testimony relating his interview notes of a jailhouse informant's statements about incriminating remarks Cummings had made to him. (*Id.* at pp. 1292-1293.) At trial, the informant testified that he "had no recall of the conversations with Cummings or [the detective], had been undergoing detoxification, was sometimes delusional, and was still having drug-related problems at the time of trial . . . [but] that what he told [the detective] was the truth." (*Ibid.*) In *Cummings*, as in the instant case, "[t]he bias, lack of recall, use of memory-affecting drugs, and all matters relevant to the credibility of the witness, both at the time he made his statement and at the time of his testimony were fully explored." (*Id.* at p. 1292 fn. 32.) 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.) This Court noted that the informant had "sufficient recall of the events that the trial court had a sufficient basis for concluding that his testimony was reliable." (*Id.* at p. 1294.)

For all these reasons, the trial court properly admitted Phinney's statements to Diederich as a past recollection recorded. Hence, this Court should reject appellant's claim.

2. Appellant's Right To Confront Phinney Was Preserved Because Phinney Was Extensively Cross-Examined

Appellant also urges this Court to "reconsider its holding in *Cummings* with respect to Evidence Code section 1237, in light of the United States Supreme Court's recent decision in *Crawford v. Washington, supra,* [541] U.S. [36,] 124 S.Ct. at p. 1354." (AOB 179-183.) Appellant also (essentially) claims that Phinney's memory was so problematic that this Court should find that appellant was unable to effectively cross-examine Phinney. (AOB 181-183.) But appellant is wrong on both counts.

In *California v. Green, supra*, 399 U.S. at page 158, the Court pointed out that the purpose of confrontation is to ensure reliability by means of the oath, to expose the witness to cross-examination, and to permit the trier of fact to assess credibility. Also, as the court noted in *People v. Perez* (2000) 82 Cal.App.4th 760, "'[T]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."'" (*Id.* at p. 765, quoting *United States v. Owens, supra,* 484 U.S. at p. 559.) Therefore, a witnesses's failure to remember does not deprive a defendant of meaningful cross-examination under the Confrontation Clause; rather the failure to remember itself may be used to impeach the witness. (See generally *People v. Cloyd* (1997) 54 Cal.App.4th 1402, 1409 [implying the inability to ask a particular question or receive a particular answer does not render cross-examination meaningless].) In *People v. Tran* (1996) 47 Cal.App.4th 759, 765-770, the court decided whether a severely disabled victim, specifically a quadriplegic without the ability to speak, could be meaningfully cross-examined. The court held that witnesses with substantial communication limitations, and also child witnesses, can be adequately cross-examined and the Confrontation Clause does not create the constitutional right to ask a particular question, or in this case, to receive a particular answer from these witnesses.

(*Id.* at p. 770.) Thus, Phinney's cross-examination was not meaningless simply because he could not answer every question posed by defense counsel.

Appellant's reliance on *Crawford* is likewise meritless. There, the United States Supreme Court held that testimonial hearsay statements generally could not be admitted at a trial unless the hearsay declarant was subjected to cross-examination. (*Crawford v. Washington, supra*, 541 U.S. at p. __, 124 S.Ct. at pp. 1370-1374.) But this Court has held that the Sixth Amendment right to confrontation "does not forbid the use of out-of-court statements by a declarant who testifies at trial and is subject to full cross-examination in regard to the prior statement." (*People v. Hayes* (1990) 52 Cal.3d 577, 610) In *Crawford*, the United States Supreme Court agreed: "[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." (*Crawford, supra,* 124 S.Ct. at p. 1369, fn. 9; see also *California v. Green, supra,* 399 U.S. at p. 162.)

Here, as noted *supra,* Phinney testified at trial and was extensively cross-examined. Therefore, appellant's claim must be rejected.

F. Any Error Was Harmless

Finally, any error in admitting Phinney's statements to Diederich was harmless. A judgment will not be set aside because of the erroneous admission of evidence unless its admission resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b).) A miscarriage of justice occurs only when the appellate court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Boyette, supra* 29 Cal.4th at pp. 427-428; *People v. Cooper* (1991) 53 Cal.3d 771, 836; *Fowler, supra,*

196 Cal.App.3d at p. 88.)

Here, even if the testimony of Phinney and Diederich regarding Phinney's statements had been excluded, it is not reasonably probable appellant would have obtained a better result. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) It simply cannot be said that the trial court, as a matter of law, exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (Evid. Code, § 353, subd. (b); *People v. Rodrigues* (1994) 8 Cal.4th at 1060, 1124; *People v. Dyer* (1988) 45 Cal.3d 26.) Hence, even if the trial court's admission of the testimony was wrong, the judgment must be affirmed. Appellant's claim must be rejected.

VII.

THE TRIAL COURT PROPERLY ADMITTED LASKOWSKI'S TESTIMONY BECAUSE THE TECHNIQUE OR METHODOLOGY USED BY LASKOWSKI TO EVALUATE THE PISTOL'S BARREL WAS NOT NEW, AND BECAUSE LASKOWSKI'S TESTIMONY MET THE TEST FOR SCIENTIFIC EVIDENCE; IN ANY EVENT, ANY ERROR WAS HARMLESS.

Appellant claims that Criminalist Gregory Laskowski's ballistics evidence was wrongly admitted as expert testimony without the proper foundation for a new scientific application. (AOB 186-194.) But the trial court properly admitted Laskowski's testimony because the technique or methodology used by Laskowski was not new, and because Laskowski's testimony met the test for scientific evidence. Also, any error was harmless. Hence, appellant's claim is without merit and should be rejected.

A. The Proceedings Below

At the start of the court day on Monday, April 15, 1996, when the court was to continue with the process of reviewing the hardship excuses of potential jurors, the prosecutor noted that there was "something" regarding Laskowski that she had "discovered" the previous Friday afternoon. (RT 433.) Defense counsel was unaware of what it could be. (*Ibid.*) The prosecutor called Laskowski to the witness stand. (RT 434.)

Laskowski testified that he had originally determined that the .25-caliber Colt pistol did not fire the bullets that killed Clifford. (RT 434-435.) But on Thursday, April 11, 1996, Laskowski had breakfast with Christopherson and learned that the pistol's barrel may have been altered. (RT 436.) Laskowski asked Christopherson to re-submit the pistol to the laboratory for a follow-up examination. (*Ibid.*) Laskowski noted that there was damage to an area close

to the muzzle of the barrel, and he made a cast or mold of the barrel using Microsil. (RT 436-438.) Laskowski examined the barrel mold, compared it to the evidence bullets and the test-fire bullets, and opined that the pistol had fired the bullets that killed Clifford. (RT 438-439.)

Laskowski was cross-examined, and also answered a few questions from the court. (RT 440-462.) After some discussion, a recess, and argument, the court denied defense counsel's motions to exclude the evidence based on the late timing of its disclosure and to continue the trial for a month to provide time for the defense to analyze and prepare a response to the evidence. (RT 463-488.) Defense counsel did not make a *Kelly-Frye* motion (*People v. Kelly* (1976) 17 Cal.3d 24, 30; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014), at the time because he did not have enough information to do so. (RT 473.)

On May 22, 1996, just before Laskowski was to testify at trial, defense counsel raised *Kelly-Frye* and foundational (chain of custody) issues regarding the testimony. (RT 2118-2120.) After some discussion (RT 2121-2127), an Evidence Code section 402 hearing was held.

Laskowski, an employee of the Kern County Regional Criminalistics Laboratory, noted that he had taken several courses on firearms and tool marks from the California Department of Justice, as well as a course on gunshot residue and primer analysis from the FBI. (RT 2127-2129.) Laskowski was a fellow of the American Academy of Forensic Sciences, as well as a member of the Association of Firearms and Tool Marks Examiners (hereinafter "AFTE"), the California Association of Criminalists, the International Association for Identification, and the Southern California Firearms Study Group. (RT 2129.) Laskowski had written, published, and presented several papers. (RT 2129-2130.)

Previously, Laskowski had fired test bullets from the .25-caliber Colt pistol and opined that it was not the gun that fired the bullets that killed

Clifford. (RT 2130.) But he had re-examined the pistol in April 1996 after learning from Christopherson that the barrel might have been altered. (RT 2131.) Laskowski saw that there were some "disturbances" near the end of the muzzle that would have prevented him from matching the test-fired bullets to the bullets found in Clifford. (RT 2131-2132.)

Laskowski was aware that a cast or mold could be made from the barrel of a gun. (RT 2132-2133.) One of the classes that he had taken involved reviewing barrel molds to show that "each firearm has its unique signature." (RT 2133.) Laskowski decided to make a mold of the pistol's barrel using Microsil, "a silicone rubber type of compound which is manufactured in Sweden and has been regarded by firearms and tool marks examiners as the premiere casting material for tool marks." (RT 2134.) Previously, Laskowski had used Microsil to make barrel molds, to make molds of tool marks (made during burglaries), and for proficiency exams. (RT 2134, 2141-2143.)

Laskowski prepared the Microsil using the manufacturer's specifications, and instructions from a research paper in the Association of Firearms and Tool Marks Journal. (RT 2134.) Once the mold was ready, he simply pulled it out of the pistol's barrel "much like pulling a cork from a wine bottle." (*Ibid.*) Laskowski compared the barrel mold and the bullets recovered from Clifford's body, and opined that the pistol fired those bullets. (RT 2135-2137.) In response to the court's question regarding the barrel mold procedure, Laskowski said, "It is by no means a new scientific procedure." (RT 2137.) Barrel molds had previously been done using lead, but the use of lead was decreasing due to the introduction of "elastomer rubber" materials like Microsil and Co-Flex. (RT 2140.) Laskowski had first learned about using Microsil to make barrel molds in 1985, and the first paper on the subject was done by Doctor Robert Levine and presented to the AFTE in 1995. (RT 2144.)

Laskowski had never before testified in court regarding a bullet comparison done using a Microsil barrel mold. (RT 2137.) He had talked to

two members of the AFTE, one of whom had never done a barrel mold using Microsil, and the other of whom had never done a bullet comparison using a Microsil barrel mold. (RT 2138-2140.) Also, Laskowski had called people who had made Microsil barrel molds, in California and in other places in the United States, but he had not been able to find an instance where a Microsil barrel mold was compared to a bullet, with the results presented to a court via testimony. (RT 2142-2144, 2151.) He talked to 12 or more people, who encouraged him to proceed with this "excellent technique," particularly in light of the fact that any alternative would be destructive to the evidence, and they asked him to inform them of the outcome. (RT 2150, 2152-2153.) No one said that it was not an acceptable technique. (RT 2153.) Laskowski did not call the FBI because the people that he knew there had retired, and because he thought it best to talk to the people who had published information on the subject. (RT 2145-2147.) Laskowski testified that using Microsil as he did to evaluate the evidence in this case was not a new scientific process, it was just "rare." (RT 2150-2152.)

In regard to potential problems with the use of Microsil, Laskowski pointed out that an examiner should be aware that one type of Microsil absorbs light. (RT 2148-2149.) But Laskowski did not use that brand. (RT 2153.) Also, air bubbles can be a "technique-oriented" (rather than a product-oriented) problem with Microsil, the material is soft (so that some distortion can occur if it is not laid out right under the microscope), and it shrinks about one to two percent. (RT 2149, 2155.) The Microsil that he used did shrink, but not enough to affect his comparison. (RT 2154.) Also, the flexibility of the material was not a problem, because the pistol's barrel was only two inches long; and in any event, the forensic microscope that he used could not accommodate a two-inch-long object, so he had to slice the barrel mold into pieces to view it. (RT 2155-2156.) The only other problem that Laskowski was aware of was that the Microsil would not uniformly harden if it was not

properly mixed with the hardening agent; but that could be remedied by simply re-doing the mold. (RT 2156-2157.) Defense counsel did not present any witnesses at the Evidence Code section 402 hearing.

The trial court was not sure that *Kelly-Frye* was applicable, in light of the fact that the Microsil process used by Laskowski appeared to be simply a new material (albeit a material that was accepted, according to Laskowski) used in a technique or methodology "that has been around for years." (RT 2157-2158.) The prosecutor agreed, and expressed her belief that the *Kelly-Frye* analysis did not include the fact that the use of Microsil to make a barrel mold had not been testified to in court. (RT 2158.) Defense counsel argued that the *Kelly-Frye* test was applicable pursuant to *People v. Leahy* (1994) 8 Cal.4th 587, which rejected the use of the horizontal gaze nystagmus test. (RT 2159.)

Then the trial court stated:

> Mr. Sprague [defense counsel], you and I have been around long enough to know that back in the early '70's in DUI investigations, gaze nystagmus was not even determined by the officers, and then all of a sudden in the early '80's, someone suggested that not only would it indicate intoxication, but one could even determine blood alcohol level based on the degree of onset, and this was a new thing, this was totally out of left field, if you will.
>
> What we're dealing with here is simply – is an old procedure that has been employed for years in terms of identifying or – or – a firearm as being that which fired a slug, that has been with us for years and a little bit different technique, possibly, but the basic science, if you will, is the same, it is not a new technique and new process.
>
> So your objection is noted. It is overruled. Let's bring the jury in.

(RT 2159-2160.)

B. The Applicable Law

The *Kelly-Frye* rule, applicable to scientific evidence in California pursuant to *Leahy, supra*, 8 Cal.4th at p. 591, requires the proponent of expert

testimony based on the application of a new scientific technique to satisfy three criteria: "(1) general acceptance in the relevant scientific community, (2) testimony by properly qualified experts, and (3) the application of correct scientific procedures in the case under review. [Citations.]" (*People v. Fierro* (1991) 1 Cal.4th 173, 214; *Kelly, supra*, 17 Cal.3d at p. 30; see also *Farnam, supra,* 28 Cal.4th at p.160; *People v. Venegas* (1998) 18 Cal.4th 47, 76-80.) "Under the *Kelly* test, the admissibility of evidence obtained by use of a scientific technique does not depend upon proof to the satisfaction of a court that the technique is scientifically reliable or valid. [Citation.]" (*People v. Bolden* (2002) 29 Cal.4th 515, 546.) A trial court's rulings during a *Kelly-Frye* proceeding are reviewed for abuse of discretion. (*Venegas, supra*, 18 Cal.4th at p. 91.)

C. *Kelly-Frye* Is Not Applicable Because The Microsil Barrel Mold Process Used By Laskowski Is Not A "New Scientific Technique." In Any Event, The Trial Court Properly Admitted Laskowski's Testimony.

First, respondent notes that, contrary to appellant's assertions (AOB 189-193), Laskowski's use of Microsil to make a barrel mold was not a "new scientific technique." Rather, as properly found by the trial court, it was simply the use of a new material – and one less destructive to evidence, which of course would be helpful to the defense in that it would allow additional testing – to perform a technique that "has been employed for years." (RT 2159-2160; see generally Hawley, Firearms Forensics–Firearms Identification at Trial (updated August 2004) 60 Am.Jur.3d Proof of Facts 1; Inbau, Firearms Identification–"Ballistics" (Summer 1999) 89 J. Crim.L. & Criminology 1293.) Therefore, the *Kelly-Frye* test was not applicable to the admission of Laskowski's testimony, and this Court should reject appellant's claim. (*Leahy, supra*, 8 Cal.4th at p. 605 ["*Kelly* is applicable only to 'new scientific techniques.'"]; see also *People v. Ayala* (2000) 24 Cal.4th 243, 281; *Roberti v.*

Andy's Termite & Pest Control, Inc. (2003) 113 Cal.App.4th 893, 901;[43] *United States v. Foster* (D.Md. 2004) 300 F.Supp.2d 375, 377, fn.1.[44])

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43. The *Roberti* court held:

> Plaintiff's experts based their opinion testimony upon research papers and studies (primarily those conducted on animals) in peer-reviewed journals regarding Dursban [a pesticide] and its effects, and to some extent upon physical examination of plaintiff using techniques that are generally accepted in the relevant medical community. They did not rely upon any new scientific technique, device, or procedure that has not gained general acceptance in the relevant scientific or medical community. Rather, it was the theory of causation, that Dursban caused plaintiff's autism, that has not gained general acceptance in the relevant medical community. The *Kelly* test is not applicable even though the proffered evidence presents a new theory of medical causation.

(*Roberti, supra*, 113 Cal.App. 4th at p. 901.)

44. The *Foster* court stated:

> Ballistics evidence has been accepted in criminal cases for many years. The first comprehensive textbook of ballistics, *Firearms Investigation. Identification and Evidence,* was published by Major Julian S. Hatcher in 1935. In the years since *Daubert*, [*v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579,] numerous cases have confirmed the reliability of ballistics identification. *See, e.g., United States v. Santiago,* 199 F.Supp.2d 101, 111 (S.D.N.Y.2002) ("The Court has not found a single case in this Circuit that would suggest that the entire field of ballistics identification is unreliable. . . . To the extent that [the defendant] asserts that the entire field of ballistics identification is unacceptable 'pseudo-science,' the Court disagrees."); *United States v. Cooper,* 91 F.Supp.2d 79, 82-83 (D.D.C. 2000) (implying that ballistics identification involves "well-established" scientific principles); *United States v. Davis,* 103 F.3d 660, 672 (8th Cir.1996) (upholding the use of expert testimony to link bullets recovered from a crime scene to a firearm associated with the defendant); *cf. United States v. Scheffer,* 523 U.S. 303, 313-14, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998) (contrasting polygraph evidence with other more accepted fields of expert testimony, including ballistics).

(*Foster*, *supra*, 300 F.Supp.2d at p. 377 fn.1.)

But even if this Court determines that the *Kelly-Frye* test is applicable to Laskowski's Microsil barrel mold, respondent submits that the trial court properly admitted Laskowski's testimony because the test's requirements were met. Specifically, Laskowski's testimony established that the use of Microsil was generally accepted in the scientific community: Laskowski first became aware of the use of Microsil to make barrel molds in 1985; a paper about the use of barrel molds to make bullet comparisons had been presented to the AFTE in 1995; and the many people that Laskowski spoke to about the Microsil barrel mold encouraged him to use what they viewed as an "excellent technique." (RT 2144, 2150, 2152-2153.) Also, Laskowski's extensive training and experience, over the course of more than 10 years, including membership in multiple professional firearms and tool mark organizations, as well as the fact that he had published and presented several papers, established him as a properly qualified expert. (RT 2127-2130.) Finally, Laskowski's testimony also established that he had applied correct scientific procedures: he did not use the brand of Microsil that had light absorption problems (RT 2148-2149, 2153); he used short lengths of the barrel mold so that the flexibility of the Microsil did not pose a problem (RT 2149, 2154-2156); and the Microsil he used did not shrink enough to affect his comparison (RT 2154).

Appellant attempts to indict Laskowski's methodology by pointing out that he sliced the Microsil barrel mold into pieces, and by claiming that he inserted a Q-tip into the mold. (AOB 192, citing RT 2154-2157.) But, contrary to appellant's assertion, respondent has been unable to find any indication in the Evidence Code section 402 hearing reporter's transcript that would indicate that Laskowski used a Q-tip on the mold (not that that would affect respondent's analysis of appellant's claim). Moreover, Laskowski sliced the two-inch Microsil barrel mold into smaller pieces for two very legitimate reasons–it eliminated any concerns about the flexibility of the Microsil, and it also ensured that he would be able to evaluate the barrel mold under the microscope. (RT

2155-2156.) Furthermore, respondent notes that "'[c]areless testing affects the weight of the evidence and not its admissibility, and must be attacked on cross-examination or by other expert testimony.' (*People v. Farmer* (1989) 47 Cal.3d 888, 913.)" (*People v. Smith* (1989) 215 Cal.App.3d 19, 28, parallel citation omitted.) Defense counsel presented no expert witnesses to rebut Laskowski's testimony, and defense counsel's cross-examination of Laskowski did not impact the fact that Laskowski's testimony met the preponderance-of-the-evidence burden imposed upon the prosecutor. (Evid. Code § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."].)

For all these reasons, the trial court properly admitted Laskowski's testimony. Therefore, this Court should reject appellant's claim.

D. Any Trial Court Error In Admitting The Evidence Was Harmless

Finally, respondent notes that the exercise of a trial court's discretion under normal rules of evidence does not ordinarily implicate the federal Constitution. (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.) Therefore, any error in admitting such expert scientific testimony does not require reversal under the harmless-beyond-a-reasonable-doubt test of *Chapman v. California*, (1967) 386 U.S. 18, 24. (*Venegas*, *supra*, 18 Cal.4th at p. 93; *Kelly*, *supra*, 17 Cal.3d at p. 40.) For example, error in admitting statistical blood group evidence is reviewed under *Watson*, *supra*, 46 Cal.2d at page 836, which requires a "reasonable probability" that the defendant would have obtained a more favorable result in the absence of error. (*People v. Poggi* (1988) 45 Cal.3d 306, 324; compare *People v. Brown* (1985) 40 Cal.3d 512, 535-536 [overwhelming evidence of guilt rendered statistical use of inadmissible evidence harmless]; cf. *People v. Wallace* (1993) 14 Cal.App.4th 651, 663, fn. 4 [declining to address defense claim that DNA statistics were unduly

prejudicial after finding that a *Kelly-Frye* violation was harmless under either standard].)

Here, as discussed *supra*, the evidence against appellant was strong. The murders of the Mercks were horrific crimes. Appellant's fingerprints were found inside the Mercks' home, and a number of witnesses established that appellant had possessed several items of the Mercks' property. Therefore, it is not reasonably probable that appellant would have obtained a more favorable result had the trial court excluded Laskowski's testimony regarding the Microsil barrel mold. Appellant's claim must be rejected.

VIII.

THE TRIAL COURT PROPERLY EXCLUDED APPELLANT'S STATEMENTS TO FRALEY BECAUSE THE FACT THAT APPELLANT VOLUNTEERED TO TALK TO FRALEY WAS IRRELEVANT TO APPELLANT'S GUILT OR INNOCENCE

Appellant claims that the trial court erred in excluding appellant's evidence tending to establish his defense based on lack of consciousness of guilt. (AOB 195-202.) But the trial court properly excluded appellant's statements to Fraley because the fact that appellant volunteered to talk to Fraley was irrelevant to appellant's guilt or innocence. Appellant's claim is meritless and should be rejected by this Court.

