SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

DARRELL LEE LOMAX,
Defendant and Appellant.

S057321

CAPITAL CASE

SUPREME COURT
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DEPUTY

County Superior Court No. NA023819
The Honorable Margaret M. Hay, Judge

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DARRELL LEE LOMAX, Defendant and Appellant.	S057321 CAPITAL CASE

STATEMENT OF THE CASE

On May 26, 1995, in an information filed by the District Attorney of Los Angeles County, in case number NA023819-01, appellant was charged with murder (count 1; Pen. Code,[1] § 187, subd. (a)) and two counts of robbery (counts 2 & 3; § 211). It was alleged that the murder was committed during the course of a robbery (§ 190.2, subd. (a)(17)), and that appellant personally used a firearm in the commission of the murder (§ 12022.5, subd. (a)). As to each robbery count, it was also alleged that appellant personally used a firearm (§ 12022.5, subd. (a)). As to all counts, it was further alleged that at the time of the offenses appellant was on bail or on his own recognizance (§ 12022.1). (1CT 47-49, 480.)

Appellant pled not guilty and denied the allegations. (1CT 75-76.) The court bifurcated the allegation that appellant was out on bail when he committed the charged offenses.[2] (3CT 480-481.)

Trial was by jury. (3CT 517.) Appellant was convicted as charged,

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

2. This charge was eventually dismissed pursuant to a request by the prosecution. (RT 2208.)

except for the allegation that appellant was on bail when he committed the charged offenses. (3CT 629-631.) The penalty phase was also by jury. The jury fixed the penalty at death. (3CT 666, 673-674.)

On October 16, 1996, the court denied probation and affirmed the imposition of the death penalty on count 1. (3CT 686-694, 696-703, 704-706D.) As to the remaining counts, the court stayed imposition of the sentence in count 2, and as to count 3, the court imposed five years for the robbery and an additional five years for the gun use. Appellant was given credit for 1167 days of presentence custody, consisting of 779 actual days and 388 days good time/work time. (3CT 691-703.)

This appeal is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

GUILT PHASE

Prosecution

The Robbery Of James Edge

James Edge owned a Laundromat at 3331 East 4th Street in Long Beach. (RT 1186-1187.) On August 25, 1994, Edge went to his Laundromat to repair a change machine. He finished at about 1:30 a.m., locked up the Laundromat, and walked toward his car. He picked up some beer bottles lying in the parking lot. Appellant and a woman approached in a Ford Taurus. Appellant asked whether the Laundromat was open. Edge replied that it opened at 6:00 a.m. Edge threw the beer bottles in a trash can and walked to his car. The Taurus turned around and parked. Appellant abruptly approached Edge and "stuck a gun in [his] ribs." Appellant said, "Give me all your money. Give me everything you got." (RT 1188-1189.) Edge gave appellant about $200, a day planner, his set of keys, and some envelopes. Edge noted the vehicle's license

plate number (3GVV520) and contacted the police. (RT 1189.)

Edge was shown People's Exhibits 1 through 4 (car photographs), and testified that each picture depicted the car used in the robbery. (RT 1190.) He identified People's Exhibit 5 as "similar to the same gun" used in the robbery. Edge had noted that the dark-colored gun was an automatic because appellant "racked the automatic portion of the weapon." (RT 1190-1191.) Shortly after the robbery, Edge was shown a photographic line-up by Detective Arcala and identified appellant as the robber. (RT 1192.)

In March of 1995, Edge attended a live line-up at the county jail and identified appellant from among six similar looking persons. (RT 1192-1193, 1207.) Edge was told that the robbery suspect may have been involved in a murder. (RT 1202.) Edge did not review the six-pack or his prior description of the robber when he made the live identification. (RT 1205.) Edge identified appellant in court and was "certain" that appellant was the robber. (RT 1191-1192.)

The prosecution requested that appellant repeat the words spoken by the robber, to give Edge an opportunity to identify the voice of the robber. The defense objected. (RT 1207-1208.) The court ruled that appellant had to make the statement in court. (RT 1211-1213.) Appellant refused to utter the words. (RT 1213.) The court instructed the jury:

> We will take up where we left off. The last thing before lunch was the People were asking if [sic] the defendant be asked to stand and say the words, "Give me your money, wallet and everything, and give me all that stuff."
>
> I did give that order to the defendant. He refuses to say those words. You are now informed of that refusal. That witness has been excused.

(RT 1219.)

The Robbery and Murder of Nassar Akbar

A. The Commission Of The Crimes

Sompop Mannil owned the P & B Market on August 29, 1994. His market was robbed and he determined that the monetary loss was $68. Nasser Akbar was his employee. Akbar was killed during the robbery. (RT 1594-1595.)

Prior to trial, Angela Toler admitted taking part in the robbery and murder of Akbar, which occurred at P & B Market on August 29, 1994, at approximately 11:00 p.m. She pled guilty to robbery and use of a firearm and was sentenced to 10 years in prison. She agreed that she would testify truthfully in the case against appellant in exchange for not being prosecuted for murder. She testified truthfully at the preliminary hearing and intended to testify truthfully at trial. (RT 1221-1222.)

In August of 1994, Toler lived at 440 Orange, Long Beach, California. Toler's friend Iheshia Sullivan lived across the street. Toler met appellant through Sullivan. About a week before the murder, Toler went to Sullivan's apartment and appellant was present. Toler recalled seeing appellant "about twice" before the murder. Each time was at Sullivan's apartment. (RT 1222-1224.)

In the afternoon of August 29, 1994, appellant asked Toler to "[h]ook him up with a lick." (RT 1225.) Toler understood this to mean that appellant wanted her to show him a place where he could commit a robbery. Sullivan was initially going to be involved in the robbery, but ended up staying home to care for her children. (RT 1225-1226.)

Toler smoked phencyclidine ("PCP") about six hours before the robbery. (RT 1226, 1306-1307.) Smoking PCP made Toler "high," but did not affect her ability to see, hear, or understand what occurred around her, or to remember events. She had been smoking PCP for about one year prior to the robbery.

She had never lost consciousness or become uncontrollable. It made her "meaner" sometimes. (RT 1306-1307, 1310-1311.) She was not under the influence of PCP during the robbery. (RT 1243, 1307.)

At about 10:30 or 11:00 p.m., Toler and appellant left Sullivan's apartment in a rented Ford Taurus. The Taurus looked similar to the car depicted in People Exhibit 4. Toler was driving. They went to a liquor store, but decided there were too many people around to commit a robbery. They then went to P & B Market, which was near the intersection of 4th and Cherry, and parked around the corner. (RT 1226-1229.) They got out of the car and walked to the parking lot. Both Toler and appellant were carrying guns. Toler was carrying a chrome-plated pink-handled semiautomatic handgun (People's Exhibit 6). Appellant was carrying a dark-colored semiautomatic handgun (People's Exhibit 5). (RT 1230-1231.)

Toler and appellant entered the market and both announced that they were committing a robbery. Akbar was standing behind the counter and was facing toward appellant and Toler. Akbar took money from the register and handed it to appellant. Akbar also took some money from a brown paper bag and handed it to Toler. (RT 1231-1232.) Another employee appeared briefly during the robbery. (RT 1233-1234.)

After Akbar handed the money to appellant and Toler, Akbar did not say anything, make any gestures, or reach for any object. Nonetheless, appellant shot Akbar twice. Akbar fell to the floor. Appellant reached over the counter and shot Akbar two more times as he lay on the floor. Then appellant shot at a security camera. Appellant fired his gun a total of five times. (RT 1234-1236, 1302-1303.) Toler did not discharge her gun. She had it pointed at the other clerk who appeared during the course of the robbery. (RT 1236-1237.)

Cleavon Knott was a private security guard. Knott went to the P & B Market shortly after 11:00 p.m. Knott was familiar with the market because he

helped his friend Akbar close the market nearly every night for a couple of years. (RT 1326-1327.)

Knott drove into the market's parking lot. While still in his car, which was facing toward the market, Knott saw appellant and Toler inside the market. Both appellant[3] and Toler[4] had guns which were aimed toward Akbar. (RT 1328-1332.)

Akbar was behind the counter. Another clerk was standing to the side near a second cash register. Toler had her gun pointed at Akbar. She took something off the counter and then "flinched." That is when Knott heard gun shots. Knott saw appellant shooting Akbar. (RT 1335-1338.) Appellant fired three rapid shots into Akbar. Akbar fell to the ground. Appellant reached over the counter and fired another shot at Akbar while he was on the ground. As appellant was leaving the market, it appeared that he fired another shot back toward the other clerk inside the market. (RT 1338-1340.)

As Toler and appellant ran out of the market, appellant "ran directly up on [Knott]." Knott was first able to fully see appellant's face. (RT 1332-1333.) Knott was about 16 feet away from appellant and Toler when they ran out of the market. (RT 1341.) Toler was wearing a long T-shirt, stretchy pants or leotard, and striped shoes. (RT 1363.) Appellant and Toler ran toward Cherry, but Knott did not see them get into a car. (RT 1344.)

Knott went inside the market. The second clerk was crouching by the

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3. Knott had seen appellant earlier in the day. (RT 1342.) He saw appellant on the stairway of an apartment building. He had seen appellant with Toler several times during the week before the murder. (RT 1364.) Appellant had a thin mustache and braids in his hair that week. (RT 1369-1370.)

4. Knott recognized Toler from seeing her around Long Beach. Knott saw her congregate with a group of people in front of her home. Toler lived across the street from Knott's sister. Knott's sister and Toler did not know one another. (RT 1341-1342.)

freezer. Akbar was laying face-down in a pool of blood. Knott went to Akbar. Akbar was still alive and said, "Help me friend." (RT 1342-1343.) Knott did not want to talk to the police. When the police arrived, Knott was "blocked in by patrol cars" and did not feel he could leave. He spoke with some police officers briefly. (RT 1344-1345.)

According to Knott, People's Exhibit 5 looked like the gun appellant used to kill Akbar. Knott had been able to see that appellant's gun was a semiautomatic. Toler had used a chrome semiautomatic handgun which appeared to be a .38 or a .25-caliber weapon. People's Exhibit 6 looked like the gun used by Toler. (RT 1334.)

B. Investigation At P & B Market

Long Beach Police Officer Ernest Armond and his partner, Officer Brad Scavone, responded to a dispatch call for an assault with a deadly weapon and robbery. They proceeded to the P & B Market. Officer Armond was familiar with the market and personally knew Akbar. (RT 1398-1399, 1412.) When they arrived, people were standing in front of the market and saying that someone had been shot. (RT 1400, 1412-1413.)

Officer Armond observed Akbar lying face-down, in a pool of blood, on the floor behind the counter. Akbar tried to speak, but Officer Armond did not understand. He called for paramedics and attempted to stop the bleeding by applying pressure to the wounds. Akbar continued to lose color and bleed. He tried to speak, but eventually stopped breathing. (RT 1408-1409.)

After the paramedics took Akbar to the hospital, Officer Armond and his partner attempted to contact witnesses and search for evidence inside the market. They discovered nine-millimeter shell casings. (RT 1410, 1413.) There were also bullet fragments and several broken bottles of liquor in the area behind the counter, near the video camera. (RT 1410-1411.)

Long Beach Police Officer Kevin Bradburn took part in the investigation at P & B Market. Officer Bradburn found the nine-millimeter shell casings. He did not find any other shell casings, or any ammunition of another caliber. (RT 1421-1423.)

Long Beach Police Officer Douglas Hara participated in the search for evidence at the P & B Market. (RT 1519-1521.) People's Exhibits 21, 22, 23, and 24 were shell casings. People's Exhibit 21 was a brass nine-millimeter shell casing and was found just north of the front door to the market. People's Exhibit 22 was a spent nine-millimeter shell casing and was found on the counter next to a cash register (depicted in People's Exhibit 11). (RT 1522-1524.) People's Exhibits 23 and 24 were both spent nine-millimeter shell casings that were found on top of the candy containers (depicted in People's Exhibit 13). (RT 1524.) Officer Hara searched the entire market and did not find any other shell casings other than the nine-millimeter casings. (RT 1524-1525.)

People's Exhibit 25 was a bullet fragment found on the floor behind the counter near the victim (depicted in People's Exhibits 14, 15 & 20). (RT 1525.) People's Exhibit 26 was a bullet fragment found on the counter next to the cash register (depicted in People's Exhibit 16). (RT 1526.) The counters were three feet and three inches above the floor. (RT 1527.) People's Exhibit 17 depicted the market's security camera which had been hit by a bullet. No other ballistic evidence was found in the vicinity of the security camera. (RT 1526.)

On September 4, 1994, in the afternoon, Long Beach Police Officer John Helms recovered a gold-colored nine millimeter shell casing from P & B Market. The shell casing was recovered slightly to the left of the second cash register, between the counter and some paper bags sitting on top of the cigarette rack. (RT 1472-1474.)

C. Traffic Stop And Field Show-Up

After the shooting, Toler and appellant fled to the Taurus and then drove to Toler's home. Toler went inside her home and dropped off her gun and her share of the money. Appellant went across the street to Sullivan's apartment. About five minutes later, Toler went to Sullivan's apartment. Appellant was in the bathroom. Appellant took off the black T-shirt that he wore during the robbery and put on a white T-shirt. Toler returned to her home and got her gun. (RT 1237-1239.)

Appellant, Toler, and Sullivan left together and drove around. Toler was driving. They drove around for "[n]o reason at all." Toler told Sullivan about the robbery. (RT 1239-1240.) After midnight, they were stopped by the police in Belmont Shores. The police told them to get out of the car. Afterwards, the police found Toler's gun stuck between two car seats. (RT 1241.)

On August 30, at 12:20 a.m., Long Beach Police Officer Timothy Everts and his partner, Officer Russel Moss, were on patrol in Long Beach. Officer Moss was driving. Officer Everts spotted a Ford Taurus (depicted in People's Exhibits 1-4). The Taurus was traveling westbound on 2nd Street approaching Livingston. After the driver made an illegal lane change, the officers followed the Taurus and signaled for the driver to pull over. (RT 1431-1434, 1451-1453.)

After the Taurus came to a stop, Officer Everts approached the car. Toler was driving and Sullivan was in the front passenger seat. Appellant was sitting in the right rear passenger seat. Officer Everts noticed that appellant was Black and that his hair was in braids, and determined that he might be a suspect in the robbery and murder. Appellant moved his shoulders and had his hands in between his legs. (RT 1434-1437, 1453-1455.)

All three occupants were ordered to get out of the car. They complied. After appellant, Toler, and Sullivan had been searched, Officer Everts went

back to the Taurus and found a Glock nine-millimeter semiautomatic handgun (Glock), in a map holder that had been directly in front of where appellant had been sitting (depicted in People's Exhibit 19). The Glock was pointed with the handle out, which would allow a person to grab the gun easily. The Glock had a magazine. Both the Glock and its magazine contained bullets (People's Exhibit 5). (RT 1437-1438.) Appellant was arrested and booked. Among the items taken from appellant, there were two $10 bills, two $5 bills, one $2 bill, eleven $1 bills, and 57 cents in change ($43.57 total). (RT 1438-1439.)

Long Beach Police Detective Ralph Garcia was one of the follow-up officers who assisted after the traffic stop of appellant, Toler, and Sullivan. Detective Garcia searched the Ford Taurus and found a Lorcin .25 caliber semiautomatic handgun. The Lorcin had a magazine which contained bullets (People's Exhibit 6). (RT 1457-1459.) The Lorcin was located in between the front seats, with the pink grip protruding out and the barrel pointing downward (depicted in People's Exhibit 36). A right-handed driver could grab the gun while it was in that position. (RT 1459-1460.)

Long Beach Police Officer John Bruce assisted in the search of the Ford Taurus. He searched the trunk and the rear passenger seats. He found several items in the trunk. Among these items included a black ski mask and a black corduroy jacket with a large "F" on the chest. Both the mask and the jacket were found inside the same plastic bag. (RT 1462-1464.)

Officer Bruce was responsible for booking the evidence recovered from the Ford Taurus. He checked both firearms. The Glock had 11 rounds of ammunition in the magazine and one round in the gun itself. Fully loaded the gun contained 18 bullets: 17 in the magazine and one in the chamber. (RT 1465-1467.) The Glock was semiautomatic: when fired it automatically loads a new bullet in the chamber and expels the expended round's shell casing. (RT 1467-1468.) The Lorcin .25 caliber semiautomatic gun had five bullets in the

magazine and one bullet in the chamber. Fully loaded the gun contained eight bullets: seven in the magazine and one in the chamber. (RT 1468-1469.)

Long Beach Homicide Detective William Collette, and his partner, Detective Logan Wren, were assigned to investigate the crimes committed at P & B Market. When they arrived at the market, the entire parking lot was circumscribed by yellow police tape. (RT 1533-1536.) Later that night, Detectives Collette and Wren went to the field show-up for appellant, Toler, and Sullivan. Detective Collette spoke briefly with Knott, who said that he was not sure of the identity of the robbers. (RT 1538-1539.)[5]

Detective Wren spoke with Gary Thornton, who was present at the field show-ups for appellant, Toler, and Sullivan. Thornton told Detective Wren about a conversation he had with Cleavon Knott after the field show-ups had been conducted. Knott had said that although he had not made an identification, the police had arrested the correct people. (RT 1605-1606.)

Detective Wren drove from the crime scene to where appellant was arrested. The distance was 2.2 miles and the trip took five minutes traveling at 30 miles per hour. The distance between the crime scene and Toler's residence was half of a mile and the trip took one minute traveling at 25 miles per hour. (RT 1612-1613.)

D. Toler's Confession

Detectives Collette and Wren spoke with Toler at an office at the police

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5. Knott had also seen Sullivan congregate with people across the street from his sister's home. He did not socialize with Toler or Sullivan because he did not "socialize with those kind of people." (RT 1365.) Several times he saw appellant getting into a black hatchback parked in front of Sullivan's house. One of the women always drove. (RT 1366-1367.) Although Knott only saw appellant during the week leading up to the murder, he had seen the other women travel together in the black car for about a month. He saw them when he visited his sister, who lived across the street from Sullivan. (RT 1367-1368.)

station during the early morning hours after the shooting. During the first 15 to 20 minutes of the interview, Toler denied any involvement in the shooting. She spoke slowly and looked down at the floor. However, Toler admitted her involvement in the shooting after Toler was told that she had been identified as the girl in the market with the chrome gun. Toler never asked for leniency, special treatment, or any deal. Toler was not offered any kind of deal. (RT 1543, 1600-1603.) Toler appeared to be ashamed, guilt ridden, and feeling very badly about what had happened. She hung her head and would not look into the detectives' eyes. (RT 1547.)

Toler admitted that she and appellant had gone out to do a "lick." Toler did not know appellant's name. Toler was driving appellant's car. They parked on Cherry near 4th Street. Toler was armed with a small chrome .25 caliber automatic and appellant was armed with a large dark-colored gun. Both Toler and appellant had their guns drawn during the robbery. They entered the market and appellant ordered Akbar to give him the money. Akbar complied. Appellant took the money and then fired shots into Akbar. Akbar fell to the floor. Appellant learned over the counter and fired additional shots into Akbar as he was laying on the floor. (RT 1544, 1602-1603.)

Toler saw another clerk appear near the rear of the market. Toler pointed her gun at the second clerk, but did not fire at him. After appellant shot Akbar, she and appellant ran out of the market. Toler drove them to Sullivan's apartment on Orange Avenue. Toler and appellant stayed at the apartment for a while. Toler went home. A short time later, Toler, appellant, and Sullivan went out together and were later stopped by the police. (RT 1603.)

Detective Collette used a tape recorder to memorialize Toler's statement. He did not record the entire interview because this was a poor technique for interviewing suspects. Toler was not threatened or promised any reward for making the statement. At the time of the interview, Detective Collette was

aware that the victim had already died and therefore the case might involve a capital crime. Toler was not threatened with the death penalty, although she was informed of the potential charge of robbery-murder. (RT 1544-1547.)[6]

E. Police Interviews With Knott

On August 30, 1994, the day after the murder, Detectives Collette and Wren spoke with Cleavon Knott down the street from Knott's residence. When confronted with his statement to Thornton, Knott expressed that he was fearful of getting involved. However, Knott said he could identify appellant and Toler as the robbers, he had seen them among the three suspects at the field show-up, and he had seen them before in the neighborhood. (RT 1538-1540, 1605-1607, 1609-1610, 1653.) Knott knew Toler by her nickname, "Chocolate." (RT 1540.)

Knott's sister and her children lived in the area of 5th and Orange, which was near the residences of Toler and Sullivan. Knott was afraid for his safety, and the safety of his family, because he believed that Toler and appellant were involved in gangs and drugs and would retaliate against him if he cooperated with the police. (RT 1540-1541.) Knott had seen Toler and appellant together on prior occasions before the murder. (RT 1541.)

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6. According to Toler, she was interviewed by Detectives Wren and Collette at a police station several hours after the robbery. Initially, Toler lied to the police about her name and her involvement in the robbery. The police told Toler that she had been identified as a perpetrator. Subsequently, Toler truthfully told the police her real name and that she participated in the robbery. The police did not threaten Toler or make her any promises. She was not under the influence of PCP when she was interviewed. (RT 1242-1243, 1273, 1312-1313.) The amount in her system was "low" at the time she was interviewed. Toler felt "okay" and was not tired during the interview. (RT 1307-1308.) There was no agreement in place regarding Toler's sentence when she pled guilty. (RT 1244.) Toler did not feel threatened when the interviewing officers mentioned that the case could involve the death penalty. (RT 1312-1313.)

Subsequently, Knott left a message on Detective Collette's answering machine indicating that he wanted to talk about the murder. On September 1, 1994, Detective Collette had another conversation with Knott near his home. Knott reiterated his identifications and his fear of cooperating. However, Knott agreed to testify, despite his fear, because he had been friends with Akbar and felt cooperating was "the right thing to do." Knott did not mention his traffic tickets or warrants to the police during any of these interviews or conversations. He did not request any assistance of any kind. (RT 1541-1543, 1607-1608.)

A few months later, Knott contacted Detective Wren. Detective Wren assisted Knott in getting some traffic warrants dismissed. Knott did not offer his cooperation in exchange for Detective Wren's assistance. Detective Wren assisted Knott to avoid the risk that Knott would end up incarcerated with appellant before Knott was able to testify in court. During his 30-year tenure as a police officer, there had been confrontations between incarcerated defendants and witnesses which affected the case afterwards. Detective Wren was concerned about such a confrontation in this case. (RT 1608.)

F. Knott's Explanation Of His Actions

Knott explained that he had initially lied to the police when they arrived at the market to investigate the shooting. He purposely gave them an erroneous description of the car used by appellant and Toler. He said the car was a short white Oldsmobile. Knott did not want to get involved because he recognized Toler as one of the assailants. (RT 1345, 1359-1362.)

Later that night, Knott was asked to view some people in a field show-up. Knott recognized appellant and Toler as the perpetrators. However, Knott told the police that he "was not sure" because he did not want to be involved in the matter because his sister, his niece, and his nephew, lived too close to the defendants. Knott feared appellant and Toler and did not want to have any

problems with them. (RT 1346-1347, 1349-1350.) Knott feared them because they had committed a hideous crime very close to his sister's home, and there was "no telling what they would do to [Knott] and his family." (RT 1348.) Also, Knott had already had run-ins with people he associated with Toler. (RT 1348-1349.)

However, after the field show-up, Knott spoke with Gary Thornton. (RT 1346-1347.) A day or so after the crime, Knott told Detectives Wren and Collette what had really happened. He told them essentially what he had testified to at trial. (RT 1350.)

Knott had a number of traffic tickets that had gone to warrant. The following year, in 1995, the detectives assisted Knott in getting those cases dismissed. (RT 1350-1351.) This was not done in exchange for Knott's testimony. Rather, it served two purposes. First, it allowed Knott to travel back and fourth from court without any confrontations with the police. Second, by avoiding time in jail, there was no chance that appellant could find Knott while he was serving a jail term. This was important to Knott and was the main purpose for getting the traffic ticket cases dismissed. (RT 1350-1351.) Three of the matters involved fines amounting to $565, $391, and $835. (RT 1387.) Knott did not pay these tickets because he needed the money to support himself and help his sister's family. (RT 1388-1391.) When Knott told the police the truth the day after the murder, there was no discussion or agreement regarding his traffic tickets. (RT 1392.)

On the night of the robbery and murder, Knott was carrying a firearm in his car without lawful authority. Knott told the police about the gun. The statute of limitations had already run by the time of trial, so the prosecution had not granted him immunity from prosecution. (RT 1351-1356)

G. Appellant's Live Line-Up

Detective Wren had been a homicide detective for 23 years. On March 29, 1995, he attended a live line-up at Los Angeles County Jail. (RT 1596-1597.) People's Exhibit 42 was a photograph depicting the live line-up conducted on March 29. Appellant was in position number four. (RT 1612-1613.) There was a standard six-person line-up and each witness was given the standard admonishment. The witnesses were admonished orally and in writing:

> (1) You are going to view a line-up of six similar appearing individuals.
>
> (2) The suspects involved in your crime may or may not be in this line-up.
>
> (3) You are under no obligation to identify anyone as a suspect.
>
> (4) The purpose of this line-up is to eliminate any innocent persons as well as identify the persons responsible.
>
> (5) Do not talk to each other during the line-up.
>
> (6) If you have a question after the line-up is completed, raise your hand and an officer will contact you. Otherwise, please mark your document as appropriate and an officer will collect it.
>
> (7) There may be prosecuting attorneys present who wish to speak to you regarding your case. You are under no obligation to speak to them or answer their questions. Whether you do or not is entirely up to you.
>
> (8) There may also be attorneys representing various defendants who may wish to speak with you regarding your case. You are under no obligation to speak to them or answer their questions. Whether you do or not is entirely up to you.

(RT 1596-1598.) One of the sheriff's deputies also admonished the witnesses to focus on the faces of the persons in the line-up because some aspects of a person's appearance could change. (RT 1598-1599.)

According to Detectives Wren and Collette, Edge attended the line-up

and identified appellant. Knott also attended the line-up and identified appellant. (RT 1547-1548, 1599-1600.) Each of the witnesses was kept away from the others as well as the lawyers and police detectives. (RT 1664.)

H. Firearms Examination Evidence

Los Angeles County Deputy Public Defender Isaacson Sheriff Dwight Van Horn was assigned to the sheriff's crime lab as a firearms examiner and a tool mark examiner. His basic duty was to determine whether a bullet or cartridge or some other ammunition component was fired from a particular gun. (RT 1571.)

Deputy Van Horn explained that when a bullet passes down the barrel of a firearm it becomes engraved in a process called "riffling." When the riffling patterns of two bullets matched, then they were fired from the same gun. Sometimes the riffling on a particular bullet was insufficient in quality or quantity to draw the conclusion that a bullet was fired from a particular gun. This result was called an "inconclusive opinion." (RT 1573-1574.)

Deputy Van Horn also explained that a cartridge case could be matched to a particular gun. This was based on looking at the imprint left by the "breach face" of the gun on the back end of the cartridge case. Like the marking left by riffling, the marks left by the breach face were unique to a particular firearm. (RT 1573-1574.)

Deputy Van Horn explained that some guns are manufactured by creating a barrel of a certain size and then using a tool to cut the groves inside the barrel. This results in conventional riffling which makes very distinct marks on the bullet. The gun tested by Deputy Van Horn was manufactured by a process known as hammer forging, which did not create the same kind of accidental characteristics seen in conventional riffling. However, the general characteristics of the hexagonal profile are very distinct and readily

distinguishable from conventionally riffled guns. Glock is the only company that uses the hexagonal profile. Another company, H & K, uses a similar method called polygonal riffling, but the difference in the markings from Glock guns and H & K guns are readily apparent under a microscope. (RT 1577-1578.)

People's Exhibits 21 though 24, and People's Exhibit 35 were expended nine-millimeter caliber cartridge cases. People's Exhibits 25 and 26 were fragments from a nine-millimeter caliber bullet jacket. People's Exhibits 31 and 32 were bullet fragments. People's Exhibits 33 and 34 were expended nine-millimeter caliber bullets. People's Exhibit 5 was a Glock manufactured model 199 semiautomatic pistol. Deputy Van Horn conducted a comparison between the Glock and the bullets, cartridge casings, and bullet fragments. The gun was test fired and the bullets and cartridge cases were compared with the bullet and cartridge evidence found at P & B Market. (RT 1574-1576.)

As to People's Exhibits 21 though 24, and People's Exhibit 35, Deputy Van Horn concluded that these cartridge casings had been fired from the particular Glock recovered by the police (People's Exhibit 5). This conclusion was drawn from comparing the marking caused by the breach face on these casings with the marking on test-fired casings. Each gun creates unique markings, and here the markings on the recovered cartridge casings matched the markings on the test-fired cartridge casings. (RT 1580-1584.)

Deputy Van Horn concluded that People's Exhibits 33 and 34 were nine-millimeter bullets. As to People's Exhibits 25 and 26, as well as People's Exhibits 31 and 32, Deputy Van Horn drew the conclusions that these bullet fragments came from bullets that were at least nine-millimeter in caliber. Deputy Van Horn concluded that the bullets were fired from a Glock handgun based on the riffling and the size of the bullets. Deputy Van Horn was unable to conclude that the bullets and bullet fragments came from a particular Glock

pistol. He did conclude that none of the bullets or bullet fragments could have been from .25 caliber bullets. (RT 1579-1580.)

The Glock could hold a maximum of eighteen nine-millimeter bullets. The Glock was a semiautomatic pistol that ejected a cartridge casing each time the weapon was fired. The Glock could hold one round of ammunition in the chamber with an additional 17 rounds of ammunition in the magazine. (RT 1584-1585.) The magazine was loaded from the top against a spring. Accordingly, it became progressively more difficult to load the magazine as it neared full capacity. There was a popular notion that leaving one bullet out of the magazine prevented wear on the spring-component of a gun. (RT 1585-1586.) People's Exhibit 27 was 11 live rounds of nine-millimeter caliber ammunition and People's Exhibit 28 was a single round of nine-millimeter caliber ammunition. These live rounds could be loaded into the Glock's magazine (People's Exhibit 5). (RT 1586-1587.)

I. Fingerprints And Gunshot Residue Evidence

Long Beach Police Officer Albert Bratcher was the Identification Officer for the city's crime laboratory. Officer Bratcher was responsible for collecting and preserving physical evidence such as gunshot residue, fingerprints, and photographs. (RT 1558.) Bratcher collected the fingerprint samples from appellant, Toler, and Sullivan. Bratcher also looked for fingerprints at the crime scene, but did not find any of the suspects' fingerprints. (RT 1550-1551, 1559-1560.)

Bratcher explained that he rarely found fingerprints on guns, but it depended on the type of surface on a particular gun. Guns with rough or porous surfaces, such as People's Exhibit 5, were less likely to hold fingerprints. Also, Fingerprints could be wiped away when the gun was placed in a pocket or bag. Bratcher did not find any of the suspects' fingerprints on the

recovered guns (People's Exhibits 5 & 6). (RT 1550-1551, 1561-1562.)

Appellant, Toler, and Sullivan were given gunshot residue tests after they were arrested. The results of the tests were negative. The test involved taking samples from a suspect's hands and then testing the samples under a microscope for the presence of gunshot residue. The test did not always reveal whether a suspect had handled or fired a weapon for various reasons: a gun may not leave residue, residue dissipates, and residue can be washed off. (RT 1548-1550.)

J. Drug Recognition Expert Testimony

Long Beach Police Detective Wayne Watson was a certified drug recognition expert assigned to the drug investigation section. (RT 1476, 1480-1482.) Detective Watson attempted to perform a drug recognition examination of appellant. Appellant indicated he did not want to participate in the test. However, Detective Watson was able to converse with appellant briefly and watch appellant as he walked or moved. Based on his observations, Detective Watson did not notice any impairment due to drugs or alcohol. (RT 1482-1483.)

Detective Watson performed a drug recognition examination of Toler the morning after the robbery. She stated that she had used PCP at about 6 p.m., on Monday night, but was not under the influence of the drug during the examination. Detective Watson concluded that Toler was not under the influence of PCP, appeared to understand what was said, gave answers that made sense, and was not emotionally distraught. She did appear to have some lingering effects from the PCP and she appeared tired. (RT 1483-1485.) The effect of PCP will wear off after about four to six hours after ingesting the drug. A person could be under the influence of PCP and still be able to see, hear, and understand what is happening around them. PCP had been refined in recent

years to prevent uncontrollable behavior in the user and the users typically ingested less of the drug to prevent uncontrollable behavior. (RT 1485-1488.)

K. Autopsy

Dr. Eugene Carter was a Medical Examiner for Los Angeles County's Department of Coroner. He reviewed the autopsy report for Nasser Akbar. (RT 1498-1499.) A toxicology screening was performed on Akbar. There were no drugs or alcohol detected in his blood stream. (RT 1508-1509.) Akbar was 5' 4" tall and weighed 189 pounds. (RT 1509.)

People's Exhibit 39 depicted two bullet wounds to Akbar's right lower front leg (gunshots I & II). People's Exhibit 40 depicted bullet wounds to his left front chest and side lower chest and abdomen (gunshots III & IV). People's Exhibit 41 depicted an exit wound beneath Akbar's right armpit caused by gunshot III. (RT 1500-1501.) People's Exhibit 34 was the bullet recovered from Akbar's right upper arm. Gunshot III went all the way through Akbar's body and lodged in his upper arm. (RT 1502.) People's Exhibit 33 was a bullet found in Akbar's spine. People's Exhibit 32 was a piece of deformed lead which was part of the lead slug found in the wound on the lower-part of Akbar's right lower leg. People's Exhibit 31 was a deformed piece of lead with its copper jacket found in the upper-part of Akbar's right lower leg. (RT 1502.)

Gunshot I hit Akbar's right leg below the knee traveling from left to right into tissues and hitting bone. The projectiles recovered were the copper-jacketed bullets where the slugs had separated from the casings. Each was found within an inch of the other inside Akbar's body. (RT 1503.) Gunshot II was a wound below the wound caused by gunshot I. The projectile recovered was a lead slug fragment. The wound and fragment could have been caused by gunshot I, or it could have been caused by a second bullet that struck something else before hitting Akbar's body. (RT 1503.) Neither wound would be

expected to cause death. (RT 1503.)

Gunshot III entered Akbar's front left abdomen at about the level of his naval. That bullet traveled from front to back, left to right, and steeply upward. The bullet climbed 10 inches and went through Akbar's spleen, liver, and lung, then exited through his chest, and then re-entered at his upper arm (gunshot wound V). The wounds caused by gunshot III were consistent with a shooter standing on his feet firing downward into a prone victim laying on his side. These wounds were fatal. (RT 1503-1506.) Gunshot wound IV was caused by a bullet that traveled from left to right into the spine and spinal cord. This wound was also fatal. (RT 1507.) Akbar died of multiple gunshot wounds. (RT 1509.)

L. Appellant's Gesture To Toler During The Week Of Trial

Angela Toler saw appellant in the courthouse the week of his trial. When appellant saw Toler, he raised a finger to his lips. Toler interpreted this gesture as a request or order for her not to say anything. (RT 1322-1323.)

Defense

The Robbery Of James Edge

Sally Elliot was an investigator. On March 2, 1995, she went to the residence of James Edge. She left her business card because Edge was not at home. A person identifying himself as "James Edge" called her later that day. Elliot asked Edge some questions regarding his photographic identification and the connection between the person who robbed him and the shooting that took place days later. Edge said he picked appellant's photograph because it was "closest one" or the "closest person" to the person who robbed him. (RT 1689-1691.) Edge also said that he got a good look at the robber and could probably identify the robber if he saw him in person. (RT 1694-1696.)

The Robbery And Murder Of Nassar Akbar

On August 29, 1994, around 11:00 p.m., Tena Delaguerra was near the corner of 4th and Cherry when she heard gunshots. Two Black people ran out of the market and continued on Cherry toward 7th Street. They got into a dark blue or black car. (RT 1667-1668.) Another Black man drove into the parking lot outside the market from Cherry. Delaguerra saw this man again later on when he was talking to the police. He was wearing a security guard jacket. Delaguerra thought that "maybe" the Black man drove into parking lot after the shots were fired. However, she was "not really sure" because "everything happened so fast." (RT 1669-1671.)

Delaguerra wore glasses to correct farsightedness. However, she was not wearing her glasses when she heard the gunshots. Due to her vision problem and the amount of distance involved she was unable to identify whether the fleeing Black persons were male or female. She could not recall the make or the color of the car she saw enter the parking lot. (RT 1672-1674.) After hearing the gunshots, Delaguerra went across the street. When the police arrived, the Black man she saw pull into the driveway got out of his car. She spoke with the man, but did not remember the conversation. When Delaguerra spoke with the police, she did not mention any other witnesses. (RT 1675-1677.)

Leo Hurd was a Deputy Probation Officer for Los Angeles County. During November of 1994, Officer Hurd interviewed Angela Toler for the purpose of creating a probation and sentencing report. According to his report, Toler reported that she took Dilantin to help control grand mal seizures. She also admitted that she used phencyclidine (PCP) and alcohol. Toler said that she had used PCP the day that she was arrested and was under the influence during the robbery and murder. Toler stated that she drank about five days a week and would consume a fifth of bourbon. Officer Hurd conceded that he

had no actual recollection of the interview with Toler and could not pick her out of a photographic line-up. (RT 1679-1682.) However, Officer Hurd endeavored to make accurate reports and believed Toler's report was accurate. (RT 1683.) At the time the interview, Officer Hurd was aware that Toler had already accepted a plea bargain that included a 10-year prison term. (RT 1683-1684.)

Daniel Mendoza was a licensed private investigator assigned to appellant's case. In 1996, he took photographs of the crime scene in the daytime. He also measured certain distances by "pacing heal to heal." These distances were reflected on the chart he had created. His shoe size was 9 ½. He also took some photographs of a white Cutlass Oldsmobile. He believed the car was made in 1978 or 1979. (RT 1685-1688.)

Dr. Terence McGee was a medical doctor who specialized in addiction medicine and ran drug testing programs for Children and Family Services Departments of Los Angeles County, Ventura County, and Tulare County, as well as the Inglewood Police Department. From 1975 through 1978, Dr. McGee was an Inglewood police officer who arrested people for being under the influence of various drugs. (RT 1710-1712.) Dr. McGee lectured extensively, trained police officers, and consulted with the California Attorney General's Office. (RT 1713-1714.)

According to Dr. McGee, the effect of marijuana on the central nervous system was "difficult to say." When a person smokes marijuana, it typically causes an increased heart rate, bloodshot and watery eyes, and a sleepy or droopy visage. Marijuana causes people to focus on one particular item. If a person was experiencing fear, marijuana use could intensify the fear. (RT 1715-1716.) Marijuana sold at the time of trial was "more powerful" than marijuana sold ten to fifteen years prior to trial. (RT 1719.) A dose of marijuana lasted four to six hours. (RT 1720.) Long term users developed a

tolerance to the effects of marijuana. (RT 1720.)

Phencyclidine ("PCP") was initially created as a "dissociative anesthetic," but was abandoned due to its long-term side effects such as memory loss. (RT 1717-1718.) PCP was no longer legally made and illegal production created different analogs of the drug. (RT 1718-1719.) PCP users had told Dr. McGee that the effects of PCP lasted four to six hours. Very high doses could cause the effect to last for days. The effect depended on the person taking the drug and the amount of the drug taken. (RT 1720-1721.)

Alcohol initially acts as a stimulant and eventually becomes a depressant. Alcohol can intensify emotional states of mind. A person who drank a "fifth of bourbon" five times a week consumed an extremely high amount of alcohol. (RT 1718.) A person under the influence of alcohol could exhibit symptoms such as watery eyes, slurred speech, changes in gate and balance, and flushing. (RT 1733.)

Nicotine was a highly addictive stimulant commonly ingested by smoking cigarettes. (RT 1719.)

The defense asked Dr. McGee about the cumulative effect long term use of cigarettes, alcohol, and PCP had on a person's brain. Dr. McGee responded that it was impossible for him to say with any degree of certainty without examining the individual drug user. (RT 1719, 1734.) Dr. McGee had never met or examined Toler. Nor had he reviewed the recorded part of the police interview with Toler. (RT 1735.)

Dr. McGee reported that in general, long-term users of PCP had obduntation or very flat moods. People with obduntation were "blunted" or "something less than sharp." (RT 1719-1720.)

A person under the influence of PCP typically smelled like ether and had very rigid or robot-like coordination. They had a "Frankenstein kind of walk." They also had a blank stare on their faces. Some police officers called such a

look the "thousand yard stare" because the user appeared to be "looking through" people. (RT 1731-1732.) They typically had involuntary bouncing of the eyes in lateral and vertical directions. This was known as horizontal and vertical nystagmus. (RT 1732.) Sometimes users grind their teeth. Speech patterns were delayed in a significant way which was noticeable to the average person. (RT 1732-1733.)

Generally, a low or moderate dose of PCP did not deprive a person of their ability to see, hear, and understand what is going on around them. This could only occur as a result of a very high dose. (RT 1735-1736.) Dr. McGee testified that he had no idea what Toler had said during her testimony and did not know whether she had observed the murder as she described it during trial. (RT 1736.)

People could build a tolerance for drugs and alcohol, meaning that if they used the same amount they had used in the past they would be less affected by the drug. (RT 1734.) Smoking a whole marijuana cigarette dipped in PCP could be considered a "strong dose," depending on the amount of PCP in the marijuana cigarette. (RT 1737-1738.)

PENALTY PHASE

Prosecution

A. Appellant's Other Crimes

1. Attempted Carjacking Of Donna Annas

On June 24, 1987, Donna Annas celebrated her birthday with a friend in a restaurant. Afterwards, she went to her car. She was alone. After starting her engine, she heard a tapping on her window. She looked out her window and saw appellant, who was indicating that he wanted to know the time. She looked at her clock, rolled down her window a bit, and then looked up at

appellant. Appellant was pointing a gun at her through her window. Appellant said, "Get out of the car, you fuckin' bitch." (RT 1981-1983.)

The gun was about 8 inches from her head. Annas stuck her finger in the barrel of the gun, sounded the horn, pushed the accelerator, and yelled for help. Appellant again ordered her to get out the car, but as she continued to back her car up, appellant abandoned the carjacking and walked out of the parking lot. Annas parked her car and went back in the restaurant to tell her husband, who was the restaurant's manager, what had happened. (RT 1984-1985.)

She reported the incident to the police and later identified appellant from a photographic six-pack. She attended appellant's sentencing hearing. She heard appellant pled guilty and offer the explanation that he had committed the carjacking and shooting because he felt bad after he had not received a birthday present for his birthday. (RT 1985-1986.) As a result of appellant's actions, Annas was much more apprehensive about getting in her car and dealing with strangers. She refused to go to downtown Portland for years and eventually left the city. (RT 1986.)

2. Attempted Murder Of Dennis Bryant

Dennis Bryant was a security guard for a restaurant in Portland, Oregon. He was armed with a nightstick. As he was escorting an employee to her car, he noticed a commotion in the parking lot. He heard a car horn and saw appellant walking away from the car. Bryant followed appellant for a while. They suddenly encountered each other as they came from opposite sides of a blind corner. Bryant told appellant to return to the restaurant, but appellant refused. Bryant said words to the effect that he could identify appellant and that he was going to call the police. Appellant took out a gun and said, "You ain't got shit mother fucker." (RT 1952-1956.)

