IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **SCOTT FORREST COLLINS,** Defendant and Appellant.

CAPITAL CASE

Los Angeles County Superior Court No. LA009810
The Honorable Leon Kaplan, Judge and
The Honorable Howard Schwab, Judge

RESPONDENT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **SCOTT FORREST COLLINS,** Defendant and Appellant.	**CAPITAL CASE** S058537

In an amended information filed on March 15, 1993, by the Los Angeles County District Attorney, appellant was charged with the murder of Fred Rose (Pen. Code,[1/] § 187, subd. (a); count 1), second degree robbery (§ 211; count 2), and kidnapping for robbery (§ 209, subd. (b); count 3). Appellant was further alleged to have committed the murder in count 1 while engaged in the crimes of kidnapping and robbery, both within the meaning of section 190.2, subdivision (a)(17). The information further alleged that appellant personally used a firearm during the commission of each offense. Finally, the information alleged that appellant had a prior serious felony conviction of robbery within the meaning of section 667, subdivision (a), and that he had served two prior prison terms within the meaning of section 667.5, subdivision (b). (CT 124-128.)

Appellant pled not guilty and denied the special allegations. (CT 194, 198.) Trial was by jury. (CT 459.) On September 30, 1993, the jury found appellant guilty of first degree murder and also found true the special circumstance that the murder was committed during the course of a kidnapping and robbery. The jury found true the firearm use allegations. The jury also

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

found appellant guilty of the crimes of second degree robbery and kidnapping, and found the firearm use allegations true as to those counts. (CT 912-917; RT 5291-5297.)

The penalty phase of the trial began on October 12, 1993. (CT 1030.) On November 2, 1993, the jury found the appropriate penalty to be death. (CT 1117A, 1118.)

On November 23, 1993, appellant filed a motion for new trial on grounds of jury misconduct. (CT 1120-1151.) On January 5, 1994, appellant filed a second motion for new trial on grounds of jury misconduct. (CT 1153-1180.) On January 14, 1994, a hearing was held regarding jury misconduct, wherein three jurors testified. (CT 1191.) On February 17, 1994, appellant filed a motion for a new penalty phase trial based on grounds of jury and prosecutorial misconduct. (CT 1199-1244.) On March 8, 1994, the prosecution filed a written response to appellant's motion for new trial based on alleged jury and prosecutorial misconduct. (CT 1247-1285.) On April 7, 1994, the trial court granted appellant's motion for new trial with respect to the penalty phase. The trial court imposed sentence on the remaining counts of robbery and kidnapping. Judge Leon Kaplan, who had presided over this case up until this point, recused himself from further proceedings. (CT 1293.)

The People appealed from the trial court's order granting a new penalty phase trial. (CT 1303-1304; see Appellant's Mot. to Augment, Exh. A.) The California Court of Appeal, Second Appellate District, Division One, reversed the trial court's decision to grant a new penalty phase trial. (CT 1538-1548.) Appellant filed a petition for review with this Court. (Appellant's Mot. to Augment, Exh. D.) This Court denied the petition for review "without

prejudice to subsequent consideration after judgment."[2/] (Appellant's Mot. to Augment, Exh. E.)

On remand, the case was reassigned to Judge Howard Schwab, who denied appellant's application for modification of the verdict of death pursuant to section 190.4, subdivision (e), and sentenced appellant to death. (CT 1592-1597.)

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

STATEMENT OF FACTS

I. Guilt Phase Evidence

A. Prosecution Evidence

As set forth in detail below, the facts elicited at trial established that between 6:00 and 6:30 p.m. on January 23, 1992, appellant shot 41-year-old Fred Rose near some railroad tracks in North Hollywood, ultimately causing Rose's death. Rose, a construction manager, was last seen at his Lancaster office at approximately 2:15 p.m. that afternoon, when he left for lunch. Although Rose's coworkers expected him to return promptly, Rose never returned.

Appellant's mother had dropped appellant off in Lancaster at 11:00 a.m. that day. Prior to killing Rose, appellant stole Rose's car and wallet and withdrew cash from Rose's bank account at an ATM in Northridge. Following the murder, appellant continued to use Rose's car, Chevron credit card, and ATM card. Appellant was apprehended in Rose's car the following evening in Bakersfield, after a police pursuit concluded in the crash of Rose's car.

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2. Justices Kennard and Brown were of the opinion the petition for review should have been granted.

1. The Events Leading To Fred Rose's Disappearance

Fred Rose was a 41-year-old construction manager for Marriott Diversified Services, a service station maintenance and construction business. Rose's office was located at the intersection of Trevor and I Street in Lancaster. (RT 2426, 2455-2456.) Rose lived with Sharon Rose, his wife of 20 years, and their three children, ages 16, 14, and 12. (RT 2405, 2408.)

Rose's job required him to travel to various job sites. On the evening of January 22, 1992, Rose spent the night at a job site in Fontana. (RT 2427-2428, 2456.) On Thursday, January 23, Rose returned to his Lancaster office around 1:00 p.m. Rose had a brief conversation with his boss, Thomas Marriott, and remained in the office for about an hour. (RT 2456.) At 2:11 p.m., Rose left his office to get something to eat. He told Barbara Cobb, the office manager and dispatcher, that he was going to get a burger.[3/] (RT 2488.)

When Rose left his office, his computer remained on and his briefcase was open. (RT 2488.) Rose was very orderly and regimented. Thus, it would have been very uncharacteristic of him to leave his computer on and his briefcase open had he not planned on returning to the office after lunch. (RT 2459.) Although Rose usually returned from lunch within 30 minutes, he never returned that day. (RT 2467, 2488, 2492.) Marriott was not aware of any meetings Rose had scheduled that afternoon. (RT 2467.)

There were many fast food restaurants located on Avenue I in Lancaster, within a mile and a half of Rose's office. Rose often went to Burger King, which was located on the other side of 10th Street. (RT 2463-2464, 2494.) Rose had a habit of stopping at Bob's Liquor Store after lunch to get a candy

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3. One of Cobb's duties as a dispatcher was to keep track of when employees left and returned. (RT 2491.) She remembered looking at her clock when Rose left and noting that it was 2:11 p.m. because this was an unusual time for Rose to leave for lunch. (RT 2487.)

bar. (RT 2477.) Rose drove a company car while at work, a 1983 gray Oldsmobile Cutlass, with a license plate number of 1JVY834. (RT 2457.)

When Rose did not come home that night, his wife began making telephone calls trying to locate him. She called his boss and his mother, and she filed a missing person's report with the police. (RT 2406-2407.)

2. Neighbors' Observations At The Scene Of The Shooting

John Kirby lived near Clybourn and Chandler in North Hollywood. Between 6:00 and 6:30 p.m. on January 23, Kirby heard two gunshots, about three to five seconds apart. (RT 2498.) Kirby went outside and saw a car pull away from the curb and drive westbound on Chandler with its lights off. (RT 2499-2502.) Although lighting conditions were poor, Kirby believed the car was either silver or gray. (RT 2507.) Kirby identified a photograph of Rose's Oldsmobile as being similar to the car he had seen driving away. (RT 2504.)

Lynda Ryan also lived near Clybourn and Chandler. (RT 2543.) Between 6:20 and 6:30 p.m., Ryan heard two gunshots. She looked out her window and saw a silver or gray car driving westbound on Chandler with its lights off. The car had two long rectangular taillights and what appeared to be a decal on the bumper. (RT 2543-2546.) When shown photographs of Rose's Oldsmobile, Ryan testified that the Oldsmobile "certainly looked like the car" she had seen that night, although she could not be certain because she did not see the license plate. (RT 2548.) After viewing the photographs, Ryan explained that what she thought was a decal on the bumper was actually a light. (RT 2547.)

Robert Chandler lived near Clybourn and Chandler and also heard two gunshots that evening. Chandler walked outside and saw a car driving westbound on Chandler with its lights off. Chandler believed the car may have

been associated with the gunshots. He attempted to get the car's license plate number, but he was unable to see it. (RT 2517-2520.) Chandler saw the silhouette of the driver but did not see anyone else in the car. (RT 2522.) When shown photographs of Rose's Oldsmobile, Chandler testified that the taillight formation and bumper of the car he had seen were similar to the Oldsmobile. (RT 2521.) Although Chandler initially described the car he had seen as white, tan, or beige, the lighting from a nearby bakery may have distorted his perception of the car's color. (RT 2524, 2532.)

3. The Discovery Of Fred Rose's Body

At 8:45 p.m., Richard Hamar was jogging near the railroad tracks on Chandler in an eastbound direction. (RT 2568, 2576.) He passed a man, later identified as Rose, who was lying on the ground making gurgling sounds. (RT 2569, 3984.) Hamar believed Rose was merely drunk and continued jogging. When Hamar jogged back in the opposite direction 20 minutes later, he noticed that Rose was still there. Hamar approached Rose and realized he was lying in a pool of blood. (RT 2569.) Hamar ran to a nearby garage where some musicians were rehearsing and called 911. (RT 2570, 2602.) Hamar and one of the men from the garage went back to check on Rose. (RT 2571.) Hamar kept other people in the area from getting too close to Rose until the paramedics arrived. (RT 2572-2573.)

4. The Crime Scene Evidence

Los Angeles firefighters Kurt Tietze and Kevin Miller were the first to arrive at the scene. (RT 2606-2607, 2621.) Upon their arrival, they discovered Rose had been shot in the head. (RT 2623.) Rose was still alive and appeared to be panicking and struggling. Rose was unable to speak. (RT 2611, 2623.) Tietze put an oxygen mask on Rose's face, which Rose attempted to push away.

(RT 2611-2612, 2624.) Tietze and Miller removed some of Rose's clothing to check for additional injuries. In doing so, they did not observe any weapons on Rose. (RT 2612, 2624-2625.) Rose was airlifted to Northridge Medical Center. (RT 2626.)

Los Angeles Police Officer Roy McIntosh and his partner, Pete Wilson, were the first police officers to arrive at the scene. (RT 2631-2632.) Rose was no longer at the scene when they arrived. (RT 2632.) Officers McIntosh and Wilson secured the crime scene by placing police tape around a fairly large area surrounding the location in which the victim was found. (RT 2634.) The area in which the victim was found was not a major thoroughfare, although some people would walk through the area. (RT 2636.)

Los Angeles Police Detective Jesse Castillo arrived at the scene around 11:00 p.m. (RT 3691.) The victim's clothing was located just south of a large pool of blood. (RT 3963.) At Detective Castillo's request, a photographer arrived and took numerous photographs of the crime scene. (RT 3695.) Detective Castillo noticed footprints to the left and right of the pool of blood and the victim's clothing. Detective Castillo was careful not to step on any of the marks on the ground. (RT 3966.) Photographs were taken of the footprints. (RT 3967.) Detective Castillo searched for a weapon and bullets, but neither were found. (RT 3968-3969.) No identification or jewelry was found at the scene. (RT 3968-3969.) There was no blood or drag marks, which led Detective Castillo to conclude the victim had been shot at the location where he was found. (RT 3976.)

Detective Castillo described the area near the railroad tracks as so hard that no footprints could be found there. The ground further away was softer and contained footprints which were photographed. Some of the footprints were easily recognizable as matching the distinctive boots worn by firefighters. (RT 3764-3765, 3971.)

Criminalist Ronald Raquel testified as an expert in shoe print comparison. (RT 3776-3779.) Raquel compared the soles of appellant's Nike shoes with photographs of shoe prints taken at the crime scene. Raquel enlarged the photographs. He made transparent overlays of appellant's size-13 Nike shoes, and placed them over the enlarged photographs. He concluded that seven of the approximately fifty crime scene photographs contained shoe prints which matched the pattern of appellant's Nike shoes. (RT 3792-3797, 3827-3835, 3856.) Raquel believed the shoes making the prints in these seven photographs were between size 12 ½ and 13 ½. Raquel could not be more precise in determining the size of the shoe because there were no photographs depicting an entire heel to toe impression. (RT 3835.) Because there was no heel to toe impression, Raquel could not state with certainty that appellant's shoes had made the prints contained in the seven photographs. However, there was nothing inconsistent between the photographs and appellant's shoes, and in Raquel's educated opinion, appellant's shoes made the shoe impressions depicted in the seven photographs. (RT 3835-3836, 3857.)

Detective Castillo testified that the Nike shoe prints found at the scene were within "a few feet" of the pool of blood. The firefighters' shoe prints were also within a few feet of the pool of blood. One of the photographs showed a firefighter's shoe print overlapping one of the Nike shoe prints. (RT 3981-3982.)[4/]

Daniel Potter, a patent and inventions manager for Nike Corporation, examined the photographs of the Nike shoe prints found at the crime scene. He believed that the shoe prints were made by a size 13 shoe, although it could have been anywhere from size 12 ½ to 13 ½. (RT 4124-4127.) The sole pattern depicted in the photographs was used on Nike shoes manufactured from

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4. On cross-examination, Detective Castillo testified that the closest Nike shoe prints were 15 feet away from the pool of blood. (RT 4081-4082.)

1988 to 1991. More than 4.8 million pairs of Nike shoes with such a pattern were distributed in the United States during this time period, and 826,000 were distributed in California. (RT 4127-4128.) In California, there were 35,907 pairs of size 13 shoes with this sole pattern, and a total of 38,387 pairs ranging from size 12 ½ to 13 ½. (RT 4127-4128.)

5. Appellant's Actions On The Date Of The Murder

In January 1992, appellant lived in Palmdale with his mother, Mary Collins. At 11:00 a.m. on January 23, Ms. Collins dropped appellant off in Lancaster on 10th Street, in between Avenue I and Avenue J.[5/] When Ms. Collins dropped appellant off, he was wearing blue pants, a blue sweatshirt, and Nike tennis shoes. (RT 2676-2679.)

Later that day, just after 4:00 p.m., Caroline LeBlanc was sitting in her car while her husband used an ATM at a First Interstate Bank at the intersection of Tampa and Nordhoff in Northridge. LeBlanc observed appellant walk by her car. When an ATM opened up, appellant hesitated and walked back to the parking lot. Appellant returned shortly thereafter and completed a transaction at an ATM. (RT 2685-2692.)

According to Helga Shattuck of First Interstate Bank, $200 was withdrawn from Rose's account at the Northridge branch at 4:05 p.m. Another attempt to withdraw money from the account was made at 4:06 p.m., although the transaction was denied because the daily withdrawal limit had been exceeded. (RT 2704-2708.) A surveillance videotape capturing the withdrawal

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5. According to Detective Castillo, this location was within walking distance of the fast food restaurants that Rose was known to frequent. (RT 4043-4044.)

and attempted withdrawal was played for the jury. (RT 2710-2714; People's Exh. No. 12.)[6]

At 9:30 p.m., appellant used Rose's Chevron credit card to purchase 8.34 gallons of gas at a Chevron station located at 10960 Moorpark Street in North Hollywood. (RT 2731-2735.) After purchasing the gas, appellant also attempted to purchase a 12-pack of Budweiser beer from cashier Rezaul Kahn. Kahn requested identification, which appellant produced. However, when Kahn began writing down information from appellant's identification, appellant told him not to write his name down. Kahn did not write down any information and returned the identification to appellant. Appellant left without the beer. (RT 2732-2734.)

At 10:30 or 11:00 p.m., appellant showed up unexpectedly in Bakersfield at the home of Tony and Olga Munoz, where his girlfriend, Maria Salome Gutierrez, was living at the time.[7] Appellant had been Gutierrez's boyfriend for about a month at that point. (RT 2858-2860.) Appellant did not have a car and was not working at the time. He usually arrived in Bakersfield via Greyhound bus. Gutierrez asked appellant how he had gotten there on this occasion, and he told her that his uncle had driven him. (RT 2859-2861.) Appellant spent the night with Gutierrez. (RT 2861.)

6. The Following Day In Bakersfield

On Friday morning, appellant left the Munoz residence, and Gutierrez left about 15 minutes later. (RT 2861.) Appellant went to Dagoberto Amaya's house, which was on the same street as the Munoz residence. (RT 2868, 2956-

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6. Another withdrawal in the amount of $200 was made from the same account from a First Interstate Bank ATM in Bakersfield the following day at 11:22 a.m. (RT 2708-2709.)

7. Gutierrez was also known as "Salo." (RT 2858.)

2957.) Amaya, also known as "Junior" and "Drifter," was Gutierrez's cousin. (RT 2950, 2954.) Amaya had met appellant in December 1991 through Gutierrez. (RT 2954.) Appellant gave Amaya $40 and told him not to tell Gutierrez about the money. Appellant then left. (RT 2956-2957.)

Gutierrez saw appellant about two hours later at her mother's house. (RT 2862.) Gutierrez and appellant walked to the Tecate market to buy beer, which appellant paid for with a $20 bill. (RT 2863-2864.) They returned to Amaya's house. (RT 2864.) At one point, appellant retrieved the $40 he had given to Amaya so that he could go and buy beer. (RT 2957.) Between 4:00 and 5:00 p.m., appellant and Gutierrez went back to the Tecate Market and bought four cases of beer. (RT 2867.) Appellant told Gutierrez that Amaya had given him $40 to buy beer. (RT 2872.) When appellant bought the beer, Gutierrez saw about $100 in his wallet. (RT 2867.) Later that afternoon, Gutierrez overheard appellant talking on the telephone with his mother. Appellant told his mother he had $80 in his wallet. (RT 2866.) Gutierrez asked appellant where he had gotten the money, and appellant replied that he had done some construction work in Los Angeles. (RT 2866-2867.)

Back at Amaya's house, several young men had gathered there for a party, and more arrived throughout the course of the evening. Many of these young men were affiliated with the Varrio Bakers gang, including Amaya, Michael Hernandez ("Jokey Boy"), Richard Smith ("Lazy Boy"), Sergio Javier Zamora ("Lonely Boy"), Larry Castro ("Soldier Boy"), Rudy Amaya ("Sad Boy"), and Lorenzo Santana ("Grande"). (RT 2877, 2950-2951, 3305, 3382.)

Several witnesses, including Gutierrez, Amaya, and Zamora, saw Rose's car parked on the street in front of Amaya's house. (RT 2867-2869, 2960-2961, 3308.) Appellant told Amaya he had stolen the car to get to Bakersfield. (RT 2960-2961.) At the party, appellant displayed a .38-caliber gun. The gun was passed around in a handkerchief. (RT 3305-3306, 3389-3390, 3505.)

There was something wrong with the gun. In order to make it fire, a nail had to be placed into a hole below the barrel. (RT 2965-2967, 3194, 3390-3391, 3509.)

Santana overheard appellant bragging to Castro about a murder appellant had committed. Appellant stated that he had encountered the murder victim at a liquor store. Appellant also said that the car he was driving had been stolen and had a "murder rap" on it. (RT 3383-3385, 3389, 3408, 3468.) Hernandez also heard appellant comment about the gun having a "murder rap." (RT 3507-3508.) Appellant showed Amaya a bank card and a Chevron card, each with a name similar to "Fred Jose." (RT 2961-2962.)

Santana, Hernandez, Castro, and an older gang member known as "Veterano" left the party in the Oldsmobile. They drove to a house and parked outside. Santana and Hernandez stayed in the car while Castro and Veterano went inside. Castro and Veterano returned with a VCR, a wallet, and money. They went back to the party at Amaya's house. (RT 3386-3387, 3500-3505, 3509.)

At one point during the party, Amaya and his girlfriend, Debbie Jiminez, got into an argument. Amaya grabbed appellant's gun and placed it against his head. Appellant intervened and knocked the gun away. Appellant emptied the gun of bullets and put it in his pocket. (RT 2893-2894, 2912-2913, 3425-3427.) Amaya ran down the street. Appellant, Jiminez, and Gutierrez all ran after Amaya. They caught up to him four to five blocks away. (RT 2914.)

At about 7:00 p.m., Hernandez and Santana picked David Camacho up at his house and drove him to a cemetery near Amaya's house. (RT 3049-3050.) Camacho met appellant for the first time that evening at the cemetery, where a group of people were drinking beer. (RT 3048.) Later that evening, Hernandez, Santana, Camacho, Zamora, Smith, and appellant decided to go cruising in the Oldsmobile. (RT 3050-3054, 3387-3388.) The group drove to

the Colonias, which was the name of a neighborhood as well as the name of a rival gang. (RT 3052-3053, 3434-3435.)

While driving through the Colonias territory, bricks were thrown at the Oldsmobile. Hernandez, who was driving the Oldsmobile, drove to a nearby field. Appellant, who still had the gun that had been passed around earlier at Amaya's house, test-fired the gun at the field, placing a nail in it to get it to work. (RT 3194-3197, 3211, 3310, 3344, 3391-3392, 3438-3440, 3444, 3512, 3574.) Hernandez then drove back to the area where the bricks had been thrown at them. While in the front right passenger seat, appellant rolled down his window and fired the gun in the direction of two men in Colonias territory. The shots did not hit anyone. Although he tried to fire the gun several times, the gun only fired once or twice. (RT 3198, 3310-3311, 3344, 3387-3389, 3513, 3575-3576.)

Once the Oldsmobile was several blocks away from the scene of the shooting, Kern County Deputy Sheriff Francis Moore began following the Oldsmobile and attempted to initiate a stop. Hernandez panicked and tried to speed away. A pursuit ensued, which lasted two to three blocks. (RT 2755-2758, 2778, 3311, 3391, 3515.)

During the pursuit, appellant threw several items out of the window, including the gun, bullets, credit cards, and a black watch.[8/] (RT 3312.) While they were being chased, Zamora recalled appellant saying it was the last time they would see each other because appellant had kidnapped a guy, taken him

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8. Fred Rose typically wore a Casio G-Shock watch everyday. (RT 3532.) Rose's watch was not found at the crime scene (RT 3968-3969), and it was not among his personal effects at the morgue (RT 3535-3536). At trial, Zamora was shown a watch that was the same brand and model that Rose typically wore. When asked whether it looked like the watch appellant had thrown out of the car, Zamora stated that he had just seen the wristband. (RT 3312-3313.)

to the bank to get money, and then shot him in the head.[9] (RT 3315-3317.) Santana recalled appellant telling Hernandez to drive faster during the pursuit. (RT 3395.) The Oldsmobile ultimately crashed into a fence. (RT 3055.) Camacho recalled appellant say he was "going to the county because he had the murder up in L.A." (RT 3056, 3079.) Santana and Hernandez recalled that just as they crashed, appellant said the car had a murder rap on it. (RT 3395, 3491, 3517.)