A. The Proceedings Below

On May 28, 1996, before the jury arrived, defense counsel indicated that he wanted to make a record on some issues, and that he needed the court to rule on some evidentiary requests. (RT 2421-2423.) One of those requests was to admit into evidence appellant's remarks to Fraley, which appellant made when he called Fraley in February 1985 (after Fraley had talked to Tags earlier that day). (RT 2423-2424.) Defense counsel told the court that appellant had said to Fraley, "I'll come down right now if you want me to," and that, after Fraley told appellant that he was not ready to talk to him, appellant said that he hoped Fraley would be ready to talk soon, because appellant did not like "what [was] going around." (RT 2424.) Defense counsel cited Evidence Code section 1250,[45] and argued that appellant's statements would not be admitted for their

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45. Evidence Code section 1250 provides, in pertinent part, "Subject to [Evidence Code] section 1252, evidence of a statement of the declarant's then existing state of mind . . . is not made admissible by the hearsay rule when . . . [t]he evidence is offered to prove the declarant's state of mind . . . at that time or at any other time when it is itself an issue in the action . . . ." Evidence Code

truth, but rather to show appellant's state of mind at the time–which counsel argued would be "circumstantial evidence" of appellant's state of mind as to the murders. (RT 2424.) The court did not rule on the request at that time. (*Ibid.*)

Later, defense counsel repeated his request that the trial court admit appellant's statements to Fraley where appellant volunteered to come in and talk to Fraley. (RT 2504.) The prosecutor objected that appellant's statements were hearsay and irrelevant. (*Ibid.*) Defense counsel again argued that appellant's statements should be admitted pursuant to Evidence Code section 1250 to show appellant's state of mind, and more specifically, his "lack of consciousness of guilt." (RT 2505.) The court found that appellant's statements to Fraley were irrelevant, and denied defense counsel's request. (*Ibid.*)

B. The Applicable Law

Evidence Code section 350 provides, "No evidence is admissible except relevant evidence." (See also *Crittenden*, *supra*, 9 Cal.4th at p. 132; *People v. Babbit* (1988) 45 Cal.3d 660, 681.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; see also *People v. Scheid* (1997) 16 Cal.4th 1, 14 ["The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]"], quoting *People v. Garceau* (1993) 6 Cal.4th 140, 177.) The trial court has "wide discretion" in determining the relevance of evidence (*Garceau, supra,* 6 Cal.4th at p. 177) and the probative value versus the prejudice of evidence (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214). Respondent notes that evidence proffered by the

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section 1252 states, "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness."

defense which produces only speculative inferences is irrelevant evidence. (See *Babbitt*, *supra*, 45 Cal.3d at p. 682.)

A trial court's evidentiary decisions are not to be disturbed absent a manifest abuse of discretion resulting in a miscarriage of justice. (*Rodrigues*, *supra*, 8 Cal.4th at pp.1124-1125; *People v. Milner* (1988) 45 Cal.3d 227, 239; *People v. Vargas* (2001) 91 Cal.App.4th 506, 543.) Typically, an abuse of discretion will not be found "except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner . . . ." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) A miscarriage of justice occurs only when the appellate court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*People v. Earp* (1999) 20 Cal.4th 826, 878; *Scheid, supra,* 16 Cal.4th at p. 21.)

Statements made by an out-of-court declarant that are offered to prove the truth of the matter asserted are generally inadmissible as hearsay, unless such statements fall within an exception to the general rule. (Evid. Code, § 1200, subds. (a) & (b); *People v. Duarte* (2000) 24 Cal.4th 603, 610.) As noted *supra* in footnote 45, there is an exception to the hearsay rule for state-of-mind declarations, but that exception is subject to the requirement of trustworthiness. (See Evid. Code, §§ 1250, 1252.) "When hearsay evidence is admitted it is usually because it has a high degree of trustworthiness. [Citations.]" (*People v. Spriggs* (1964) 60 Cal.2d 868, 874.) To determine whether a hearsay statement is trustworthy, a trial court should consider the words themselves as well as the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. (See *Cudjo*, *supra*, 6 Cal.4th at p. 607.)

C. Analysis

In *People v. Cruz* (1968) 264 Cal.App.2d 350, 361, the court held, "We reaffirm the California rule to the effect that exculpatory extrajudicial statements of a defendant . . . are not admissible because they indicate a lack of consciousness of guilt." (See also *People v. Green* (1980) 27 Cal.3d 1, 39 [absence of flight not admissible to show innocent state of mind], disapproved on other grounds by *People v. Martinez* (1999) 20 Cal.4th 225, 233-237, and *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 *People v. Harvey* (1984) 163 Cal.App.3d 90, 114-115 [court properly excluded evidence of defendant's cooperation with police]; *People v. Doran* (1972) 24 Cal.App.3d 316, 321 [trial court properly excluded evidence that the defendant did not attempt to escape when his handcuffs were removed during a meal with the officer who arrested him], disapproved on other grounds by *People v. Beamon* (1973) 8 Cal.3d 625, 629, fn. 2.) In February 1985, appellant obviously knew that the police did not have sufficient evidence against him to arrest him for the murder of the Mercks, in light of his proper concession that he was "not naive regarding the workings of the criminal justice system" by then (AOB 199). Otherwise, he would have already been arrested. Had Fraley accepted appellant's offer to come in for an interview, appellant undoubtedly would have lied about murdering the Mercks.[46/] So appellant had a clear motivation to volunteer to come in to talk

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46. Respondent notes that, had Fraley accepted appellant's offer to come in and be interviewed, and had appellant made false exculpatory statements to Fraley, those statements would not have been admissible at trial (see, e.g., *People v. Whitt* (1990) 51 Cal.3d 620, 643) except to show a consciousness of guilt on appellant's part (see, e.g., CALJIC No. 2.03; *People v. Kelly* (1992) 1 Cal.4th 495, 531-532; *People v. Kimble* (1988) 44 Cal.3d 480, 496; *People v. Osslo* (1958) 50 Cal.2d 75, 93; *People v. Cole* (1903) 141 Cal. 88, 90 ["Deception, falsehood, and fabrication as to the facts of the case are treated as tending to show consciousness of guilt, and are admissible on the same theory as flight and concealment of the person when charged with crime."]).

to Fraley-- his desire to deflect the suspicions of the police onto others, to allow him to continue to evade responsibility for his crimes (as he had for over five months at the time he made the offer to Fraley).

Hence, while appellant's statements regarding his willingness to talk to Fraley may have been admissible under the state-of-mind exception to the hearsay rule (Evid. Code, § 1250), the trial court properly excluded the statements because the statements were "made under circumstances such as to indicate [their] lack of trustworthiness." (Evid. Code, § 1252; see *Smith, supra,* 30 Cal.4th at p. 629 [court properly excluded defendant's statements to his wife as "untrustworthy because [defendant's] primary motivation in making them was to placate her," in spite of the fact that the statements might have been relevant state-of-mind evidence at the penalty phase to show remorse for his crimes]; *Cruz, supra,* 264 Cal.App.2d at p. 358 ["admissibility of declarations of a present state of mind is . . . subject to the rule of trustworthiness"].) In sum, the law does not support appellant's claim that he should have been allowed to present evidence of a "consciousness of innocence" or a "lack of consciousness of guilt."

Furthermore, the trial court properly noted that appellant's state of mind in February 1985, over five months after the Mercks had been murdered, was irrelevant to appellant's intent, malice aforethought, or state of mind at the time of the murders. At most, appellant's statements to Fraley were relevant to show that, at one point in time, he was willing to talk to Fraley. But appellant's cooperativeness was not at issue in the trial; his guilt was the issue.

Appellant also seems to claim that the trial court's exclusion of the evidence denied his ability to present a defense. (AOB 196.) But as this Court noted in *Cudjo, supra,* 6 Cal.4th at page 585:

> As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. 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. [Citations.]

(*Id.* at p. 611, quoting *Hall, supra*, 41 Cal.3d at p. 834; see also *People v. Jones* (1998) 17 Cal.4th 279, 305.) The exclusion of evidence that appellant volunteered to talk to Fraley did not deny appellant the ability to put on a defense; his defense never varied from the theme that Lutts and Phinney were the murderers.

Also, appellant's claim that the application of the rules of evidence is unfairly balanced in favor of the prosecution is nothing more than speculation. The standard rules of evidence about which appellant complains are based on sound reasoning and logic, and thus are well established. (See *People v. Williams* (1997) 55 Cal.App.4th 648, 653 ["Since flight and the absence of flight are not on similar logical or legal footings, the due process notions of fairness and parity in *Wardius* [*v. Oregon* (1973) 412 U.S. 470, where the Court held that due process mandated reciprocal discovery rights in criminal cases] are inapplicable"].) Hence, contrary to appellant's assertions (AOB 198), the reasoning of *Green* is helpful in this case. (See *Green, supra*, 27 Cal.3d at pp. 36-40, fn. 26 ["The combined result of [Evidence Code] section 1127c and the *Montgomery* rule [*People v. Montgomery* (1879) 53 Cal. 576] may offend one's sense of logical symmetry, but it does not support defendant's final argument that it is "unfair" to instruct on flight as consciousness of guilt without permitting him to call the jurors' attention to evidence [of a lack of flight] that may persuade them of his innocence."].) Appellant received a fair trial; he has not shown that the exclusion of the evidence resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *Rodrigues, supra*, 8 Cal.4th at pp.1124-1125.) As discussed *supra*, the evidence against him was strong. Thus, this portion of his claim must fail because he has not shown a constitutional violation as demonstrable reality. (*People v. Desantis* (1992) 2 Cal.4th 1198, 1221.)

For all these reasons, the trial court properly excluded the evidence of appellant's self-serving statements to Fraley. Therefore, this Court should reject

appellant's claim.

D. Any Trial Court Error In Excluding The Evidence Was Harmless

Even if the trial court erred in excluding the above-mentioned evidence, such error was harmless. As noted, *supra*, the trial court's ruling did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325.) Nor did the trial court's exclusion of certain defense evidence constitute a violation of due process. (See *Williams, supra,* 55 Cal.App.4th at pp. 651-653.) Given the strong evidence against appellant, including two of his fingerprints found inside the Mercks' house and the numerous witnesses who saw in appellant's possession, or received from appellant, property that had belonged to the Mercks, it is not reasonably probable that the admission of appellant's statements to Fraley would have resulted in a verdict more favorable to appellant. (*Ibid.*, citing, e.g., *Watson, supra,* 46 Cal.2d at p. 836.) Therefore, appellant's claim must be rejected.

IX.

THE PICTURES OF THE VICTIMS WERE NOT PREJUDICIALLY GRUESOME; THIS COURT HAS REPEATEDLY UPHELD IN CAPITAL CASES THE ADMISSION INTO EVIDENCE OF PICTURES OF THE VICTIMS

Appellant claims that the trial court erred by admitting gruesome post-mortem pictures of Clifford and Alma Merck, and an unduly prejudicial photograph of Alma Merck while alive, thereby rendering the trial fundamentally unfair and the verdict unreliable. (AOB 203-210.) But the pictures of the victims were not prejudicially gruesome; this Court has repeatedly upheld in capital cases the admission into evidence of pictures of the victims. Therefore, this Court should reject appellant's claim.

A. The Proceedings Below

On March 14, 1996, appellant filed an in limine motion to exclude post-mortem photographs of the victims. (CT 1202-1214.) On March 26, 1996, the court denied appellant's motion. (CT 1278.)

At the hearing on appellant's motion, initially defense counsel offered to stipulate to the decedents' manner of death, their names and ages, and the location where they were found. (RT 54.) Alternatively, he asked that any photographs be made into black and white photographs. (*Ibid.*) The prosecutor estimated that there were "[a]t least" 50 photographs, out of "several hundred" that had been taken, that she would like to "have available." (RT 55-56.) The prosecutor noted that, due to the nature of the case (as a capital case), she believed she had a right to use the photographs "to show the intent of the defendant and so forth." (RT 56.) She also stated, "I think the jury has a right to see what he did and how he did it." (RT 57.) The prosecutor also rejected defense counsel's proferred stipulation. (*Ibid.*) Defense counsel reiterated his

Evidence Code section 352 objection to "any and all" victim and autopsy photographs in the guilt phase. (RT 58.) The court noted that the prosecutor could not be forced to accept the stipulation, and that there was some probative value to the photographs, at least as to the degree of murder. (*Ibid.*)

The next day, the court returned to appellant's motion. (RT 96.) The court noted that there were two photographs of Alma while she was alive, and the prosecutor responded that both of the pictures showed Alma wearing the ring that was at issue (which respondent notes Fraley had gotten from Glass, appellant's sister, who told him that appellant had given her the ring, RT 1939-1942, 2161-2163). (RT 97-98.) Defense counsel objected that "the ring itself cannot be really distinguished." (RT 99.)

The court, not knowing which photographs the prosecutor intended to use, could not determine at that point which photographs were relevant. (RT 99.) But the court overruled appellant's relevance objection, noting that, in its experience, "one can come up with theories of relevance that would make these photographs admissible." (RT 100.) The court's example was that perhaps the photographs could corroborate (or not) Tags's testimony. (*Ibid.*)

Also, given the uncertainty as to when or which photographs would be used, the court was not able to fully evaluate appellant's Evidence Code section 352 objection. (RT 100-101.) But the court cited *Zapien, supra,* 4 Cal.4th at p. 929, found that none of the photographs posed the type of prejudice that would preclude their admission into evidence,[47] and overruled appellant's objection. (RT 101-102.)

The court also denied appellant's request that any photographs be made into black and white photographs. (RT 102.) The court noted that "many" of the photographs were "grainy," and found that reducing the photographs to

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47. The court noted that none of the photographs "have dismembered parts, these are people not laid out on a slide and cut up to show trajectories or probes inside of organs or body parts. There is none of that at all." (RT 101.)

black and white could potentially mislead the jury (because blood would no longer look red) and would cause the pictures to lose their probative value. (*Ibid.*)

B. The Applicable Law And Analysis

Initially, respondent notes that appellant has waived any constitutional bases in this claim by failing to raise any such arguments in the trial court, relying instead solely upon Evidence Code section 352. (*People v. Seaton* (2001) 26 Cal.4th 598, 638; *Carpenter, supra*, 15 Cal.4th at p. 385; *People v. Raley* (1992) 2 Cal.4th 870, 892.) As to his challenge to the trial court's admission of the pictures under Evidence Code section 352, appellant's claim is baseless.

"Relevant" evidence is that 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." (Evid. Code, §§ 210, 350; see also *Garceau, supra*, 6 Cal.4th at p. 177.) A trial court has discretion to exclude even relevant evidence, of course, if the probative value of the evidence "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." (Evid. Code, § 352; see also *Gionis, supra*, 9 Cal.4th at p. 1214; *Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.)

The trial court's evidentiary decisions will not be disturbed absent a manifest abuse of discretion resulting in a miscarriage of justice. (*Rodrigues, supra,* 8 Cal.4th at pp. 1124-1125; *Milner, supra*, 45 Cal.3d at p. 239.) Typically, an abuse of discretion will not be found "except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absu`rd manner . . . ." (*Jordan, supra,* 42 Cal.3d at p. 316.) A miscarriage of justice

occurs only when the appellate court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Earp, supra,* 20 Cal.4th at p. 878; *Scheid, supra,* 16 Cal.4th at p. 21.)

In *People v. Gurule* (2002) 28 Cal.4th 557, this Court aptly summarized the law applicable to claims regarding the admission of victim pictures into evidence:

> This court is often asked to rule on the propriety of the admission of allegedly gruesome photographs. (See, e.g., *People v. Weaver,* [(2001)] 26 Cal.4th [876,] 933; *People v. Anderson,* [(2001)] 25 Cal.4th [543,] 591.) At base, the applicable rule is simply one of relevance, and the trial court has broad discretion in determining such relevance. (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) "'[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant'" (*People v. Pierce* (1979) 24 Cal.3d 199, 211, quoting *People v. Long* (1974) 38 Cal.App.3d 680, 689), and we rely on our trial courts to ensure that relevant, otherwise admissible evidence is not more prejudicial than probative (Evid. Code, § 352). A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value. (*People v. Allen,* [(1986)] 42 Cal.3d [1222,] 1256.) Finally, prosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victims' bodies to determine if the evidence supports the prosecution's theory of the case. (*People v. Scheid, supra,* at p. 16; *People v. Pride* (1992) 3 Cal.4th 195, 243.)

(*Gurule, supra*, 28 Cal.4th at pp. 624-625, parallel citations omitted; see also *People v. Martinez* (2003) 31 Cal.4th 673, 692-693.) Hence, this Court has repeatedly upheld the admission into evidence, during the guilt phase, of pictures of the crime scene–including the victims, as they were found at the crime scene. (See, e.g., *People v. Taylor* (2001) 26 Cal.4th 1155, 1167-1169, cert. den. *sub nom. Taylor v. California* (2002) 536 U.S. 967 [court upheld, against challenges of relevancy and prejudice, the admission of eight crime scene pictures that included the handcuffed victims, as well as a videotape of the same, citing, e.g., *Scheid, supra*, 16 Cal.4th at pp. 15-16, 18-19, and *Box*,

supra, 23 Cal.4th at pp. 1198-1199; see also *People v. Hart* (1999) 20 Cal.4th 546, 615-617; *People v. Wash* (1994) 6 Cal.4th 215, 246-247; *People v. Kelly* (1991) 51 Cal.3d 931, 963-964; *People v. Nye* (1969) 71 Cal.2d 356, 370-371.) Contrary to appellant's assertion that the trial court did not properly balance the probative value versus the prejudice of the pictures (AOB 208), the discussion that the trial court had with defense counsel and the prosecutor clearly reflects that the trial court understood and applied the balancing test of Evidence Code section 352. (See *Crittendon, supra,* 9 Cal.4th at p. 135; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1187-1188; *People v. Waidla* (2000) 22 Cal.4th 690, 724 [court "'need not expressly weigh prejudice against probative value–or even expressly state that [it] has done so'"].)

Here, the trial court did not abuse its discretion in admitting the challenged post-mortem pictures because, contrary to appellant's contention, the pictures were not overly gruesome. (See People's Ex. Nos. 13-16, 25-28; see also *People v. Anderson* (2001) 25 Cal.4th 543, 592-593.) Rather, the pictures fairly depicted the crime scene as it was discovered (RT 1606-1616), as well as the method by which appellant killed Clifford (appellant used pillows to muffle the gunshots, RT 1614) and Alma (appellant strangled her with a phone cord, RT 1607-1612). As noted by the prosecutor, the pictures reflected appellant's intent as it related to first-degree murder. (RT 56-57.) The pictures also corroborated Nerida's testimony regarding the crime scene. (See *Schied, supra,* 16 Cal.4th at pp. 14-17, and cases cited therein.) In addition, the post-mortem pictures were not particularly inflammatory, given the testimony about the details of the crime scenes.

Furthermore, the pictures of Alma wearing the ring while she was alive (see People's Ex. Nos. 36, 70) were relevant to show the jury exactly that–Alma wearing the ring while she was alive–and to illustrate the ring's appearance. (*Anderson, supra,* 25 Cal.4th at pp. 592-594; *Zapien, supra,* 4 Cal.4th at pp. 983-984.) Since Fraley got the ring from Glass, appellant's sister, who told him

that she had gotten the ring from appellant (RT 1939-1942, 2161-2163) [48], the picture helped to prove appellant's guilt as to the murders of the Mercks, and to illustrate, for the jury, what appellant had done with the ill-gotten gains from his crimes.

For all these reasons, the trial court did not abuse its discretion, i.e., did not rule contrary to reason resulting in a miscarriage of justice (*Rodrigues, supra,* 8 Cal.4th at pp. 1124-1125), in concluding that the probative value of the pictures outweighed any prejudice to appellant. Therefore, this Court should reject appellant's claim regarding the admission into evidence of pictures of the victims.

C. Any Trial Court Error In Admitting The Photographs Was Harmless

Lastly, even if the trial court erred under Evidence Code sections 350 or 352 in permitting one or more of the challenged photographs into evidence, that error did not harm appellant. Contrary to appellant's assertions, the evidence against him was strong and damning, including his fingerprints found in the Mercks' house, his possession of Clifford's pistol (which he used to murder Clifford), and multiple witnesses who saw him with various items of property that appeared to have belonged to the Mercks. Thus, there is no reasonable probability that, absent the contested pictures, the jury would have acquitted appellant of the murders of the Mercks.[49] (*Watson, supra*, 46 Cal.3d at p. 836;

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48. Respondent notes that there was no evidence of any link between Glass and either Lutts or Phinney–the two men that appellant seeks to blame for his crimes.

49. To the extent appellant contends any error amounted to a federal constitutional deprivation requiring application of the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24, respondent disagrees. First, appellant waived any claim that his federal constitutional rights were violated by not raising it below. (See *People v. McPeters* (1992) 2 Cal.4th at 1148,

People v. Davis (1996) 42 Cal.App.4th 806, 813.) The trial court did not reversibly err in admitting those photos into evidence; this Court should reject appellant's claim..

1174 [to preserve a federal issue for appeal, a defendant must make a specific objection on that ground at trial].) Even assuming the federal constitutional claim was not waived, it is without merit. "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.'" (*People v. Lucas* (1996) 12 Cal.4th 415, 464, quoting *People v. Hawthorne* (1992) 4 Cal.4th 43, 58.) Moreover, the mere erroneous exercise of discretion under ordinary rules of evidence does not implicate the federal Constitution. (*Cudjo*, *supra*, 6 Cal.4th at p. 611.) In any event, for the reasons stated above, any error was harmless under any standard.

X.

APPELLANT MISCHARACTERIZES THE TIMING AND APPLICABILITY OF HIS OBJECTION TO TAGS'S PRELIMINARY HEARING TESTIMONY THAT SHE BELIEVED THAT APPELLANT COMMITTED THE MURDERS. IN ANY EVENT, THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY TO SHOW TAGS'S BIAS AND PERCEPTIONS, AND ANY ERROR IN ADMITTING THE TESTIMONY WAS HARMLESS

Appellant claims that the trial court erred in admitting Gerry Tags's former testimony that she believed appellant committed the charged murders, and, alternatively, in failing to instruct the jury that the evidence was admitted for a limited purpose. (AOB 211-223.) But appellant mischaracterizes the timing and applicability of his objection to this evidence; in any event, the trial court properly admitted the testimony to show Tags's bias and perceptions and any error in admitting the testimony was harmless. Therefore, this Court should reject appellant's claim.