Bryant begged appellant not to shoot. Appellant fired a shot that went

past Bryant's ear. Bryant heard the bullet pass by his head and took cover behind a telephone pole. Appellant fired a second shot that struck the telephone pole. Appellant fired a third shot that missed Bryant and hit a stucco house. Appellant ran away and Bryant went back to the restaurant. The police had arrived and Bryant told them what had happened. (RT 1956-1959.) Bryant identified appellant in a field show-up after the incident. (RT 1960-1961.)

Bryant went to appellant's plea and sentencing hearing. Appellant explained to the judge that the day before the incident was his birthday, and he was angry because nobody gave him a birthday present. Appellant felt his situation justified his actions. (RT 1960-1961.)

Ronald Mitchum observed appellant attempt to shoot Bryant. Mitchum was sitting on his front porch, which was in the vicinity of Northeast 7th and Skylar in Portland, Oregon. According to Mitchum, appellant was pacing back and forth with one hand underneath his shirt. Appellant walked toward a blind corner and was confronted by a security guard who was coming from the other side of the blind corner. The security guard was not holding a gun. After the security guard tried to grab appellant, appellant started shooting at the security guard. Appellant fired either two or three shots while the security guard was trying to take cover behind a telephone poll. (RT 1943-1946.)

Appellant ran away and somebody chased after him. Mitchum and his roommate followed them for about nine blocks and then returned home. They reported the incident to the police and later identified appellant as the shooter. He could still recognize appellant. (RT 1946-1947.)

3. Attempted Murder Of Brian Bachelor, Keith Jacobs, And Brian Widmer

On April 27, 1994, Brian Bachelor lived in Portland, Oregon, with Keith Jacobs and Mark Ball. At 8:00 p.m., Brian Widmer telephoned Bachelor at work and asked if he could bring a person to the house to get some marijuana.

Bachelor agreed and asked his friend to use good judgment as Bachelor had never previously sold marijuana to strangers. (RT 1988-1990.)

At about 8:30 p.m., Bachelor arrived home and saw that Jacobs, Ball, and Scott Cody, were also home. A little later, Widmer arrived with appellant and two other men that Bachelor did not know. They came into the garage where Bachelor was working on his car. They went into the house and hung out playing music and talking for about an hour. Bachelor eventually left to pick up some marijuana. Cody and Ball also left the house at some point. (RT 1990-1992.)

After Bachelor returned, the remaining group smoked marijuana, except for appellant, who was standing off to the side of the group. Everyone was sitting except appellant, who was leaning against a wall. Appellant was wearing a coat, even though it was April and the weather was warm. In the kitchen, Bachelor tried to the show two of the strangers the marijuana he had picked up, but they did not look at the marijuana and instead moved around the room. Appellant was not in the kitchen at the time. Eventually, appellant entered the kitchen and pointed a gun at Bachelor. Appellant told Bachelor, Jacobs, and Widmer, that he was going to "blow their fucking heads off," and directed them into a bathroom. The other strangers ransacked the home and stole marijuana and money. (RT 1992-1996.)

Appellant made the men empty their pockets and continued threatening to kill them. None of the men resisted or argued with appellant. The other strangers tied their hands and feet together. They were placed face-down on the floor. Appellant turned out the light, said "good night," and then started shooting. A bullet went through Bachelor's shoulder. Appellant and the other men left. Bachelor and Widmer were able to get up and free themselves. Jacobs remained on the floor. He was bleeding from his head, but he was still conscious. They went next door to call 911, because the assailants had ripped

the phone from the wall. Paramedics arrived and rendered aid. The police also arrived. Bachelor was sure that appellant was the man who shot him and his friends. (RT 1997-2000.)

Keith Jacobs also testified about the shootings. Jacobs was at home with his roommates, when Brian Widmer brought appellant and two other men to the house. Eventually Jacobs, Bachelor, Widmer, appellant, and the two other men were congregated in the living room. Appellant and the two other men wanted to buy some marijuana. They all smoked marijuana that evening. Bachelor left and later returned on his motorcycle. Jacobs was preparing to leave, when appellant pointed a gun at his face and ordered him to put up his hands. (RT 2092-2097.)

He was led into the bathroom along with Bachelor and Widmer. Appellant forced them to empty their pockets. Appellant took Jacobs's jacket. Jacobs also handed over the change in his pocket. He also took property from Bachelor and Widmer. The other men came in and all three victims had their hands bound. They were ordered to lie down on the floor. Their feet were also bound and then "it got really quiet" and Jacobs believed they were going to be murdered. Appellant said, "Get a knife. I am going to kill these guys." Then there was silence again. The bathroom light was turned off, appellant said something like "good night" and then fired four shots. (RT 2097-2099.)

A bullet struck Jacobs below his ear and came out just above his right eye. The bullet tore out Jacobs's sinuses, fractured his jaw, and destroyed his eye. His eye was subsequently removed. After counsel refused to stipulate that Jacobs had lost his eye, Jacobs lifted his eye patch and displayed what was underneath for the jury. (RT 2099-2101.)

After the assailants left the house, Widmer got up and untied Bachelor. Widmer went next door to use the telephone and Bachelor untied Jacobs. Jacobs remained conscious as a neighbor applied a towel to his head and spoke

with him to keep him from becoming unconscious. The police arrived. Jacobs was taken to the hospital and eventually his eye was surgically removed. Jacobs could no longer fly on airplanes or go scuba diving. Jacobs lived in Connecticut and had traveled by train to California. He had trouble with depth perception. He only went back to the house to pick up his belongings. Appellant was the only person who had a gun. Jacobs was certain appellant was the man with the gun that night. (RT 2101-2103.)

4. Appellant Attacks Los Angeles County Sheriff's Deputy Joe McCaleb

Los Angeles County Sheriff's Deputy Joe McCaleb was assigned as a bailiff in the courtroom used for appellant's trial. By September 27, 1995, Deputy McCaleb had been escorting appellant from the courtroom into lock-up for about six months. At around noon on September 27, after a short hearing, Deputy McCaleb was escorting appellant back to the lock-up facility. Appellant had a chain around his waist and his hands were handcuffed to his sides toward the front of his body. (RT 2047-2050.)

When they reached appellant's cell, appellant turned around and Deputy McCaleb uncuffed his hands and took off his waist chain. Deputy McCaleb was only armed with pepper spray because firearms were not permitted in the lock-up area. Deputy McCaleb ordered appellant to enter the "five-cell" in lock up. Appellant failed to comply and stated that he had property in "four-cell." (RT 2050-2053.)

Deputy McCaleb had observed that appellant appeared upset during the trial proceeding, so he had called for some assistance, but the lock-up unit was short staffed that day. The procedure followed in lock-up required that the only other deputy on duty at that time had to remain in a control both. Under these particular circumstances, Deputy McCaleb decided to show extra patience and explain to appellant that he would put him in five-cell temporarily and then put

him in four-cell when he retrieved the proper keys. Appellant responded, "Why in the fuck didn't you explain it to me the first time." Deputy McCaleb repeated his order for appellant to enter the cell and put his hand on appellant's shoulder to guide him into the cell. Appellant hit Deputy McCaleb with his right hand, causing him to "see stars." Then appellant rapidly struck him in the head four to six times. Deputy McCaleb yelled for help as he attempted to fend off blows. When he heard help arriving, Deputy McCaleb "blindly threw a couple of punches to distance himself" from appellant. Another deputy arrived and together they attempted to subdue appellant by taking him to the ground. Appellant was able to resist their efforts. The deputies did not strike appellant. (RT 2052-2056.)

Deputy McCaleb retreated momentarily and pulled out his pepper spray. When he returned showing the pepper spray, appellant dropped his hands and walked into his cell. Deputy McCaleb suffered a concussion and had visible lumps on his forehead and the side of his head. He was off duty for three weeks and on light duty for two additional weeks. (RT 2057-2058.)

5. Appellant Threatens Witnesses During Trial

Tom Duker was in the courtroom when his wife Donna Annas testified during the penalty phase and remained in the courtroom after the jury had been excused and the judge left the courtroom. He saw appellant write on a piece of paper and then display the message "I will be out" in large letters to the group of people in the back of the courtroom. When people began discussing appellant's display, appellant tore-up the paper into little pieces. (RT 2025-2027.)

Dennis Bryant saw appellant write and display the note to people in the audience section of the courtroom. Appellant ripped up the note. Appellant also mouthed the work "mother fucker" at Bryant. Bryant understood

appellant's action as a threat. (RT 2028-2032.)

Officer Ernest Armond was in the courtroom after the judge and jury had left. He saw appellant hold up a sign that said "I will be out." Officer Armond went to the defense table and saw appellant tear up the sign (People's Exhibit 43). (RT 2033-2034.)

B. Victim Impact Evidence

Officer Armond had known Akbar since January of 1993. He considered Akbar a good friend because he had always been friendly and kind to Officer Armond while he was still a rookie and stressed out. (RT 2035-2036.)

When Officer Armond arrived at the market, Akbar was still alive, laying face-down in a pool of blood. Akbar was trying to speak and losing color. He turned very pale and took his last breath in front of Officer Armond. Officer Armond spoke to Akbar, but did not know if Akbar could hear him. Officer Armond had worked on other cases in which people had been shot or injured, but none of these cases, before of after Akbar's death, had the same effect on him as Akbar's death. Officer Armond could still picture the scene and that he had done everything to help Akbar before he died. (RT 2036-2037.)

During August of 1994, Hilda Kelly operated an antique store located at 412 Cherry Avenue in Long Beach. She had operated the business for about eight years at that time. She knew Akbar because she frequently made purchases at P & B Market. She had known him for over six years and saw him about five days a week. Akbar would occasionally come to her store and discuss family, business, living in America. Akbar was a happy man who wondered why Americans had become so violent. The area had changed over time from a quiet community to one affected by drugs, panhandlers, and

unscrupulous characters. She described Akbar as "the loveliest person she had ever met." Akbar was always helpful and had an even temperament. He felt pride in living in America and was also proud that his children were doing well in school. He asked about the welfare of others and would do kind deeds. The community was shocked when people discovered Akbar had been murdered. (RT 2038-2042.)

Kelly could not go back to the market. She started looking for a new location for her business. By the time of trial she had moved her business. She was afraid of the area where he was murdered. For months after Akbar's death, she believed that Akbar would return because she was so shocked by his death. She learned that Akbar had died after she approached the crime scene. Kelly fainted when she discovered he had been killed. After reading the newspaper, she saw appellant's picture and realized that he had been around P & B Market earlier in the evening that Akbar was murdered. (RT 2042-2045.)

Razieh Mardemomen was Akbar's widow. They had been married for 17 years and had two children, who were 16 and 17 years old when their father was murdered. They came to America in 1977. They both worked and raised their family together. Her husband was "everything to her" because she was not close to anyone else in America. He worked very hard and was a kind husband and a good father. (RT 2068-2071.) He worked very long hours every day, despite the strain that this put on him because his family was in an unfamiliar country. (RT 2072.) Her life was significantly harder emotionally and financially because she was alone with two daughters. Her daughters had also suffered emotionally from the loss of their father. (RT 2073.)

C. Appellant's Prior Convictions

A "priors packet" (People's Exhibit 44) was from Oregon Department of Corrections showed that appellant was received into the Oregon Department

of Corrections on March 1, 1988, was placed on parole on October 28, 1993, and his parole was set to end on October 27, 1997, as long as his parole was not revoked. (RT 2085-2089.)

Robert Wynne was an identification officer for the city of Long Beach Police Department assigned to Detective Bureau Special Investigation Division Crime Lab Latent Fingerprint Detail. He held this position for 26 years. Officer Wynne had obtained a fingerprint exemplar from appellant (People's Exhibit 45). Appellant initially refused to give an exemplar while he was in lock-up. Appellant again refused when he was brought to the courtroom. Appellant gave an exemplar after the court ordered him to do so. The fingerprints taken from appellant matched the fingerprints contained in People's Exhibit 46. (RT 2110-2113.)

Defense

On September 27, 1995, at around noon, Roman Cooper was in the lock-up area of the courthouse. Appellant was talking with a bailiff. The bailiff put his hand on appellant's shoulder, appellant objected, and then tried to grab the bailiff's hand. The bailiff grabbed appellant again and they began fighting. Both people were throwing punches. (RT 2124-2128.) Cooper was a convicted back robber and also had a conviction for sodomy with a person under 14 by means of force. Cooper was a registered sex offender. He also had been convicted for illegal possession of a concealed firearm. (RT 2138-2139.)

The parties stipulated that if called, Gaylin S. Muakawa, would testify that in his interview on December 19, 1995, Roman Cooper stated with regard to this incident: "The defendant sustained bruises on his face and eyes." (RT 2142.)

Alvin Carney had been appellant's stepfather since appellant was seven years old. He had been with appellant's mother for 20 years preceding

appellant's trial. He had lived with appellant for about 14 years. Carney worked in the shipyards for 16 years and then went on disability after he was injured. When Carney met appellant's mother, she worked for a bank. Appellant had a brother and a sister. (RT 2142-2144.)

When appellant was a "little kid," he was a "good kid" who minded his stepfather. He made Carney feel like he was his "real father." They had a lot of fun together playing sports. Appellant treated other people well and "got a little job taking care of little kids." Carney had never known appellant to be violent, disrespectful, or a user of drugs or alcohol. Carney's thought that appellant did not deserve the death penalty because he did not believe in capital punishment and he also believed that appellant could help other people in prison. He believed appellant could "do something productive with his life" while in prison. Despite the fact that appellant had been convicted of murder, Carney's opinion of appellant did not change. (RT 2144-2146.)

Appellant was never abused by Carney, his mother, or anyone else. He had a good home, enough food, and he attended school regularly. Carney was aware of appellant's prior convictions for attempted robbery and attempted murder and that appellant had spent time in prison for these crimes. Carney's opinion that appellant was a "good kid" would remain the same regardless of what crimes, convictions, or testimony the prosecutor presented to him. Carney was unaware that appellant had changed his name from Darrel Lee Lomax. Carney could not see appellant robbing or killing. He did not believe appellant committed any of the crimes for which he had been convicted. (RT 2146-2151.)

Abdul Hasan was appellant's uncle and he had known appellant all of his life. Hasan was a Muslim. About two or three years before trial, appellant went to Hasan and expressed that he was fearful of government and society. Appellant wanted to know if there was "any escape from oppression or

persecution of those who do underhanded things." Hasan advised appellant to turn to God and practice the Islamic faith. Thereafter, appellant changed his name from Darrel Lee Lomax to Malik Hassan. (RT 2152-2154.)

While growing up appellant was a joyous person, very compassionate, fun loving, and a wonderful child. Hasan never saw appellant act violently or steal anything. Hasan was "not surprised" that appellant had been convicted of "heinous crimes," but was "fairly sure" that he did not commit the crimes. (RT 2154-2155.) As far as Hasan was concerned, all of appellant's convictions were based purely on false accusations and false evidence. (RT 2156-2157.) Hasan apparently did not personally know, but was aware of appellant's stepfather, stating that: "I knew he was around." As far as Hasan knew, appellant grew up in a good home and was never abused by his mother or step father. (RT 2158-2159.)

Angela McCall met appellant in 1994. They started a relationship which produced a child. During their relationship, McCall never saw appellant use drugs or alcohol, engage in criminal activity, or possess a weapon. Appellant was a person who liked "to eat, [and to] laugh." They "talked a lot" together. She had never seen appellant become hostile with anyone. She had never heard him curse. Appellant was not abusive to McCall or any of her children. In her opinion, appellant did not deserve the death penalty because he was not a vicious person, and he could help raise his son even if he spent his entire life in prison. (RT 2161-2163.)

McCall clarified that she had known appellant for about three months. Appellant never lived with McCall. They were initially friends, but later started having sexual intercourse. Appellant was at her house on a daily basis, until one day he called and told her he was gone. Appellant's child was born after he left Portland. McCall was aware that appellant had been released from custody, but did not know he was on parole and never asked him about his

convictions. She did not know he had been convicted of attempted murder and attempted robbery. She never asked appellant if he had a job. She just saw him in the evenings when she was not working. (RT 2163-2167.)

Saundra Carney was appellant's mother. She was a Muslim. She separated from appellant's natural father while she was pregnant. She raised appellant by herself, until she married Alvin Carney. She already had two children when appellant was born, and it was difficult for her to raise three children by herself. She was not employed until appellant was about five years old. Appellant was a "fairly good child" in that he engaged in childish behavior, but never criminal behavior. Appellant was good with other people and had a mild disposition. (RT 2169-2173.)

When appellant was about six, he caught a cold and almost died. Appellant was rushed to the hospital and had surgery, even though Carney was not consulted because she was at work at the time. Appellant went to live with his biological father for about one year when he was 12 or 13 years old. When appellant returned, he started hanging out with the wrong crowd and would stay out late. Appellant's convictions for violent crimes were inconsistent with the way he was raised. Appellant should not be executed because he was not a "bad person." Carney did not believe that appellant would take a life unless he was threatened. She thought the death penalty was no more than a "legal way" of "doing the same thing" (committing murder), and the death penalty "didn't seem to be a deterrent." She thought that appellant could "help other people his age get their lives together." Also, appellant was only 25 years old and had been in jail or prison most of his adult life. She supported appellant during this period of time. (RT 2173-2176.) She did not believe that appellant had actually committed the crimes for which he had been convicted, although he was with the people who committed the attempted murder. (RT 2186-2188.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS BECAUSE APPELLANT FAILED TO ESTABLISH ANY VIOLATION OF HIS STATUTORY, STATE CONSTITUTIONAL, OR FEDERAL CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL OR TO DUE PROCESS

Appellant's first claim on appeal is that the State's failure to comply with the statutory and constitutional obligations to provide discovery caused appellant to suffer a violation of his state and federal rights to a speedy trial and due process of law. (AOB 34-85.) Respondent disagrees. Appellant has failed to establish any violation of his rights to a speedy trial or to due process because (1) the trial court acted within its discretion in denying his speedy trial motion, (2) appellant was not prejudiced, and (3) appellant waived his speedy trial claim by failing to make a timely assertion of his claim.

A. Relevant Proceedings

1. Summary Description Of The Relevant Proceedings

The instant matter involves two cases. Case Number NA021332 was initialed on September 1, 1994. In that case, appellant and Toler were charged with the Akbar robbery/murder, and appellant and Sullivan were charged with the Edge robbery. The main prosecutor was Deputy District Attorney Steve Schreiner. The public defender's office declared a conflict as to Toler and Sullivan, but did not declare any conflict as to appellant. During that case, appellant either represented himself or was represented by Deputy Public Defender Isaacson. Appellant was provided with an investigator and discovery while he represented himself. During that case, appellant admitted that he had invoked his right to self-representation as a ruse to acquire an attorney other that

Deputy Public Defender Isaacson. That case was dismissed on March 13, 1995, after a writ of mandate was issued by the court of appeal. That case was pending for between six and seven months.

The instant case, Case Number NA23819, was initiated on March 13, 1995, and charged appellant with the Akbar robbery/murder and the Edge robbery. In October of 1995, the prosecution committee determined it would seek the death penalty. The main prosecutor was again Deputy District Attorney Steve Schreiner.[7] During the beginning of the instant case, either appellant represented himself or was again represented by Deputy Public Defender Isaacson.[8] However, in November of 1995, Deputy Public Defender Isaacson informed the court that the public defender's office potentially had a conflict to representing appellant. The matter was investigated by independent counsel and, in February of 1996, the court found that the public defender's office had a conflict and could not represent appellant. The public defender's officer was relieved as counsel, and the court appointed Counsel Randy Short to represent appellant. In December of 1996, appellant refused to personally waive time, but agreed to waive time at subsequent hearings. In May of 1996, the court denied appellant's motion to dismiss the case based on speedy trial grounds.[9] On September 3, 1996, a jury was empaneled to try the case. The instant case was pending for about 18 months.

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7. On some occasions, when Deputy District Attorney Schreiner was engaged in trial or ill, another Deputy District Attorney would appear on behalf of Deputy Schriener.

8. On some occasions, when Deputy Public Defender Isaacson was engaged in other matter, another Deputy Public Defender would appear on behalf of Deputy Isaacson.

9. The court of appeal denied appellant's mandamus/prohibition petition, and the California Supreme Court denied appellant's petition for review.

2. Full Description Of The Relevant Proceedings

Appellant, Toler, and Sullivan were arrested on August 30, 1994. On September 1, 1994, appellant, Toler, and Sullivan appeared in court for case number NA021332. The public defender moved to represent all three defendants, and requested a continuance. The prosecution stated it was probably inappropriate for the public defender to represent all three defendants. The public defender stated that because it had not received discovery before that day, his supervisor had specifically instructed the deputy to move to represent all three defendants, even though it was likely that there were conflict issues. The court told the defendants that the public defender's office needed "some time to sort things out" and asked if this was okay. Appellant and both co-defendants replied yes. (Supp. III 1CT 2-5, 8-10.)

On September 8, 1994, the public defender declared a conflict as to the co-defendants, but continued to represent appellant. (Supp. III 1CT 14-19.) Appellant requested to represent himself, but refused to answer any questions by the court. Appellant refused to enter a plea, stating that he pled to no one but Allah. (NA021332 1RT 6-7.) The Deputy Public Defender asks for time to speak with appellant about motions, including the possibility of renewing the motion for self-representation. (NA021332 1RT 8.)

On September 16, 1994, the court granted appellant's request to represent himself. (NA021332 1RT 10-12; Supp III 1CT 20.) On September 21, 1994, appellant appeared in pro per and agreed to a preliminary hearing on the September 28, 1994. (Supp. III 1CT 24.) On September 28, 1994, appellant made a motion for discovery and requested a continuance until October 26, 1994. The court appointed John Rice as appellant's investigator. (NA021332 1RT 22-23, 27-28; Supp. III 1CT 30-39.)

On October 7, 1994, Deputy District Attorney Schreiner was engaged in trial and the matter was trailed for discovery compliance. (NA021332 1RT

31-32; Supp. III 1CT 43-44, 46.) On October 11, 1994, appellant stated he had the police reports, but that addresses were blacked out. The prosecutor stated the addresses would be given to appellant's investigator, but not to appellant. The court found the prosecution was in substantial compliance with discovery. (NA021332 1RT 33-39 (Supp. III CT 47.) On October 26, 1994, appellant told the court his investigator had received discovery, but appellant had not received copies, and appellant was informed that his investigator was somewhere on other business. Appellant stated he was prepared for the preliminary hearing because he had reviewed all discovery except for the autopsy report. The matter was continued over appellant's objection because a co-defendant had established good cause. (NA021332 1RT 44-50; Supp. III 1CT 54-59, 80.)

On November 8, 1994, a felony complaint was filed. Appellant was charged in both crimes, Toler in the Akbar robbery/murder, and Sullivan in the Edge robbery. (Supp. III 1CT 85-89.) On November 18, 1994, appellant was held to answer after the preliminary hearing. (Supp. III 1CT 95-123, 125.) Toler pled guilt to robbery. The remaining charges were dismissed, and she was sentenced to state prison for a term of ten years. (Supp. III 1CT 126-128.)

On December 2, 1994, an information was filed against appellant. (Supp. III 1CT 129-132.) After the court denied appellant's request for co-counsel status, appellant invoked his right to counsel. (NA021332 2RT 4-10, 12-15; Supp III CT 133-145.) Appellant admitted that he had invoked his right to go pro per because he did not like Deputy Public Defender Isaacson and wanted to wait "until something else comes along." (NA021332 2RT 11-12.) Appellant stated he did not want reappointment of Deputy Public Defender Isaacson, and asked for a different lawyer, who would allow appellant to direct the defense. (NA021332 2RT 15.) The court found that appellant was unable to understand court procedure and was unable to answer a question put to him by the court. Based on the record, the court denied appellant's request to

represent himself in Superior Court and appointed counsel. (NA021332 2RT 15-16.)

On December 5, 1994, the court revisited appellant's request to represent himself, and determined that his inability to answer questions and his propensity to ramble and repeat himself would cause him to be unable to examine witnesses and reduce the trial to a farce. The prosecution warned the court that appellant had a right to go pro per and that it appeared that appellant was trying to manipulate the court into causing reversible error. (NA021332 2RT 20-22.) Defense counsel refused to allow the court to interview appellant about pro per status. The court stated that appellant had a right to represent himself and could make such a request if he desired. (NA021332 2RT 23-24.)

On January 12, 1995, appellant moved through counsel to dismiss pursuant to section 859, subdivision (b), but the court denied the motion. (NA021332 2RT 36-38; Supp. III 1CT 175-182, 184.) On January 24, 1995, defense counsel informed the court that after lengthy discussions with appellant, appellant did not indicate that he wanted to proceed in pro per, and counsel also asked the court not to engage appellant in any conversation regarding pro per status. Based on counsel's representation, the court did not inquire. Counsel told the court that it would re-file the 859(b) motion as a 995 motion. On January 24, 1995, the motion was denied. (NA021332 2RT 41-44; Supp. III 1CT 193-199, 201.) Appellant and counsel waived time. (NA021332 2RT 44.)

On February 7, 1995, appellant filed a motion for pretrial discovery. (Supp. III 1CT 208-217.) On February 9, 1995, Deputy District Attorney Rose appeared for Deputy District Attorney Schreiner, who was ill, and the matter was trailed until February 16, 1995. (NA021332 2RT 46-47; Supp. III 1CT 218, 221.) On February 17, 1995, appellant and counsel waived time until March 13, 1995. The court issued an order for a line-up, at which Cleavon Knott, Eric Berman, Georgina Hightower, Somphop Jardensiri, Nathan Apley,

James Edge, Tena Marie Delaguerra, and Don Seipp would attend. (NA021332 2RT 51-54; Supp. III 1CT 224-225.)

On March 13, 1995, the case was dismissed as to appellant based on Writ of Mandate issued by the court of appeal. (NA021332 2RT 56-57; Supp. III 1CT 247-248, 250, 253.)

A felony complaint was filed the same day. (NA021332 2RT 57; Supp. IV CT 4.) Appellant's counsel, Deputy Public Defender Isaacson explained that in the dismissed case a line-up motion was granted, "but we never got the line-up due to miscommunication . . . ." Appellant pled not guilty and a preliminary hearing was set. (15-page Reporter's Transcript 1-3.)

On April 3, 1995, Deputy Public Defender Krause appeared for Deputy Public Defender Isaacson, who was ill, and the preliminary hearing was continued until May, 2, 1995. (15-page Reporter's Transcript 5-6.) On May 10, 1995, appellant did not come to court. (15-page Reporter's Transcript 10-11.)

On May 11, 1995, appellant again did not come to court. (15-page Reporter's Transcript 12-13.) Appellant moved to dismiss the case on the ground that the preliminary hearing was taking place beyond 60 days after arraignment. The court pointed out that the hearing was taking place on the 60th day and denied the motion. (15-page Reporter's Transcript 12-15; 1CT 3-4.) On May 15, 1995, a felony complaint was filed in the Municipal Court of Long Beach. (15-page Reporter's Transcript 1CT 50-54.) On May 26, 1995, an information was filed in the Superior Court of Los Angeles County. (1CT 47-49, 72.)

On May 30, 1995, appellant was granted pro per status and the public defender's office was relieved. (1CT 74.) The case was trailed to June 5, 1995, when appellant's pro per status was voluntarily revoked and the public defender was reappointed. (1RT A1-A2; 1CT 78-79.) On June 16, 1995, appellant and

Deputy Public Defender Koury appeared and the matter was trailed until June 21, 1995. (1RT A6-A7; 1CT 81.) On June 21, 1995, appellant and Deputy Public Defender Isaacson appeared. Deputy District Attorney Gowen appeared for Deputy District Attorney Schreiner. Deputy Public Defender Isaacson stated that the prosecution had not yet decided whether to seek the death penalty and that counsel was not ready for trial. Deputy Public Defender Isaacson explained that the parties agreed to continue the matter until July, 14, 1995, which would be day 49 of 60, but that the defense was not be ready and would almost certainly request a continuance. Deputy Public Defender Isaacson expressed hope that the prosecution would decide whether to seek the death penalty, and also whether to consolidate the two cases. The court stated that it hoped the prosecution would resolve these questions by the next hearing. Deputy District Attorney Gowen stated that the two decisions were linked. The court stated that although the old case had been dismissed, the new case was essentially the same, and the did not want "a whole lot of delays." The court asked Deputy District Attorney Gowen to convey the court's comments to Deputy District Attorney Schreiner. (1RT A8-A10; 1CT 82.)

Deputy Public Defender Isaacson told the court that he never received a copy of the information or preliminary hearing transcript "because [appellant] went pro per at that time. Deputy Public Defender Isaacson stated he was unaware of appellant's arraignment date. The court asked appellant what he did with the transcript. Deputy Public Defender Isaacson interjected that he did not give appellant the transcript. Appellant said: "I never even had a chance to go pro per." Deputy Public Defender Isaacson explained that it was unlikely appellant had been given transcripts. The court asked Deputy Public Defender Isaacson to check with courtroom 6. (1RT A10-A11.) Deputy Public Defender Isaacson and the court discussed appellant's location of incarceration and how it might be the cause for appellant's late arrivals to court. (1RT A11-A13.) The

matter was trailed until July 14, 1995. (1RT A13; 1CT 82.)

On July 14, 1995, appellant and Deputy Public Defender Isaacson appeared. Deputy Public Defender Isaacson also stood in for Sullivan's counsel. The court stated that it was concerned the case was not ready for trial. The court stated its understanding that the reason the case was not ready was due to two reasons: the District Attorney's Office committee had not decided whether to seek the death penalty, and discovery had not been completed. Deputy Public Defender Isaacson explained it was still seeking addresses of witnesses, and that without the addresses preparation was extremely difficult. Deputy Public Defender Isaacson stated he had conferred with Deputy District Attorney Schreiner, who assured counsel he would get the addresses from the police. Deputy Public Defender Isaacson explained that he had sought the information himself, but the police had refused to turn over the addresses. (1RT A14-A15.)

The court stated: "Well, I wonder if you had a right to ask the court to forbid the death penalty if they can't make up their mind what they are selecting." Deputy Public Defender Isaacson replied: "That is an option if we don't get enough time to prepare." The court stated:

> I would think it is something you would consider doing. The court is kept dangling around. This is the second time the matter has been before court. This is the second filing. There is nothing new to the downtown committee and I don't want cases in this court just kept dangling because some committee can't get itself together to make a decision. So I would think you would have grounds for such a motion.

(1RT A15-A16.)

Deputy Public Defender Isaacson requested a continuance until August 10, 1995, which would be day 0 of 30. The court stated: "[Appellant] do you give up your right to a speedy trial and agree to have the matter delayed to

August 10, 1995, understanding you'll go to trial within 30 days of that date." Appellant replied "yes" and counsel joined. Sullivan also waived time. (1RT A16; 1CT 83.) Deputy Public Defender Isaacson explained that appellant's "K-10" status at the jail had hampered efforts to communicate and that there was "a lot of animosity" between appellant and counsel. Deputy Public Defender Isaacson requested the court remove appellant from his current status so that counsel could "have more of a relationship and try to prepare. (1RT A17-A19.) The court replied that appellant status was due to his own conduct of intentionally missing court or arriving late to court. However, the court rescinded its order that appellant be "red-banded"[10] and left appellant's housing to the sheriff's department. (1RT A19-A20.)

On July 31, 1995, appellant filed a motion regarding pretrial discovery, including a request for contact information for percipient witnesses whether or not they would testify at trial and also for any exculpatory evidence. (1CT 89-98.) On August 10, 1995, appellant appeared with Deputy Public Defender Isaacson. Deputy District Attorney Santos stood in for Deputy District Attorney Schreiner, who was engaged in trial. According to Deputy Public Defender Isaacson, the prosecution was not prepared on the 995 motion or the discovery motion, and Deputy District Attorney Schreiner planned to meet with the detectives to resolve the discovery. Deputy Public Defender Isaacson also informed the court:

> I have a problem that I'm not going to be available until the 28th of August. I haven't even had a chance to speak to [appellant] because of problems at wayside when I went to see him. I'm asking the matter go over to the 28th of August. *Realize particularly, your Honor, because the committee has not even received the memo regarding the penalty yet,*

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10. "Red-banding" appears to be a designation that an inmate has engaged in non-conforming behavior.

there's no way that we are going to be ready for trial for several months after that date.

(1RT A21-A22, emphasis added.) Appellant expressly waived his right to a speedy trial and agreed to have the matter set for August 28, 1995, as day 0 of 60. Sullivan also waived time. The trial was set for August 28, 1995, as day 0 of 60. (1RT A22; 1CT 99.)

On August 28, 1995, the court denied the motion to dismiss. (1RT A25-A27.) Deputy Public Defender Isaacson stated the discovery motion was still pending and that he had been unable to obtain the address of the witnesses which had been blacked-out of the police murder book. These included witnesses from Los Angeles and Oregon, some of whom would be called as witnesses by the prosecution, and some that had exculpatory statements to the police. The court noted that appellant himself was not entitled to the information, but that defense counsel was entitled to it, and asked the prosecution for an explanation. The prosecution explained that the civilian witnesses were terrified of appellant and did not want their addresses disclosed, and the prosecution did not want to disclose the addresses for the same reason. The trial court commented that this was the first time this issue had been brought to the court's attention. The prosecutor proposed that the court order the local witnesses to appear at the district attorney's office, and requested additional time to find options for the Oregon witnesses. (1RT A28-A30.)

Deputy Public Defender Isaacson explained that he already knew Cleavon Knott's address, because he had been contacted by appellant's investigator, which upset Knott, and as a result the police refused to release the other addresses. Deputy Public Defender Isaacson denied the other witnesses had expressed fear of appellant. Deputy Public Defender Isaacson stated he had no objection to interviewing Knott at the prosecution's office. However, Deputy Public Defender Isaacson saw no reason the police would not disclose

the addresses of the witnesses who were present at the field show-up who said appellant was not the person who committed the crime. Deputy Public Defender Isaacson stated the other liquor store clerk had apparently left the country, and they needed him as a witness because his statement was inconsistent with Toler's statement, and Deputy Public Defender Isaacson did not have the store clerk's former employer's contact information. (1RT A30-A31.)

The prosecution argued that several witnesses had expressed extreme fear of appellant and their fear and intimidation may have caused some witnesses to deliberately not identify appellant even though they could. The prosecution stated it would make the witnesses available, but did not want to disclose the contact information for any civilian witnesses. (1RT A31-A34.) The defense wanted information for Cleavon Knott, Eric Berman, Georgine Hightower, Somphop Jardensiri, Nathan Apley, James Edge, Tana Marie Delaguerra, Donna Seipp, and Somphop Mannil. Deputy Public Defender Isaacson proposed to handle the matter informally with the prosecution, and to continue the discovery motion until August 27, 1995. Deputy Public Defender Isaacson commented that he had received most of the items he had requested, and the police had been very cooperative with the exception of the witness contact information. The matter was continued until the September 27, 1995. (1RT A34-A37.)

Before recessing, however, appellant asked to address the court, and Deputy Public Defender Isaacson asked the prosecution to leave the room in case appellant was raising a *Marsden* issue. After the prosecution left the courtroom, it appears a *Marsden* hearing was held, and the court denied appellant's *Marsden* motion. Appellant then moved to represent himself a third time. Appellant completed the pro per form, waived his right to counsel, and the court granted him pro per status. The court asked Deputy Public Defender

Isaacson to give appellant the discovery. (1RT A38-A42.) Appellant agreed to receive discovery in jail. (1RT A42-A44.) Appellant requested additional time to prepare. The court set September 27, 1995, as day 30 of 60. (1RT 43-46; 1CT 100-107.)

On September 27, 1995, appellant was informed in writing that the death penalty committee would meet on October 5, 1995, and the committee wanted all mitigating information submitted two days prior to the meeting. (1RT A47-A48.) Appellant told the court that the public defender's office had not turned over the two boxes of discovery, even though a month had passed since he went pro per. Deputy Public Defender Koury stated that Deputy Public Defender Isaacson had gone to the jail with the discovery, but appellant was unwilling or unable to meet with him. Appellant responded he met with Deputy Public Defender Isaacson, but he only gave him some motions, and said he still had to copy the two boxes of other materials. Appellant cut the meeting short to avoid missing a meal, because Deputy Public Defender Isaacson just wanted to talk about whether appellant would continue to represent himself. (1RT A49-51.) Appellant moved for co-counsel or advisory counsel. (1RT A51-A59.) The court denied the motion. (1RT A61-A63.)[11]

The court and appellant discussed pro per funding for telephone calls and getting appellant an investigator. (1RT A63-A70.) Appellant accused the court of being biased against him and requested to withdraw his pro per status. Appellant request was granted and the public defender was reappointed. (1RT A70-A71; 1CT 119.) Appellant protested the reappointment of Deputy Public Defender Isaacson. Appellant said he was "declaring a conflict of interest" and

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11. The court noted that in the prior case appellant was difficult to understand, but that it in the present case appellant was quite understandable, which led the court to believe that appellant deliberately used confusing language at times. The court also noted appellant appeared to react when he was displeased with his counsel. (1RT A62-A63.)

felt he was being denied competent counsel. Appellant complained that he should not have to choose between his right to a competent attorney and his Sixth Amendment right. The court refused appellant's request for a *Marsden* hearing, and the matter was continued to October 4, 1995. (1RT A72-A73.)

On October 4, 1995, Deputy District Attorney Turner appeared for Deputy District Attorney Schreiner, who was engaged in trial. Deputy Public Defender Isaacson informed the court that Deputy District Attorney Schreiner had agreed to turn over all the outstanding names and addresses of the witnesses, but that he had to obtain the information from the police. Deputy Public Defender Isaacson and Deputy District Attorney Schreiner had agreed to a discovery compliance date of three weeks. The court asked how long Deputy Public Defender Isaacson had been seeking this discovery. Deputy Public Defender Isaacson responded that in the first case, the discovery motion had been pending when the case was dismissed. It was requested in the second case in January of 1995, but it had never been turned over despite representations that the police would release the information. Deputy Public Defender Isaacson also reported that the death penalty committee was meeting the following day, he had submitted a document the previous day, and he expected a decision by the following week. The court set October 25, 1995, as a final discovery compliance date and threatened to impose sanctions for failure to comply. The court noted that Deputy District Attorney Schreiner had not personally attended all of the hearings in the case. The court told Deputy District Attorney Turner that Deputy District Attorney Schreiner should be warned that discovery should have already been completed long before, and that the defense had a right to know the status of discovery. The court expressed displeasure that Deputy District Attorney Schreiner had not informed the court that he would be unable to appear at the day's hearing. (1RT A74-A78.) Appellant personally waived his right to a speedy trial until November 6, 1995,

which would serve as day 0 of 60. Deputy Public Defender Isaacson joined in the waiver. (1RT A79; 120.)

On November 6, 1995, Deputy Public Defender Koury appeared on behalf of Deputy Public Defender Isaacson. A pretrial conference was continued until November 11, 1995. The court mentioned that there had been an incident in the lock-up on September 27, 1995, but stated it would put additional information on the record at the next hearing. (1RT A80-A81; 1CT 124.) On November 21, 1995, Deputy Public Defender Isaacson contacted the court telephonically and the matter was continued until November 30, 1995. The prosecutor informed the court he believed the discovery matter was essentially resolved. He mentioned that the prosecution was seeking the death penalty, represented that the defense would be seeking a considerable amount of additional time to conduct and investigation of the Oregon witnesses who would testify at the penalty phase. The prosecutor assured the court that any outstanding discovery would be resolved. The defense did not object. (1RT1-2; 1CT 126.)

On November 30, 1995, appellant and Deputy Public Defender Isaacson appeared. The prosecution told the court it had turned over all the discovery requested except for the contact information for Knott and Edge. Deputy Public Defender Isaacson told the court that the addresses for "the witnesses" were no good and the defense could not find "the witnesses." The court asked the prosecution if any of these witnesses would be called at trial. The prosecution indicated that it was possible, and that if the prosecution obtained new information for these witnesses, it would be turned over to the defense, but the prosecution would not serve as an investigator for the defense. The prosecution anticipated a trial in January of 1996 because the defense would seek additional time to prepare for the potential penalty phase. (1RT 3-6.)

Deputy Public Defender Isaacson argued that the prosecution had a duty

to find the location of the surviving liquor store clerk Somphop Jardensiri and the witnesses who were at the field show-up who said appellant was not involved in the crime. Deputy Public Defender Isaacson believed that the combination of the prior case being dismissed before discovery, appellant's decision to represent himself at various times, and the prosecution's failure to turn over discovery in the present case caused the addresses to become stale. Deputy Public Defender Isaacson stated that the police were able to contact witnesses for a line-up in March of 1995, and speculated that the police had updated addresses for these people. (1RT 7-8.)

As to Jardensiri, Deputy Public Defender Isaacson asserted that the police talked to him in January, and if they had shared his location at that time, the defense could have attempted to interview him and might have tried to preserve his testimony if he was planing to leave the country. Instead, the police informed the defense that Jardensiri left the country. Deputy Public Defender Isaacson stated the defense had attempted to contact Jardensiri's employer, Somphop Mannil, to obtain Jardensiri's new address. However, the letters sent to Mannil went unanswered and the investigator believed that Mannil was home but did not want to speak with the defense. (1RT 8-9.)

The court responded that the prosecution was not responsible for appellant's choice to represent himself on two separate occasions and any damage that occurred to appellant's case due to his poor litigation decisions. The court agreed with counsel that the issue was unknown at that point in time. The court ordered the prosecution to turn over any new information for witnesses who attended the March line-up at the police station. Deputy Public Defender Isaacson stated he wanted information for Jardensiri and also Knott, Edge, Seipp, Berman, and Delaguerra. As to Knott and Edge the court and the parties agreed that these witnesses would be made available to the defense at the prosecution's office. (1RT 9-11, 15-16.)

Deputy Public Defender Isaacson raised the issue that the public defender's office may have a to representing appellant. Deputy Public Defender Isaacson explained that during discovery he learned that his office had represented Knott in a prior matter where the police had assisted Knott in exchange for his cooperation in appellant's case. The prosecution stated that he was aware that the police had assisted Knott with some traffic tickets that had gone to warrant, in order to help address some of Knott's safety concerns. The prosecution said it would investigate the matter further. Deputy Public Defender Isaacson wanted Knott brought to court for inquiry to determine the presence of a conflict in representing appellant. The court stated that the matter would be taken up at the next hearing (1RT 11-15.)

Deputy Public Defender Isaacson requested that the prosecution state what aggravating evidence would be presented at the penalty phase. Deputy Public Defender Isaacson noted that appellant had been convicted or accused of many serious and violent crimes in Oregon and the defense needed to know how broad in scope its investigation would need to be. He also noted he had other urgent matters, and requested a continuance until December 12, 1995. (1RT 16-18; 1CT 127.) Deputy Public Defender Isaacson told the court that appellant wanted the case dismissed because of the prosecution's delay in complying with discovery. The court again noted that appellant's choice to represent himself *may* have caused delay. The court ordered the prosecution to submit in writing all the *current* evidence the prosecution intended to use for the guilt phase and penalty phase by the next court hearing. (1RT 18-20.) Appellant waived his right to a speedy trial, counsel joined, and the matter was continued to December 12, 2005, as day 0 of 30. (1RT 21; 1CT 127.)