Deputy Moore approached the Oldsmobile with his gun drawn and initially ordered the six occupants to stay inside the car while he waited for backup to arrive. (RT 2759-2762.) While waiting for backup, Deputy Moore received a radio broadcast indicating that the Oldsmobile had been involved in a North Hollywood homicide, and that the occupants of the car were wanted for questioning. (RT 2767, 2784.) Deputy Moore was 20 to 25 feet away from the Oldsmobile when he heard this radio broadcast. His radio was located in his lapel and could only be heard from a distance of five to ten feet away. Therefore, the occupants of the Oldsmobile would not have been able to hear the broadcast. (RT 2814.)

Other officers arrived at the scene. Appellant and the other five occupants were placed under arrest. Appellant was transported to Kern County Jail by Kern County Deputy Sheriff J.R. Rodriguez. The other five occupants, all juveniles, were taken to juvenile hall in separate patrol cars. (RT 2771, 3155-3157.) Kern County Deputy Sheriff Martin Williamson, who coordinated the investigation, advised the deputies transporting the juveniles to keep them separated once they arrived at juvenile hall. Deputy Williamson explained to

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9. Zamora later stated he could not recall whether appellant made the comment about shooting the victim in the head while at Amaya's house or during the police pursuit. (RT 3361.)

the jury that the purpose of separating the individuals was to prevent them from manufacturing a story. (RT 2389-2483.)

After taking appellant to jail, Deputy Rodriguez began to inventory appellant's property. Appellant was wearing a dark colored trench coat, blue pants, Nike tennis shoes, and a Lakers baseball cap. Deputy Rodriguez found a wallet, a pair of gloves, and a handkerchief in appellant's pants pockets. He also found two .38-caliber live rounds of ammunition in appellant's pants and another .38-caliber round of ammunition in appellant's coat pocket. One hundred dollars in cash was found in appellant's wallet. Deputy Rodriguez noticed a faint odor of gunpowder on appellant's coat. In appellant's presence, Deputy Rodriguez showed the bullets to another deputy and asked his opinion regarding them. Appellant stated, "You ain't going to pin no shooting on me." Prior to that point, Deputy Rodriguez had not said anything about a shooting. (RT 3158-3168.)

Deputy Moore searched the Oldsmobile and found a knife in the floorboard of the front passenger side, a partially filled five-gallon gas can in the back seat,[10] and a wallet in the glove compartment. (RT 2763-2765.) Just outside the Oldsmobile on the passenger side, Deputy Moore found keys to the Oldsmobile, Fred Rose's First Interstate ATM card, a live .38-caliber round of ammunition, an empty shell casing, and a plastic bag filled with small ceramic pieces of spark plugs. (RT 2767-2771.) Deputy Moore found a .38-caliber revolver with a broken hammer along the pursuit route, about a block and a half from the crash site. A live 38-caliber round, similar the one found next to the Oldsmobile, was found next to the gun. The gun contained two casings, which appeared to be misfired bullets. (RT 2773-2777, 2804.)

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10. Camacho, Santana, and Hernandez testified that at some point that day, appellant had discussed the need to burn the Oldsmobile because it was stolen and had been used in a murder in Los Angeles. (RT 3081-3083, 3248, 3252-3254, 3257-3259, 3400-3401, 3519-3520, 3560, 3642.)

7. Appellant's Statements To Detective Castillo

Detective Castillo first interviewed appellant at 4:40 a.m. at the Kern County Jail, following appellant's arrest in Bakersfield. Prior to the interview, Detective Castillo advised appellant of his *Miranda*[11] rights. Appellant waived these rights and agreed to speak to Detective Castillo. (RT 3997.) Appellant claimed he did not know anyone in the Oldsmobile other than Zamora. He stated that he had been picked up at Third and Whitlock. Prior to being picked up, appellant had been drinking with his girlfriend at her cousin's house. Appellant got into the car because he wanted a ride to the store. (RT 3998-3999.) Appellant denied any involvement in a drive-by and stated he was not in the car when any drive-by occurred. (RT 4000.)

Appellant initially denied throwing a gun out the window. However, when Detective Castillo told appellant his fingerprints had been found on the gun (which was not true), appellant then stated that the gun had been passed his way from the back seat. Appellant admitted throwing some things out the window, but he thought these items were "bottles and shit" and trash bags. (RT 4000-4001.) Detective Castillo asked whether appellant's fingerprints would be found in the car. Appellant replied that they would be found near the ignition because he had tried to turn off the ignition when the driver was driving so crazily. Appellant also said his fingerprints would be found on the passenger side of the car because that was where he had been sitting. (RT 4003.) Appellant denied throwing any bullets out of the window. He stated that he was drunk and just throwing things out the window, and that the jacket he was wearing did not belong to him. (RT 4004.)

Appellant repeatedly stated he had only been in the car for 10 minutes and denied knowing that the car was stolen. (RT 4003.) Detective Castillo

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11. *Miranda v. Arizona* (1996) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

informed appellant that the car was stolen from Palmdale. Appellant agreed it was a coincidence that he was from Palmdale. (RT 4004.) Appellant claimed he had not been in North Hollywood in the past three and a half years. Appellant initially stated that he had not been to Los Angeles from Palmdale. Appellant subsequently stated he had been to Los Angeles once. Appellant told Detective Castillo that 10 years ago, he lived at 4847 Cahuenga Boulevard in North Hollywood.[12/] Appellant admitted he had gone into the glove box to get a pen to write a number down. (RT 4005-4006.)

When Detective Castillo accused appellant of murdering a man to get his wallet, appellant started laughing. Appellant claimed he had not participated in taking the car and repeated that he had only been in the car for 10 minutes. (RT 4006.)

Detective Castillo interviewed appellant again on Monday, January 27. (RT 4008.) At this time, appellant had been transported from Bakersfield to the North Hollywood Jail. (RT 4012.) At the beginning of the interview, appellant asked Detective Castillo if he could see any written reports that had been prepared by the police. Appellant also asked what he had said in his previous interview. (RT 4013.) Appellant stated, "Put that together for me in my head because I really don't know. . . . you guys told me that there was a guy he got robbed, shot and killed." (RT 4035-4036.) Up until that point, Detective Castillo had never mentioned to appellant how the victim had been killed. (RT 4036.)

Before the second interview, Detective Castillo had learned that Rose's ATM card had been used at 4:00 p.m. at the First Interstate Bank in Northridge. Carolyn LeBlanc had identified appellant from a photographic array as the

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12. Detective Castillo later determined that appellant's former residence was 1.2 miles away from the location where Rose was shot and .9 miles away from the Chevron station where appellant used Rose's credit card to purchase gas. (RT 4043-4044.)

person she had seen at the ATM that day. (RT 4013.) Detective Castillo had also learned that Rose's Chevron card had been used at 9:33 p.m. on Moorpark Street in North Hollywood. The cashier had identified appellant from a photographic array. (RT 4010-4012.)

Detective Castillo asked for handwriting samples, which appellant agreed to provide. Appellant signed his name very slowly. He claimed this was how he normally wrote. (RT 4014.) Detective Castillo asked appellant to sign the name "Scott Rose," but appellant refused, claiming it was bad luck to sign a dead man's name. (RT 4014-4105.)

Detective Castillo asked appellant to describe his actions on January 23, and to explain how he had obtained the $100 found in his possession at the time of his arrest. Appellant stated that his mother dropped him off in Lancaster that day near Avenue I. His mother had given him $50. He walked around various construction sites, picking up odd jobs which paid a total of $45. (RT 4016.) He went to McDonald's to eat and then got a ride with a "construction guy" to Mojave. From there, he hitchhiked to Bakersfield and spent the night at his girlfriend's house. The gray Oldsmobile was already in Bakersfield when he got there. (RT 4017.)

Detective Castillo again asked appellant to sign the name "Scott Rose," but appellant refused. (RT 4028.) Detective Castillo showed appellant an enlarged version of the signed Chevron station receipt. Appellant appeared frightened and denied that it was his signature. Detective Castillo then stated that appellant had been identified in a photographic lineup and accused him of killing Rose. At that time, appellant said, "I'll tell you." Appellant stated that he found the car parked in Lancaster, with the keys inside of it. The gun, wallet, and credit cards were also inside the car. Appellant admitted using the ATM card, and claimed that it had the pin number on it. Appellant also admitted purchasing gas at the Chevron station. (RT 4029-4031.)

8. The Medical Evidence

Fred Rose was airlifted to Northridge Medical Center. He was still alive when he arrived, although he was placed on life support systems. (RT 2615, 2626.) At 11:00 a.m. on January 24, Rose was taken off life support systems and pronounced dead by Dr. Jonathan Heard. (RT 2992-2993.)

Dr. William Sherry supervised Rose's autopsy. (RT 3871-3873.) Dr. Sherry determined the cause of death to be a gunshot wound to the head. The entrance wound was located at the upper right rear portion of the head. The bullet passed through the scalp, the skull, and the upper right portion of the brain. The bullet exited through the forehead on the right side. (RT 3873.) No bullet was recovered from the head cavity. (RT 3874.) Small lead fragments remained in the head cavity, which caused Dr. Sherry to conclude that at least a portion of the bullet contained an area of exposed lead. (RT 3875.)

Based on the size of the wound, the injury to the brain, and the subsequent effects of brain softening (which occurs when a person lives for a period of time after sustaining a gunshot wound), Dr. Sherry opined that the wound was caused by a handgun using a medium caliber bullet. A typical medium caliber bullet is a .38 special. (RT 3875-3876.) Based on the amount of lead fragments, it was more likely that a revolver was used than an automatic. (RT 3876.)

Rose had abrasions on his hands and knuckles. He also had a scratch on his knee, an abrasion just below his knee, and a bruise on his elbow. (RT 3877.) These injuries occurred while Rose was still alive. (RT 3878-3879.) Assuming Rose's body was in the standard anatomic position, i.e., standing and looking straight ahead with his hands down at his sides, the gunshot wound was from back to front, slightly left to right, and downward. This would be consistent with the shooter being a little bit taller than Rose, or the shooter holding the gun above Rose's head. It would also be consistent with Rose and

the shooter being the same size, with Rose kneeling, which would also account for the abrasion on Rose's knee. (RT 3878.) The downward trajectory of the bullet was also consistent with Rose's head being tilted backwards when the bullet struck his head. (RT 3880.) Based on the absence of stippling, tattooing, sooting, and searing, which are all associated with a gunshot fired from a very close range, Dr. Sherry opined that the shot was fired from at least 18 inches away. The shot could have been fired from as far away as 100 feet. (RT 3886-3888.)

9. The Threatening Letter Written By Appellant

While appellant was in jail awaiting trial in the instant case, jail officials intercepted a letter written by appellant. The letter stated in pertinent part:

> As far as my case goes, I should start my trial in about 2 months. Will see watts [sic] up -- if the jury believes those ratas from Varrios Bakers - If you run into anybody over their [sic] from "Varrio Bakers" tell them to put palabra to the calles to put in check Mike Hernandez, aka Jokey Boy - Javier Sergio Zamora aka Lonely Boy - David Camacho who is Rascal de VBKs Lil Carnal - Lorenzo Santana aka Grande - Dagoberto Amaya Jr. aka Drifter - their [sic] all youngsters between 15 & 20 years old . . .
>
> Do me the favor homie, you already saw the stack of paperwork I've got on those gente.
>
> Now with business being out of the way - let's get down to pleasure - just watts [sic] up with you getting me -1- of those fine rucas from Cutler, CA to write me - remember what we talked about if I get out . . . the party's on & so's the $cash$ lil brother.

(Peo. Exh. No. 55; Supp. CT II 22-25; see RT 4196-4198.) Attached to the letter were the names and addresses of Santana, Camacho, Zamora, and Hernandez. (Peo. Exh. No. 55; Supp. CT II 25; see RT 4198.)

Los Angeles County Sheriff's Deputy Louis Alain explained some of the terms in the letter. The phrase "put palabra to the calles to put in check" means to put the word out on the streets to "put in check" the individuals named in the letter. (RT 4196-4197.) "Put in check" could mean anything from a simple verbal warning or intimidation, to a beating, or possibly a stabbing or killing. (RT 4188-4189.) If the author of the letter felt another individual was lying, "put in check," as used in the letter, would not refer to correcting the untruthfulness of what he was saying. (RT 4190.)

"Rucas" means girls. (RT 4198.) "Gente" means people. (RT 4197.) "Youngsters" of a gang are newly jumped-in members. (RT 4200.) The "stack of paperwork" likely refers to copies of crime reports listing the names of victims and witnesses; paperwork may also be slang for permission or authorization to "check" the youngsters. (RT 4203.)

B. Defense Evidence

1. Appellant's Testimony

Appellant testified in his own defense. (RT 4409.) On January 23, 1992, appellant's mother drove him from their house in Palmdale to Lancaster, so that appellant could follow up on some job applications he had previously filled out at various businesses in Lancaster. Appellant arrived in Lancaster between 10:30 and 11:00 a.m., and he was dropped off a couple of blocks from I Street. (RT 4409-4410.) Appellant spent two to three hours looking for work, with no success. He began heading back towards Palmdale around 1:30 to 2:00 p.m., walking along the Sierra Highway. (RT 4412-4413.)

As appellant was walking along the Sierra Highway near Avenue K, he approached a silver 1983 Oldsmobile Cutlass. Appellant looked into the car and saw the keys inside. Appellant looked around to see if anyone was nearby. He had just gotten out of prison and his "values were not too straight as far as staying clean." (RT 4414-4416.) Appellant wanted to use the car to drive to Los Angeles. Appellant broke into the car by "bending" the rear passenger window, which was slightly open, and unlocking the door. (RT 4418-4419.) There was a milk crate on the back seat which contained construction tools. Appellant pushed these items out of the way and climbed into the front seat. (RT 4420.) Appellant started the car and drove away. (RT 4419.)

Appellant got onto the 14 Freeway at Lancaster Boulevard and started driving towards Reseda, where he planned to visit his friend, "Crazy Javier." (RT 4418-4421.) The Oldsmobile's gas tank was only half full, so appellant stopped in Newhall or Canyon Country to buy gas. Appellant's mother had given him $50 to buy clothes, and he used some of this money to buy gas. While stopped at the gas station, appellant searched the car and found a wallet in the glove box which contained credit cards and a First Interstate bank card in Fred Rose's name. (RT 4421-4424.) The wallet had some money in it, but it was less than $20. (RT 4424.) Appellant looked for Rose's address, which he thought would be helpful in allowing him to use the department store credit cards in Rose's wallet. (RT 4425.) Appellant also looked for social security numbers that his friends in jail could use to set up "burn out lines" in order to make free phone calls from jail. (RT 4426.)

Appellant continued driving towards Reseda. He exited the freeway and began looking for a bank. (RT 4422, 4428.) Around 4:00 p.m., appellant went to the First Interstate Bank at Tampa and Nordoff and used Rose's bank card to withdraw $200 at the ATM. Appellant wore a hard hat he had found in Rose's car to disguise his appearance in case the ATM had a camera. Appellant

attempted to withdraw more money from the ATM, but he was unable to do so. (RT 4429-4432.) Appellant had obtained Rose's personal identification number from a card in Rose's wallet that said First Interstate and had a number written next to it. (RT 4426.)

Appellant then went to look for his friend Crazy Javier. He drove by the house where Crazy Javier used to live, and realized he must have moved, because the one-time "party" hangout had been remodeled. (RT 4432.) Appellant decided to surprise his friend Sylvia Gomez by visiting her at Gomez's mother's house in East Los Angeles. Appellant had not seen Gomez since 1988 or 1989, before he had gone to prison. He had spoken to her on the phone once or twice in recent weeks, however. (RT 4433-4434.) It took appellant about an hour to drive to Gomez's house in East Los Angeles. He arrived there between 5:30 and 6:00 p.m. (RT 4434.)

Appellant knocked on Gomez's door, and she invited him inside. Gomez's boyfriend, Joe Valle, was also there, as were Gomez's three children. Appellant stayed for an hour and a half to two hours. (RT 4434-4436.) For a portion of the evening, appellant was talking to Valle and watching sports on television while Gomez was taking care of her children. (RT 4436.) Appellant left around 8:00 p.m., because Gomez and Valle were going to go to a party with Gomez's children. They invited appellant to join them, but he declined, because he had a tendency to fight with people he did not know if they were his own age or older. (RT 4438.) Appellant told Gomez and Valle of his plans to go to Bakersfield. (RT 4437.)

After leaving Gomez's house, appellant drove through downtown Los Angeles into Hollywood. He stopped at McDonald's, where he ran into an acquaintance, Ronald Delgado. (RT 4439.) Appellant left McDonald's and got back onto the freeway. He stopped in Studio City to get gas at a Chevron station before driving to Bakersfield. Appellant used Rose's Chevron card and

bought $9.12 worth of gas. He attempted to buy beer, but changed his mind when the cashier asked for identification. He drove to Bakersfield and arrived around 11:00 p.m. (RT 4439-4441.)

Once in Bakersfield, appellant parked the Oldsmobile on Third Street, across from Dagoberto Amaya's house. (RT 4442-4443.) Appellant then went to see his girlfriend, Maria Salo Gutierrez, at Tony and Olga Munoz's house. Not wanting Gutierrez to know about the car, appellant hid the car keys near a trash can. (RT 4443-445.) Gutierrez was not home when appellant arrived, so he waited for about 10 minutes until she came home. Gutierrez was upset that appellant had showed up unexpectedly, because she had plans that weekend that did not involve appellant. Appellant stayed the night with Gutierrez. (RT 4447.)

The next morning, appellant woke up around 9:00 a.m. He bought cigarettes at the Tecate Market. Appellant drove the Oldsmobile to a bank where he used Rose's ATM card again. (RT 4451-4453.) Appellant returned to Gutierrez's neighborhood around noon. Appellant went back to Gutierrez's house, where he ran into Sergio Javier Zamora, who was living at the Munoz residence. Appellant then returned to the Tecate Market and bought two 40-ounce bottles of beer. Appellant returned to Gutierrez's house and gave Zamora one of the bottles of beer. (RT 4455-4457.)

Appellant went to Amaya's house to find out if he had any plans for the evening. Amaya said that he planned on drinking and making a fire. Appellant gave Amaya $40 and asked him to hold on to it until appellant returned, at which time appellant would use the money to buy beer. Appellant did not want to explain to Gutierrez how he had gotten the money. (RT 4458-4459.)

Appellant went to Gutierrez's parents' house to look for her. She was not there, but he found her at her grandmother's house, at around 1:00 p.m. Appellant called his mother and told her that he was in Bakersfield and would

be there until Monday. When his mother asked how he had gotten there, appellant claimed that he had earned money doing odd jobs at constructions sites and had hitched a ride to Bakersfield. (RT 4461.)

Appellant went to the Tecate Market for the third time that day to buy more beer while Gutierrez went home to change her clothes. Appellant bought four quarts of beer. (RT 4462.) At 2:00 p.m., appellant went back to Gutierrez's house, and the pair then went to Amaya's house. Only Amaya, Gutierrez, and appellant were present at first. Zamora joined them shortly thereafter, and the four of them drank the beer appellant had purchased and they started a fire in a trash can in Amaya's backyard. Around 3:30 p.m., appellant and Gutierrez returned to the Tecate Market and bought two cases of beer. (RT 4463-4466.) By the time appellant and Gutierrez came back, Castro and Veterano had arrived at Amaya's house. As the evening progressed, about 20 people showed up at Amaya's house. (RT 4465-4470.) Of the two cases of beer purchased by appellant, most of it was consumed by appellant, Amaya, Gutierrez, and Zamora. (RT 4471.)

Around 5:00 p.m., appellant retrieved the $40 he had given Amaya earlier in the day and also collected money from other people at the party. Appellant went back to the Tecate market and purchased five cases of beer. (RT 4471-4472.) Appellant knew Zamora better than the other people at the party because Zamora lived at the same house where Gutierrez was living. Zamora was very intoxicated. (RT 4472.) When appellant returned from the store, there were only about eight people still there. Most of the others had gone to the cemetery a block or two away from Amaya's house where people were gathering because a black "homeboy" named Negro had just gotten out of jail. (RT 4473.)

Appellant told Amaya he had stolen a car. Castro heard this and suggested, "Let's go cruise in the car. I got a gun." Amaya removed a gun

from behind some boards and showed it to other people at the party. Appellant purchased this gun from Castro for $60. Appellant was not interested in going out cruising in the car, but he allowed Castro to take the gun and the stolen Oldsmobile that evening. Castro left with Hernandez, Santana, and Veterano. (RT 4495-4500.) When Castro and Veterano returned, wallets and other items were thrown into the fire. (RT 4502.)

At one point in the evening, Amaya and his girlfriend, Jiminez, were arguing. Amaya took the .38-caliber revolver and held it to his head. Appellant wrestled the gun away from Amaya. Appellant emptied the bullets from the gun and put them in his pocket. (RT 4503.) Jiminez ran down the street. Appellant gave the gun to Hernandez and went after Jiminez with Gutierrez and Amaya. They caught up with her at the Fremont school, which was about two to three blocks away. (RT 4504.) Amaya and Jiminez began arguing again. Amaya hit Jiminez. Appellant grabbed Amaya, threw him to the ground, and told Jiminez and Gutierrez to leave. (RT 4504.)

A group of "youngsters" in the stolen Oldsmobile drove up to appellant and Amaya. Castro and another male got out of the car with a stereo or VCR. Appellant got into the car because he wanted to go buy more beer. They drove to the Tecate Market, but it was closed. They then drove to the Tiptop market, where the youngsters' homeboys were partying in a blue car. (RT 4505.) They stayed at the market for about 15 minutes. Someone in the group suggested going to "box" with the Colonia gang. Appellant went along because Zamora was passed out drunk in the car, and he believed boxing meant fighting. (RT 4506.)

Appellant was still in the Oldsmobile when the two cars left the market. Hernandez was driving, Zamora and appellant were in the front seat, and there were two guys in the back seat. One of the guys in the back seat was older. (RT 4507.) Both cars drove into Colonia territory, where Colonia members

threw bricks at them. (RT 4507-4508.) The two cars drove to a field, where appellant test fired the .38-caliber revolver. (RT 4508.)