A. The Proceedings Below

Tags, appellant's girlfriend at the time of the murders, testified at the preliminary hearing. (9/7/94 RT 90-173.) At that hearing, defense counsel elicited testimony that Tags hated appellant because he had made her a prostitute, because he had beaten her, and because of "other things." (RT 9/7/94 154-155.) Tags also testified that she had begun hating appellant when she saw that "he had a different person inside of him." (9/7/94 RT 155.) During the re-direct examination, the prosecutor questioned Tags about the "other things" that made her hate appellant. (9/7/94 RT 169.) Tags explained that it was because of what she believed that appellant had done, even though Tags could not say that he had done those things because she was not there. (*Ibid.*) Tags testified that appellant had "hurt people that shouldn't have been

hurted [*sic*]," by which she meant the Mercks and Russell. (9/7/94 RT 170.) When the prosecutor asked if it bothered Tags that appellant had hurt those people, defense counsel made an objection of speculation;[50] the prosecutor responded that it went to Tags's state of mind, and the court allowed it on that basis but not for the truth of the matter. (*Ibid.*) The prosecutor asked whether Tags was afraid of appellant when she was dating him, and Tags answered positively. (*Ibid.*) Then the prosecutor asked Tags a number of questions about her statements to Hillis, as well as a few other questions. (9/7/94 RT 170-172.) Appellant's defense counsel asked a few additional questions, and then Tags was excused. (9/7/94 RT 172-174.)

Tags died of cancer before the trial (CT 1267), so the prosecutor filed a motion and sought to admit at trial Tags's preliminary hearing testimony (CT 1262-1266; RT 59-60). During the discussion of motions before jury voir dire, defense counsel objected to the admission of any of Tags's previous testimony, arguing that it was hearsay, and inadmissible as prejudicial "because of the nature of this case." (RT 60-61.) Defense counsel also argued that he would not be able to fully impeach Tags's testimony with at least one statement that she had previously given to Hillis, because defense counsel did not have a "full and complete opportunity" to cross-examine Tags at the preliminary hearing based on the volume of material that had to be covered at that hearing. (RT 61-63.) The prosecutor stated her desire that all of Tags's testimony be admitted, but she conceded that, based on some of defense counsel's objections, "there are parts that I will be more than happy to eliminate." (RT 63.)

The court indicated that it wanted to read the transcript of Tags's testimony, in order to familiarize itself with the testimony, and to ensure that the foundational requirements for admission of the evidence had been met. (RT

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50. The transcript attributes the objection to defense counsel for co-defendant Gerald Cowan. (9/7/94 RT 170.) But later appellant's defense counsel stated that he made the objection. (RT 73-74.)

63-65.) Defense counsel then pointed out the specific portions of Tags's testimony to which he objected. (RT 67-74.) During the discussion, the prosecutor agreed that several portions of the testimony could be omitted. (*Ibid.*)

One of the portions of Tags's testimony to which defense counsel objected was Tags's statement that she hated appellant, as well as her explanation–her hate was due to the murders, which she believed he had committed. (RT 73-74.) Defense counsel stated that the testimony had been admitted not for its truth, but for Tags's state of mind, and he objected that her state of mind was irrelevant. (*Ibid.*) The prosecutor argued that it was defense counsel who had brought up Tags's hatred of appellant; hence, since defense counsel made Tags's state of mind and bias an issue, the testimony should be admitted. (RT 74.) The court deferred its ruling so that it could review Tags's testimony. (*Ibid.*)

Later, when the court returned to the issue, defense counsel asserted that he had objected, as speculative and unduly prejudicial under Evidence Code section 352, to Tags's testimony at the preliminary hearing that she hated appellant because she believed he had committed the murders. (RT 113.) The prosecutor noted that, contrary to defense counsel's earlier assertions, defense counsel had cross-examined Tags "at length," including about her statements to Hillis. (RT 114-115.) Defense counsel repeated his objection to Tags's testimony, and there was some discussion between defense counsel, the prosecutor, and the court. (RT 115-118.)

The court ruled that there was proper foundation for Tags's testimony (RT 118-119), but that some portions of the testimony would not be admitted at trial (RT 118-127). As to Tags's testimony regarding her hatred of appellant, and the objection that was raised, the court stated:

> Finally, we get to page 169, lines 20 through 28 and page 170, line 9 which is where Judge Pfister overruled the objection saying, simply,

state of mind. I am not sure what he meant by "state of mind" on that. Of course, the statute itself, the statute that's being used in this proceeding, it;s [*sic*] objections which cannot be raised at this point. I don't think this is an objection as to form but if by "state of mind" he meant to communicate this shows her bias toward the defendant, then it seems to me that the statute -- that the objection was properly overruled, the reasoning being very simple: She hates the defendant, therefore, she is going to testify in such a way as to make things look bad for him.

If that's what Judge Pfister was doing, then I don't see this as inadmissible.

(RT 124-125.) The court noted that the ruling was made "at this point" in time, and that the situation could change during the trial. (RT 125.)

Later, the court returned to the issue of Tags's testimony. (RT 1816-1836.) As to Tags's testimony regarding the reasons for her hatred of appellant, the following discussion ensued:

MR. SPRAGUE [DEFENSE COUNSEL]: 169, Line 28. What do you think he did? Talking about she said she was angry. She asked Mr. -- the prosecution asked, what do you think he did? And then from Lines 1 to 11 she states about she thinks that he hurt these people in this case. I object to that as being irrelevant and immaterial.

THE COURT: Is that the reason that she hated him?

MS. RYALS [PROSECUTOR]: Yes, your Honor.

THE COURT: Objection is overruled.

MS. RYALS: Thank you. [¶] Mr. Sprague asked earlier in the testimony that she hated him, whether or not she hated him. I think her reason should come in.

THE COURT: The appropriate objection that I am concerned with, obviously this sort of thing, if her -- I am assuming that in the earlier testimony on cross it was brought out that she disliked Mr. Cowan, hated him. I think that the reason for the hate is relevant.

MR. SPRAGUE: Let me make a clear record. [¶] On Page 170 of the transcript, between Lines 1 to 11, objecting to it, it is irrelevant, immaterial and prejudicial under [Evidence Code section] 352. Irrelevant why she hates him. The fact that she hates him is irrelevant. She is saying I hate him because I think that he hurt these people in this case. That is speculation on her part, [Evidence Code section] 352

situation.

> THE COURT: Well, the objection -- I don't know that the basis is necessarily the one that you're being -- that is being tendered at this point, but -- but the fact of the matter going to the witness'[*sic*] state of mind is the basis on which it was admitted. It won't be admitted for the truth.
>
> I think that the ruling of the Court can remain and [*sic*] read to the jury, unless you want me to instruct the jury the only limiting [*sic*] nature of the witness' [*sic*] testimony in that regard.
>
> In other words, it is only coming in for the state of mind of the witness. It is not coming in for the truth of the matter.
>
> I think that her state of mind in terms of her hatred is relevant and the reason for that hatred is also relevant in terms of the witness' [*sic*] state of mind.
>
> MR. SPRAGUE: I would state my position that we would object to it in its entirety. However, if the Court is going to overrule that objection, we would request a limiting instruction.
>
> THE COURT: Just leave in the statement by the Court that it won't be admitted for the truth. Any other limiting instruction will be given the jury at the appropriate time.

(RT 1833-1835.)

Later, the prosecutor and defense counsel read Tags's preliminary hearing testimony into the record. (RT 2329-2388.) The reading included Tags's testimony that she hated appellant because he had made her a prostitute, because he had beaten her, and because of "other things." (RT 2372.) The reading also included the re-direct testimony regarding the reasons that Tags hated appellant. (RT 2384-2385.) But at the point of the objection on the grounds of speculation, defense counsel only stated, "And the court said." (RT 2385.) Thereafter, the reading of testimony continued.

Afterwards, outside the presence of the jury, defense counsel again raised the issue, as it related to another portion of Tags's testimony–that appellant had told her that he did not kill the "old people on McClean Street." (RT 2393-2394.) Defense counsel asserted that this reflected adversely on

Tags's state of mind, in that she believed that appellant had committed the crimes even though he had told her that he did not commit the crimes. (RT 2397.) Then there was additional argument regarding whether to admit Tags's testimony that appellant had told her that he did not kill the Mercks. (RT 2398-2402.) The court admitted the testimony. (RT 2403.) Later, the jury was instructed with CALJIC No. 2.09 (Evidence Limited As To Purpose), CALJIC No. 2.20 (Credibility Of Witnesses), and CALJIC No. 2.81 (Opinion Testimony Of Lay Witness). (CT 1390, 1393-1394, 1408.)

B. The Applicable Law

As noted *supra*, only relevant evidence is admissible (Evid. Code, § 350; *Crittenden, supra,* 9 Cal.4th at p. 132), and evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (Evid. Code, § 210; see also *Scheid, supra,* 16 Cal.4th at p. 14). The trial court has "wide discretion" in determining the relevance of evidence (*Garceau, supra,* 6 Cal.4th at p. 177) and the probative value versus the prejudice of evidence (*Gionis, supra,* 9 Cal.4th at p. 1214).

A trial court's evidentiary decisions are not to be disturbed absent a manifest abuse of discretion resulting in a miscarriage of justice. (*Rodrigues, supra,* 8 Cal.4th at pp.1124-1125; *Milner, supra,* 45 Cal.3d at p. 239.) An abuse of discretion will generally not be found "except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner . . . ." (*Jordan, supra,* 42 Cal.3d at p. 316.) A miscarriage of justice occurs only when the appellate court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Earp, supra,* 20 Cal.4th at p. 878; *Scheid, supra,* 16 Cal.4th at p. 21.)

C. Appellant Did Not Object To Tags's Testimony, Given At The Preliminary Hearing, About Her Belief That Appellant Had Committed The Murders. In Any Event, The Trial Court Properly Admitted The Testimony Because It Was Relevant To Tags's Bias Against Appellant

First, respondent notes that appellant incorrectly characterizes the timing and applicability of his objection at the preliminary hearing.[51] (Compare 9/7/94 RT 169-170 with AOB 211-212.) Specifically, appellant claims that he objected to Tags's testimony that she hated appellant because she believed that he had committed the murders, and that based on his objection Tags's testimony was admitted only to show Tags's state of mind. (AOB 211-212.) But a review of the transcript reveals that no objection was made until after the prosecutor asked whether Tags's beliefs (about appellant's guilt) bothered her, and Tags responded, "Both of the cases," at which point Tags's testimony was interrupted by an objection that the question called for speculation. (9/7/94 RT 170.) If appellant had wanted to exclude Tags's testimony about her belief that appellant had committed the murders, he should have objected sooner–when Tags explained her hatred based on "[W]hat I think he's done," or when the prosecutor asked, "What do you think that he did?" or, after Tags answered that question, when the prosecutor asked, "Are you talking about the people in this case?" (9/7/94 RT 169-170.) Had he done so, the trial court could have stricken the testimony if it had found that appellant's objection had merit. Instead, the objection was made after the prosecutor asked if it bothered Tags, with the follow-up question (after the objection) being whether Tags was afraid of appellant. (9/7/94 RT 170.)

For these reasons, appellant's objection was not timely, in that the

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51. If, indeed, appellant made any objection at all. As appellant concedes, the transcript indicates that defense counsel for Gerald Cowan made the objection. (9/7/94 RT 170.)

objection did not apply to the testimony to which appellant claims it applied. Thus, the testimony to which appellant refers (regarding Tags's belief that appellant committed the murders) was admitted without limitation at the preliminary hearing, so no admonishment or limiting instruction was required as to that testimony at trial. Therefore, appellant's claim is meritless and should be rejected.

Second, respondent submits that appellant is precluded from raising this claim based on the doctrine of invited error, which provides that "[i]f defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." (*People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201; see *Shields v. United States* (1927) 273 U.S. 583, 586 ["a court can not be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request"]; *People v. Moran* (1970) 1 Cal.3d 755, 762 [stating that where the appellant is responsible for the admission of the evidence at trial, appellant cannot claim on appeal that its admission was erroneous]; *People v. Thoi* (1989) 213 Cal.App.3d 689, 697-698 [trial court erroneously failed to answer jury questions regarding the applicable law, but error was invited by defense counsel]; see also *People v. Medina* (1995) 11 Cal.4th 694, 763; *People v. Cain* (1995) 10 Cal.4th 1, 38, fn. 14; *People v. Duncan* (1991) 53 Cal.3d 955, 969.) Here, defense counsel did not read into the trial record that portion of the preliminary hearing transcript that contained the earlier ruling that a portion of Tags's testimony was not admitted for the truth of the matter asserted. Therefore, he cannot complain on appeal that the jury was not properly informed of the limitation on a portion of Tags's testimony.

Even if this Court accepts appellant's characterization of the timing and applicability of his objection, his claim is without merit. Appellant opened the door to Tags's potential bias against him when defense counsel asked Tags, on cross-examination, whether she hated appellant, and some of the reasons for her

hatred. (9/7/94 RT 154-155.) The questioning was proper, because it revealed Tags's bias against appellant. (Evid. Code, § 780.) But appellant did not explore the "other things" for which Tags hated appellant. Thus, on re-direct examination the prosecutor properly asked Tags about the "other things" in order to fully explore Tags's bias and motivations.

Appellant speculates that the jury "likely believed" that Tags was expressing an "insider's opinion" based on additional information not revealed to the jury. (AOB 213.) But Tags specifically conditioned her testimony about her beliefs by stating, "I can't say that he done [*sic*] it because I wasn't there or nothing [*sic*] . . . ." (9/7/94 RT 169.) So, contrary to appellant's speculation, Tags, by admitting that she was not present and could not say that appellant had committed the murders, essentially told the jury that she was simply expressing her own beliefs or perceptions, regardless of the logic or rationale, or lack thereof, in those beliefs. As Tags testified, "[I]n my own mind, I would–I would always hate him, you know, because -- he -- man, I tell you, I always hate him." (9/7/94 RT 169.) Tags basically told the jury that her viewpoint was simply that–a viewpoint, and not an established fact.

For all these reasons, the trial court properly admitted Tags's testimony without an admonishment or limiting instruction. Appellant's claim should be rejected.

D. Any Trial Court Error In Admitting Tags's Testimony Was Harmless

Should this Court find that appellant's objection at the preliminary hearing was properly timed, and that his claim has merit, respondent submits that any trial court error as to the admission of Tags's testimony was harmless. In light of the strength of the evidence against appellant, as discussed *supra*, a miscarriage of justice did not occur. (Evid. Code, § 353.) Nor is it reasonably probable the jury would have reached a result more favorable to appellant had

Tags's testimony about her beliefs regarding appellant's guilt been excluded, or had the trial court given a limiting admonishment to the jury regarding that portion of Tags's testimony. (*See, e.g., People v. Melton* (1988) 44 Cal.3d 715, 759, citing *Watson, supra,* 46 Cal.2d at pp. 836-837.)

XI.

APPELLANT HAS WAIVED ANY CONSTITUTIONAL CLAIMS AS TO THE ADMISSION OF MITZI COWAN'S TESTIMONY; IN ANY EVENT, NO CONSPIRACY WAS REQUIRED FOR APPELLANT AND GERALD TO MURDER RUSSELL AND THE TRIAL COURT PROPERLY ADMITTED MITZI'S TESTIMONY; ANY ERROR WAS HARMLESS

Appellant claims that the trial court erred in admitting Mitzi Cowan's testimony that in early September 1984, Gerald Cowan returned to the apartment he shared with Mitzi with more than $200 in folded U.S. currency. (AOB 224-230.) Specifically, appellant claims that the testimony was improperly admitted because there was no proof that a conspiracy existed between appellant and Gerald Cowan. (AOB 226-228.) But appellant has waived any constitutional claims as to the admission of Mitzi's testimony; in any event, no conspiracy was required for appellant and Gerald to murder Russell, and the trial court properly admitted Mitzi's testimony. Finally, any error in admitting the testimony was harmless. Therefore, this Court should reject appellant's claim.

A. The Proceedings Below

Mitzi Cowan, who was married to appellant's brother Gerald, testified that appellant and Tags visited her and Gerald a day or two before she and Gerald were to be evicted from their apartment on September 6, 1984. (RT 2430.) At the time, Gerald was unemployed. (*Ibid.*) Appellant and Gerald left the apartment at about 5:00 p.m. on the day that appellant and Tags came to visit. (RT 2431.) Gerald returned at about 10:00 p.m., and Mitzi let him use her car. (RT 2432.) The prosecutor sought to elicit testimony from Mitzi regarding Gerald's emotional state when he returned to their apartment at about 1:00 a.m. the next morning. (RT 2430-2433.) Defense counsel objected, and

the court held an in limine hearing regarding the admission of the testimony. (RT 2433.)

During the in limine hearing, defense counsel objected to any testimony regarding "any activities of Gerald Cowan . . . as immaterial and irrelevant what he did or did not do." (RT 2434-2435.) Defense counsel noted that Gerald was no longer a defendant in the case, and that there had been no showing that: more than one person had been involved in either of the murders charged in the case; Gerald had been involved in any of the murders; or there was a conspiracy between Gerald and appellant to kill either the Mercks or Russell. (RT 2435.) Defense counsel also asserted that the testimony would be "very prejudicial," and he told the court that he would request a mistrial if the court were going to allow the testimony. (*Ibid.*) The prosecutor withdrew her question about Gerald's state of mind. (*Ibid.*)

Defense counsel then noted that Mitzi was apparently going to testify that Gerald came back to the apartment and threw onto the bed over $200, which was folded like Russell had folded his money. (RT 2436.) Counsel objected that there had been "no showing of a conspiracy or a showing of any kind of act between Gerald Cowan and Robert Cowan concerning any homicide." (*Ibid.*) The prosecutor pointed out that: appellant and Gerald left the apartment together (although it was unknown whether they left in the same car); Gerald returned alone and asked for Mitzi's car keys; and later, when Gerald returned alone again, he had the money folded like Russell's money. (RT 2436-2437.) Defense counsel repeated his request for a mistrial if the court decided to admit the testimony. (RT 2437.)

The court then overruled appellant's objection. (RT 2437.) The court stated:

> I think the fact that they left together, I think the financial situation of Gerald Cowan was established. It is apparent that something took place between 5:00 P.M. and 1:00 A.M. that allowed Mr. Gerald Cowan to come into possession of the money, and it would also, I think, it is

> apparent that the two of them were involved doing something during that time frame, and I think the only reasonable inference to be drawn, given what I assume the testimony of this witness will be regarding the money and its connection with Mr. Russell, I think there is sufficient evidence to establish that, in fact, there was a conspiracy.
>
> I'm not swayed by your argument that there is no evidence that more than one individual was involved in the murder. I don't know that that necessarily precludes co-conspirators. It involves who were not actual participants in the actual homicide in terms of actually being the executioner.

(*Ibid.*) Defense counsel noted that Gerald told Mitzi that the money came from a drug deal. (RT 2438.) Then there was some discussion regarding the evidence. (RT 2438-2439.) The court ruled that the testimony regarding the money and the argument between appellant and Gerald would be admitted. (RT 2439.) The court denied appellant's request for a mistrial, and the jury was brought back into the courtroom. (RT 2440.)

Mitzi testified that, when Gerald returned to the apartment at about 1:00 a.m., he threw onto the bed over $200, folded in half. (RT 2440-2441.) Appellant returned to the house at about 3:00 a.m., wearing different clothes than he had been wearing when he left the previous evening. (RT 2441-2442.) Gerald yelled at him, "Where did you go? Where did you go? Why did you leave me?" (*Ibid.*) Appellant did not yell back at Gerald, but appellant and Tags left. (RT 2442.) Appellant and Tags returned either later that morning or the next day to help Gerald and Mitzi move out of the apartment.[52/] (RT 2442-2443.)

B. The Applicable Law

Initially, respondent notes that appellant objected to the testimony in

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52. Respondent notes that Tags's preliminary hearing testimony, which was read into the record at trial, closely corroborated Mitzi's testimony regarding this incident. (RT 2335-2340.)

question only on the bases of relevancy and prejudice. Therefore, he waived any other objections, such as those which rest on a constitutional basis, to the admission of Mitzi's testimony. (See, e.g., *People v. Burgener* (2003) 29 Cal.4th 833, 867; *Earp, supra*, 20 Cal.4th at p. 884; *People v. Davis* (1995) 10 Cal.4th 463, 532-533 & fn. 29.)

As noted *supra*, only relevant evidence is admissible (Evid. Code, § 350; *Crittenden, supra,* 9 Cal.4th at p. 132), and evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (Evid. Code, § 210; see also *Scheid, supra,* 16 Cal.4th at p. 14). The trial court has "wide discretion" in determining the relevance of evidence (*Garceau, supra,* 6 Cal.4th at p. 177) and the probative value versus the prejudice of evidence (*Gionis, supra,* 9 Cal.4th at p. 1214).

A trial court's evidentiary decisions are not to be disturbed absent a manifest abuse of discretion resulting in a miscarriage of justice. (*Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125; *Milner, supra,* 45 Cal.3d at p. 239.) An abuse of discretion will generally not be found "except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner . . . ." (*Jordan, supra,* 42 Cal.3d at p. 316.) A miscarriage of justice occurs only when the appellate court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Earp, supra,* 20 Cal.4th at p. 878; *Scheid, supra,* 16 Cal.4th at p. 21.)

C. No Conspiracy Was Required For Appellant And Gerald To Murder Russell; In Any Event, The Trial Court Properly Admitted Mitzi's Testimony

Here, a conspiracy was not required for appellant and Gerald to murder Russell. Rather, Russell could, and probably was, simply in the wrong place at the wrong time (playing pool in a bar and displaying his cash) when appellant

and/or Gerald decided to take his money. Once one of the brothers began to act on his decision to take Russell's money no matter what the cost, the other brother could have simply cooperated or helped with the acts that led to the robbery and murder of Russell. Thus, appellant's claim that the conspiracy had to be proven before the court could admit Mitzi's testimony is meritless.

Moreover, as the court properly found in admitting Mitzi's testimony, the circumstantial evidence provided by the remainder of Mitzi's testimony (and corroborated by Tags's testimony about the events that occurred at the apartment that night) supported the prosecution's theory that appellant and Gerald murdered Russell for his money. Thus, the trial court properly admitted Mitzi's testimony about Gerald's possession of the money, in that the testimony was very probative circumstantial evidence that appellant and Gerald robbed and murdered Russell. Appellant's claim that the testimony was inadmissible because it was irrelevant is meritless.

D. Any Error In Admitting Mitzi's Testimony Was Harmless

After asserting that the trial court erred in admitting Mitzi's testimony, appellant's claim makes several unsupported leaps of highly convoluted speculation. Specifically, appellant claims that his death sentence must be reversed because the jurors who believed that appellant murdered Russell (in spite of the fact that those jurors obviously knew that they had been unable to reach a verdict on that count, RT 2769-2778) "may well have" considered Russell's murder as an aggravating circumstance during the penalty phase deliberations, in violation of the court's instruction that any crimes of violence considered by the jury during the penalty phase deliberations had to be proven beyond a reasonable doubt (see CT 1518; RT 2972). (AOB 228-230.) And this rank speculation is even more nonsensical when one considers that appellant's claim apparently rests on the proposition that such jurors would regard Mitzi's

testimony as the determining factor in imposing the death penalty, when those same jurors had already unanimously found beyond a reasonable doubt that appellant had brutally murdered two defenseless senior citizens (based on the strong evidence against him–such as his fingerprints inside their house and his possession of their property).