On December 12, 1995, Deputy Public Defender Sterkenberg appeared for Deputy Public Defender Isaacson and the matter was continued until December 18, 1995. (1RT 24; 1CT 128.) On December 18, 1995, Deputy

Public Defender Isaacson stated the prosecution had tendered a written list of 24 witnesses and five prior incidents of criminal conduct to be presented in the guilt phase or penalty phase. Deputy Public Defender Isaacson complained that the list did not specify which witnesses were connected with the five prior instances of criminal conduct. He stated he had reports for everything except for the 1993 case of attempted murder. Deputy Public Defender Isaacson requested "additional discovery on those cases." (1RT 25-26.)

The prosecution argued it had complied with the court's discovery order and explained that the prosecution was still conducting an investigation of the witnesses and victims in the Oregon crimes. The prosecution and the defense were in the same position of knowing that appellant had convictions from 1987 and 1993, but neither party had any reports. The prosecution expected reciprocal discovery as both parties completed their investigations. (1RT 26-28.) As to the witnesses at the March 1995 line-up, the prosecution had turned over the addresses including updated information. As to Jardensiri, the prosecution turned over an address, and both parties believed that Jardensiri had gone to Thailand. As to Knott, the prosecution confirmed that Detective Wren assisted in getting four traffic tickets dismissed. (1RT 27-28.) Deputy Public Defender Isaacson acknowledged he had received the addresses he was seeking, and commented that it was unclear whether the witnesses would be found, but that the defense would look. (1RT 29.)

Deputy Public Defender Isaacson raised the issue of the public defender's potential conflict in representing appellant. Deputy Public Defender Isaacson explained that his office did not feel there was a conflict, but appellant believed that the office was part of a large-scale conspiracy against him, because they had assisted Knott in getting his tickets dismissed in exchange for his cooperation in appellant's case. (1RT 29-30.) The prosecution explained that Knott was initially afraid of appellant and Toler, and became much more

afraid after he was contacted by appellant's investigator at a time when appellant was in pro per. Mr. Knott sought assistance with his traffic tickets after being contacted by appellant's investigator, because he feared being in the same jail as appellant and expected appellant to retaliate if Knott cooperated with the police. (1RT 30-31.)

Deputy Public Defender Isaacson explained that the defense had never been able to locate appellant's former investigator. Deputy Public Defender Isaacson also stated that the defense was having problems because discovery had been turned over "very late it the game" and that it was very difficult to find the penalty phase witnesses for appellant's prior convictions from 1987, 1993, and 1994. Deputy Public Defender Isaacson stated the defense needed additional time to prepare, but appellant wanted his case dismissed. (1RT 32-33.)

The court focused on the potential Oregon witnesses and asked the prosecution when it intended to conduct its investigation. The prosecution explained that the prosecution was seeking funding to send the detectives to Oregon, and the detectives were clearing their schedules pending the court's funding order. The prosecution expressed hope the investigation would be conducted within a month. (1RT 34-35.) Deputy Public Defender Isaacson requested a firm date for the prosecutor to complete its investigation, so the defense could begin its investigation. The prosecution objected that the prosecution should not be required to finish its investigation before the defense began its own investigation. The court agreed, but wanted the prosecution's assurance that the investigation would actually begin before January 8, 1996, when the judge would be essentially gone until about February 1, 1996. (1RT 35-36.)

Deputy Public Defender Isaacson represented that they had begun their investigation of witnesses in Oregon, but that the attorneys that had represented

appellant's co-defendants refused to turn over any information to the defense, and the Oregon detectives would also not provide information to lawyers not involved in the Oregon cases. Deputy Public Defender Isaacson conceded it was an "unusual situation" which caused the defense to seek an investigation by the prosecution. The court responded that the prosecution had been ordered to cooperate with the defense. The attorney's agreed to continuance until February 5, 1996, as day 0 of 60. (1RT 36-37.)

The court asked appellant if he agreed to waive his right to a speedy trial. Appellant refused to waive time and argued he should not be compelled to give up his constitutional rights because the prosecution had delayed in turning over discovery. Appellant stated:

> I'm proceeding with whatever the trial date set. . . . I would like to move for a dismissal for the simple fact that we are prejudiced because my attorney cannot preside [sic] with this matter and investigate it effectively and prepare a proper defense for me. Because of the prosecutor we have been completely patience [sic] over and over again in the request for discovery.

(1RT 38.) The court asked appellant whether he wanted continued representation by Deputy Public Defender Isaacson, in which case the court would find good cause for the continuance, or he could proceed without Deputy Public Defender Isaacson. Appellant refused to answer the question, insisted that he would not waive time, insisted it was not up to him to dismiss his attorney, and asked for the case to be dismissed. The court found good cause and continued the case until February 5, 1996. (1RT 38-41; 1CT 130.)

The trial court focused on the potential conflict issue and proposed to appoint an independent attorney to investigate the potential conflict. Deputy Public Defender Isaacson objected to the appointment. The court ruled that it would appoint the independent attorney (Counsel Veganes), to conduct an

investigation to determine whether the public defender's office had a conflict because it had previously represented Knott. (1RT 33-34, 41-43; 1CT 129.)

On February 5, 1996, Counsel Veganes filed a motion supporting appellant's claim that the public defender's office must declare a conflict of interest. (1CT 131-141.) The court found that the public defender's office had a conflict. The public defender's office was relieved as counsel and Counsel Randy Short was appointed to represent appellant. Counsel Short informed the court that he had some discovery from Deputy Public Defender Isaacson, and if he was appointed by the panel, he would then receive the balance of discovery. The matter was trailed until March 8, 1996. (1RT 44-46, 48; 1CT 142.)

On February 28, 1996, the court appointed an investigator to assist Counsel Short. (1CT 143-145.) On March 8, 1996, appellant and Counsel Short appeared. Counsel Short explained that appellant wanted to take up a writ regarding his time waivers in November and December and a stay of the trial. Appellant wanted to matter put over for 60 days, so counsel could pursue the writ and stay, and then would be willing to waive time. Counsel Short stated that if the case was not stayed, and appellant did not waive time, then the defense would stipulate that the prosecution would get a reasonable continuance. (1RT 53-55.) The matter was trailed until March 21, 1996. (1RT 56-57; 1CT 146.)

On March 21, 1996, appellant moved to dismiss Judge Hay. The matter was trailed until March 28, 1996, when the motion was denied. (1RT 66-69; 1CT 147-152.) The matter was continued until April 30, 1996. (1CT 164.) On April 24, 1996, Counsel Short filed a motion to dismiss the information. (1CT 166-205.) On April 30, 1996, the matter was trailed until May 3, 1996. (1RT 74-77; 1CT 165.)

On May 3, 1996, the motion to dismiss was argued. The prosecution

argued that on December 18, 1995, the court had granted a continuance based on good cause based on defense counsel's representation that he needed additional time to prepare the defense in a capital case. The prosecution argued it had provided discovery and complied with the court's orders regarding discovery. He noted the discovery had been an ongoing process and the prosecution had turned over additional discovery when requested by the defense. He also pointed out that appellant failed to identify individual items that it alleged had been not been turned over in an untimely fashion. Also, appellant chose to represent himself and failed to conduct discovery during these pro per episodes. (1RT 78-80.)

Counsel Short argued that:

> The overall picture of the situation, your Honor, is we have delayed discovery, delayed decision on seeking death, delayed investigation by both sides, a counsel who is representing [appellant] who is basically in conflict of interest for eleven months, ineffective assistance of counsel in terms of getting out there making sure this discovery compliance was done. Several times compliance was ordered and nothing went after that. No questions for sanctions were made until [appellant] demanded his dismissal on November 30. Sanctions were talked about previous to that, but never did Mr. Isaacson write a 1054 motion saying I have not received this discovery, this is the sanction I want.
>
> When you combine all these different things, the conflict of interest, the attorney not really doing what he was supposed to do, these delays over objection, I think it amounts to a substantive due process issue. Beyond 1382 and beyond speedy trial rights I think it amounts to an unfair proceeding overall that cannot be corrected. [Appellant] cannot overcome this problem with the crucial witness that is now missing. It is no way I can prepare his case within 60 days of April 30th in terms of

> the penalty phase and the Oregon matters if I get discovery in the next - - even if it were tomorrow. If they came in tomorrow with all the discovery from Oregon - - and it should be massive. Some of them are open cases, multiple charges. If I have a box on just [appellant]'s case I should have two or three on the Oregon cases of all the police work that's been done on this stuff. None of this has been done.
>
> I think the bottom line is it has now put [appellant] in the position there's no way he can properly defend himself in the next 50 days and he is going to be stuck with what we have and it's unfair. And I ask that the court dismiss the case based on all those arguments.

(1RT 89-90.)

The court asked the prosecution if all discovery the prosecution intended to use at trial had been turned over to the defense. The prosecutor stated that he believed this was the case. (1RT 91-92.) The prosecutor reiterated the belief that all discovery had been turned over, but since appellant received discovery himself, through Deputy Public Defender Isaacson, and through Counsel Short, the prosecution wanted to review discovery with Counsel Short to determine if there was anything outstanding or if discovery were complete. The matter was submitted by the parties. (1RT 91-96.)

The court denied the motion. As to the motion to dismiss from December 18, 1995, the court found that appellant personally refused to waive time after counsel requested additional time to adequately prepare for trial. Appellant understood that if he stayed with counsel, the court would grant the continuance for good cause, or he could represent himself. Appellant refused to make an election, invoked his right to a speedy trial, and sought dismissal as the exclusive remedy. The court found that because appellant elected to continue with representation, the court granted the continuance because a defense attorney needed to be ready to defend in a death penalty case. (1RT 96-

98.)

The court also rejected appellant's claim that his right to a speedy trial was violated because the public defender's conflict of interest should have been discovered earlier. The court pointed out that the public defender's office had believed there was no conflict. Also, the conflict was not immediately known, and when the matter was looked into, the court records and public defender's records were missing. The court emphasized that human beings, rather than machines, constituted the criminal justice system, and there was no evidence showing a deliberate denial of due process. The court also found that any prejudice was waived when appellant entered into subsequent time waivers. The court rejected all claims that the matter should be dismissed. (1RT 97-99.)

As to Jardensiri, the court stated there was no evidence of when he had left the country and no showing he would have testified at trial. The defense had not mentioned any efforts to locate this witness, including any efforts by computer, facsimile, telephone, or letter, and there was no evidence the witness was irretrievably lost. (1RT 99.) The court found that appellant failed to show any prejudice for days he missed court, and noted there were times when appellant refused to come to court, which caused unwarranted delay. (1RT 99-100.) The court stated that sanctions other than dismissal would be dealt with at trial if it was determined that discovery was late, and that the court had in fact imposed discovery sanctions in very important cases. (1RT 100-103.) The parties were ordered to meet for discovery compliance and the matter was trailed until May 23, 1996. (1RT 100-101; 1CT 206.)

On May 22, 1996, Counsel Short filed a mandamus/prohibition petition and request for stay of trial in California Court of Appeal. (1CT 262-299, 2CT 307-338.) On May 23, 1996, the court of appeal denied the petition. (2CT 356.) On June 1, 1996, Counsel Short filed a petition for review in the California Supreme Court. (2CT 339-355.) The petition was denied on July

26, 1996. (2CT 404.)

On May 23, 1996, appellant and Counsel Short appeared and the matter was trailed until June 19, 1996. (2CT 357.) On June 17, 1996, Counsel Short filed a motion for a continuance until August 13, 1996. (2CT 359-361.) On June 18, 1996, Counsel Short filed a suppression motion. (2CT 363-377.) Counsel Short also filed a motion for contact information which had not been provided by the prosecution. On June 19, 1996, the court granted the motion for a continuance and denied the discovery motion. The trial was continued until August 13, 1996. (2CT 378-390.) On July 19, 1996, the parties set August 21, 1996, as day 8 of 10 for the trial to begin. (2CT 403.) On August 2, 1996, Counsel Short filed a motion for pretrial discovery. (2CT 444-453.)

On August 13, 1996, appellant and Counsel Short appeared and the matter was continued until August 20, 1996. (2CT 468.) On August 20, 1996, appellant and Counsel Short appeared. (3CT 480-481.) On August 21, 1996, voir dire commenced. (3CT 489.) On September 3, 1996, a jury was empaneled to try the case. (3CT 517.)

B. Relevant Law

A criminal defendant in state court has a federal right to a speedy trial under the Sixth and Fourteenth Amendments. (*People v. Harrison* (2005) 35 Cal.4th 208, 225, citing *Klopfer v. North Carolina* (1967) 386 U.S. 213, 222-223 [87 S.Ct. 988, 18 L.Ed.2d 1].) In California, a criminal defendant also has a right to a speedy trial under the state constitution. (*People v. Harrison, supra*, 35 Cal.4th at p. 225, citing Cal. Const. article I, section 15.) "The California Legislature has 're-expressed and amplified' these fundamental guarantees by various statutory enactments, including Penal Code section 1382." (*People v. Harrison, supra*, 35 Cal.4th at p. 225, citing *Townsend v. Superior Court* (1975) 15 Cal.3d 774, 779.) "A defendant is 'brought to trial' under section

1382 when the court has 'committed its resources to the trial, and the parties must be ready to proceed and a panel of prospective jurors must be summoned and sworn.'" (*People v. Lewis* (2001) 25 Cal.4th 610, 628-629, citing *Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 780.)

Defense counsel has the authority to waive a defendant's statutory right to a speedy trial, unless the waiver amounts to prejudicial ineffective assistance of counsel. (*People v. Harrison, supra*, 35 Cal.4th at p. 225, citing *People v. Wright* (1990) 52 Cal.3d 367, 389.) The trial court is vested with the discretion to determine what constitutes good cause to delay a criminal trial over a defendant's motion to dismiss. (*People v. Johnson* (1980) 26 Cal.3d 557, 570.) Good cause includes: (1) delay caused by the defendant's conduct; (2) delay for the defendant's benefit; and, delay arising from unforeseen circumstances. Good cause does not include: (1) delay attributed to the fault of the prosecution; and (2) delay caused by improper court administration. (*Ibid.*) On appeal, a criminal defendant must show that he was prejudiced by the error under section 1382. (Cal. Const. art. VI, § 13; *People v. Johnson, supra*, 26 Cal.3d at pp. 574-575; *People v. Wilson* (1963) 60 Cal.2d 139, 151; *see People v. Martinez* (2000) 22 Cal.4th 750, 769 ["Prejudice becomes an issue for a statutory speedy trial claim only when the defendant waits until after the judgment to obtain appellate review"].)

Under the state constitution, the right to a speedy trial is triggered following the filing of a felony complaint. (*People v. Martinez, supra*, 22 Cal.4th at p. 755, citing *People v. Hill* (1984) 37 Cal.3d 491, 497, fn. 3; *People v. Hannon* (1977) 19 Cal.3d 588, 607-608.) The state constitutional speedy trial right is broader than the section 1382, and allows a defendant to claim a state constitutional violation for delay not covered by section 1382. (*People v. Martinez, supra*, 22 Cal.4th at p. 766.) However, a defendant must make a showing of specific prejudice to establish a violation of the state Constitution's

speedy trial right. (*Id*. at pp. 755-756.) After a defendant affirmatively shows prejudice, then the court must weigh the prejudicial effect of the delay against any justification. (*Id.* at pp. 766-767, 769; *People v. Love* (2005) 132 Cal.App.4th 276, 286.)

Under the federal Constitution, the right to a speedy trial is triggered following a formal indictment or information, or actual restraint imposed by arrest and holding to answer criminal charges. (*People v. Martinez, supra*, 22 Cal.4th at p. 755, citing *United States v. Marion* (1971) 404 U.S. 307, 320 [92 S.Ct. 455, 30 L.Ed.2d 468].) Before a court will consider a speedy trial claim, the defendant must allege that the interim period between accusation and trial constitutes "'presumptively prejudicial'" delay. (*Doggett* v. *United States* (1992) 505 U.S. 647, 651-652 [120 L.Ed.2d 520, 112 S.Ct. 2686], quoting *Barker* v. *Wingo* (1972) 407 U.S. 514, 530-531 [33 L.Ed.2d 101, 92 S.Ct. 2182].) A presumption of prejudice arises where the delay is "'uncommonly long.'" (*People v. Martinez, supra,* 22 Cal.4th at pp. 755-756, citing *Doggett v. United States, supra,* 505 U.S. at pp. 651-652, 656-657.) "Depending on the nature of the charges, the lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year. [Citations.]" (*Doggett* v. *United States, supra,* 505 U.S. at p. 652, fn. 1; *see Stabio v. Superior Court* (1994) 21 Cal.App.4th 1488, 1498 [recognizing the "one-year benchmark" in *Doggett*].)

Thus, "a defendant can establish a speedy trial claim under the Sixth Amendment without making an affirmative demonstration that the government's want of diligence prejudiced the defendant's ability to defend against the charge." (*People v. Martinez* (2000) 22 Cal.4th 750, 755-756, citing *Moore v. Arizona* (1973) 414 U.S. 25, 26 [94 S.Ct. 188, 38 L.Ed.2d 183].) Assuming the defendant establishes a period of delay that is presumptively prejudicial, then the court will make four inquires: (1) whether the delay is

uncommonly long; (2) whether the government or the criminal defendant is more to blame for the delay; (3) whether the defendant asserted his right to a speedy trial in due course; and, (4) whether the defendant suffered prejudice as a result of the delay. (*People v. Harrison, supra*, 35 Cal.4th at p. 226, citing *Barker v. Wingo, supra,* 407 U.S. at p. 530; *People v. Seaton* (2001) 26 Cal.4th 598, 633.)

The first factor, whether the delay was uncommonly long, is actually a "double enquiry." To trigger a speedy trial analysis, the defendant must show that the delay was long enough to cross the line from ordinary delay to presumptive delay. If "presumptive delay" is found, then the inquiry is triggered, and the court takes a second look at the delay, and the other three factors, to determine whether there has been a speedy trial violation. (*People v. Horning* (2004) 34 Cal.4th 871, 891-892.) However, as the length of the delay increases, the presumption that there has been prejudice increases, because excessive delay may compromise the trial in unprovable or unidentifiable ways. (*Id.*) Pretrial delay can often be inevitable and wholly justifiable due to government's need to assemble witnesses and deal with pretrial motions, and such considerations should be weighted heavily when balanced against a claim that the passage of time has made the accuracy of the trial questionable. (*Id.* [two and one-half year delay between crime and arraignment did not presumptively require a dismissal, rather the defendant had to affirmative show prejudice].) Unreasonable delay while facing formal accusation threatens the harms of (1) oppressive pretrial incarceration; (2) anxiety and concern of the accused; and, (3) the defense will be impaired because of the loss of exculpatory evidence. (*People v. Horning, supra*, 34 Cal.4th at p. 892, citing *Doggett v. United States, supra*, 505 U.S. at p. 654.)

A criminal defendant also has a right to due process of law. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 7.) Delay between the commission

of a criminal act and the filing of a complaint does not implicate the defendant's right to a speedy trial but may affect his right to a fair trial under the Due Process Clause. (*United States* v. *MacDonald* (1982) 456 U.S. 1, 7 [102 S.Ct. 1497, 71 L.Ed.2d 696]; *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 505; *People v. Archerd* (1970) 3 Cal.3d 615, 639.) As with the right to speedy trial, appellant bears the burden of showing unfairness and prejudice from any delay, which will then be balanced against the justification for the delay. (*People v. Butler* (1995) 36 Cal.App.4th 455, 466.)

C. The Trial Court Properly Denied Appellant's Motion To Dismiss Pursuant To Section 1382

Appellant claims that his case should have been dismissed under section 1382, subdivision (a), because the delay was attributable to the fault or neglect of the state and was therefore unjustified. (AOB 68-74.) This claim is meritless. Appellant's counsel requested the waiver for appellant's benefit: to prepare for both the guilt and penalty phases of a capital case. (*Townsend v. Superior Court, supra*, 15 Cal.3d at p. 780.) Appellant's counsel did not claim he wanted additional time to concentrate on other cases. (*See People v. Johnson, supra*, 26 Cal.3d at pp. 567-572.) Indeed, the trial court found that counsel had good cause for a continuance based on defense counsel's representation that he needed additional time to prepare, and appellant expressly stated he wanted continued representation. (1RT 96-99.) Under these circumstances, appellant's defense counsel had the authority to waive appellant's statutory right to a speedy trial. (*People v. Harrison, supra*, 35 Cal.4th at p. 225, citing *People v. Wright, supra,* 52 Cal.3d at p. 389; *see People v. Frye* (1998) 18 Cal.4th 894, 939 ["the inherent tension between the right to a speedy trial and the right to competent, adequately prepared counsel is not, in itself, an impermissible infringement on the rights of the accused,

including the right to a fair trial."].) Moreover, as discussed in more detail below, appellant has failed to show prejudice. (Cal. Const. art. VI, § 13; *People v. Martinez, supra*, 22 Cal.4th at p. 769; *People v. Johnson, supra*, 26 Cal.3d at p. 574-575.) Accordingly, appellant's claim fails for both reasons.

D. The Trial Court Properly Denied Appellant's State And Federal Constitutional Claims Regarding His Rights To A Speedy Trial And To Due Process

Appellant also claims that his federal and state constitutional right to a speedy trial, and his right to due process, were violated when his trial was continued beyond the 60-day period, over his objection, without good cause. (AOB 74-75, 78-85.) Appellant's claims all fail because the trial court acted within its discretion when it denied the motion to dismiss and appellant has failed to establish prejudice.

This Court has denied a speedy trial claim based on both the state and federal constitutions after application of the four-part federal test. (*People v. Harrison, supra*, 35 Cal.4th at p. 227, citing *Barker v. Wingo, supra*, 407 U.S. at p. 530; *People v. Seaton, supra*, 26 Cal.4th at p. 633.) In Case Number NA021332, appellant was arrested on August 31, 1994, and the case was dismissed on March 13, 1995, and thus was pending for about six or seven months. In this case, Case Number NA23819, appellant remained in custody, and the proceedings went from March of 1995, until voir dire commenced in late August, and thus was pending for about 17 or 18 months. Therefore, appellant was incarcerated on both cases for about two years before his trial was presented to the jury. Assuming this Court finds that appellant has established that the delay in this case, or both cases, requires application of the four-part federal test, then application of that test shows the trial court properly denied the motion to dismiss.

1. The Delay Was Not Uncommonly Long Considering All Of The Underlying Circumstances

First, the delay in this case was not uncommonly long considering all of the underlying circumstances. The case involved two separate crimes: the robbery of Edge and the subsequent robbery and murder of Akbar. There were also three overlapping co-defendants. As to the robbery of Edge, the prosecution also initially charged co-defendant Sullivan, which made that robbery case more complicated. Sullivan's case was eventually severed and she took a plea agreement. As to the robbery and murder of Akbar, the prosecution also initially charged co-defendant Toler, which again made appellant's murder case more complicated. Toler eventually entered a pled agreement and testified for the prosecution.

Even more significantly, the prosecution sought the death penalty. This added a penalty phase, which is obviously not part of a non-capital trial, and created more work for both parties and the trial court. The prosecution had to assemble the evidence to be used in aggravation. The defense had to assemble mitigating evidence and, in particular, it had to present such evidence to the prosecution in seeking to dissuade it from seeking the death penalty. Both parties had to look at and analyze the other party's discovery for the penalty phase, decide on the best strategy considering the evidence, and then prepare that strategy for the penalty phase. In this particular capital case, appellant's prior violent criminal conduct was a significant part of the evidence the prosecution intended to admit during the penalty phase. Significantly, appellant committed his prior violent crimes in Oregon before coming to California where he robbed Edge and murdered Akbar. Because Oregon is some distance from Long Beach, and the parties both had to deal with non-California agencies, the process of obtaining information was more difficult and delayed.

For example, the prosecution had to obtain funds from the court for the detectives to travel to Oregon, and the detectives had to clear their other responsibilities before leaving the state. (1RT 34-35.) The defense also cited problems. Counsel claimed it was very difficult to find witnesses from the prior crimes, because they occurred in Oregon in 1987, 1993, and 1994. (1RT 32-33.) Counsel also claimed that neither the defense attorneys nor the police detectives would turn over information to a California attorney not involved in the Oregon cases. Even Deputy Public Defender Isaacson conceded it was an "unusual situation" which caused the defense to seek to rely on the prosecution, rather than conduct its own investigation. (1RT 36-37.) When counsel argued the motion to dismiss, Counsel Short claimed the discovery from Oregon was "massive," involved open cases, with multiple charges, and might involve two or three boxes of documents. (1RT 89-90.)

2. Appellant Is More To Blame For The Delay Than The Prosecution

Second, appellant is more to blame for the delay that the prosecution. Appellant intentionally tried to inject error and delay into the proceedings in the hope that this Court would now reward him for his efforts. Appellant admitted as much to the court. For example, in the first case, appellant represented himself from September (1RT 6-8, 10-12; Supp III CT 20), until early December of 1994 (1RT 10; Supp III CT 133-145). During this period, the trial court found the prosecution had complied with discovery (Supp. III 1CT 47.), and appellant told the court his investigator had received discovery, and he had personally reviewed all discovery except for the autopsy report (Supp. III 1CT 54-59, 80).

In December, when appellant invoked his right to counsel, he expressly admitted that he had invoked his right to self-representation for the purpose of

trying to obtain new counsel because he did not like Deputy Public Defender Isaacson. Thus, appellant never actually intended to represent himself, and invoked his right to self-representation as a sham excuse to delay the proceedings in the hope of eventually obtaining new counsel. (1RT 11, 15.) Appellant should not be rewarded for intentionally invoking his constitutional rights for the tactical purposes of seeking a different lawyer to which he had no right and to delay the proceedings.

Even after admitting that he was playing games with the court, appellant continued his attempt to inject error into the proceedings. Appellant requested to return to self-representation, but intentionally acted in a manner to give the trial court grave doubts about allowing self-representation. The strategy almost worked, because the court initially considered denying self-representation because appellant's demeanor would reduce the trial to a farce, but relented when the prosecution warned that appellant was trying to manipulate the court into causing reversible error. (1RT 21-22.) Over time it became evident to the trial court that appellant was engaged in a deliberate attempts to inject error, because in the second case, the court noted that appellant deliberately used confusing language at times. (1RT A62-A63.)

Because appellant played pro per games with the court, his counsel did not file a pretrial discovery motion until February 7, 1995. (Supp. III 1CT 208-217.)[12/] Moreover, the defense waited until February 17, 1995, to obtain a court order requiring Cleavon Knott, Eric Berman, Georgina Hightower, Somphop Jardensiri, Nathan Apley, James Edge, Tena Marie Delaguerra, and Don Seipp to attend a line-up for appellant. (Supp. III 1CT 224-225.) However, the case

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12. It is unclear what appellant and his investigator did with the discovery turned over to the defense when appellant was in pro per from September through December of 1994. Appellant never disputed the fact that discovery had been turned over.

was dismissed in March, so discovery and the line-up were not completed. Thus, most if not all of the delay in the first case was caused by appellant's admittedly deceptive efforts to obtain new counsel when the court had already determined that Deputy Public Defender Isaacson was not subject to dismissal under *Marsden*.

In the second case, appellant continued to play games with counsel, the trial court, and his jailers. On May 30, 1995, appellant was granted pro per status, but it was revoked days later, and appellant did not appear with Deputy Public Defender Isaacson until June 21, 1995. (1RT A1-A2, A6-A10; 1CT 74, 78-79, 81-82.) Deputy Public Defender Isaacson told the court that he never received a copy of the information or preliminary hearing transcript "because [appellant] went pro per at that time." (1RT A10-A11.) Counsel complained that there was "a lot of animosity" between himself and appellant, and that appellant's restricted status at the jail made it difficult to prepare the defense. (1RT A17-A19.) The court reminded counsel that appellant's status was due to his own conduct of intentionally missing court or arriving late to court. Even so, court still rescinded its order that appellant be "red-banded" and left appellant's housing to the sheriff's department. (1RT A19-A20.)

Counsel requested a long continuance, until August 28, 1995, because he was not available until then. Counsel also explained that he had not "even had a chance to speak to [appellant] because of problems at wayside when I went to see him." Counsel also told the court:

> Realize particularly, your Honor, because the committee has not even received the memo regarding the penalty yet, *there's no way that we are going to be ready for trial for several months after that date.*

(1RT A21-A22, emphasis added.)

On August, 28, 1995, after the court denied his *Marsden* motion,

appellant attempted to get rid of Deputy Public Defender Isaacson by seeking self-representation a third time. The court asked counsel to give appellant the discovery. (1RT A38-A42.) Appellant agreed to receive discovery in jail (1RT A42-A44), and then *appellant requested additional time* to prepare. (1RT 43-46; 1CT 100-107.) It is fairly clear from the record that appellant never intended to represent himself, and each time he invoked his right to counsel he was attempting to delay the proceedings in the hope of acquiring a new attorney he liked better than Deputy Public Defender Isaacson. Appellant expressly admitted that this was his strategy the first time he had gone pro per, and there is every reason to believe this remained his strategy throughout the proceedings.

Aside from the direct delay caused by appellant's decision to delay the proceedings by disingenuously invoking his right to counsel, there were also indirect delays which were also attributable to appellant and appellant's counsel. For example, on September 27, 1995, appellant told the court that the *public defender's office* had not turned over the two boxes of discovery, *even though a month had passed since he went pro per*. A deputy public defender claimed appellant was unwilling or unable to meet with counsel. Appellant claimed he met with Deputy Public Defender Isaacson, who said he still had to make copies of the discovery. (1RT A49-51.) Of course, Deputy Public Defender Isaacson no doubt understood that appellant was playing games and had no intention of representing himself. This proved true when appellant withdrew his pro per status again, and continued to protest the reappointment of Deputy Public Defender Isaacson. (1RT A51-A63, A70-A71; 1CT 119.) Appellant said he was "declaring a conflict of interest" because he felt he was being denied competent counsel. (1RT A72-A73.) All of the delay caused directly or indirectly by appellant's game playing should be weighted heavily against appellant, because he basically admitted that he was abusing his constitutional rights to attempt to get an attorney he liked better.

Appellant also engaged in other contumacious behavior that took time away from focusing on the legitimate aspects of the trial. As discussed above, appellant's behavior at the jail caused restrictions to be imposed which made it difficult for counsel to communicate with appellant. Also, as discussed in detail below in Argument II, appellant actually attacked a deputy while in lock-up. (1RT 20-21, 53, 170-173, RT 2047-2058; 2CT 454-460.) This led the court to decide that appellant must wear the stun-belt, which then led to further delay of court proceedings when appellant refused to come to court or arrived to court late. (1RT 46-48, 58-59, 65-66, 169.) Appellant also engaged in other contumacious behavior when he threatened Toler during trial, and the penalty phase witnesses during the penalty phase. These incidents further highlight appellant's attempts to delay the proceedings, produce terror in the hearts of his victims, and to inject error into the trial. Appellant should not be rewarded for his behavior.

There was also significant delay attributable to the public defender's office in this unusual case. On November 30, 1995, Deputy Public Defender Isaacson told the court that the public defender's office might have a conflict to representing appellant. On December 12, 1995, counsel delayed the proceeding by claiming that the public defender's office did not have a conflict. (1RT 29-30.) Counsel even objected to the appointment of an independent attorney to examine the issue. The court was required to appoint an attorney to investigate the conflict. (1RT 33-34, 41-43.) On February 5, 1996, the independent attorney found there was a conflict and Counsel Short replaced Deputy Public Defender Isaacson. Counsel Short explained that it would take time for the panel to fully appoint him as appellant's counsel. The matter was continued until March 8, 1996. (1RT 44-46.) As discussed above, the trial court found that the public defender's office had believed there was no conflict, and when the matter was looked into, the court records and public defender's

records were missing. The court found there was no intent to delay the proceedings or hamper appellant's due process rights. (1RT 97-99.)

When the delay caused by appellant, both directly and indirectly, and when the delay caused by the unusual conflict issue, are compared with any delay attributable to the prosecution, the result is that appellant is more responsible for the delay in bringing his case to trial than the prosecution. In the first case, the trial court found that the prosecution had complied with discovery and appellant made no additional discovery requests while he was in pro per. In the second case, there was some delay in getting all the discovery to the defense, but it turned out that there was a reasonable explanation for the delay: witnesses had expressed fear of appellant and did not want their contact information disclosed.

On July 14, 1995, the trial court expressed concern that the case was not ready for trial, and stated its understanding that there were two unresolved issues: the committee decision to seek the death penalty and the completion of discovery. Deputy Public Defender Isaacson told the court he had gone to the police for the contact information, as directed by the prosecution, but the police refused to turn over the addresses. (1RT A14-A15.) The court suggested counsel might seek sanctions other than dismissal, such as prohibiting the prosecution from seeking the death penalty. Counsel stated it might pursue such action if the defense was not given adequate time to prepare for the penalty phase. (1RT A15-A16.) Appellant personally waived time until August 10, 1995, as day 0 of 30. (1RT A16; 1CT 83.)

On August 10, 1995, Deputy Public Defender Isaacson reported to the court that Deputy District Attorney Schreiner planned to meet with the detectives to resolve the discovery issues. Counsel also mentioned that the defense would need several months to prepare for he penalty phase. (1RT A21-A22.) Appellant personally waived time until August 28, 1995, as day 0 of 60.

(1RT A22; 1CT 99.)

On August 28, 1995, Deputy Public Defender Isaacson reported that the prosecution had not turned over the contact information for witnesses and that the contact information was blacked-out of the murder book. The prosecution explained that the civilian witnesses were terrified of appellant and did not want their addresses disclosed, and the prosecution did not want to disclose the addresses for the same reason. The prosecutor proposed that the court order the local witnesses to appear at the district attorney's office, and requested additional time to find options for the Oregon witnesses. (1RT A28-A34.)

Deputy Public Defender Isaacson commented that he had received most of the items he had requested and the police had been very cooperative with the exception of the witness contact information. The defense wanted information for Knott, Eric Berman, Georgine Hightower, Somphop Jardensiri, Nathan Apley, James Edge, Tana Marie Delaguerra, Donna Seipp, and Somphop Mannil. Counsel proposed to handle the matter informally with the prosecution, and continue the discovery motion until August 27, 1995. The matter was continued until the September 27, 1995. (1RT A34-A37.)

On September 27, 1995, appellant was informed in writing that the death penalty committee would meet on October 5, 1995, and the committee wanted all mitigating information submitted two days prior to the meeting. (1RT A47-A48.) On October 4, 1995, Deputy Public Defender Isaacson informed the court that Deputy District Attorney Schreiner had agreed to obtain the witness's contact information from the police, and that they had agreed to a compliance date of three weeks. The court set October 25, 1995, as a final discovery compliance date and threatened to impose sanctions for failure to comply. (1RT A74-A78.) Appellant personally waived time until November 6, 1995, as day 0 of 60. (1RT A79; 120.)

On November 6, 1995, Counsel Koury appeared on behalf of Deputy

Public Defender Isaacson. A pretrial conference was continued until November 11, 1995. (1RT A80-A81; 1CT 124.) On November 21, 1995, Deputy Public Defender Isaacson contacted the court telephonically and the matter was continued until November 30, 1995. The prosecution informed the court he believed the discovery matter was essentially resolved. (1RT1-2; 1CT 126.) On November 30, 1995, the prosecution told the court it had turned over all the discovery requested except for the contact information for Knott and Edge. (1RT 3-6.) Deputy Public Defender Isaacson claimed the addresses had become "stale." (1RT 7-8.) The court ordered the prosecution to turn over any new information for witnesses. As to Knott and Edge, the court and the parties agreed that these witnesses would be made available to the defense at the prosecution's office. (1RT 9-11, 15-16.) The court also ordered the prosecution to submit in writing all the *current* evidence the prosecution intended to use for the guilt phase and penalty phase by the next court hearing. (1RT 18-20.) Appellant personally waived time until December 12, 2005, as day 0 of 30. (1RT 21; 1CT 127.)

On December 12, 1995, Counsel Sterkenberg appeared for Deputy Public Defender Isaacson and the matter was continued until December 18, 1995. (1RT 24; 1CT 128.) On December 18, 1995, Deputy Public Defender Isaacson stated the prosecution had tendered a written list of 24 witnesses and five prior incidents of criminal conduct to be presented in the guilt phase or penalty phase, but wanted "additional discovery on those cases." (1RT 25-26.) The prosecution argued it had complied with the court's discovery order, and stated that any new information would be turned over to the defense, and the prosecution expected reciprocal discovery as both parties completed their investigations. (1RT 26-28.) The prosecution expressed hope the Oregon investigation would be conducted within a month. (1RT 34-35.) The court wanted the prosecution's assurance that the investigation would actually begin

before January 8, 1996. (1RT 35-36.)

Under these circumstances, there were legitimate reasons for the delay in turning over discovery. As to the California witnesses, the prosecution had asked the defense to obtain the contact information from the police, not knowing that some witnesses were apparently terrified of appellant, and did not want to be contacted by the defense. When this was brought to the prosecutor's attention, he raised his concern in court and offered to make the witnesses available at his office, and ultimately turned over the information to the defense despite his misgivings. Unlike the delay intentionally caused by appellant's game-playing, the prosecution acted in good-faith to resolve a thorny problem where the defense wanted contact information, but the witnesses were terrified and did not want to be contacted. As to the Oregon witnesses, the committee made the decision to seek the death penalty near the end of October of 1995, and the prosecution turned over discovery to the defense by December of 1995, so there was very little delay once the committee decided that the prosecution would seek the death penalty. The decision to seek the death penalty was made about seven or eight months after the second case was filed, and the defense was given several additional months to investigate. Under these circumstances, appellant was more to blame for the delay than the prosecution.

3. Appellant Did Not Assert His Speedy Trial Rights In Due Course

Appellant failed to assert his right to a speedy trial in due course because he had personally waived time until *after* the prosecution had turned over all discovery. On November 21, 1995, the prosecution represented that the discovery issues had been resolved, and that the defense was seeking additional time to investigate the Oregon crimes. (1RT 1-2.) On November 30, the prosecution told the court all contact information had been given to the defense,

except Edge and Knott, who would meet with the defense at the prosecutor's office. (1RT 3-4, 15-16.) By December 18, 1995, the prosecution turned over discovery on five prior cases of criminal conduct and 24 witnesses. (1RT 25-26.) Thus, although the second case was filed in March of 1995, appellant personally and expressly waived time to begin trial until January 12, 1996. (1RT 21; 1CT 127.) This was after the prosecutor had complied with discovery. Under these circumstances, appellant failed to assert his right to a speedy trial in due course, and therefore this factor should be weighted heavily against appellant.

4. Appellant Has Failed To Show Prejudice

As will be discussed in detail immediately below, appellant failed to establish any prejudice as to any of his speedy trial claims, or his due process claim, and therefore his claims should be rejected.

E. Appellant Has Failed To Show Prejudice

Appellant further claims that he was prejudiced by the trial court's erroneous denial of his motion to dismiss for violation of his state statutory and constitutional speedy trial rights. (AOB 75-78.) Appellant first argues he was prejudiced because the case had been dismissed once and could only be filed again if the prosecution could meet the standard under section 1387.1. (AOB 76-77.) Of course, whether the charges could be refiled does not show how appellant was prejudiced by the delay at the trial where he was convicted of robbery and murder with special circumstances and sentenced to death.

Moreover, it is likely that the case could have been filed a third time due to the excusable neglect from the first case leading to the first dismissal. Section 1387.1 states:

> (a) Where an offense is a violent felony, as defined in Section 667.5 and the prosecution has had two prior dismissals, as defined in Section 1387, the people shall be permitted one additional opportunity to refile charges where either of the prior dismissals under Section 1387 were due solely to excusable neglect. In no case shall the additional refiling of charges provided under this section be permitted where the conduct of the prosecution amounted to bad faith.
>
> (b) As used in this section, "excusable neglect" includes, but is not limited to, *error on the part of the court*, prosecution, law enforcement agency, or witnesses.

(emphasis added.) Here, the first case was dismissed after the trial court failed to secure appellant's personal waiver to have the preliminary hearing beyond the 60-day time limit. The trial court had neglected to research whether "good cause" could permit a continuance, over an objection, of the 60-day time limit under section 859b, and continued the preliminary hearing when it should not have done so. This appears to be excusable neglect on the part of the trial court, and therefore meets the requirements of both section 1387.1, subdivision (a) and subdivision (b). Therefore, appellant cannot show prejudice because the case would have been refiled if it had been dismissed a second time.

Appellant next argues that the prosecution's delay in complying with discovery resulted in the loss of exculpatory evidence. (AOB 77-78.) Appellant claims that Somphop Jardensiri was "a potentially critical exculpatory witness" who was lost during the delay. Appellant claims that the "loss" of Jardensiri "indisputably undermined the fairness of appellant's trial and was patently prejudicial." (AOB 78.) Respondent disagrees. The trial court properly found that appellant failed to establish prejudice regarding Jardensiri.

First, appellant has failed to show that he did not receive Jardensiri's contact information when he represented himself. Appellant represented

himself from September (1RT 6-8, 10-12; Supp. III CT 20), through December of 1994 (Supp. III CT 148). During this period, the trial court found the prosecution had complied with discovery (Supp. III 1CT 47), and appellant told the court his investigator had received discovery, and he had personally reviewed all discovery except for the autopsy report (Supp. III 1CT 54-59, 80). Apparently, appellant was able to contact Knott during this period of time through his investigator. However, appellant never stated that he did not have Jardensiri's contact information, or that he was seeking that information, or that he had any interest in Jardensiri whatsoever. There is no evidence that appellant made any efforts to find Jardensiri while appellant was in charge of his case for over three months.

Second, because appellant played pro per "games" with the court, his counsel did not file a pretrial discovery motion until February 7, 1995. (Supp. III 1CT 208-217.) When the motion was heard on February 17, 1995, the prosecutor told the court that Jardensiri may have already left the country for Cambodia. (1RT 52.) Thus, it appears that Jardensiri left the country very close to the period of time that appellant chose to represent himself and made no efforts to seek Jardensiri, and during the period in which the court stated the prosecution was in compliance with discovery. The trial court found that there was no evidence when Jardensiri left the country and no evidence showing that he would have testified. The court also noted that the defense had not mentioned any efforts to locate Jardensiri, and therefore there was no evidence that the witness had been irretrievably lost. (1RT 99.)[13]

Third, the notion that Jardensiri was clearly an exculpatory witness is not

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13. The court stated that sanctions other than dismissal would be dealt with at trial if it was determined that discovery was late, and that the court had in fact imposed discovery sanctions in very important cases. (1RT 100-103.) Appellant did not request any discovery sanctions at trial.

supported by the record. During trial, Counsel Short claimed that Jardensiri told the police that he saw Toler with a gun, he saw Toler fire a bullet that struck the security camera, he heard Toler demand money from Akbar and then gunshots. Counsel also pointed out that Jardensiri had identified Toler as the shooter. (6RT 1250-1251.) However, the prosecutor pointed out that Jardensiri said the shooter was holding a chrome handgun rather than a black handgun, and the physical evidence showed that the chrome gun was not fired during the robbery. The prosecutor argued that cross-examination on this issue would reveal that Jardensiri panicked and identified the wrong person. (6RT 1252-1253.)