After test firing the revolver, appellant gave it to black "cholo" who wanted to shoot at the Colonias. Appellant moved to the blue car and the black "cholo" got into the Oldsmobile. The youngsters in the Oldsmobile wanted to shoot at the Colonias, while the older gang members in the blue car preferred to just fight. (RT 4510-4511.) The two cars drove back into Colonia territory, with the Oldsmobile leading the way. Bricks were thrown at the two cars again, and the black "cholo" fired two shots at some Colonia members. (RT 4512.)

The two cars fled the scene, meeting up in alley a few blocks away. They stayed there for about five minutes. Appellant got back into the Oldsmobile, and the black "cholo" returned to the blue car. Some other guys got out of the Oldsmobile and got into the blue car. Appellant got the gun back from the black "cholo" before they switched cars. (RT 4513-4515.) After the Oldsmobile began driving away, the police started chasing them. Appellant denied telling the other occupants of the car during the chase that the gun had a murder rap on it. (RT 4516.) After the car crashed and the police ordered them out of the car, one of the officers stated that the car had been used in a murder in Los Angeles. (RT 4517-4518.)

During the pursuit, Hernandez, the driver, panicked. The guys in the back of the car were telling him to stop. Appellant told Hernandez to keep going. Because appellant was on parole, he wanted to get rid of the gun. (RT 4515.)

When appellant was interviewed by Detective Castillo, the very beginning of their conversation was not tape recorded. Before turning on the tape recorder, Detective Castillo informed appellant that he was a suspect in the murder of the man whose car appellant had stolen. Detective Castillo also asked where appellant's girlfriend could be located, indicating that he wanted

to question her in connection with the murder. (RT 4519.) Appellant lied to the police, telling them that he had only been in the stolen car for 10 minutes. Appellant intended to lead the police on a "wild goose chase" in order to protect his girlfriend. Everything he told the police during the first interview was a lie. (RT 4520-4521.)

Appellant was interviewed again at the North Hollywood police station two days later. Appellant had asked to speak to the police in order to find out the status of his case, but the police wanted to interview him. Although appellant initially intended to tell the truth during this interview, he became angry and changed his mind. (RT 4522-4523.) Appellant lied again throughout the second interview. (RT 4524.)

Appellant recalled telling Detective Castillo during the second interview that the victim had been robbed, shot, and killed. He explained that he was merely repeating what Detective Castillo had previously told him during the first interview before the tape recorder was activated. (RT 4524.) Appellant refused to sign the name "Rose" when he gave a handwriting sample. He told the officer it would be bad luck to sign a dead man's name in an effort to prevent signing the name, because appellant knew he had signed the credit card slip as "Scott Rose" at the Chevron station. (RT 4525.)

After the second interview, appellant called his mother, Gomez, Gutierrez, and Zamora. He admitted threatening Zamora because the police had told him that the juveniles in Bakersfield had made statements against him. Because these statements were false, appellant threatened the Bakersfield juveniles in an effort to get them to be truthful. (RT 4530-4533.)

Appellant admitted writing the letter which constituted People's Exhibit No. 55. He wrote the letter to his friend Daniel Graciano, who was in prison. Appellant was attempting to threaten the Bakersfield juveniles in order to get them to tell the truth. (RT 4533-4534.) Appellant admitted having committed

other crimes and serving time in custody. Specifically, he had been convicted of the felony offenses of robbery, assault, and possession of narcotics. (RT 4428.) However, he denied killing Fred Rose. (RT 4536.)

2. Alibi Witnesses

Sylvia Gomez and her boyfriend, Joseph Valle, corroborated appellant's testimony that he had visited them at Gomez's mother's house on the evening of January 23. Gomez testified that appellant arrived between 5:00 p.m. and 5:30 p.m. and stayed until 8:45 or 9:00 p.m. (RT 4219-4220, 4226.) Valle testified that appellant arrived around 6:30 or 7:00 p.m. and stayed for about an hour. (RT 4342.) Ronald Delgado corroborated appellant's testimony that he was at McDonald's in Hollywood at 8:30 p.m. (RT 4322-4323.)

3. The Drive-by Shooting

Jessica Cepeda lived in the Colonias neighborhood. Her house was the target of a drive-by shooting on the evening of January 24. There were two cars parked outside her house, a gray Regal and a blue Nova. One of the men in the gray car said Varrio Bakers and shot toward Cepeda's door, missing it. Cepeda fell to the ground and heard two more shots. Cepeda's grandson, Jaime Garcia, and his cousin, Gabriel Cabrera, were outside Cepeda's house at the time. Cabrera ran in the house yelling that "Spooky" was responsible for the shooting. Spooky was an African-American who was a member of an Hispanic gang who had been known to commit drive-by shootings in the neighborhood. Cepeda told the police that Spooky was the shooter based on what Cabrera had said. However, she did not see the face of the shooter. She saw that he was wearing something dark on his head, possibly a beanie or a baseball cap. She could not tell the ethnicity of the shooter. (RT 4382-4396.)

C. Rebuttal Evidence

Los Angeles Detective Gary Arnold interviewed appellant's mother at 11:30 a.m. at her home on January 27, 1992. She stated that she had dropped appellant off in Lancaster around noon on Thursday, January 23, 1992. (RT 4782-4783.) Mrs. Collins told Detective Arnold that she had given appellant $50 to buy clothes on Wednesday, but she did not know if appellant had spent the money. Mrs. Collins did not seem confused about which day she gave appellant the money. (RT 4784.)

Detective Castillo attempted to investigate appellant's alibi. Specifically, he tried to contact Joseph Valle. Valle refused to speak to Detective Castillo, stating that he did not have anything to say to the police. Valle failed to appear for an arranged meeting with another officer a month earlier. (RT 4791-4793.)

After interviewing Sylvia Gomez on July 16, 1993, Detective Castillo called Gomez several times to ask her to provide her 1992 appointment book in which she stated she had made notes regarding meeting appellant. Detective Castillo explained the importance of providing the appointment book and that he wanted his scientific investigations division to look at the book. Gomez said that she needed a lawyer and no longer wanted to talk to Detective Castillo. (RT 4793.)

The distance between the location where Fred Rose was shot in North Hollywood and Gomez's house was 14.2 miles. Detective Castillo was able to drive this route in 18 minutes. (RT 4796.) Detective Castillo went to the McDonald's restaurant at Hollywood and Highland, where appellant claimed to have eaten on the night of the murder. There was a Chevron station located very near McDonald's, and there were two other Chevron stations located along Western Avenue. (RT 4796-4797.)

II. Penalty Phase Evidence

A. Prosecution Evidence

1. Evidence Of Other Crimes

a. The Molotov Cocktail Incident

Fred Joseph operated a market located at 11418 Moorpark in North Hollywood. Around 9:00 p.m. on April 20, 1986, Joseph went into the parking lot and saw two carloads of young males pull up. The youths jumped out of the car, prompting Joseph to run inside his market. Joseph was afraid of the young men and believed appellant was inside one of the cars. Three weeks earlier, Joseph had asked appellant to leave the market after receiving complaints from customers that appellant was harassing them. (RT 5336-5338.) Joseph called the police. (RT 5339.)

Joseph later went out to the parking lot and saw a huge area which had been burned in the vicinity of the trash cans in the back of the parking lot. An apartment building was adjacent to the trash can area, on the other side of a wall. Joseph saw a glass bottle in the burned area. (RT 5340.)

At 9:00 p.m., Lisa Nevolo was sitting in her car outside a laundromat on Moorpark that was near Joseph's market. (RT 5658-5659.) As she sat inside her car, appellant and other juveniles pulled up in a car. Appellant had a Molotov Cocktail in his hand. (RT 5660.) Appellant ran out of Nevolo's sight. Nevolo saw a flash and thought the apartment building at the end of the parking lot was on fire. Appellant and another juvenile ran past her car again, got into their car, and drove away. Appellant was no longer carrying the Molotov Cocktail when got into his car. (RT 5661-5662.)

Sergeant John Mosley of the Los Angeles Police Department arrived at the scene and interviewed Joseph and Nevolo in the parking lot behind Joseph's market. Sergeant Mosley observed a burned area in the parking lot. In the

vicinity of the burned area, Sergeant Mosley found a glass fragment, part of a bottle cap, and a rag inside a bottle. Sergeant Mosley opined the burned area was caused by a Molotov Cocktail. (RT 5675-5676.)

b. The Assault Of John Hall

On June 9, 1998, John Hall was sitting in his pickup truck, which was parked in the street on Independence Avenue in Canoga Park. Hall saw appellant and another individual tampering with a van belonging to Hall's friend. Hall asked what they were doing, and the pair left. A few minutes later, Hall heard a yell that caused him to look over his shoulder and saw appellant and the other man running away from a nearby AM-PM store. Fearing the two men had robbed the AM-PM store, Hall moved his truck to block their access. (RT 5645-5646.) Hall jumped out of his truck and tried to stop appellant by grabbing his arms. There was a brief struggle, during which Hall felt something in his back. Realizing appellant had a weapon, Hall pushed him away and told others present at the scene not to go near appellant because he had a knife. Hall's back was bleeding after the struggle. (RT 5647.)

Sergeant William Martin of the Los Angeles Police Department arrived at the scene at 10:40 p.m. after receiving a report of an assault with a deadly weapon in progress. Sergeant Martin interviewed Hall and obtained a description of Hall's assailant. Hall had a horizontal laceration on his back that was bleeding and appeared to have been caused by a sharp object. While interviewing Hall, Sergeant Martin received a radio broadcast that a robbery had occurred one block away at the AM-PM. The description given for the robbery suspect matched the description Hall had given of his assailant. Sergeant Martin searched the area and located appellant hiding under some bushes next to a residence 150 feet away from Hall and a block away from AM-PM. Hall identified appellant as his attacker. (RT 5408-5410.)

c. The South Gate High School Incident

On January 13, 1989, South Gate Police Officer David Dattola was flagged down by security officers at South Gate High School. The security officers informed Officer Datola that a possible gang fight was in progress at the school. Officer Dattola and his partner, Officer Sekiya, responded to the area and observed several males on the verge of fighting. Appellant had no shirt on and was wearing a purple bandanna. (RT 5390-5393.) Appellant was yelling and challenging another male to fight. Appellant was waving his arms and screaming profanity. The other male appeared to be passive. When the officers arrived, the males began to separate. (RT 5393-5394.)

Officer Dattola followed appellant and asked him to stop and put his hands up. Appellant said, "Fuck you," and stated that he did not have to comply. Officer Dattola, who was dressed in civilian clothes with a black jacket bearing the word "police," continued to follow appellant. Officer Dattola got in front of appellant and told him again to stop. Appellant again said, "Fuck you." Fearing that appellant would not stop and would possibly hit him, Officer Dattola radioed for Officer Sekiya to join him. (RT 5394-5396.) Officer Sekiya responded to the location, grabbed appellant's arm, and placed him under arrest. Appellant stated he thought Officer Dattola was school security police rather than "real police." (RT 5396.) Appellant claimed to be from a gang in Watts. Appellant was wearing a purple bandanna, which was the color for the Watts Varrio Grape Street gang. Officer Dattola recovered a knife from one of appellant's front pants pockets. The knife was concealed and in an open position. (RT 5397-5398.)

d. The 7-Eleven Incident

On April 6, 1989, 15-year-old Wil Taylor had just left school and was waiting by a bus stop. Taylor's friend, James Richardson, went inside a 7-

Eleven while Taylor stayed outside at the bus stop. As Richardson walked out of the 7-Eleven, a Caucasian or Hispanic male later identified as appellant followed him. Appellant had a knife in his hand. Richardson threw a Slurpee at appellant. Appellant stumbled and fell. Richardson ran towards Taylor. Appellant got up, took his shirt off, said something about "Watts," and came at Taylor and Richardson with the knife. Taylor picked up a rock. Appellant said something along the lines of "mother fucking nig[g]ers. Watts."[13] (RT 5425-5428.)

Los Angeles Police Officer William Tatum, who was off duty at the time, drove by and saw appellant trying to stab two younger boys. (RT 5440-5442.) Officer Tatum observed appellant swinging a knife at the two younger boys, who were backing away from appellant. Officer Tatum pulled out a gun, pointed it out the window of his car at appellant, and told him to stop. When appellant failed to do so, Officer Tatum got out of his car, walked towards appellant with his gun drawn, and identified himself as a police officer. Appellant started walking backward, and an Hispanic male ran towards appellant.[14] Appellant and the Hispanic male ran away. Officer Tatum flagged down Los Angeles Police Officer Larry Read, who was driving by on a motorcycle. Officer Read apprehended appellant about 10 minutes later. (RT 5444-5446, 5449.) Officer Read conducted a cursory search of appellant's person for weapons, but none were found. (RT 5451.)

Los Angeles Police Officer Larry Capra, who was assigned to the gang unit, also responded to the scene of the arrest. Officer Capra recognized appellant from previous contacts. Officer Capra transported appellant to the west valley station for booking. Appellant stated, "Fuck you Capra, you ain't

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13. Taylor and Richardson were African-American. (RT 5441.)

14. Officer Tatum believed appellant was also Hispanic, due to the way he was dressed and the way his hair was combed back. (RT 5443-5444.)

got shit. You don't have the knife. You ain't going to find it. I will be out by 4:00 a.m." (RT 5452-5455.)

e. The Wayside Jail Incidents

In May 1992, Armando Gonzalez was in custody at Wayside Jail as a result of driving under the influence. Appellant harassed Gonzalez and took money from Gonzalez's pocket as well as a pair of shoes. Before taking the money and shoes, appellant shoved Gonzalez. Appellant told Gonzalez not to tell anybody or he would get his "butt kicked." (RT 5465-5467.) Later that night while Gonzalez was in bed, he saw appellant coming towards him and became scared. Gonzalez got up quickly. Appellant went back to his bunk when he saw Gonzalez was awake. (RT 5468.)

The following day, Gonzalez was moved to another dormitory at his request. (RT 5468-5469.) After waking up from a nap, he discovered appellant two beds away. Later that night, appellant told Gonzalez he would begin charging him "rent." Appellant also said, "I ought to shank you," which meant the same thing as stabbing him. Appellant had a razor blade in his hand when he made this statement. Gonzalez was very afraid of appellant and later handed a note to a deputy requesting to be moved away from appellant, stating it was a "matter of life and death." (RT 5470-5473.)

Los Angeles County Deputy Sheriff Jonathan Melville was the deputy who received Gonzalez's note. Deputy Melville later pulled appellant out of the dormitory and questioned him. Appellant responded that he was in there for murder and a little robbery would not bother him. Appellant was placed in administrative segregation. (RT 5495-5498.)

On April 18, 1993, Los Angeles County Deputy Sheriff Robert Peacock interviewed appellant regarding an inmate incident report communicated to him by another deputy. (RT 5524-5525.) When appellant refused to provide any

information, Deputy Peacock handcuffed him to the wall, which was the normal procedure prior to transporting an inmate to the pre-discipline housing area. (RT 5526-5527.) When appellant began complaining he was being picked on, Deputy Peacock told him to be quiet and face the wall. Appellant responded, "What are you, a tough guy? . . . Why don't you take the handcuffs off and I'll show you who the tough guy is." (RT 5527-5528.)

Appellant turned in Deputy Peacock's direction, causing him to fear appellant would kick or hit him. Deputy Peacock put his hands on appellant's back in order to push him against the wall. He tried to put appellant in a wristlock, but appellant prevented this by straightening his arms. (RT 5528-5529.) Appellant kicked Deputy Peacock in the shin, and a struggle ensued. Deputy Michael Mendoza came to Deputy Peacock's assistance. Appellant tried to kick Deputy Mendoza as well. (RT 5528-5530, 5540-5541.)

f. The Robbery Of Sandra Trujillo

At 6:30 p.m. on December 3, 1988, Sandra Trujillo was in an alley behind a video store on Vineland in North Hollywood. She was looking for a parking place so she could return some videos. (RT 5607.) Appellant approached her and motioned to his watch as if he were asking for the time of day. Trujillo made a gesture to her wrist, which had no watch. (RT 5608.) Appellant pointed a gun at Trujillo's head and told her to get out of her car. When Trujillo opened the car door, appellant grabbed her, pulling her from the car. Appellant pointed the gun at Trujillo's head again. Trujillo was very afraid and feared appellant would kill her. In an angry tone, appellant told Trujillo, "You start running bitch, or I'm going to kill you." Trujillo walked away backwards. Appellant began driving away in Trujillo's car. He opened the passenger door and two other men got into the car. (RT 5609-5610.)

2. Victim Impact Evidence

a. Sharon Rose

Sharon Rose was Fred Rose's wife. They had been married for 21 years. They had three children, Amy, Heather, and Justin. Mr. Rose was 42 years old when he was killed. (RT 5686-5688.) The family had lived in Valencia for the past 10 years and Chatsworth prior to that. After her husband's death, Ms. Rose moved out of state to get away from where the crime had occurred. Ms. Rose described her husband as a wonderful person who loved his family. (RT 5688.) He paid his taxes and went to work every day. (RT 5688-5689.) Mr. Rose was a good husband and father. They had planned on growing old together and buying a motor home. The pain from her husband's death was ongoing and there were no words to describe it. Ms. Rose and her children had gone to and continued to go to bereavement support groups. All of the children had a hard time at school after their father's murder. (RT 5690-5691.) Ms. Rose was very lonely and missed her husband very much. (RT 5691.)

b. Doris Baker

Doris Baker was Fred Rose's mother. Ms. Baker stayed close to Mr. Rose after he got married. Mr. Rose was "everything a mother could have wished for." He was bright, fun loving, a wonderful parent, and loved his children and family. The pain caused by her son's death was still with her and would be with her for the rest of her life. Ms. Baker continued to go to therapy to cope with her son's loss. Prior to her son's death, Ms. Baker had seen him at least three times a month. (RT 5684-5685.)

c. Amy Rose

Amy Rose was Fred Rose's oldest daughter. She was 15 years old when her father was murdered. She never got to say goodbye to her father. Mr. Rose was a good father who took her places such as horseback riding, which she no longer does. Amy missed her father very much and wished everything could go back to the way it was. (RT 5692-5693.)

d. Heather Rose

Heather Rose was Fred Rose's daughter. She was 12 years old when her father was murdered. She did not get to say goodbye to her father. Her father loved the family and loved spending time with them. He was the nicest man you could ever meet. She used to do a lot of activities with her father which she could no longer do, such as going camping. Heather missed her father very much. (RT 5696-5697.)

e. Justin Rose

Justin Rose was Fred Rose's son. He was 10 or 11 years old when his father was murdered. Justin did not get to say goodbye to his father. His father was nice, handsome, and a good dad. Justin used to fly airplanes, shoot targets, and go camping with his father, activities which he could no longer do. Justin missed his father very much. (RT 5694-5695.)

B. Defense Evidence

1. Appellant's Mother's Testimony

Appellant's mother, Mary Collins, testified on appellant's behalf. Appellant's father died when appellant was two and a half years old as a result of heart disease. (RT 5879-5880.) Ms. Collins had two children from a

previous marriage. Her oldest son joined the military shortly after appellant was born, and her other son moved out of the house when appellant was five or six years old, causing appellant to feel "very lost." (RT 5878, 5894.)

When appellant was five years old, he was diagnosed as borderline hyperkinetic. He was given Ritalin, which did not help his condition. (RT 5882-5883.) At the age of 13 or 14, appellant started associating with Hispanic gang members. (RT 5898.) Ms. Collins was protective of her son and tried to teach him the difference between right and wrong. She sent appellant to counseling and obtained a "big brother" for him. (RT 5893, 5895, 5897, 5899.) When appellant got in trouble for the Molotov Cocktail incident at the age of 15 or 16 and was facing the possibility of going to the California Youth Authority, Ms. Collins convinced the judge to allow appellant to go to the De Sisto school in Florida. (RT 5905-5907, 5924.)

Ms. Collins believed the De Sisto school would provide the treatment appellant needed, whereas the California Youth Authority would have turned appellant into a hardened criminal. (RT 5906-5907, 5910-5911.) Although Ms. Collins initially intended for appellant to stay at the De Sisto school for six months, he came home after only three or four months when Ms. Collins disagreed with the school's method of treatment, which included the use of antidepressants. (RT 5912.) When appellant returned from Florida, his behavior was worse. (RT 5925.) He began taking drugs and overdosed in November 1987. (RT 5926, 5939-5940.)

In 1988, appellant joined a gang and sustained a beating that required extensive surgery to his head. (RT 5929-5931.) On the day appellant robbed Sandra Trujillo, he was also arrested for possessing phencyclidine. (RT 5934.)

2. CYA Case Work Specialist Joe Kraics' Testimony

Joe Kraics was a case work specialist for the California Youth Authority in 1986 and 1987. (RT 5567.) In 1986, Kraics prepared a diagnostic evaluation for the juvenile court, which was intended to assist the court with determining the appropriate level of treatment for appellant. Kraics' report incorporated the opinions of Dr. Susan Fukushima, a psychiatrist, and Dr. Gary Abrams, a psychologist. (RT 5568-5569, 5571.) According to Kraics' report, appellant was an immature 16 year old with family problems, school problems, and problems with the law, such as vandalism and burglaries. It was the problems with the law that caused the juvenile court to refer appellant for a diagnostic evaluation. Appellant was immature and trying to find an identity for himself. (RT 5571.)

Appellant was getting involved with gangs and drugs. Although appellant was not Hispanic, he was involved in an Hispanic gang. Appellant was unsure of himself and needed an identifying force. Appellant did not have a normal or high level of self-worth. (RT 5572.) Appellant had low impulse control. (RT 5573.) Appellant's relationship with his mother was troubled. They engaged in arguments that were more typical of siblings than mother and child. Their relationship lacked the normal bonding between a mother and son, which would include respect. (RT 5574.) Appellant's mother tried to protect him rather than recognizing he was involved in delinquent behavior. (RT 5575.)

Appellant did not take responsibility for his actions. Appellant was aggressive and admitted fighting frequently. Appellant had a self-serving, egocentric personality with assaultive tendencies. (RT 5576-5577.) Kraics recommended the lesser restrictive alternatives that were available for appellant. (RT 5579-5580.) It was also recommended that following a treatment program, appellant should receive intensive follow-up supervision in order to prevent

further anti-social and predatory behavior. Kraics did not know whether appellant ever received the recommended treatment. (RT 5582.)