A miscarriage of justice did not occur. (Evid. Code, § 353.) It is not reasonably probable the jury would have reached a result more favorable to appellant had Mitzi's testimony been excluded. (See, e.g., *Melton, supra,* 44 Cal.3d at p. 759, citing *Watson, supra,* 46 Cal.2d at pp. 836-837.) Thus, any error in admitting Mitzi's testimony about Gerald's possession of the money was harmless, and appellant's claim must be rejected.

XII.

APPELLANT WAIVED HIS CONSTITUTIONAL CLAIMS AS TO VICTIM IMPACT TESTIMONY; THE TRIAL COURT PROPERLY ADMITTED AND LIMITED THE VICTIM IMPACT TESTIMONY; ANY ERROR WAS HARMLESS

Appellant claims that improperly admitted victim impact testimony violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 231-244.) But appellant waived his constitutional claims. In any event, the trial court properly admitted and limited the victim impact testimony; and any error was harmless. Therefore, this Court should reject appellant's claim.

A. The Proceedings Below

As part of the prosecution's evidence during the penalty phase, Shelley Cox, Alma's granddaughter, testified that: (1) she saw Alma often when she was growing up (RT 2844); (2) it was "very difficult to put into words the emotion that [her family members had] all experienced" as a result of Alma's murder (RT 2845); (3) Alma had been suffering from Parkinson's disease (*ibid.*); (4) it was "extremely difficult" for Cox and her husband to help clean out the Merck's house (*ibid.*); and (5) "I will never forget the smell in the house, the smell of death and blood was everywhere" (*ibid.*). Cox testified that she imagined what her grandmother's last few minutes of life were like -- the fear and terror, pleading for her life, and perhaps hearing her husband being murdered. (RT 2845-2846.)

Defense counsel objected as "very prejudicial" and "no evidence." (RT 2846.) The prosecutor responded, "I believe this is how she feels." (*Ibid.*) The court stated, "I think the jury understands that. It is impact-type testimony, and it [apparently the portion of Cox's testimony regarding Alma's last minutes

alive] is not to be considered by the jury. Obviously this witness was not a percipient witness. You may proceed with that understanding." (*Ibid.*)

Cox thereafter testified that she could not understand why anyone would "brutally murder" her grandparents, because they could not hear or see well and were "defenseless." (RT 2846.) Defense counsel's objection that Cox's testimony had become argument was overruled. (*Ibid.*) Cox next noted that the murder had affected her entire extended family, as well as friends, "like a disease." (*Ibid.*) The court overruled defense counsel's objections that there was no question pending, and that the testimony was speculation and conjecture. (RT 2846-2847.) Cox concluded her testimony by stating:

> I pray for Mr. Cowan because right now I believe his heart is hard and he has no remorse, and he does not realize what he has done.
>
> I pray that his heart softens, because he will feel the pain, and I want him to feel the pain of what he has done, and the guilt, and yes, we're asking for the death penalty, and it is not out of revenge. We're not vengeful people. It is out of justice and fairness. An eye for an eye, tooth for a tooth. He made the choice. He should suffer the consequences, and thank you for listening to me. That's all that I have.

(RT 2847.)

Betty Turner, the youngest of Alma's four children, described Clifford and Alma as "loving people, very quiet and [they] stayed to themselves." (RT 2848-2849.) Turner would never forget the day they were murdered; she did not understand why their lives were taken. (*Ibid.*) She testified, "I knew Cliff tried to do the best he could to protect my mother that day, but he couldn't." (RT 2849.) Defense counsel objected on the same bases that he had voiced as to Cox, and stated, "It goes beyond victim impact." (*Ibid.*) The court overruled the objection, and noted that it would be discussed during the noon recess. (RT 2849-2850.) Turner believed that Clifford and Alma "must have gone through pure hell;" she had "no sympathy" for anyone who takes an innocent life. (RT 2850.) She hoped that her family could begin to move on. (*Ibid.*)

Terri Jones, another granddaughter of Alma, testified that she had maintained a close relationship over the years with Alma and Clifford. (RT 2851.) She would never forget the pain of losing them. (RT 2851.) The last time they talked, Alma was crying because she was recovering from a broken hip. (*Ibid.*) Jones "went into shock" when she heard about the murders; she could not attend the funeral; she thinks about it every day. (RT 2852.) Also, the loss was "very hard" on Jones's mother. (*Ibid.*) Jones had children, but she waited for them to get older before she told them the details of what had happened to their great-grandparents. (*Ibid.*) Her children were "shocked" when she finally told them, and it was "horrible." (RT 2853.)

During the noon recess, defense counsel moved for a mistrial based on his assertions that the testimony of Cox and Tuner was "way beyond that which is permitted by the Supreme Court and [*sic*] to victim impact testimony," and because the testimony was narrative and speculative. (RT 2861.) The prosecutor responded that she believed that victim impact testimony was "exactly" about the beliefs of family members, the reasons for those beliefs, and the effect of the crime on family members. (RT 2862.) The court noted that: it had made clear to the jury that the testimony was only being presented for that purpose; it had pointed out that the witnesses were not percipient witnesses; and the witnesses were only being presented to explain how the crime had impacted the family. (*Ibid.*) The court denied the motion for a mistrial, but told defense counsel that it would consider a "further limiting instruction." (*Ibid.*) Defense counsel said that he would not request such a limiting instruction because he did not believe that any instruction could cure the error. (*Ibid.*)

Later, the jury was instructed not to be "influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings." (CT 1492 [CALJIC No. 8.84.1].) The jury was also instructed that "mercy, sympathy, compassion, or pity for the defendant or his family" was permissible in determining the penalty, but that prejudice or bias against defendant was

impermissible, and that the jury "must not be influenced by mere conjecture, passion, prejudice, public opinion or public feeling." (CT 1494; see also CT 1516 [instruction on sympathy that was given to the jury, which concluded, "The jury is permitted to consider mitigating evidence relating to the defendant's character and background, whether or not related to the offense for which he is on trial."]; CT 1521 ["In determining whether to sentence the defendant to life imprisonment without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant."]; CT 1525 ["You may spare the defendant's life for any reason you deem appropriate and satisfactory, based on the law and evidence."].) In addition, the jury was instructed not to consider limited-purpose evidence for "any purpose" other than that for which it had been admitted. (CT 1500 [CALJIC No. 2.09].)

B. The Applicable Law

Initially, respondent notes that appellant objected to the testimony at issue only on the basis of prejudice, speculation, argument, and "no evidence." Therefore, he waived any other objections, such as those which rest on a constitutional basis, to the admission of the victim impact testimony. (See, e.g., *People v. Pollock* (2004) 32 Cal.4th 1153, 1181-1182; *Farnam, supra*, 28 Cal.4th at p. 175, citing *Rodrigues, supra*, 8 Cal.4th at p. 1153 and *People v. Pinholster* (1992) 1 Cal.4th 865, 956; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1233; *People v. Mickle* (1991) 54 Cal.3d 140, 186.)

Section 190.3 sets forth the types of evidence which may be considered by the trier of fact in determining the appropriate penalty in a capital case. Victim impact evidence is admissible under section 190.3, factor (a). (See, e.g., *People v. Brown* (2004) 33 Cal.4th 382, 394-398; *Taylor, supra*, 26 Cal.4th at pp. 1171-1172; *Johnson, supra*, 3 Cal.4th at p. 1245; *Raley, supra*, 2 Cal.4th at p. 916; *Edwards, supra,* 54 Cal.3d at p. 835.)

The constitutional limits of victim impact evidence were outlined in *Payne v. Tennessee* (1991) 501 U.S. 808 (*Payne*).[53] (See generally, Annot., Victim Impact Evidence in Capital Sentencing Hearings–Post *Payne v. Tennessee* (2003) 79 A.L.R.5th 33; see also *Boyette, supra*, 29 Cal.4th at p. 445, fn. 12 [consideration of victim impact evidence as a circumstance of the crime does not render section 190.3, factor (a), unconstitutionally vague].) In *Payne*, United States Supreme Court overruled its prior holdings in *Booth v. Maryland* (1987) 482 U.S. 496 (*Booth*) and *South Carolina v. Gathers* (1989) 490 U.S. 805 (*Gathers*), which generally barred admission of victim impact evidence and related prosecution argument during the penalty phase of a capital trial. The Court noted that turning the victim into a faceless stranger at the penalty phase of a capital trial deprives the State of the "full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." (*Payne, supra,* 501 U.S. at p. 825.) The Court concluded that a state may properly determine that for the jury to meaningfully assess the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.

> [T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual,

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53. In *Payne*, the defendant was convicted of the first degree murder of a mother and her two-year-old daughter and first degree assault with intent to murder her three-year-old son. The capital sentencing jury heard that defendant was a caring and kind man who went to church and did not abuse drugs or alcohol. He was a good son and suffered from low intelligence. The prosecution presented testimony from the three-year-old victim's grandmother to the effect that he missed his mother and baby sister. The court held that her testimony "illustrated quite poignantly some of the harm that Payne's killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant." (*Payne, supra*, 501 U.S. at p. 826.)

> so too the victim is an individual whose death represents a unique loss to society and in particular to his family. [Citation.]

(*Ibid.*)

As a result, the Court in *Payne* ruled that victim impact evidence is admissible and important to show each victim's uniqueness as an individual human being and "whatever the jury might think the loss to the community resulting from his death might be." (*Payne, supra*, 501 U. S. at p. 823.) The Eighth Amendment erects no per se bar to the admission of evidence about the impact of a murder on the victim's family:

> A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

(*Id.* at p. 827.)

In *Edwards, supra,* 54 Cal.3d at pages 832-836, this Court relied on the principles enunciated by the Supreme Court in *Payne* when it held that victim impact evidence (of the "specific harm caused by the defendant") is admissible as bearing on the "circumstances of the crime" under section 190.3, factor (a). (*Id.* at p. 833.) This Court explained that the word "circumstance" under factor (a) means the immediate temporal and spatial circumstances of the crime, as well as that "which surrounds materially, morally, or logically" the crime. (*Ibid.*) Factor (a) therefore allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. (*Id.* at p. 835; see *Johnson, supra,* 3 Cal.4th at p. 1245.) This holding "only encompasses evidence that logically shows the harm caused by the defendant." (*Edwards, supra,* 54 Cal.3d at p. 835.)

This Court in *Edwards* expressly refused to explore the "outer reaches" of evidence admissible as a circumstance of the crime, but did hold that "emotional" evidence was allowable. (*Edwards, supra,* 54 Cal.3d at

pp. 835-836.) However, this Court quoted the limitation expressed in *People v. Haskett* (1982) 30 Cal.3d 841, 864, the "leading pre-*Booth* case," that, although emotional evidence is permissible, "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Edwards, supra*, 54 Cal.3d at p. 836, quoting *Haskett, supra,* 30 Cal.3d at p. 864 [this Court also noted in *Haskett* "[A]ssessment of the offense from the victim's viewpoint would appear germane to the task of sentencing."]; see also *Taylor, supra,* 26 Cal.4th at p. 1172 [evidence from the victim's wife and son about the "various ways they were adversely affected by their loss of [the victim's] care and companionship" was properly admitted]; *People v. Sanders* (1995) 11 Cal.4th 475, 549-550 [evidence and argument are permissible on emotional, though relevant, subjects that could provide legitimate reasons to sway the jury to show mercy, or to impose the ultimate sanction].)

In the 20 years since *Haskett* was decided, this Court has not specifically defined what might constitute "inflammatory rhetoric" which diverts the jury's attention from its "proper role." The jury's proper role, simply put, is to decide between a sentence of death and life without the possibility of parole. (*Rodrigues, supra,* 8 Cal.4th at p. 1193.) A penalty phase jury "performs an essentially normative task. As the representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if life or death is the appropriate penalty for that particular offense and offender." (*People v. Mendoza* (2000) 24 Cal.4th 130, 192, internal quotation marks omitted.) The jury is therefore making a "moral assessment," not a mechanical finding of facts. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1268, quoting *Brown, supra*, 40 Cal.3d at p. 540; see also *Smith, supra*, 30 Cal.4th at p. 634 ["Unlike the guilt determination, where appeals to the jury's passions are inappropriate, in making the penalty decision, the jury must make a moral assessment of all the relevant facts as they reflect on its decision."].)

In deciding which defendants receive a death sentence, states must allow an "*individualized* determination on the basis of the character of the individual and the circumstances of the crime." (*Zant v. Stephens* (1983) 462 U.S. 862, 879, italics in original.) That determination, however, should be based not on abstract emotions, but should instead be rooted in the aggravating and mitigating evidence. (See *California v. Brown* (1987) 479 U.S. 538, 542 [discussing limitations on verdicts based on "mere sympathy"].)

It is true that the court must "strike a careful balance between the probative and the prejudicial." (*People v. Lewis* (1990) 50 Cal.3d 262, 284.) However, in the penalty phase of a capital trial, a trial court has less discretion to exclude evidence as unduly prejudicial than in the guilt phase, because the prosecution is entitled to show the full moral scope of the defendant's crime. (*Anderson, supra*, 25 Cal.4th at pp. 591-592.) As part of the jury's normative role, it must be allowed to consider any mitigating evidence relating to the defendant's character or background. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) There is nothing unconstitutional about balancing that evidence with the most powerful victim evidence the prosecution can muster, because that evidence is one of the circumstances of the crime. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017; *Edwards, supra,* 54 Cal.3d at pp. 833-836.)

In the context of the penalty phase, "emotional evidence" and "inflammatory rhetoric" are different concepts. The limitation against "inflammatory rhetoric" is similar to the federal limitation against evidence which is "so unduly prejudicial that it renders the trial fundamentally unfair." (*Howard, supra,* 1 Cal.4th at pp. 1190-1191.) But as the United States Supreme Court has stated in *Payne*, victim impact evidence is not unfair in any way.

Because of the penalty phase jury's particular duties, even highly emotional victim impact evidence will not divert it from its proper role. An improper diversion might occur if, for example, the prosecution were to

urge that a death sentence should be imposed on the basis of the victim's or defendant's race. (*Booth, supra,* 482 U.S. at p. 517 (dis. opn. of White, J.) [victim impact evidence should be held constitutionally permissible, but "the State may not encourage the sentence to rely on a factor such as the victim's race in determining whether the death penalty is appropriate"]; see also *Gathers, supra*, 490 U.S. at p. 821 (dis. opn. of O'Connor, J.) ["It would indeed be improper for a prosecutor to urge that the death penalty be imposed because of the race, religion, or political affiliation of the victim"]; *Furman v. Georgia* (1972) 408 U.S. 238, 242 (conc. opn. of Douglas, J.) [death penalty "unusual" if imposed on the basis of "race, religion, wealth, social position, or class"].)

C. The Trial Court Properly Admitted And Limited The Victim Impact Testimony

Here, the specific harm caused by appellant when he murdered Clifford and Alma -- the horribly tragic impacts on their families -- was relevant to the jury's meaningful assessment of appellant's "moral culpability and blameworthiness." (See *Payne*, *supra*, 501 U.S. at p. 809.) Evidence of the impact of appellant's crimes on the victims' families advanced the State's interest in "counteracting the mitigating evidence which the defendant is entitled to put in[.]" (*Id.* at p. 825.) Fairness demands that evidence of the victims' personal characteristics, and the harm suffered by their families, be considered along with the "'parade of witnesses'" praising the "'background, character, and good deeds of the defendant . . . without limitation as to relevancy[.]'" (*Id.* at p. 826, citation omitted; see also *People v. Dennis* (1998) 17 Cal.4th 468, 534 [capital defendant in penalty phase presented evidence from his friends and associates as to his childhood difficulties, his shyness and loneliness due to his hearing problem, his friendly and easygoing nature, his pride and love for his son and his devastation at his son's death, his honesty,

thoughtfulness, and sensitivity, his good record at Lockheed, and his compassion for others; defendant's mother presented a pictorial biography of defendant's life and their relationship and spoke of awards he had won. The jury also heard a tape recording of defendant and his son].)

Therefore, the trial court here properly struck "a careful balance between the probative and the prejudicial" (*Edwards*, *supra*, 54 Cal.3d at p. 836) by allowing Alma's relatives to provide highly emotional testimony on the permissible subject of how the murders had affected their lives and the lives of their families. (*Johnson*, *supra*, 3 Cal.4th at p. 1245; *Raley*, *supra*, 2 Cal.4th at p. 915; see also *Payne, supra,* 501 U.S. at p. 827 ["[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." (quotation marks omitted)]; *Boyette*, *supra*, 29 Cal.4th at p. 445 ["Testimony from the victims' family members was relevant to show how the killings affected *them,* not whether they were *justified* in their feelings due to the victims' good nature and sterling character." (emphasis in original).) The trial court properly allowed "evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." (*Edwards*, *supra*, 54 Cal.3d at p. 836.)

Respondent notes that the victim impact testimony was not so emotional, given that the jury had already heard the evidence of the circumstances of the deaths of Clifford and Alma, as to constitute irrelevant information or inflammatory rhetoric that could divert the jury's attention from its proper role or that could have invited an irrational, purely subjective response. (*Payne*, *supra*, 501 U.S. at p. 809; see *Edwards*, *supra*, 54 Cal.3d at p. 836; see also *Navarette*, *supra*, 30 Cal.4th at p. 520 [the court stated, "One can reasonably infer that an innocent murder victim will feel fear and plead with the killer to stop," in rejecting a claim of prosecutorial misconduct based on a portion of the prosecutor's penalty phase argument that asked the jury to imagine what the

murder victim saw, thought, and said just before she died].) In addition, the court immediately and specifically limited the admissibility of the victim impact testimony. Thus, the jury in this case was given the proper evidence to "face its obligation soberly and rationally," and was never given the impression that they could allow emotion to "reign over reason." (*Edwards*, *supra*, 54 Cal.3d at p. 836.) For all these reasons, the trial court did not err by admitting this evidence.

Appellant seems to suggest that only family members who witnessed the crimes could provide relevant victim impact testimony. (AOB 236.) But appellant is wrong. (*Pollock, supra,* 32 Cal.4th at pp. 1182-1183.) In *Payne*, one of the victim impact witnesses was the victim's mother who was not present when her daughter and her granddaughter were killed. She testified about how the victim's son had been affected by the murders of his mother and sister. (*Payne*, *supra*, 501 U.S. at pp. 814-815; see also *People v. Marks* (2003) 31 Cal.4th 197, 235-236.) California law similarly does not limit victim impact testimony to relatives who were present at the scene of the crime. In *Taylor*, *supra*, 26 Cal.4th at pages 1171-1172, the victim's son, who was not present when his mother was killed and his father was attacked, testified as to the impact of his mother's death on him. In *People v. Clark* (1990) 50 Cal.3d 583, 629, this Court allowed evidence of the impact of the defendant's conduct on victims other than the murdered person. In short, the law allows testimony about the impact of a victim's death on the surviving family and on the community.

Appellant also claims error, specifically, in the admission of the testimony of Cox and Turner regarding what they believed must have been the horror of Alma's last minutes alive, as well as Cox's testimony about appellant's lack of remorse, her remark that the family was asking the jury to impose the death penalty, and a Biblical reference that she made ("An eye for an eye, a tooth for tooth," RT 2847). First, respondent notes that there can be

no dispute that Alma's last minutes alive were horrific. She was strangled to death by a phone cord, presumably after her hands were bound with an electrical cord (so that she could not use her hands to struggle against the strangling effect of the phone cord). (RT 1520, 1607-1612, 2264-2266.) According to the coroner, Alma would have lived up to four or five minutes after the phone cord was tight enough to restrict the flow of blood to her brain. (RT 2265.) Thus, the testimony of Cox and Turner regarding Alma's last minutes of life was not speculative; in fact, it was relevant and admissible as to the circumstances of appellant's crimes–specifically, as to Alma's suffering. (*Cole, supra*, 33 Cal.4th at p. 1233 ["Evidence of [the victim's] suffering was admissible as a circumstance of the crime."]; *Farnum, supra*, 28 Cal.4th at p. 200; [this Court held that the prosecutor did not commit misconduct by referring to "the agony and the terror" the victim endured, because the prosecutor's argument was based on "testimonial and photographic evidence"]; *Bradford, supra*, 15 Cal.4th at p. 1379 [this Court ruled that victim's suffering was a proper subject of prosecutorial argument during the penalty phase].) Hence, the trial court properly allowed Cox and Turner to testify about their beliefs regarding Alma's last minutes of life because the testimony provided the jury with a personal glimpse of the impact of appellant's evil actions on Alma's family.

As for Cox's testimony that appellant's heart was hard, and that she did not believe that he had any remorse, respondent notes that this Court has held that a prosecutor cannot argue that a defendant's lack of remorse is an aggravating factor to be considered by the jury in determining the appropriate penalty. (See, e.g., *Navarette, supra*, 30 Cal.4th at p. 519; *Mendoza, supra*, 24 Cal.4th at p. 187.) But in *People v. Lewis* (2001) 25 Cal.4th 610, this Court noted, "As we have explained, 'the presence or absence of remorse is a factor "'universally' deemed relevant to the jury's penalty determination."'" (*Id.* at p. 673, quoting *People v. Marshall* (1996) 13 Cal.4th 799, 855.) Respondent

believes that there is a significant difference between the argument of a prosecutor regarding aggravating factors and the victim impact testimony of a murder victim's relative. Hence, it is unclear whether a direct relative of the murder victim, testifying regarding the impact of the defendant's crimes, can express a lay opinion as to the defendant's lack of remorse. In any event, Cox did not appeal to the jury to use appellant's lack of remorse as a factor in aggravation. Rather, she was simply stating her beliefs or feelings, as Alma's granddaughter, regarding the impact of appellant's crimes. The admission of the challenged testimony "did not undermine the fundamental fairness of the penalty-determination process." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1063.) Furthermore, as discussed *infra*, any error was harmless. Therefore, this portion of appellant's claim should be rejected.

As for Cox's testimony that the family was asking the jury to impose the death penalty, in *Pollock, supra*, 32 Cal.4th at page 1180, this Court reiterated that "victim impact evidence does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims' family members or friends." Thus, it appears that the trial court erred in allowing Cox to make this remark. But the trial court immediately and specifically limited Cox's testimony. In addition, presumably the relative of a murder victim testifying as to the impact of the murder would believe that the death penalty should be imposed on the murderer. (See *Sanders, supra,* 11 Cal.4th at p. 550 [this Court characterized as an "obvious truism" the fact that the family was aggrieved].) Therefore, as noted *infra*, any error was harmless, and this portion of appellant's claim should also be rejected.