Moreover, Counsel stated that the defense had attempted to contact Jardensiri's employer, Somphop Mannil, to obtain Jardensiri's location, but the letters sent to Mannil went unanswered. The defense investigator believed that Mannil was home but did not want to speak with the defense. Counsel also believed that both men lived in the same home. (1RT 8-9.) Appellant has failed to show that Jardensiri would have cooperated with the defense any more than Mannil did, who was Jardensiri's employer and roommate, and would have nothing to do with the defense. Under these circumstances, appellant's claim of prejudice amounts to speculation that Jardensiri would have been an "exculpatory" witness that would have helped the defense. Appellant's defense was that he did not participate in the robbery/murder of Akbar. Jardensiri's statement did not substantiate this defense. Furthermore, as the prosecution pointed out, Jardensiri's statements to the police were directly refuted by the undisputed physical evidence that the chrome gun was *not* fired during the robbery. Thus, appellant has failed to show what efforts he took to find Jardensiri, failed to show that Jardensiri would have cooperated with the defense, failed to show that Jardensiri was an exculpatory witness, and failed to show how Jardensiri would have helped his case when his testimony was

obviously wrong when considering the undisputed physical evidence. Therefore, appellant has failed to establish he was prejudiced as to any claim regarding his right to a speedy trial, be it statutory or constitutional, or his due process claim. Accordingly, appellant's claims should be rejected.

II.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION AND PRESERVED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT REQUIRED APPELLANT TO WEAR AN ELECTRONIC SECURITY BELT DURING TRIAL

Appellant's second claim on appeal is that the trial court erred when it ordered appellant to wear an electronic security belt during parts of the trial and, as a result, infringed his ability to participate in his defense in violation of his state and federal constitutional rights. (AOB 86-110.) Respondent disagrees. The trial court acted within its discretion when it required appellant to wear an electronic security belt during parts of the trial. The record supports a finding that there was manifest need to physically restrain appellant based on his violent, threatening, contumacious, and other non-conforming behavior. Finally, any alleged error was harmless.

A. Relevant Proceedings

On November 30, 1995, the trial court stated:

> The last thing I will put on the record before we conclude today because I think the record is still deficient in this point, on September 27th when the hearing in this court was concluded, I was told that the following occurred: [Appellant] was taken from this courtroom by the regular bailiff to this courtroom. He was taken down to lock-up and told

to go into a side cell. [Appellant] objected and pointed out that his belongings were in another cell. Deputy McCaleb explained that he had no key to that other cell. That he had to put [appellant] in the side cell, go and get the key and then would move [appellant] into the same cell as the one containing his belongings. Deputy McCaleb had taken the handcuffs off [appellant] at that point in order to be able to put him in the side cell unmanacled. [Appellant] then struck my bailiff four or five times. All blows were to the head. My bailiff was calling out for another who eventually reached [appellant] and my bailiff. The moment that other deputy appeared and was close enough to use pepper spray, [appellant] stopped his attack and walked into the cell. The deputy hit suffered a slight concussion and was off work for nearly three weeks and was on light duty for some period of time.

(1RT 20-21.)

On December 12, 1995, a hearing was held without appellant's presence. The matter was continued. (1RT 24.) On December 18, 2005, appellant was present in court, but the record does not indicate whether he was physically restrained. At the hearing the prosecution represented that it had turned over to the defense the report for the 1995 incident with Deputy McCaleb. (1RT 25-41.) This report was written by the Deputy Janulis, who came to Deputy McCaleb's aid during the attack. Deputy Janulis reported that he witnessed appellant assaulting Deputy McCaleb in lock-up. (2CT 454-460.)

On February 5, 1996, the Public Defender's Officer was relieved, based on a conflict of interest, and Randy Short was appointed as counsel. (1RT 44-45.) Bailiff Michael English was present in court. The court asked the bailiff whether appellant had been involved in an incident in lock-up that day. The bailiff explained that appellant was told he would be fitted with the "react belt" which is a device that administeres a 50,000 volt electric shock if a defendant

attempted to escape or engage in violent conduct. Appellant refused to wear the device, so the bailiffs called for a sergeant. The court asked for appellant's presence before the sergeant could arrive, so appellant was brought to court without the react belt. (1RT 46-47.) The court noted that it had waited twenty minutes for appellant to appear in court. (1RT 48.)

The prosecutor stated for the record that appellant was not wearing the react belt at that time. The court stated that it wanted appellant to wear the react belt. The court further stated: "This record should also reflect that I want it on him because of his previous attack on my bailiff." (1RT 48.)

On March 8, 1996, appellant's counsel addressed the court. Counsel requested that the react belt not be used during trial or court proceedings. Counsel also stated:

> I understand there was an alleged altercation with the bailiff, that the facts of that have to be litigated and have not yet at this time. It's my basic understanding, however, that he's not caused any violent problems in the courtroom itself or created any disturbance of any major type in the courtroom. I think [appellant]'s attitude is changing with new counsel and I would like to get off to a fresh start by not having the restraint belt on him until it seems necessary if any problems occur in the future.
>
> If the court does not wish to grant that request, I do request alternatively that the belt not be used until we have a medical examination. He had been documented with high blood pressure. It is a 50,000 volt belt and I would like a doctor's approval before it is used. [Appellant] believes, but I'm not sure, that's regulation that should have been done in the first place, but I don't know the regulation regarding that.

(1RT 51-52.)

The court rejected appellant's request not to wear the belt at further trial proceedings. The court stated:

> This man assaulted my bailiff without the least provocation at all. As you say it hasn't been litigated and inmates are all aware of all their litigation rights which they use to the [nth] degree. It is also noteworthy in that assault the moment the second deputy was within range of Mr. Hasan, as he insists on calling himself, and ran the risk of having one finger laid on him, he stopped at that instant. So it was obviously highly calculated and he knew when to stop so that he didn't suffer any adverse consequences. I will not have my staff subject to that risk. And much as it might be good for you that you start off on a different foot, I understand your position in that. Unfortunately it's not you that we are dealing with. It is not you that the bailiffs are dealing with. It is Hasan and he has demonstrated his attitude very fully. And you -- so your request that he be without the belt is denied.

(1RT 52.)

The court granted appellant request for a medical exam. (Supp III 2CT 305.) The court stated:

> I will always sign and order for a medical examination. I will sign it today if you have it, but he will have the belt on this morning because the belt does absolutely nothing to anybody if that person does what he is told. And an inmate is required to do as he is told. So he runs not the slightest risk. Ready to have him up then? We have the prosecutor here.

Appellant was not present during the hearing. (1RT 53.)

On March 21, 1996, the court stated that appellant refused to come to court wearing the react belt. While appellant remained in lock-up, appellant's

motion to recuse the court was stayed for one week. (1RT 58-60.) Appellant's counsel stated:

> I intend to also move for a change of venue for a hearing regarding the react belt and also for a motion regarding the 12/18/95 hearing where [appellant] refused to waive time. All these are interlinked and I have been thrown in the middle of it. During that stay period I hope to clear it all up.

(1RT 59-60.)

On March 28, 1996, a hearing was held regarding appellant's motion to recuse the court. Appellant appeared in court wearing waist and ankle chains. The bailiff stated that his supervisor had suggested this strategy to get appellant to attend the court proceeding. The court explained that it had, "with grave misgivings," allowed appellant to wear shackles instead of react belt in order to have his presence at the hearing for counsel's sake. The court stated that it intended to use the react belt at future hearings. (1RT 65-66.)

Appellant's counsel stated that "at some point there may need to be a hearing on that issue . . . ." (1RT 66.) The court responded by acknowledging that there had not yet been a hearing on the issue, and commented that another court might hear the specific matter. (1RT 66.) The prosecution argued that the matter should not be decided by another court, because this would create a system where a defendant who was unhappy with a particular court could simply attack the court's staff in order to have his case heard in another court. (1RT 66-67.)

On August 13, 1996, appellant appeared in court without the react belt. The court commented that there were four deputies in the courtroom. The court told appellant's counsel that the court would require appellant to wear the react belt during trial. (1RT 169.) Appellant's counsel stated:

I would like to have a hearing regarding that, your Honor. I don't know exactly how to propose to do it. I know probably there would be some inmates that we could bring in to testify on his behalf regarding the incident with the bailiff and perhaps convince the court that he is not a danger and does not need the react belt.

The following discussion occurred:

THE COURT: His record, other than any incidents in this courtroom, includes an escape, does it not?

MR. SCHREINER: I don't have that, your Honor.

THE COURT: I'm sorry. That's somebody else. Somebody else. Okay.

MR. SCHREINER: What I have is an extensive history of violence in terms of both convictions and in terms of other evidence that we intend to present at penalty phase. We, of course, have the information regarding the incidents with Deputy McCaleb. The court's going to make the determination obviously about security here, but I would support any measure that the court would choose to present.

Now, counsel has to be concerned, of course, about the appearance before the jury, but my understanding of the react belt is that that is something worn under the clothing that is not visible to the jury. So if he refuses to do that for whatever reason, he has to appear in chains. The jury is not going to be aware of that unless an incident is created by the defendant. So I don't see there's any real objection to it. It's not going to be any hindrance to it unless there's an incident.

THE COURT: Tell me what is your objection to the react belt?

MR. SHORT: Basically Mr. Hasan's objection. He feels it is a dangerous apparatus, that he has a heart problem which even though we have had medical orders signed I'm not sure that has been resolved as to

what his physical state is. And he feels uncomfortable because he doesn't believe the way counsel puts it that it's only going to be because he acts badly that the react belt will be used. He thinks someone can misuse judgment when he is not acting badly.

THE COURT: The court's order is that he will be on the react belt. It has been developed as the best security device so far introduced. Chains and manacling is not desirable in front of the jury. The react belt is not visible. Therefore, from the point of view of appearance it is the best. The react belt is the safest from a point of view from the defendant. If he conducts himself in the proper manner for a courtroom appearance, he has absolutely nothing to fear from the belt whatsoever. It will only be activated if he is either attempting to escape or is using some violence on somebody in the courtroom. I don't want any gunfire in this courtroom. This is an extremely serious case. The security of this building is deplorable. There are doors right, left and center. And I don't want any escape and I don't want any incident at all. The react belt in this case is the ideal solution and is ordered for this defendant. So we are then in recess then until - - one more thing?

MR. SHORT: Yes, your honor. Mr. Hasan would like to address the court regarding the react belt.

THE COURT: Go ahead.

THE DEFENDANT: Yes. As far as the allegations as far as assault taking place at lock-up, you know what I mean, I had 14 witnesses that says, you know what I'm saying, this individual attacked me and I was protecting myself. I feel if it was that serious, you know what I'm saying, I should have been charged with it. Therefore, I can go ahead and litigate the issue, prove my innocence, then I won't have to be subject to, know what I'm saying, having this react belt on.

As far as any other, you know, allegations outside of this state, you know what I'm saying, the present case at hand and, you know what I'm saying, those are all allegations which have not been proven, know what I'm saying, will just be brought up for aggravating factors. They are planning on bringing some things up, you know what I'm saying, as far as allegations that I have not been arraigned on, et cetera.

I don't think the react belt is even necessary. I haven't had any problems, know what I'm saying, at least 10 months before the incidents even took place, you know what I mean. I'm not a hostile individual. I don't have any long history of violence in the county jail. They can subpoena my records there to see if I have altercations, any type of disputes there. There's no reason for the react belt whatsoever, you know, as far as this --

THE COURT: Okay, thank you. The problem is I have to have some security. I assume that Mr. Short is not suggesting that you just sit there in civilian clothes and that's an end to it as if it were a civil case. I know he is not suggesting that. I think he is suggesting one, perhaps two bailiffs in the courtroom is sufficient. There was an incident within the last week, I think within this county, where a defendant, being dressed in street clothes, just walked out through the courtroom, through the corridor and out through the building. The fact of being in street clothes makes an escape more attractive. I have to take some security measures. Would you rather be shackled with leg irons and waist irons?

THE DEFENDANT: I don't think I need - -

THE COURT: I know that. I'm asking you. Inasmuch as I'm going to take –

THE DEFENDANT: I would rather not have any restraints.

THE COURT: I know that. Inasmuch as you are going to have something, would you rather have waist chains and leg shackles rather than the belt?

THE DEFENDANT: I'm not going to agree to any kind of shackles. You are going -

MR. SHORT: As his counsel I would rather have the react belt on him, but I really wish that he would be examined by a doctor and make sure this is safe.

THE COURT: I will sign the order definitely. I will sign it that I want to have the results. That has helped in the past. And can require that somebody inform me why he has not been examined if he has not.

The react belt is ordered. The court has the responsibility as to the security of court, staff and jurors.

(1RT 170-173.)

The Clerk's Transcript shows that on August 13, 1996, the court signed an order for a medical exam, specifying that appellant was to be examined for heart problems that would prevent him from wearing the react belt. The court indicated it wanted a report by August 20, 1996, and ordered appellant to appear in court the same day. (2CT 470, 3CT 512-513.) On August 19, 1996, the court received the report regarding appellant's medical examination. Dr. John H. Clark, Chief Physician III, of the Medical Services Department of the Los Angeles County Sheriff's Department, reported that appellant had been examined by Dr. A.P. Johnson. The results of the examination were:

(1) Patient has a current diagnosis of Hypertension, which is controlled by medication. There is no contra-indication to use the react belt based on a review of the medical record.

(2) Patient's prognosis is good.

(3) Patient's care and treatment is continuing.

(4) Patient is medically fit to continue trial proceedings.

(2CT 475-476, 3CT 511.)

On September 6, 1996, appellant moved for mistrial. Appellant's counsel explained that the September 6, 1996, edition of the Press Telegram stated: "Because Hasan, a robust 26-year-old, beat up a deputy sheriff last year he is equipped with a electronic stun device monitored remotely by specially-trained bailiffs . . ." The court stated it was aware and had read the article. The Court denied a mistrial, and explained that the jury had been instructed not to read any articles in the press. The court offered to question the jury. Defense asked the court to ignore the issue. (6RT 1284-1285.)

Appellant requested not be present for verdict, but the request was denied, and appellant appeared in shackles because the react belt was not available. (10RT 2338-2334.)

Appellant appeared in court on August 23, 27, 28, 29, and 30, 1996. (3CT 489-490, 509-510, 515-516) Appellant also appeared in court on September 4, 5, 6, 9, 10, and 11, 1996. (3CT 517-519, 526-530, 538-539.) Appellant was convicted on September 16, 1996. (3CT 629-631, 636-638.) Appellant appeared in court for the penalty phase on September 17, 18, 19, and 20, 1996. (3CT 639-646.) On September 23, 1996, the jury determined that appellant should put to death for his crimes. (3CT 666, 673-674.)

B. Relevant Law

This Court has specifically addressed the use of the react belt on a criminal defendant in *People v. Mar* (2002) 28 Cal.4th 1201. The Court reaffirmed that a trial court must find "manifest need" before a defendant can

be "subjected to physical restraints of any kind in the courtroom while in the jury's presence . . . ." Manifest need has been found were a defendant fought with officers, threatened witnesses, expressed an intent to escape, expressed an intent to procure a weapon, resisted being brought to court, refused to dress for court, shouted obscenities in the courtroom, and kicked the defense table. (*People v. Mar, supra,* 28 Cal.4th at pp. 1216-1217 [citing several cases]; *see People v. Pride* (1992) 3 Cal.4th 195, 232-233 [series of threats against deputies]; *see also People v. Alvarez* (1996) 14 Cal.4th 155, 190-192, [possession of explosive device and weapons in jail was grounds for restraint].) The court also reiterated that where physical restraints are used, the restraints should be "as unobtrusive as possible, although as effective as necessary under the circumstances." (*People v. Mar, supra,* 28 Cal.4th at p. 1217, citing *People v. Duran* (1976) 16 Cal.3d 282, 290-91.)

A trial court's determination that a defendant must be physically restrained "cannot be successfully challenged on review except on a showing of a manifest abuse of discretion." (*People v. Mar, supra,* 28 Cal.4th at p. 1217, citing *People v. Duran, supra,* 16 Cal.3d at p. 293, fn. 12.) However, in order to properly exercise its discretion the trial court should follow certain procedures previously set forth in *People v. Duran*.

First, it is the trial court's duty to determine whether physical restraints are necessary in light of the defendant's right to due process. Such a determination cannot be left exclusively to the prosecutor. (*People v. Mar, supra,* 28 Cal.4th at p. 1217, citing *People v. Duran, supra,* 16 Cal.3d at pp. 290-91.) The court's determination of manifest need cannot rely exclusively on jail or court security personnel. The court's responsibility cannot be abdicated. (*People v. Mar, supra,* 28 Cal.4th at p. 1217, citing *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825, and *People v. Jacla* (1978) 77 Cal.App.3d 878, 885.)

Second, evidence of the non-conforming behavior underlying the decision to use physical restraints "must appear as a matter of record." The imposition of physical restraints without a record showing the non-conforming behavior will be deemed an abuse of discretion. (*People v. Mar, supra,* 28 Cal.4th at p. 1217, citing *People v. Duran, supra,* 16 Cal.3d at pp. 290-91.) Thus, "[t]he record must demonstrate that the trial court independently determined on the basis of an on-the-record showing" that there was manifest need for the defendant to be physically restrained. (*People v. Mar, supra,* 28 Cal.4th at p. 1217, citing *People v. Hill* (1998) 17 Cal.4th 840, 841-842.) A formal hearing is not required, but the court must make its ruling based on facts, rather than rumor or innuendo. (*People v. Mar, supra,* 28 Cal.4th at p. 1217, citing *People v. Cox* (1991) 53 Cal.3d 618, 651-652.)

Third, this Court provided guidance to trial courts regarding the compelled use of the stun belt at future trials. (*People v. Mar, supra,* 28 Cal.4th at pp. 1225-1226.) A trial court should "authorize the least obtrusive or restrictive restraint that effectively will serve the specified security purpose." (*Id.* at p. 1226, citing *People v. Duran*, *supra*, 16 Cal.3d at p. 291 and *Spain v. Rushen* (9th Cir. 1989) 883 F.3d 712.) While the stun belt is not visible to the jury, and therefore eliminates prejudice arising from the jury seeing physical restraints, there are other factors that should be considered. A trial court should consider the potential physical and psychological effects of the stun belt on the defendant, and how these potential effects may diminish the defendant's ability to participate in his defense. (*People v. Mar, supra,* 28 Cal.4th at pp. 1226-1228.) The possibility of accidental activation of the stun belt must be considered and should be brought to the attention of a defendant asked to chose between the stun belt or more traditional security measures. (*Id.* at pp. 1228-1229.) The court must determine if the stun belt is medically appropriate. Finally, the court should monitor the progression of the technology so as to be

aware of which stun belt design may constitute the least restrictive device to meet the security concern. (*Id.* at pp. 1229-1230.)

C. The Trial Court Acted Within Its Discretion When It Ordered Appellant To Wear The Stun Belt During Trial

The trial court acted within its discretion when it ordered appellant to wear the stun belt during trial. The court determined there was manifest need to physically restrain appellant after the court determined he attacked a deputy, and also when it determined appellant was an escape risk considering his propensity for violence and the courtroom's poor security design. Both these grounds are a proper basis for requiring physical restraints. (*People v. Mar, supra,* 28 Cal.4th at pp. 1216-1217.) The trial court specifically stated that the stun belt was not visible to the jury, which conforms with this Court's requirement that physical restraints be "as unobtrusive as possible, although as effective as necessary under the circumstances." (*People v. Mar, supra,* 28 Cal.4th at p. 1217, citing *People v. Duran, supra,* 16 Cal.3d at pp. 290-91.)

The trial court made the relevant determinations and did not leave the decision to the prosecutor or the court security staff. (*People v. Mar, supra,* 28 Cal.4th at p. 1217.) Rather, the trial court itself determined that appellant should wear the stun belt because he was a security risk. The court did not rely on the prosecutor. The prosecutor expressly stated to the trial court: "The court's going to make the determination regarding security here, but I would support any measure that the court would chose to present." (1RT 170.) Nor did the court rely exclusively on court security personnel. The record shows that the court independently determined that appellant should wear the stun belt because he was a security risk. For example, on March 8, 1996, the court found that the attack was "obviously highly calculated" and the court refused "to have her staff subject to that risk." The court also commented that appellant had

"demonstrated his attitude very fully." (1RT 52.) Thus, the court met the requirement that it not abdicate its responsibility to determine if there is manifest need for physical restraints.

As to potential physical effects, the trial court determined that the use of the stun belt was medically appropriate after it ordered a medical examination which determined that there was no contra-indication to the use of the stun belt. As to potential psychological effects, the court gave appellant the option of being physically shackled when he expressed concern about the stun belt, but then appellant refused to express any preference. As discussed above, the trial court determined that the stun belt was the least obtrusive device which would serve the security purpose of preventing appellant from attacking someone or trying to escape. The trial court specifically told appellant that the stun belt would only be activated if he attacked someone or attempted to escape, rather than for other non-conforming behavior. As to the progression of technology, the court found that the stun belt used in 1996 was the best security device which had been introduced at that time.

Finally, the evidence of appellant's non-conforming behavior and the court's independent determination to order the stun belt appear in the record and demonstrate that the court made its ruling based on facts, rather than mere rumor or innuendo. The court expressly created a record regarding its order requiring appellant to wear the stun belt. The court explained that it had been informed that appellant attacked Deputy McCaleb by striking him in the head four or five times and caused the deputy to suffer a concussion and miss three weeks of work while recovering. (1RT 20-21.) The court's ruling was supported by the incident report written by Deputy Janulis, who reported that he witnessed appellant assaulting Deputy McCaleb in lock-up. (2CT 454-460.) This report was turned over to the defense (1RT 25-41), and there is no reason to believe that the Court was not aware of the report. At a subsequent hearing,

the court reiterated that the "record should also reflect that I want it on him because of his previous attack on my bailiff." (1RT 48.) When appellant's new trial lawyer, Randy Short, was assigned to the case, he asked the court to reconsider the order requiring appellant to wear the stun belt. Counsel stated that he understood that there had been an altercation with appellant and a deputy, but wanted the court to reconsider so that counsel could have a better relationship with appellant. The court rejected counsel's request and again reiterated that the court had determined that appellant had attacked Deputy McCaleb in a highly calculated manner. (1RT 53.) Under these circumstances, the record shows that the trial court acted within its discretion when found there was manifest need to require appellant to wear the stun belt during trial.

Appellant first claims that "the court's ultimate ruling on [requiring appellant to wear a stun belt] was that restraints were necessary to prevent appellant from attempting to escape during trial" and "there was no basis in the record for the court to conclude that appellant was an escape risk." (AOB 97-98.) Respondent disagrees because this argument is meritless. One simply cannot fairly characterize the trial court's decision as resting *exclusively* on the risk that appellant could attempt to escape. The record clearly shows, as discussed above, that the trial court considered several factors in implicitly determining there was manifest need for appellant to be physically restrained. (1RT 20-21, 48, 51-53, 65-67, 169-173; 2CT 470, 3CT 512-513.)

The court asked appellant for the basis of his objection to the stun belt. Appellant objected on the basis that he believed the stun belt was dangerous, especially because appellant had a "heart problem." (1RT 170-171.) However, appellant had an undisputed medical evaluation which indicated he did not have a heart problem, rather only hypertension controlled by medication, and that there was "no contra-indication to use the react belt based on a review of the medical record." (2CT 475-476, 3CT 511.)

Appellant also objected because he felt uncomfortable based on his belief that the stun belt could be activated not only when "he acts badly," but also when the security officer uses poor judgement and incorrectly perceives that appellant is "acting badly." The court specifically addressed this concern and informed appellant that the stun belt would only be activated under limited circumstances. The only reasons which would justify activating the stun belt would be appellant's attempt to escape from the courtroom or to use violence against another person in the courtroom. (1RT 170-171.)

The trial court also allowed appellant to personally address the court regarding the imposition of the stun belt. Appellant *acknowledged* that he assaulted Deputy McCaleb, but claimed that he did so in self-defense when he was attacked. Appellant dismissed his record of violence outside the state by asserting that this record was based on unproven allegations. Appellant also claimed he was not a hostile person and that in the ten months leading up to his assault on Deputy McCaleb, he did not have a long record of violence in the county jail. (1RT 172.) In this regard, it appears that the trial court disbelieved appellant's claims that he was non-violent. Indeed even defense counsel did not advocate appellant's extreme position, and instead conceded that some form of heightened security was warranted under the circumstances.

The trial court nonetheless inquired whether appellant would rather be shackled with leg irons and waist irons. The court made it clear that it understood appellant wanted no physical restraints, but that the court wanted to know which he preferred, knowing that one of these options would be required. Appellant refused to answer the question. Appellant's counsel stated that he would prefer the stun belt, as long as the stun belt was cleared for use following a medical examination. (1RT 173.)

D. Even If The Trial Court Should Have Held A More Extensive Hearing, The Record At Trial Shows That The Court's Decision To Require The Stun Belt Was Well Supported

Appellant argues that the trial court abused its discretion because there is an insufficient on-the-record showing of manifest need. As discussed above, a formal hearing is not required, but the court must make its ruling on facts rather that "rumor or innuendo." (*People v. Mar, supra,* 28 Cal.4th at p. 1217, citing *People v. Cox, supra,* 53 Cal.3d at pp. 651-652.) Here, the court did not make its determination based on rumor or innuendo. The court made it ruling based on facts which were reported to the judge from the court security personnel. This was not a case where the court relied on "rumors" of a pending escape by defendants or where the court assumed appellant was dangerous because of the present or past crimes charged against him. As discussed above, the court used information from court security personnel to independently determine that the stun belt was necessary, and did not rely on the security personnel's opinion that the stun belt should be used. Thus, the record shows that court independently determined the need for the stun belt based on an on-the-record showing. (*People v. Mar, supra,* 28 Cal.4th at p. 1217, citing *People v. Hill, supra,* 17 Cal.4th at pp. 841-842.) As discussed above, the court apparently disbelieved appellant's claims that he was non-violent, and that the stun belt was necessary to prevent further violent acts.

However, assuming this Court finds that the trial court was required to have a more extensive on-the-record showing of manifest need, then respondent submits that the record at trial clearly justifies the trial court's decision to require the stun belt. In other words, even if the record is lacking prior to imposition of the stun belt, the record that was developed by the end of trial clearly showed that the trial court was wholly justified in requiring appellant to wear the stun belt.

1. Deputy McCaleb Testified During The Penalty Phase

During the penalty phase, Deputy McCaleb testified that appellant attacked him the in the court house lock-up cells. Deputy McCaleb testified that he was assigned as a bailiff in the courtroom used for appellant's trial. By September 27, 1995, Deputy McCaleb had been escorting appellant from the courtroom into lock-up for about six months. At around noon on September 27, after a short hearing, Deputy McCaleb was escorting appellant back to the lock-up facility. Appellant had a chain around his waist and his hands were handcuffed to his sides toward the front of his body. (9RT 2047-2050.) When they reached the lock-up area, appellant turned around and Deputy McCaleb uncuffed his hands and took off his waist chain. Deputy McCaleb was only armed with pepper spray because firearms were not permitted in the lock-up area. Deputy McCaleb ordered appellant to enter the five-cell in lock-up. Appellant failed to comply and stated that he had property in four-cell. (9RT 2050-2053.)

Deputy McCaleb had observed that appellant appeared upset during the trial proceeding, so he had called for some assistance, but the unit was short staffed that day. The procedure followed in lock-up required that the other deputy on duty had to remain in a control booth. Under these particular circumstances, Deputy McCaleb decided to show extra patience: he explained to appellant that he would put him in five-cell temporarily and then into four-cell when he retrieved the proper keys. Appellant responded, "Why in the fuck didn't you explain it to me the first time." Deputy McCaleb repeated his order for appellant to enter the cell and put his hand on appellant's shoulder to gently guide him into the cell.

Appellant hit Deputy McCaleb with his right hand, causing him to "see

stars." Then appellant rapidly struck him in the head four to six times. Deputy McCaleb yelled for help. Deputy McCaleb was primarily trying to fend off blows. When he heard help arriving he "blindly threw a couple of punches to distance himself" from appellant. Another deputy arrived and together they attempted to subdue appellant by taking him to the ground. Appellant was able to resist their efforts. The deputies were not striking appellant. (9RT 2052-2056.) Deputy McCaleb retreated momentarily and pulled out his pepper spray. When he returned showing the pepper spray, appellant dropped his hands and walked into his cell. Deputy McCaleb suffered a concussion and had visible lumps on his forehead and the side of his head. He was off duty for three weeks and on light duty for two additional weeks. (9RT 2057-2058.)

During the penalty phase, appellant called Roman Cooper to attempt to rebut Deputy McCaleb's testimony. Cooper acknowledged that he had convictions for bank robbery, sodomy with a person under 14 by means of force, and illegal possession of a concealed firearm. He admitted he was a registered sex offender. (9RT 2138-2139.) Cooper testified that he was in the lock-up area of the courthouse. Appellant was talking with a bailiff. The bailiff put his hand on appellant's shoulder, appellant objected, and then tried to grab the bailiff's hand. The bailiff grabbed appellant again and they began fighting. Both people were throwing punches. (9RT 2124-2128.)

The parties stipulated that, if called, Gaylin S. Muakawa would testify that in his interview on December 19, 1995, Cooper stated with regard to this incident: "The defendant sustained bruises on his face and eyes." (9RT 2142.)

On October 16, 1996, the court sentenced appellant, and made the following finding:

> While in lock up in this courthouse, [appellant] viciously attacked and beat a deputy sheriff. This was a most calculated attack in that he picked a moment when he knew a shortage of staff exposed the deputy

to greater risk than ususal. Even more significant is the fact that the moment when he knew a second deputy reached the scene and [appellant] was, therefore, likely to be pepper sprayed or taken to the ground, he stopped the attack and walked into his cell. As with all bullies, he is also a coward who feared physical pain inflicted on himself.

(10RT 2349; 3CT 692-693.)

2. The Testimony Of Deputy McCaleb And The Trial Court's Findings Shows The Trial Court Properly Required Appellant To Wear The Stun Belt

Based on Deputy McCaleb's testimony, and the trial court's findings of fact, it is clear that the record supports the trial court's decision to require appellant to wear the stun belt. Deputy McCaleb's testimony mirrors the facts recited by the trial court before requiring appellant to wear the stun belt, which shows that the trial court made the right decision, even if the decision was procedurally premature. Appellant took the advantage, attacked Deputy McCaleb when he was alone, and then made a calculated retreated after another deputy arrived. Appellant was a clear danger to the safety of anyone in his vicinity, whether it was the lock-up area or the courtroom. This record amply supports the imposition of the stun belt.

Moreover, Respondent observes that even assuming Cooper's testimony is credible, Cooper essentially testified that appellant physically resisted Deputy McCaleb when he was engaged in his official duties. Deputy McCaleb had every right to physically guide appellant into a lock-up cell, and appellant had no right to physically resist being placed in a lock-up cell. Thus, the trial court's decision to require appellant to wear the stun belt is *supported* by the only testimony that appellant offered to rebut Deputy McCaleb's testimony. Of

course, Cooper's testimony was obviously false because he claimed appellant suffered bruises to his face and eyes, when there was no evidence appellant had sustained any injuries at all. Therefore, the record clearly justifies the trial court's decision to require appellant to wear the stun belt.

3. Appellant's Other Conduct During Trial Also Shows Manifest Need

There were several other incidents of non-conforming conduct which support the trial court's decision to require appellant to wear the stun belt.

a. *Appellant Threatens Toler During Trial*

On September 6, 1996, during a hearing pursuant to Evidence Code section 402, Toler testified that she had seen appellant in the men's holding tank in the courthouse the week of trial. Toler explained that she was about to talk to the prosecutor and detective, when appellant saw her coming out of the female holding tank. Appellant raised a finger to his lips. Toler interpreted this gesture as a request or order for her not to say anything. Also, Toler reported that female inmates were delivering messages from appellant that Toler was a liar and a "snitch." Toler did not perceive these messages as threats. (6RT 1314-1318.) Further, Toler's friend "New York" told her that the previous night on the jail bus appellant was arguing with her. Appellant told New York that Toler was a snitch and a liar. Rhonda was also on the bus and heard appellant talk about Toler. (6RT 1318-1319.) The trial court found that appellant's gesture to Toler was widely accepted as meaning "keep quiet." The court ruled that Toler could testify regarding the threatening gesture. (6RT 1320-1323.)

b. *Appellant Refuses To Dress For Court*

On September 17, 1996, appellant appeared for trial wearing his "jail blues." Both appellant and counsel told the court that is was appellant's decision to wear his jail clothing to court. (9RT 1975.) At the prosecution's request, the court admonished the jury that appellant chose to wear jail clothing and that they should ignore his clothing because it had no bearing on the case. (9RT 1980.)

c. *Appellant Threatens Witnesses During Trial While Wearing The Stun Belt*

The same day, the prosecution reported that after the court left the bench, appellant wrote "I will be out" and held the sign up to the people who had testified in the penalty phase. Then appellant mouthed the word "mother fucker" after showing them the sign, and then tore the sign into shreds. The prosecution argued that such evidence was relevant because appellant was still trying to intimidate the witnesses and thereby manifested a consciousness of guilt. Appellant grinned at the courtroom while shredding the sign. The prosecution even noted that appellant was grinning while the prosecution was then speaking. (9RT 2013.)

The court had the bailiff pick up the shredded pieced of paper in front of appellant. (9RT 2016.) Defense counsel stated he was "in a bad position" because he had provided appellant with paper during the trial. Counsel was concerned he could be a witness against his client and was unsure of what position to take. (9RT 2016.) Appellant requested to address the court. Appellant said that he had written the sign stating he would be back, but did not mouth the word "mother fucker." Appellant concluded by saying that his sign was not a threat, just a "matter of fact." (9RT 2017.)

Tom Duker was in the courtroom when his wife Donna Annas testified during the penalty phase, and remained in the courtroom after the jury had been excused and the judge had left the courtroom. He saw appellant write on a piece of paper and then display the message "I will be out" in large letters to the group of people in the back of the courtroom. When people began discussing appellant's display, appellant tore the sign into little pieces. (9RT 2025-2027.)

Dennis Bryant saw appellant write and display the sign to people in the audience section of the courtroom. Appellant also mouthed the words "mother fucker" at Bryant. Bryant took this as a threat. Appellant ripped up the sign. Bryant was working as a jail correctional officer in Oregon and had contact with appellant within two-years of the time appellant attempted to shoot him. (9RT 2028-2032.)

Officer Ernest Armond was in the courtroom after the judge and jury had left. He saw appellant hold up a sign that said "I will be out." Officer Armond went to the defense table and saw appellant tear up the sign (People's Exhibit 43). (9RT 2033-2034.)

d. *Appellant Refuses To Give A Voice Sample Or To Be Fingerprinted*

The record shows that appellant refused to allow himself to be fingerprinted for comparison with the prints in the prison packet, but ultimately relented when the court informed him that they would be taken by force or at least that the jury would be instructed regarding the refusal and that this would show a consciousness of guilt. (9RT 2079-2082.)

Moreover, the prosecution requested that appellant give a voice sample to give Edge an opportunity to identify the voice of the person who robbed him. (6RT 1207-1208.) The court ruled that appellant had to make the statement in court. (6RT 1211-1213.) Appellant refused to utter the words. (6RT 1213.)

The court instructed the jury that appellant had refused to give a voice sample. (6RT 1219.)

Thus, the record shows there were several other incidents of non-conforming conduct which support the trial court's decision to require appellant to wear the stun belt. Accordingly, the record conclusively supports the trial court's order requiring appellant to wear the stun belt during portions of the trial.

E. Any Order Compelling Appellant To Wear The Stun Belt Was Harmless

The court in *Mar* declined to decide whether the *Watson*[14] or *Chapman*[15] standard of harmless error applied to erroneous orders compelling a defendant to wear a stun belt. (*People v. Mar, supra*, 28 Cal.4th at p. 1225, fn. 7.) Respondent contends that the *Watson* standard of harmless error applies. In any event, any error in this case was harmless under either standard.

Where the physical restraints of a defendant are visible to the jury, any error must be harmless beyond a reasonable doubt, but when the jury is unaware of the restraints, or only briefly glimpses the restraints, any possible abuse of discretion does not rise to the level of constitutional error and the proper test is that articulated in *Watson*. (*See People v. Combs* (2004) 34 Cal.4th 821, 838-839; *People v. Coddington* (2000) 23 Cal.4th 529, 651, overruled on other grounds *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 fn. 13; *People v. Anderson* (2001) 25 Cal.4th 543, 596; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584; *People v. Jackson, supra,* 14 Cal.App.4th at pp. 1829-1830.)

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14. *People v. Watson* (1956) 46 Cal.2d 818.

15. *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

Here, there is no evidence that the stun belt was visible to the jury.[16] Thus, the *Watson* standard applies. Under any standard, though, any error in this case was not prejudicial because there is no evidence that the jury saw the stun belt or that it impaired or prejudiced the appellant's right to participate in his defense. (*People v. Anderson, supra,* 25 Cal.4th at p. 596.)

Appellant has not demonstrated that any juror noticed the stun belt. If no juror saw the belt, there can be no possible prejudice in the minds of a juror because of it. (*People v. Coddington, supra,* 23 Cal.4th at p. 651; *People v. Tuilaepa, supra,* 4 Cal.4th at pp. 583-584.) Nor is there any indication of an adverse affect on appellant's psyche or his case. In *Mar*, the Court found the trial court's order that the defendant wear a stun belt was prejudicial because (1) the evidence in the case was close, (2) the defendant's demeanor while testifying was crucial because the case turned on the jury's determination of the credibility of the witnesses, and (3) there was an indication in the record that the stun belt had some effect on the defendant's demeanor while testifying. (*People v. Mar, supra*, 28 Cal.4th at pp. 1224-1225.)

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16. However, on September 16, 1996, an alternate juror asked a bailiff if appellant was wearing leg shackles. The trial court addressed the matter and found that the Alternate 1 had not discussed her observation with the jurors. (9RT 1976-1979.) The court asked Alternate 1 not to discuss shackles with anyone and explained that the sheriff's department were properly securing the courtroom and the safety of the jurors. (9RT 1978-1979.) This incident illustrates the advantage of using the stun belt over other visible restraints. Also, the court's rejection of other restraint options was fully consistent with the prevailing notion at the time that the stun belt was the least restrictive restraint because it was not visible to the jury and did not prevent a defendant's movement. (*See People v. Garcia, supra*, 56 Cal.App.4th at p. 1356; *see also*, *Hawkins v. Comparet-Cassani* (2001) 251 F.3d 1230, 1240-1242.) The *Mar* court's holding that a stun belt should not automatically be considered the least restrictive means of restraining a defendant came after appellant's trial. The Court in *Mar* listed its factors to "provide guidance" in future cases only, and therefore, those factors are not necessarily applicable to appellant's case. (*See People v. Mar, supra*, 28 Cal.4th at pp. 1225-1228.)

This case is wholly distinguishable from *Mar*. First, the evidence against appellant was very strong if not overwhelming. As to the robbery of James Edge, Edge was able to identify appellant, the car used during the robbery, and the gun appellant used during the robbery. Appellant provided no real defense to this charge. As to the robbery and murder of Nassar Akbar, co-perpetrator Toler testified that appellant participated in the robbery and murdered Akbar. Cleavon Knott witnessed appellant shoot Akbar. Appellant was apprehended in the area of the murder within two hours of the crime. When appellant was apprehended, he possessed the Glock nine–millimeter semiautomatic handgun used to fire the bullets that killed Akbar. Second, the case did not turn on appellant's demeanor while testifying, because appellant did not testify at either the guilt or penalty phases of the trial. Third, there was no evidence in the record that the stun belt affected appellant's demeanor at any time. There is nothing in the record which supports the notion that appellant was unable to focus on anything but the stun belt. In fact, despite wearing the stun belt, appellant apparently felt at liberty to write and display a threatening sign and silently mouth threats and taunts at the people appellant had attempted to kill in Oregon. Thus, unlike in *Mar*, there is no evidence in the record that appellant was uncomfortable wearing the belt, that it prevented him from concentrating or thinking clearly, that he was concerned about being shocked, that it caused him anxiety, that it impacted his demeanor on the stand, that it limited his ability to communicate with counsel or participate in his defense, or that it otherwise rendered his trial unfair. Under these circumstances, any error was harmless beyond a reasonable doubt. Accordingly, appellant's second claim should be rejected.

III.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE SEARCH AND SEIZURE WERE CONSTITUTIONAL

Appellant's third claim on appeal is that the trial court erred when it denied his motion to suppress evidence obtained following appellant's detention and arrest the night of the murder. Appellant claims that the seizure of evidence violated the federal and state prohibitions against unreasonable searches and a state statute addressing racial and cultural diversity training. (AOB 111-122.) Respondent disagrees. The trial court properly denied the motion to suppress. It is undisputed that the police had probable cause to make a traffic stop because they observed traffic violations and the police had a right to look inside the vehicle where they discovered appellant's gun in plain view. Also, the police had reasonable suspicion to believe that there could be weapons in the car and had a right to check for officer safety. Finally, the police formed probable cause to arrest appellant and Toler as suspects in the shooting during the traffic stop.

A. Relevant Proceedings

On June 18, 1996, appellant filed a motion to suppress evidence pursuant to Section 1538.5 and the Fourth and Fourteenth Amendments. Appellant argued that the traffic stop was a pretext for an unlawful search, the search and arrest were beyond the scope of the traffic stop, the search was not incident to a lawful arrest, and that the fruits of the unlawful seizure must also be suppressed. (2CT 363-377.) The People filed a response to the motion and argued that the traffic stop was lawful, and that the search and seizure were also lawful. (2CT 472-474.) At the hearing on the motion, the prosecution

conceded that appellant had standing (2RT 206-236), and the defense conceded it was not challenging the initial stop of the vehicle because defense counsel believed that the officers observed traffic violations. Rather, the defense was challenging the alleged unlawful detention and search of the vehicle, and moving to suppress the evidence obtained from the search. (2RT 238-239.)

The prosecution called Officer Timothy Everts at the hearing. Officer Everts testified that on August 30, 1994, shortly after midnight, he was patrolling the area of 2nd and Ximeno in the Long Beach. While traveling on 2nd Street, Officer Everts observed a dark green Ford Taurus make an illegal lane change by traveling straight through an intersection in a lane that required a right turn. (2RT 237, 240.) Officer Everts and his partner decided to stop the car for the illegal lane change. Officer Everts observed that there were two Black females and one Black male in the Taurus. Officer Everts had received information regarding the shooting, including updated information that the perpetrators were a Black male and a Black female who were traveling in a dark green or blue newer model vehicle. The Black male suspect was described as having dread locks. (2RT 240-241.)

Officer Everts activated his overhead lights, but the Taurus did not stop. Rather, it proceeded through a stop sign and continued traveling down 2nd Street for about 100 to 150 yards. During this time, Officer Everts observed appellant, who was sitting in the back seat. Appellant moved his shoulders back and fourth, which made Officer Everts believe he was moving something with his hands. (2RT 241-242.) He also observed that appellant had "cornrow braids," which could be mistaken for dread locks. He realized that this information, along with the time and place of the stop, the fact that there was a Black male and Black female in the car, and the similarity of the vehicle, meant that these could be the shooting suspects. (2RT 242-243.)