3. Psychiatrist Susan Fukushima's Testimony

Dr. Susan Fukushima, a psychiatrist who did contract work for the California Youth Authority, examined appellant in the fall of 1986. (RT 5701-5702.) Dr. Fukushima diagnosed appellant as exhibiting adolescent conduct disorder, attention deficit disorder, and a mixed personality disorder. (RT 5704.) Dr. Fukushima defined adolescent conduct disorder as a pattern of repeatedly breaking rules, which is characterized by cruelty to other people and animals, lying, stealing, and conduct problems at school. (RT 5705.) She defined attention deficit disorder as being characterized by hyperactive behavior, impulsivity, and lack of attention. She explained that common conduct associated with attention deficit disorder included difficulty sitting still, low frustration tolerance, poor peer relationships, difficulties at school, and hyperactivity. (RT 5707-5708.) Mixed personality disorder meant personality traits that were "maladaptive, so that they interfere with occupational and social functioning." (RT 5708-5709.)

According to Dr. Fukushima, appellant had a co-dependent relationship with his mother. Such a relationship could be counterproductive to psychological well-being. (RT 5710.) She observed that appellant's relationship with his mother was a stress factor causing him to have more difficulties getting through adolescence and establishing a male identity. Dr. Fukushima's report indicated that appellant's closeness with his mother, combined with the absence of a male figure in the family, was a detracting force with respect to appellant's normal maturation. (RT 5711.) Involvement in a gang gave appellant peer support and male role models. (RT 5712.)

Dr. Fukushima recommended in her report that appellant would benefit from a long-term treatment program with set limitations and structure, where he could continue his education. She also concluded appellant might benefit from contact with positive male role models and supportive therapy to deal with issues of increasing his independence from his mother and developing a male identity. (RT 5712-5713.) Dr. Fukushima opined that long-term structured treatment was appellant's best chance of becoming a well-adjusted adult without behavioral problems. Dr. Fukushima had no further contact with appellant after interviewing him and preparing her report. (RT 5716.)

4. Prison Consultant James Park's Testimony

James Park was a prison consultant specializing in adult male prisons. He had spent 41 years working in the corrections field, with 31 of those years spent working with the California Department of Corrections. (RT 5748-5751.) Park described the conditions at a level four prison in California, which is a maximum security prison. He described a point system used to classify prisoners for purposes of housing. (RT 5749, 5752.) A prisoner sentenced to life in prison without the possibility of parole would automatically receive enough points to be assigned to a level four maximum security prison. (RT 5752-5754.)

According to Park, as prisoners matured, they became less likely to assault other prisoners. After the age of 25, most prisoners became acclimated to prison life. (RT 5752, 5768-5769.) No prisoner had ever escaped from a new state-of-the-art level four prison. (RT 5769.) After reviewing appellant's county jail records, Park believed it was unlikely appellant would behave the same way in a level four prison as he had in county jail. (RT 5776-5778.) Park did not believe the letter appellant wrote attempting to dissuade witnesses' testimony was extremely serious. (RT 5778.) Park did not believe appellant

would pose a threat to other inmates or prison employees if housed in a level four prison. (RT 5779.)

C. Rebuttal Evidence

John Iniguez was the acting chief of classification at the California Department of Corrections. (RT 6030.) According to Iniguez, there were not enough jobs for all prisoners in state prison. Many prisoners without jobs spent their time watching television in their cells, exercising, playing sports, or just hanging around. (RT 6034-6035.) Iniguez believed inmates had become more violent, and gang orientation may cause inmates to remain more violent as they aged. (RT 6037.) If appellant was sentenced to life in prison without the possibility of parole, Iniguez opined that appellant would be a threat to staff and other inmates, based on appellant's past behavior in correctional facilities. Due to appellant's recent behavior in county jail, Iniguez predicted that appellant's violence and predatory behavior would escalate. (RT 6041-6042.)

Iniguez testified that a prisoner sentenced to life in prison without the possibility of parole had recently escaped from the level four prison in Lancaster, which marked the first escape from a level four prison. (RT 6038-6039.)

APPELLANT'S CONTENTIONS

1. The trial court correctly ordered a new penalty trial based on jury misconduct. (AOB 48-74.)

2. The trial court correctly ordered a new penalty trial based on the prosecutor's misconduct in informing the jurors that the victim's family wanted the death penalty. (AOB 75-82.)

3. The trial court correctly ordered a new penalty trial based on the erroneous admission of prejudicial evidence of other crimes alleged to have been committed by appellant. (AOB 83-91.)

4. The trial court erred in denying appellant's mistrial motion after the prosecutor elicited inadmissible evidence that appellant had recently been released from prison. (AOB 92-97.)

5. The prosecutor committed misconduct and violated appellant's rights to remain silent and to due process under *Doyle v. Ohio* by using appellant's post-*Miranda* warning silence for impeachment. (AOB 98-112.)

6. The prosecutor committed numerous acts of misconduct while cross-examining appellant. (AOB 113-122.)

7. The prosecutor repeatedly committed misconduct during her guilt phase argument. (AOB 123-134.)

8. The trial court erroneously instructed the jury that they could convict appellant of murder without agreeing whether he had committed malice murder of felony-murder. (AOB 135-144.)

9. The trial court erred in allowing the jury to hear evidence in aggravation that appellant was involved in an incident in which a Molotov Cocktail was thrown. (AOB 145-158.)

10. The trial court erred in allowing the jury to hear evidence in aggravation that appellant possessed a concealed knife in 1989. (AOB 159-167.)

11. The prosecutor committed misconduct at the penalty phase by bringing to the jury's attention the erroneous fact that appellant would receive a 30-year review by the Board of Prison Terms if sentenced to life in prison without the possibility of parole. (AOB 168-179.)

12. The prosecutor committed misconduct by arguing to the jury that it could consider appellant's lack of remorse as evidence in aggravation at the penalty phase. (AOB 180-185.)

13. The prosecutor committed misconduct by urging the penalty phase jury to render a verdict based on vengeance. (AOB 186-192.)

14. The prosecutor committed misconduct by urging the jury to show appellant the same mercy he showed the victim. (AOB 193-200.)

15. The prosecutor committed misconduct during her penalty phase argument to the jury by relying on inflammatory facts not in evidence to argue for the death penalty. (AOB 201-205.)

16. The prosecutor committed misconduct by referring to purported aggravating evidence outside the record in her penalty phase argument to the jury. (AOB 206-210.)

17. The trial court erred by failing to instruct the jury at the penalty phase regarding general principles of law relevant to the evaluation of evidence. (AOB 211-216.)

18. The trial court's failure to instruct properly on mental and emotional disturbance as a mitigating factor violated appellant's constitutional rights. (AOB 217-220.)

19. The trial court's penalty phase instruction defining the scope of the jury's sentencing discretion, and the nature of its deliberative process, violated appellant's constitutional rights. (AOB 221-230.)

20. California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States Constitution. (AOB 231-257.)

21. The cumulative effect of the errors requires reversal of the convictions and sentence of death. (AOB 258-260.)

22. The case should be remanded to the trial court for a new review by the trial judge under section 190.4, subdivision (e). (AOB 261-277.)

23. Appellant's death sentence must be vacated because the death penalty violates international law. (AOB 278-280.)

RESPONDENT'S ARGUMENT

1. Any jury misconduct was nonprejudicial, as there was no substantial likelihood of juror bias.

2. Appellant has waived his claim that the prosecutor committed misconduct by informing the jury of the victim's family's preference regarding the verdict; in any event, there was no misconduct.

3. The admission of other crimes evidence does not warrant a new penalty phase trial.

4. Appellant's claim that the prosecutor committed misconduct by eliciting inadmissible evidence has been waived; in any event, the trial court properly denied appellant's motion for mistrial based on Gutierrez's testimony regarding the origin of appellant's collect telephone calls.

5. The prosecutor did not commit misconduct under Doyle by using appellant's post-*Miranda* silence for impeachment purposes.

6. The prosecutor did not commit misconduct in cross-examining appellant.

7. The prosecutor did not commit misconduct during her guilt phase argument.

8. The trial court had no duty to instruct the jury that it must unanimously agree whether the murder was premeditated and deliberate murder or felony murder.

9. Evidence of the Molotov Cocktail incident was properly admitted during the penalty phase.

10. The trial court properly allowed evidence of the incident at South Gate High School.

11. The prosecutor did not commit prejudicial misconduct at the penalty phase during her cross-examination of defense witness James Park.

12. The prosecutor did not commit misconduct by arguing appellant's lack of remorse could be considered as an aggravating factor.

13. The prosecutor's comments regarding vengeance did not constitute misconduct.

14. The prosecutor did not commit misconduct by arguing that the jury should show appellant the same mercy he showed the victim.

15. The prosecutor did not commit misconduct in arguing that Fred Rose was killed either while on his knees begging for mercy or while running away in fear.

16. The prosecutor did not commit misconduct in her penalty phase argument by observing that she could not "bring in every single bad thing" appellant had done throughout his entire life to convince the jury to impose the death penalty.

17. Any error in failing to reinstruct at the penalty phase with applicable guilt-phase instructions was invited by appellant; in any event, there was no error because the jury is presumed to be guided by the appropriate guilt-phase instructions.

18. The trial court did not err in failing to delete the word "extreme" from CALJIC No. 8.85.

19. The trial court properly instructed the jury on its sentencing discretion pursuant to CALJIC No. 8.88.

20. California's death penalty law is not unconstitutional.

21. No reversal is required based on the cumulative effect of alleged errors.

22. Remand to the trial court for a new review by the trial judge pursuant to Penal Code section 190.4, subdivision (e) is not necessary.

23. Appellant's death sentence does not violate international law.

ARGUMENT

I.

ANY JURY MISCONDUCT WAS NONPREJUDICIAL, AS THERE WAS NO SUBSTANTIAL LIKELIHOOD OF JUROR BIAS

Appellant contends the trial court properly ordered a new penalty phase trial based on jury misconduct. (AOB 48-74.) Respondent submits any misconduct was not prejudicial, as there was no substantial likelihood of juror bias. Therefore, the California Court of Appeal properly reversed the trial court's ruling granting a new penalty phase trial.

A. Relevant Proceedings Below

On November 2, 1993, the jury returned a verdict of death. (RT 6449-6450.) Three days later, defense counsel informed the trial court of his intention to file a motion for new trial based on alleged experiments conducted by the jury during its deliberations. (RT 6456-6457.) On November 23, 1993, the defense filed a motion for new trial on grounds of juror misconduct. (CT 1120-1151.) At a hearing that same day, the parties agreed that three jurors, William Barickman, Greg Beckman, and Charles Collingwood, would be called in for questioning, as opposed to sending investigators out to obtain declarations from them. (RT 6460-6464; see also RT 6477.) On January 14, 1994, jurors Barickman, Beckman, and Collingwood were questioned under oath. (RT 6478-6510.)

1. The Jurors' Testimony

a. Juror Beckman

Beckman was the first to be questioned. The trial court asked Beckman about an article in the Los Angeles Times, which had reported that jurors had used a string, a protractor, and a coroner's report to assist them in reaching a verdict. (RT 6479.) Beckman inquired whether he was obligated by law to divulge what had happened in the jury room. (RT 6479.) The trial court responded,

> Well, let's say, sir, that it's my duty under certain sections to receive evidence and conduct a hearing with respect to certain aspects of jury deliberations, and in response to your question do I have the authority to order you to answer my questions, it's not clear to me whether I do or not. I think I do. I would have to research that. Normally, the lawyers send their investigators to speak to a juror. I've been requested in deference to the jurors feelings and to make it as comfortable as possible, to call jurors into court so they can be asked questions in a neutral setting as opposed to an adversary, what could be perceived as an adversary environment.

(RT 6479-6480.)

Beckman then stated he would cooperate. Beckman explained that based on Dr. Sherry's testimony about the victim's injury, and Beckman's experience in Vietnam, which included observing several gunshot injuries, it was his belief that Fred Rose's injury could only have been caused in two ways - an "execution" type of shooting, or being shot from a helicopter or gunship, which would also produce the downward trajectory. The term "executed" was

used on numerous occasions during deliberations, upsetting one of the jurors[15] and prompting that juror to ask how one could be certain the shooting was an execution style shooting. (RT 6480.) Beckman then stated as follows:

> Well, on my computer, I worked out height patterns and came up with the fact that anyone standing six feet away from another person would have to just about be standing on a stool two and a half feet high to get a downward trajectory through the back of the skull of an individual, and I used that reference to back up the statements that were made in the deliberation room about an execution instead of a murder.

(RT 6480-6481.) The trial court then asked Beckman to respond to the newspaper article's references to the use of a protractor, a string, and a coroner's report. (RT 6481.) Beckman responded as follows:

> For the string you could have substituted a piece of paper or yardstick. For the protractor somebody holding their hands straight out in a position such as that as a crucifix just to maintain a straight line. No one made any determination about angles on this or anything. There was no reference to that by Dr. Sherry. The subjects used in the deliberations, were of the approximate height of Fred Rose and Scott Collins.

(RT 6481.) The court then gave defense counsel the opportunity to question Beckman. Defense counsel asked whether a protractor had been brought into the jury room. Beckman replied that the protractor was already in the jury room, and he had not brought it in there. Defense counsel then asked whether a string was used in a demonstration. (RT 6481.) Beckman responded that a string that was six to eight feet long was used in a demonstration. (RT 6481-6482.) Beckman further described the demonstration as follows:

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15. In response to subsequent defense questioning, Beckman identified this juror as the woman who was forced to leave during deliberations due to dental surgery. Defense counsel identified this juror as Flora Mercier. (RT 6484.)

Juror Beckman: The demonstration was the protractor, the centerpoint was placed at a point on the side of the head approximately this location pointing just above my orbit, the low part of the frontal bone, the right side of the head.

The Court: The record should reflect you are using your index finger.

Juror Beckman: Eyebrow level.

The Court: Eyebrow level at approximately one inch.

Juror Beckman: On the side of the head, and then - -

The Court: Is it fair to describe it as being somewhere between - -

Juror Beckman: About level with the top.

The Court: Of your eyebrow?

Juror Beckman: Approximately the temple. It's approximately where the protractor was placed.

The Court: Uh-huh.

Juror Beckman: And then a slight downward angle as described by Dr. Sherry was approximately five to ten degrees.

[Defense Counsel]: Could you explain how the string was used, if at all, at this demonstration?

Juror Beckman: The string was used going from the center portion of the protractor to the back at ten degrees or five degrees, I don't remember which, straight back to be held above a head approximately six feet away.

[Defense Counsel]: Why was it held approximately six feet away?

Juror Beckman: During testimony, the closest footprints that were found by the investigating officers at the scene of Fred Rose's shooting, were six feet away from Fred Rose.

[Defense Counsel]: Did you yourself play a role in this demonstration, sir?

Juror Beckman: Yes, I did.

[Defense Counsel]: Could you explain what that role was?

Juror Beckman: That role was to take the string and bring it back on a slight angle to show that if anybody was going to shoot from that position, your chances of hitting somebody was very very slim.

[Defense Counsel]: Would it be correct to say, you essentially were playing the role of the shooter in that demonstration?

Juror Beckman: Yes.

[Defense Counsel]: You undoubtedly know Mr. Collingwood. Was he playing the role of Mr. Rose?

Juror Beckman: Yes.

[Defense Counsel]: Was he erect or in some other position during this demonstration?

Juror Beckman: He was standing erect and he was also in a kneeling position on his knees.

(RT 6481-6483.)

Defense counsel asked whether Beckman had brought the string into the jury room. Beckman replied that the string was part of his jacket, but he had not brought it in the jury room for the specific purpose of using it in an experiment. (RT 6484.) When asked by defense counsel to elaborate on the work he had done on his computer to prepare for the demonstration, Beckman responded as follows:

Juror Beckman: I marked off six feet, two inches in the scale. I marked off five foot, ten inches, and six feet, two inches referring to approximately the height of Mr. Collins and five foot, ten inches of the approximate height of Fred Rose. . . . Then I separated the two

approximately six feet in scale and used an angle of trajectory, slight downward angle of approximately five to seven degrees to give an approximate location where the person's head would have to be in order to identify a weapon at that distance and at that angle.

(RT 6484-6485.) Beckman further stated that he did not tell the other jurors he had done any preliminary testing on his home computer. (RT 6485.) When asked how the experiment came about, Beckman explained:

[Fellow juror Mercier] became a little riled, a little upset. She said something to the effect of, "How do you know it was an execution style? How do you know? How do you know this?" I obviously had offended somebody. We tried to keep these deliberations on a very friendly basis. We hadn't tried to create any animosity. We wanted to give [appellant] every conceivable consideration. This young man's life was on the line and we all knew that.

(RT 6486.) Beckman confirmed that the demonstration occurred during the penalty phase deliberations. (RT 6486.)

Beckman was then questioned by the prosecutor. Beckman stated that the protractor was found in the jury room on the floor behind some boxes, and the piece of string happened to be on his jacket. He did not make a conscious effort to go home and prepare an experiment to be conducted in the jury room. (RT 6487.) In making his decision with respect to the trajectory of the angle at which the bullet entered the victim's skull, Beckman used testimony that had been presented in the courtroom. The demonstration was based solely on testimony received in court and not on any outside information. (RT 6488.)

Beckman further testified that the only reason the protractor was used was because it "happened to be there." They just as easily could have used a piece of paper or another object. They did not use the protractor to compute any angles. The protractor's only purpose was to "maintain a straight line from

up to the down position so there was no confusion as to the angle that the bullet traveled." (RT 6489.) Beckman conducted the work on his computer the night before the demonstration in the jury room. (RT 6490.)

b. Juror Collingwood

Collingwood acknowledged that the jury used a string and protractor in a demonstration. (RT 6493.) Collingwood described the demonstration as follows:

> Yes, kind of a demonstration where they, I think - - I can't remember exactly, but we had the string at a certain angle. They said whoever shot, whatever, however they shot it was at a high angle and so we just showed that angle could have been or whatever. It was because we did so many different ones, was not one specific thing. Like could his head [have] been down or head sideways or kneeling or standing, things like that, and it wasn't for me. I didn't need it. It was just one of those they wanted to see it visually, see like the angle on which way the bullet might have entered or might not have went.

(RT 6493-6494.)

Collingwood did not remember how the demonstration came about. He stated, "I think it was some of the ladies didn't understand some of the things that some of the witnesses were saying or wanted some clarification." (RT 6494.) Collingwood played the role of the victim because he was about the same size. (RT 6495, 6497.) The demonstration was not planned and lasted only two to three minutes. There was no comment that any prior research had been done regarding the demonstration. Collingwood did not know where the protractor came from. He assumed another juror "must have brought it," although he did not know which one. (RT 6496.)

Collingwood did not know where the string came from. The protractor was placed to the side of Collingwood's head. Collingwood did not know for sure what the protractor's purpose was; he assumed it was to show "the angle." (RT 6497.) He explained,

> I don't know for sure that we got the angle from one of the witnesses. One of the witnesses said the angle would be a certain thing and the protractor was used to show the angle and the string showing the actual line of the bullet or whatever.

(RT 6497.) The string was about six feet long. Collingwood did not recall whether there was any discussion about the significance of the length of the string. Collingwood was alternately standing and kneeling during the demonstration. (RT 6498.) He moved his head to different positions to represent the different possibilities. (RT 6500.) This was based on Dr. Sherry's testimony that the victim's head could have been turned in a number of ways when he was shot. (RT 6500-6501.)

Some of the jurors were drawing on the chalk board, but no one could draw well, which prompted the demonstration. (RT 6500.) The demonstration was based on information received inside the courtroom. (RT 6501.)

c. Juror Barickman

Barickman recalled Beckman and Collingwood using a protractor and a string in a demonstration, but he did not know what they were basing this demonstration on. Beckman stood and Collingwood knelt down, and they used a string in some way. Barickman did not remember exactly how the string was used or what the point of the experiment was. He did not think the demonstration, which lasted 15-20 seconds, was important. (RT 6504-6505.) Beckman, who conducted the experiment, was trying to prove his point that the victim was kneeling when he was shot. (RT 6506-6507.) This fact seemed to

make a difference to Beckman, but it did not make a difference to Barickman what position the victim was in when he was shot. (RT 6507.)

Barickman did not know where the protractor came from. He assumed it came from Beckman. Barickman also assumed the string came from Beckman. (RT 6506.) Barickman did not recall Beckman commenting on any preliminary thought he had given to the demonstration. (RT 6507.)

Barickman did not recall discussing the coroner's testimony regarding degrees, angles, and trajectories. The demonstration occurred during the penalty phase. (RT 6508.) Beckman did not bring any outside information into the jury room. The demonstration appeared to be a re-enactment of the crime based on testimony heard in court. (RT 6509.) Beckman mentioned his knowledge of guns to other jurors, although he did not mention military experience. Beckman did not say that the victim's wound was either a result of having been shot while in a kneeling position or having been shot from a helicopter. (RT 6510.)

2. The Trial Court's Request For Further Briefing

After the three jurors testified, the trial court invited defense counsel to file a revised motion for new trial, in light of the fact that the jurors' testimony revealed that the experiment had occurred during penalty phase deliberations rather than guilt phase deliberations. The trial court also stated that defense counsel should have the opportunity to base the motion on the testimony given by the jurors. (RT 6512-6513.) On February 17, 1994, defense counsel filed a motion for a new penalty phase trial based on grounds of jury misconduct and prosecutorial misconduct. (CT 1199-1244.) The prosecutor filed a response on March 8, 1994. (CT 1247-1285.)

3. The Trial Court's Ruling

A hearing on the motion for new trial was held on March 30, 1994. (RT 6701.) The prosecution argued that a new trial was not warranted based on jury misconduct nor prosecutorial misconduct. (RT 6705-6727.) The trial court invited counsel to focus on additional areas of concern which had not been raised by the defense, including the prosecutor improperly communicating the victim's family's preference for the death penalty during her penalty phase argument and the other crimes evidence introduced through Fred Joseph's testimony. (RT 6703-6704, 6714.) The trial court invited defense counsel to file additional points and authorities. (RT 6731-6732.)

The matter was then continued to accommodate defense counsel's scheduling conflict. (RT 6727-6728.) The hearing resumed on April 7, 1994. (RT 6733.) Without hearing argument, the trial court found that prejudicial jury misconduct had occurred, that the prosecutor had improperly communicated the victim's family's preference for the death penalty during her closing argument, and that Fred Joseph had improperly testified about other crimes committed by appellant. (RT 6742-6755.) The trial court concluded by stating, "For each and all of the foregoing reasons, the defense motion for a new trial as to the penalty phase only is granted." (RT 6755.)