As to Cox's use of what is apparently a Biblical reference (although Cox never referred to the Bible), as appellant notes, it is true that this Court has in large part forbidden the use of Biblical references in the penalty phase arguments of prosecutors, to prevent an appeal to higher authority or law as approving or even mandating imposition of the death penalty, which would

obviously reduce the sense of responsibility that the jury should have for its verdict. (See, e.g., *People v. Slaughter* (2002) 27 Cal.4th 1187, 1209-1211, citing, e.g., *People v. Wrest* (1992) 3 Cal.4th 1088, 1106-1108; *People v. Hill* (1998) 17 Cal.4th 800, 836-837.) Nevertheless, this Court has, on a number of occasions, found such Biblical references to be harmless error. (See *Slaughter, supra,* 27 Cal.4th at pp. 1209-1211, citing several cases.) Again, respondent believes that there is a significant difference between the argument of a prosecutor and the victim impact testimony of a murder victim's relative. Thus, it is unclear whether it was error for the court to allow Cox to make the statement. But in any event, as discussed *infra,* any error was harmless, and this portion of appellant's claim should also be rejected.

In sum, appellant brutally killed two human beings, Clifford and Alma Merck. Though he may not have known the precise dimensions of the tragedy his actions left behind, the profound harm to the survivors was "so foreseeable as to be virtually inevitable." (*Payne, supra,* 501 U.S. at p. 838 (conc. opn. of Souter, J.).) Thus, the jury was properly allowed to hear evidence concerning the full impact of appellant's actions.

D. Any Error Was Harmless

As to any portion of appellant's claim that this Court finds appellant has not waived, and to which there is merit, respondent submits that any trial court error was harmless. Both standards for the analysis of prejudice have been used to analyze the erroneous admission of victim impact evidence. (Compare *Lewis, supra*, 50 Cal.3d at pp. 284-285 [applying the *Chapman* standard to improper prosecutorial argument regarding victim impact as a federal constitutional error] with *People v. Hovey* (1988) 44 Cal.3d 543, 571 [applying the *Watson* standard to the erroneous admission of a picture of the victim while alive]; see also *Edwards, supra*, 54 Cal.3d at p. 844, fn.15 ["reasonable

probability" standard applies to guilt-phase errors, while "stricter reasonable possibility standard applies even to errors of state law at the penalty phase."].)

But, under any standard, any errors here were not prejudicial. As properly admitted evidence in aggravation, the jury had before it the circumstances of the instant crimes showing appellant committed multiple murders (of Alma and Clifford) while engaged in the crimes of burglary and robbery. (CT 647-665.) The jury also heard about other violent crimes committed by appellant–specifically, the robbery of Foster and Cruz in 1985, and the 1993 abuse of Hunt's son, Michael. (RT 2802-2809 [discussion of the documentation of appellant's prior convictions], 2853-2859 [Foster's testimony], 2864-2869 [Abney's testimony about the 1993 abuse], 2871-2875 [prior conviction evidence was submitted].) The jury also considered appellant's 1970 conviction for robbery.

Given the state of the evidence, neither Cox's potentially impermissible testimony regarding appellant's lack of remorse, nor her testimony regarding the family's desire that the death penalty be imposed, nor her oblique reference to a Biblical standard of justice, were the crucial factor(s) in convincing the jury that appellant should be put to death for his horrific crimes. All three of these portions of Cox's testimony were brief; in fact, the whole of Cox's testimony only consumed about three pages of reporter's transcript (RT 2843-2847) out of nearly 40 pages of transcript consumed by the prosecution's entire penalty phase case in chief (RT 2843-2870). (See *Wrest, supra,* 3 Cal.4th at p. 1107 [this Court found harmless a prosecutor's "brief reference" to the Bible during a penalty phase argument].) Cox merely expressed a lay opinion that appellant had no remorse. Also, as noted *supra*, one would assume that the relative of a murder victim, testifying at the penalty phase of a capital case, would prefer that a death sentence be imposed on the murderer. And Cox's reference to an "eye for an eye . . ." was not identified as a Biblical reference. Further, as noted *supra*, the trial court immediately and specifically instructed the jury that Cox's

testimony essentially was not to be considered for its truth–but rather that the testimony was simply how Cox felt or perceived the impact of appellant's crimes. The evidence against appellant was strong, yet the jury conscientiously returned a death verdict only as to Alma's murder. Hence, the jury was not prejudicially impacted by the victim impact evidence. Thus, the jury would not have chosen a sentence, as to Alma's murder, of life in prison without the possibility of parole, had the trial court not allowed Cox's brief remarks. Therefore, for all of these reasons, any trial court error regarding the admission of victim impact testimony was harmless.

XIII.

APPELLANT WAIVED ANY JURY INSTRUCTION CLAIM REGARDING THE JURY'S CONSIDERATION OF RUSSELL'S MURDER DURING THE PENALTY PHASE; IN ANY EVENT, THE JURY WAS PROPERLY INSTRUCTED; ANY ERROR WAS HARMLESS

Appellant claims that the trial court erred by failing to instruct the jury that it could not consider the murder of Jewell Russell as an aggravating factor in the penalty phase unless it found beyond a reasonable doubt that appellant had committed the crime. (AOB 245-252.) But appellant waived any jury instruction claim regarding the jury's consideration of Russell's murder during the penalty phase by failing to object to the jury instructions. In any event, the jury was properly instructed, and any error was harmless. Therefore, this Court should reject his claim.

A. The Proceedings Below

As noted *supra*, the jury split nine to three and was unable to reach a verdict as to the murder of Russell. (CT 1459; RT 2769-2776.) As a result, the trial court declared a mistrial as to that count. (RT 2776-2778.)

After the penalty phase evidence and arguments, the trial court provided a number of instructions to the jury. (CT 1491-1538; RT 2959-2977, 3001-3003.) Those instructions included CALJIC No. 1.01 (Instructions to be Considered as a Whole, CT 1493), and CALJIC Nos. 8.86 and 8.87 (requiring any conviction of other crimes (the instruction listed robbery), or other criminal activity (the instruction listed residential burglary, residential robbery, and child abuse), be found true by individual jurors by proof beyond a reasonable doubt before such could be considered as aggravating circumstances, CT 1517-1518). The jury knew that, while individual jurors could individually consider and weigh the mitigating and aggravating circumstances (CT 1523 [Instruction No.

16]),[54] the penalty verdict must be unanimous (CT 1522 [Instruction No. 11, "The possibility of a hung jury is an inevitable by-product of the requirement that a verdict be unanimous."]; see also CALJIC No. 8.88 ["To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."]).

During the penalty phase deliberations, the jury requested and received a read-back of Dr. Dollinger's testimony. (CT 1580; RT 3011.) The read-back began, but defense counsel objected. (RT 3011-3012.) At an in limine hearing, defense counsel noted that a mistrial had been declared as to Russell's murder, voiced an objection that any read-back of Dr. Dollinger's testimony regarding the autopsy of Russell would be irrelevant and prejudicial, and stated his belief that any jury consideration of the Russell murder would be the basis for a mistrial. (RT 3012.) The court stated that those jurors who were convinced beyond a reasonable doubt that appellant murdered Russell would be able to consider the Russell murder as an aggravating circumstance. (RT 3012-3013.) The prosecutor agreed, and pointed out that one of the jury instructions specifically stated that the jury could consider all of the evidence adduced during the trial (both guilt and penalty phases). (RT 3013.)

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54. Instruction No. 16 provided:

> With regard to factors in mitigation and aggravation, each juror must make his or her own individual assessment of the weight to be given such evidence.
>
> There is no requirement that all jurors unanimously agree on any matter offered in mitigation. Each juror makes an individual evaluation of each fact or circumstance offered in mitigation of penalty. Each juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors.

(CT 1523.)

The court, based on its desire not to mislead the jury, stated an intention to send the jury a note asking whether the read-back it sought was Dr. Dollinger's autopsy of Russell. (CT 1580; RT 3013.) Defense counsel again objected. (RT 3013-3014.) The jury responded to the note in the affirmative. (CT 1580.) Defense counsel requested a mistrial. (RT 3014.) The prosecutor responded that the jury was entitled to consider Russell's murder as evidence of "other violent acts." (RT 3014-3015.)

The court agreed with the prosecutor. (RT 3015-3016.) The court pointed out that either nine or three of the jurors had found beyond a reasonable doubt that appellant murdered Russell, and that the jury was not required to "unanimously agree on any particular circumstance involving aggravation during this phase." (RT 3106.) After the read-back of Dr. Dollinger's testimony was finished, the jury retired to continue its deliberations. (*Ibid.*)

B. Appellant Waived His Claim By Failing To Object Below

Initially, respondent notes that appellant has waived his claims regarding the instructions given to the jury by failing to object or raise those claims in the trial court. (See, e.g., RT 2811 [defense counsel did not object to CALJIC Nos. 8.85, 8.86, or 8.87].) An appellant may not raise on appeal a claim that he or she did not raise below. (See, e.g., *People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13.) Appellant's failure to object precludes review. (See, e.g., *Arias*, *supra*, 13 Cal.4th at p. 171 ["[D]efendant's failure to request a clarifying instruction waives that claim."].) *People v. Estrada* (1995) 11 Cal.4th 568, 574 [defendant's duty to request any clarifying or amplifying instructions]; *Raley*, *supra*, 2 Cal.4th at p. 892 [criminal defendant's failure to raise a constitutional objection at trial waives the claim on appeal].) "A defendant who believes that an instruction requires clarification must request it." (*People v. Coddington* (2000) 23 Cal.4th 529, 584, overruled on other grounds in *Price v. Superior*

Court (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Respondent is cognizant of section 1259[55] and cases that appear to make virtually every claim of instructional error cognizable on appeal. (See, e.g., *Rodrigues, supra,* 8 Cal.4th at p. 1132; *People v. Baca* (1996) 48 Cal.App.4th 1703, 1706.) These cases have repeatedly held, usually without substantial analysis, that the particular instructional claim was cognizable as it impacted the defendant's substantial rights.

But other cases have at least recognized that there are some limits to the applicability of section 1259. (See e.g. *Farnam, supra*, 28 Cal.4th at p. 165, citing *People v. Bolin* (1998) 18 Cal.4th 297, 326 [claim of instructional error barred by failure to object at trial]; *Dennis, supra,* 17 Cal.4th at pp. 534-535 [notwithstanding section 1259, failure to object bars contention based on unfair surprise arising from instruction].) As noted by the court in *People v. Andersen* (1994) 26 Cal.App.4th 1241, the determination that a defendant's substantial rights were involved is a determination that there was a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error. (*Id.* at p. 1249, citing § 1259; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978; accord, *People v. Rivera* (1984) 162 Cal.App.3d 141, 146.)

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55. Section 1259 provides:
Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

Here, appellant did not object to CALJIC Nos. 8.86, 8.87, or 8.88. (RT 2810-2811.) By failing to object, he waived any claim regarding those jury instructions.

C. Defense Counsel Provided Effective Assistance

Appellant also asserts that defense counsel was ineffective for failing to object to the jury instructions. (AOB 248-249.) To establish a claim for the ineffectiveness of counsel, an appellant must show that: (1) counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability the result would have been different absent the error. (*In re Resendiz* (2001) 25 Cal.4th 230, 239, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, and *Waidla*, *supra*, 22 Cal.4th at p. 690.) This two-step approach requires a consideration of two sets of applicable rules.

First, with regard to the objective standard:

> Courts must in general exercise deferential scrutiny in reviewing such claims; the reasonableness of defense counsel's conduct must be assessed "under the circumstances as they stood" at the time of counsel's acts or omissions; "second guessing" is to be avoided.

(*People v. Mincey* (1992) 2 Cal.4th 408, 449; see also *In re Fields* (1990) 51 Cal.3d 1063, 1069-1070.) This "highly deferential" scrutiny prohibits "second-guessing" counsel's assistance and employs a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*Strickland, supra,* 466 U.S. at p. 689; *People v. Thomas* (1992) 2 Cal.4th 489, 530-531.) As this Court found in *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218, when discussing the deferential review of defense counsel's decisions on strategy and tactics:

> In some cases . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one,

> or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal.

(*Id.* at p. 218; see also *Strickland*, *supra*, 466 U.S. at p. 668; *People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

Second, with regard to the requirement of prejudice to appellant, it must be noted that "a reasonable probability" that the result would have been different "is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at pp. 693-694; *People v. Diaz* (1992) 3 Cal.4th 495, 557.) Appellant's burden is significant. (See *In re Jackson* (1992) 3 Cal.4th 578, 604-605 [defendant must show a reasonable probability that the error "would have" affected the judgment rather than simply that there is "any reasonable likelihood" that the error "could have" affected the result], overruled in part on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535.) Thus, appellant must prove "prejudice as a `demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*Williams, supra,* 44 Cal.3d at p. 937; see also *McPeters*, *supra*, 2 Cal.4th at p. 1177.)

Here, appellant has failed to meet his burden as to either prong of the *Strickland* test regarding defense counsel. First, he has not rebutted the strong presumption that defense counsel's failure to object fell below an objectively reasonable standard. Defense counsel may very well have understood the jury instructions as those instructions were meant to be understood–specifically, that consideration of the Russell murder was permissible by individual jurors provided that those jurors believed that appellant had committed the murder beyond a reasonable doubt, and provided that the jurors unanimously agreed on the penalty verdict. Presumably, defense counsel knew that California law, as discussed *infra*, does not require the jurors to unanimously agree on which aggravating circumstances are considered, or how the aggravating circumstances are weighed. Second, appellant has not shown that, but for the specific inclusion in the jury instructions of Russell's murder as one of the

criminal activities that the jurors were permitted to consider if it were proven beyond a reasonable doubt, there is a reasonable probability that the outcome would have been different. Thus, his assertions regarding defense counsel are without merit.

D. The Trial Court Properly Instructed The Jury

"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016; see also *People v. Hughes* (2002) 27 Cal.4th 287, 340.) "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258.)

The question is whether there is a reasonable likelihood that the jury applied the challenged instruction in a manner that violates the Constitution. (*Kelly, supra*, 1 Cal.4th at pp. 526-527; see *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4.) Courts must assume that the jurors are intelligent and capable of understanding and correlating all instructions which are given to them. (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338; see also *Boyde v. California* (1990) 494 U.S. 370; *People v. Morales* (2001) 25 Cal.4th 34, 47.) Furthermore, courts presume that jurors are true to their oaths and follow the instructions given to them by the court. (*Cunningham, supra*, 25 Cal.4th at p. 1014; *People v. Tarantino* (1955) 45 Cal.2d 590, 597.)

Here, the jury was properly instructed. California law does not require the jury to unanimously agree on which aggravating circumstances are to be considered. (See e.g., *Anderson, supra*, 25 Cal.4th at p. 589, citing numerous cases.) The jury instructions specifically permitted those jurors who believed, beyond a reasonable doubt, that appellant murdered Russell, to consider that

during the deliberations on the proper penalty. As discussed *supra*, the jury instructions required the penalty phase verdict to be unanimous, and it obviously was. (See RT 3025-3026.) Therefore, appellant's claim must fail.

E. Any Error Was Harmless

Any error in the jury instructions must be evaluated for prejudice. (See, e.g., *People v. Breverman*, (1998) 19 Cal.4th 142, 165, citing *Watson, supra,* 46 Cal.2d at p. 836.) Instructional errors only require reversal when the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *People v. Flood* (1998) 18 Cal.4th 470, 490.)

Here, no miscarriage of justice occurred. As noted, *supra*, state law allows the jurors to individually consider and weigh various circumstances in arriving at their individual determinations of the proper penalty, provided that the final verdict is unanimous. That is what occurred here. Also, there was strong evidence against appellant at the penalty phase, which included testimony from the relatives of the Mercks, as well as testimony regarding another robbery, and child abuse, that appellant had committed. Furthermore, the jury showed a "conscientious[ness] in [the] performance of [its] high civic duty" in light of the fact that the jury returned a verdict of death as to only one of the two horrific Merck murders. (See *Cooper, supra*, 53 Cal.3d at p. 837; see also *People v. Walker* (1995) 31 Cal.App.4th 432, 438-439.) Hence, it is not reasonably probable that the jury would have reached a verdict more favorable to appellant had the trial court specifically listed Russell's murder as criminal activity that the jury could not consider absent a finding that appellant committed the murder beyond a reasonable doubt. (*Breverman, supra*, 19 Cal.4th at p. 178; *Flood, supra*, 18 Cal.4th at p. 490.)

Appellant predictably asserts that the alleged error should be reviewed under the stricter test for harmless error. (See AOB 249-250, citing *Chapman,*

supra, 386 U.S. at p. 18.) But, as appellant acknowledges, this Court has already rejected that position. (See, e.g., *People v. Brown* (1988) 46 Cal.3d 432, 446.) Therefore, appellant's assertion that the more stringent standard for harmless error is without merit.

But, even assuming for the sake of argument that the error here rose to a constitutional level, any error in the jury instructions was harmless beyond a reasonable doubt, in light of the state of the evidence in this case, and the fact that the jury carefully and conscientiously performed its duties. (See *Chapman, supra*, 386 U.S. at p. 18.) For all these reasons, this Court should reject appellant's claim.

XIV.

THE TRIAL COURT WAS NOT REQUIRED TO RE-INSTRUCT THE JURY DURING THE PENALTY PHASE ON THE MEANING OF "REASONABLE DOUBT," BECAUSE DURING THE GUILT PHASE THE JURY HAD BEEN INSTRUCTED ON, AND HAD APPLIED, THE "REASONABLE DOUBT" STANDARD; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant claims that the trial court erred by not defining "reasonable doubt" when instructing the jury that appellant's commission of the crimes of robbery, burglary and child abuse must be proven beyond a reasonable doubt before they could be considered as aggravating circumstances in the penalty phase. (AOB 253-258.) But the trial court was not required to re-instruct the jury on the meaning of "reasonable doubt," because during the guilt phase the jury had been instructed on, and had applied, the "reasonable doubt" standard. In any event, any error was harmless. Therefore, this Court should reject appellant's claim.

A. The Proceedings Below

On Monday, June 10, 1996, the trial court held conferences in the morning and afternoon to discuss the penalty-phase jury instructions. (RT 2809-2833.) But a re-instruction on the meaning of "reasonable doubt" was not mentioned.

B. The Applicable Law

As noted *supra*, jury instructions are analyzed in the context of their entirety, rather than by a focus on any particular instruction (*Castillo, supra,* 16 Cal.4th at p. 1016; see also *Hughes, supra,* 27 Cal.4th at p. 340), and essentially the instructions are interpreted, if possible, so as to support the judgment

(*Laskiewicz, supra,* 176 Cal.App.3d at p. 1258). Courts assume that the jurors are intelligent and capable of understanding and correlating all instructions which are given to them (*Yoder, supra,* 100 Cal.App.3d at p. 338; see also *Boyde, supra,* 494 U.S. at p. 370; *Morales, supra,* 25 Cal.4th at p. 47), and presume that jurors are true to their oaths and follow the instructions given to them by the court (*Cunningham, supra,* 25 Cal.4th at p. 1014; *Tarantino, supra,* 45 Cal.2d at pp. 590, 597).

C. The Trial Court Was Not Required To Re-Instruct The Jury On The Meaning Of "Reasonable Doubt," Because During The Guilt Phase The Jury Had Been Instructed On, And Had Applied, The "Reasonable Doubt" Standard

Here, the trial court did not re-instruct the jury, during the penalty phase, on the definition of "reasonable doubt." Appellant claims that several factors caused the jury to misunderstand "reasonable doubt" in the penalty phase: (1) the definition of "reasonable doubt" is not a term commonly understood by jurors; (2) the penalty phase deliberations began nine days after the jury had heard the " reasonable doubt" definition during the guilt phase; and (3) "the jury was expressly instructed to '[d]isregard all other instructions given to [it] in other phases of this trial.'"[56/] This Court has already rejected an identical contention. (See *People v. Holt* (1997) 15 Cal.4th 619, 685.) Appellant's claim is likewise without merit.

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56. CALJIC No. 8.84.1 reads, in pertinent part:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial. [¶] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow that law that I shall state to you. Disregard all other instructions given to you in other phases of this trial. . . .

(CT 1492.)

It is true that "reasonable doubt" is not commonly understood by laypersons and so must be defined. But in this case it was defined, during the guilt phase, so the crux of appellant's claim comes down to his second point -- that the jury would have forgotten the definition by the time of the penalty phase. Appellant relies on *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1221-1223, a case in which the appellate court found prejudicial error because the trial court neglected to read the jury the standard reasonable doubt instruction (CALJIC No. 2.90) before deliberations, even though it had read that instruction to the jury during voir dire the same day. The court stated one of several bases to find prejudice from such an error as follows:

> [T]he instruction was given not to actual jurors, but to prospective jurors who at the time did not know whether they would ultimately serve in the case. As a result, the members of the panel could well have viewed the court's remarks as hypothetical and thus have failed to give the instruction the same focused attention they would have had they been impaneled and sworn.

(*Id.* at p. 1222.)

But this case is distinguishable in two important respects. First, in this case the jury did not just hear the reasonable doubt instruction earlier. It actually applied the concept, several times during the guilt phase, in finding some charges and enhancement allegations proven while being unable to reach a verdict as to Russell's murder. Respondent submits that a jury that actually applies a reasonable doubt standard multiple times – including being unable to reach a verdict – can be relied upon not to forget it, particularly when, as here, it is reminded that it must do so again.

This brings us to the second point on which *Elguera* is distinguishable. In *Elguera* the failure of the trial court to read CALJIC No. 2.90 before the jury's deliberations meant that the jury was deprived at that point not only of the definition of "reasonable doubt" but also of the directive to apply the reasonable doubt standard. Here, by contrast, the court expressly told the jury that it must

apply the "reasonable doubt" standard to the allegations of other criminal activity. (CT 1518 [CALJIC No. 8.87]; RT 2972; see also CT 1517 [CALJIC No. 8.86 – reasonable doubt standard applies to evidence of prior robbery conviction]; RT 2971-2972.)

In his third point, appellant contends that the court undercut this directive by telling the jury to disregard the instructions it had received in the guilt phase. Not so. The question is what a reasonable juror would have interpreted the "disregard" instruction to mean about the definition of "reasonable doubt," given the court's directive to apply the reasonable doubt standard. If the penalty phase definition was to be any different from the guilt phase one, a juror would expect the court to state the different definition. Otherwise, the court would have effectually told the jury to apply a standard -- the meaning of which the jury could not know. A juror would not expect a trial court to instruct him or her to do the undo-able, and that alone would have prevented the jury from interpreting the instruction as appellant claims it did. Moreover, if for any reason a juror did suspect that the effect of the court's instructions was to leave unclear the meaning of "reasonable doubt" (or any other term), that juror would have indicated as much by asking for clarification. (See *Holt, supra*, 15 Cal.4th at p. 685.) In sum, the jury had no reason to parse the court's instructions in such a way as to paralyze itself, and its lack of any questions on the matter foreclosed any reasonable likelihood that it did so.