For officer safety, Officer Everts drew his weapon and went to the back

of the passenger side of the vehicle. His partner went to the driver's side. All three occupants were removed from the car. Officer Evert looked in the back seat area and saw a Glock nine millimeter semi-automatic handgun (People's Exhibit 1) located in the map holder pocket. Appellant was handcuffed and then the gun was seized. Officer Bruce searched the car and recovered a smaller automatic handgun from the area between the front driver and passenger seats. (2RT 243-245.)

Appellant called Officer Russell Moss to testify for the defense. He testified that the Taurus was pulled over because of an illegal lane change and running a stop sign. After the Taurus stopped, Officer Moss approached the driver's side. As he did so, he began to realize that the occupants were possibly connected to the shooting. (2RT 274-276.) Officer Moss knew that people often mistake blue or black for green when making observations at night. Also, as Officer Moss approached the car, he noticed that appellant was a Black male and had cornrow braids in his hair, which fit the description of one of the murder suspects. (2RT 277-281.) The occupants were removed from the car and searched for weapons. (2RT 281-281.) This was not included in his police report. (2RT 281-283.) Officer Moss also observed appellant moving his hands prior to the stop. Along with his other observations, Officer Moss concluded that the occupants of the car may be the murder suspects. (2RT 283-284.) Officer Evert handcuffed appellant and then recovered the gun from the map holder. (2RT 284-286.)

The parties stipulated that after the arrest Detective Wren and Detective Collette interviewed Angela Toler which led to a statement which incriminated appellant. (2RT 287.)

The prosecutor argued that the initial traffic stop was justified, and that the search and seizure were justified based on probable cause for an arrest, and reasonable suspicion that the officers had to be concerned with their safety, and

the fact that the gun was in plain view of the officers. The evidence pointing to appellant as a murder suspect included the general description of the car, the basic description of a Black male and a Black female suspect, the specific description of the Black male's hair style. Also, the traffic stop occurred mere blocks from the scene of shooting, within an hour of the shooting, and it was late at night. Further, the police were trained to look for people and vehicles, keeping in mind that different people have various abilities to observe and recall events. The prosecution pointed out that the third person in the car could have been the get-a-way driver for appellant and Toler. The driver of the car initially failed to pull over for the police, and when the officers approached, appellant began making furtive movements with his hands. (2RT 287-289.)

Further, the prosecution argued that the police were justified in removing the occupants of the vehicle and patting them down, and then checking the vehicle for weapons, based on concern for officer safety. The prosecutor pointed out that it would be unreasonable to expect the officers to search the suspects, but not the car, and then allow the suspects to return to the car. Finally, part of appellant's gun was in plain view and gave rise to a probable cause for arrest for a firearms offense, which in turn gave the police authority to search the entire vehicle. (2RT 289-290.)

The defense argued that there was no probable cause to believe that appellant was a murder suspect because the description of the car and the suspects was too dissimilar to appellant and his car. Counsel suggested that to meet good faith the police should have merely removed and questioned the occupants of the car, but refrain from even looking at the inside of the vehicle. In other words, unless questioning the suspects created probable cause, the suspects should have been returned to the vehicle and allowed to leave, without even looking inside the car. As to appellant's gun being in plain view, counsel argued that this was an issue of credibility, and the officers should not be

believed because it was important case and the police were "hedging." (2RT 290-291.)

The court denied the motion to suppress, stating:

> Motion is denied. These officers were not acting on a hunch. They were acting as intelligent and responsible officers. They had information of a crime that had occurred within a few blocks and within a short space of time. Those are extremely important facts. They . . . had information that a male and female were involved. The fact that a third person in the car shows some intelligence in thinking that it is likely there would have been at least somebody else in the car to make a quick getaway.
>
> The hair issue. The one point that comes across is that some hair style had been described and it is very likely that whoever gave the description could confuse cornrows and dread locks and several other descriptions of hair styling. Something had been done to the hair and the person in the car had something of that nature done to his hair. That in and of itself is sufficient.
>
> The color of the car. The color of a dark car seen at night certainly they shouldn't refuse to deal with the cars if it were involved in a serious crime because it turns out to be dark green instead of dark blue. That would be very, very poor police work.
>
> Taking these facts together, there was . . . not sufficient for them to have stopped the car in the first place, but once the traffic violations had occurred, which gave ample reason to stop, then with the further observations they had good cause to take the occupants out of the vehicle and to go back and look in it. The plain view sight of the weapon all is in order here. And the motion is denied.

(2RT 291-292.)

B. Relevant Law Regarding Automobile Stops, Driver And Passenger Detention, And The Plain View Doctrine

Federal constitutional standards govern claims that evidence was obtained during an unlawful search. (Cal. Const., art. I, § 28, subd. (d); *People v. Willis* (2002) 28 Cal.4th 22, 29; *People v. Gomez* (2005) 130 Cal.App.4th 1008, 1013-1014.) The reviewing court should defer to the superior court's express and implied factual findings, and then exercise its independent judgement to determine the legality of the search. (*People v. Woods* (1999) 21 Cal.4th 688, 673-674.) "When the testimony is conflicting, [the reviewing court] accept[s] the version most favorable to the People to the extent that it is supported by the record." (*People v. Marquez* (1992) 1 Cal.4th 553, 570.)

"As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." (*Whren v. United States* (1996) 517 U.S. 806, 810 [116 S.Ct. 1769, 135 L.Ed.2d 89]; *see In re Justin K.* (2002) 98 Cal.App.4th 695, 698 [probable cause to stop because rear window brake light was broken]; *People v. Castellon* (1999) 76 Cal.App.4th 1369, 1374 [probable cause to stop because registration tags had expired 12 days earlier].) The subjective intent of the officers who make the traffic stop is irrelevant to the determination of whether there was probable cause of a traffic violation. (*Id.* at pp. 810-819; *United States v. Ibarra* (9th Cir. 2003) 354 F.3d 711, 714 ["If nothing else, *Whren* foreclosed the possibility that a search or seizure may be invalidated solely because of the subjective intentions of a state officer].)

A police officer may order a driver to exit his vehicle during the traffic stop. (*Pennsylvania v. Mimms* (1977) 434 U.S. 106, 108-109 [98 S.Ct. 330, 54 L,Ed,2d 331].) Also, consistent with the Fourth Amendments, "an officer

making a traffic stop may order *passengers* to get out of the car pending completion of the stop." (*Maryland v. Wilson* (1997) 519 U.S. 408, 415 [117 S.Ct. 882, 137 L.Ed.2d 41], emphasis added.) This rule serves the purpose of officer protection:

> Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop. And the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.

(Id. at p. 414.) Under the plain view doctrine, firearms that are within plain view during a traffic stop may be seized by the police. (*See Minnesota v. Dickerson* (1993) 508 U.S. 366, 374-376 [113 S.Ct. 2130, 113 S.Ct. 2130]; *Horton v. California* (1990) 496 U.S. 128, 136-137 [110 S.Ct. 2301 110 L.Ed.2d 112]; *Texas v. Brown* (1987) 460 U.S. 730, 739 [103 S.Ct. 1535, 75 L.Ed.2d 502] (plurality opinion).)

C. Appellant's Claim Should Be Rejected Because He Conceded That There Was Probable Cause To Stop The Vehicle For A Traffic Violation And Appellant's Gun Was Found In Plain View Inside The Vehicle

In the instant case, appellant conceded it was not challenging the initial stop of the vehicle because defense counsel believed that the officer observed traffic violations. Rather, appellant argued that the stop was a pretext because the officers subjectively wanted to investigate the occupants involvement with the murder. (2RT 238-239.) On appeal, appellant acknowledges this

concession in the trial court. (AOB at 113-114, fn. 42.) As discussed above, this contention has been rejected by the Supreme Court, which has found that the subjective intent of a police officer is irrelevant where there exists probable cause to make a traffic stop. (*Whren v. United States, supra,* 517 U.S. at pp. 810-819; *United States v. Ibarra, supra,* 354 F.3d at p. 714 ["If nothing else, *Whren* foreclosed the possibility that a search or seizure may be invalidated solely because of the subjective intentions of a state officer].) Also, appellant and the other passengers were properly ordered to exit the vehicle. (*Maryland v. Wilson, supra,* 519 U.S. at p. 415; *Pennsylvania v. Mimms, supra,* 434 U.S. at pp. 108-109.)

Moreover, the *Wilson* Court's opinion is practically prescient of the facts of the instant case: after appellant was removed from the vehicle, the police found appellant's gun, which was clearly within appellant's reach if he had remained in the vehicle. Thus, had appellant been permitted to remain in the vehicle, there is every reason to believe that he would have attempted to shoot officers in order to escape capture for his other crimes. Finally, under the plain view doctrine, appellant's firearm was subject to immediate seizure. (*See Minnesota v. Dickerson, supra,* 508 U.S. at pp. 374-376; *Horton v. California, supra,* 496 U.S. at pp. 136-137; *Texas v. Brown,* 460 U.S. at p. 739.) This is exactly what the trial court determined had happened, finding that

> Taking these facts together, there was . . . not sufficient for them to have stopped the car in the first place, but once the traffic violations had occurred, which gave ample reason to stop, then with the further observations they had good cause to take the occupants out of the vehicle and to go back and look in it. The plain view sight of the weapon all is in order here.

(2RT 291-292.) The trial court's factual findings that there was probable cause to stop the vehicle and that appellant's gun was in plain view are supported by

the record, and therefore appellant's claim should be rejected.

D. The Search And Seizure Were Also Proper Because The Police Had Reasonable Suspicion That Appellant And The Others Had Firearms, And The Police Formed Probable Cause During The Stop To Arrest Appellant And Toler As Murder Suspects

The suppression motion was also properly denied because there were additional constitutional grounds justifying the warrantless search and seizure. Police officers may conduct a limited, warrantless search for weapons in order to protect themselves and others in the area if they have a reasonable, articulable suspicion that the person may be armed and presently dangerous. (*Terry v. Ohio* (1968) 392 U.S. 1, 30 [88 S.Ct. 1868, 20 L.Ed.2d 889]; *People v. Coulombe* (2000) 86 Cal.App.4th 52, 56.) "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." (*Terry v. Ohio, supra*, 392 U.S. at p. 27 .) "The officer must be able to point to specific and articulable facts together with rational inferences therefrom which reasonably support a suspicion that the suspect is armed and dangerous. [Citations.]" (*People v. Dickey* (1994) 21 Cal.App.4th 952, 956.) "Appellate courts have repeatedly emphasized it is inappropriate for judges to second-guess on-the-spot decisions of officers in the field under these circumstances." (*People v. Wilson* (1997) 59 Cal.App.4th 1053, 1063.) Violation of a minor traffic law by itself cannot support a *Terry* search and an officer may not conduct a search incident to a traffic citation without a reasonable suspicion that the suspect he is investigating at close range is dangerous and may be concealing weapons. (*See Knowles v. Iowa* (1998) 525 U.S. 113, 117 [119 S.Ct. 484, 142 L.Ed.2d 492]; *People v. Superior Court* (1972) 7 Cal.3d 186, 208; *People v. Superior Court* (1970) 3 Cal.3d 807, 812; *People v. Lawler* (1973) 9 Cal.3d 156, 159-163; *see also In re Arturo D.* (2002)

27 Cal.4th 60, 74-76.)

Here, the evidence supports a conclusion that the search of appellant was justified by a reasonable, articulable suspicion that he might be armed. This reasonable suspicion arose as the police conducted the lawful traffic stop. Officer Everts testified that they observed appellant's car make an illegal lane change and run a stop sign. (2RT 237, 240.) While engaged in stopping appellant's car, Officer Everts observed the number of people in the car, the similarities between the occupants and the murder suspects, and the similarities between appellant's car and the description of the suspect's vehicle. (2RT 240-241.) After Officer Everts activated his overhead lights, the Taurus proceeded through a stop sign, and during this time Officer Everts observed appellant move his shoulders back and fourth, which made Officer Everts believe he was moving something with his hands. (2RT 241-242.) Also, Officer Evert's noticed appellant's "cornrow braids" and realized this hairstyle could be mistaken for dread locks. He realized that they could be the shooting suspects. (2RT 242-243.) The stop was very close in time and distance to the murder of Akbar. The stop was late at night and the officers were outnumbered by the suspects. Under these circumstances, Officer Evert's formed reasonable suspicion that appellant and the others in the car could have firearms, and the search of the car was also justified on this basis. Under the totality of the circumstances, the facts could have led Officer Everts to form a reasonable suspicion that appellant or the other occupants of the car may have been armed. (*See People v. Avila* (1997) 58 Cal.App.4th 1069, 1074 [although perhaps individually harmless, individual factors observed by a police officer can reasonably combine to create fear in a detaining officer]; *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1230 [lone officer's suspicion that the detained men might be burglars is sufficient to justify a patdown search as officers know that burglars are frequently armed with items that can be used as weapons].)

"Probable cause [to arrest] exists when the facts known to the arresting officer would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime. (*People v. Celis* (2004) 33 Cal.4th 667, 673, quoting *Dunaway v. New York* (1979) 442 U.S. 200, 208, fn. 9, [99 S.Ct. 2248, 60 L.Ed.2d 824.]) "'[P]robable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts.'" (*People v. Celis, supra*, 33 Cal.4th at p. 673, quoting *Illinois v. Gates* (1983) 462 U.S. 213, 232 [103 S.Ct. 2317, 76 L.Ed.2d 527].) There cannot be a precise definition, and court must look at the particularized aspects of the case as they relate to the person arrested. (*People v. Celis, supra* 33 Cal.4th at p. 673, citing *Maryland v. Pringle* (2003) 540 U.S. 366, 371 [124 S.Ct. 795, 157 L.Ed.2d 769].) For many of the same reasons discussed above, the police also formed probable cause to arrest appellant when the police made additional observations after pulling the car over for traffic violations, including the observation of a partially concealed gun inside appellant's car.

E. Appellant Cannot Establish A Violation Of Penal Code Section 13519.4, Subdivisions (d) And (e) Because There Was Probable Cause To Stop The Vehicle For Traffic Violations

Appellant also claims that the police's selective enforcement of the law based on race violated appellant's right to equal protection and violated California Penal Code section 13519.4, subds. (d) and (e), which prohibits racial profiling. (AOB 120-121.) Appellant's claim is meritless and should be rejected because the police had probable cause to stop the vehicle based on traffic violations, and did not stop the vehicle based on the fact that the occupants were Black.

Penal Code section 13519.4 states in relevant part:

(d) The Legislature finds and declares as follows:

(1) Racial profiling is a practice that presents a great danger to the fundamental principles of a democratic society. It is abhorrent and cannot be tolerated.

(2) Motorists who have been stopped by the police for no reason other than the color of their skin or their apparent nationality or ethnicity are the victims of discriminatory practices.

(3) It is the intent of the Legislature in enacting the changes to Section 13519.4 of the Penal Code made by the act that added this subdivision that more than additional training is required to address the pernicious practice of racial profiling and that enactment of this bill is in no way dispositive of the issue of how the state should deal with racial profiling.

(4) The working men and women in California law enforcement risk their lives every day. The people of California greatly appreciate the hard work and dedication of law enforcement officers in protecting public safety. The good name of these officers should not be tarnished by the actions of those few who commit discriminatory practices.

(e) "Racial profiling," for purposes of this section, is the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped.

There appear to be two published cases citing this statute: *People v. Jackson* (2003) 109 Cal.App.4th 1625 and *People v. Durazo* (2004) 24 Cal.App.4th 728. In *Jackson*, the statute is only mentioned in passing, and the case does not involve any Fourth Amendment issue. (*People v. Jackson, supra*, 109 at pp. 1627, fn. 3.)

However, the second case, *People v. Durazo*, illustrates why the traffic stop in the instant case was consistent with the Constitution as well as

California law. The court of appeal found that an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. (*Id.* at p. 731.) In that case, the police pulled over a vehicle with two Hispanic men based on a "gut feeling" that the men were involved in criminal activity: an alleged threat against a civilian four days earlier by persons who identified themselves as Mexican gang members. However, in *Durazo* the police "observed no equipment or traffic violations that would justify a traffic stop" (*Id.* at pp. 731-732.)

The court of appeal found that "[h]aving failed to observe any such violations, an objectively reasonable officer would have known that insufficient facts existed to warrant a traffic stop." (*Id.* at p 737.) Nonetheless, the police pulled over the vehicle and discovered a gun underneath the passenger's seat. (*Id.* at p. 732.) As part of the court of appeal's analysis, the court observed that California does not permit reliance *solely* on the immutable characteristic of race to establish probable cause, because to do so amounts to impermissible racial profiling under Penal Code section 13519.4, subds. (d) and (e). (*Id.* at p. 735.) The court concluded by stating:

> However sincere Officer Bartlett's intentions may have been, his self-described "gut" feeling lacked the requisite objective showing to justify Durazo's detention. No crime had occurred at or near the time reported. The officer's observed "glance" at the alleged victim's residence was merely a general glance in the direction of numerous residences. The only observed slowing of Durazo's vehicle occurred during a left turn, *and no violation of law was ever observed in the vehicle's operation despite the officer's three-mile pursuit.* The only "facts" that distinguished the case in the officer's mind were the ethnicity of the vehicle's occupants, and the perceived unusual manner in which they

> both looked in the direction of the alleged victim's multi-unit apartment building as they drove by. These facts are insufficient to justify law enforcement's interference with the free use of a public street and the resulting incursion into Durazo's liberty.

(*Id.* at p. 738, emphasis added.) In the instant case, as discussed above, *there is no dispute* that there was probable cause to stop the vehicle after the police observed at least two traffic violations. Therefore, appellant's claims based on the Equal Protection Clause and Penal Code section 13519.4 should also be rejected.

IV.

THE TRIAL COURT PROPERLY GRANTED THE PROSECUTOR'S CHALLENGE FOR CAUSE OF PROSPECTIVE JUROR JELENIC

Appellant's fourth claim on appeal is that his conviction and death sentence must be reversed because the trial court violated the Sixth and Fourteenth Amendments when it erroneously granted the prosecution's challenge for cause of Prospective Juror Jelenic. (AOB 123-133.) Respondent disagrees. The trial court acted within its discretion when it removed Prospective Juror Jelenic because the record supports the court's findings that he was not able to use or understand English with sufficient proficiency for a constitutional trial and that he was also unable to accept his duties as a juror.

A. Relevant Proceedings

The court asked Prospective Juror Jelenic some questions to clarify some of his answers on his jury questionnaire. After questioning Prospective Juror Jelenic, and reviewing his written answers on his questionnaire, the court determined that Prospective Juror Jelenic should be excused for cause because

he did not have sufficient ability to understand and use the English language.

At the hearing, the court asked Prospective Juror Jelenic: You say Mr. Jelenic that you know somebody connected with this case either witness or defendant." Prospective Juror Jelenic replied that he did not believe this was his written response, and that he "didn't know nothing about the case." (5RT 963-964.) The following exchange occurred:

> THE COURT: All right. [¶] In one question you were asked "do you feel the testimony on law enforcement personnel will be more accurate than civilian testimony" and you say, "they lie too much." You mean police officers lie?
>
> PROSPECTIVE JUROR JELENIC: Yes
>
> THE COURT: And is it your prejudgment in this case that police officers testifying in this case will be lying?
>
> PROSPECTIVE JUROR JELENIC: No. I mean I just know that what I'm - - what I wrote on that paper is that from personal experience I know they lie.
>
> THE COURT: How does that play into your evaluating credibility of witnesses here?
>
> PROSPECTIVE JUROR JELENIC: You have to look at the - -
>
> THE COURT: Don't tell me what I have to look at.
>
> PROSPECTIVE JUROR JELENIC: I'm saying the person who is like - -
>
> THE COURT: You.
>
> PROSPECTIVE JUROR JELENIC: Myself, have to look around what everybody is saying not just one person. Because a person is an officer that doesn't mean that they are the actual person telling the truth the

whole truth and nothing but the truth.

THE COURT: You are not answering my question. What effect will your thinking that police officers lie a great deal have on the way you decide if police officers here are telling you the truth?

PROSPECTIVE JUROR JELENIC: It won't have no affect as far as the case goes. It won't have no affect because - -

THE COURT: Why did you put here "they lie too much" When you are actually answering the question having to do with this case?

PROSPECTIVE JUROR JELENIC: The reason I did that is I have a bad case on me where I called the police on the phone, 911, and when they came to the scene they told me just it's best for you to walk away. When I walked away a hundred feet from the phone they arrested me. They said that they watched me beat up two security guards and break a door down. When I called the police.

THE COURT: And you are telling me that you will credit police officers here with being truthful unless the particular individual witnesses in front of you show you that they are lying?

PROSPECTIVE JUROR JELENIC: I believe everybody's voice, whatever they are saying, is equal to me. In a way.

THE COURT: I don't understand what that means.

PROSPECTIVE JUROR JELENIC: Everybody can lie. Not just one person. So what I'm trying to say is you have to look at the roundabout part of everybody.

THE COURT: The roundabout part?

PROSPECTIVE JUROR JELENIC: As far as the whole situation. If you go as far as listening to one person there's really no case.

THE COURT: Are you going to judge the credibility of all witnesses by the same standard or not?

PROSPECTIVE JUROR JELENIC: Everybody - - my personal opinion everybody that I listen to will be – have the same – same effect on my own mind.

THE COURT: You are not answering my question.

PROSPECTIVE JUROR JELENIC: Believing them.

THE COURT: You are not answering my question. Don't you understand my question?

PROSPECTIVE JUROR JELENIC: Are you saying - -

THE COURT: Listen. I'm asking a question. Will you - - and if you don't understand my question do be sure to tell me because there are no right and wrong answers. I want you to be sure to understand that. It's your frankness that's appreciated. Are you going to judge the credibility of all the witnesses by one standard or by more than one?

PROSPECTIVE JUROR JELENIC: Everybody that testifies or says anything about the case I'll put them all together in one. There won't be nobody like picked out saying in my own mind like I believe you more than you. Everybody will be believed in the same way.

THE COURT: All right. [¶] That appears to be an inability to accept the duties of a juror.

MR. SCHREINER: I would challenge for cause based upon competence, your honor.

MR. SHORT: Your honor, I disagree. I believe this person has answered the court's question. He should just say yes or no, but he has answered the court's question that he will use the same standard for

everybody. Even his personal opinion about police officers will be put aside and every witness will be judged according to the same standard. It is clear to me that he is saying that. He may not be saying it in the exact same words that court and counsel would like, but that's what he is saying.

THE COURT: Thank you. [¶] The challenge is granted. There is plenty to support it in the written questionnaire and the oral answers. Amply support the challenge for cause. [¶] Thank you, Mr. Jelenic you are excused from service in this case. Would you go back to the sixth floor jury room please.

PROSPECTIVE JUROR JELENIC: All right.

THE COURT: Thank you. [¶] The court is of the opinion that Mr. Jelenic is incompetent to act as a juror based on his inability to understand or to use the English language.

MR. SCHREINER: So the record is clear, your honor - -

THE COURT: Beg your pardon?

MR. SCHREINER: The court's opinion in that case was based upon the written record by that juror as well as his oral statements here in court?

THE COURT: Yes.

(5RT 964-968.)

Prospective Juror Jelenic provided the following answers to the jury questionnaire.

Question 1E asked: "What is your race or ethnic background?" Prospective Juror Jelenic wrote down: "Human." (Supp. I 8CT 2309.)

Question 10 asked prospective jurors: "Except for a firing range, military use, or whilst hunting, have you ever fired a gun or been present when a gun

was fired? If so please give details." Prospective Juror Jelenic wrote: "Yes - Everybody almost has guns." (Supp. I 8CT 2312.)

Part of Question 17 asked: If a juror refuses to discuss the case with fellow jurors, this is a failure to deliberate. Will you so info [sic] the Court? Prospective Juror Jelenic wrote: "Do what needed a time." (Supp. I 8CT 2313.)

Question 21 inquired about crimes committed by the prospective juror or relatives or friends. The question directed: "If 'Yes', please explain; state your relationship of the person to you; state if you attended any court proceedings; state if you thought the person was fairly dealt with by the police and the court system. Prospective Juror Jelenic answered: "I have for loaded firearms & trespassing. Aunt for murder 1st degree - all ok [sic]." (Supp. I 8CT 2314.)

Question 22, asked whether Prospective Juror Jelenic or his friends or relatives had been the victim of a serious or violent crime. If the answer was "yes," the question directed: "give details of each incident, state relationship of person to you, state whether anyone was caught and punished for the crime, if not state whether you hold that against law enforcement; state whether or not you were satisfied with the outcome." Prospective Juror Jelenic either ignored or was unable to answer most of the questions, and simply put down "Uncle was murdered." (Supp. I 8CT 2314.)

In Question 23, Prospective Juror Jelenic indicated that he had testified at his uncles' murder trial. When the question asked: Please state the outcome of that proceeding, if you know." Prospective Juror Jelenic wrote "?". (Supp. I 8CT 2315.)

In response to Question 25, Prospective Juror Jelenic indicated that he knew the defendant and the witnesses in the case.

Question 28 asked: "The defense is also entitled to put on evidence but

choose not to have the defendant himself testify. If this happens will you hold that against the defendant?" Prospective Juror Jelenic responded: "Yes." (Supp. I 8CT 2315.)

Question 34 asked: "Will you evaluate the testimony of an accomplice by what you see and hear in court, and by reference to the court's instructions?" Prospective Juror Jelenic put an "X"on both the "Yes" and "No" lines. (Supp. I 8CT 2316.)

Question 35 asked: "The crimes against Nasser Akbar and James Edge occurred on August 25 & 29, 1994. The reason for the delay is not relevant in this trial and will not be explained to you. Will you evaluate the evidence in the trial in a different way from the evidence in a trial of more recent crimes?" Prospective Juror Jelenic responded: "Yes." (Supp. I 8CT 2316.)

Question 39 asked: Do you feel that the testimony of law enforcement personnel will be more truthful or accurate than civilian testimony?" Prospective Juror Jelenic marked "No" and offered the explanation that "they lie too much." (Supp. I 8CT 2317.)

Question 45 asked: "Will you be an impartial juror?" Prospective Juror Jelenic did not answer the question, and wrote down: "Don't know what asked?" (Supp. I 8CT 2318.)

For Questions 52, 55, and 57 Prospective Juror Jelenic wrote down "?". (Supp. I 8CT 2335-2336.)

B. Standard Of Review

A court may discharge a juror for "good cause" where the court finds the juror is unable to perform his or her duty. (§ 1089.) The decision to discharge a juror rests within the sound discretion of the trial court. (*People v. Cleveland* (2001) 25 Cal.4th 466, 474; *People v. Marshall* (1996) 13 Cal.4th 799, 843;

People v. Turner (1994) 8 Cal.4th 137, 205; *People v. Bell* (1998) 61 Cal.App.4th 282, 287; *see* § 1089.) A juror's inability to perform his duties must be shown on the record to be a demonstrable reality. (*People v. Holt* (1997) 15 Cal.4th 619, 659; *People v. Szymanski* (2003) 109 Cal.App.4th 1126, 1131-1132.) A trial court's determination of controverted facts will not be disturbed. (*People v. Marshall, supra,* 13 Cal.4th at pp. 843-844*; Wagner v. Doulton* (1980) 112 Cal.App.3d 945, 948-949.) "'Where equivocal or conflicting responses are elicited, the trial court's determination of the prospective jurors' states of mind is binding on an appellate court.'" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1199, quoting *People v. Beardslee* (1991) 53 Cal.3d 68, 103; *see People v. Bell, supra,* 61 Cal.App.4th at p. 287 [few appellate courts have disturbed a trial court's decision whether to discharge a juror for good cause].)

Insufficient command of the English language renders a juror unable to perform his or her duty if the juror cannot fully understand the jury instructions or fully participate in deliberations. *People v. Szymanski, supra,* 109 Cal.App.4th at p. 1131; *People v. Elam* (2001) 91 Cal.App.4th 298, 316.) Also, a juror who is unable or unwilling to determine the facts and render a verdict in accordance with the court's instructions may be discharged. (*People v. Williams* (2001) 25 Cal.4th 441, 456-457.) The trial judge who is best situated to determine a juror's competency to serve impartially because demeanor plays a "fundamental role" in evaluating credibility, and determinations as to credibility are entitled to "special deference." (*Patton v. Yount* (1984) 467 U.S. 1025, 1036-38 & fn.12 [104 S.Ct. 2885, 81 L.Ed.2d 847].) It is within the trial court's broad discretion to determine the scope and mode of an investigation of juror misconduct. (*See People v. Keenan* (1988) 46 Cal.3d 478, 533, 539.)

C. The Trial Court Acted Within Its Discretion

The trial court acted within its discretion when it found that Prospective Juror Jelenic was unable to perform his duties as a juror because he could not understand and use the English language at a level needed for a constitutional trial. The record shows, as a demonstrable reality, Prospective Juror Jelenic's inability to fully comprehend English at the level necessary to sit as a juror. The trial court expressly relied on both the written answers to the questionnaire as well as Prospective Juror Jelenic's comments to the court. The trial court stated: "There is plenty to support it in the written questionnaire and the oral answers." (5RT 967.)

First, Prospective Juror Jelenic indicated in writing that he did not understand Questions 52, 55, or 57, because rather than indicating "yes" or "no," Prospective Juror Jelenic wrote down "?". (Supp. I 8CT 2320.) These particular questions, like many jury instructions, were rather long and explained legal concepts. Thus, the answers indicate an inability to fully understand English on the level needed to conduct a constitutional criminal trial. (*See People v. Szymanski, supra,* 109 Cal.App.4th at pp. 1128-1132 [judgment reversed because trial court allowed juror with some demonstrable difficulties with English to remain on the jury].) Moreover, when asked if he could be an impartial juror, Prospective Juror Jelenic wrote down, "don't know what asked." This appears to show his fundamental ignorance of the meaning of the word "impartial." (Supp. I 8CT 2318.) The inability to understand terms such as "impartial" would certainly be problematic during trial and deliberations. (*See People v. Szymanski, supra,* 109 Cal.App.4th at p. 1132 ["Juror admitted she did not understand many commonly understood terms such as 'law enforcement' and 'police department.'"].)

Second, many of Prospective Juror Jelenic's responses to other questions

demonstrates his inability to fully understand and communicate in English. Prospective Juror Jelenic indicated his race or ethnicity was "human." (Supp. I 8CT 2309.) Question 10 asked prospective jurors: "Except for a firing range, military use, or whilst hunting, have you ever fired a gun or been present when a gun was fired? If so please give details." Prospective Juror Jelenic wrote: "Yes - Everybody almost has guns." (Supp. I 8CT 2312.) This answer shows Prospective Juror Jelenic did not understand the question, because it seems unlikely that "everyone" he knew had discharged a firearm in places other than ranges, military exercises, or hunting grounds. In response to Question 25, Prospective Juror Jelenic indicated that he knew the defendant and the witnesses in the case. However, in court, Prospective Juror Jelenic explained that he did not know the defendant or any witnesses. This indicates that it is possible Prospective Juror Jelenic did not understand the basis meaning of question 25.

Also, Question 22 asked whether Prospective Juror Jelenic or his friends or relatives had been the victim of a serious or violent crime. If the answer was "yes," the question directed: "give details of each incident, state relationship of person to you, state whether anyone was caught and punished for the crime, if not state whether you hold that against law enforcement; state whether or not you were satisfied with the outcome." Prospective Juror Jelenic either ignored or was unable to answer most of the questions, and simply put down "Uncle was murdered." (Supp. I 8CT 2314.) Prospective Juror Jelenic's answer is incomplete, and indicates that he was either unable to fully understand the question or was unwilling to fully answer the question.

Further, Question 34 asked: "Will you evaluate the testimony of an accomplice by what you see and hear in court, and by reference to the court's instructions?" Prospective Juror Jelenic put an "X"on both the "Yes" and "No" lines. (Supp. I 8CT 2316.) By giving opposite answers, Prospective Juror

Jelenic indicated that he did not understand the question or was unwilling to follow the court's instructions. Question 21 inquired about crimes committed by the prospective juror or relatives or friends. The question directed: "If 'Yes', please explain; state your relationship of the person to you; state if you attended any court proceedings; state if you thought the person was fairly dealt with by the police and the court system. Prospective Juror Jelenic answered: "I have for loaded firearms & trespassing. Aunt for murder 1st degree - all ok [sic]." (Supp. I 8CT 2314.) Prospective Juror Jelenic's answer is incomplete and indicates he did not fully understand the question.

Third, some of Prospective Juror Jelenic's answers indicate his unwillingness to follow the court's instructions. Part of question 17 asked: If a juror refuses to discuss the case with fellow jurors, this is a failure to deliberate. Will you so info [sic] the Court? Prospective Juror Jelenic wrote: "Do what needed a time." (Supp. I 8CT 2313.) This answer indicates that Prospective Juror Jelenic either refused to answer the question or misunderstood the question. Question 28 asked: "The defense is also entitled to put on evidence but choose not to have the defendant himself testify. If this happens will you hold that against the defendant?" Prospective Juror Jelenic responded: "Yes." (Supp. I 8CT 2315.) Question 35 asked: "The crimes against Nasser Akbar and James Edge occurred on August 25 & 29, 1994. The reason for the delay is not relevant in this trial and will not be explained to you. Will you evaluate the evidence in the trial in a different way from the evidence in a trial of more recent crimes?" Prospective Juror Jelenic responded: "Yes." (Supp. I 8CT 2316.) These answers indicate that either Prospective Juror Jelenic refused to follow the court's instructions or misunderstood the question. In either case, his removal was proper.

Fourth, the trial court was in the best position to ascertain Prospective Juror Jelenic's ability to use and understand English, and the court concluded

that he lacked the ability to fulfill his duties as a juror based on both his written answers and his oral statements. Appellant tries to characterize Prospective Juror Jelenic's dialog with the court as "comprehensible and responsive." (AOB 128.) *Perhaps* this is *one* reasonable interpretation from a cold record. However, as discussed above, the cold record also amply supports the trial court's finding that Prospective Juror Jelenic was unable to understand and speak English at a level sufficient for a constitutional criminal trial. Moreover, only the trial court was in the position to actually hear the verbal responses, including the pace of the responses, any gesticulation, any facial gestures, the amount of confidence displayed by the speaker, and the other factors which are used to evaluate credibility and demeanor. The trial court repeatedly gave Prospective Juror Jelenic a few opportunities to answer her concerns, but he was unable to effectively communicate with the trial court, and the court expressed concern that Prospective Juror Jelenic did not understand her questions. (5RT 966.) Under all the circumstances discussed above, the trial court acted within its discretion when it removed Prospective Juror Jelenic for cause. Accordingly, appellant's fourth claim on appeal should be rejected.

V.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S *WHEELER/BATSON* MOTION

Appellant's fifth claim on appeal is that the prosecutor's use of peremptory challenges to strike African-American prospective jurors from the jury violated appellant's right to equal protection and to a jury from a representative cross-section of the community. (AOB 134-158.) Respondent disagrees. The trial court properly denied appellant's *Wheeler/Batson* motion after finding that the prosecution had excused the challenged prospective jurors for race-neutral reasons.

A. Relevant Proceedings

The court called 18 initial prospective jurors: Mark Kennedy, Cynthia Ruiz, Joe Lopes, Katherine Martin, Laurie Moore, Gloria Young, Robbie Washington, Raymond Bosak, Linda Self, Darnell Fizer, Edwin McEachern, Ray Davis, William Nichols, Mark Tokunaga, Carmen Rowan, Tina Larkin, Hedy Grosshandler, and Mary Costello. (5RT 1105-1106.)

The first peremptory went to the prosecution. The prosecutor excused Gloria Young. The defense excused Mark Kennedy. The prosecution accepted the panel. The defense excused Mark Tokunaga. The prosecution accepted the panel a second time. (5RT 1109-1110.) The defense excused Laurie Moore. The prosecution accepted the panel a third time. (5RT 1111.) The defense excused Cynthia Ruiz. The prosecution excused Tina Larkin. The defense excused Katherine Martin. The prosecution excused Mary Costello. (5RT 1111-1112.) The defense excused Joe Lopes. The prosecution accepted the panel a fourth time. The defense excused Denis Hite. The prosecution accepted the panel a fifth time. The defense excused Carmen Rowan. The prosecution excused Janet Wallech. (5RT 1113.) The defense excused Charles James. The prosecution excused Robbie Washington. (5RT 1114.) The defense excused Chris Verdon. The prosecution excused Hedy Grosshandler. (5RT 1116.) The defense accepted the panel. The prosecution excused Ricky Wasp. The defense excused Saul Weinberg. The prosecution excused Fred Rassam. (5RT 1117.) The defense excused Claude Rigdon. The prosecution excused William Nichols. (5RT 1118.) The defense excused James Johnson. The prosecution excused Darnell Fizer. The defense accepted the panel a second time. (5RT 1119.) The prosecution excused Khoai Phan. The defense excused Linda Self. The prosecution accepted the panel a sixth time. The defense excused Edwin McEachern. (5RT 1119-1120.) The prosecution

excused David Ridgley. The defense accepted the panel a third time. The prosecution excused Repeka Penitusi. The defense excused Dan Hintz. (5RT 1121.) The prosecution excused Jonathan Seales. (5RT 1122.)

Appellant made a *Wheeler* motion claiming that the prosecution was systematically excluding minorities, and specifically Black persons. Counsel stated there were very few Blacks in the pool, and the prosecution had used five peremptory challenges to excuse Black prospective jurors. The trial court stated that it was not finding a prima facie case at that time, but because the court did not have its notes, the court asked the prosecutor to discuss the issue. The court stated it would ultimately decide whether a prima facie showing had been made. (5RT 1122-1123.) The court noted that "Mr. W." and "Mr. L." were Black males on the jury panel. (5RT 1123.)

The prosecutor stated:

> I have exercised five peremptory challenges against Blacks and [used 13 challenges overall]. As to Mr. Seales I actually accepted Mr. Seales on several occasions. What I have is a grading system of A through F for jurors. What I'm looking for are people who are, of course, going to be fair jurors, but, you know, more conservative jurors with an eye toward guilt phase. But my greatest concern at this point is getting stronger for penalty phase.
>
> It's my philosophy even if you get people who express philosophical positions supporting the death penalty that once put in that position of actually making the decision it's something that's very difficult to do. And I think we heard that expressed from a lot of people.
>
> Mr. Seales may or may not be okay, but he is one of the group that expressed a position that their philosophical position is neutral. It's simply a matter of looking down the road with the number of

> peremptory challenges that I have and some of the people that I know are coming up now deciding that I can do better than that.
>
> If the court wants me to go into other individuals I would be happy to.

(5RT 1123-1124.)

The court stated: "I think it's going to make a better record for me to say there is a prima facie based on the numbers, therefore requiring you to go further." (5RT 1124.) The dialogue continued:

> MR. SCHREINER: Okay. Okay. I think the first peremptory challenge was as to Ms. Young, who I had given an F to in my grading system. And I noted numbers 21, 22 B, 49 and 50 as areas that I wanted to go into. And if the court can give me a moment I will refresh my memory. There's been a lot of people. Typically on any of these cases when there's some sort of criminal justice connection, you know, relative or friend who's in the system by virtue of, you know, being tried or convicted of something, that's something I'm concerned about. We did have a nephew with a murder, I think. In and of itself that may not be enough. I'm also trying to take, you know, some type of a read on this neutrality which some of these people have expressed. As I told the court I would prefer not to have anybody who expresses that they are neutral because I have a hard time accepting that we are going to have some absolute neutrality.
>
> Now, bearing in mind that I don't have enough peremptory challenges to probably exclude all people who have expressed that position, but I'm doing as much of that as I can.
>
> I'm not sure who else I excused who was in that category that we are concerned about here. I have a stack of people who have been excused.

And Mr. James I think that was the defense.

THE COURT: James was defense.

MR. SCHREINER: Okay. Well, let's mention that for the record.

THE COURT: Washington, female Black.

MR. SCHREINER: I would like to mention Mr. James to illustrate my point. Essentially I think counsel and I are both seeking people who are either respectively likely to vote for a death verdict or unlikely on the other hand. Obviously Mr. James is somebody who I had accepted and wanted to have on the jury. He is black, but he is somebody who I think we both perceived to be prosecution oriented and for the death penalty and that's why he is not here now.

Similarly, is it Ms. Washington?

THE COURT: Yes.

MR. SCHREINER: Or Mr. Washington?

THE COURT: No. Female.

MR. SCHREINER: In addition to the issues I have discussed about the likelihood of actually being neutral and the strength of conviction for death penalty, which Ms. Washington expressed, generally I try to get older, more conservative people. And I have a 24 year old here who came into court wearing a T-shirt and somewhat sloppily attired and that's not somebody that I care to have on my jury either. In any case.

MR. SHORT: There's a Mr. Fizer.

THE COURT: Fizer.

MR. SCHREINER: Mr. Fizer I actually had mixed feelings about because I passed and accepted a couple of times and I thought he had actually came across okay. What I was troubled by - - and I'm trying to

remember. I think he might have indicated neutrality as well. But my take as to the way he came across wasn't as bad. My take on him number 23 he indicated he had testified on behalf of a relative essentially as an alibi witness in a case in which that testimony obviously wasn't accepted. I don't know what took place there, but it gives rise to a great concern on my part that he may have perjured himself on behalf of a relative or friend. So I had some problems with him for that reason. [¶] I'm sorry. There was somebody else who I forgot to mention. Was it - -

THE COURT: Wasp.

MR. SCHREINER: Wasp? Okay. Let's see. 21, 22, 23, 57 I have noted. I have also got neutrality once again noted here as the philosophical position towards the death penalty. If I may have a moment, your honor to refresh my memory as to Mr. Wasp. I think as to 21 he indicated numerous friends who have been arrested. In fact - - Oh. This was one where I thought he might have been ineligible if he was arrested and convicted of receiving stolen property. We indicated it was a misdemeanor.

THE COURT: That's right.

MR. SCHREINER: So there are a number of reasons why I didn't want Mr. Wasp on the jury. I'm not sure. Is that all there is?

MR. SHORT: I think that's five.

MR. SCHREINER: As long as we are back here though, I noticed that Ms. Maston Hunter is in the group coming up, and I certainly will exercise a peremptory challenge as to her when she comes up for the reasons that I have already discussed in some of the other ones in terms of insisting that she had no opinion on the death penalty. Checking

neutrality. Another particular youthful person who I didn't want. I have circled 10, 21, 49 and 50. Let me look. I think she - - also for me it was somewhat revealing the comment that was written down on 49 that "why some are put to death and some aren't for somewhat similar crimes" that there may be some deeper philosophical reservations about the death penalty above and beyond that expressed in terms of neutrality.

Essentially, as to all these people that we have what I'm trying to do is find people who are going to be stronger in their convictions. Obviously I want jurors who are going to support my position in terms of convicting, but I want people who are going to be able to work together and people who are going to take a strong enough position with regard to the death penalty. If it's something that they either don't believe in or very weak in their feelings, I think we are going to have a real difficult time when it comes to penalty phase. And I'm looking to get the strongest 12 that I can get. That's essentially what I'm trying to do.

THE COURT: It seems to me presently sitting is Mr. L. who is male Black and Mr. W., male Black.