With respect to the finding of jury misconduct, the trial court observed that Juror Beckman possessed information gained from his life experience acquired during the Vietnam War that an injury such as the one inflicted in this case could only have resulted from a shooting from a helicopter or an execution style killing. The trial court stated that had this fact been known, both sides would have been entitled to voir dire the juror to determine whether he should have been disqualified; however, without such information, neither side had the opportunity to voir dire the juror on this subject. (RT 6743.) The trial court continued:

> Armed with this very strong belief on this particular issue, the juror went home and sat down at his computer screen at home and performed what can only be described as a simulation model from which he concluded that his preconceptions were in fact correct and that a person standing 6 feet away from a victim would have to be standing on a stool 2 feet higher than the other person in order to create the type of downward trajectory that was testified to by the medical examiner in this case.

(RT 6743-6744.)

The trial court noted that Juror Beckman, "having gathered and developed this information outside the jury room," proceeded to duplicate the experiment inside the jury room by posing different jurors as the shooter and the victim. A protractor was used within the jury room, although it was unclear how the protractor got inside the jury room. (RT 6744.) The trial court observed:

> The fact that angles were discussed, cannot be overlooked as a difference between five degrees in an angle would have an impact on distance and the number of feet and the circumstances of the offense. This is a type of experiment that would not be allowed in open court without a proper foundation being laid. No such foundation could be laid in the jury room and this evidence that was brought in and created, that was brought into the jury room and created in the jury room was not subject to cross-examination or confrontation of any kind. But perhaps even of greater difficulty is the ultimate fact that the creation of this experiment gave the impression of scientific certainty and took a set of circumstances that were an arguable possibility and gave them the imprimatur of scientific truth. In fact, the conclusion reached by the jurors seemed to have been motivated by their observation that footprints were found 6 feet away and this experiment confirmed the

magic figure of 6 feet. As Detective Castillo has clarified subsequently, and the facts before the jury that led the jury to conclude that the distance was 6 feet were in fact erroneous because some information was deleted and that the very closest distance would have been 15 feet.

(RT 6744-6745.)

The trial court rejected the People's argument that it was not conceivable that the jurors were influenced by the experiments, and thus that there was no prejudice. (RT 6746.) The trial court stated that its contrary conclusion was based on the jurors' testimony, in addition to the fact that the jury foreperson had previously evinced a "willingness to violate a court order in order to protect the jury" when he failed to report contact between Juror Mercier and appellant's mother. (RT 6746-6747.) As evidence that it was conceivable the experiment influenced the jury, the trial court noted that the jury had been troubled by the killing being described as execution style. (RT 6747.) The trial court also observed that the jurors had testified that prior to conducting the experiment, they had been unable to reach a decision and that "the jurors themselves felt it was important as they reported that as a salient feature when they spoke about the case immediately following the recording of the verdict." (RT 6748-6749.)

The prosecutor argued that the trial court's ruling was legally erroneous. (RT 6757-6760). She then stated her belief that the trial court was "twisting and torturing out of all shape what has occurred in this case in order to reach this court's decision not to impose the death penalty on this defendant because of this Court's personal beliefs." (RT 6760.) The trial judge stated that he would refrain "from succumbing to the temptation to respond to personal attacks on this Court which have been ongoing and relentless." (RT 6760.) The court provided additional reasons supporting his decision to grant appellant's motion for a new penalty trial. (RT 6760-6762.) The trial court then recused himself from the case, with the following statement:

I have one last statement to make and that is that in light of the personal attacks against the court, I feel that justice would be best served if I would recuse myself from further hearings in this case. The People may wish to consider reassigning this case but that is something that is entirely and exclusively within their province. As for myself, I am going to recuse myself from presiding over further proceedings, however I do not recuse myself from availability to making any supplemental or additional findings that may be required by any reviewing court. Thank you very much.

(RT 6762-6763.)[16]

4. The California Court Of Appeal's Ruling

The prosecution appealed the trial court's granting of a new penalty phase trial to the California Court of Appeal. (See Appellant's Mot. to Aug., Ex. A.) The court of appeal reversed the trial court's ruling. The court of appeal relied extensively on this Court's ruling in *In re Carpenter* (1995) 9 Cal.4th 634, 653-655 (*Carpenter*), which sets forth the applicable standard for determining whether jury misconduct requires reversal. (CT 1544-1548.) In applying *Carpenter* to the facts of this case, the court of appeal first observed that the experiment inside the jury room was proper, as "all the factual assumptions explored by the demonstration were well within the evidence." (CT 1546.) The court of appeal further noted,

Even assuming the protractor was used both as a straightedge and to demonstrate angles, doing so would be no different from using a ruler

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16. The trial court did not provide any additional justification for the recusal. Assuming good cause for recusal existed immediately following the court's ruling on the motion for new trial, it is not readily apparent why such good cause did not exist when the court ruled on the motion for new trial in appellant's favor.

to mark linear measurements. Thus, there was nothing improper about the demonstration, nor did it involve any improper evidence.

(CT 1546-1547.)

The court of appeal then considered Juror Beckman's earlier use of his home computer and concluded that, while technically misconduct, there was no prejudice. The court of appeal explained:

> First, the juror never mentioned the use of his home computer to the other jurors. Thus, its use had no effect on the other jurors and did not in any way enhance the opinion of the offending juror. Second, there was no evidence the offending juror obtained information from the computer or did computations he otherwise could not have done. While he used the computer to draw the heights and distances to scale, the drawing was nothing more than he could have done on paper or on the blackboard. Third, the offending juror used the computer only to help himself visualize the relative positions of Rose and [appellant]. Some jurors were unsure about the prosecutor's argument that [appellant] essentially executed Rose while Rose was on his knees or running away. The offending juror already agreed with the argument, and merely used the computer to help him visualize his thoughts to more effectively persuade his fellow jurors. Finally, the evidence against [appellant] was strong. Thus, the technical misconduct was not prejudicial and the trial court abused its discretion in granting a new penalty trial on this record.

(CT 1547-1548.)

B. Controlling Principles Of Law

Section 1181 sets forth the circumstances in which a defendant may apply for and be granted a new trial. As relevant here, section 1181 provides for a new trial in the following circumstances:

2. When the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property.

3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented.

(§ 1181, subds. (2) & (3).)

An accused has a constitutional right to a trial by an impartial jury. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751]; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578; *People v. Holloway* (1990) 50 Cal.3d 1098, 1112, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1) and every member is "'capable and willing to decide the case solely on the evidence before it.'" (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554 [104 S.Ct. 804, 78 L.Ed.2d 663], quoting *Smith v. Phillips* (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 71 L.Ed.2d 78.)

Misconduct by a juror raises a rebuttable presumption of prejudice to the defendant. (*In re Hamilton* (1999) 20 Cal.4th 273, 295.) If the juror commits misconduct that raises a presumption of prejudice, the presumption is rebutted and the verdict will not be disturbed if the entire record in the particular case, including the nature of the misconduct or other event and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant. (*Id.* at p. 296.)

> [W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire

record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias.

(*Carpenter*, *supra*, 9 Cal.4th at p. 653.)

This Court has stated that there are two ways such bias can be shown:

First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [Citation.] The judgment must be set aside if the court finds prejudice under either test.

(*Ibid.*)

The first test is analogous to the general standard for harmless error analysis under California law:

Under this standard, a finding of "inherently" likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this "inherent prejudice" test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information.

(*Carpenter*, *supra*, at pp. 653-654.)

Under the second test, "the totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose." (*Carpenter*, *supra*, at p. 654.) 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.

(*People v. Nesler*, *supra*, 16 Cal.4th at p. 581, quoting Code Civ. Proc., § 225, subd. (b)(1)(C).) If a juror's partiality would have constituted grounds for a challenge for cause during jury selection, or for discharge during trial, but the juror's concealment of such a state of mind is not discovered until after trial and the verdict, the juror's actual bias constitutes misconduct that warrants a new trial. (*People v. Nesler*, *supra*, citing *People v. Galloway* (1927) 202 Cal. 81, 89-92.)

"Grounds for . . . 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." (*People v. Nesler*, *supra*, 16 Cal.4th at p. 581, quoting *People v. Keenan* (1988) 46 Cal.3d 478, 532.) Furthermore,

> [a]lthough Evidence Code section 1150, subdivision (a) permits a court to receive otherwise admissible evidence about matters that may have influenced a verdict improperly, it limits the evidence as follows: "No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined."

(*People v. Lewis* (2001) 26 Cal.4th 334, 388-389, quoting Evid. Code, § 1150, subd. (a).) Where a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstances "open to [corroboration by] sight, hearing, and the other senses." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 350.)

In determining whether there is actual bias, "[a]ll pertinent portions of the entire record, including the trial record, must be considered." (*Carpenter*, *supra*, 9 Cal.4th at p. 654.) In an extraneous-information case, the "entire record" logically bearing on a circumstantial finding of likely bias includes:

the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant. For example, the stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict. (*Ibid.*)

C. The Demonstration Conducted Inside The Jury Room Did Not Constitute Misconduct; Even Assuming It Was Misconduct, There Was No Substantial Likelihood Of Bias

It is impermissible for a jury to conduct an experiment in which it considers extrinsic evidence and outside influences. (See *People v. Cumpian* (1991) 1 Cal.App.4th 307, 313, and cases cited therein.) However, not every experiment constitutes jury misconduct, as jurors are to be given enough latitude in deliberations to permit them to use common experiences and illustrations to reach their verdicts. (*Id.* at p. 316; accord, *People v. Bogle* (1995) 41 Cal.App.4th 770, 778.) "[J]urors may engage in experiments which amount to no more than a careful examination of the evidence which was presented in court." (*People v. Cooper* (1979) 95 Cal.App.3d 844, 853-854.) Thus, the jury may carry out experiments within the lines of offered evidence, but if their experiments invade new fields and the jury is influenced in their verdict by discoveries which do not fall fairly within the scope and purview of the evidence, then, manifestly, the jury has taken evidence without the knowledge of either party, evidence which it is not possible for the injured party to meet, answer, or explain. (*Higgins v. L.A. Gas & Electric Co.* (1911) 159 Cal. 651, 656-657.)

Furthermore, jurors may rely on their own personal life experiences during deliberations. In *People v. Fauber* (1992) 2 Cal.4th 792, several jurors related personal anecdotes about drug use, which the defendant urged was

tantamount to relying on extrajudicial information relating to issues pending before them. (*Id.* at p. 838.) This Court held that the personal anecdotes did not rise to the level of misconduct.

> To say, for example, that the memory of some of the witnesses may have been affected by drugs is to say no more than the common knowledge that ingestion of drugs affects perception. Jurors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room.

(*Id.* at p. 839.)

Here, all three jurors who testified at the evidentiary hearing stated that the demonstration conducted in the jury room was based entirely on evidence adduced at trial, and that it did not involve any extrinsic evidence or outside influences. (See RT 6488, 6501, 6509.) The protractor was already in the jury room, and was only used to maintain a straight line rather than to compute angles. (See RT 6481 [Juror Beckman]; RT 6493, 6497 [Juror Collingwood; "the *witnesses* said that certain angles were used"; protractor's purpose was to "show the angle" as testified to by one of the witnesses]; RT 6505 [Juror Barickman - knows a protractor is used to measures degrees and angles, but was not paying attention to what Jurors Beckman and Collingwood were basing their demonstration on], emphasis added.)

The trial court found it problematic that the jurors had even discussed angles, as it stated, "The fact that angles were discussed, cannot be overlooked as a difference between five degrees in an angle would have an impact on distance and the number of feet and the circumstances of the offense." (RT 6744.) This implicit finding that the jurors committed misconduct by even discussing angles is plainly mistaken. The coroner testified about the slight downward trajectory of the bullet and the wounds on the victim's knee and hands. The jury was certainly entitled to discuss what inferences could be

drawn from this testimony, including the various possible angles at which the bullet traveled.

Furthermore, while Juror Beckman's personal experiences in Vietnam led him to believe that the victim was either shot from a helicopter or "execution" style (RT 6480), such a belief was consistent with the coroner's testimony that the trajectory of the bullet was slightly downward, and that there were millions of possibilities regarding the positions of the victim and the shooter (RT 3880-3881), and Juror Beckman expressly stated that in determining the trajectory of the angle of the bullet, he relied on testimony presented in the courtroom (RT 6488). Thus, Juror Beckman did not substitute his own experience for evidence adduced at trial. Rather, he merely viewed the evidence in light of his own personal experiences, which was permissible. (See *People v. Fauber*, *supra*, 2 Cal.4th at p. 839.) Moreover, Juror Beckman did not inject any extrinsic information into the deliberations, as he did not share his personal experience in Vietnam with any of the other jurors. (RT 6510.)

The string happened to be on Juror Beckman's jacket, and was six to eight feet in length. (RT 6482, 6487.) Juror Beckman's use of a six-foot distance was based on his recollection of the testimony (RT 6483) rather than a result of any experiment. Regardless of whether Beckman's recollection was accurate, it was clearly based on the evidence received in the courtroom as opposed to being derived from outside influences.

Furthermore, the experiment Juror Beckman conducted on his home computer did not introduce any extrinsic information into the deliberations. Based on the evidence at trial, viewed in light of his own personal experiences, Juror Beckman had already formed the opinion that the shooting was execution style. His home computer calculations merely confirmed this belief, and he never shared this information with the other jurors. (RT 6480, 6485, 6496, 6507, 6510.) As the California Court of Appeal reasonably concluded, all the

factual assumptions explored by the demonstration were well within the evidence, and therefore, there was nothing improper about the jury room demonstration. (See CT 1546-1547.)

In any event, even assuming the jury room demonstration constituted misconduct, any extraneous material, judged objectively, was not inherently and substantially likely to have influenced the jurors. The demonstration was very brief, lasting less than three minutes. (RT 6496, 6505.) Moreover, none of the jurors testified that the demonstration produced any conclusive result. Rather, the demonstration showed many different possibilities regarding the positions of the victim and shooter (RT 6483, 6494, 6498-6503), which was consistent with the coroner's testimony (RT 3880-3881). To the extent the trial court found that the demonstration "gave the impression of scientific certainty and took a set of circumstances that were an arguable possibility and gave them the imprimatur of scientific truth" (see RT 6745), such a finding is not supported by the record.

Moreover, whether the victim was shot execution style was not substantially likely to have affected the verdict. The evidence supporting the penalty determination was very strong. (See *Carpenter*, *supra*, 9 Cal.4th at p. 658 [a review of entire record may show extrinsic information was not prejudicial; strength of the evidence may be considered in this analysis].) Regardless of whether appellant shot the victim execution style or in some other manner, there was absolutely no evidence that the killing was unintentional. Nor was there any evidence of a physical struggle.

Furthermore, appellant's actions were extremely callous. Appellant kidnapped Rose in Lancaster, drove him to Northridge, kept him alive until after appellant could withdraw $200 from Rose's bank account, and then killed Rose. A few hours later, appellant used Rose's credit card to buy gas and attempt to buy beer. Appellant then drove to Bakersfield to visit his girlfriend.

The following day, appellant used Rose's money to party with juvenile gang members and repeatedly bragged about murdering Rose and stealing his car. Thus, under section 190.3, subdivision (a), the circumstances of the offense were already extremely aggravated, regardless of whether the killing was execution style.

In addition, during the penalty phase the jury heard an abundance of evidence regarding a consistent pattern of appellant's escalating predatory and violent behavior. In contrast, the mitigating evidence was nearly non-existent. Appellant had a loving mother who did her best to teach him right from wrong. She sent him to private schools, sought counseling for him, and got him a "big brother." While the defense attempted to blame the juvenile justice system for failing to adequately deal with appellant's early signs of delinquency, the jury was really presented with a young man who continued to engage in criminal behavior despite having numerous opportunities to rehabilitate himself.

Nor was there a substantial likelihood of actual bias on the part of any juror. Although Juror Beckman mentioned his personal experiences in Vietnam as one of the reasons he believed the victim had been killed in an execution type of shooting, he also testified that he relied on the evidence produced at trial. (RT 6480.) Juror Beckman did not plan the jury room demonstration ahead of time, instead relying on tools available inside the jury room. (RT 6487.) Moreover, while he used his home computer to help himself visualize a theory in which he already believed, he did not share this information with his fellow jurors, and did not discuss his experience in Vietnam with his fellow jurors. (See *Carpenter*, *supra*, 9 Cal.4th at p. 656 [whether juror who learned of extrinsic information shared the information with fellow jurors is relevant to determination of actual bias].) Finally, he did not conceal any information about his military experience during voir dire. In fact, he revealed that he had served in the Navy as a dental technician in Vietnam in his juror questionnaire.

He also revealed that he had owned shotguns, rifles, and firearms. (Supp. CT I 4149-4150.) Thus, to the extent the trial court stated the parties had no opportunity to voir dire Juror Beckman on this subject (see RT 6743), this finding was erroneous.

D. Any Misconduct Committed By Juror Beckman Through The Use Of His Home Computer Did Not Result In A Substantial Likelihood Of Bias

The jury was admonished not to discuss the case, do research, or conduct experiments outside of court. (See CT 676, 1088; RT 4959.) Thus, Juror Beckman's use of his home computer was arguably improper. (See *In re Hamilton*, *supra*, 20 Cal.4th at p. 305 ["A sitting juror commits misconduct by violating her oath, or by failing to follow the instructions and admonitions given by the trial court"].) However, for the reasons previously discussed above, the presumption of prejudice is rebutted as there is no substantial likelihood of bias.

The model Beckman created on his computer was based on the evidence he heard at trial. As the California Court of Appeal properly observed, the model could have just as easily been done on paper or on the blackboard. (CT 1547-1548.) Beckman had already formed his opinion of what inference should be drawn from the evidence, and the model merely allowed him to visualize his beliefs. He did not tell any of the other jurors about the model he created on his computer, and he did not share his experiences in Vietnam with any of the other jurors. Nor did he conceal any information about his experiences in Vietnam during voir dire. Accordingly, there was no substantial likelihood that Beckman was actually biased.

E. The Abuse Of Discretion Standard Does Not Apply; In Any Event, Even Assuming Such A Standard Applies, The Trial Court Abused Its Discretion In Granting Appellant's Motion For A New Penalty Phase Trial

Appellant claims an abuse of discretion standard applies. (AOB 55-56.) Respondent disagrees. Once the California Court of Appeal reversed the trial court's order granting the motion for a new penalty phase trial, the trial court order ceased to exist.[17/] While the order denying the petition for review stated that it was "without prejudice to subsequent consideration after judgment," respondent submits this merely indicates that appellant is not barred by the law of the case from raising the underlying issue of jury misconduct. (See, e.g., *People v. Barragan* (2004) 32 Cal.4th 236, 246.)

In any event, even assuming the abuse of discretion standard applies here, the trial court's finding that prejudicial juror misconduct warranted a new penalty phase trial constituted an abuse of discretion. The trial improperly relied on juror thought processes in reaching its decision. While evidence is admissible to prove misconduct by a trial juror, the law expressly prohibits evidence of the effect of such misconduct on the minds of the jurors. (Evid. Code, § 1150; *Carpenter*, *supra*, 9 Cal. 4th at p. 651; *People v. Holloway*, *supra*, 50 Cal.3d at pp. 1108-1109; *People v. Stokes* (1894) 103 Cal. 193, 196-197.)

The trial court's reasoning in support of granting the motion for new trial based on juror misconduct was replete with forbidden references to the jurors'

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17. Had this Court intended to review the matter under an abuse of discretion standard, it could have granted appellant's petition for review and promptly resolved the matter. The petition for review was denied on November 13, 1996. (Appellant's Mot. to Aug., Ex. D.) Thus, as of the time the current respondent's brief is being filed, roughly eight and a half years will have elapsed since the denial of the petition for review.

thought processes and the effect the misconduct had on the jurors, as illustrated by the following excerpt:

What did the jurors say concerning whether or not this was important? And I realize that this is not as the People point out to be considered in order to secondguess [sic] the thinking process of the jury, only to look, only as circumstances tending to show the fact that it's very conceivable, in fact likely, that jurors were affected by this particular issue. And I am not going to quote all of the statements made by the jurors but only the ones that concern these circumstances.

"*The mention of the word 'execution' tended to upset one of the jurors. She became a little riled, she stated, 'how do you know it was execution style? How do you know, how do you know this?*'

At page 6494 of the transcript, "I think it was some of the ladies didn't understand some of the things that some of the witnesses were saying or wanted some clarification, not everybody but some of the, some of the men in there too didn't really understand or not so much understand they just wanted to visually see more." At page 6506, "No, I would say no. I don't know really because what I remember we had taken a vote and then that morning and it was a Friday, I think when this happened, and when we took the votes no one knew what each of them voted. So he couldn't direct." *The point being as of that particular Friday the jury has not yet made a decision.*

At page 6500, "Yes, we had a discussion the previous day and then the next day we were still discussing it and then they said - - well, look - - let's see, I am not - - don't take me exactly, but I think we were doing something on the board and drawing something or did both and nobody could draw that good. So couldn't make sense out of it or whatever, and

it was everybody. So it's kind of hard to say, pinpoint exactly who, what, when, where."

At pages 6507, "*It seems to make a difference to him and it did not to me as to what position the victim was in when he was shot. I guess being knelt down versus lying down seems to be more cruel of the execution style they talked about.* I don't remember which, straight back to be held above a head approximately 6 feet away." This is at page 6483. "Mr. Hill: Was it held approximately 6 feet away: Juror Beckman: During testimony, the closest footprints that were found by investigating officers at the scene of Fred Rose's shooting, were 6 feet away from Fred Rose."