Yet again, we must recall the High Court's method for assessing a jury's interpretation of instructions:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with common sense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

(*Boyde v. California* (1990) 494 U.S. 370, 380-381.) Hence, appellant has

constructed a claim of error that may be plausible on paper but only because it relies on the technical hairsplitting the High Court in *Boyde* cautioned against. When a jury is instructed to apply the same standard of proof in the penalty phase that it applied in the guilt phase, it is not reasonably likely that the jury will fail to apply that standard, even if it is not defined a second time and the jury is told to disregard prior instructions.

D. Any Error Was Harmless

In any event, any error in the jury instructions must be evaluated for prejudice. (See, e.g., *Breverman, supra*, 19 Cal.4th at p. 165, citing *Watson, supra,* 46 Cal.2d at p. 836.) Instructional errors only require reversal when the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *Flood, supra*, 18 Cal.4th at p. 490.)

Here, no miscarriage of justice occurred. As noted *supra*, there was strong evidence against appellant at the penalty phase, which included testimony from the relatives of the Mercks, as well as testimony regarding another robbery, and child abuse, that appellant had committed. Furthermore, the jury showed a "conscientious[ness] in [the] performance of [its] high civic duty" in light of the fact that the jury returned a verdict of death as to only one of the two horrific Merck murders. (*Cooper, supra,* 53 Cal.3d at p. 837; *Walker, supra,* 31 Cal.App.4th at pp. 438-439.) Hence, it is not reasonably probable that the jury would have reached a verdict more favorable to appellant had the trial court provided, for a second time during the trial, the definition of reasonable doubt. (*Breverman, supra*, 19 Cal.4th at p. 178; *Flood, supra*, 18 Cal.4th at p. 490.)

Appellant predictably asserts that the alleged error is reversible per se, or alternatively that it should be reviewed under the stricter test for harmless error. (See AOB 256-258, citing, e.g., *Chapman, supra,* 386 U.S. at p. 18.)

But in *People v. Benson* (1990) 52 Cal.3d 754, this Court held that the rules regarding the penalty-phase consideration of evidence that the defendant had committed other crimes were "statutorily based" and not "constitutionally mandated." (*Id.* at pp. 809-811, quoting *People v. Miranda* (1987) 44 Cal.3d 57, 98-99, disapproved on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4; see also *Moran v. Godinez* (9th Cir. 1994) 57 F.3d 690, 698.) Respondent also notes that some of the evidence of appellant's prior criminal activity was introduced to rebut the defense case in mitigation. (See *Clark, supra*, 5 Cal.4th at p. 1027.) Therefore, appellant's assertions are without merit.

But even assuming for the sake of argument that the error here rose to a constitutional level, any error in the jury instructions was harmless beyond a reasonable doubt, in light of the state of the evidence in this case, and the fact that the jury carefully and conscientiously performed its duties. (See *Chapman, supra*, 386 U.S. at p. 18.) For all these reasons, this Court should reject appellant's claim.

XV.

APPELLANT WAIVED HIS CLAIM BY FAILING TO OBJECT TO CALJIC NO. 8.87; IN ANY EVENT, THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING APPELLANT'S BURGLARY AND ROBBERY OF FOSTER AND CRUZ; ANY ERROR WAS HARMLESS

Appellant claims that the trial court erred in listing both residential burglary and residential robbery as other violent crimes committed by appellant because the instruction led the jury to believe that it should consider each crime as a separate aggravating circumstance. (AOB 259-262.) But appellant waived his claim by failing to object to CALJIC No. 8.87. In any event, the trial court properly instructed the jury regarding appellant's burglary and robbery of Foster and Cruz; and any error was harmless. This Court should reject appellant's claim.

A. The Proceedings Below

During the penalty phase, the prosecution's case-in-chief included the testimony of James Foster, Jr., that appellant: (1) burglarized his apartment on October 24, 1985; (2) tied up Foster and his driver, Jessie Cruz, with a belt, cords, and clothing; (3) pointed a revolver at Foster and Cruz and threatened to kill them; and (4) rummaged through Foster's apartment and took multiple items before leaving. (RT 2853-2857.) Then Foster freed himself and Cruz and called the police. (RT 2857-2858.) Later that day, when the police took Foster to look at someone nearby, he identified appellant.[57] (RT 2858.)

The trial court held conferences to discuss the penalty-phase jury instructions. (RT 2809-2833.) Appellant voiced no objection to CALJIC No.

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57. The parties stipulated that appellant committed the crimes as to Foster and Cruz. (RT 2874-2875.)

8.87. (RT 2811.) As a result, the court instructed the jury with, inter alia, CALJIC No. 8.87. (CT 1518; RT 2972.) That instruction provided, in pertinent part:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts: residential burglary, residential robbery and child abuse, which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any of such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.

(CT 1518 [CALJIC No. 8.87]; RT 2972.)

B. The Applicable Law

As noted *supra*, jury instructions are analyzed in the context of their entirety, rather than by a focus on any particular instruction (*Castillo, supra,* 16 Cal.4th at p. 1016; see also *Hughes, supra,* 27 Cal.4th at p. 340), and essentially the instructions are interpreted, if possible, so as to support the judgment below (*Laskiewicz, supra,* 176 Cal.App.3d at p. 1258). Courts assume that the jurors are intelligent and capable of understanding and correlating all instructions which are given to them (*Yoder, supra,* 100 Cal.App.3d at p. 338; see also *Boyde, supra,* 494 U.S. at p. 370; *Morales, supra,* 25 Cal.4th at p. 47), and presume that jurors are true to their oaths and follow the instructions given to them by the court (*Cunningham, supra,* 25 Cal.4th at p.1014; *Tarantino, supra,* 45 Cal.2d at pp. 590, 597).

This Court has repeatedly approved CALJIC No. 8.87. (See, e.g., *People v. Millwee* (1998)18 Cal.4th 96, 162 & fn. 33; *People v. Osband* (1996) 13 Cal.4th 622, 703-704; *Medina, supra*, 11 Cal.4th at p. 771; *Rodrigues, supra*, 8 Cal.4th at p. 1190; *People v. Jennings* (1991) 53 Cal.3d 334, 389, fn. 14.) Respondent notes that the purpose of the statutory exclusion (as to non-

violent criminal acts) included in section 190.3, factor (b), is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision. (*People v. Boyd* (1985) 38 Cal.3d 762, 776.)

But section 190.3, factor (b), includes more than offenses that are defined in violent terms; specifically, it includes all "crimes that were perpetrated in a violent or threatening manner." (*People v. Grant* (1988) 45 Cal.3d 829, 851.) Hence, this Court has repeatedly upheld the admission into evidence of the (often criminal but nonviolent) circumstances surrounding violent criminal acts. (See, e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 110 ["In addition, the evidence of Coffman's behavior following the Murray offenses [which the court described as "celebratory"–ordering food and wine on Murray's credit card at a restaurant, talking loudly, embracing her co-defendant, and later buying items at a sporting goods store using Murray's credit card] was both properly noticed as part of the 'facts and circumstances surrounding' the kidnapping, robbery, rape and murder of Murray and admissible as pertinent to section 190.3, factor (b)."]; *Kirkpatrick, supra,* 7 Cal.4th at pp. 1013-1014; *Cooper, supra,* 53 Cal.3d at pp. 840-841 [court rejected claim that burglary and theft offenses were nonviolent conduct that should have been excluded, stating: "Section 190.3, factor (b), refers to 'criminal activity,' not specific crimes. The various crimes that defendant committed were part of the series of events which commenced with the burglary, continued with the violent crimes against the victim who interrupted the burglary, and ended with the theft of the victim's vehicle. This was a continuous course of 'criminal activity' which clearly involved force or violence, or at least the 'threat' of force or violence."]; *Melton, supra,* 44 Cal.3d at p. 757.)

Moreover, this Court in *Cooper* stated:

We thus hold that all crimes committed during a continuous course of

> criminal activity which includes force or violence may be considered in aggravation even if some portions thereof, in isolation, may be nonviolent. The jury properly was allowed to consider all the crimes committed during this violent episode of criminal activity.[58/]

(*Cooper, supra*, 53 Cal.3d at pp. 840-841; see also *Farnam, supra*, 28 Cal.4th at p. 176 [court found evidence of an attempted burglary, which "tended to show that defendant, armed with a pipe, attempted to break into Beverly McCarthy's hotel room late at night knowing the room was occupied," admissible under section 190.3, factor (b)].) This Court reached a similar conclusion in *Melton*:

> Defendant urges that the sordid events leading up to the assault itself were irrelevant to any specific "aggravating circumstance" listed in the statute. In particular, he suggests, evidence of prior *nonviolent* crimes against James was inadmissible because there was no indication defendant had suffered felony convictions for such offenses. (§ 190.3, subd. (c).)
>
> Defendant failed to object to any of this evidence. In any event, its admission was proper. The People were entitled to show that the assault was particularly vicious and callous, since it was committed against a vulnerable victim who had shown defendant great kindness over a long period. Violent "criminal activity" presented in aggravation may be shown in context, so that the jury has full opportunity, in deciding the appropriate penalty, to determine its seriousness. We find no error in the admission of James' testimony.

(*Melton, supra*, 44 Cal.3d at p. 757, footnote omitted.)

C. The Trial Court Properly Instructed The Jury Regarding Appellant's Burglary And Robbery Of Foster And Cruz

First, appellant neither challenged the instruction at issue nor sought a clarifying instruction in the trial court. He has thus waived any claim of error concerning it. (*Arias, supra*, 13 Cal.4th at p. 171; *Rodrigues, supra*, 8 Cal.4th

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58. In light of this holding, we need not consider whether a residential burglary inherently involves an "implied threat to use force or violence."

at p. 1192; see also *Melton, supra*, 44 Cal.3d at p. 757.)

Second, appellant claims that the inclusion of the burglary in the jury instruction, so that there were two aggravating circumstances (burglary and robbery) rather than just one (robbery), "artificially inflated the prosecution's case for the death penalty." (AOB 260.) But, as noted by the cases discussed *supra,* Foster's testimony was properly admitted to show not only appellant's violent robbery, which included the personal use of a pistol and threats to kill Foster and Cruz, but also the circumstances surrounding the robbery, which included the burglary and the fact that appellant bound Foster and Cruz (as he did Clifford and Alma). Furthermore, respondent submits that the burglary was properly included in the jury instruction because the burglary involved the "implied use of force or violence or the threat of force or violence." (CALJIC No. 8.87.) Appellant had armed himself prior to the burglary, presumably to either defend against or rob anyone who might be at home or who might interrupt the burglary. Therefore, the trial court properly included residential burglary in CALJIC No. 8.87. (See *Cooper, supra*, 53 Cal.3d at pp. 840-841 ["[A]ll crimes committed during a continuous course of criminal activity which include force or violence may be considered in aggravation even if some portions thereof, in isolation, may be nonviolent."].) For all these reasons, appellant's claim is meritless and should be rejected by this Court

D. Any Error Was Harmless

Any error in the jury instructions must be evaluated for prejudice. (See, e.g., *Breverman, supra*, 19 Cal.4th at p. 165, citing *Watson, supra*, 46 Cal.2d at p. 836.) Instructional errors only require reversal when the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *Flood, supra*, 18 Cal.4th at p. 490.)

Here, as discussed *supra*, the evidence against appellant was strong. In

the portion of the prosecutor's penalty-phase closing argument that related to section 190.3, factors (a) and (b), she pointed out that the evidence showed how little appellant valued human life, and that he had committed crimes against every age group. (RT 2979-2984 [the murders of the elderly Mercks, the burglary and robbery of the presumably middle-aged Foster and Cruz, and the abuse of Brenda Hunt's young son].) The prosecutor summarized that portion of her argument by stating:

> What that proves is that he [appellant] has no respect for anyone, not the elderly, not the middle age [*sic*] or not the young. The people who can't help themselves, the young and the old, he mistreats, he harms. Those people who might stand up to him if he doesn't have a gun in his hand, he just ties up and he just threatens them.
>
> That is the man that you are judging here to determine how he should spend the rest of his life, something that he did not give anyone a chance when he was considering what to do with Clifford and Alma Merck.

(RT 2984.)

As this Court noted in *People v. Clair* (1992) 2 Cal.4th 629, where the jury was allowed to consider, as an aggravating circumstance, that Clair had burglarized an apartment and then armed himself with a knife to defend against anyone who might respond to the burglary call:

> The application of both standards [of harmless error analysis] yields but one result: no harm. The actual--and proper--focus of the penalty phase was defendant and his capital crime. To be sure, the evidence of the [] burglary was not insubstantial. Nevertheless, it added little, if anything, of marginal significance to the picture presented of the murder and the murderer.

(*Id.* at p. 678, fn. 11.) It is not reasonably probable that, had the trial court deleted the words "residential burglary" from CALJIC No. 8.87, the jury would have decided that appellant did not deserve the death penalty for his horrific murder of Alma Merck.

Even assuming, for the sake of argument, that the error here rose to a constitutional level, any error in the jury instructions was harmless beyond a

reasonable doubt, in light of the state of the evidence in this case, and the fact that the jury carefully and conscientiously performed its duties. (See *Chapman, supra*, 386 U.S. at p. 18.) For all these reasons, this Court should reject appellant's claim.

XVI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AND PROPERLY REJECTED APPELLANT'S PROPOSED INSTRUCTION REGARDING THE PENALTY-PHASE CONSIDERATION OF APPELLANT'S CURRENT CONVICTIONS AND SPECIAL CIRCUMSTANCE FINDINGS; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant claims that the trial court erred in denying his request to instruct the jury that the finding of first degree murder with special circumstances was not itself an aggravating factor in the determination of penalty. (AOB 263-265.) But the trial court properly instructed the jury and properly rejected appellant's proposed instruction; in any event, any error was harmless. Therefore, this Court should reject appellant's claim.

A. The Proceedings Below

As noted *supra*, the trial court held conferences to discuss the penalty-phase jury instructions, including CALJIC No. 8.85, which essentially repeats the provisions of section 190.3 as to evidence that the jury may consider when deciding the appropriate penalty.[59] (RT 2809-2833.) Appellant proposed the following jury instruction:

> You may not treat the verdict and finding of first degree murder committed under [a] special circumstance[s], in and of themselves as

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59. Section 190.3 provides, in pertinent part:

> If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. . . .
>
> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 109.1.

constituting an aggravating factor. For, under the law, first degree murder committed with a special circumstance may be punished by either death or life imprisonment without possibility of parole.

Thus, the verdict and finding which qualified a particular crime for either of these punishments may not be taken, in and of themselves, as justifying one penalty over the other. You may, however, examine the evidence presented in the guilt and penalty phases of this trial to determine how the underlying facts of the crime bear on aggravation or mitigation.

(CT 1541 [Proposed Penalty Phase Instruction No. 2]; see also RT 2813-2814.) The trial court refused to give appellant's proposed instruction. (RT 2831.)

Instead, the court gave CALJIC No. 8.85, as well as appellant's Proposed Penalty Phase Instruction No. 3, which read:

You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crimes for which the defendant has been convicted. In other words, do not consider the same factors more than once in determining the presence of aggravating factors.

(CT 1520; [Proposed Penalty Phase Instruction No. 3]; see also RT 2975.) The court also instructed the jury with CALJIC No. 8.88, which provides, in pertinent part, "An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CT 1537; RT 3002.)

B. The Trial Court Properly Instructed The Jury And Properly Rejected Appellant's Proposed Instruction; In Any Event, Any Error Was Harmless

As noted *supra*, jury instructions are analyzed in the context of their entirety, rather than by a focus on any particular instruction (*Castillo, supra,* 16 Cal.4th at p. 1016; see also *Hughes, supra,* 27 Cal.4th at p. 340), and essentially the instructions are interpreted, if possible, so as to support the judgment below

(*Laskiewicz, supra,* 176 Cal.App.3d at p. 1258). Courts assume that the jurors are intelligent and capable of understanding and correlating all instructions which are given to them (*Yoder, supra,* 100 Cal.App.3d at p. 338; see also *Boyde, supra,* 494 U.S. at p. 370; *Morales, supra,* 25 Cal.4th at p. 47), and presume that jurors are true to their oaths and follow the instructions given to them by the court (*Cunningham, supra,* 25 Cal.4th at p. 1014; *Tarantino, supra,* 45 Cal.2d at pp. 590, 597).

In *Tuilaepa v. California* (1994) 512 U.S. 967, the United States Supreme Court upheld section 190.3, factor (a), and CALJIC No. 8.85 against constitutional attack:

> Petitioner's challenge to factor (a) is at some odds with settled principles, for our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty. [Citation.] We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976; see also *Boyde, supra,* 494 U.S. at pp. 377-384.) This Court has also repeatedly upheld factor (a) against constitutional attack. (See, e.g., *Farnum, supra*, 28 Cal.4th at p. 192; *People v. Lucero* (2000) 23 Cal.4th 692, 726-727 ["As both the United States Supreme Court and this Court have said, an instruction that the jury may consider the circumstances of the offense at the penalty phase of a capital case is not unconstitutionally vague. [Citations.]"]; *Osband, supra*, 13 Cal.4th at p. 703; *Sanders, supra*, 11 Cal.4th at p. 563; *Cain, supra*, 10 Cal.4th at p. 68; *People v. Webster* (1991) 54 Cal.3d 411, 452-453; *People v. Williams* (1988) 45 Cal.3d 1268, 1332; see also *People v. Lenart* (2004) 32 Cal.4th 1107, 1133 ["CALJIC No. 8.85 accurately describes the law as set out in section 190.3, factor (a)."].)

Therefore, as a starting point, there is no requirement that a trial court supplement CALJIC No. 8.85 and specifically instruct the jury not to double count factors in aggravation. (See, e.g., *People v. Proctor* (1992) 4 Cal.4th 499, 550; but see *People v. Keenan* (1988) 46 Cal.3d 478, 520-521 [when standard instruction is adequate, court is under no duty to amplify in absence of request].) Further, in *Melton, supra*, 44 Cal.3d 713, this Court noted that the possibility of prejudice from the lack of such a special instruction "seems remote." (*Id.*, at p. 289; see also *People v. Monterroso* (2004) 34 Cal.4th 743, __ [22 Cal.Rptr.3d 1, 39-40]; *People v. Ramos* (2004) 34 Cal.4th 494, 531.)

Appellant claims that section 190.3, factor (a) violated his constitutional rights because it results in "erroneous inflation of the case in aggravation" (i.e., "double counting" the same facts as both circumstances of the crime and as special circumstances). (AOB 263-264.)[60/] But this Court has also repeatedly rejected this claim. For example, in *Ayala, supra,* 24 Cal.4th at p. 243, this Court stated:

> "[W]e have already concluded that the standard instructions do not inherently encourage the double counting of aggravating factors. [Citations.] We have also recognized repeatedly that the absence of an instruction cautioning against double counting does not warrant reversal in the absence of any misleading argument by the prosecutor." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1180.)

(*Id.* at p. 289; see also *Hughes, supra,* 27 Cal.4th at pp. 404-405; *Lewis, supra,* 25 Cal.4th at p. 669; *Earp, supra,* 20 Cal.4th at pp. 900-901; *People v. Mayfield* (1997) 14 Cal.4th 668, 804-805; *Medina, supra,* 11 Cal.4th at p. 779; *People v. Gallego* (1990) 52 Cal.3d 115, 198.) "[T]he jury is not apt to give undue weight to the facts underlying the present offenses merely because those facts also give rise to a special circumstance[.]" (*Medina, supra,* 11 Cal.4th at p. 779; see also *Keenan, supra,* 46 Cal.3d at p. 521 [juries unlikely to double

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60. Unfortunately, appellant does not mention any of the numerous cases, cited here by respondent, that are directly on point as to appellant's claim.

count facts on basis of instruction based on § 190.3, factor (a)].)

Furthermore, there can be no constitutional infirmity in the standard jury instruction absent improper argument by the prosecutor which could mislead the jury into the double counting of aggravating factors. (*Ayala*, *supra*, 23 Cal.4th at p. 289; *People v. Barnett* (1998) 17 Cal.4th 1044, 1180; *Proctor*, *supra*, 4 Cal.4th at p. 550.) Here, appellant fails to cite any portion of the prosecutor's argument that could have conceivably been misleading on this issue; indeed, there was none. (See RT 2977-2990; *Barnett*, *supra*, 17 Cal.4th at p. 1180.) The prosecutor discussed the factors the jurors were to consider, and pointed out that they were to weigh and balance the gravity they individually gave to the various factors. (RT 2978-2982; see *Lewis*, *supra*, 25 Cal.4th at p. 669.) And, in discussing factor (a), the prosecutor never suggested that the circumstances of the crime as well as the special circumstance should be considered more than once in determining the appropriate punishment to be imposed. (RT 2979-2981.) There was no misleading argument by the prosecutor that could have suggested to the jury that they could double count the facts of the murders.

This Court concluded in *Earp*:

> In this case, however, the trial court did instruct the jury to "factor out" the elements of the capital offense when considering it as an aggravating circumstance. The trial court's instructions included CALJIC No. 8.88 (1989 rev.), which in relevant part told the jury: "An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." Defendant's requested special instructions "D" and "E" would have been duplicative of this instruction.

(*Earp, supra,* 20 Cal.4th at p. 901.) As noted *supra*, the trial court instructed the jury with CALJIC No. 8.88, as well as with a special instruction, both of which warned the jury not to "double count" the circumstances of the current crime and the special circumstances. (CT 1520, 1537; RT 2975, 3002.) Thus,

appellant's proposed instruction was duplicative. Appellant's claim should be rejected.

Finally, appellant fails to cite any place in the record that suggests the jury was confused by the instructions or applied them inappropriately. (See *Lewis*, *supra*, 25 Cal.4th at p. 669.) Because the prosecutor did not urge the jury to double count the circumstances of the murders in weighing the aggravating and mitigating circumstances, the possibility of prejudice is therefore "remote." (See *Ochoa*, *supra*, 26 Cal.4th at p. 457; *Medina*, *supra*, 11 Cal.4th at p. 779; *People v. Visciotti*,(1992) 2 Cal.4th 1, 76.) Stated differently, there is no reasonable likelihood that the jury applied CALJIC No. 8.85 in a way that violates the Constitution. (*Ochoa*, *supra*, 26 Cal.4th at p. 290; *People v. Welch* (1999) 20 Cal.4th 701, 766.) Accordingly, even if this Court were to find that the trial court erred in rejecting appellant's proposed instruction, his claim must be rejected because appellant suffered no prejudice. (See *Lewis*, *supra*, 25 Cal.4th at p. 669; *Barnett*, *supra*, 17 Cal.4th at pp. 1080-1081 [distinguishing *United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087].)