MR. SCHREINER: And maybe as long as we are flushing out the record, I hadn't given Mr. L that high of a grade based on his response, but one of the factors you look at is in terms of how the person simply projects - - appearance in terms of dress, his demeanor, the way he conducts himself, the way he expresses himself - - and I get a better feeling than his grade in his case. And that's part of what I'm doing here with regard to all these people. So that's as thoroughly as I can explain that. And there will be a challenge as to Maston Hunter when she comes up so we need to deal with that. We might want to address it now.

THE COURT: Do you wish to say anything further Mr. Short?

MR. SHORT: Submitted.

THE COURT: I have evaluated these reasons. I do not have the individual questionnaires in front of me, but I have had each one as his name or her name has been called and excused I have had notes on those. In each case I have myself seen reasons why there might be an excusal or a challenge rather and I agree with counsel's statement on demeanor. [¶] There was a recent case in which body [language] was held not to be a good reason for a challenge and that case has been depublished. We are back in the position where counsel's own reading of a person's demeanor and apparent attitude is exactly the kind of thing that he can consider in a peremptory challenge. [¶] I find that there has been no systematic exclusion of jurors based on race except counsel's explanation. Challenge is denied.

MR. SHORT: May we regroup here. First of all what do you have as our numbers. I have it as 14/14.

MR. SCHREINER: That's not what I have. I have 13.

THE COURT: What do you mean? You mean the number of challenges used?

MR. SHORT: Yes. He said 13. And I may have missed one.

THE COURT: Fourteen people have used. Sixteen defense has used.

MR. SCHREINER: I had 13, but I don't have the list in front of me. I would ask, though, given the severity of this and the difficulty of keeping up the changing of people as quickly as we are, if at some point, now or soon, we can take a break or at least excuse the jury and allow us to run through and make sure we are all on the page to be sure we are - - it appears we are - -

THE COURT: Let's take a lunch break now and do it now.

(5RT 1124-1129.)

After the court denied appellant's *Wheeler* motion, the defense excused David Jones. The prosecution accepted the panel a seventh time. The defense excused Yan Wong. The prosecution excused Stephanie Maston-Hunter. The defense excused Pamela Lydon. The prosecution excused David Dulce. (5RT 1132-1133.) The defense accepted the panel. The prosecution excused Ray Davis. The defense accepted the panel. The prosecution excused Marcia Hinman. The defense accepted the panel. The prosecution excused Raymond Bosak. Both parties had one remaining peremptory challenge when they accepted the panel. (5RT 1134-1135.)

B. Standard Of Review

In *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69], the Supreme Court established its three-part process for evaluating claims that a prosecutor violated the Equal Protection Clause in the exercise of the prosecution's peremptory challenges. (*Rice v. Collins* (2006) 126 S.Ct. 969, 973-974; *Miller-El v. Cockrell* (2003) 537 U.S. 322, 328 [123 S.Ct. 1029, 154 L.Ed.2d 931].) The defendant must first make a prima facie showing that a peremptory challenge has been exercised on the basis of race. (*Miller-El v. Cockrell*, 537 U.S. at 328-29, citing *Batson*, 476 U.S. at 96-97.) If the defendant makes a prima facie showing, then the prosecution must offer a race-neutral basis for striking the juror in question. (*Miller-El v. Cockrell*, 537 U.S. at 328-29, citing *Batson,* 476 U.S. at 97-98.) Finally, the trial court must determine whether the defendant has shown purposeful discrimination based on the arguments submitted by the parties. (*Miller-El v. Cockrell*, 537 U.S. at 328-29, citing *Batson,* 476 U.S. 98; *see Purkett v. Elem* (1995) 514 U.S. 765, 767-768 [115 S.Ct. 1769, 131 L.Ed.2d 834] (per curiam); *Hernandez v. New York* (1991) 500 U.S. 352, [111 S.Ct. 1859, 114 L.Ed.2d 395](plurality

opinion).)

"This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (*Rice v. Collins, supra,* 126 S.Ct. at p. 974, quoting *Purkett v. Elem, supra,* at 514 U.S. at p. 768.) In evaluating the third part of the test, "the critical question in determining whether a prisoner has proved purposeful discrimination" is the persuasiveness of the explanations offered by the prosecution to justify the peremptory challenges in question. (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 338.) Of course, "implausible or fantastic justification" will normally be found as pretexts for the prosecution's purposeful discrimination. However, the pertinent inquiry is whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility may be measured by, inter alia, the demeanor of the prosecution, the objective reasonableness of the prosecution's explanations, and whether the prosecution's explanations have some basis in accepted trial strategy. (*Miller-El v. Cockrell*, *supra*, 537 U.S. at p. 338, citing *Purkett v. Elem*, *supra*, 514 U.S. at p. 768.)

In an analogous area, the Supreme Court has specifically found that it is the trial judge who is best situated to determine a juror's competency to serve impartially. (*Patton v. Yount, supra,* 467 U.S. at pp. 1036-1038, fn.12.) Notably, the Court explained that a juror's *demeanor* plays a fundamental role in determining credibility. (*Id.* at p. 1038, n.14.) Thus, because demeanor plays a "fundamental role" in evaluating credibility, and only the trial court is in a realistic position to evaluate demeanor, a trial court's determinations as to credibility are entitled to "special deference." (*Patton v. Yount*, *supra*, 467 U.S. at 1038; *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1426.)

In *Miller-El v. Cockrell*, the Supreme Court noted that a judge's finding regarding a prosecutor's credibility is very similar to "evaluating the state of

mind of a juror, because evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" (*Miller-El v. Cockrell*, 537 U.S. at 338, citing *Hernandez v. New York*, 500 U.S. at 365 (plurality opinion), quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 428 [105 S.Ct. 844, 83 L.Ed.2d 841], citing *Patton v. Yount,* 467 U.S. at 1038.) The Court explained that deference "is necessary because a reviewing court, which analyzes only the transcripts from *voir dire,* is not as well positioned as the trial court is to make credibility determinations." *Miller-El v. Cockrell*, 537 U.S. at 338. This is because "[t]he credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review." (*Miller-El v. Cockrell*, 537 U.S. at 338, quoting *Hernandez v. New York*, *supra*, 500 U.S. at p. 367.)

The Supreme Court has held that:

> A court addressing this issue must keep in mind the fundamental principle that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."

Hernandez v. New York, *supra*, 500 U.S. at pp. 359-360, quoting *Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 264-265 [97 S.Ct. 555, 50 L.Ed.2d 450].)

C. The Trial Court Acted Within Its Discretion When It Found That The Prosecutor Had Not Excused Any Prospective Black Jurors Based On Race

In the instant case, the trial court acted within its discretion when it found the prosecutor's reasons for excluding the challenged prospective jurors

were bona fide. As to Gloria Young, the prosecutor had given her a grade of F: he was concerned with her answers to questions 21, 22 B, 49 and 50. Question 21 revealed that Young's nephew was facing murder charges in Chicago. (Supp. I 2CT 296.) The California Supreme Court has made clear that it is permissible to surmise that a juror's close relative's contact with the criminal justice system might make the juror unsympathetic to the prosecution and excusing a juror can be justified on such a basis. (*People v. Williams*, *supra*, 16 Cal.4th at pp. 664-665; *see, e.g.*, *People v. Jackson, supra,* 13 Cal.4th at p. 1196 [daughter of juror prosecuted as juvenile]; *People v. Buckley* (1997) 53 Cal.App.4th 658, 668 [friend charged with driving under the influence]; *People v. Barber* (1988) 200 Cal.App.3d 378, 389-94 [juror's relatives involved in theft or drug convictions]; *See also United States v. Jackson*, 914 F.2d 1050, 1052-53 (8th Cir. 1990) [nephew was incarcerated]; *Gibson v. Bowersox*, 78 F.3d 372, 373-74 (8th Cir. 1996) [relatives tried or convicted of a criminal offense].)

There were additional reasons which justified excusing Young. Question 22 revealed that she was unsure she could be an impartial juror because her father had been murdered, no one was charged for the crime, and she remained unsatisfied with the result. (Supp. I 2CT 296-297.) It was certainly reasonable for the prosecutor to believe that Young *might* be distracted from appellant's murder trial because her own father's murder remained unsolved and she remained unsatisfied with the result, and perhaps assigned some blame to the criminal justice system. These reasons justified the prosecutor's peremptory challenge. (*Tolbert v. Gomez* (9th Cir. 1999) 190 F.3d 985, 989; *see also United States v. Steel* (9th Cir. 2002) 298 F.3d 906, 914 [belief that racism may taint the criminal justice system was race neutral].)

Also, Young indicated she was neutral on the death penalty and commented: "I am neither for nor against the death penalty." (Supp. I 2CT

301.) The prosecutor explained that part of his strategy was to find jurors that were fair, but who were more inclined to impose the death penalty. As part of this strategy, the prosecutor looked to excuse some, but not necessarily all, prospective jurors who had expressed neutrality to the death penalty. This is a proper basis for a peremptory challenge. (*People v. Panah* (2005) 35 Cal.4th 395, 441 [neither prosecutor or trial court required to accept jurors representation they could impose death penalty when they also expressed reservations]; *People v. Davenport* (1995) 11 Cal.4th 1171, 1202 [overall reservations about the death penalty certainly provide a race-neutral explanation, even if insufficient for challenge for cause].) Thus, the record supports the prosecutor's stated reasons[3] for excusing Young.

As to Robbie Washington, the prosecutor was concerned about his view on the death penalty because he had indicated he was neutral. Also, the prosecutor tried to choose a jury of older, more conservative people. As to the death penalty, Washington indicated he was neutral and commented: "The death penalty should be imposed if the presiding judge/jury finds him/her guilty without a reasonable doubt. I am pro-choice in this respect." When asked if he would decide the case based on the evidence and the instructions, Washington stated: "The preponderance of the evidence during the phases of discovery etc. will either clear him to be guilty or innocent."[4] (Supp. I 2CT 305-319.) As to youth, Washington was 24, single, and came to court wearing a T-shirt and

3. Young's questionnaire also revealed she was divorced, had failed to obtain a degree from Long Beach City College, and was a postal worker. She assumed that a defendant was guilty of all crimes if he was guilty of one crime. She knew one or more people who used drugs. (Supp. I 2CT 292-302.) Although not cited by the prosecutor, these race-neutral reasons are also an appropriate basis to excuse a prospective juror.

4. Washington's somewhat confused and erroneous comments about the death penalty show his inexperience and potential inability to engage in serious deliberation about imposition of the death penalty.

somewhat sloppy attire. His friend and a relative had either been charged with a crime or had been a victim of a violent crime. The prosecutor stated he would not want this type of juror for any case (5RT 1125-1126), and these race-neutral reasons are supported by the record. (*People v. Sims* (1993) 5 Cal.4th 405, 429 [prosecutor excused a juror who "appeared too young and to lack sufficient experience in exercising responsibility."]; *People v. Williams*, *supra*, 16 Cal.4th at pp. 664-665; *United States v. Lorenzo* (9th Cir. 1993) 22 F.3d 1448, 1455-1456 [long hair and inattentiveness]; *Jordan v. Lefever* (2nd Cir. 2002) 293 F.3d 587, 595 [young and inexperienced in making decisions].)

As to Ricky Wasp, the prosecution had concerns with Wasp's answers to questions 21, 22, 23, and 57, and his stated neutrality on the death penalty. (5RT 1126-1127.) Wasp had numerous friends who had been arrested, and Wasp had himself been convicted of receiving stolen property. He also had a friend or relative who had been the victim of a violent crime. Moreover, Wasp had testified on behalf of a prisoner seeking parole, but he did not know the outcome of the proceeding. As discussed above, these reasons were race-neutral. *People v. Williams*, *supra*, 16 Cal.4th at pp. 664-665; *People v. Jackson*, *supra*, 13 Cal.4th at p. 1196.)

As to the death penalty, Wasp indicated he was neutral and commented: "Sometimes in certain cases I may be in favor of the death penalty, in other cases not so." When asked if he would decide the case based on the evidence and the instructions, Wasp stated: "I'll try, some times things or evidence is overlooked." (Supp. I 2CT 320-334.) Thus, Wasp's comments show that in reality he was probably moderately against the death penalty, because he limited application to "certain cases" and further qualified his willingness to impose the death penalty by saying "sometimes" he "may" impose the death penalty in those "certain cases." The prosecutor told the court he sought to exclude prospective jurors who had expressed neutrality, but might be worse than

neutral from the prosecution's perspective. Wasp also expressed some doubt about the criminal justice system when he commented that "things or evidence" may be overlooked. These race-neutral reasons justify excusing Wasp.

As to Darnell Fizer, the prosecutor stated he had mixed feeling about this juror, which was evident from the fact that the he had accepted a panel with Fizer. (*People v. Reynoso* (2003) 31 Cal.4th 903, 917 ["It is well settled that peremptory challenges based on counsel's personal observations are not improper.") However, the prosecution pointed out that Fizer had been an alibi witness for a relative who was convicted, which suggested that Fizer committed perjury. (5RT 1126.) The prosecutor also believed Fizer had indicated neutrality on the death penalty, although he thought Fizer would be a better juror than Washington. Fizer's questionnaire indicated he was 25 years old, single, and did inventory and warehouse work. He was in the Navy, but was court martialed for falsifying documents on his watch station and discharged from service. His cousin was convicted of armed robbery. (Supp. I 2CT 335-349.) The prosecutor's reasons for excusing Fizer are supported by the record.

As to Jonathan Seales, the prosecution stated it had accepted him as a juror on several occasions. The prosecutor was concerned with getting the best jurors in terms of a positive attitude towards the death penalty. The prosecutor stated:

> Mr. Seales may or may not be okay, but he is one of the group that expressed a position that their philosophical position is neutral. It's simply a matter of looking down the road with the number of peremptory challenges that I have and some of the people that I know are coming up now deciding that I can do better than that."

(RT 1123-1124.) Seales's questionnaire indicated he was 61, twice divorced, and retired or working in shipping or security. Seales noted that after seeing the defendant, the question arose in his mind: "Why would such a young guy be

charged with murder?" As to the death penalty, Seales indicated he was neutral and commented: "Sometimes 'yes' & sometimes "no" - it depends on the nature of the crime. (Supp. I 2CT 350-364.)

As to Stephanie Maston-Hunter, the prosecutor stated he intended to excuse Maston-Hunter because she had also indicated she was had no opinion on the death penalty and was neutral. She was also very youthful. The prosecutor was concerned with her answers to questions 10, 21, 49, and 50. On question 49, she wrote "why some are put to death and some aren't for somewhat similar crimes," which made the prosecution believe that she had deeper reservations about the death penalty than a person who was truly neutral. (5RT 1127-1128.) Maston-Hunter's questionnaire indicated she was 25, married, and worked for a telephone company. Her ex-boyfriend faced charges for purse-snatching, she did not attend the proceedings, but believed he was dealt with fairly. Her cousin had been shot in the park, no one was caught, and she held nothing against law enforcement. Her friend had also been shot on her front porch and the case was still pending. As to the death penalty, he indicated he was neutral and commented: "Why some are put to death and some aren't for somewhat similar crimes." (Supp. I 2CT 2684-2698.)

Under these circumstances, the trial court acted within its discretion when it determined that the prosecutor's stated race-neutral reasons were genuine. In addition to evaluating the prosecutor's reasons, the trial court also noted that there were two Black males on the jury when the defense objected. (5RT 1123.) This was additional evidence supporting the trial court's finding. (*People v. Reynoso, supra*, 31 Cal.4th at p. 926 [accepting jury with two Hispanics on four such occasions was "hardly the most failsafe or effective way to effectuate that unconstitutional discriminatory intent."]; *People v. Snow* (1987) 44 Cal.3d 216, 225, 242 [although not a conclusive factor, "the passing of certain jurors may be an indication of the prosecutor's good faith in

exercising his peremptories"].) Here, the prosecution explained that each party was looking for a jury inclined in their favor, without regard to race, and this was illustrated by James, a Black prospective juror who the prosecution accepted and wanted on the jury, who was excused by the defense because both parties perceived he was prosecution oriented and for the death penalty. (5RT 1125.) These additional circumstances support the trial court credibility determination that the prosecutor gave honest reasons for excusing the challenged jurors. Because the trial court's finding is supported by the record, it should not be disturbed on appeal. Finally, as discussed below, appellant offers nothing to revisit the trial court's credibility determination, and his claim should be rejected.

D. Appellant's Arguments To The Contrary Are Meritless

Appellant claims the trial court failed to conduct a sincere and reasoned evaluation of the prosecution's reasons for exercising its peremptory challenges requires reversal. (AOB 145-149.) This claim is meritless. "'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.'" (*People v. Reynoso, supra,* 31 Cal.4th at p. 923, quoting *People v. Silva* (2001) 25 Cal.4th 345, 385-386.) Here, as discussed above, the prosecutor's reasons met both these criteria.[5]

Moreover, "there is no reason to conclude that the trial court did not make 'a sincere and reasoned effort' to evaluate the credibility of the prosecutor's nondiscriminatory justifications." (*People v. Jackson, supra,* 13

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5. It is only where "'the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.'" (*People v. Reynoso, supra* 31 Cal.4th at p. 923, quoting *People v. Silva, supra*, 25 Cal.4th at pp. 385-386.)

Cal.4th at pp. 1197-1198.) In the instant case, as in *Jackson*, the trial court had apparently independently assessed the prosecutor's reasons because the court had independently noted reasons which might prompt a peremptory challenge (5RT 1128). (*Ibid.*) The court also apparently independently evaluated credibility because the court expressly stated that the court agreed with the prosecutor's evaluation of the prospective jurors' demeanor. (5RT 1128-1129.) Finally, following the prosecutor's explanations, the trial court asked defense counsel whether he wanted to add anything, and the defense submitted the matter without asking the court to conduct further inquiry or comparative analysis. Under these circumstances, further inquiry by the trial court was not required. (*People v. Jackson, supra*, 13 Cal.4th at pp. 1197-1198, citing *People v. Johnson, supra*, 47 Cal.3d at p. 1218.)

E. Appellant Failed To Argue Based On Comparative Analysis In The Trial Court, So Such An Analysis Should Not Be Conducted For The First Time On Appeal

Recently, this Court recognized that the United States Supreme Court had conducted comparative analysis on appeal, even though the defendant had failed to request comparative analysis in the trial court. (*People v. Guerra* (2006) --- Cal.Rptr.3d ----, 2006 WL 488528, citing *Miller-El, supra*, --- U.S. at pp. ---- - ----, 125 S.Ct. at pp. 2325-2332.) This Court reiterated that the long standing practice was that a reviewing court need not conduct a comparative analysis where the defendant had failed to request such an analysis in the trial court. (*People v. Guerra, supra,* 2006 WL 488528, citing *People v. Johnson* (2003) 30 Cal.4th 1302, 1324- 1325; *People v. Johnson, supra,* 47 Cal.3d at p. 1220-1222.) Without deciding whether comparative analysis should be conducted for the first time on appeal, this Court conducted a comparative analysis. (*People v. Guerra, supra,* 2006 WL 488528.)

F. Comparative Analysis Supports The Trial Court's Credibility Finding That The Prosecutor's Race-Neutral Reasons Were Genuine

In the instant case, the prosecution also excused 11 White prospective jurors and 2 Asian/Pacific Islander prospective jurors. Tina Larkin's questionnaire indicated she was 35, divorced, and was a nurse. She stated her race as White. Her ex-husband had been arrested for drug possession. She had testified on behalf of a boyfriend with traffic tickets. A friend or relative had been the victim of a violent crime, but she wished to discuss the matter privately, although she did state her ex-father-in-law was killed during a robbery. She also stated that she had been the victim of robbery and kidnapping by two Black women, and was injured escaping from a moving car. The perpetrators were not caught and she told the police to drop the case. As to the death penalty, she was neutral and commented: "I believe in it when it is deserved. I can vote towards it but am not happy to see something come down to it, but some people commit horrible crimes w/ special circumstances. when this happen death can be humane + less costly." (Supp. I 2CT 442-459.) Like many of the other jurors excused by the prosecution, Larkin's friends and relatives had contact with the criminal justice system, she and her relatives had been the victim of violent crime, and she expressed reservations about the death penalty.

Mary Costello's questionnaire indicated she was 58, remarried, and was a paralegal. She indicated her race as Caucasian. As to the death penalty, she wrote: "My personal opinion would depend on each individual case, evidence, circumstances, etc." She also commented: "I believe in the death penalty for people like Charles Manson, Bundy, ect." (Supp. I 2CT 460-474.) Costello is a good example of the prosecution's stated goal of excusing prospective jurors whom may actually disfavor, or place limits on, the death penalty even though

they think or say they are neutral. Here, reserving the death penalty for only the most infamous of serial killers is inconsistent with neutrality, and can fairly be characterized as a limitation consistent with one who is moderately against the death penalty.

Janet Wallech's questionnaire indicated she was 51, divorced, and was a college professor. She indicated her race as White. Her house had been burglarized and no one was caught. She did not hold this against law enforcement, but would have been more satisfied if the burglars had been caught. As to the death penalty, she was moderately against and commented: "I feel that it is not necessarily a deterrent to crime, but I am not against it in principle." (Supp. I 2CT 535-549.) Wallech expressly said she was moderately against the death penalty and also expressed a negative belief about the deterrence value of the death penalty.

Hedy Grosshandler questionnaire indicated she was 42, single, and worked as a teacher. She was born in Israel and indicated her race as White. As to the death penalty, she indicated she was moderately in favor and commented: "I have mixed feelings about the death penalty, but I can be purely objective as a juror." (Supp. I 3CT 566-579.) Here, is another good example of the prosecutor's strategy to excuse jurors who were really somewhat opposed to the death penalty, or expressed some form of reservation about the death penalty, even though they believed or characterized themselves as neutral or in favor of the death penalty. "Mixed feelings" could potentially interfere with penalty phase deliberations, even if one professes an ability to be objective.

Fred Rassam's questionnaire indicated he was 56 years old, married, and worked as a salesman. He was born in Iran and indicated his race as White. His son was arrested for stealing from a store. He indicated he would not be an impartial juror. As to the death penalty, he indicated he was neutral and commented: "Neutral." (Supp. I 3CT 596-610.) Rassam's son also had contact

with the criminal justice system, which was probably the primary reason, but his unwillingness to make any substantive comment about the death penalty may have led the prosecutor to doubt he was actually neutral.

William Nichols questionnaire indicated he was 55 years old, twice divorced, and was a parts expediter for an aircraft company. He indicated his race was Caucasian. His oldest son had faced charges, and Nichols had attended the proceedings and believed his son was dealt with fairly. Nichols testified on behalf of his son, who went to jail. As to the death penalty, Nichols indicated he was neutral and commented: "If a person is proven guilty of murder and special circumstances I could vote for the death penalty." (Supp. I 2CT 380-394.) Like many of the excused prospective jurors, Nichols had a close relative who faced felony charges.

Khoai Phan's questionnaire indicated he was 56, married, and worked as an eligibility worker for a public agency. He indicated his race as Asian. As to the death penalty, he indicated he was neutral and commented: "Depends on the law - I always obey the law." (Supp. I 3CT 657-671.) Phan's response indicates he may lack any personal conviction regarding the death penalty, because he absolutely deferred to "obeying the law." The prosecutor may have been concerned that Phan would find making a qualitative determination regarding the death penalty difficult because his views on the subject appeared largely unexamined.

David Ridgley's questionnaire indicated that he was 55 years old, married, and repaired machines. He indicated his race as "Cauc." He had two convictions for driving under the influence, and his daughter had been convicted for the same crime. He felt the system was fair. His car was broken into and he chased the person away. As to the death penalty, he indicated he was neutral and commented: "It is the present law + as a juror I would follow instructions." (Supp. I 10CT 2699-2713.) Again the prosecution excused a

prospective juror who had contact with the criminal justice system, or had a relative who had been arrested or convicted of a crime.

Repeka Penitusi's questionnaire indicated she was 43, married, and worked as an office clerk. She indicated her race was Samoan. Her husband had been convicted of domestic violence, she went to the proceedings, and felt the system was fair. As to the death penalty, she indicated she was neutral and commented: "I feel that if a person kills just out of hate or for no apparent reason, then death is their punishment. But in general, death penalty does not solve the solutions to the crimes being committed." (Supp. I 3CT 780-794.) Again we see the familiar themes. First, Penitusi's husband had been convicted of a crime. Also, she expressed reservation about imposing the death penalty in two ways. She might not impose the death penalty if there was any apparent reason other than hate for the killing. And she did not think the death penalty was part of the solution to the problem of crime.

David Dulce's questionnaire indicated he was 47, married, and worked for the United States Immigration Service. He indicated his race was Caucasian. He was arrested for assaulting a police officer. He had been assaulted and robbed on another occasion. As to the death penalty, he indicated he was neutral and commented: "The law is the law." (Supp. I 3CT 718-732.) Again, the prosecutor excused a prospective juror who had a conviction, and who had been a victim of crime, and who indicated an unexamined view about the death penalty.

Ray Davis's questionnaire indicated he was 66, married, and worked for Sears. He indicated his race as English/German. He had a bad experience with a lawyer, but did not discuss any details. As to the death penalty, he indicated he was moderately in favor and commented: "The death penalty is good when a person can't change." (Supp. I 3CT 734-748.) Here, it appears that perhaps the prosecution did not want a juror who might not like lawyers. However, this

juror expressed that he might not impose the death penalty if there was evidence that a person was capable of change, even though he indicated he was moderately in favor of the death penalty. The prosecution may have worried that any criminal defendant can make a colorable argument he is capable of change and reform while serving a life term without parole.

Marcia Hinman's questionnaire indicated that she was 69 years old, married, and worked as an office assistant. She indicated her race as White, Protestant. As to the death penalty, she indicated she was neutral and commented: "If needed, use it. Need is no hope of renovating thinking of felon/criminal." (Supp. I 3CT 795-809.) As with Davis, Hinnman expressed that she would reserve the death penalty only if the prosecution could prove that there was no hope of renovating appellant's thinking. The prosecution could be concerned that it would be difficult to prove there was no hope that appellant's thinking could be changed while serving life in prison.

Raymond Bosak's questionnaire indicated he was 61, single, and worked as an engineer. He indicated his race as Caucasian. He had been in the military and contributed to police charities. He had faced charges relating to careless driving and was dealt with fairly. His home was burglarized, no one was caught, and the police handled the matter okay. His friend's home was burglarized and the person was caught, and the police handled the matter okay. His friend was convicted of credit card fraud. As to the death penalty, he indicated he was neutral and commented: "I have no problem with capital punishment." (Supp. I 3CT 749-753.) Again, this prospective juror had personal contact with the criminal justice system, had a friend who had a criminal conviction, and had also been the victim of a crime.

Thus, when one compares the prosecutor's stated reasons for excusing the Black jurors with profiles of the White and Asian prospective jurors also excused by the prosecutor, there is consistent evidence that the prosecution's

stated reasons were genuine. This prosecutor consistently excused jurors who had contact with the criminal justice system, had a relative or friend who had been arrested or convicted, had a relative who was the victim of a violent crime, or who made comments that could fairly lead to the conclusion that the prospective juror had substantial, if not insurmountable, reservations about the death penalty.

Appellant offers two comparative analysis arguments. First, appellant argues that seated Juror Number 9 and Juror Number 11 had indicated they were neutral on the death penalty, which shows the prosecution's reason was not genuine. (AOB 155.) This argument is meritless. Indeed, the prosecutor expressed a willingness to retain some "neutral" jurors. As to the death penalty, Juror Number 9 indicated she was neutral, she commented: "I feel it is needed to fit certain crimes." Thus, Juror Number 9 felt that she was neutral, her comment appears to express an inclination of imposing the death penalty for certain crimes, which arguably takes her outside of neutral where, as here, the crime is especially calculated and cold-blooded. Her comments do not express personal reservations about the death penalty made by the jurors who were excused by the prosecution. Also, she had a relative or close relative who worked in law enforcement, and it appears she applied for a job in law enforcement. (Supp. I 1CT 124-138.) Her affinity for law enforcement may been viewed as a positive by the prosecution which outweighed any potential negative qualities.

Similarly, as to the death penalty, Juror Number 11 indicated he was neutral and commented: Haven't given it much [thought?] except the laws seams to favor the person before he/she is put to death." (Supp. I 1CT 154-168.) Again, like Juror Number 9, Juror Number 11 indicated they were neutral, but then added a comment evidencing a belief that criminal defendants have greater legal advantages when facing execution.

Appellant also argues that Juror Number 8 and Juror Number 12 had relatives who had been convicted of crimes. (AOB 155-156.) Appellant complains that the prosecutor did not excuse Juror Number 8 (Negrete) from the jury even though he had a son who was a gang member and had been convicted of burglary. (AOB 144, fn. 68.) This is true. And when one reviews Juror Number 8's comments regarding his son, one can see why the prosecutor did not excuse him on this basis: Juror Number 8 expressed unmitigated contempt for gangs, crime, *and his own son*. The defense was worried that he was biased against gang members. (3RT 626-630.)

Appellant also complains that the prosecutor did not excuse Juror Number 12 from the jury even though he had a cousin who was convicted of aggravated assault. (AOB 144, fn. 68.) Juror Number 12 explained that she heard about the matter from family, she did not attend the proceedings, and the cousin went to jail. She had heard he was treated fairly. She was familiar with the prosecutor from prior jury duty, although she was not selected for a trial. She had a sister worked as a Los Angeles County Sheriff's Deputy. Her uncle was a detective for Long Beach. She herself had applied to the police department and still hoped to become a police officer. The defense attempted to excuse this prospective juror for cause. The prosecutor commented "I can certainly understand why defense wouldn't want this person." (4RT 839-848.) Thus, when one examines the record in a broader manner than suggested by appellant, one can see that appellant's claims based on comparative analysis are meritless. Accordingly, appellant's arguments should be rejected, and his fifth claim should be denied.

VI.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION AND PRESERVED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT LIMITED DEFENSE COUNSEL'S CROSS-EXAMINATION OF ALLEGED ACCOMPLICE TOLER, AND ANY ALLEGED ERROR WAS HARMLESS

Appellant's sixth claim on appeal is that he was deprived of his right to confront witnesses, to a fair trial, to due process of law, to present a defense, and to a reliable penalty determination, by the trial court's erroneous limitation of defense counsel's cross-examination of alleged accomplice Toler. (AOB159-172.) Respondent disagrees. Defense counsel conceded he had no evidence that the police told Toler that: (1) Jardensiri said she shot at him; (2) Jardensiri said she demanded money; or, (3) Jardensiri said she shot Akbar, and further conceded that counsel merely speculated that Toler had been confronted with these statements. Under these circumstances, the trial court acted within its discretion under state law and preserved all of appellant's constitutional rights during the guilt phase and penalty phase when it properly limited cross-examination. In any case, as the trial court's ruling did not implicate the federal Constitution, the *Watson* standard of harmless error applies, and appellant cannot show a reasonable probability that the trial could have been different if the court had allowed the additional cross-examination. Moreover, considering that appellant's entire arguments rests on unproven speculation as to what additional cross-examination *might* have yielded, any alleged error was harmless beyond a reasonable doubt.

A. Relevant Proceedings

During opening statement, appellant's counsel told that jury that Knott was a liar, Toler was a liar, and the police did not investigate the case

sufficiently. (6RT 1171-1186.) As to Toler, counsel stated

> and I think the evidence will show she is trying to protect a third party. She knows who it is, but she's got [appellant] sitting in the back near this weapon and she's being told you're facing the death penalty. You're facing life without [parole]. At a minimum you are facing 25 to life. And we have an I.D. on you. The clerk in the store has identified you. The clerk in the store said you shot at him. The clerk in the store said you demanded the money. The clerk in the store said . . . you shot Mr. Nasser Akbar.

(6RT 1174-1175.) The prosecution lodged an objection on the ground that there was no evidence Toler was ever confronted with these statements allegedly made by the store clerk Jardensiri. Rather, the evidence only showed that the police told Toler she had been identified, and then Toler changed her story regarding the robbery and murder. The prosecutor further argued that defense counsel had disregarded the court's prior order prohibiting him to argue based on alleged hearsay statements by Jardensiri, the statements were inadmissible hearsay, and the statements were also inadmissible because there were no witnesses for the prosecution to cross-examine. (6RT 1176.)

The court asked defense counsel whether he had any evidence that the police told Toler that (1) the clerk said you shot at him; (2) the clerk said you demanded money; and, (3) the clerk said you shot Akbar. Defense counsel conceded he did not have such evidence, but opined that Toler was interviewed for two hours and there was no tape-recording and only a small follow-up report. The court sustained the prosecutor's objection and informed defense counsel that his opening statement would be terminated if he continued to violate the court's ruling in this area. (6RT 1178-1179.)

Defense counsel continued his opening statement. Counsel stated that Toler was pressured into blaming appellant because she had used PCP and

other drugs, it was early in the morning, and she was interviewed by experienced police officers. (6RT 1179-1181.) Counsel argued that Toler lied to avoid a long prison term. Counsel also stated: "Ms. Toler is protecting somebody else . . . ." (6RT 1182.) Counsel also pointed out that the evidence would show that Toler initially lied to the police. (6RT 1182-1183.)

On direct examination, Toler explained that she plead guilty to robbery and use of a firearm and was sentenced to 10 years in prison. She agreed that in exchange for not being prosecuted for murder, she would testify truthfully in the case against appellant. (6RT 1221-1222.) Toler testified that she and appellant entered the liquor store and both announced that they were committing a robbery. A clerk took money from the register and handed it to appellant, and took money from a brown paper bag and handed it to Toler. (6RT 1231-1232.) Appellant shot the clerk without provocation and then shot him again when he was on the ground. Appellant also fired a shot at the security camera. (6RT 1233-1234-1236, 1302-1303.) Toler did not discharge her gun, but she had it pointed at the second employee who appeared during the course of the robbery. (6RT 1236-1237.)

As to the interview with police, Toler testified that she initially denied any involvement, but told the truth after the police told her that she had been identified as a robber. (6RT 1242-1243, 1273, 1312-1313.) Toler also testified that there was no agreement in place regarding Toler's sentence when she pled guilty (6RT 1244), and she did not feel threatened when the interviewing officers mentioned that the case could involve the death penalty. (6RT 1312-1313.)

During cross-examination, defense counsel asked: [The police] never told you you were identified as someone who had shot the victim." Toler replied, "No." Before counsel could fully reiterate the question the prosecution interposed an objection, and the court excused the jury. The court asked

counsel for his statement as to what Jardensiri would testify if he were in court. Appellant's counsel stated:

> Mr. Jardensiri told the police that he came out from the back room. That he saw Ms. Toler with a gun. That he saw a male Black leaning on the counter, did not see a gun in his hand. That Ms. Toler shot a bullet at him, striking the camera, I believe, and that he took cover and heard Ms. Toler demand money from the victim and followed directly by shots fired. And he went out to view Ms. Toler and said that is the person that shot at me and shot [Akbar].

(6RT 1250-1251.) The court prohibited mention of these statements by either party unless Jardensiri testified that he made the statements. (6RT 1251.)

Defense counsel stated that he needed to cross-examine Toler regarding statements made to her by the police, in order to cross-examine her regarding the truth of her testimony. (6RT 1251-1252.) The court stated that the evidence was inadmissible hearsay. Defense counsel replied that he was not offering the statements for the truth of the matter asserted. Rather, the statements were offered to show Toler's state of mind when she told police she and appellant participated in the robbery. The court told defense counsel that he could not ask questions based on speculation, but could ask questions if counsel had a good faith belief that Toler could answer. (6RT 1252.)

The prosecution interjected:

> Your Honor, if I may. Just to make the record clear, the court did inquire about the statements of Jardensiri, what counsel believes Jardensiri would say.
>
> One of the important factors that counsel will note is in the police report in the statement made by Jardensiri. Of course we have a different theory; is that this person panicked and identified this person.

He notes that this person, the female in addition to doing what counsel said, is holding a chrome semiautomatic handgun, not the black one, the chrome one.

We put together the physical evidence in that it is clear the chrome gun was not fired by whoever is holding it. That is part of what I would be able to do if I had a witness to cross-examine. That is why I feel so strongly about us not improperly putting into evidence in the abstract picking and choosing that which is convenient.

I will also note for the record I have asked the witness if she was threatened by the detectives or promised anything. Certainly those questions can be asked by counsel as well.

But my position is contrary to what counsel is saying. The only purpose for asking these specific questions is, once again, he is attempting to improperly get those statements in front of the jury without a witness to utter them.

(6RT 1252-1253.) The court replied: "That is why I have ruled as I have." (6RT 1253.)

Later on during cross-examination, defense counsel asked Toler if the police ever mentioned any evidence they had against her. Toler said no. Counsel asked if the police had threatened her with life in prison or the death penalty. Toler replied that they had mentioned that she could get life in prison or the death penalty, but she did not consider this to be a threat. Toler said the police did not offer to help her avoid life in prison or the death penalty in exchange for the truth. (6RT 1274-1275.) In response to further questioning, Toler conceded that she understood that cooperating with the police was a possible way to avoid getting the death penalty. (6RT 1276.)

On redirect examination, in response to questions, Toler reiterated that

the police mentioned that the case potentially involved the death penalty, but that she did not feel threatened by the police. Toler did not accuse appellant because she was trying to avoid the death penalty. Rather, she told the truth because "it was going to come out eventually." (6RT 1311-1312.) Toler explained that after the police told her she had been identified, she told them the truth because they knew who she was. Toler also explained that she was not promised anything for telling the truth, and she was not threatened with a certain result if she failed to tell the truth. (6RT 1312-1313.)

On recross-examination, in response to questions, Toler acknowledged that when she told the police about appellant's involvement in the murder, she understood that the police had said she was potentially subject to the death penalty. (6RT 1323-1324.)

B. Standard Of Review

In *People v. Frye*, this Court reiterated the standard for establishing a violation of the Confrontation Clause:

> "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" [Citations.] However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. (*See People v.*

Belmontes (1988) 45 Cal.3d 744, 780.) Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [Citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]

(*People v. Frye, supra,* 18 Cal.4th at p. 946.)

The Confrontation Clause is generally subject to the rules of evidence. "In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352." (*People v. Quarterman* (1997) 16 Cal.4th 600, 622-623, citing *People v. Harris* (1989) 47 Cal.3d 1047, 1090-1091.) A trial court will be deemed to have exercised its discretion under Evidence Code section 352, regardless of whether it expressly stated that it was exercising its discretion. (*People v. Singh* (1995) 37 Cal.App.4th 1343, 1381.)

A trial court has "broad" discretion to exclude evidence where "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *see People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) "As with all relevant evidence . . . the trial court retains discretion to admit or exclude evidence offered for impeachment." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9; *see People v. Clair* (1992) 2 Cal.4th 629, 654-655.) An evidentiary ruling made pursuant to Evidence Code section 352 will only be overturned for an abuse of discretion. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070; *People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532 [in most cases appellate courts will uphold the trial court's exercise whether the evidence was admitted or excluded].) On appeal, the burden is on the complaining party to establish an abuse of discretion. (*Denham v. Superior Court* (1970) 2 Cal.3d

557, 566; *People v. Thompson* (1994) 24 Cal.App.4th 299, 308.) The complaining party must show "that the court exercised its discretion in an arbitrary, capricious or patently absurd manner . . . ." (*People v. Rodrigues, supra,* 8 Cal.4th at pp. 1124-1125, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

C. The Trial Court Acted Within Its Discretion Under State Law And Preserved Appellant's Constitutional Rights For Both The Guilt Phase And The Penalty Phase

In the instant case, the trial court acted within its discretion when it prohibited defense counsel from asking Toler whether she had been told that a store clerk had *identified her as the shooter*, because there is no evidence that the police made such a statement to Toler during the interview. Defense counsel conceded he had no evidence that the police told Toler that: (1) a clerk said she shot at him; (2) a clerk said she demanded money; or, (3) a clerk said she shot Akbar. (6RT 1178-1179.) Rather, counsel merely speculated that Toler had been confronted with these statements because she was interviewed for two hours, the entire interview was not tape-recorded, and there was only a small follow-up report. (6RT 1178-1179.)

Upon hearing that there was no evidence that the alleged statements had been made by the police, the court initially ruled that the statements were inadmissible hearsay. When defense counsel explained that hearsay was not the issue because he was not offering the statements for the truth of the matter asserted, the court then implicitly ruled that the statements were inadmissible under Evidence Code section 352. The trial court acted within its discretion under Evidence Code section 352 because the proposed questions for cross-examination had little if any relevance as they were based on mere speculation by trial counsel, and this was outweighed by the substantial danger of undue

prejudice and misleading the jury that the statements had in fact been made. It seems clear why appellant wanted these alleged statements to be heard by the jury: the jury would hear a non-testifying witness accuse Toler of being the shooter, and the prosecution would be unable to cross-examine the witness. This is particularly unfair considering the physical evidence showed that *only appellant's gun was discharged* during the robbery, which shows that Toler was not the shooter. (7RT 1579-1584.)

Moreover, the trial court's ruling must be viewed against the cross-examination that was permitted by the trial court. Appellant was able to conduct substantial cross-examination to explore whether Toler was lying to save herself after being confronted with evidence that she participated in the robbery and was subject to the death penalty. It should be noted that defense counsel was able to ask Toler:

> [The police] never told you you were identified as someone who had shot the victim?

Toler said no. The court never admonished the jury to disregard either the question or Toler's answer. (6RT 1250.) Defense counsel was also permitted to ask Toler if the police ever mentioned any evidence they had against Toler. Toler conceded she was told she had been identified as a robber. Counsel also asked if the police had threatened her with life in prison or the death penalty. Toler replied that she did not feel threatened. (6RT 1274-1275.) Further, counsel got Toler to concede that she understood that cooperating with the police was a possible way to avoid getting the death penalty. (6RT 1276.) Later on, counsel again got Toler to acknowledge that when she told the police about appellant's involvement in the murder, she understood that the police had said she was potentially subject to the death penalty. (6RT 1323-1324.) Thus, appellant was in fact permitted to explore whether Toler was lying on cross-examination to save herself when confronted with evidence that she

participated in the robbery and was subject to the death penalty. There was no violation of the Confrontation Clause because the court merely precluded defense counsel from formulating questions based on mere speculation that certain statements had been made, but did not prevent the defense from attempting to impeach Toler. Therefore, appellant has failed to show he was denied his right to present a defense and to a fair trial, or any other constitutional violation in either the guilt or penalty phase. Accordingly, his sixth claim on appeal should be rejected.

D. Any Alleged Error Was Harmless

As previously discussed, a trial court's erroneous admission or exclusion of evidence under Evidence Code section 352 does not implicate the federal Constitution. Accordingly, such errors are analyzed under the standard set forth in *People v. Watson, supra,* 46 Cal.2d at p. 836. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Under *Watson*, a state law error will not permit reversal unless it is reasonably probable that a result more favorable to appellant would have resulted absent the error. (Cal. Const., art. VI, § 13; *People v. Cahill* (1993) 5 Cal.4th 478, 492.) The *Watson* test conforms to and satisfies the constitutional command that: "[N]o judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (*People v. Odle* (1988) 45 Cal.3d 386, 415, citing Cal. Const., art. IV, § 13.)