Finally, *it appears that the jurors themselves felt it was important as they reported that as a salient feature when they spoke about the case immediately following the recording of the verdict.* Because of the particular nature of these proceedings, and by these proceedings meaning the penalty phase are different from any other type of proceeding, because the law provides that an individualized determination must be made and it directs the jury to look at each factor and permits them to assign weight, assign whatever emotional or sympathetic value they deemed to be appropriate, and for all the foregoing reasons I've stated, it appears to me that information was developed, was considered by the jury and in the context where vengeance and retaliation were discussed and its appropriateness, it was logical for jurors to look at the question of whether or not there should be an execution in exchange for an execution whether or not the victim was given a chance to get back or run away. These issues were the subject of argument by counsel. They were presented before the jury. I feel as stated earlier that there's a substantial liklihood [sic] that the

improper consideration of this evidence influenced the outcome of the jurors[']decision. [Defense counsel] in his argument argues that this conclusion is dictated by the prosecutorial appeal to passion. I invited further briefing on the questions of appeal to vengeance. I would like to address that at this time.

(RT 6747-6750, emphasis added.)

When the prosecutor pointed out that the trial court's comments improperly considered the jurors' thought processes, the trial court responded as follows:

[T]he thought processes of the jurors indeed cannot be looked at. The standard is an objective one. I've found that information was gathered outside the courtroom, taken into the jury room all of which raised the presumption of prejudice. The people then have the duty to overcome that presumption of prejudice. The People argued that it's not conceivable, in fact remotely conceivable that the jurors' conclusion would have been affected by this improper conduct. My recitation of the jurors testimony and other circumstances, is simply a way of illustrating that it's indeed extremely conceivable and indeed very logical under a law that bases the constitutionality of the death penalty on the fundamental and ultimate ability of every juror to give each and every one of the pertinent factors in aggravation and mitigation the weight that that juror feels is appropriate. In that light, it's entirely conceivable that jurors would be looking at the particular circumstances referred to by the witnesses during their testimony, specifically whether or not the victim was given any chance at all. *This was an issue that according to the jurors was a subject of concern just before they conducted this experiment. They had been unable to reach a verdict before. I've read portions which substantiate the fact that number 1, it*

was not only one juror that was concerned about it, but instead some of the women or, alternatively, not some of the women but some of the men, et cetera. I will not reiterate that.

(RT 6760-6761, emphasis added.)

As shown above, the trial court's finding of prejudice heavily relied on the jurors' testimony regarding how the alleged misconduct affected their thought processes. Because such reliance was contrary to law, the trial court's ruling constituted an abuse of discretion. Appellant's claim must be rejected.

II.

APPELLANT HAS WAIVED HIS CLAIM THAT THE PROSECUTOR COMMITTED MISCONDUCT BY INFORMING THE JURY OF THE VICTIM'S FAMILY'S PREFERENCE REGARDING THE VERDICT; IN ANY EVENT, THERE WAS NO MISCONDUCT

Appellant contends the trial court correctly ordered a new penalty trial based on the prosecutor's misconduct in informing the jury that the victim's family wanted appellant to receive the death penalty. (AOB 75-82.) This claim has been waived, as appellant failed to object to the prosecutor's argument in this regard. In any event, the claim fails on the merits, as the prosecutor did not improperly communicate the victim's family's preference regarding the verdict.

A. Relevant Proceedings Below

After arguing at length about the circumstances in aggravation and lack of circumstances in mitigation during her penalty phase closing argument, the prosecutor argued in pertinent part as follows:

> Just a couple of more concepts I want to discuss with you before I close, ladies and gentlemen. One of them is vengeance. Now, most of us have been raised to believe that vengeance is a bad thing, that it's not appropriate. I suggest to you, that under certain circumstances it's not only appropriate but in fact quite healthy. It has a legitimate place in our society and has a legitimate role within our criminal justice system. Don't let me kid you, when any prosecutor gets up in front of a jury or any court and asks that jury to come back with a verdict of death, that vengeance isn't involved. Because what this prosecutor is saying to you, ladies and gentlemen, is that someone did something so bad, so bad that it has to be done back to them. Now because I am not as eloquent as others ahead of me, before me, sorry about that.

I want to quote to you from somebody who was very eloquent and how they felt about vengeance, and this is the quote; "We have been plied and belabored with the notion that anger is invariably a dysfunction, a failure to cope with our environment. Great literature from Homer on teaches otherwise. It teaches that anger can be necessary for coping. We are told the desire for vengeance is primitive and shameful, but when the society becomes like ours, uneasy about calling prisons penitentiaries or penal institutions and instead calls them correction facilities, society has lost its bearings. The idea of punishment is unintelligible if severed from the idea of retribution, which is inseparable from the concept of vengeance with is an expression of society's anger. If you have no anger, you have no justice. The society incapable of sustained focused anger in the form of controlled vengeance is decadent. If we lived in a world in which vengeance was really senseless, so would life be, or as Macbeth said, life would be a tale told by an idiot."

I am going to go away from the quote for just a moment. We don't have to take Shakespeare's words for it, we don't need Macbeth. Think about Clint Eastwood and all the Dirty Harry movies and Charles Bronson where he is an architect and goes out killing all these people because his wife has been murdered. Clint Eastwood in Dirty Harry, he has made millions of dollars playing this Dirty Harry, playing a kind of shall we say cop who uses pre-*Miranda* tactics on his prisoner. And why has he made all this money? Because it satisfies this longing for justice that we all have, this anger that we have.

Let me go back to the quote here, "We should use the criminal justice system to punish society from physical danger and to strengthen society by administering punishments that express and nourish through

controlled indignation the vigor of our values. We should be ashamed to live in a society that does not intelligently express through its institutions the public's proper sense of proportionate punishment for the likes of people like this defendant."

(RT 6282-6284.)

After discussing how appellant's lack of remorse prevented the jury from considering remorse as a mitigating factor (see RT 6284-6285), the prosecutor continued her argument as follows:

Now, another area I want to talk to you about is the social impact of your decision. Somehow it's a main point that by being a part of civilization, we give up something, but we give it up because we do get something in return and at some unknown point in our evolution from beast to man we voluntarily surrendered, we surrendered our right to individual justice. When man gave up this right to personal vengeance, he may have given up a great deal psychologically and the state's efforts can never ever give you the same feeling you get by exacting personal vengeance, but in return the state did give man two things. One, it lends us its powers so even the weak may have revenge, and secondly it does impose reason and order on its process of vengeance.

Now, the Rose family, is part of this social contract. They have given up their right to take personal vengeance on the defendant because they're law abiding. In return, they're entitled to action of the state that serves the same purpose. They're entitled to vengeance, plain and simple. They're not allowed to take this defendant to Clybourn and Chandler in North Hollywood and shoot a bullet into his head. They gave up their right for vengeance like we all did because we are law abiding, but we owe them something in return and something that they are not entitled to get on their own.

(RT 6285-6286.)

Defense counsel did not object to the above portions of the prosecutor's argument. (See RT 6282-6286.) On November 23, 1993, defense counsel filed a notice of motion and motion for new trial based solely on grounds of jury misconduct. (CT 1120-1151.) On January 5, 1994, defense counsel filed another notice of motion and motion for new trial based solely on grounds of jury misconduct. (CT 1153-1180.) On January 14, 1994, three jurors testified about the experiment conducted during penalty phase deliberations. (RT 6477-6511.) After hearing this testimony, the trial court invited counsel to file a new motion in order to incorporate the jurors' testimony. (RT 6513.)

On February 17, 1994, defense counsel filed his final notice of motion and motion for new trial based on grounds of jury misconduct and prosecutorial misconduct. (CT 1199-1244.) With respect to the issue of prosecutorial misconduct, defense counsel alleged that the prosecutor appealed to passion and prejudice during her closing argument by asserting that appellant shot the victim in the back of the head while the victim was either on his knees begging for mercy or running away in fear from appellant. Defense counsel argued that there was no evidence to support this assertion, or to support the prosecutor's theory that the victim had been shot in an "execution type slaying" while on his knees. (CT 1201, 1229-1232.) Defense counsel also argued that the prosecutor committed misconduct by asking the jury to give appellant the same amount of mercy he had shown the victim. (CT 1203, 1229-1232.) Defense counsel further argued, in response to comments made by the trial court on November 23, 1993, that the prosecutor had committed misconduct based on certain facial expressions and body language noticed by the court but not witnessed by defense counsel. (CT 1209, 1232-1235.) However, defense counsel did not address the issue of prosecutorial misconduct in the context of the prosecutor

improperly communicating the victim's family's preference for the death penalty during argument. (CT 1199-1244.)

During a record correction hearing held on March 14, 1994, the trial court asked counsel to address additional areas of "concern," including the prosecutor's comments "calling for the exercise of vengeance," the prosecutor describing the manner of death (with respect to the imposition of the death penalty) as painless and non-intrusive, and how emotional impact testimony should be evaluated in the context of "victim impact / circumstances of the crime" under section 190.3, subdivision (a). (RT 6692-6693.)

A hearing on the motion for new trial was held on March 30, 1994. (RT 6701.) Defense counsel indicated that he had not, nor did he intend to, file any additional written points and authorities in support of his motion for new trial. (RT 6702-6703.) The trial court stated that it had reviewed the transcript of the penalty phase and called counsels' attention to "the objections to testimony by Mr. Joseph . . . ." (RT 6703.) The court suggested some corrections to the transcript, and then noted,

> And the defense has not addressed Mr. Joseph's testimony and the court's overruling the defense objection in [the] context in which it happened. If you recall his testimony, it involved incremental portions and information came up during the course of his testimony which surprised both the people and the defense and I think that is something that needs to be addressed.

(RT 6703-6704.)

The trial prosecutor argued the issue of jury misconduct. (RT 6705-6711.) Deputy District Attorney Peter Berman then addressed the issues of prosecutorial misconduct to the extent they were based on the prosecutor's conduct observed by the court during the prosecutor's closing argument and comments allegedly made by the prosecutor in chambers. (RT 6712-6713.)

The trial court replied that the dispute in chambers with the prosecutor would not be considered in the context of prosecutorial misconduct. The court stated that the factors to concentrate on were the prosecutor's statements on the issue of vengeance and how they related to defense counsel's argument regarding jury misconduct. (RT 6713-6714.) The court then stated that it was also interested in:

> whether or not the prosecution communicated something to the jury without adducing testimony to the effect [of] what the victim's family's specific interests were with respect to the verdict. I think those are the real substantive issues that I am concerned about. The rest I think is not of any significance as to what the jury perceived or observed.

(RT 6714.)

The trial prosecutor stated that she was not prepared to argue the issue the court had just raised about whether she had communicated the victim's family's preference regarding the verdict. (RT 6717.) The prosecutor stated that she was prepared to comment on the issue of vengeance. The trial court stated that there were two separate issues, the concept of vengeance, and bringing to the jury's attention the family's preference regarding the outcome of the case. (RT 6718-6719.) The prosecutor reiterated that she was not prepared to address the issue of communicating the victim's family's preference regarding the verdict to the jury, but noted "off the top of [her] head" that she did not see how her argument could be interpreted as conveying the family's preference. (RT 6719.)

The prosecutor continued her argument, addressing the other areas of concern raised by the court, such as her argument regarding the method of the death penalty being painless and non-intrusive, her references to vengeance, and victim impact testimony. (RT 6719-6726.) Due to defense counsel's need to appear in another court in an unrelated case, the matter was continued. (RT

6727-6728.) The trial court invited defense counsel to file additional points and authorities on the issue of prosecutorial misconduct. (RT 6731-6732.) The prosecutor noted that the court had improperly expanded appellant's motion for new trial into an appeal, and that the court had exceeded the scope of the motion for new trial. The court did not respond. (RT 6732.)

When the proceedings resumed on April 7, 1994, defense counsel acknowledged that he had not filed any additional points and authorities, and he had none to present orally. (RT 6733.) Without inviting (or allowing)[18] any argument from either counsel, the trial court proceeded to grant appellant's motion for a new penalty phase trial. (RT 6742-6755.) The trial court first summarized the jury misconduct issue and found that there had indeed been prejudicial jury misconduct. (6742-6749.) The court then noted that the prosecutor had discussed the concept of vengeance in her penalty phase argument and observed that the victim's family was unable to seek their own personal vengeance. Such arguments were improper, according to the court, because "they effectively told the jury exactly what the desires of the family were with respect to the death penalty and that is something that is not permitted by the law." (RT 6750-6751.) The court further stated, "Any objective observer could not but conclude beyond a reasonably doubt that the Rose family clamored for the imposition of the death penalty. This was prejudicial." (RT 6752.) Finally, the court noted that it had invited briefing regarding allowing Joseph's testimony, but neither side had provided briefing. The court discussed the prejudicial other crimes evidence volunteered by Joseph. (RT 6752-6754.) The court then concluded, "For each and all of the

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18. At one point, the prosecutor attempted to address some of the issues raised by the court and to present points and authorities, but was asked to "kindly wait." (RT 6750.) Neither side was given an opportunity to present argument before the court ruled on the motion. (RT 6742-6755.)

foregoing reasons, the defense motion for a new trial as to the penalty phase only is granted." (RT 6755.)

The prosecution appealed the trial court's ruling to the California Court of Appeal, arguing, inter alia, that the trial court lacked the authority to raise on its own motion issues in support of granting a motion for new trial. (See Appellant's Mot. to Aug., Ex. A at p. 48, 66.) The court of appeal declined to address the issues of prosecutorial misconduct during the penalty phase argument and erroneous admission of other crimes evidence during the penalty phase, finding that the "trial court did not rely on those grounds in granting [appellant] a new penalty trial." (CT 1542-1543, fn. 3.)

B. The Trial Court Lacked The Power To Grant A Motion For New Trial Based On The Prosecutor's Alleged Urging That The Victim's Family Favored The Death Penalty

The trial court's comments supporting its decision to grant appellant's motion for new trial were somewhat unclear and could be interpreted as relying on the separate grounds of prosecutorial misconduct and the improper admission of other crimes evidence, in addition to the jury misconduct issue actually raised by the defense. However, the trial court had no power to raise issues on its own motion. A motion for new trial pursuant to section 1181 may only be granted upon application of the defendant. (*People v. Bangeneaur* (1871) 40 Cal. 613, 614.) In *People v. Skoff*, the court of appeal held that it was error for a trial court to grant a motion for new trial on a ground not specified in the defendant's motion for new trial. (*People v. Skoff* (1933) 131 Cal.App. 235, 239 (*Skoff*).) In *People v. Rothrock*, this Court cited *Skoff* with approval, in finding that a trial court may not grant a motion for new trial upon its own motion. (See *People v. Rothrock* (1936) 8 Cal.2d 21, 24 (*Rothrock*), citing *Skoff, supra*, 131 Cal.App. at p. 239.)

Here, defense counsel never raised the issue of whether the prosecutor had committed misconduct in communicating the victim's family's preference regarding the verdict to the jury. Even when the trial court asked counsel to address the issue, defense counsel declined to do so. (See RT 6714, 6731-6733.) Accordingly, even if the trial court intended to grant the motion for new trial based in part on the prosecutor improperly conveying the victim's family's preference for the death penalty, the trial court lacked the power to do so. (*Rothrock*, *supra*, 8 Cal.2d at p. 24; *Skoff*, *supra*, 131 Cal.App. at p. 239.)

Thus, when the California Court of Appeal found that the trial court did not rely on the findings of prosecutorial misconduct or the improper admission of other crimes evidence, it likely recognized that it would have been improper for the trial court to have done so, and construed any ambiguous comments suggesting reliance on such improper factors in a manner consistent with the assumption that a trial court understands and follows the law. (See *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913; Evid. Code, § 664.)

C. Appellant's Claim Of Prosecutorial Misconduct Has Been Waived

In order to preserve a claim of prosecutorial misconduct on appeal, a defendant must make a timely objection on grounds of prosecutorial misconduct and request an admonition. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1209.) This requirement does not apply if an objection or admonition would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Here, defense counsel failed to make a timely objection to the portion of the prosecutor's argument he now challenges. Because he has not demonstrated that an objection would have been futile or that an admonition would not have cured any harm, his claim is waived for purposes of appeal.

D. The Prosecutor Did Not Impermissibly Communicate To The Jury That The Victim's Family Favored The Death Penalty

Even assuming the issue has been preserved on appeal, the prosecutor did not commit misconduct. It is improper for a victim's family members to express their opinion to the jury regarding the proper verdict. (*Booth v. Maryland* (1987) 482 U.S. 496, 508-509 [107 S.Ct. 2529, 96 L.Ed.2d 440].) Furthermore, it is misconduct for a prosecutor to argue facts not in evidence or to imply the existence of facts known to the prosecutor but not the jury. (*People v. Bolton* (1979) 23 Cal.3d 208, 212-213.) However, no such error occurred in the instant case.

Appellant does not argue that any of the victim's family members testified about their preference that appellant receive the death penalty in this case. Rather, he argues that the prosecutor impermissibly conveyed this information to the jury during her argument. (See AOB 81.) Appellant's argument is unpersuasive.

This Court's decision in *People v. Montiel* (1993) 5 Cal.4th 877, is instructive. There, the murder victim's grandson testified that his grandfather, though 78 years old at the time of his death, was in excellent health and capable of enjoying life to its fullest. In closing argument, the prosecutor:

> asked the jury to remember the emotion in [the grandson's] testimony and urged that the victim's wife, siblings, children, and grandchildren had been robbed of a beloved relative. He concluded this portion of his argument by "implor[ing]" the jury to return the death penalty, not only for the victim, his "children and his family," but also for the People of the State of California.

(*People v. Montiel*, *supra*, 5 Cal.4th at p. 934.) This Court rejected the defendant's claim that the prosecutor's argument improperly conveyed that the victim's family favored the death penalty. As this Court explained, "a

reasonable jury would interpret the prosecutor's plea for death 'for' the victim's 'children and family' as merely a claim that the supreme penalty was the only appropriate means of redressing the injury." (*Id.* at p. 935.)

Likewise, in the instant case, the prosecutor's comments did not improperly convey the victim's family's preference for the death penalty. The prosecutor argued that law-abiding citizens, who give up their right to personal vengeance, may give up "a great deal psychologically," but in return, by allowing the state to prosecute crimes, "the weak may have revenge" and the process imposes "reason and order on its process of vengeance." The prosecutor had argued at the outset that the jury was limited in the evidence it could consider at the penalty phase, and that only factors in aggravation and mitigation were relevant. (See RT 6218-6219.) Thus, the prosecutor's reference to "reason and order" in the context of vengeance properly reminded the jury that it was required to follow the law as instructed by the court.

The prosecutor proceeded to argue that the victim's family members were law abiding, and thus, could not seek personal vengeance. (RT 6286.) She further argued,

> In return, they're entitled to action of the state that serves the same purpose. They're entitled to vengeance, plain and simple. They're not allowed to take this defendant to Clybourn and Chandler in North Hollywood and shoot a bullet into his head. They gave up their right for vengeance like we all did because we are law abiding, but we owe them something in return and something that they are not entitled to get on their own.

(RT 6286.)

In context, the prosecutor's argument merely suggested that the victim's law-abiding family members, who would not resort to personal vengeance, were entitled to vengeance to the extent "reason and order" allowed. As in *Montiel*,

the prosecutor's comments did not improperly convey the family's preference for the death penalty, but rather was merely a claim that the supreme penalty was the only appropriate means of redressing the injury. (*Id.* at p. 935.)

In any event, error, if any, was harmless. As previously stated, the prosecutor's argument largely focused on the aggravating circumstances of the current offense and appellant's prior acts of criminal violence, as well as the lack of any mitigating factors. There is no reasonable possibility the prosecutor's comments regarding the victim's family affected the verdict. Appellant's claim should be rejected.

III.

THE ADMISSION OF OTHER CRIMES EVIDENCE DOES NOT WARRANT A NEW PENALTY PHASE TRIAL

Appellant contends the trial court correctly ordered a new penalty trial based on Fred Joseph's testimony regarding inadmissible evidence of other crimes alleged to have been committed by appellant. (AOB 83-91.) Respondent submits the trial court lacked the power to raise this issue on its own motion and to grant a new penalty trial on this basis. Furthermore, a new penalty trial is not warranted based on the admission of other crimes evidence.

A. Relevant Proceedings Below

1. Fred Joseph's Testimony

Fred Joseph, the owner of a market in North Hollywood, testified at the penalty phase about appellant's involvement in throwing a Molotov Cocktail in the parking lot behind Joseph's market. On direct examination, Joseph testified that on April 20, 1986, at about 9:00 p.m., he was in the parking lot outside the market on his way to the trash can when two carloads of young males drove up quickly and started exiting the cars. Joseph feared the young men would attack him, because appellant had threatened him three weeks earlier. (RT 5337.) Appellant had been at Joseph's market, intimidating customers into giving him money. Joseph's brother was about to throw appellant out of the parking lot when Joseph came out. Appellant "started to get wise" with Joseph." Joseph went inside the market. Joseph's brother later told Joseph that appellant said he was going to kill Joseph. (RT 5338.)

When the two car loads of young men pulled up on April 20, Joseph did not see appellant, although he assumed he was there. (RT 5338.) Joseph went back inside and called the police. He later learned that there had been a fire in

the parking lot. (RT 5339.) When the police arrived, Joseph went out to the parking lot and saw that a huge area near the trash cans, which was where Joseph's customers would park their cars and just on the other side of the wall from an apartment building, had been burned. Joseph saw a glass bottle with a stain where it had been burned. (RT 5340.)[19] Defense counsel made no objections during Joseph's direct examination. (RT 5336-5441.)

On cross-examination, defense counsel asked whether Joseph had problems with anyone during the three weeks preceding the Molotov Cocktail incident. Joseph replied that he had had a problem with appellant. (RT 5342.) Defense counsel then asked the following series of questions:

Q Is that the only person with whom you feel you had a problem, sir?

A Well, he came back with another fellow in the store one hour after he threatened to kill me and we called the police at that time. [¶] And he was subsequently arrested. And his mother sent a lawyer into the store that tried to talk me out of prosecuting this kid because he was an only child or something.

Q So if I can interrupt you just one moment, sir. [¶] Let's take this step by step, if we could.

A Okay.

Q When you say "three weeks before this episode" - -

A It could have been a month and a half. I don't know.

Q Okay. Let's just say approximately a month. Let's say sometime in the latter part of March or first part of April. That was the first time

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19. Subsequent testimony from Lisa Nevolo placed appellant at the scene with a Molotov Cocktail in his hand just before the fire started. (See RT 5658-5662.)

you had any contact with a person that you felt was [appellant]; is that right?

A Yeah, and some of his friends. That we settled the trouble with some of the friends that were local people.

Q What I'm getting at, sir, is before you met [appellant], whenever that was, end of March, beginning of May, had you been having problems with other individuals at that particular establishment?