XVII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH THE APPROPRIATE STANDARD CALJIC INSTRUCTIONS PERTAINING TO THE IMPOSITION OF THE DEATH PENALTY; APPELLANT'S PROPOSED INSTRUCTIONS WERE UNNECESSARY; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant claims that the trial court erred in denying his request to instruct the jury that it must consider the death penalty as a more severe punishment than life in prison without the possibility of parole. (AOB 266-268.) But the trial court properly instructed the jury with the appropriate standard CALJIC instructions; appellant's proposed instructions were unnecessary. In any event, any error was harmless. Appellant's claim is without merit.

A. The Proceedings Below

Appellant proposed two special instructions that, inter alia, described death as the "most serious" or "ultimate" penalty. (CT 1540, 1555.) Those two instructions were discussed during the conference regarding penalty phase instructions. (RT 2813, 2826.) After some consideration, the court declined to give the proposed special instructions. (RT 2830-2831.) The court cited *People v. Hernandez* (1988) 47 Cal.3d 315, 362-363, to point out its belief that the special instructions were not an entirely accurate statement of the law, and the court noted that some of the information in the special instructions would already be conveyed to the jury in other instructions. (RT 2830-2831.)

B. The Trial Court Properly Instructed The Jury With The Appropriate Standard CALJIC Instructions; Appellant's Proposed Instructions Were Unnecessary; In Any Event, Any Error Was Harmless

In *Earp supra*, 20 Cal.4th at page 903, this Court pointed out that

California law "'expresses no preference [between the death penalty and life without the possibility of parole] as to the appropriate punishment.'" (*Ibid.*, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 852, and citing *Hayes, supra,* 52 Cal.3d at p. 643.) But death is obviously both different, and more severe, than any another other punishment; indeed, it has often been called the "ultimate penalty." (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

In *Gurule, supra,* 28 Cal.4th at p. 557, this Court noted its previous explanation that the standard CALJIC penalty phase instructions "'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*Id.* at p. 659, quoting *Barnett, supra,* 17 Cal.4th at pp. 1176-1177.) In *Ochoa*, this Court held:

> Contrary to defendant's claims, the federal Constitution did not require that the jury be specifically instructed on lingering doubt (*People v. Mayfield, supra,* 14 Cal.4th at p. 807), nor was there any legal requirement that the jury be specifically instructed that death is the greater penalty. With regard to the latter point, the penalty trial itself, including the instructions given, made clear that the state viewed death as the extreme punishment. Indeed, it is the worse punishment as a matter of law. (*People v. Memro, supra,* 11 Cal.4th at pp. 879-880; *People v. Hill, supra,* 3 Cal.4th at p. 1016; cf. *People v. Bloom* (1989) 48 Cal.3d 1194, 1223 ["a jury might well conclude that death was 'too good' for the defendant and that life imprisonment with no hope of parole would be the more severe and more appropriate punishment"].)

(*People v. Ochoa* (1998) 19 Cal.4th 353, 478-479, parallel citations omitted.)

Here, appellant's claim is based on nothing more than sheer speculation. (See AOB 267 ["[S]ome jurors may well have voted for death in the mistaken belief that such a sentence was, under California law, more lenient" than life in prison without the possibility of parole.].) As noted *supra*, the trial court properly instructed the jury with the standard CALJIC penalty-phase instructions, which this Court has already held to be adequate (*Gurule, supra*, 28 Cal.4th at p. 659); there was no legal requirement that the jury be instructed

with appellant's special instructions that death was the more severe of the two sentencing options (*Ochoa, supra*, 19 Cal.4th at p. 478). For all of these reasons, appellant's claim is without merit and should be rejected by this Court.

In any event, any trial court error in rejecting appellant's special instructions was harmless. As noted *supra,* errors in the jury instructions are to be evaluated for prejudice. (See, e.g., *Breverman, supra*, 19 Cal.4th at p. 165, citing *Watson, supra,* 46 Cal.2d at p. 836.) Instructional errors only require reversal when the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *Flood, supra,* 18 Cal.4th at p. 490.)

Here, as discussed *supra*, the evidence against appellant was strong. It is not reasonably probable that, had the trial court given appellant's two special instructions, a different result would have been obtained. This is particularly true in light of the fact that the jury carefully and conscientiously performed its duties. (*Cooper, supra,* 53 Cal.3d at p. 837; *Walker, supra,* 31 Cal.App.4th at pp. 438-439.) Appellant's claim must be rejected.

XVIII.

THE TRIAL COURT PROPERLY ADMITTED DEPUTY RASCOE'S TESTIMONY OF WHAT MICHAEL HUNT HAD SAID TO HIM REGARDING APPELLANT'S ABUSE OF ROBERT HUNT; IN ANY EVENT, ANY ERROR WAS HARMLESS

Appellant claims that the trial court erred in permitting Deputy Sheriff Michael Rascoe to testify about a prior statement made to him by Brenda Hunt's son, Michael, concerning appellant's abuse of Michael's older brother, Robert. (AOB 269-273.) But appellant has waived a portion of his claim by failing to object at trial on the various constitutional bases that he attempts to raise here. Further, the trial court properly admitted Rascoe's testimony of what Michael had said to him; and, in any event, any error was harmless. Therefore, this Court should reject appellant's claim.

A. The Proceedings Below

During the prosecution's penalty phase case-in-chief, Betty Abney, a neighbor to appellant when he lived with Brenda Hunt and her children, testified that she saw appellant lift Robert, one of Hunt's children, by his hair and throw him to the ground. (RT 2865-2867.) The police talked to Robert, and to his brother Michael, and then appellant was arrested. (RT 2868.)

In mitigation, defense counsel called as witnesses Brenda Hunt, as well as Robert, Michael, and Hunt's daughter, Melody. (RT 2920-2950.) Hunt testified that appellant did not do what Abney had testified he did; she also testified that appellant had never hurt her and was good and kind to her children. (RT 2925-2926.) Hunt's children essentially testified that appellant was good to them and respected them, and that they liked or loved him and called him "Dad." (RT 2929-2948.) Robert testified in regard to the incident in question that he had tripped and fallen over a stump, and that appellant had

picked him up by the hand and gripped his chin while saying something to him. (RT 2933-2934.) Robert also testified that he could not remember whether appellant had picked him up by the hair, but appellant had not hurt him. (RT 2933-2934.)

In rebuttal, the prosecutor called Deputy Sheriff Michael Rascoe, who had responded to the scene (as Abney had described) and had talked to Robert and Michael. (RT 2951-2952.) Rascoe said that Robert was "very scared"; it looked like he had been crying; and he had been told he would be taken out of the home if he talked to Rascoe. (RT 2953, 2956.) Rascoe told Robert that that was not true. (*Ibid.*) Robert said that he, his brother, and some other children had been playing in the front yard, and they had been told to stay off of a van that was parked in front of the house. (*Ibid.*) Robert told his brother and the other children to get off of the van or they would get in trouble. (RT 2954.) Appellant came outside and was mad because he thought that Robert had been playing on the van. (*Ibid.*) Appellant grabbed him by his hair, shook him, and then threw or pushed him to the ground. (*Ibid.*)

When the prosecutor asked Rascoe if he had talked to Michael, defense counsel objected on the basis of "lack of foundation." (RT 2954.) The court asked whether Michael was in the hallway of the courthouse, and defense counsel replied that Michael had been released. (*Ibid.*) When the court inquired further, defense counsel admitted that the court had not released Michael. (*Ibid.*) The court overruled the defense's objection, noting that Michael was subject to recall. (*Ibid.*)

Then Rascoe testified that Michael said that appellant had grabbed Robert by his hair and picked him up off of the ground. (RT 2955.) Defense counsel said, "Objection, your Honor, no showing that Michael ever saw anything. We don't know if this is hearsay that Michael is relaying. We don't know the basis of the foundation of Michael's alleged statement to this witness." (*Ibid.*) The court overruled the objection. (*Ibid.*) Rascoe then

testified that Michael told him that appellant had thrown Robert backwards, which caused Robert to fall onto his back. (*Ibid.*) During cross-examination, Rascoe said that Michael had told him that he had seen what had happened. (RT 2955-2956.) At the time, Rascoe believed that Michael was seven years old. (RT 2956.) Robert had told Rascoe that Michael had been "right there" when the abuse happened. (RT 2958.)

B. The Applicable Law

Initially, respondent notes that appellant has waived a portion of his claim by failing to object below. Specifically, defense counsel objected as to Rascoe's testimony only on the bases of lack of foundation and hearsay. (RT 2954-2955.) But appellant here also claims that the admission of the testimony violated his constitutional rights to a reliable penalty determination, to due process, and to confront witnesses. (AOB 271-272.) Appellant's failure to object on those bases below is fatal to those portions of his claim here. (See, e.g., Evid. Code, § 353; *Horning, supra,* 34 Cal.4th at p. 871, ___ [22 Cal.Rptr.3d at p. 327], citing *Carpenter, supra*, 21 Cal.4th at p. 1049; *Williams, supra,* 44 Cal.3d at p. 906.)

As to the merits of appellant's claim, statements made out of court that are offered for the truth asserted therein are generally inadmissible as hearsay. (Evid. Code, §§ 351, 1200.) This rule of exclusion does not apply if the out-of-court statement is inconsistent with any part of the declarant's in-court testimony and, at the time of its admission, the declarant has not been excused from giving further testimony. (Evid. Code, §§ 769, 1235.)

A prior statement is admissible if it tends to contradict or disprove the testimony or any inference to be deduced from it. (*Boyd, supra*, 222 Cal.App.3d at p. 566; see also *Johnson, supra,* 3 Cal.4th at p. 1219.) "Inconsistency in effect, rather than contradiction in express terms, is the test

for admitting a witness' prior statement . . . ." (*Green*, *supra*, 3 Cal.3d at p. 988.) A trial court's ruling on an evidentiary question will not be disturbed on appeal absent an abuse of discretion. (*Cox, supra,* 30 Cal.4th at p. 955.)

C. The Trial Court Properly Allowed Rascoe To Testify About Michael's Statement Because The Statement Was Inconsistent With Michael's Testimony

Here, the trial court properly allowed Rascoe to testify about Michael's statement to him about appellant's abuse of Robert, because the statement was inconsistent with Michael's testimony about appellant. Specifically, Michael testified that all of Hunt's children liked to call appellant "Dad" because it made appellant feel good and because appellant treated them like a father would – with respect. (RT 2940.) Obviously, Michael's statement to Rascoe – which corroborated that appellant had lifted Robert off of the ground by his hair and thrown him backwards, causing him to fall onto his back (RT 2955-2956), was inconsistent with Michael's earlier testimony about appellant.

Therefore, the trial court properly admitted Rascoe's testimony about Michael's statement to him. Appellant's claim must be rejected.

Also, appellant's claim that his right to confront witnesses was violated is meritless. Michael was subject to recall. (RT 2954.) Further, as this Court noted in *Zapien*, *supra*, 4 Cal.4th at page 929, "The receipt in evidence of a prior inconsistent statement does not violate the confrontation clauses of the federal and state Constitutions where the declarant testifies at trial and is subject to cross-examination." (*Id.* at p. 955, citing *California v. Green*, *supra*, 399 U.S. at p. 164, and *Chavez, supra,* 26 Cal.3d at p. 361; see also *Brown, supra*, 35 Cal.App.4th at p. 1597.)

D. Any Error Was Harmless

Finally, any error in admitting Rascoe's testimony was harmless. A

judgment will not be set aside because of the erroneous admission of evidence unless its admission resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b).) A miscarriage of justice occurs only when the appellate court, after an examination of the entire record, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Boyette, supra*, 29 Cal.4th at pp. 427-428; *Cooper, supra*, 53 Cal.3d at p. 836; *Fowler, supra*, 196 Cal.App.3d at p. 88.)

Here, Michael's statement to Rascoe was cumulative of Robert's statement to Rascoe -- that appellant got mad because he thought Robert had been playing on a parked van, and that appellant had picked him up by his hair, shaken him, and pushed or thrown him onto the ground. (RT 2954.) Also, as discussed *supra*, the evidence against appellant was strong. Therefore, even if Rascoe's testimony about Michael's statement had been excluded, it is not reasonably probable appellant would have obtained a better result. (See *Watson, supra*, 46 Cal.2d at p. 836.) It simply cannot be said that the trial court, as a matter of law, exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (Evid. Code, § 353 subd. (b); *Rodrigues, supra*, 8 Cal.4th at p. 1124; *Dyer, supra,* 45 Cal.3d at p. 26.) Hence, even if the trial court erred in admitting the testimony, the judgment must be affirmed. Appellant's claim must be rejected.

XIX.

APPELLANT WAIVED HIS CLAIM OF POTENTIAL JUROR MISCONDUCT; THE TRIAL COURT PROPERLY FOUND THAT THERE WAS NO REQUIREMENT FOR ADDITIONAL ACTION AFTER TALKING TO JUROR NOS. 040149 AND 045829

Appellant claims that the trial court failed to adequately investigate jury misconduct during the penalty phase deliberations. (AOB 274-278.) But appellant waived his claim of potential juror misconduct. In any event, the trial court properly found that there was no requirement for additional action after talking to Juror Nos. 040149 and 045829. Therefore, this Court should reject appellant's claim.

A. The Proceedings Below

The jury's penalty phase deliberations began at 3:35 p.m. on June 12, 1996, and then continued throughout the day on June 13 and into June 14. (CT 1483, 1487-1488, 1573.) At 8:50 a.m., the court received from the jury foreperson a note that indicated that Juror No. 040149 wanted to speak with the court.[61] (CT 1574, 1577; RT 3017.)

The court brought Juror No. 040149 into the court with the prosecutor, defense counsel, and appellant. (RT 3017-3018.) When given a chance to speak, Juror No. 040149 said that something had been "eating at" him, and he explained:

> We have a juror that was very adamant in her decisions in all three verdicts and, you know, which is fine, everybody is. Now she is adamant in her verdict now [*sic*], but she is claiming that she has some kind of second thoughts about her original verdict in the two convictions, and I – yesterday, I don't know exactly when it was, it was

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61. At the start of the hearing regarding the note, the court pointed out that it was 9:30 a.m. at that time, which meant that the jury foreperson "was an hour off" in writing the time of the note as "9:50 a.m." (RT 3017.)

> on return back to the courthouse, she was sitting right next to two of Mr. Cowan's relatives, his aunt and then another – another person. I was over at the stairs. So when her head was turned, all I could see is the back of her head. I don't know if she was conversing with them. I did note that they were talking and it was maybe purse room between the three. I don't know if maybe she heard something that she is now, you know, holding up or trying to recant or whatever. I just feel that that needs to be brought to the Court's attention.

(RT 3018-3019.) The court asked Juror No. 040149 about the juror he had seen, and clarified that it was Juror No. 045829, before the court thanked Juror No. 040149 and sent him back to the jury room. (RT 3019.) The court asked counsel for their thoughts. (RT 3020.) The prosecutor said that she did not have "any ideas," and defense counsel responded, "I think that we just have to play it out and see what happens." (*Ibid.*)

Then a second note arrived that indicated that Juror Nos. 045829 and 024178 wanted to speak to the court. (RT 3020; CT 1576.) The court had Juror No. 045829 brought to the courtroom. (RT 3021.) She said that Juror No. 040149 had said that she was talking to appellant's relatives, but the court corrected her – and explained that Juror No. 040149 had only said that he had seen her sitting in the hallway near appellant's relatives. (RT 3021-3022.) Juror No. 045829 replied, "That is what he said in there." (RT 3022.) The court said that it did not know, nor did it want to know, what had been said "in there." (*Ibid.*) But the court explained that its intent was to take no action on the information from Juror No. 040149, because "there wasn't anything indicated by that juror that would have suggested any impropriety on your part." (RT 3022.) Juror No. 045829 said that she did not have anything else to raise to the court, and returned to the jury room. (*Ibid.*)

When Juror No. 024178 was brought into the courtroom and asked whether she had anything that she wanted to talk about, she replied, "Now I just – no, I am fine." (RT 3022) When the court asked, she again indicated that she did not have anything to say. (RT 3023.) The court told her that it was

available to talk to her if there were any problems. (*Ibid.*) Then she went back to the jury room. (*Ibid.*) Both the prosecutor and defense counsel said that they had no comments or objections, so the court declared a recess. (*Ibid.*)

B. Appellant Waived His Claim Of Potential Juror Misconduct; The Trial Court Properly Found That There Was No Requirement For Additional Action After Talking To Juror Nos. 040149 And 045829

Initially, respondent notes that appellant failed to ask the court to take any additional action on the information provided by Juror No. 040149, nor did appellant object to Juror No. 045829, and appellant's motion for a new trial (CT 1586-1608) failed to raise the issue that Juror No. 045829 had potentially committed misconduct. Therefore, appellant has waived this claim. (See *People v. Lucas* (1995) 12 Cal.4th 415, 487 [claim of juror misconduct waived by failure to raise issue at trial]; *People v. Martinez* (1968) 264 Cal.App.2d 906, 912.)

If this Court proceeds to the merits of appellant's claim, then respondent notes that section 1089 sets forth the procedure for the dismissal of a juror and the selection of alternate jurors, as well as the duties of such alternates.[62/] Section 1089 authorizes a trial court to dismiss an impaneled juror before the jury returns a verdict if the juror becomes ill or upon a showing of good cause that the juror is unable to perform his or her duty. (*Williams, supra,* 25 Cal.4th at pp. 447-448; *People v. Daniels* (1991) 52 Cal.3d 815, 864.)

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62. Section 1089 provides in pertinent part:

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

"Good cause" for the discharge of an impaneled juror has been found when a juror, inter alia, loses the ability to render a fair, impartial, and unbiased verdict. (*People v. Warren* (1986) 176 Cal.App.3d 324, 327; see also *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1446, fn. 2; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1780-1781.) Obviously, serious and willful misconduct by a juror constitutes "good cause" to dismiss that juror. (*Daniels, supra,* 52 Cal.3d at p. 864.) Also, "a juror's inadvertent receipt of information that [has] not been presented in court falls within the general category of 'juror misconduct.'" (*People v. Nesler* (1997) 16 Cal.4th 561, 579.) A juror's inability to perform his or her duties under section 1089 must appear in the record as a "demonstrable reality" and will not be presumed. (*People v. Marshall* (1996) 13 Cal.4th 799, 843; *Lucas, supra*, 12 Cal.4th at p. 469; *People v. Collins* (1976) 17 Cal.3d 687.)

A rebuttable presumption of prejudice to a defendant may arise from a showing of misconduct by a juror. (See, e.g., *In re Hamilton* (1999) 20 Cal.4th 273, 295; *Nesler, supra* 16 Cal.4th at p. 578; *In re Carpenter* (1995) 9 Cal.4th 634, 654; *Marshall, supra*, 50 Cal.3d at p. 950.) However, when the alleged misconduct involves an unauthorized communication between a juror and a witness in the case, the presumption of prejudice does not arise unless the communication actually involved the pending case. (See, e.g., *People v. Cobb* (1955) 45 Cal.2d 158, 161; *People v. Woods* (1950) 35 Cal.2d 504, 511-512; *People v. Phelan* (1899) 123 Cal. 551, 567; *People v. Dunn* (1889) 80 Cal. 34, 36.) Further,

> the presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant.

(*Hamilton, supra,* 20 Cal.4th at p. 296; see also *Nesler, supra,* 16 Cal.4th at pp.

578-579 [juror bias may be found in two ways: if, viewed objectively, extraneous information was so prejudicial in itself "that it is inherently and substantially likely to have influenced a juror"; or if, even if the extraneous material was not inherently prejudicial, "from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant"].)

This Court has held that when there is a claim of juror misconduct, the trial court must conduct "'an inquiry sufficient to determine the facts . . . whenever the court is put on notice that good cause to discharge a juror may exist.'" (*People v. Pinholster* (1992) 1 Cal.4th 865, 928, citing *People v. Burgener* (1986) 41 Cal.3d 505, 519.) An evidentiary hearing into a claim of juror misconduct is required only where there is a material conflict in the claimed action by the juror which can only be resolved at such a hearing. (see *People v. Brown* (2003) 31 Cal. 4th 518, 581-582, and *People v. Hardy* (1992) 2 Cal.4th 86, 174, both applying *People v. Hedgecock* (1990) 51 Cal.3d 395.)[63] Respondent notes that "[t]he jury system is an institution that is legally fundamental but also fundamentally human." (*People v. Danks* (2004) 32 Cal.4th 269, 302.) As recognized by this Court, "Jurors are not automatons. They are imbued with human frailties as well as virtues." (*Id.* at p. 304, quoting *In re Carpenter, supra,* 9 Cal.4th at pp. 654-655.)

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63. In *Hedgecock,* this Court held that, in the context of a motion for new trial raising allegations of jury misconduct, the trial court has discretion to conduct an evidentiary hearing to determine the truth of the allegations. This Court further held that a criminal defendant is not entitled to such a hearing as a matter of right. Instead, a hearing is required only when the trial court, in its discretion, concludes that an evidentiary hearing is needed to resolve material, disputed issues of fact. (*Hedgecock, supra,* 51 Cal.3d at 415.) *Hedgecock* also held that an evidentiary hearing should be conducted only when the defense has produced evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even in that situation, an evidentiary hearing is generally unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing. (*Id.* at p. 419.)

The decision whether to investigate the possibility of juror bias, as well as the decision whether to retain or discharge a juror, rests within the sound discretion of the trial court. (*People v. Engelman* (2002) 28 Cal.4th 436, 442; *Osband, supra,* 13 Cal.4th at p. 675; *People v. Ray* (1996) 13 Cal.4th 313, 343.) Appellate courts defer to the trial court's determination, on the basis of credibility, that a juror was biased. (*Nesler, supra,* 16 Cal.4th at p. 583; *In re Carpenter, supra,* 9 Cal.4th at p. 656.) The verdict will be set aside only if it appears there was a substantial likelihood of juror bias. (*Danks, supra,* 32 Cal.4th at p. 303; *In re Carpenter, supra,* 9 Cal.4th at p. 653.) The issue of whether prejudice resulted from jury misconduct is a mixed question of law and fact subject to an appellate court's independent determination. (*Danks, supra,* 32 Cal.4th at p. 303.) The reviewing court accepts the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. (*Id.* at p. 304.)