Appellant has failed to establish prejudice. Toler's testimony had no effect on appellant's conviction for robbing Edge. As to the murder of Akbar, as discussed above, the defense was given wide latitude to cross-examine Toler about the circumstances of her confession and plea agreement with the

prosecution. Defense counsel expressly asked Toler: "[The police] never told you you were identified as someone who had shot the victim?" The court never admonished the jury to disregard either the question or Toler's answer. (6RT 1250.) Thus, the defense successfully asked a question that covered whether the police confronted Toler with any statement, by anyone, that she was the shooter. Toler said, "No." By denying that she had been confronted with any statement that she was the shooter, Toler foreclosed that she had been confronted with statements by a specific person. Therefore, the defense would have gained very little by asking Toler whether she had been confronted with Jardensiri's statement.

The prosecution put on a very strong case of appellant's guilt, and appellant's defense was weak by comparison, and so what little appellant had to potentially gain through some additional derivative cross-examination cannot create reversible error. Appellant was arrested within about 80 minutes of the murder, 2.2 miles from where the murder occurred, in the company of confessed robber Toler, in the get-a-way car, and in possession of the gun used to murder Akbar. The Glock nine-millimeter handgun was found in a map holder directly in front of where appellant was sitting when they were pulled over by the police. Appellant was the only person sitting in the back seat and Officer Everts saw appellant manipulating something right before the stop. Edge testified that the Glock looked similar to the one appellant used to rob Edge. This amounts to compelling evidence that appellant was in possession of the Glock, which in turn is very strong evidence of appellant's guilt for murdering Akbar.

Only the Glock was fired during the robbery, and therefore the person who used the Glock during the robbery was the one who shot and killed Akbar. Toler's pink and chrome gun, which was not fired during the robbery, was secured next to her in the front seat. This circumstantial evidence that appellant

was the shooter, which the defense conceded was the strongest evidence of appellant's guilt, was not refuted by the defense in any meaningful way. The defense could only lamely suggest that appellant was in "the wrong place at the wrong time," even though the police saw appellant manipulating something just before appellant knew he would have contact with the police, and then the gun was found partially concealed directly in front of appellant. (8RT 1834, 1837, 1865.) The defense attacked the prosecution for not tracking down the gun's registered owner, but the defense never sought to show that the gun was registered to Toler or Sullivan, or some other third party, even though the defense constantly suggested that Toler or some unknown third party was the shooter. (8RT 1876-1877.) The defense claimed it could not put on an alibi because "when you are in the neighborhood, you are in the neighborhood." (8RT 1878.) Even so, perhaps one's neighbors might shed some light. Under these circumstances, the circumstantial evidence in itself was solid and undisputable proof that appellant killed Akbar.

The defense conceded that the jury might find that the circumstantial evidence led to only one reasonable conclusion: that appellant was guilty, but urged the jury to find the eye-witnesses so unbelievable that they canceled out the circumstantial evidence. (8RT 1877-1878.) The jury apparently evaluated the credibility of the eye-witnesses and rejected the defense's invitation to find them so incredible that they actually somehow canceled out the compelling circumstantial evidence of appellant's guilt.

As to Knott, he was already familiar, to various degrees, with the location of the murder, the victim Akbar, Toler, Sullivan, and appellant. He was very familiar with Akbar and the market because he went there nearly every night to help Akbar. (6RT 1326-1327.) Knott was also already familiar with Toler and Sullivan, because they both lived near his sister, and Knott would apparently visit his sister fairly often. Knott saw Toler when she congregated

with others in front of her home, and also in the general area of Long Beach. (6RT 1341-1342.) Knott had some familiarity with appellant, because he had seen appellant with Toler several times in the week preceding the murder, and had seen appellant on the stairway to an apartment building earlier in the day. (6RT 1342, 1364, 1369-1370.) Thus, Knott did not just witness a shooting in an unfamiliar place involving unfamiliar people. Quite to the contrary, while on familiar ground Knott saw Toler, whom he had seen several times, participate in the robbery, and appellant, whom he had recently seen in Toler's company, shoot his friend Akbar. Knott claimed that he saw appellant's face when appellant ran directly towards him after fleeing the market. Knott estimated he was as close as 16 feet when he saw appellant's face. (6RT 1332-1333, 1341.) Knott fixed the dark gun used to kill Akbar in appellant's hand, and the chrome gun which was not discharged in Toler's hand. (6RT 1334.) Under these circumstances, assuming the jury found Knott's testimony credible, Knott's eyewitness identification is not only sufficient evidence of appellant's guilt, it appears to be very strong evidence, standing alone, that appellant shot and killed Akbar.

The jury apparently believed Knott's testimony and appellant has not presented any claim that he was foreclosed from attempting to impeach Knott. Instead appellant claims that if he had been permitted to impeach Toler, as discussed above, the jury would not have believed Knott. (AOB 169-170.) Not only does this argument patently ignore the compelling circumstantial evidence that appellant shot Akbar, it is also simply wrong. Appellant claims that Knott was incredible because he changed his story. (AOB 170.)

Knott did change his story: at the field show-up he claimed he could not identify the robbers and then later he claimed he had lied when he made this claim, and that he failed to identify them because he feared retaliation against himself or his sister's family. However, appellant ignores the fact that after the

field show-up Knott spoke with Gary Thornton, and Knott told him that the police had arrested the correct people. Thornton in turn told Detective Wren about his conversation with Knott, which prompted the detective to track down Knott even though Knott did not make an identification at the field show-up. (7RT 1605-1606.) It seems highly unlikely that the police would seek out Knott, who did not make an identification, and confront him with an imaginary statement to Thornton, in the hope of manufacturing a witness against appellant. Moreover, when the police interviewed Knott a second time, they discovered that Knott lied because he feared for his own safety and the safety of his sister's family. (6RT 1345-1350, 1359-1362, 7RT 1540-1541.) He already was aware that Toler and Sullivan were involved in gangs and drugs, and obviously he had witnessed his own friend brutally murdered by appellant. He was honest with the police and told them he could identify appellant and Toler, but that he feared getting involved. (7RT 1538-1540, 1605-1607, 1609-1610, 1653.)

Appellant also argues that Knott was incredible because he "admitted that after he agreed to cooperate and testify against appellant, the police arranged for the dismissal of various traffic violations and for the recall of outstanding warrants for his arrest." (AOB 170.) Appellant can only imply a quid pro quo, because the facts are otherwise. Knott agreed to testify before the detectives even were aware of Knott's situation. (6RT 1392, 7RT 1541-1543, 1607-1608.) Months later in 1995, after Knott had already agreed to testify, he obtained Detective Wren's help getting his tickets and warrants dismissed, which allowed Knott to travel and avoid the chance he would be incarcerated in the same facility as appellant. (6RT1350-1351, 7RT 1608.)

Appellant also complains that the prosecution did not prosecute Knott for having a concealed weapon in his car the night of the murder. (AOB 170.) This is true, but incomplete. It appears that a day or so after the shooting, Knott told the detectives he possessed a gun at the market. A detective asked if he

had it on him, Knott said no, and the detective did not attempt to seize the gun. By the time of trial the statue of limitations had run, so there were no immunity issues. (6RT 1353-1356.) Thus, this quibble does not amount to much in terms of impeaching Knott. Aside from any potential corpus delicti issues, Fourth Amendment issues, and any other impediments to prosecuting Knott for possession of a concealed weapon in a car, the police were trying to solve a brutal murder, and any reasonable juror understands this fact.

Thus, contrary to appellant's assertions, it appears Knott proved to be a credible witness for the prosecution. He was already familiar with the location, the perpetrators, and the victim. The fact that he could actually identify appellant and Toler came from a third party. His fear of retaliation was both natural and well-founded. His traffic ticket problems had not been mentioned when he agreed to testify, and the assistance he received was entirely consistent with legitimate fear of being harmed by appellant. Around the same time Knott was apparently approached by appellant's investigator, when appellant was initially acting in pro per, which caused Knott to become very upset. (1RT A31-A32.) Finally, the jury understood that the police had merely overlooked a relatively unimportant crime in order to try and solve a brutal murder. Accordingly, Knott was a strong eye-witness for the prosecution because of the strength of his identifications and the facile manner in which any credibility issues were resolved.

As to Toler, she helped plan and participated in the robbery and clearly knew who shot and killed Akbar. The only issue was her credibility. The jury evaluated her credibility knowing that she had made a plea agreement with the prosecution for 10 years in prison in exchange for her truthful testimony during appellant's prosecution. The jury already knew she was a drug addict and heard a defense expert regarding potential effects of drug use. The jury already knew that Toler initially denied any involvement in the robbery, but confessed after

the police told her she had been identified as a robber, and also told the police about appellant's involvement in the robbery and shooting. Defense counsel expressly asked Toler: "[The police] never told you you were identified as someone who had shot the victim?" Toler said no. (6RT 1250.) The jury knew all of these circumstances when it evaluated Toler's testimony, and the jury still apparently concluded that Toler was telling the truth. Appellant has failed to show how asking Toler derivative and cumulative questions on cross-examination would have made any difference at appellant's trial. Under these circumstances, any alleged error was harmless under either *Watson* or *Chapman*. Accordingly, appellant's sixth claim should be rejected.

VII.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION AND PRESERVED APPELLANT'S CONSTITUTIONAL RIGHTS WHEN IT DENIED APPELLANT'S MOTION TO RECALL DETECTIVE COLLETTE, AND ANY ALLEGED ERROR WAS HARMLESS

Appellant's seventh claim on appeal is that the trial court erred when it denied his motion to recall Detective Collette to ask whether he was aware of Jardensiri's alleged statement identifying Toler as the shooter, and whether he informed Toler she had been identified as the shooter. Appellant claims that during the guilt phase of the trial the error violated appellant's rights under the Fifth, Sixth, and Fourteenth Amendments, and during the penalty phase it violated his rights under the Eighth and Fourteenth Amendments. (AOB 173-180.) Respondent disagrees. Appellant has waived his constitutional claims by failing to raise these grounds in the trial court. The trial court acted within it discretion to limit cross-examination. And any alleged error is harmless because the defense was permitted ample opportunity to attempt to impeach both Detective Collette and Toler.

A. Relevant Proceedings

Detective Collette testified that he and Detective Logan spoke with Toler at his office during the early morning hours after the shooting. Toler initially denied any involvement, but admitted her involvement in the shooting after one of the detectives told Toler that she had been identified as the girl in the store with the chrome gun. (7RT 1543.) Toler said that she and appellant both had guns drawn during the robbery, but it was appellant who fired several rounds into the clerk. (7RT 1544.) Detective Collette testified that Toler was not threatened or promised any reward for making the statement. She did not ask for anything in exchange for her statement. She was not directly threatened with the death penalty, although she was informed of the potential punishment based on the nature of the potential charges. (7RT 1544-1547.)

Appellant asked Detective Collette if he assisted Knott in getting his outstanding tickets taken care of. When Detective Collette replied that he did not, appellant's counsel informed the court he did not want to cross-examine Detective Collette. Counsel stated:

> I have a lot of information I want to get from the investigating officers, but I would prefer to get it from Detective [Wren]. I don't want to cross examine [Detective Collette]. . . . I don't want to cross-examine Collette and be in situation where it's considered cumulative when I call the other officer to the stand. . . . .

(7RT 1552.) The prosecutor stated that Detective Wren could testify at the following morning. Defense counsel stated that because Detective Wren would be available for cross-examination, he had no further cross-examination for Detective Collette. Defense counsel asked that Detective Collette remain on call, and the court excused him subject to recall by the court. (7RT 1552-1553.)

The following day, the prosecution stated that he intended to call the

store owner, Mannil, to the stand simply to fix the monetary loss sustained after the robbery. Because Mannil had been the person who translated Jardensiri's statements for the police, the prosecution was concerned that the defense might try to yet again introduce Jardensiri's statements to the jury. (7RT 1590.)

Defense counsel asked to make an offer of proof. He argued that Detective Collette had information that Toler was the shooter, so when Detective Collette told Toler she was not eligible for the death penalty, this was a misstatement of the law. Counsel argued this "opened the door" for cross-examination as to whether Detective Collette had any information that Toler was the shooter. The court said there was no evidence Detective Collette was aware of Jardensiri's statements. Defense counsel requested to inquire outside the presence of the jury to determine whether Detective Collette was aware of Jardensiri's statements. (7RT 1591.)

The prosecution argued that Detective Collette had only indicated his belief that Toler was not eligible for the death penalty, the only relevance was what was actually said to Toler. The court agreed that the issue was what the detective said to Toler, and the detective had already testified as to what he said to Toler, so any speculation about what the detective may have known was irrelevant. Defense counsel reiterated that he wanted to explore whether the detective had information that Toler "was the shooter from whom and when and where." The court denied the request to recall Detective Collette. (7RT 1592-1593.)

B. Appellant's Constitutional Claims Are Waived Because He Did Not Raise These Grounds In The Trial Court

To preserve a claim of federal constitutional error for appeal, these claims must be raised in the trial court, and the appellant cannot rely on objection based on state law. (*People v. Sapp* (2003) 31 Cal.4th 240, 307

[claims in a capital case that testimony violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution were waived because these grounds were not raised in the trial court].) Here, appellant did not raise any constitutional grounds and his constitutional claims should be considered waived on appeal.

C. The Trial Court Complied With The Constitution And Acted Within Its Discretion When It Denied Appellant's Request To Recall Detective Collette

The law regarding a trial court's discretion to limit cross-examination was discussed in the previous argument section. As to Detective Collette, the trial court acted within its discretion when it prohibited defense counsel from asking Detective Collette if he was aware of Jardensiri's alleged statement identifying Toler as the shooter, because there is no evidence that the police made such a statement to Toler during the interview. As previously discussed, defense counsel conceded he had no evidence that the police told Toler that: (1) a clerk said she shot at him; (2) a clerk said she demanded money; or, (3) a clerk said she shot Akbar. (6RT 1178-1179.) Rather, counsel merely speculated that Toler had been confronted with these statements based on the additional speculation that Detective Collette was aware of the alleged statements made by Jardensiri. (6RT 1591-1593.)

In denying the request to recall Detective Collette, the trial court again found that the proposed area of cross-examination was either irrelevant or inadmissible under Evidence Code section 352. The trial court acted within its discretion because the proposed questions for cross-examination had little if any relevance as they were based on mere speculation by trial counsel, and Detective Collette had already testified about what he actually said to Toler during the interview. It should again be noted that it is understandable that

defense counsel wanted the jury to be exposed to hearsay statements of an unavailable witness, but it would be particularly unfair considering the physical evidence showed that *only appellant's gun was discharged* during the robbery, showing that Toler was not the shooter.

Moreover, the trial court's ruling must be viewed against the cross-examination that was permitted by the trial court. Appellant also had the opportunity to conduct cross-examine of Detective Collette, but chose to forego cross-examination aside from his request to improperly interject hearsay statements at trial. Again, as to Toler, appellant was able to conduct substantial cross-examination to explore whether Toler was lying to save herself, including whether the detectives said she had been identified as a shooter. (6RT 1250.) Further, counsel got Toler to concede that she understood that cooperating with the police was a possible way to avoid getting the death penalty. (6RT 1276, 1323-1324.)

In addition to foregoing a general cross-examination of Detective Collette, appellant also had the opportunity to cross-examine Detective Wren. (7RT 1613-1652.) On direct examination, the prosecution elicited that Toler changed her story after she was told that she had "been identified." Detective Wren testified that he did not make any promises, inducements, or threats to get Toler to change her story. (7RT 1600-1601.) He did not threaten her with particular punishments or penalty, or suggest she could obtain some lesser penalty by cooperating with the police. Detective Wren did not recall any mention of the death penalty during the interview. (7RT 1601-1603.)

On cross-examination, appellant's counsel asked Detective Wren about details of the Toler interview. Detective Wren testified that Toler was interviewed between 5 and 6:46 a.m., they recorded the portion of the interview that took place between 6:28 and 6:48 a.m., and the detective destroyed his hand-written notes after typing the police report. (7RT 1623-1625.)

Appellant's counsel explored other details of the interview. (7RT 1626-1632, 1635-1639.) Counsel specifically asked if they gave Toler information that her initial story was not credible, and Detective Wren testified that he told Toler she had been identified and that she was under arrest for robbery/murder. Detective Wren denied mentioning the death penalty, or any potential penalty, and denied hearing Detective Collette mention the death penalty during the whole interview. (7RT 1633-1634.)

D. Any Alleged Error Was Harmless

As with his sixth claim regarding the cross-examination of Toler, appellant's assertion in his seventh claim that the trial court's ruling caused any prejudice to him is based speculation. Toler denied being told she was the shooter. Detective Wren testified that they did not confront her with information she was the shooter. Thus, it is pure speculation to say that cross-examining Detective Collette would have changed anything about appellant's trial. Moreover, whether Toler was told she was identified as a mere participant in the robbery, or as the shooter, it seems to respondent that Toler would have the same motive to seek a deal with the prosecution and lay as much blame as possible on her co-perpetrator or some innocent third party. Toler cracked and told the truth when she was told she had been identified as a robber. Thus, it appears it would have made no difference if she had been told she had been identified as the shooter. Finally, the strength of the prosecution's case, and the necessarily weak efforts of the defense to create reasonable doubt, were discussed at length above. Under these circumstances, appellant has failed to show prejudice under any standard.

VIII.

THE TRIAL COURT ACTED WITHIN ITS DISCRETION WHEN IT ALLOWED THE PROSECUTION TO PRESENT EVIDENCE THAT A SKI MASK AND BLACK JACKET WERE FOUND IN THE TRUNK OF THE CAR IN WHICH APPELLANT WAS RIDING AT THE TIME OF HIS ARREST, AND ANY ALLEGED ERROR WAS HARMLESS

Appellant's eighth claim on appeal is that the trial court erred by allowing the prosecution to introduce evidence that a black ski mask and jacket were found in the trunk of appellant's car when he was arrested because the evidence was irrelevant and highly prejudicial. Appellant also claims that the court's ruling violated appellant right to a fair trial under the Due Process Clause of the Fifth and Fourteenth Amendments. (AOB 181-187.) Respondent disagrees. Appellant's due process claim has been waived or at least partially waived to the extent it differs in substance from his trial objection under state law grounds. The black jacket was admissible because it was found in appellant's car four or five days after the Edge robbery, who told police that appellant was wearing "dark clothing" during the robbery. The ski mask was relevant because it was found in the same plastic bag as the jacket and bolstered the theory that the black jacket was used during the Edge robbery. Alternatively, even if admission of the ski mask was erroneous under state law, its admission cannot reasonably be said to have rendered appellant's trial fundamentally unfair, so appellant has failed to establish any due process violation. Finally, any alleged error was harmless because there is no reasonable probability the alleged error changed the outcome of the trial.

A. Relevant Proceedings

James Edge testified that appellant was wearing "dark clothing" during the robbery. (6RT 1200.) Long Beach Police Officer John Bruce assisted in the search of the Ford Taurus after the traffic stop on the night of the robbery/murder of Akbar. He searched the trunk and found items including a black ski mask and a black corduroy jacket with a large "F" on the chest. Both the mask and the jacket were found inside the same plastic bag. (7RT 1462-1464.)

Defense counsel moved to exclude admission of the black ski mask and jacket found in the trunk of appellant's car because these items had no probative value and the mask might be prejudicial to appellant. (7RT 1426.) The prosecution stated the belief that Knott had testified that appellant wore a black jacket, and that the ski mask arguably went with the jacket, and these items were found in the trunk of appellant's car. Also, although the ski mask was not used during either robbery, it was the type of items a robber might choose to use, or not use, before committing a robbery. The court asked of the mask was being introduced "to create the suggestion of possible other use." The prosecution replied, "Yes, it is." The prosecution also argued that the jacket and mask were found together in a plastic grocery bag, and the other more innocuous items were not inside the plastic bag, but were in the trunk. The prosecution reiterated that the mask was circumstantial evidence of a robbery, and appellant might have carried the mask with him into the liquor store, but ultimately decided not to wear the mask. (7RT 1426-1428.) The defense countered that when Knott testified he was not shown the jacket or asked to identify it, and that this foundational question should be put to Knott. The court stated that the prosecution could introduce the mask and jacket even though the jacket was not shown to Knott during his testimony. (7RT 1428-

1429.)

Later on, appellant objected to admission of the ski mask and jacket on the ground that there was never any evidence regarding a plastic bag containing the items. The prosecution argued that both sides had mentioned the plastic bag in questioning and therefore it should be admitted. The trial court agreed and overruled the objection. (8RT 1700-1701.)

During argument, the prosecution discussed the location of the gun used to kill Akbar and the other gun recovered from appellant's car. The prosecutor then stated:

> We hear from Officer Bruce about finding the black jacket that is packaged together with the ski mask in the trunk. And that is of some significance too. Why are they in the bag together? Are those items that [appellant] is readying to dispose of at that point? They are in the trunk together.

(8RT 1811.) Defense counsel argued that the prosecution introduced the ski mask and jacket in order to prejudice the minds of the jurors. Counsel stated:

> That is the same reason they brought in the ski mask. Not a single person in the world has said anything about anyone using a ski mask in the robbery or murder. Why is it in this courtroom? Because people who have ski masks are potential robbers. If you are in a car with a ski mask, you are a potential robber and murder [sic]. Simple as that. More prejudicial evidence with no probative value.

(8RT 1858-1859.) Later on, counsel argued:

> There was no black shirt found. This jacket was found in the trunk. I guess they can argue, well, maybe she thought the jacket was a shirt. The jacket was never described by Mr. Knott. Nobody has ever come in here and said this jacket has anything to do with this case, but it is

> found in the trunk. Okay. Now it is a large jacket. [¶] You can see I am a relatively large man. It is big on me. Young people do wear baggy clothes, especially Insane Crips. You put a jacket on a female like Ms. Toler or Sullivan. You do a little thing with your hair, put it in a pony tail or something, and, hey, you can look like a man. They can look like a man.
>
> Ms. Toler came in skimpily dressed in here. It is not her fault. She doesn't get to choose what she wears. Shows her full endowment as a woman. That is not what she was wearing out there that night. She was wearing sweats. She said black sweatshirt, baggy pants. This thing here (showing jacket evidence) maybe, you know. [¶] Very easily Mr. Knott could have made his mistake about two male Blacks if they are dressed in that way distinguishing themselves. Females disguise themselves in that way. You know what is the sad thing is we will never know. We will never know if there is any scientific evidence on this coat to support my theory, okay. Because the police didn't [preserve the evidence and test it for hair fibers, blood, or gunshot residue].

(8RT 1861-1862, 1876.)

During closing argument, the prosecution responded to defense counsel's argument, stating:

> There are a couple of points he makes that counsel believes are put in solely to prejudice you. And it's ironic in the context of another group of things that he says oh, they should have done this or should have investigated that. He said why did they put in the ski mask. What's that. That's put in just to prejudice you to make you think he is an armed robber as opposed to a skier. I don't know if he a skier or not, but I know he is a murderer and a robber. It's in the same bag with the black ski jacket. The way that it's packaged suggests it's either going to be

> moved somewhere, hidden or discarded. That's the significance of it. I don't know if the defendant is a skier or not, but that's the ski mask found in the trunk of the vehicle he is in an hour and minutes after the robbery occurs.

(8RT 1898-1899.) Later on the prosecution argued: "In terms of what we have with the jacket and ski mask he is preparing to dispose of those items. Again, indicating a consciousness of guilt." (8RT 1906.) A little later, the prosecution argued in passing that Knott mentioned the black jacket, and the jacket was found in the trunk of the car. (8RT 1908.)

B. Appellant's Due Process Claim Is Waived To The Extent It Is Substantively Different From The State Law Grounds Raised In The Trial Court

This Court recently addressed the requirements for preserving an issue for appeal:

> What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.

(*People v. Partida, supra,* 37 Cal.4th at p. 435.) The Court cited the specific example of a defendant who raises an objection under section 352, but then asserts a due process violation on appeal:

> If he had believed at trial, for example, that the trial court should engage in some sort of due process analysis that was different from the Evidence Code section 352 analysis, he could have, and should have, made this clear as part of his trial objection. He did not do so. Accordingly, he may not argue on appeal that due process required exclusion of the evidence for reasons other than those articulated in his Evidence Code section 352 argument.

(*Id.* at p. 435.) The Court found that the defendant's claim on appeal was limited to arguing "that the asserted error in admitting the evidence over his Evidence Code section 352 objection had the additional legal consequence of violating due process." (*Ibid.*) "Similarly, a defendant may argue that error in overruling a trial objection was prejudicial under the *Watson* test . . . ." (*Ibid.*)

In the instant case, appellant may only argue that the trial court erroneously admitted the jacket and ski mask under state law, and also that the error was so serious it violated due process for the same underlying reasons: the evidence was irrelevant or more unfairly prejudicial than probative. Any other claims have been waived by the failure to raise those claims in the trial court. Moreover, appellant is precluded from arguing that the alleged error should be reviewed under the Chapman standard of harmless error, because he is limited to showing prejudice under Watson after failing to raise a due process claim in the trial court.

C. Relevant Law

Pursuant to Evidence Code sections 350 and 351, only relevant evidence is admissible, and all relevant evidence is admissible unless otherwise provided by statute. Pursuant to Evidence Code section 210:

> "Relevant evidence" means evidence, including evidence relevant to

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

Evidence meets the test of relevancy where the evidence in question tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 185.) Evidence is "relevant" when, no matter how weak it is, it tends to prove a disputed issue. (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843-1844.) A trial court has broad discretion in determining whether evidence is relevant. (*People v. Scheid* (1997) 16 Cal.4th 1, 14.)

As to the right to due process, this Court recently reiterated that:

> The admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair.* (*Estelle v. McGuire* (1991) 502 U.S. 62, 70, 112 S.Ct. 475, 116 L.Ed.2d 385; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564, 87 S.Ct. 648, 17 L.Ed.2d 606; *People v. Falsetta* (1999) 21 Cal.4th 903, 913 . . . ["The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair."]; *see also Duncan v. Henry, supra,* 513 U.S. at p. 366 . . . .) Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Earp* (1999) 20 Cal.4th 826, 878 . . . ; *People v. Watson, supra,* 46 Cal.2d at p. 836 . . . .)

(*People v. Partida, supra,* 37 Cal.4th at p. 439.)

D. The Trial Court Acted Within Its Discretion When It Admitted The Ski Mask And Black Jacket Found In The Trunk Of Appellant's Car

In the instant case, it appears appellant is correct that Knott did not testify that appellant was wearing a black jacket during the robbery/murder. (AOB 181, fn. 84.) However, Edge testified that appellant was wearing "dark clothing" during the robbery taking place four or five days before the robbery/murder of Akbar. (6RT 1200.) The presence of a dark colored jacket in the back of appellant's car tended to connect him to the robbery of Edge. The evidence was therefore relevant. The presence of jacket has no inherent prejudicial value, and carried no risk of consuming too much time or confusing the jury, so the jacket was also admissible under section 352. Because the jacket was relevant and carried no risk of undue prejudice, its admission did not constitute a violation of due process.

The ski mask also had relevance, although probably less so than the black jacket because there were no witnesses who testified that someone wore a ski mask during either the Edge robbery or the Akbar robbery/murder. However, the ski mask was found in the same plastic bag as the jacket, and this nexus could allow a reasonable fact-finder to draw inferences that appellant was preparing to dispose of the clothing he actually used during the Edge robbery as well as ski mask which could have been used during the Edge robbery. (*See People v. Darling* (1989) 210 Cal.App.3d 910, 912-914 [although screwdriver found on burglary defendant was not used in alleged burglary, it was properly admitted because it tended to show defendant took a screwdriver and took it to a distant neighborhood for the purpose of committing a burglary].) This evidence also tended to counter appellant's defense that he was in the wrong place at the wrong time when the police found him in constructive possession of the murder weapon. (*See People v. Williams* (1965) 238 Cal.App.2d 446,

463 ["bolt cutters, a sack, gloves, pen-lights, and a watch cap seized from defendant who fled burglary scene were relevant to the issue of felonious intent, although not actually used in the burglary"].) Therefore, the court also acted within its discretion when it admitted the ski mask into evidence.

E. Any Alleged Error Was Harmless

As previously discussed, a court's erroneous admission or exclusion of evidence under Evidence Code section 352 does not implicate the federal Constitution. Accordingly, such errors are analyzed under the standard set forth in *People v. Watson, supra,* 46 Cal.2d at p. 836. (*People v. Partida, supra,* 37 Cal.4th at p. 439.) Under *Watson*, a state law error will not permit reversal unless it is reasonably probable that a result more favorable to appellant would have resulted absent the error. (Cal. Const., art. VI, § 13; *People v. Cahill, supra,* 5 Cal.4th at p. 492.) The *Watson* test conforms to and satisfies the constitutional command that: "[N]o judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (*People v. Odle, supra,* 45 Cal.3d at p. 415, citing Cal. Const., art. IV, § 13.)

Here, appellant conceded that the strongest evidence the prosecution had was the presence of the murder weapon within appellant's reach during the traffic stop, but argued that appellant was simply in the wrong place at the wrong time and the presence of the gun was not proof beyond a reasonable doubt that appellant participated in the robbery/murder of Akbar. Under these circumstances, the presence of the ski mask was not prejudicial because appellant defense was simply that these items, along with the guns found in the car, belonged to someone other than appellant. Defense counsel made this very

assertion during his closing argument to the jury by suggesting that Toler was the owner of the jacket and the ski mask.

Moreover, it is only a ski mask, and therefore is not something that "uniquely tends to evoke an emotional bias against defendant'" without regard to its relevance on material issues. (*People v. Bolin* (1998) 18 Cal.4th 297, 320; *see also People v. Edelbacher* (1989) 47 Cal.3d 983, 1016.) There is nothing inherent in simply possessing a ski mask which might tend to uniquely provoke an emotional reacion. (Compare *People v. Hart* (1999) 20 Cal.4th 546, 616 ["unpleasant" photographs of a murder victims partially-clothed body displaying "grievous wounds" not unduly prejudicial].) As discussed above, the case against appellant was very strong, consisting of compelling circumstantial evidence that appellant killed Akbar, Knott's eye-witness identification, and the testimony of appellant's co-perpetrator Toler. The ski mask played little if any role at trial, and even if it was erroneously admitted, appellant has failed to show a reasonable probability that its admission effected the verdict. The evidence against appellant was compelling in this case, and the defense offered no affirmative defense, and was not able to raise reasonable doubt, so the admission of the ski mask was harmless under any standard.

IX.

THE TRIAL COURT PROPERLY EXCLUDED PROSPECTIVE JUROR BELL FOR CAUSE

Appellant's ninth claim on appeal is that the trial court violated his right to a reliable penalty determination under the Sixth and Fourteenth Amendments when the court granted the prosecution's motion to dismiss Juror Bell for cause. (AOB 188-197.) Respondent disagrees. The trial court properly removed Juror Bell after implicitly finding that she was biased against the death penalty and that her beliefs would substantially impair the performance of her duties as a

juror.

A. Relevant Proceedings

After voir dire had commenced, defense counsel objected to the written form of "question 4" and also noted that the trial court had verbally asked the question in different forms. Counsel requested the deletion of the words "was life imprisonment without the possibility of parole" be deleted, and that the question be read as such:

> Do you have such a conscientious opinion in favor of the death penalty that you would automatically vote for a death penalty even if you felt it was not the appropriate decision based upon all the facts and the law?

(3RT 536-537.) Defense counsel argued that the question would make the instruction less confusing. After the noon recess, the prosecution stated it would not oppose appellant's proposed language. (3RT 539.)

Later on during voir dire, the prosecution raised his concern about "questions 3 and 4 in the *Hovey* question." (3RT 574.) The prosecutor stated that:

> . . . I think that part of the confusion is that when you are asking somebody essentially on one hand if you are so against the death penalty can you vote for it if you think it's appropriate, or if you – on the other side of it, if you think it's appropriate essentially you are asking someone if they are against the death penalty that may never feel it's appropriate. But you are asking them to suppose they do. [¶] I'm wondering if perhaps a phrase that says essentially that if the mitigating circumstances outweigh or aggravating circumstances outweigh, if they can that. I know this is a little late for that. It just seems to me sometimes when they are trying to figure out what that means that – we

> have had a couple of people who said they are very strong one way or another. You said well can you do the opposite of your feelings if you fell it's appropriate. Well sure if I feel it's appropriate. The issue is given their feelings would that ever happen.

(3RT 574-575.) The court replied: "What you are suggesting is we make it a little better. Aggravating and mitigating are long words that will throw a lot of people that we are dealing with." (3RT 575.) The prosecutor noted that the majority of prospective jurors understood the questions, and that the court had helped other prospective jurors by rephrasing the question. However, the prosecution wanted to ensure that the questions addressed the real issue: whether a juror could put aside his philosophical beliefs regarding the death penalty and follow the law. (3RT 575.) The prosecutor told the court it was not asking to change the basic form of the question, but suggested that where it was apparent a prospective juror was having difficulty understanding, the court could ask follow up questions regarding aggravating and mitigating circumstances. (3RT 576.)

The court asked Prospective Juror Bell:

> You have stated here that your general opinion or feeling for the death penalty is neither for or against it. It just exists. But if we get to the penalty phase it will do more than just exist to you. You will personally have to confront your decision-making with regard to that penalty. Do you understand?

Prospective Juror Bell replied "yes." The court asked:

> So understanding that, do you have any more to say about your general opinion or feeling regarding the death penalty?

Prospective Juror Bell replied "no." The court continued:

> Do you have such a conscientious objection to the death penalty that,

> even if the People prove beyond a reasonable doubt the defendant is guilty of first degree murder, you would vote not guilty just to avoid reaching the death penalty question?

Prospective Juror Bell replied "no." (5RT 889.) The court asked:

> Do you have such a conscientious objection to the death penalty that, even if the People prove beyond a reasonable doubt the special circumstances are true, you would vote not true just to avoid getting to the death penalty question?

Prospective Juror Bell replied "no." (5RT 889-890.) The court asked:

> Do you have such a conscientious objection to the death penalty that you would automatically vote against death even if you actually felt that death was the appropriate decision based on the facts and the law?

Prospective Juror Bell replied "no." The court asked:

> Do you have such a conscientious opinion in favor of the death penalty that you would automatically vote for death even if you actually felt that death was not the appropriate decision under the facts and the law?

Prospective Juror Bell replied "no." (5RT 890.)

The prosecution stated it doubted that Prospective Juror Bell had neither positive or negative feelings about the death penalty and requested direct inquiry regarding Prospective Juror Bell's philosophical outlook on the death penalty. (5RT 890.) The court inquired:

> Ms. Bell can you see it is a little difficult for us getting this answer "it just exists" when it is a matter of such major importance to a juror whom might actually be called upon to make such a decision? Do you see that?

Prospective Juror Bell indicated she understood. The court continued:

> Okay. What is your own philosophy? What is it that you can see yourself doing if the evidence calls for it. I mean do you have any opinion as being in favor for the death penalty or opposed to it?

Prospective Juror Bell replied:

> Well, I suppose if I - - if I were forced to say - - to vote one way or the other I would vote against it. Against the death penalty period.

(5RT 890-891.) The court asked a follow-up question:

> Okay. Well, if this trial reaches a death penalty phase, it is the job of the juror to vote for the penalty which the juror thinks is appropriate. Are you saying that you will definitely vote against death?

Prospective Juror Bell replied:

> I guess it would depend on what I heard in the courtroom. It's hard to say that yes or no when I don't know.

The court responded that a moment earlier Prospective Juror Bell had said if forced to vote she would vote against the death penalty, and did not allow Prospective Juror Bell to respond to the court's observation. (5RT 891.)

Defense counsel objected to any further questions regarding Prospective Juror Bell's opinion on the death penalty, and argued that she was neutral on the death penalty and that Prospective Juror Bell should not be forced to explain her neutrality. (5RT 891.) The court replied:

> No, it's not a case of forcing. The point is that Ms. Bell has already on the record said I would vote against it and then that I would listen to the evidence. And her statement was - - the statement that was puzzling is that "it just exists." That was the thing that was puzzling because a juror dealing with that issue, it does a whole - - it has to do a whole lot more

than just exists. That's the point.

(5RT 891-892.) The court asked Prospective Juror Bell if she could provide any additional information. Prospective Juror Bell replied, "I guess I'm against it." (5RT 892.)

The prosecution stated that Prospective Juror Bell's initial response had raised a concern and that further questioning had revealed that Prospective Juror Bell was philosophically opposed to the death penalty and that she would vote against the death penalty. The prosecutor was concerned that she would be unable to vote for the death penalty even if the aggravating factors sufficiently outweighed the mitigating factors. The court stated that Prospective Juror Bell's last answer was that she was against the death penalty. The prosecution moved to exclude Prospective Juror Bell for cause. (5RT 892.) The defense argued that the issue was whether she could put aside her philosophical beliefs and follow the law, and that Prospective Juror Bell had indicated she would. The defense suggested she was being singled out. The court replied:

> Let me make perfectly plain to Ms. Bell, as she can hear what we are saying, she is not being singled out at all. Anyone who has put something on the questionnaire that has led to some questions in my mind has been questioned. And this statement "it just exists" just cried out for some explanation. [¶] I also think perhaps Ms. Bell thinks she is being put on trial here or grilled too much. I apologize for the intrusion. I do hope you understand it's only done because it is necessary. [¶] I think in view of Ms. Bell's answers the challenge should be granted.

(5RT 893.) Prospective Juror Bell was excused. (5RT 893.)

B. Relevant Law

In *People v. Maury*, this Court reiterated the standard for excusing prospective jurors for cause based on views regarding capital punishment:

> "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. Cunningham* (2001) 25 Cal.4th 926, 975 . . ., quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 852, 83 L.Ed.2d 841].) "On review of a trial court's ruling, if 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." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 488 . . . .)

(*People v. Maury* (2003) 30 Cal.4th 342, 376-377.) A prospective juror is properly excused where there is substantial evidence that they cannot apply the death penalty under any circumstance, or were not prepared to impose the death penalty and undecided whether they could impose the death penalty. (*People v. Maury, supra,* 30 Cal.4th at p. 377, citing *People v. Cunningham, supra,* 25 Cal.4th at pp. 980-982.) A reviewing court must defer to trial court's determination of a prospective juror's state of mind where a prospective juror gives equivocal and conflicting statements regarding their ability to render a death verdict. (*People v. Maury, supra,* 30 Cal.4th at p. 377; *People v. Millwee* (1998) 18 Cal.4th 96, 96, 146; *People v. Bradford* (1997) 15 Cal.4th 1005, 1318-1319.) The rationale underlying the standard of review was explained by this Court:

> In many cases, a prospective juror's responses to questions on voir

> dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress of being a prospective juror in a capital case, such equivocation should be expected.

(*People v. Fudge* (1994) 7 Cal.4th 1075, 1094.)

The scope of inquiry permitted during voir dire is committed to the discretion of the trial court. The court is not required to limit questioning to four questions proposed by the defense or limit jurors to "yes" and "no" answers. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1157; *People v. Lucas* (1995) 12 Cal.4th 415, 479; *People v. Champion* (1995) 9 Cal.4th 879, 908.) Moreover, a trial court has discretion to deny all questioning by counsel when a prospective juror gives "unequivocal disqualifying answer[s]," and may subject to reasonable limitation further voir dire of a juror who has expressed disqualifying answers. (*People v. Samayoa* (1997) 15 Cal.4th 795, 823.)

C. The Trial Court Acted Within Its Discretion And Preserved Appellant's Constitutional Rights When It Excused Prospective Juror Bell For Cause

The trial court acted within its discretion when it excused Prospective Juror Bell for cause. In excusing Bell, the trial court implicitly determined that she was biased and that her beliefs would substantially impair the performance of her duties as a juror. The court and the prosecution appeared concerned with Bell's claim that the death penalty "just exists" and she had no opinion or feelings for the death penalty or against the death penalty. Bell *declined* the court's open invitation to clarify her position regarding the death penalty. (5RT 889.) After further general inquiry, the prosecution expressed doubt that Bell was actually neutral on the death penalty and requested further inquiry, and the court properly engaged in such additional inquiry. (*People v. Ramos, supra,* 15

Cal.4th at p. 1157 [court not limited to four questions].) This additional inquiry revealed that Bell would be unable to put aside her bias against the death penalty and that her beliefs would substantially impair the performance of her duties as a juror.

When asked to state her philosophy regarding the death penalty, Bell indicated she was philosophically against the death penalty and also further stated she would vote against the death penalty if she were forced to vote. (5RT 890-891.) This is a very different position from her stated neutrality or her notion that the death penalty simply "existed." After a follow-up question, Bell equivocated and told the court she was unsure that she would definitely vote against the death penalty. The court found that Bell's initial answer required additional inquiry. Further, her subsequent answers were inconsistent because she first said she would vote against the death penalty and then that she would listen to the evidence. (5RT 891-892.) Finally, when asked for clarification a second time, Bell replied, "I guess I'm against it." (5RT 892.) Thus, there is substantial evidence that Bell either could not apply the death penalty under any circumstance, or Bell was at least unprepared to impose the death penalty and undecided whether she could impose the death penalty. Under these circumstances, this Court must defer to trial court's determination about Bell's state of mind regarding the death penalty. Accordingly, appellant's ninth claim on appeal should be rejected.

X.

THE TRIAL COURT PROPERLY DISMISSED AND REPLACED A JUROR DURING PENALTY PHASE DELIBERATIONS

Appellant's tenth claim on appeal is that the trial court improperly discharged a holdout juror during penalty phase deliberations, in violation of

appellant's right to trial by jury, guaranteed by the Sixth Amendment, and the California Constitution, the right to due process, and his right to be free from cruel and unusual punishment guaranteed by the Eight and Fourteenth Amendments. (AOB 198-237.) Respondent disagrees. The trial court acted within its discretion and preserved appellant's constitutional rights when it removed Juror Number 5 after determining that he had a general conscientious objection to the death penalty, was unwilling or unable to participate in the penalty phase deliberations, and had committed perjury by falsely stating that he was moderately in favor of the death penalty in the jury questionnaire.

A. Relevant Proceedings

After deliberation had begun in the penalty phase, the jury tendered a note which stated:

> It has come to our attention that one juror has reevaluated his/her personal feelings regarding application of the death penalty. His/her [conscientious] objection causes him/her to be unable to continue to deliberate.

(3CT 632.) The prosecution requested that if juror stated he or she in fact had a conscientious objection to the death penalty, then the juror should be removed without further inquiry, and if the jury contradicted the note, then further inquiry should be conducted. The defense requested that the court order the jury to continue deliberating without any inquiry. The court stated that the law required further inquiry. (10RT 2290-2291.) The court stated: "I think we are in the area of the possibility of their being a juror sitting there who is not qualified to sit because of a preconceived idea or issue which is preventing that person having an open-mind." (10RT 2291.)

Juror Number 2 was the foreperson and the author of the note. The court

asked whether it was the opinion of the jury that one juror had a conscientious objection which caused the juror to be unable to deliberate. Juror Number 2 indicated this was correct and told the court that the jury was referring to Juror Number 5. The court informed Juror Number 5 that the court was not engaged in criticism and was only seeking information. The court then asked a number of questions. The court asked if Juror Number 5 had a conscientious objection to the death penalty such that the juror could not impose the death penalty based on the evidence and instructions. Juror Number five said "no." (10RT 2292.) The court asked whether the juror could conceive of a situation where the juror would vote for the death penalty based on the evidence. Juror Number 5 answered "yes." Juror Number 5 stated he understood that the jury could chose life without parole or the death penalty, and the judge replied that this was correct. Juror Number 5 stated that: "And I tried to make an evaluation from the evidence that was presented and that is what I came up with the life position without the possibility of parole." The court asked if there was any situation where Juror Number 5 would vote for the death penalty. Juror Number 5 replied "yes." (10RT 2292-2293.)