A You mean like shoplifters and people like that?

Q Any kind of behavior that you would characterize or classify as harassment of you as a store owner or of your customers.

A Not until after this. They started painting graffiti on the walls.

(RT 5342-5343.)

Defense counsel asked Joseph whether he had experienced any problems with gang activity prior to meeting appellant and whether he had had anyone else arrested around the same period of time preceding the Molotov Cocktail incident. Joseph testified that over the years, he had experienced problems with various "characters" who wanted to rob him, but at this particular point in time, he was only having trouble with appellant and his friends. Joseph further testified that he had worked with a local juvenile judge in the area in helping to prevent and remove graffiti from the walls around the market. (RT 5344.) Defense counsel then asked the following series of questions:

Q Was that something which had predated your first contact with [appellant]?

A No. At the time you're talking about with [appellant], I had trouble with [appellant] and there were some more kids he ran around with that lived down the street that I knew of that we approached and told them, "Look. Like you don't want to get in trouble. We don't want trouble. Like you guys back off or we are going to put you in jail." [¶]

But this one didn't back off. He came with two cars of like Spanish gang members on me. Okay?

Q Sure.

A And we had asked them to back off or we would put them in jail. It was that simple.

Q If I understand you, Mr. Joseph, you had indicated that your first contact with [appellant] was one in which he was alone; am I correct or incorrect in that?

A He was alone standing at the back door, yes, in a coat with his head shaved and trying to - - customers were frightened of him. He was asking for money. But he was standing in a very military stance. Like very threatening. He was being very pushy with them.

Q Between this moment you just mentioned to us, this first contact that you had with him and the events of April the 20th, 1986, did you see [appellant]?

A Did I see him again?

Q Yes.

A He came in the store with - - the same day after he threatened to kill me with this other tall fellow about his size.

Q So on the same day perhaps a month before April 20th [appellant] was having contact with your customers; is that a fair statement?

A Yeah.

Q Did you personally witness that, sir?

A I had complaints from customers. That's why we went to tell him that he had to leave the property.

Q My question is if you personally witnessed that, sir.

A I witnessed him standing - - I told my brother he is standing at the back door, right in the back door. I mean, right in our doorway.

Q With regard to what you witnessed, would you please tell the jury what it was that you saw [appellant] doing on that first occasion that you came in contact with him.

A He was just standing there like he had been standing there for 20 minutes when my brother came. [¶] Like he was standing there. And so when my brother came back from wherever my brother - - I told my brother, "We have got this dude standing at the back door. Is very intimidating to our customers and I have had complaints."

Q Was that in fact the only thing that you saw [appellant] do doing your first confrontation with him?

A Yeah. He was just standing there, yeah.

Q You stated, I believe, sir, if I'm not incorrect, that [appellant] returned to that store on that same date of the first - -

A An hour later, yeah.

Q Did you see him when he came back?

A Yes, I saw him coming across the parking lot. And I instantly went upstairs and told my brother that he was coming across the parking lot. [¶] And he came into the store. I saw him from upstairs. And we called the police instantly.

Q Would I be correct that in this second contact that you had with [appellant], albeit on the same day, what you saw him do was to walk across the parking lot and enter your store?

A Looking for me.

Q How do you know that?

A Because he had threatened me verbally to my brother.

Q So this is something - -

A They even arrested him with a knife. And it was an illegal search and seizure. [¶] And I can't understand. The guy had the knife. He had threatened me. He showed my brother the knife under his coat. They got him and let him go because it was an illegal search. [¶] I kept trying to have him arrested even with the judge. [¶] I mean, this guy is coming after me and I can't get him locked up.

Q You were trying to have him arrested through a judge?

A I was trying to get him locked up. This judge is a juvenile judge. He works with gangs and he works with the North Hollywood police. [¶] And I tried even with the probation - - I mean, we have lots of customers coming in the store. They are involved in the legal system. And I wanted this guy off my back. [¶] I mean, wouldn't you want this guy off your back?

Q My understanding, sir, is that you met [appellant] once about April - - before April 20th by about a month.

A Yeah.

Q That you see him standing by your store.

A Uh-huh.

Q That he returns about an hour later, walks across the parking lot and then enters the store.

A No, but when I started really going after him was when they came and threw the Molotov Cocktail. That's when I was really frightened. [¶] Then this guy was like the other ones said here, a few weeks later they come back and caught me in a parking lot in the middle of the night and they were about to attack me. [¶] You know, I'm outside and I got two carloads of these guys pulling up on me. [¶] Now, I didn't see, but I would assume, since I hadn't had no trouble with anyone else, that he was the one in the car and, you know.

(RT 5434-5439.)

Defense counsel attempted to clarify whether Joseph was really frightened on the first date he met appellant, as Joseph had indicated he was not really frightened until he saw the two carloads of people drive up. (RT 5349.) The following exchange ensued:

A That's when I really - - that's when I went to Jack Gold, the juvenile judge. That's when I went to the probation. That's when I really wanted to get this guy out of my hair.

Q When was it you went to Jack Gold?

A After the incident where they threw the Molotov Cocktail.

Q About this time in 1986?

A Yeah, because he helps work with gang units to keep graffiti off the walls and all.

Q Do you know whether Judge Gold ever had any contact as a bench officer with [appellant]?

A I have only heard hearsay that he was looking for Jack's house. [¶] And they got him sent to Florida or something after that.

Q This is something that you found out about Judge Gold; is that right?

A About this fellow and Judge Gold. But that's, like I say, that was hearsay in the area.

Q All right. Am I correct, sir, that between this first contact that you had with [appellant], which was on two occasions of one date, that you had no other contact with him until this date we have mentioned which is April 20th, 1986?

A I had contact with his friends and also with people down the street that he had threatened at the stained glass shop. [¶] It wasn't only me that he threatened in the area. Okay? [¶] And I don't know how

you run your life, but when we are out in the open we are like open targets. You got to take care of these people, these criminals fast. You have got to get them - - because it's not like when you're living in a house. No one knows where you are or who you are.

(RT 5349-5350.)

2. The Defense Request To Exclude All Evidence Regarding The Molotov Cocktail Incident On Grounds That There Was No Evidence Of Violence Directed Toward A Person

After Joseph finished testifying, defense counsel argued that since there was no evidence of violence against a person, no further witnesses should be allowed to testify about the Molotov Cocktail incident, and the jury should be instructed to disregard Joseph's testimony. (RT 5365.) The prosecutor argued that an upcoming witness, Lisa Nevolo, would testify that she saw appellant with the Molotov Cocktail in his hand, and that possession of a destructive device, which was eventually thrown, constitutes a threat of violence. (RT 5366.) The court expressed concern that the prosecutor's earlier offer of proof was that the Molotov Cocktail had been thrown at the market, which was occupied at the time. (RT 5370.) The trial court also observed that there had been a "wide description of nasty behavior by [appellant] from a very very adamant member of the community . . . ." (RT 5371.)

The prosecutor responded that she did not know ahead of time that Joseph would testify that the Molotov Cocktail was thrown randomly, rather than at the market, as she and defense counsel were both relying on the police report. (RT 5371.) The prosecutor summarized what she had stated earlier as an offer of proof regarding the witnesses she would call. The trial court acknowledged the prosecutor had accurately stated her offer of proof previously, and indicated that its statements to the contrary were incorrect. (RT 5372.) The trial court stated it had misunderstood and believed that a witness

would testify that appellant threw the Molotov Cocktail at the market, rather than at the trash bin in the parking lot. (RT 5373.)

The trial court asked whether there was a motion to strike Joseph's testimony. The prosecutor reiterated her argument that the incident still evidenced a threat to use violence. (RT 5373.) Defense counsel disagreed, noting there was no threat of violence. (RT 5375.) The trial court asked the prosecutor for an offer of proof as to Lisa Nevolo's testimony. The prosecutor replied that Nevolo would testify that she saw appellant with a Molotov Cocktail in his hand and within a minute, a fire had started. (RT 5379-5381.)

The trial court tried to summarize the argument that the incident constituted a threat of violence, i.e., that the setting of the incendiary device was in close proximity to Joseph's store, which was an implied threat of violence, in attempting to "shake him up a little bit." (RT 5382.) In response to defense counsel's argument that there was no witness who saw appellant throw the Molotov Cocktail, the trial court noted that appellant was seen carrying it, so a trier of fact could infer that he threw it. (RT 5384.)

The following day, the court again addressed the issue of the Molotov Cocktail incident. Defense counsel argued that evidence of this incident was inadmissible because it did not constitute violence against a person. (RT 5558.) The prosecutor argued that considering the history between appellant and Joseph, the throwing of the Molotov Cocktail could be viewed as an implied threat of violence against Joseph. (RT 5559.) The trial court reiterated its concern that the evidence did not conform to its original understanding of the offer of proof, i.e., that appellant threw the Molotov Cocktail at an occupied building, and was instead thrown about seven car lengths away from the market. (RT 5559-5560.) The trial court stated that for the jurors to conclude this was part of a threat aimed at Joseph, they would have to rely on Joseph's state of mind, and that Joseph based his opinion in part on hearsay not subject

to cross-examination. The trial court also expressed concern under Evidence Code section 352 that Joseph had introduced additional information such as the fact that he had sought help from a judge in dealing with appellant. (RT 5560.) The court stated that the jury might focus on the other factors that had been introduced, which may be more prejudicial than probative. Finally, the court noted that the evidence was "somewhat cumulative." For these reasons, the court stated it would grant appellant's motion to strike Joseph's testimony. (RT 5560-5561.)

The prosecutor then pointed out that the court may have overlooked the fact that Joseph had testified that he was outside on his way to take the garbage out when the two carloads of young men drove up, and the Molotov Cocktail eventually was thrown in the area near the garbage cans. (RT 5561.) The prosecutor argued that throwing a Molotov Cocktail was a violent act, and the focus should not be on state of mind. The trial court replied that Joseph had described appellant as "public enemy number 1" and "the worst of all the worst." Joseph presented a number of factors which tended to be unduly prejudicial as compared to the probative value of the evidence. The court further stated that the testimony regarding this incident was somewhat cumulative in light of all the other incidents presented to the jury. (RT 5562.)

The prosecutor argued that all of the aspects of Joseph's testimony mentioned by the court had been elicited by defense counsel on cross-examination. (RT 5563.) The prosecutor also reiterated her argument that it was not a "giant leap" to assume that appellant was targeting Joseph, when Joseph had just been in the area near the trash bin, where the Molotov Cocktail was ultimately thrown. The trial court disagreed with the prosecutor's recollection of the testimony but stated it would reread the record. (RT 5564.)

The following day, the court revisited the issue. The court acknowledged that it did not have the power to exclude all evidence with

respect to a section 190.3, subdivision (b) aggravating factor on grounds of Evidence Code section 352. (RT 5617.) The court noted that it had "major problems" with Joseph's testimony, which was attributed in large part to Joseph being a "very difficult to control witness." The court specifically noted Joseph's testimony on direct that Joseph's brother had told Joseph that appellant was going to kill Joseph. The court also identified problematic testimony Joseph gave on cross-examination, such as the fact that appellant went looking for a judge's house, which implied that appellant intended to do some harm to the judge. (RT 5620.) The court also noted Joseph's volunteered testimony that appellant had threatened someone at a stained glass shop. The court noted several other examples of prejudicial testimony given by Joseph. (RT 5621-5622.)

The trial court then stated that a violation of section 12303.3 (possession of a destructive device) did not necessarily have to rest on threatening Joseph, and that a violation of the statute did not require the intent to intimidate any particular person. (RT 5622.) The court then invited comment from counsel. Defense counsel stated that he had discussed the matter with the prosecutor, and they had reached a tentative solution, which he described as follows:

> I believe that we have a tentative solution, if that is acceptable with the court. Each one of us feels that it would be counter productive if it could be done practically to recall Mr. Joseph to the stand. It would likely result in a repetition of much the same type of testimony as we saw the other day.
>
> Similar problems are engendered if the jury is instructed in some fashion or another to disregard or not pay attention to the testimony of Mr. Joseph. They have in fact heard it.

If not carefully drawn and drafted, the instruction could in fact heighten the problems which have been created rather than abate those problems.

Consequently, we have agreed upon some wording very similar to the wording used with regard to the testimony of Maria Gutierrez when she indicated that because of things that other people had told her, her attitude and demeanor toward the defendant had changed.

With the thought in mind, that perhaps the most significant areas of problem in the testimony of Mr. Joseph could be abated by a stipulation or instruction that any information given to him or related to him by others was not offered for the truth of those matters, but only for the purpose of establishing Mr. Joseph's state of mind and giving meaning to his testimony, essentially.

(RT 5623-5624.)

The trial court asked what effect such a stipulation would have on the prosecution proceeding with evidence regarding the violation of section 12303.3. The prosecutor responded that it would allow the jurors to consider the areas of Joseph's testimony which related directly to the Molotov Cocktail incident, which combined with Nevolo's testimony and the police officer who arrived at the scene of the fire, would then leave the jury to determine whether there was a violation of section 12303.3. The prosecutor argued that Nevolo would place appellant with a Molotov Cocktail in his hand walking in the direction of Joseph's store and parking lot. (RT 5624.) Nevolo would testify that she then saw a flame and thought a building was on fire, and she subsequently saw appellant. (RT 5625.)

The court asked counsel to focus on the elements of the offense, and stated that intent to destroy property alone was not sufficient. (RT 5625.) After hearing further argument from the prosecutor, the trial court asked whether the

defense was withdrawing its motion to strike the testimony. (RT 5634.) The court noted that one option was to strike the testimony and allow the prosecutor to proceed on the incident based on the fact that appellant was in the shopping center with a Molotov Cocktail, and allow the jury to determine whether or not appellant had the intent to intimidate or terrify people. (RT 5634-5635.) Before defense counsel could answer, the trial court asked the prosecutor what the police officer would testify to. The prosecutor replied that the police officer would testify that he saw the burning on the ground in the parking lot, he retrieved components from a Molotov Cocktail, and that Nevolo gave him a license plate number of the car that drove away. The trial court then made the following statement:

> The Court: Well, clearly, the People do have the right to present evidence that the defendant was in possession of this type of an explosive device.
>
> And inferentially, why would somebody else be in possession of such a device in an open retail area except to intimidate.
>
> And then the jury will determine what the proper inferences are. [¶] But to infer he had the specific intent to come after Mr. Joseph, I think, is not supported by the current state of the record for the reasons I have indicated. I.e. that there was a four to six week passage period of time. [¶] That there were other people that he had been intimidated by, although this is only hearsay. [¶] And given the full opportunity to really throw the incendiary devise [sic] at the store, he didn't do that. And instead, "They were disposing of it."
>
> So you wish to proceed pursuant to the previous stipulation and simply invite a limiting instruction?

(RT 5635-5636.)

At that point, the prosecutor stated,

[Prosecutor]: May I read the proposed limiting instruction and see what the court has to say about it? [¶] We thought we would tailor something along these lines:

> With respect to Mr. Joseph's testimony, you are advised that anything he testified to which he claimed was related to him by others is not to be considered by you for the truth of those facts, but only to consider such testimony as it affected Mr. Joseph's state of mind and in court testimony.

(RT 5636, internal quotation marks omitted.)

The trial court invited a response from defense counsel and suggested including language about the presence or absence of bias, interest, and motive. Defense counsel replied, "Defense would suggest an approach where we can agree upon language, and I think perhaps the bias, interest and motive would be an appropriate inclusion. I don't think we would have a problem with that." (RT 5636.) The trial court then added, "I would suggest that you might consider another cautionary sentence to the effect Mr. Joseph's state of mind cannot be impugned [sic] to the defendant." The trial court then asked both counsel to submit an instruction, if they could reach an agreement. Defense counsel replied, "I believe so. We discussed it quite a bit over the noon hour and I think our thought processes are pretty close." (RT 5637.)

3. The Instruction Given To The Jury Regarding Joseph's Testimony

The trial court ultimately gave the jury the following instruction, which was agreed upon by both counsel:

> With respect to the testimony of Mr. Fred Joseph, you are advised that anything he testified to which he claimed was related to him by others, is not to be considered by you for the truth of those facts.

You are only to consider such testimony as it may have affected Mr. Joseph's state of mind. Mr. Joseph's state of mind cannot be imputed to the defendant.

(CT 1100; RT 6203.)

4. The Motion For A New Penalty Phase Trial

As previously discussed in Arguments I and II, defense counsel moved for a new penalty phase trial, initially on grounds of jury misconduct alone, and subsequently on grounds of prosecutorial misconduct. (See CT 1120-1151, 1153-1180, 1199-1244.) At no time did defense counsel raise the issue of Joseph's testimony regarding other crimes evidence as a ground for a new penalty phase trial, despite the trial court's request that defense counsel address this issue. (See RT 6752.) At the hearing on the motion for new trial, the trial court raised the issue of Joseph's testimony regarding inadmissible other crimes evidence as a possible separate ground for a new penalty phase trial. The trial court made the following comments:

I've invited briefs on the effect of my rulings allowing Mr. Joseph's testimony to be heard by the jury and this is an area that caused me great concern at the time. Now, neither side has briefed it for me.

If you recall, counsel, the prosecution had given the defense notice that it intended to introduce as a factor in aggravation, among others, an act of violence directed at Mr. Joseph, specifically the throwing of a Molotov Cocktail at Mr. Joseph. . . .

Early on [defense counsel] objected based on the then available offer of proof and objected to the introduction of such evidence arguing that the violence was aimed at real estate and not a person because the Molotov Cocktail was thrown at a liquor store. I inquired in camera about whether or not the liquor store was inhabited and concluded that

it was and based on the fact that it was thrown at the liquor store which was inhabited, I felt that clearly this is an act of violence against a person and I overruled the defense objection. Mr. Joseph was allowed to testify, and please let me be clear, I am not assessing blame on either side. It appears to me Mr. Joseph was a witness that was uncontrollable and provided partial information to the People as it was presented to me at different states. Once he took the witness stand, it turned out that the Molotov Cocktail was not even thrown at the liquor store at all but instead at a [garage][20/] approximately 120 feet away, and again the defense moved for the exclusion of his testimony and I overruled the defense objection based on the case of authority cited by the People to the effect that sufficient notice has been given by virture [sic] of the proximity in time and totality of existing circumstances; but then on direct Mr. Joseph volunteered in response to another question that [appellant] had committed other acts of violence of which notice was never given that he had threatened to kill Mr. Joseph three weeks earlier, and that he had threatened customers. On cross-examination, Mr. Joseph was uncontrollable and non responsive at every turn of events. He repeated that [appellant] had threatened to kill him, that is Mr. Joseph, and then volunteered that [appellant] was the worst of the bunch, that other kids had been controlled but not [appellant]. He testified to attempted robberies where [appellant] was standing in a military stance threatening, asking customers for money, testified to an arrest totally unrelated in time and circumstance where [appellant], where Mr. Joseph did a citizen's arrest on [appellant] with a knife and then volunteered that he, meaning Mr. Joseph, went to his customer, Jack Gold, who he believed to be a superior court judge. I believe Judge

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20. It appears the intended words may have been "garbage can."

Gold is a commissioner or was a commissioner at the time and then further volunteered that [appellant] was looking for Jack Gold's house. Again, I am not assigning fault. I believe counsel had no way of knowing what was going to be said from one minute to the next, but all of these outbursts by Mr. Joseph brought to the attention of the trier of fact circumstances in aggravation these acts of violence, which were not noted and which I think are rather powerful. Not the least of which is the suggestion that [appellant] is, was the very worst of the bunch and that it was not beyond him to go looking for a superior court judge for whom he had matters pending to get the judge to do his bidding.

For each and all of the foregoing reasons,[21] the defense motion for a new trial as to the penalty phase only is granted.

(RT 6752-6755.)

B. The Trial Court Lacked The Power To Raise The Issue Of Joseph's Testimony Regarding Other Crimes Evidence On Its Own Motion

As previously discussed in Argument II, a motion for new trial pursuant to section 1181 may only be granted upon application of the defendant. (*People v. Bangeneaur*, *supra*, 40 Cal. at p. 614.) Furthermore, a trial court errs in granting a motion for new trial based on a ground not specified in the defendant's motion for new trial. (*People v. Skoff*, *supra*, 131 Cal.App. at p. 239; see also *People v. Rothrock*, *supra*, 8 Cal.2d at p. 24, citing with approval *People v. Skoff*, *supra*, 131 Cal.App. at p. 239.)

Here, defense counsel never raised the issue of Joseph's testimony regarding other crimes evidence in his motion for new trial. (See CT 1120-1151, 1153-1180, 1199-1244.) Rather, even after the trial court invited defense

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21. Before discussing Joseph's testimony, the trial court had also found that jury misconduct and prosecutorial misconduct had occurred. (RT 6742-6752.)

counsel to raise the issue, defense counsel declined to do so. (See RT 6703-6704, 6752.) Accordingly, although the trial court's comments in support of granting the motion for new trial could be interpreted as relying on this ground as a separate basis, it clearly would have been improper to have done so. (*People v. Rothrock*, *supra*, 8 Cal.2d at p. 24; *People v. Skoff*, *supra*, 131 Cal.App. at p. 239.)

C. A New Penalty Phase Trial Was Not Warranted Based On Joseph's Testimony Regarding Other Crimes Evidence

In any event, a new penalty phase trial was not warranted. In the context of a penalty phase of a capital trial, the standard for evaluating whether the improper admission of evidence warrants a new trial is whether it is reasonably possible that any error affected the verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.) In the instant case, it was not reasonably possible that the admission of Joseph's testimony as it related to other crimes evidence affected the verdict.

Essentially, the jury heard the following testimony from Joseph regarding "other crimes": appellant told Joseph's brother that he was going to kill Joseph (RT 5338); Joseph was only having problems with appellant and his friends (RT 5342-5343); the other "kids" Joseph was having trouble with backed off when Joseph threatened to put them in jail, but appellant did not (RT 5345); between three and six weeks before the Molotov Cocktail incident, appellant stood alone at the back door to Joseph's market in a "very military stance" and was being pushy with customers, causing Joseph to ask appellant to leave the premises (RT 5338, 5345-5346); appellant came back to the store an hour later looking for Joseph (RT 5347); appellant showed Joseph's brother a knife and he was later arrested with a knife but a search and seizure were found to be illegal (RT 5347); Joseph learned through hearsay that appellant

had gone looking for a judge's house and that appellant was sent to Florida (RT 5350); and appellant had threatened people down the street at a stained glass shop (RT 5350). Respondent submits these facts were properly adduced as facts surrounding the Molotov Cocktail incident. (See *People v. Melton* (1988) 44 Cal.3d 713, 754.)