Here, Juror No. 040149 could not even say whether Juror No. 045829 was talking when he saw her near appellant's relatives. Moreover, his remarks implicitly indicated that, if Juror No. 045829 had overheard anything that was being said by appellant's relatives, Juror No. 045829 had not shared it with the jury. (RT 3018-3019.) Both the prosecutor and defense counsel did not seek any action by the court. (RT 3020.) Hence, there was no need for further investigation by the court. Nonetheless, Juror No. 045829 asked to talk to the court and, when she did, her remarks seemed to indicate that she had not been talking to appellant's relatives. (RT 3021-3022.) Therefore, even if, as appellant insists (AOB 276-277), the trial court should have conducted a hearing to investigate Juror No. 040149's statements, the situation was immediately remedied by Juror No. 045829's remarks to the court.

Respondent notes that the trial court had a very good reason to tell Juror No. 045829 that it did not know, nor did it want to know, what had been said in the jury deliberations room. Specifically, the law and the courts take very

seriously the confidentiality of jury deliberations. For example, as to a jury that may be deadlocked, a court may make only a "neutral inquiry into numerical division," which preserves the secrecy of jury deliberations. (See, e.g., *People v. Breaux* (1991) 1 Cal.4th 281, 319; *People v. Rodriguez* (1986) 42 Cal.3d 730, 776, fn. 14; but see *Brasfield v. United States* (1926) 272 U.S. 448, 450 [federal courts are prohibited from making any inquiry into numerical divisions of the jury, which was later found to be based exclusively on the High Court's supervisory role, and not on the Constitution] see *Lowenfeld v. Phelps* (1988) 484 U.S. 231, 239-240 [*Brasfield* rule found to be procedural].)

Furthermore, the secrecy rule as to juror deliberations likewise provided a very good reason for the trial court to decline to sua sponte investigate or explore Juror No. 045829's thoughts as to the murder verdicts that had already been rendered. Respondent notes that Juror No. 045829 did not mention any doubts or questions to the trial court; and when the penalty verdict was announced, Juror No. 045829 confirmed that it was her verdict. (RT 3025-3026.) Therefore, appellant's assertions (AOB 276-277) that the trial court had a duty to investigate any doubts in the mind of Juror No. 045829, or potential coercion of Juror No. 045829 to vote for a death verdict, based solely on Juror No. 040149's comments, is absolutely baseless.

In short, this Court should conclude that any presumption of prejudice arising from any conceivable misconduct was rebutted by the record, and that there was no prejudicial misconduct. (See, e.g., *Danks, supra,* 32 Cal.4th at p. 310.) Also, this Court should conclude that, having found no prejudicial misconduct, appellant's state and federal constitutional rights to due process, an impartial jury, fair trial, and reliable penalty verdict were not violated. (*Id.* at p. 269, modified at 32 Cal.4th 877a.)

For all these reasons, the trial court properly explored and rejected the idea that juror misconduct had occurred. Appellant's claim must be rejected.

XX.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL; THIS COURT HAS PREVIOUSLY REJECTED APPELLANT'S CLAIMS REGARDING THE VARIOUS ASPECTS OF CALIFORNIA'S DEATH PENALTY STATUTE

Appellant claims that California's death penalty statute, as interpreted by this Court and applied at his trial, violates the United States Constitution. (AOB 279-328.) Appellant raises numerous challenges to California's death penalty statute "in an abbreviated fashion," due to his concession that this Court has already rejected "most of" his claims. (AOB 279.) Appellant's concession is appropriate; this Court has previously rejected appellant's claims regarding the various aspects of California's death penalty statute. (See, e.g., *People v. Cole* (2004) 33 Cal.4th 1158, 1234-1235.) Because appellant offers no compelling reasons for reconsideration, his claims should be rejected.

A. Section 190.2 Is Not Impermissibly Broad

In Claim 1,[64/] appellant contends that California's death penalty statute is impermissibly broad because it does not "meaningfully narrow the pool of murderers eligible for the death penalty." (AOB 279-284.) This claim has been repeatedly rejected by this Court, and should be rejected here. (See, e.g., *Farnam, supra,* 28 Cal.4th at p. 192; *Ochoa, supra,* 26 Cal.4th at pp. 458-459; *People v. Kraft* (2000) 23 Cal.4th 978, 1078; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050; *People v. Frye* (1998) 18 Cal.4th 894, 1029; *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 465-468.)

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64. Respondent will refer to appellant's subheading notations in his Argument T (AOB 279-328).

B. This Court Had Repeatedly Upheld Section 190.3, Factor (a), Against Constitutional Challenges

In Claim 2, appellant contends that his death sentence is invalid because, as applied, section 190.3, factor (a), permits the arbitrary and capricious imposition of death. (AOB 284-287.) This argument has been previously rejected and should be rejected here. (See, e.g., *Maury*, *supra*, 30 Cal.4th at p. 439; *Jenkins*, *supra*, 22 Cal.4th at pp. 1050-1053; see also *Tuilaepa v. California, supra,* 512 U.S. at p. 976; *Kipp, supra,* 26 Cal.4th at pp. 1137-1138.)

C. This Court Had Repeatedly Found That California's Death Penalty Statute Contains Appropriate Safeguards To Prevent Arbitrary, Capricious Sentencing

In Claim 3, appellant makes a wide variety of sub-claims alleging a lack of appropriate safeguards in California's death penalty statute, each of which respondent will address in turn. But this Court has repeatedly rejected each of appellant's sub-claims, and should continue to do so here.

1. Appellant Has No Right To Beyond-A-Reasonable-Doubt Findings As To Each Fact Essential To The Imposition Of The Death Penalty

Appellant asserts that his constitutional rights were violated by the failure of the death penalty statute to require that the jury agree, unanimously and beyond a reasonable doubt, on the existence of aggravating factors as a prerequisite to the imposition of the death penalty. (AOB 287-303.) Appellant is wrong.

This Court first rejected this claim in *Rodriguez*, *supra*, 42 Cal.3d at pp. 777-779, and has done so ever since. (See, e.g., *People v. Sapp* (2003) 31 Cal.4th 240, 316-317, citing *People v. Bolden*, *supra*, 29 Cal.4th at p. 566; *Cox*,

supra, 30 Cal.4th at pp. 971-972; *People v. Snow* (2003) 30 Cal.4th 43, 125-127; *Burgener, supra*, 29 Cal.4th at p. 884, fn. 7; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1150-1151; *Barnett, supra*, 17 Cal.4th at p. 1178; *People v. Bradford* (1997) 14 Cal.4th 1005, 1059; *Clair, supra,* 2 Cal.4th at p. 691; accord, *People v. Mickey* (1991 54 Cal.3d 612, 701.) As this Court recently stated:

> "The Constitution does not require the jury to find beyond a reasonable doubt that a particular factor in aggravation exists, that the aggravating factors outweighed the mitigating factors, or that death was the appropriate penalty."

(*Cox, supra*, 30 Cal.4th at p. 971, quoting *Burgener, supra*, 29 Cal.4th at p. 884, fn. 7.)

Appellant, however, asks this Court to reconsider this position in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*). Specifically, appellant claims that the cases mandate that the aggravating factors necessary for the jury's imposition of the death penalty be found beyond a reasonable doubt. (See AOB 289-295.) This Court recently rejected this claim in *Snow, supra*, 30 Cal.4th at page 126, footnote 32:

> We reject that argument for the reason given in *People v. Anderson, supra*, 25 Cal.4th at pages 589-590, footnote 14, . . . : "[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without possibility of parole. (§ 190.2, subd. (a).) Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*." The high court's recent decision in *Ring v. Arizona* (2002) 536 U.S. 584 . . . does not change this analysis. Under the Arizona capital sentencing scheme invalidated in *Ring*, a defendant convicted of first degree murder could be sentenced to death if, and only if, the trial court first found at least one of the enumerated aggravating factors true. (*Id.* at [pp. 602-603].) Under California's scheme, in contrast, each juror must believe the circumstances in aggravation

> substantially outweigh those in mitigation, but the jury as a whole need not find any one aggravating factor to exist. The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another. Nothing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt.

(Accord, *Cox, supra*, 30 Cal.4th at pp. 971-972; *Smith*, *supra*, 30 Cal.4th at p. 642 [*Ring* and *Apprendi* "do not affect California's death penalty law"]; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) Appellant's claim should likewise be rejected here.

Appellant also claims that a unanimous jury finding is required on aggravating factors. But this Court has previously rejected this contention. (See e.g., *Maury*, *supra*, 30 Cal.4th at p. 440; *Jones*, supra, 29 Cal.4th at p. 1267; *People v. Seaton* (2001) 26 Cal.4th 598, 688; *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["We have consistently held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].)

At one point, appellant faults California as one of only four states that does not statutorily address a requirement that any aggravating factor be found true beyond a reasonable doubt. (AOB 289.) But this Court has rejected similar claims. (See, e.g., *People v. Lawley* (2002) 27 Cal.4th 102, 169; *People v. Sully* (1991) 53 Cal.3d 1195, 1251-1252.) Appellant's claim is without merit.

2. Appellant Has No Right To Instructions On A Burden Of Proof As To Each Fact Essential To The Imposition Of The Death Penalty

Appellant continues by claiming that the jury should have been instructed on a burden of proof, either a preponderance of the evidence or some

"tie-breaking rule," to guide its decisions on whether aggravating circumstances existed, whether aggravating circumstances outweighed mitigating ones, and whether death was the appropriate sentence. (AOB 304-306.) These claims have been rejected in prior decisions of this Court. (See, e.g., *Box*, *supra*, 23 Cal.4th at p. 1216; *Carpenter*, *supra*, 15 Cal.4th at pp. 417-418.) For example, in *Hayes*, *supra*, 52 Cal.3d at p. 577, this Court held:

> Because the determination of penalty is essentially moral and normative [citation], and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. [Citation.]

(*Id.* at p. 643; accord, *Sapp*, *supra*, 31 Cal.4th at p. 317; *People v. Bemore* (2000) 22 Cal.4th 809, 859; *Kipp, supra,* 18 Cal.4th at p. 381; *Daniels*, *supra*, 52 Cal.3d at p. 890 [during the penalty phase, "neither the prosecution nor the defense has the burden of proof"].) Consequently, the court had no duty to give such an instruction. (See *Kelly, supra,* 1 Cal.4th at p. 532 ["The court had no duty to give a legally incorrect instruction."]; see also *Frye*, *supra,* 18 Cal.4th at p. 1028 [a defendant "is not entitled to an instruction that misstates the law"]) Accordingly, appellant's claim is without merit.

3. The Jurors Were Properly Instructed On The Weighing Process Required To Determine The Appropriate Sentence

Appellant again continues by claiming that the trial court committed reversible error by failing to instruct the jury that there was no burden of proof in the penalty phase. (AOB 306-308.) In *Williams*, *supra*, 44 Cal.3d at p. 960, this Court stated:

> We are satisfied that the instructions now given to the jury regarding its obligation to consider any mitigating evidence proffered by a capital defendant are adequate to impress the jurors with the high degree of certainty a juror should have before voting to impose the death penalty.
>
> Also, as this Court pointed out in *Medina*, after stating the oft-repeated law that there is no burden of proof at the penalty phase, "Instead, as the jury is expressly instructed, the penalty is to be determined by a

> weighing of the applicable sentencing factors." (*Medina, supra*, 11 Cal.4th at p. 782, citing *Hayes, supra,* 52 Cal.3d at p. 643.) Hence, in an "inherently moral and normative" process such as the determination of the appropriate penalty for a special-circumstances murder (see, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 767; *People v. Sanchez* (1995) 12 Cal.4th 1, 81; *Rodriguez, supra*, 42 Cal.3d at p. 779), an instruction that there was no burden of proof is inapplicable and unnecessary.

Further, appellant's claim – that, in the absence of an instruction on the fact that there was no burden of proof, a juror may have voted for the death penalty "because of a misallocation of what is supposed to be a nonexistent burden of proof" – is not logical. In light of the fact that there was no burden of proof, any juror applying a burden of proof would have made it more difficult than necessary to impose the death penalty on appellant. This Court should reject appellant's claim.

4. Appellant Is Not Entitled To Written Jury Findings On Aggravating Factors

Appellant also complains about the lack of written jury findings on aggravating factors. (AOB 307-309.) However:

> The jury need not prepare written findings identifying the aggravating factors on which it relied. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1232, 47 Cal.Rptr.2d 800, 906 P.2d 1068.) Nor does the absence of any such requirement violate defendant's right to meaningful appellate review. (*Ibid.*)

(*Yeoman, supra,* 31 Cal.4th at p. 165; accord, *Prieto, supra,* 30 Cal.4th at p. 275; *Snow, supra*, 30 Cal.4th at p. 126.) Accordingly, appellant's claim is meritless.

5. Neither The Federal Constitution, Nor California Law, Requires Intercase-Proportionality Review

Appellant also challenges the lack of intercase-proportionality review.

(AOB 310-313.) But this Court has previously rejected the claim that such review is required. (See, e.g., *Snow, supra*, 30 Cal.4th at pp. 126-127.) Nor does a lack of such review violate the federal Constitution. (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51; *Cole, supra*, 33 Cal.4th at pp. 1234-1235; *Cox, supra,* 30 Cal.4th at p. 970; *Ochoa, supra,* 26 Cal.4th at p. 458.) Appellant's claim is meritless.

6. This Court Has Repeatedly Upheld The Admission Of Evidence Of Unadjudicated Crimes Pursuant To Section 190.3, Factor (b)

Appellant contends that any use of unadjudicated crimes was improper; he also asserts that, even if proper, the jury was required to unanimously find any such crime had been proven beyond a reasonable doubt. (AOB 313-314.) These claims have repeatedly been rejected by this Court and should be rejected here. (See, e.g., *Prieto, supra*, 30 Cal.4th at p. 276; *Hillhouse, supra,* 27 Cal.4th at p. 507; *Hart, supra*, 20 Cal.4th at p. 549; *People v. Smithey* (1999) 20 Cal.4th 936, 993.) And as previously noted, appellant's reliance on *Ring* and *Apprendi* is misplaced, as neither case affects California's death penalty law. (*Smith, supra*, 30 Cal.4th at p. 642.)

7. This Court Has Repeatedly Rejected Challenges To The Restrictive Adjectives Used In Section 190.3

Appellant claims that use of the word "extreme" in section 190.3, factors (d) and (g), and the use of the words "reasonably believed" in factor (f), was error. (AOB 280.) This claim, and other similar claims, have been previously rejected by this Court, and should be rejected here. (See, e.g., *Smith, supra*, 30 Cal.4th at p. 642; *Ochoa, supra*, 19 Cal.4th at p. 479; *Barnett, supra*, 17 Cal.4th at pp. 1178-1179; *Williams, supra*, 16 Cal.4th at p. 277.)

8. The Trial Court Properly Instructed The Jury On Mitigating Factors

Appellant insists that the trial court erred by failing to instruct that statutory mitigating factors were relevant solely as potential mitigators. (AOB 316-318.) Similar claims have been repeatedly rejected by this Court. (See e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 178 ["The trial court need not instruct the jury as to which factors under section 190.3 are aggravating and which are mitigating."]; *Cunningham*, *supra*, 25 Cal.4th at p. 1041 [noting previous rejection of such claims]; *Ochoa*, *supra*, 19 Cal.4th at p. 458.) Sentencing factors are not unconstitutional simply because they do not specify which are aggravating and which are mitigating. (*Bradford, supra*, 15 Cal.4th at p. 1383.) As this Court has stated, "the trial court's failure to label the statutory sentencing factors as either aggravating or mitigating was not error." (*Williams, supra*, 16 Cal.4th at p. 269, citing *McPeters, supra*, 2 Cal.4th at p. 1192.)

D. This Court Has Repeatedly Rejected Equal Protection Challenges To California's Death Penalty Statute

In Claim 4, appellant contends the alleged absence of procedural safeguards resulted in a denial of equal protection, because, according to appellant, those safeguards are provided to non-capital defendants. (AOB 318-325.) Once again, this Court has previously rejected this claim and should do so here. (See, e.g., *Yeoman*, *supra*, 31 Cal.4th at p. 165 ["The jury need not find beyond a reasonable doubt the truth of the aggravating factors on which it relies, that the aggravating factors outweigh the mitigating factors, or that death is the appropriate penalty. [Citation.] The absence of any such requirement does not render a death judgment unreliable, or violate due process or equal protection."]; *Prieto*, *supra*, 30 Cal.4th at p. 276 ["[T]he absence of intercase-proportionality review does not make the imposition of death sentences

arbitrary or discriminatory or violate the equal protection and due process clauses."]; *Anderson*, *supra*, 25 Cal.4th at p. 602 [rejecting the contention that intercase-proportionality review is required "as a matter of due process, equal protection, fair trial, or cruel and/or unusual punishment concerns"]; *Montiel, supra,* 5 Cal.4th at p. 943 ["The 1978 death penalty law does not deny equal protection insofar as it deprives capital defendants of the benefits of the Determinate Sentencing Act."]; *People v. Fauber* (1992) 2 Cal.4th 792, 848 [equal protection clause not violated by failure to require specific written findings on unadjudicated offenses in penalty phase].) Capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (See *Johnson*, *supra*, 3 Cal.4th at pp. 1242-1243.) Appellant's claim must be rejected.

E. This Court Has Repeatedly Affirmed California's Death Penalty Statute Against Challenges Based On International Norms

In Claim 5, appellant contends California's use of the death penalty violates international norms and violates the federal constitutional ban on cruel and unusual punishment under the Eighth and Fourteenth Amendments. (AOB 325-328.) But this Court has previously held that international law does not compel the elimination of capital punishment in California. (See *Snow*, *supra*, 30 Cal.4th at p. 127; *Ochoa, supra,* 26 Cal.4th at p. 462; *Jenkins*, *supra*, 22 Cal.4th at p. 1055 ["International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements."]; *People v. Ghent* (1987) 43 Cal.3d at 739, 778-779 [California's death penalty does not violate international law]; see also *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337, 370-376.) This Court also has rejected the contention that California's use of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the federal Constitution. (See *Boyette, supra,* 29 Cal.4th at p. 465; *People v.*

Fairbank (1997) 16 Cal.4th 1223, 1255; *Samayoa, supra,* 15 Cal.4th at pp. 864-865.) Appellant's death sentence was in accord with state and federal requirements; consequently, appellant's claim is without merit.

For all the foregoing reasons, appellant's challenges to California's death penalty procedures are meritless. Therefore, this Court should reject those claims.

XXI.

APPELLANT RECEIVED A FAIR AND UNTAINTED TRIAL; HIS CUMULATIVE ERROR CLAIM IS MERITLESS

Appellant also claims that the errors he has identified, both individually "and all the more clearly when considered cumulatively," denied his rights to due process, a fair trial, the right to confront the evidence against him, a fair and impartial jury, and to fair and reliable determinations of guilt and penalty. (AOB 329.) But appellant received a fair and untainted trial; his cumulative error claim is meritless. Thus, this Court should reject his claim.

A capital defendant like appellant is entitled to a fair trial, but not a perfect one. (See *Cunningham*, *supra*, 25 Cal.4th at p. 1009; *Box, supra*, 23 Cal.4th at p. 1214; *Marshall*, *supra*, 50 Cal.3d at p. 945; *People v. Hamilton* (1988) 46 Cal.3d 123, 156; see also *Schneble v. Florida* (1972) 405 U.S. 427, 432; see, e.g., *United States v. Hasting* (1983) 461 U.S. 499, 508-509 ["[G]iven the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial."].) But in a close case, the cumulative effect of multiple errors may constitute a miscarriage of justice. (*Bunyard*, *supra*, 45 Cal.3d at p.1236; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.)

Theoretically, the "cumulative errors doctrine" is always applicable in criminal cases. "The litmus test is whether defendant received due process and a fair trial." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.) Thus, 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.*) Generally speaking, an appellate court: (1) reviews each allegation; (2) assesses the cumulative effect of any errors; and (3) determines whether it is reasonably probable the jury would have reached a result more

favorable to the defendant in their absence. (*Id.* at p. 319.)

Here, for the many reasons articulated *supra*, review of the record, without the speculation and interpretation offered by appellant, shows that appellant received a fair and untainted trial. The Constitution requires no more. As the court in *United States v. Haili* (9th Cir. 1971) 443 F.2d 1295, observed, "[a]ny number of 'almost errors,' if not 'errors,' cannot constitute error." (*Id.* at p. 1299, brackets in original, quoting *Hammond v. United States* (9th Cir. 1966) 356 F.2d 931, 933.) Because the premise upon which appellant's argument rests (i.e., that prejudicial errors occurred) is false, his cumulative impact argument lacks merit. Simply put, four times zero still equals zero. (*People v. Beeler* (1995) 9 Cal.4th 994 [where none of claimed errors constitute individual errors, they cannot constitute cumulative error].) Hence, his cumulative error claim should be rejected. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1232.)

Moreover, even if errors did occur, neither singularly nor cumulatively do they establish prejudice requiring the reversal of appellant's death sentence because it is not reasonably probable that, absent the alleged errors, appellant would have received a more favorable result. (See *Jenkins*, *supra*, 22 Cal.4th at p. 1056; *People v. Gordon* (1990) 50 Cal.3d 1223, 1278 [a defendant is entitled to a fair trial, but not a perfect one], citing *Williams*, *supra*, 45 Cal.3d at p. 1333].) For all these reasons, this Court should reject appellant's claim of cumulative error.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: March 29, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

JULIE A. HOKANS
Supervising Deputy Attorney General

ERIC CHRISTOFFERSEN
Deputy Attorney General

JOHN A. THAWLEY
Deputy Attorney General

Attorneys for Respondent

JAT:wf
SA1996XS0009

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 72633 words.

Dated: March 29, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

JOHN A. THAWLEY
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY MAIL

Re: Robert Wesley Cowen **No. S055415**

I declare:

I am employed in the Office of the Attorney General. 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 March 29, 2005, I placed the attached:

RESPONDENT'S BRIEF

in the internal mail collection system at the Office of the Attorney General, 1300 I Street, Suite 125, Sacramento, California, 95814, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully postpaid, addressed as follows:

Mark Goldrosen
Attorney at Law
139 Townsend Street, Suite 201
San Francisco, CA 94107
(Representing appelllant)

Nina Wilder
Weinberg and Wilder
523 Octavia Street
San Francisco, CA 94102
(Representing appellant)

Governor's Office Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

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

Honorable Edward R. Jagels
Kern County District Attorney
1215 Truxtun Avenue
Bakersfield, CA 93301

Clerk of the Superior Court
Kern County
1415 Truxtun Avenue
Bakersfield, CA 93301

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on March 29, 2005, at Sacramento, California.

_____

DECLARANT