The court recalled Juror Number 2 and asked what conduct Juror Number 5 had displayed which showed he was not deliberating as opposed to disagreeing with the other jurors. Juror Number 2 explained that:

> We had extensive conversations about his reasoning behind his decision, and everyone in the room gave extensive reasons for their decision, and his decision was not backed up by anything. It was more of a feeling that he said he had in spite of all the evidence and facts that were presented.
>
> When asked why he felt the way he did, he basically said that he just did, and that he wasn't sharing his reasoning or his feelings with us to any degree. It was just a hard and fast decision.

> We tried asking him why, what would make him consider an alternative to his decision, and he couldn't or wouldn't come up with any reasonable foundation for - - well, for his decision. He is not cooperating with us. He doesn't feel like he wants to be in that room. I don't know how much I can say here without giving up information - -

The court interjected that the court did not want to discuss content of the deliberations, but rather the manner in which the deliberation were conducted. Juror Number 2 continued:

> We attempted with every means that I can reasonably describe here to get him to communicate with us, and to describe to us how he is evaluating the facts in the case, the law as presented in the instructions, and we basically tried to pin him down, if you will, on his feelings about the death penalty and what it means.
>
> He's basically completely uncooperative as if he really is the only person in the room. There was no input, just a hard and fast opinion that really was not founded in any manner to us.
>
> We, on many occasions, tried to get him to talk to us and in fact we asked him to state his opinion and to reverse - - and reverse to convince is, and he just would basically sit there and do nothing. [All that Juror Number 5 would say was] "I don't know."

(10RT 2294-2295.)

Juror Number 2 also explained that:

> That is what he would say. "I don't know" is the answer to basically all of our questioning of him trying to further along the process. And, again, I don't know how far I can get into it without divulging specifics, but everyone in the room was involved with the process.
>
> The wording [of the jury's question form] that you have in front of

> you was scripted on the black board and every person had the opportunity to modify, disagree with it in fact agree with what it was, including Juror Number 5, asked numerous times does everyone agree with turning this in as discussed. It took about ten minutes to get the scripting.

(10RT 2295.) Juror Number 2 continued:

> It became quite apparent to me, and I would believe the other jurors, that Juror Number 5 has a basic underlying philosophical conscientious objection that really probably was not apparent even to him when he was filling out the interview forms based on the lack of foundation of any kind that he could provide to us for his reasoning.

(10RT 2295-2296.)

The court specifically asked whether Juror Number 5 had agreed that he had a conscientious objection to the death penalty which prevented him from deliberating with the other jurors. Juror Number 2 responded that *Juror Number 5 had agreed* that the wording of the note appropriately represented his feelings in the matter. The court asked whether Juror Number 5 had been asked about circumstances where he could impose the death penalty. Juror Number 2 reported that Juror Number 5 gave evasive answers to all such questions, no matter the form of question or the underlying examples used, and *was unable to state any conditions where he could impose the death penalty.* The court asked if this had been Juror Number 5's position since the beginning of the penalty phase of deliberations. Juror Number 2 replied:

> At first we couldn't really tell if he was just in the decision process or if he had previously decided that this couldn't happen. It is my personal feeling that he didn't realize what his feelings were until he was confronted with the decision at the moment he was confronted with

them.

(10RT 2297.) The court had Juror Number 2 return to the deliberations room. (10RT 2297.)

The court asked if the parties wished additional inquiry of the Juror Number 2. Appellant asked the court to inquire whether Juror Number 5 participated in deliberations when the jury discussed whether the aggravating circumstances [regarding the attempted murders] were proved beyond a reasonable doubt. The prosecutor stated that the relevant issue was the foreman's claim that Juror Number 5 agreed with the contents of the note given to the court, and Juror Number 5's comments to the court which indicated otherwise. The prosecution requested additional inquiry in this area. (10RT 2298-2299.) The court recalled Juror Number 2, and inquired whether he had previously indicated that Juror Number 5 had engaged in any deliberation with the jury. Juror Number 2 indicated he did not make such a statement, and added:

> One more thing. From the beginning of the penalty phase Juror Number 5 has stood out in the group, has continually attempted to discuss facts not in evidence. He is hunting in areas that we have no understanding or knowledge of, trying to bring things in that are really not there, what-ifs, histories, potential circumstances. And whenever that is done, someone will mention that that is not available to us and not for our consideration. I believe he is allowing his projections of those facts that are not in evidence to form a picture for him that is not he anywhere - - is not necessarily reality.

(10RT 2300-2301.)

Defense counsel argued that Juror Number 5 was being "browbeaten" by a jury that was "upset" with him. The court disagreed with counsel's

characterization and added that the foreman's demeanor was totally non-accusatory, and there was nothing about his comments or demeanor which suggested that the foreman was attempting to find fault with Juror Number 5. Rather, the foreman had expressed concern that Juror Number 5 had a conscientious objection to doing his duty as a juror, and that the jury had been instructed to do so if they encountered that situation. (10RT 2302.)

The court brought out the remaining jurors individually and inquired about the note tendered to the court. Juror Number 1 stated that all 12 jurors ultimately agreed with the wording of the note, including Juror Number 5, even though Juror Number 5 had initially seemed a bit confused about the wording. According to Juror Number 1, Juror Number 5 participated in deliberations "a little bit" and seemed "a little confused" about the law and the evidence. Juror Number 1 believed that Juror Number 5 had a conscientious objection to the death penalty. (10RT 2304-2305.) Both parties agreed to no further inquiry of Juror Number 1. (10RT 2304.)

According to Juror Number 3, all jurors agreed with the wording of the note, and it was evident that Juror Number 5 had a conscientious objection to the death penalty. Juror Number 5 was unable to recite any circumstances where he would impose the death penalty, nor was he able to agree that certain extreme circumstances would warrant the death penalty. (10RT 2305-2307.)

According to Juror Number 4, all juror agreed with the wording of the note. Juror Number 4 believed that Juror Number 5 had a conscientious objection to the death penalty evidenced by his inability to give any reasons for his position. (10RT 2308.)

According to Juror Number 6, all jurors agreed with the wording of the note. Juror Number 6 believed that Juror Number 5 had a conscientious objection to the death penalty. Juror Number 6 also explained that it was Juror Number 5 that had explained that his position was based on his "conscientious

objection." (10RT 2309.) At defense counsel's urging, the court asked whether Juror Number 5's conscientious objection was to the particular case before the jury, or the death penalty in general. Juror Number 6 answered that Juror Number 5 was generally opposed to the death penalty, and had stated to the other jurors: "I cannot in all conscience vote for the death penalty." The court asked whether it appeared Juror Number 5 was addressing the death penalty in general. Juror Number 6 replied that when asked if there was any case which warranted the death, Juror Number 5 stated that perhaps he could vote for death for the murder of a child. (10RT 2310.)

According to Juror Number 7, all jurors agreed with the wording of the note. Juror Number 7 believed that Juror Number 5 had a conscientious objection to the death penalty, because that is what Juror Number 5 had stated himself. (10RT 2310-2311.)

According to Juror Number 8, all jurors agreed with the wording of the note. Juror Number 8 believed that Juror Number 5 had a conscientious objection to the death penalty. (10RT 2312.)

According to Juror Number 9, all jurors agreed with the wording of the note. Juror Number 9 believed that Juror Number 5 had a conscientious objection against the death penalty in general. (10RT 2314-2315.)

According to Juror Number 10, all jurors agreed with the wording of the note. Juror Number 10 believed that Juror Number 5 had a conscientious objection to the death penalty in the particular case. The court asked what Juror Number 5 had explained what he meant by "conscientiously objecting." Juror Number 10 stated:

> Yes. Well, by conscientiously objecting, he meant that he could not consider the death penalty regardless of the evidence of the case or the information that we were deliberating on because he conscientiously

could not reach that decision.

(10RT 2315-2316.) The court asked: "Regardless of the evidence?" Juror Number 10 continued:

Regardless of the evidence, regardless of our deliberations, he couldn't deliberate because he conscientiously was opposed to the death penalty. (10RT 2316-2317.) The court asked if Juror Number 5 said he was opposed to the death penalty in this case as well as generally. Juror Number 10 replied:

> Well, no, not exactly. He did apply it to this case. He stated - - he said he believed in the death penalty and that - - he said that he believed in the death penalty but he couldn't apply it in this case.
>
> In other words, he couldn't - - he said he couldn't consider any of the information we had before us, any of the evidence that has been presented, and of our deliberation for or against the death penalty because he was conscientiously opposed to the death penalty in this case.

(10RT 2317.)

According to Juror Number 11, all jurors agreed with the wording of the note. Juror Number 11 believed that Juror Number 5 had a conscientious objection to the death penalty, and stated: "He doesn't want to think about the death penalty. I mean he doesn't even want to talk about it. We have asked him his opinion. We don't think he has an opinion." Juror Number 11 believed that Juror Number 5 had a general conscientious objection to the death penalty. (10RT 2318-2319.)

According to Juror Number 12, all jurors agreed with the wording of the note. Juror Number 12 believed that Juror Number 5 had a general conscientious objection to the death penalty because "[Juror Number Five] said he did." (10RT 2319.)

The prosecution moved to excuse Juror Number Five based on four

grounds. First, Juror Number Five falsified his jury form when he indicated he was moderately in favor of the death penalty in response to question 50. Second, Juror Number Five had a conscientious objection to the death penalty. Third, Juror Number Five refused to evaluate the evidence, discuss the evidence, or deliberate with the other jurors in the penalty phase. Finally, Juror Number 5 was bringing in facts and issue which were not part of the case. (10RT 2320-2321.) Defense counsel argued that the court should allow Juror Number Five to respond to the accusations of other jurors. Counsel believed that the other jurors were putting pressure on a juror who was "voting his conscience" and may have given "all of his weight to life just in general as a mitigating factor, to the mitigating factors of [appellant] specifically in this case, that he has every right to do." (10RT 2321-2322.) At the prosecution's request, the court examined the precise wording of the note tendered by the jury. The prosecution argued that all the other jurors indicated that Juror Number 5 agreed with the wording of the note, which was sufficient "evidence in and of itself that he was unable to deliberate and is in fact not deliberating." The prosecution requested that an alternate juror be seated by lot. (10RT 2323.)

The court recalled Juror Number 5. He confirmed that he had stated he would consider the death penalty for the murder of a child. He denied that he said there was not another case in which he would vote for the death penalty. His understanding was that the other jurors were in favor of the death penalty, and could not "understand why [he] thought the way [he] thought or [he] voted the way [he] voted." He disagreed with the note because he was not a conscientious objector to the death penalty. Juror Number 5 claimed that he simply told the other jurors he agreed with the wording of the note because he was tired of being pressured by the other jurors. He also claimed he had discussed the evidence "to the best of [his] ability. He accused the other jurors of trying to fish for reasons why he did not agree with them. He also accused

the other jurors of asking him for scenarios where he would apply the death penalty after deliberating and after they believed he would be dismissed. Only then did Juror Number 5 mention scenarios where he might vote for the death penalty. The court stated that inquiry should stop at that point. The prosecution agreed. Defense counsel wanted further inquiry about the jurors believing Juror Number 5 would be dismissed. The court denied the request for further inquiry. (10RT 2325-2327.)

The prosecution argued that Juror Number 5 should be replaced based on the testimony of the other jurors. Defense counsel argued that Juror Number 5 had properly deliberated, but the other jurors could not accept his decision, so they browbeat him and threatened him with dismissal. The court dismissed Juror Number 5, stating:

> The record should reflect that Juror Number 5, the first time he came out, could scarcely be heard. He was whispering his responses and his voice has become much stronger the second time he has come out.
>
> The court's decision or the court's finding is that this is a juror who is failing to deliberate. There is considerable support for the idea that he is actually unqualified and therefore should have been dismissed for that reason in that he does have a conscientious objection against the death penalty. There is a slight ambiguity in that . . . one said he would apply it for a child. Everybody else said the opinion that he wouldn't apply it at all. His limiting it to that one situation would be reason to excuse him for cause.
>
> It appears even if he were not to be excused for his conscientious view, that he is failing to deliberate, all 11 agree that he is not using the evidence, that he has given no explanation for his views. I am aware of the fact that he does not have to give a dissertation on his views. However, that is not the extreme that is being sought.

> The foreman, who certainly is articulate, stated that Juror Number 5 would give no information at all, would not discuss the case or anything about it.
>
> [Juror] Number 5 agreed with the wording that he has a conscientious objection that makes him unable to deliberate.
>
> My opinion in seeing Juror Number 5 is that he does not like to be confronted with this. I understand his discomfort, but according to all 11 he did agree with this as an accurate statement of his position. I am therefore excusing Juror Number 5 and put in an alternate.

(10RT 2328-2329.) Juror Number 5 was replaced with Alternate Number 5 (Ms. C.). (10RT 2330-2331.)

At the next proceeding, the court added the following statement:

> My decision to remove Juror Number 5 last Friday was a discretionary call and, as such, it will be and should be subject to review. The reviewing court should have as much information as possible on my reasoning and, therefore, I wish to clarify the record.
>
> I started my evaluation with the statement written by the foreman that one juror was conscientiously opposed to the death penalty. Questioning of all twelve jurors clarified that Juror Number 5 approved of that language and knew, of course, that he was the one spoken of. The court was at the that time confronted with Mr. L's unequivocal statement on the jury questionnaire, given under penalty of perjury, that he had no conscientious objection to the death penalty, and with his later unequivocal admission to the other jurors that he did, in fact, have conscientious objection to it. At no time in the voir dire process or in last Friday's questioning did Mr. L. express any difficulty in understanding the phrase "conscientious objection." His written

statement in the questionnaire was thus shown to be perjurious. Such perjury was cause for dismissal.

Further questioning elicited his statement that he could vote for the death penalty if a child were the victim of a murder. He knew that there was no issue of a child's murder in this case and so this equivocation does not change the fact that he would automatically refuse to vote for death in every case regardless of what the evidence showed, unless a child were the murder victim.

The entire death qualification part of the voir dire process was aimed at ensuring that no one sat on this jury who would automatically vote for death regardless of the evidence, nor anyone who would automatically refuse to vote for death regardless of the evidence. Mr. L. was clearly in this later category. To have left Mr. L. on the jury would have made a mockery of the whole process of questioning potential jurors under oath as to their impartiality.

Moreover, the questioning of the other jurors revealed that Mr. L. refused to deliberate in the penalty phase by refusing to consider the evidence presented.

The questioning revealed no pressure being put by others on Mr. L. The manner of each juror questioned was calm and pleasant, no anger or impatience was shown, and no lack of respect for Mr. L. was apparent. If Mr. L. felt pressure, that does not establish that others were applying pressure. He could have well have felt pressure from his having concealed his views in voir dire.

(10RT 2324-2335.)

B. Standard Of Review

"The decision whether to investigate the possibility of juror bias, incompetence, or misconduct rests within the sound discretion of the trial court." (*People v. Burgener* (2003) 29 Cal.4th 833, 878-879, citing *People v. Cleveland, supra,* 25 Cal.4th at p. 478; *see People v. Keenan, supra,* 46 Cal.3d at pp. 533, 539 [it is within the trial court's broad discretion to determine the scope and mode of an investigation of juror misconduct].).) "A hearing is required only where the court possesses information which, if proven to be true, would constitute good cause to doubt a juror's ability to perform his duties and would justify his removal from the case." (*People v. Burgener, supra,* 29 Cal.4th at pp. 878-879, quotations and citations omitted.)

A court may discharge a juror for "good cause" where the court finds the juror is unable to perform his or her duty. (§ 1089.) The decision to discharge a juror rests within the sound discretion of the trial court. (*People v. Maury, supra,* 30 Cal.4th at p. 434; *People v. Cleveland, supra,* 25 Cal.4th at p. 474; *People v. Marshall, supra,* 13 Cal.4th at p. 843; *People v. Turner, supra,* 8 Cal.4th at p. 205; *see* § 1089.) A juror's inability to perform his duties must be shown on the record to be a demonstrable reality. (*People v. Holt, supra,* 15 Cal.4th at p. 659; *People v. Szymanski, supra,* 109 Cal.App.4th at pp. 1131-1132.) A trial court's determination of controverted facts will not be disturbed. (*People v. Marshall, supra,*13 Cal.4th at pp. 843-844; *Wagner v. Doulton* (1980) 112 Cal.App.3d 945, 948-949.) "'Where equivocal or conflicting responses are elicited, the trial court's determination of the prospective jurors' states of mind is binding on an appellate court.'" (*People v. Jackson, supra,* 13 Cal.4th at p. 1199, quoting *People v. Beardslee, supra,* 53 Cal.3d at p. 103; *see People v. Bell, supra,* 61 Cal.App.4th at p. 287 [few appellate courts have disturbed a trial court's decision whether to discharge a juror for good cause].)

Moreover, with regard to evaluating jurors, the Supreme Court has specifically found that it is the trial judge who is best situated to determine a juror's competency to serve impartially. (*Patton v. Yount, supra,* 467 U.S. at pp. 1036-1038 & n.12.) Notably, the Court explained that a juror's *demeanor* plays a fundamental role in determining credibility. (*Id.* at p. 1038, n.14.) Thus, because demeanor plays a "fundamental role" in evaluating credibility, and only the trial court is in a realistic position to evaluate demeanor, a trial court's determinations as to credibility are entitled to "special deference." (*Patton v. Yount*, 467 U.S. at p. 1038; *Perez v. Marshall, supra,* 119 F.3d at p. 1426.) The Ninth Circuit Court of Appeals has determined that when a trial court follows section 1089, the trial court preserves the essential features of a jury trial required by the Sixth and Fourteenth Amendments. (*Perez v. Marshall, supra*, 119 F.3d at p. 1426.)

> A sitting juror's actual bias, which would have supported a challenge for cause, renders him "unable to perform his duty" and thus subject to discharge and substitution under section[] 1089 . . . . [Citation.] A juror may be disqualified for bias, and thus discharged, from a capital case if his views on capital punishment "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" [Citations.] Grounds for investigation or discharge of a juror may be established by his statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists. [Citations.]

(*People v. Keenan, supra,* 46 Cal.3d at pp. 532-533; accord, *People v. Cleveland* (2001) 25 Cal.4th 466, 478; *People v. Nesler* (1997) 16 Cal.4th 561, 581.)

Actual bias "is defined as 'the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the

juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.' [Citations.]" (*People v. Nesler, supra,* 16 Cal.4th at p. 581.) Such bias may be found where a juror admittedly cannot be objective in considering the death penalty or weighing the aggravating circumstances against the mitigating ones. (*People v. Boyette* (2002) 29 Cal.4th 381, 461-463; *see People v. Kaurish* (1990) 52 Cal.3d 648, 699 [juror may be removed if predisposition to give greater weight to mitigating factors precludes juror from engaging in weighing process and returning death verdict].)

C. The Trial Court Acted Within Its Discretion When It Excused Juror Number 5 During Penalty Phase Deliberations Because There Was Substantial Evidence Supporting The Trial Court's Findings And The Trial Court Credibility Determinations Are Binding On This Court

The trial court acted within its discretion when it removed Juror Number 5 from the jury and replaced him with an alternate juror, because Juror Number 5's inability to perform his duty as a juror during the penalty phase appears in the record as a demonstrable reality. Moreover, the court's findings are based on the court's credibility determinations after examining all of the jurors and giving Juror Number 5 an opportunity to respond to the information provided by the other jurors. The court believed the other eleven jurors when they reported that Juror Number 5 had a general conscientious objection to the death penalty and refused to consider imposing the death penalty or even participate in deliberations with the other jurors. Based on this finding, the trial court also properly concluded that Juror Number 5 had committed perjury in his jury questionnaire when he indicated he was moderately in favor of the death penalty. The trial court's credibility determinations are entitled to special deference and are binding on this Court and therefore appellant cannot establish that the trial court abused its discretion when it removed Juror Number 5 for

cause. Also, because the trial court complied with section 1089, the trial court also preserved appellant's right to a jury trial required by the Sixth and Fourteenth Amendments. Appellant's arguments to the contrary are improper attempts to ask this Court to ignore the trial court credibility determinations and substitute appellant's credibility determinations which were expressly rejected by the trial court. Accordingly, appellant's tenth claim on appeal should be rejected.

The record in this case shows that Juror Number 5 harbored a disqualifying bias against the death penalty that would have prevented or substantially impaired his ability to deliberate fairly on the appropriate punishment. Indeed, his statement to other jurors that he would not consider the penalty manifested his staunch opposition to capital punishment and rendered Juror Number 5 incapable of performing his duties in the penalty phase. His statements showed that Juror Number 5 either opposed the death penalty or was unprepared to actually impose it, Juror Number 5 was properly removed. (*People v. Maury, supra,* 30 Cal.4th at p. 377; *People v. Cleveland, supra,* 25 Cal.4th at p. 478; *People v. Nesler, supra,* 16 Cal.4th at p. 581; *People v. Keenan, supra,* 46 Cal.3d at p. 532; *People v. Boyette, supra,* 29 Cal.4th at pp. 461-463 [upholding removal of juror who professed inability to be objective in considering death penalty or weighing aggravating and mitigating factors].)

Juror Number 5 was also properly removed for misleading the trial court and the parties in his juror questionnaire and on voir dire that he could give equal consideration to the death penalty by setting aside his personal feelings about capital punishment. A juror who deviates from such assurances at trial can be deemed as harboring a disqualifying bias or as misunderstanding his or her penalty-phase obligations. (*People v. Keenan, supra,* 46 Cal.3d at p. 533.) As this Court has stated, """When a person violates [her] oath as a juror, doubt

is cast on that person's ability to otherwise perform [her] duties."''' (*People v. Nesler, supra,* 16 Cal.4th at p. 586, quoting *In re Hitchings* (1993) 6 Cal.4th 97, 118, 120-122 [finding misconduct by juror who lied in jury questionnaire and on voir dire].) The doubt in this case about Juror Number 5's credibility and ability to be objective necessitated his dismissal.

Although there was evidence that Juror Number 5 had claimed he could consider the death penalty where a child was murdered, the trial court found such representations had no relevance because Juror Number 5 understood that the case did not involve the murder of a child. This finding is entitled to deference because "the trial court was in the best position to observe his demeanor and assess his credibility." (*People v. Turner, supra,* 8 Cal.4th at p. 205 [regarding assessment of juror's ability to perform duties].) Deference is also warranted because the court's finding of bias was supported by substantial evidence (*People v. Jenkins, supra,* 22 Cal.4th at p. 1049), namely Juror Number 5's admissions that he was unable to consider the death penalty objectively, if at all, due to his background and personal views. This evidence justified Juror Number 5's removal notwithstanding his representation that he could consider the penalty in some cases. (*See, e.g., People v. Navarette* (2003) 30 Cal.4th 458, 490 ["When a prospective juror has made conflicting statements regarding his or her ability to remain impartial and apply the law despite strong personal beliefs, we accept as binding the trial court's assessment."]; *People v. Maury, supra,* 30 Cal.4th at pp. 377-378 [prospective juror who said there was "extremely remote possibility" he could impose death verdict was properly excused for bias].)

Appellant also argues that, by continuing to question Juror Number 5 after he said he had deliberated and could consider the death penalty in some cases, the trial court intruded unnecessarily upon the sanctity of the jury's deliberations. (AOB 231-237.) "The need to protect the sanctity of jury

deliberations, however, does not preclude reasonable inquiry by the court into allegations of misconduct during deliberations." (*People v. Cleveland, supra,* 25 Cal.4th at p. 476.) Once the court is notified of such allegations, "'it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error.'" (*Id.* at p. 477, citations omitted.) The court should focus on the jurors' conduct rather than the content of the deliberations. (*Id.* at p. 485.)

This was precisely what the trial court did by pressing Juror Number 5 on how he truly felt about the death penalty, whether he had misrepresented those feelings, and if they affected his ability to be fair in penalty deliberations. Contrary to appellant's claim, the court had the right not to cease its inquiry until it was "satisfied . . . that no other proper ground for discharge exists." (*People v. Cleveland, supra,* 25 Cal.4th at p. 485.) Finally, because the trial court did not abuse its discretion by excusing Juror Number 5, the exclusion of this juror did not violate appellant's constitutional rights. (*People v. Roldan* (2005) 35 Cal.4th 646, 699, citing *People v. Gurule* (2002) 28 Cal.4th 557, 597.) Accordingly, appellant's tenth claim should be rejected.

XI.

NO CUMULATIVE ERROR RESULTED

Appellant contends the cumulative effect of the alleged errors discussed in the previous arguments requires reversal. (AOB 238-240.) The claim is without merit because the foregoing arguments demonstrate "there was no error . . . to cumulate" (*People v. Phillips* (2000) 22 Cal.4th 226, 244), or there was no prejudice from any alleged error (*People v. Jenkins* (2000) 22 Cal.4th 900, 1056 ["trial was not fundamentally unfair, even if we consider the cumulative

impact of the few errors that occurred"]; *accord*, *People v. Sapp* (2003) 31 Cal.4th 240, 287; *People v. Jones* (2003) 29 Cal.4th 131, 1268.)

XII.

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THE SENTENCING FACTORS WERE CONSTITUTIONAL

Appellant "raises a number of constitutional objections to the death penalty statute identical to those [the Court has] previously rejected." (*People v. Welch* (1999) 20 Cal.4th 701, 771; AOB 241-342.) To the extent appellant alleges statutory error not objected to at trial, the issue is waived on appeal. (*People v. Sanders* (1993) 5 Cal.4th 580, 589.) Similarly, any complaints relating to instructions that were not erroneous but only incomplete are waived unless appellant requested clarifying or amplifying language. (*People v. Lewis, supra*, 25 Cal.4th at p. 666.) Respondent will not "rehearse and revisit" the numerous claims previously and regularly rejected by this Court. (*People v. Ayala* (2003) 24 Cal.4th 243, 290 [internal quotation marks excluded].) Respondent simply identifies appellant's complaint and notes the Court's applicable opinions.

A. The Jury Instructions Were Constitutional

Appellant claims the instructions about the mitigating and aggravating factors in Penal Code section 190.3, and the application of these sentencing factors, render appellant's death sentence unconstitutional. (AOB 241-265.) Appellant claims that the instruction on Penal Code section 190.3, subdivision (a) and application of that sentencing factor resulted in the arbitrary and capricious imposition of the death penalty. (AOB 242-249.) Respondent

disagrees. Section 190.3, factor (a), allows the jury to consider the circumstances of the crime and special circumstances in determining the appropriate penalty. While acknowledging its facial validity (*see Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750]) appellant contends the provision is applied in a manner which resulted in the arbitrary and capricious imposition of the death penalty (AOB 248-249.) This Court has rejected and should continue to reject this claim. (*People v. Maury, supra*, 30 Cal.4th at p. 439; *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Mendoza* (2000) 24 Cal.4th 130, 192; *People v. Cain* (1995) 10 Cal.4th 1, 68.)

Second, appellant claims that the instruction on Penal Code section 190.3, subdivision (b) and application of that sentencing factor violated appellant's constitutional rights to due process, equal protection, trial by jury and a reliable penalty determination. (AOB 249-257.) Appellant claims the use of unadjudicated criminal activity as aggravation renders appellant's death sentence unconstitutional. (AOB 250-251.) Appellant further claims that absent a requirement of jury unanimity in the unadjudicated acts of violence, the instructions on Penal Code section 190.3, subdivision (b) allowed jurors to impose the death penalty on appellant based on unreliable factual findings that were never deliberated, debated, or discussed. (AOB 254-257.) This Court should reject these arguments as it has in the past. (*People v. Maury, supra*, 30 Cal.4th 342, 439; *People v. Prieto, supra*, 30 Cal.4th at p. 276; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1061; *People v. Cain, supra*, 10 Cal.4th 1, 69-70.)

Appellant also claims that the failure to require an unanimous jury finding on the unadjudicated acts of violence denied appellant's Sixth Amendment right to a jury trial and requires reversal of his death sentence. (AOB 251-254.) This Court has held otherwise and appellant provides no reason to revisit those decisions. (*People v. Maury, supra* 30 Cal.4th at p. 439;

People v. Prieto, supra, 30 Cal.4th at p. 276; *People v. Kipp* (1998) 18 Cal.4th 349, 381; *People v. Osband* (1996) 13 Cal.4th 622, 710.) This Court has considered appellant's contention that the United States Supreme Court opinions in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], as well as the opinions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403] compel a different result, and has rejected such a claim. (*People v. Morrison* (2004) 34 Cal.4th 698, 730-731 [*Ring*, *Apprendi*, and *Blakely* do not change the Court's prior analysis or holding].) Appellant has offered no compelling legal reason for reconsideration of this Court's earlier decisions, and his claims should be rejected.

Appellant claims that the failure to delete inapplicable sentencing factors violated his constitutional rights. (AOB 257-259.) This Court has repeatedly held that inapplicable sentencing factors need not be deleted from CALJIC No. 8.85.

> Trial courts need not delete from the list of sentencing factors set out in CALJIC No. 8.85 those that may not apply. [Citation.] The failure to do so does not deprive defendant of his rights to an individualized sentencing determination [citation] or to a reliable judgment [citation].

(*People v. Yeoman* (2003) 31 Cal.4th 93, 164-165; *see also People v. Maury, supra*, 30 Cal.4th at pp. 439-440; *People v. Anderson, supra*, 25 Cal.4th at p. 600, and cases cited therein.) Accordingly, appellant's claim fails.

Appellant claims that failing that statutory mitigating factors are relevant solely as mitigators precluding the fair, reliable and evenhanded application of the death penalty. (AOB 259.) This Court has previously found that a "jury properly advised about the scope of its sentencing discretion is unlikely to conclude that the *absence* of mitigating factors is entitled to aggravating

weight." (*People v. Livaditis* (1992) 2 Cal.4th 759, 784-785.) It follows that it is unlikely that a juror so advised would not find aggravating circumstances based on "nonexistent or irrational aggravating factors." (AOB 259.) Appellant has provided this Court with no reason to alter this rule. (*See also People v. Prieto, supra*, 30 Cal.4th at p. 276; *People v. Coddington, supra*, 23 Cal.4th at pp. 639-640; *People v. Gonzales* (1991) 51 Cal.3d 1179, 1234.)

B. The Use Of The Adjectives "Extreme" And "Substantial" Did Not Act As Barriers To The Jury's Consideration Of Mitigating Evidence

Appellant claims that restrictive adjectives used in the list of potential mitigating factors impermissibly impeded the jurors' consideration of mitigation. (AOB 260.) This Court has rejected this argument in several prior cases. (*People v. Morrison, supra*, 34 Cal.4th at pp. 730-731; *People v. Maury, supra*, 30 Cal.4th at pp. 439-440; *People v. Smith* (2003) 30 Cal.4th 581, 642; *People v. Turner, supra,* 8 Cal.4th at pp. 208-209 [rejecting argument in relation to factor (d)]; *People v. Wright, supra,* 52 Cal.3d at p. 444 [rejecting argument in relation to factor (g)]; *People v. Morales* (1989) 48 Cal.3d 527, 568 [same]; *People v. Adox* (1988) 47 Cal.3d 207, 270 [same]; *People v. Ghent* (1987) 43 Cal.3d 739, 776 [rejecting argument in relation to factor (d)].) Further, even if factors were inappropriately worded, appellant did not argue he was entitled to mitigation due to "extreme emotional disturbance" (factor (d)) or "extreme duress or under substantial domination of another person" (factor (g)). Thus, appellant was not prejudiced.

C. Written Jury Finding Are Not Necessary

Appellant claims that the failure to require the jury to base a death sentence on written findings regarding the aggravating factors violated

appellant's constitutional rights to meaningful appellate review and equal protection of the law. (AOB 260-263.) This Court previously rejected identical arguments. (*People v. Morrison, supra*, 34 Cal.4th at p. 730-731; *People v. Maury, supra*, 30 Cal.4th at pp. 439-440; *People v. Lucerro* (2000) 23 Cal.4th 692, 741: *People v. Osband, supra*, 13 Cal.4th at p. 710.) Appellant provides no basis for rejecting those cases.

D. The Alleged Absence Of Procedural Safeguards Does Not Violate Appellant's Right To Equal Protection

Appellant claims that the absence of procedural safeguards violates his right to equal protection. (AOB 263-265.) This Court has explicitly rejected such arguments. (*People v. Cox, supra*, 53 Cal.3d at p. 691; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1287.) Appellant's claim should also be rejected.

XIII.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE CONSTITUTIONAL BECAUSE A REASONABLE DOUBT STANDARD IS NOT REQUIRED

Appellant argues that the jury must be required to find beyond a reasonable doubt that aggravating factors are true and that aggravation outweighs mitigation. (AOB 267-281, 281-286.) Although the Court has consistently rejected identical claims (*People v. Morrison, supra,* 34 Cal.4th 698, 730-731; *People v. Maury, supra*, 30 Cal.4th at pp. 439-440; *see e.g.*, *People v. Mendoza, supra*, 24 Cal.4th at p. 191; *People v. Sanchez* (1995) 12 Cal.4th 1, 80-81), appellant contends that *Apprendi*, *supra*, 530 U.S. 466, and *Ring*, *supra*, 536 U.S. 584, compel a different result. This Court has already rejected such a claim. (*People v. Morrison, supra*, 34 Cal.4th at pp. 730-731; *People v. Maury, supra*, 30 Cal.4th at pp. 439-440; *People v. Prieto, supra*, 30

Cal.4th at pp. 262-2264, 275.) As the Court said, "the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditional discretionary decision to impose one prison sentence rather than another. [Citation.]" (*People v. Prieto, supra*, 30 Cal.4th at p. 275; accord *People v. Nahahara* (2003) 30 Cal.4th 705, 721-722; *People v. Smith, supra*, 30 Cal.4th at p. 642; *People v. Navarette* (2003) 30 Cal.4th 458, 520.)

Appellant argues that the Sixth, Eighth, and Fourteenth Amendments require that the state bear some burden of persuasion at the penalty phase. (AOB 286-291.) This Court has reaffirmed the holding of *People v. Hayes* (1990) 52 Cal.3d 577, 643, and reiterated that there was no burden of proof and no burden of persuasion in the penalty phase. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1135-1136; *see People v. Morrison, supra*, 34 Cal.4th at pp. 730-731.)

Appellant claims that the jury instructions failed to require juror unanimity on aggravating factors in violation of the Sixth, Eighth, and Fourteenth Amendments. (AOB 291-297.) This Court has held otherwise and appellant provides no reason to revisit those opinions. (*People v. Morrison, supra*, 34 Cal.4th at p. 730-731 [*Ring, Apprendi, and Blakely* do not change these decisions' analysis or holding]; *People v. Maury, supra,* 30 Cal.4th at p. 439-440; *People v. Prieto, supra*, 30 Cal.3th at p. 276; *People v. Kipp, supra,* 18 Cal.4th at p. 382; *People v. Osband, supra*, 13 Cal.4th at p. 710.)

Appellant claims that the jury instructions violated the Sixth, Eighth, and Fourteenth Amendments by failing to inform the jury regarding the standard of proof and lack of need for unanimity as to the mitigating circumstances. (AOB 297-299.) As the Court pointed out in *People v. Lenart, supra*, 32 Cal.4th at pp. 1136-1137, in the context of an ineffective assistance of counsel claim, because there is no constitutionally or statutory required burden of proof, there

is no requirement that the jury be so instructed. "Choosing between the death penalty and life imprisonment without possibility of parole is not akin to 'the usual fact-finding process,' and therefore 'instructions associated with the usual fact-finding process--such as burden of proof--are not necessary.'" (*Id.* at p. 1137, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.) Appellant's claim should be rejected. (*People v. Morrison, supra*, 34 Cal.4th at pp. 730-731; *People v. Maury, supra*, 30 Cal.4th at pp. 439-440; *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1269-1270.)

Appellant claims the jury should have been instructed on the presumption of life. (AOB 299-300.) This claim has been repeatedly rejected and appellant offers no compelling reason to reconsider. (*People v. Prieto, supra*, 30 Cal.4th at p. 271, citing *People v. Arias* (1996) 13 Cal.4th 92, 190; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137; *People v. Carpenter, supra,* 21 Cal.4th at p. 1064.)

XIV.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS WERE CONSTITUTIONAL

Appellant contends that CALJIC No. 8.88, the standard instruction on the determination of penalty which was given by the trial court in the instant case, is defective in several respects.[6] He contends that the flaws in the

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6. In pertinent part, CALJIC No. 8.88, as given in this case, stated:

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

After having heard all of the evidence, and after having

instruction violated his rights to due process, a fair trial, and a reliable penalty determination. (AOB 301-313.) Respondent disagrees. Each of appellant's challenges to CALJIC No. 8.88 has been rejected by this Court, and appellant provides no basis for this Court to reconsider its prior rulings.

Appellant first contends that the "so substantial" language of CALJIC No. 8.88 -- i.e., that the jurors "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" (emphasis added) -- is impermissibly vague and ambiguous. (AOB 302-305.) This Court

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> heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(3CT 606-607.)

has repeatedly rejected the claim that the "so substantial" language of CALJIC No. 8.88 is unconstitutionally vague. (*See People v. Coffman* (2004) 34 Cal.4th 1, 124; *People v. Griffin* (2004) 33 Cal.4th 536, 593; *People v. Carter* (2003) 30 Cal.4th 1166, 1226; *People v. Breaux* (1991) 1 Cal.4th 281, 315-316.)

Appellant next contends that the term "warrants" in CALJIC No. 8.88 -- i.e., that the jurors "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" (emphasis added) -- is overbroad. Appellant contends that instead of determining whether death was *warranted*, the jury should have been instructed to determine whether death was *appropriate*. (AOB 305-308.) This Court has repeatedly rejected this claim. (*See People v. Griffin, supra*, 33 Cal.4th at p. 593; *People v. Mendoza, supra*, 24 Cal.4th at p. 190; *People v. Medina* (1995) 11 Cal.4th 694, 781; *People v. Breaux, supra*, 1 Cal.4th at pp. 315-316.)

Appellant next contends that the instruction was inadequate because it failed to expressly inform the jurors that they were required to return a verdict of life imprisonment if they found that the aggravating factors did not outweigh the mitigating factors. (AOB 308-312.) Again, this Court has repeatedly rejected this claim. (*See People v. Coffman, supra*, 34 Cal.4th at p. 124; *People v. Kipp, supra,* 18 Cal.4th at p. 381; *People v. Tuilaepa, supra*, 4 Cal.4th at p. 593 (since instructions only allow death where aggravation substantially outweighs mitigation, so the converse principle is also clearly communicated); *People v. Duncan* (1991) 53 Cal.3d 955, 978.)

Appellant next contends that the instruction was defective because it did not tell the jurors that they could impose a life sentence even if the aggravating factors outweighed the mitigating factors. (AOB 176-177.) This Court has repeatedly held that a defendant is not entitled to such an instruction. (*See People v. Coffman, supra*, 34 Cal.4th at p. 124; *People v. Medina, supra*, 11

Cal.4th at p. 782; *People v. Tuilaepa, supra*, 4 Cal.4th at p. 593 (since instructions only allow death where aggravation substantially outweighs mitigation, so the converse principle is also clearly communicated);.)

Finally, appellant contends that the instruction was defective because it failed to inform the jury that appellant did not have the burden of persuading it that the death penalty was inappropriate. (AOB 312-313.) As this Court stated in *People v. Coffman, supra*, 34 Cal.4th at p. 125, "[CALJIC No. 8.88] was not defective for failing to inform the jury as to which side bore the burden of persuading it of the appropriateness or inappropriateness of a death verdict in this case." (*See also People v. Hayes, supra*, 52 Cal.3d at p. 643 ["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"]; *People v. Tuilaepa, supra*, 4 Cal.4th at p. 593 [no danger of jury believing appellant had to persuade them death penalty was inappropriate].)

Accordingly, appellant's challenges to CALJIC No. 8.88 should be rejected.

XV.

INTERCASE PROPORTIONALITY REVIEW IS NOT REQUIRED

Appellant claims that the instructions defining the scope of the jury's sentencing discretion and the nature of its deliberative process violated appellant's constitutional rights. (AOB 314-318.) This claim has been rejected by both the United States Supreme Court (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29] and this Court (*People v. Manriquez* (2005) 37 Cal.4th 547, 590, citing *People v. Cornwell* (2005) 37 Cal.4th 50, 105; *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731; *People v. Cox*

(2003) 30 Cal.4th 916, 969-970; *People v. Prieto, supra,* 30 Cal.4th 226, 276). This Court should continue to reject this claim.

XVI.

CALIFORNIA'S DEATH PENALTY STATUTES DO NOT VIOLATE INTERNATIONAL LAW

Appellant claims that his death sentence violates international law. This Court should reject this argument as it has in the past. (*People v. Manriquez, supra*, 37 Cal.4th at p. 590; *People v. Brown* (2004) 33 Cal.4th 382, 403, citing *People v. Hillhouse, supra,* 27 Cal.4th at p. 511; *People v. Jenkins, supra,* 22 Cal.4th at p. 1055; *People v. Ghent, supra,* 43 Cal.3d at pp. 778-779.) "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]" (*People v. Brown, supra*, 33 Cal.4th at p. 403, quoting *People v. Hillhouse,* 27 Cal.4th at p. 511; *see People v. Snow, supra,* 30 Cal.4th at p. 127; *People v. Ghent, supra,* 43 Cal.3d at pp. 778-779.)

CONCLUSION

Based on the foregoing, respondent respectfully requests that the judgment be affirmed.

Dated: April 7, 2006

Respectfully submitted,

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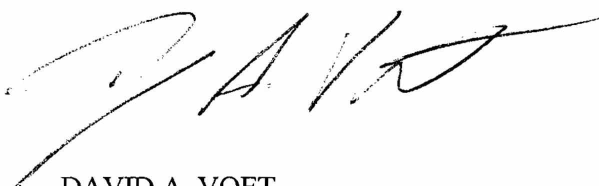

DAVID A. VOET
Deputy Attorney General

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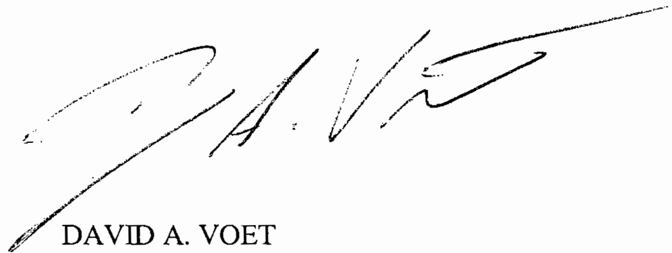
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 69224 words.

Dated: April 7, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



DAVID A. VOET
Deputy Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL
CAPITAL CASE

Case Name: ***People v. Darrell Lee Lomax*** No.:**S057321**

I declare:

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

On **April 7, 2006**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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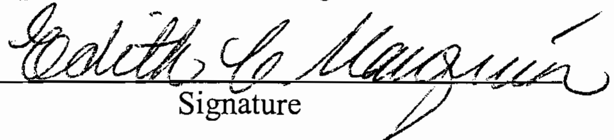
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **April 7, 2006**, at Los Angeles, California.

E.Obeso
Declarant


Signature

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