Moreover, although the jury heard Joseph refer to several prior bad acts involving appellant, it was clear that much of Joseph's testimony was not based on personal observation, but was instead based on information provided to him by other individuals. (See RT 5346-5347, 5350, 5352.) Finally, rather than asking for any of the alleged prejudicial aspects of Joseph's testimony to be stricken from the record, which it appears the trial court would have been amenable to doing, defense counsel instead joined with the prosecutor in drafting a limiting instruction. (See RT 5623-5624, 5636-5637, 6203; CT 1100.) Accordingly, any claim that the other crimes evidence was prejudicial has been waived, as defense counsel did not move to have the testimony stricken. (See, e.g., *People v. Sanchez* (1995) 12 Cal.4th 1, 55.) With defense counsel's agreement, the jury was instructed that anything Joseph testified to which he claimed was related to him by others could not be considered for the truth of the matter; rather, such evidence was only relevant to Joseph's state of mind and could not be imputed to appellant. (CT 1100; RT 6203.) Jurors are presumed to follow the law as provided in admonitions and instructions. (See *People v. Adcox* (1988) 47 Cal.3d 207, 253.) There is no reason to believe the jury would not have followed the curative admonition that defense counsel participated in drafting.

Moreover, the jury was instructed that in determining the penalty, it could only consider the limited factors provided in CALJIC No. 8.85. Thus, the jury was instructed that the only factors in aggravation it could consider included the circumstances of the current crime and any special circumstance

found to be true, prior criminal activity involving violence, and prior felony convictions. (See CT 1091; RT 6200-6202.) With respect to prior acts of criminal violence, the specific incidents the jury was allowed to consider were listed in CALJIC No. 8.87. Aside from the "possession of a destructive device with intent to injure or intimidate a person," none of the allegedly prejudicial acts mentioned by Joseph were included in CALJIC No. 8.87. (CT 1106-1107; RT 6206-6207.) Moreover, CALJIC No. 8.87 expressly advised, "A juror may not consider any evidence of any other criminal activity as an aggravating circumstance." (CT 1106; RT 6206.) As previously stated, jurors are presumed to follow the court's instructions. (*People v. Adcox*, *supra*, 47 Cal.3d at p. 253.)

Furthermore, it is almost inconceivable that Joseph's testimony about other crimes committed by appellant would have affected the jury's verdict. Appellant was born on June 26, 1970. (RT 5877.) He threw the Molotov Cocktail into the parking lot behind Joseph's store on April 20, 1986, when he was only 15 years old. (RT 5337.) The other information Joseph volunteered about appellant likewise involved the same time period when appellant was approximately 15 years old. (RT 5338-5350.)

The jury heard far more damaging evidence regarding more recent acts of violence appellant had committed, including cutting John Hall's back with a sharp object in 1988 when appellant was fleeing from an AM-PM market, where a robbery had just been reported (RT 5408-5410; 5645-5647); the robbery of Sandra Trujillo in 1988, during which appellant approached Trujillo's car, pointed a gun at her head, and ordered her out of the car (RT 5607-5610); attempting to engage a passive individual in a fight while appellant had a concealed pocket knife in an open position in his pants pocket in 1989 (RT 5390-5398); assault with a deadly weapon in 1989, at which time appellant tried to stab two younger boys outside a 7-Eleven store (RT 5425-5428, 5440-

5442); robbery of a fellow inmate at Wayside Jail in 1992 (RT 5465-5467); attempted robbery and extortion of a fellow inmate at Wayside Jail in 1992 (RT 5470-5473); and assault in 1993, when appellant kicked a deputy sheriff while in custody at Wayside Jail (RT 5528-5530, 5540-5541).

In light of the above evidence, and more importantly, the callous and cold-blooded nature of the murder and kidnapping in the instant case, there was no reasonable possibility that any improper evidence regarding additional crimes appellant may have committed when he was 15 years old affected the verdict. Indeed, when appellant's motion for reduction of the sentence pursuant to section 190.4, subdivision (e) was ultimately denied, the trial court stated that it had considered appellant's prior criminal acts of violence, and proceeded to make the following comments:

> However, the court finds that the repugnant circumstances of this tragic murder are sufficient in and of themselves, even in the absence of the aforementioned evidence of prior felony convictions and criminal activities, to substantially outweigh the mitigating circumstances.

(RT 6997.)

Because there is no reasonable possibility any improper other crimes evidence volunteered by Joseph affected the penalty phase verdict in this case, a new trial was not warranted based on the admission of the evidence. Appellant's claim must be rejected.

IV.

APPELLANT'S CLAIM THAT THE PROSECUTOR COMMITTED MISCONDUCT BY ELICITING INADMISSIBLE EVIDENCE HAS BEEN WAIVED; IN ANY EVENT, THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR MISTRIAL BASED ON GUTIERREZ'S TESTIMONY REGARDING THE ORIGIN OF APPELLANT'S COLLECT TELEPHONE CALLS

Appellant contends the trial court erred in denying his motion for mistrial after prosecution witness Maria Salome Gutierrez made comments which the jury could have interpreted as appellant having been recently released from prison. (AOB 92-97.) Appellant has waived any claim that the prosecutor committed misconduct by eliciting inadmissible testimony in this regard, as he failed to object on this ground in the trial court, and he rejected the trial court's offer to admonish the jury. Furthermore, the trial court did not abuse its discretion in denying appellant's motion for mistrial based on the admission of allegedly prejudicial testimony that appellant had made $1,200 worth of collect calls to Gutierrez while he was in Susanville, and that these calls were made while appellant "was still in Susanville before he got out in December." Finally, any error was harmless given the compelling evidence of appellant's guilt and the fact that appellant himself emphasized his past contacts with law enforcement to explain many of his actions.

A. Relevant Proceedings Below

During a break in Gutierrez's testimony, the prosecutor informed the court in a sidebar conference that she planned to ask Gutierrez whether appellant had called her and asked her to tell the police he had been with her "the whole time" and not to say anything about the credit cards in his possession. The prosecutor assured the court she would not mention the fact

that appellant had called Gutierrez from jail. Defense counsel did not object. (RT 2924.)

Gutierrez subsequently testified that about a week after the party at her cousin's house, appellant called her. Appellant told Gutierrez to tell the police that she had not seen a gun or any credit cards, and that she had been with appellant the whole time. Gutierrez told appellant she would lie for him, although she never did. (RT 2931-2932.) On cross-examination, Gutierrez acknowledged the telephone call from appellant came before she spoke to the police on January 30, so it could not have been a week after the party, which was on January 24. Gutierrez did not recall whether she had mentioned her telephone conversation with appellant when she was interviewed by the police on January 30. (RT 2932-2933.)

On redirect, the prosecutor asked Gutierrez the following series of questions:

> Q Now, you were also just asked some questions about whether you had said anything to the police officers about the defendant calling you. [¶] Do you recall in fact that the first time you did meet with Detective Castillo you did tell him that the defendant had been trying to call you ever since he had been arrested?
>
> A Yes.
>
> Q Was that true?
>
> A Yes.
>
> Q Did you also tell him that you wouldn't accept his calls?
>
> A Yes, because I didn't have money to pay for them and my mom wouldn't let me accept them.
>
> Q And you also told the detectives that other members of the defendant's family called you; isn't that true?
>
> A Yes.

Q And who was that?

A His mother.

Q And the conversation that we referred to a little while before where he did tell you to lie to the police and say he had been with you and not to mention anything about credit cards, et cetera, when was that in relationship to having told the detectives this statement? [¶] Was that right after that that he called you or was that one of the other phone calls you previously referred to?

A It was one of the previous phone calls.

Q So one time he did get through to you; is that correct?

A Yeah.

(RT 2941-2942.)

Defense counsel then further cross-examined Gutierrez as follows:

Q With regard to the telephone contact, isn't it true while you were living with Olga and Tony Munoz you built up a $1200 phone bill talking to [appellant]?

A Yes.

Q So the subject matter of telephone calls was a little sensitive around the house; is that a fair statement?

A Yes.

Q The conversation we have talked about, the one where the two of you actually made contact and spoke, was that before or after you spoke to the police officers on January 30, 1992?

A It was before.

Q My question was you talked to them on the 30th and you said, "Look. [Appellant] had been trying to reach me"; is that right?

A Yes.

Q But [you] said that you had not accepted the phone calls; am I right?

A No, I didn't. I didn't accept no phone calls.

Q But you didn't tell them about the one phone call that you now say happened before meeting with them; is that right?

A It was a direct call. It came through without an operator or anything.

Q What I'm asking you is you didn't tell the police about that at the time when you met with them on the 30th; am I right?

A Yes, I did.

(RT 2942-2943.)

The prosecutor then asked Gutierrez the following questions on further redirect:

Q Salo, this $1200 bill that you ran up, how did you run up a $1200 phone bill?

A He would call every night collect and he was in Susanville.

Q So now how much would each one of these calls be?

A A lot. I would tell him to call me back or that I needed to get off the phone and I would stay on. I would get another call and he would stay on the line and hold.

Q This was in a period of one month that you built up a $1200 collect phone bill?

A No. This was when he was still in Susanville before he got out in December.

Q How long a period of time did this $1200 phone bill encompass?

A About three months.

(RT 2944.)

After Gutierrez was done testifying, defense counsel moved for a mistrial. The following proceedings transpired in chambers:

[Defense Counsel]: Motion for mistrial based upon the response of the witness indicating not only that [appellant] was in Susanville, but that he was released in December preceding these events.

[Prosecutor]: May I respond briefly. [¶] First of all, I don't know anyone who knows what Susanville is.

The Court: It's a place people are released from.

[Prosecutor]: I had not even been aware of that and I'm a deputy DA, number 1. [¶] Number 2, I don't think she she [sic] said "released." "When he had got out." [¶] I don't know - - I quickly stopped any questioning. I did not realize that was going to be her response and it was certainly not something that I had brought up. [¶] The subject of phone bills was something elicited by defense counsel, but it was a sensitive issue about this $1200 phone bill.

The Court: Well, you know, I guess what I'm going to ask you is I'm really rather concerned with a series of things that have happened. And I'm not suggesting that they were done with any bad motive, but it is happening enough that I want to avoid it in the future. [¶] So I want to highlight what I'm concerned about. [¶] Number 1, I would really like - - I'm going to be - - I'm going to request a showing in the future as to why direct needs to be reopened. [¶] This has happened consistently. With less sensitive witnesses perhaps it didn't matter. But after the direct was completed and cross-examination there was a request to reopen in a very major, major issue which caused about 45 minutes of additional questioning. [¶] I think this is something that can be predicted ahead of time. So please, if you need a recess between witnesses to check your outline, ask me for it. But I would like to avoid reopening

direct because it's happened with almost every witness. [¶] With these witnesses I think that has a potential for being sensitive. [¶] There were two areas. One was not objected to. "Why did you change your mind?" There was no objection so she answered the question. And she made a rather strong statement to that effect. [¶] And then going to the area of the phone calls. These things are predictably sensitive.

[Prosecutor]: Your honor, frankly, I take great offense at what the court is saying. [¶] I did not raise either of these two areas. The defense did. Now, do you expect me to just leave those questions hanging up in the air?

The Court: Look. I have no idea. No, I don't expect you to do that. But I would like to be alerted that these phone calls were from Susanville. I certainly had no idea where the phone calls came from. And had I known that I would have called [a sidebar] conference and I would have avoided it.

[Prosecutor]: Judge, I did not know she had a $1200 - - or if I knew I had forgotten about a $1200 phone bill. [¶] I know there was a problem with the phone bill which is why she was no longer in the house. [¶] I'm not so sure or that it was a three month phone bill from Palmdale where she is living with her mother or where, but counsel certainly opened the door. I did not ask - -

The Court: Again, that's not the issue. I don't see that this is so prejudicial that it calls for a mistrial. I will deny the motion.

(RT 2945-2947.)

B. Appellant's Claim Of Prosecutorial Misconduct Is Waived; Furthermore, It Is Also Meritless

It is misconduct for a prosecutor to intentionally elicit or attempt to elicit inadmissible evidence in violation of a trial court's ruling. (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Silva* (2001) 25 Cal. 4th 345, 373.) Even if appellant makes a showing of such misconduct, he must also demonstrate prejudice -- i.e., that it is reasonably probable that a result more favorable to him would have occurred had the prosecutor refrained from the complained-of conduct. (*People v. Milner* (1988) 45 Cal.3d 227, 245.) In order to preserve a claim of prosecutorial misconduct for purposes of appeal, the defendant must object and seek an admonition, unless an objection and admonition would not cure the harm. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.) Here, appellant's claim of prosecutorial misconduct is not preserved for appeal because there was no timely objection on any ground, let alone an objection based on grounds of prosecutorial misconduct.

Furthermore, the claim is waived because the trial court offered to admonish the jury (RT 2982), but defense counsel expressly rejected this offer (RT 3275).[22] (See *People v. Valdez* (2004) 32 Cal.4th 73, 124 [claim of prosecutorial misconduct waived where defense refused trial court's offer to admonish jury regarding police officer's reference to the defendant being interviewed at the "Chino institute"] (*Valdez*); *People v. Silva*, *supra*, 25 Cal.4th at p. 373 [claim of prosecutorial misconduct waived where defense rejected court's offer to admonish jury and such admonishment would have cured any harm].) This is precisely the type of scenario where a prompt objection would have cured any harm. When Gutierrez testified that the telephone calls occurred

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22. Specifically, defense counsel stated: "For tactical reasons defense counsel is not asking for any cautionary instruction in that regard. [¶] It is felt that such a cautionary instruction would simply underline the reference." (RT 3275.)

while appellant was in Susanville, a rather benign comment as far as the jury was concerned,[23] defense counsel had sufficient information to object and seek to prevent further testimony that might imply appellant was incarcerated in Susanville. By failing to do so, Gutierrez further testified that the phone charges were incurred when appellant "was still in Susanville before he got out in December." (RT 2944.)

When defense counsel did raise a concern, it was not until after the allegedly prejudicial testimony had occurred, and even then, the concern was raised in the context of requesting a mistrial, not objecting on grounds of prosecutorial misconduct and requesting an admonition as the law on prosecutorial misconduct requires. (*People v. Williams* (1997) 16 Cal.4th 153, 254 [motion for mistrial does not preserve an objection for purposes of prosecutorial misconduct].) Furthermore, any harm caused by Gutierrez's testimony could have been cured by an admonishment. (See *Valdez, supra*, 32 Cal.4th at p. 125 ["The isolated reference to Chino Institute was not so grave that a curative instruction would not have mitigated any possible prejudice to defendant"]; *People v. Price* (1991) 1 Cal.4th 324, 428-431 [prosecution witness's brief, improperly volunteered reference was cured by admonishment; likewise another prosecution witness's improper disclosure that defendant admitted having served many years in prison also cured by admonishment; neither event mandated mistrial]. Thus, any claim of prosecutorial misconduct should be deemed waived.

Furthermore, the prosecutor did not commit misconduct. On cross-examination, defense counsel initiated the line of questioning regarding Gutierrez incurring a $1,200 telephone bill as a result of talking to appellant

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23. As the prosecutor pointed out in response to appellant's motion for mistrial, it was unlikely that the average juror would be aware of a prison in Susanville, as the prosecutor herself was not even aware of this fact. (RT 2945.)

while she lived with Tony and Olga Munoz. (RT 2942.) It appears this may have been done in an attempt to discredit Gutierrez's testimony that appellant had called her a week after the party at her cousin's house and told her not to tell the police anything about credit cards and to tell the police appellant had been with her the whole time. It seems defense counsel was attempting to imply it was implausible Gutierrez would have spoken to appellant, because she was no longer accepting his collect calls due to the very large telephone bill she had previously incurred as a result of speaking to appellant at the Munoz residence. Because defense counsel had raised the $1,200 phone bill as an area of inquiry, the prosecutor was entitled to address this topic on redirect. (See *People v. Navarette* (2003) 30 Cal.4th 458, 509 [prosecution entitled to clarify on redirect issues brought up by defense during cross-examination].)

Moreover, the questions the prosecutor asked were not likely to elicit inadmissible evidence. The prosecutor first asked Gutierrez how she incurred the $1,200 phone bill. Gutierrez's response was that appellant "would call every night collect and he was in Susanville." (RT 2944.) Although Gutierrez volunteered the city from which appellant called, the question easily could have been answered by explaining that appellant called her collect every night. The prosecutor's question did not specifically call for the location from which the calls originated, and thus, the prosecutor could not have anticipated Gutierrez's response. (See *Valdez*, *supra*, 32 Cal.4th at p. 125 [no misconduct where prosecutor did not intentionally solicit and could not have anticipated reference to inadmissible evidence].)

Likewise, the prosecutor's follow-up question regarding whether the $1,200 in telephone charges were incurred in a one-month period was not likely to elicit a response addressing when appellant had been released from Susanville. The prosecutor was merely attempting to clarify the issue of the $1,200 phone bill, which had been raised by defense counsel, when she asked,

"This was in a period of one month that you built up a $1200 collect phone bill?" There was no way to anticipate that Gutierrez's response to this question would be, "No. This was when he was still in Susanville before he got out in December." (RT 2944.) Everything beyond "No" went beyond the call of the question and constituted volunteered information. Indeed, the prosecutor subsequently represented to the court that she did not realize the witness would respond in that manner, and she "quickly stopped any questioning." (RT 2945.) Accordingly, appellant's claim that the prosecutor's questioning aimed to elicit inadmissible evidence is unpersuasive, as the prosecutor could not have anticipated Gutierrez's response. (See *Valdez*, *supra*, 32 Cal.4th at p. 125.)

C. The Trial Court Properly Denied Appellant's Motion For Mistrial

Furthermore, the trial court did not abuse its discretion in denying appellant's motion for mistrial. While exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case, see *People v. Harris* (1994) 22 Cal.App.4th 1575, 1580, a motion for mistrial should only be granted where the defendant's chances of receiving a fair trial have been irreparably damaged. (*People v. Bolden* (2002) 29 Cal.4th 515, 555 (*Bolden*).) The prejudice must be incurable by admonition or instruction. (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and a trial court is vested with considerable discretion in ruling on a motion for mistrial. (*People v. Williams*, *supra*, 16 Cal.4th at p. 210; *People v. Price*, *supra*, 1 Cal.4th at p. 428; *People v. Haskett*, *supra*, 30 Cal.3d 841, 854.)

In *Bolden*, a police officer called as a prosecution witness testified about the circumstances of the defendant's arrest. When asked whether he had determined the defendant's address, the officer testified that it was the "Department of Corrections parole office located at - -." The prosecutor

interrupted the officer and asked for the street address. (*People v. Bolden*, 29 Cal.4th at p. 554.) The defense moved for a mistrial on grounds that the reference to the parole office was highly prejudicial in that it indicated to the jury that the defendant had at least one prior felony conviction for which he had served a term in state prison. The trial court denied the defendant's motion for mistrial. (*Id.* at pp. 554-555.) This Court found that the trial court did not abuse its discretion in denying the motion for mistrial:

> It is doubtful that any reasonable juror would infer from the fleeting reference to a parole office that defendant had served a prison term for a prior felony conviction. The incident was not significant in the context of the entire guilt trial, and the trial court did not abuse its discretion in ruling that defendant's chances of receiving a fair trial had not been irreparably damaged.

(*Id.* at p. 555.)

Similarly, in *Valdez*, a police officer testified that the defendant had been interviewed by other investigators while he was at "Chino Institute." (*People v. Valdez*, *supra*, 32 Cal.4th at p. 124.) The trial court denied the defendant's motion for mistrial on grounds that this testimony prejudiced his right to a fair trial. (*Id.*) This Court found no abuse of discretion, noting that the prosecutor had not committed misconduct and the reference to "Chino Institute" was brief and isolated. (*Id.* at p. 128.)

Likewise, in the instant case, Gutierrez's testimony was not incurably prejudicial. First, Gutierrez's references to the telephone calls occurring while appellant was in "Susanville" before he "got out in December" were ambiguous and very brief. It is highly unlikely that Gutierrez's first reference to the calls originating from Susanville would have caused the jurors to infer this meant while he was *incarcerated* in Susanville. There was no evidence admitted at trial that a prison existed in Susanville, and this information was likely beyond

the knowledge of the jurors. Although Gutierrez further stated that the calls occurred before appellant "got out" of Susanville in December, this comment was brief and ambiguous as well. Although one possible interpretation was that appellant had been incarcerated in Susanville, it was not obvious, nor was it the only inference to be drawn from the testimony. The jury just as easily could have interpreted Gutierrez's comment as slang for appellant leaving a certain living situation. In any event, even if the jury did construe Gutierrez's testimony as appellant being incarcerated in Susanville, because the reference was brief and isolated, the trial court did not abuse its discretion in denying the motion for mistrial. (*Valdez*, *supra*, 32 Cal.4th at p. 128; *Bolden*, *supra*, 29 Cal.4th at p. 555.)

Moreover, the jury later learned through various sources that appellant had been convicted of at least one previous felony and had served time in prison. For example, defense counsel asked Detective Castillo on cross-examination whether appellant had provided any explanation for initially denying any connection to the gun. Detective Castillo stated that appellant's response, in part, was that "he did not want to get caught ex con with a gun." (RT 4101, 4115.) In a sidebar conference, defense counsel stated that he was purposely eliciting Detective Castillo's testimony about appellant's statement in this regard. (RT 4102.) Furthermore, when defense counsel was cross-examining Hernandez about whether he really feared appellant, in light of the fact that Hernandez was a gang member who had in the past retaliated against a rival gang member with a baseball bat, Hernandez replied that he feared appellant because appellant was a gang member who had been locked up before. (RT 3581.) Hernandez later testified that he feared appellant in part because he knew appellant had done "hard time." (RT 3632; see also RT 4204 [first-time inmates in county jail system feared and respected someone who had done "hard time".)

Furthermore, evidence of appellant's prior felony convictions was admissible for impeachment purposes due to the fact that appellant testified in his own behalf. (See RT 4428 [appellant acknowledges prior felony convictions of "armed robbery, assaults and possession of narcotics"].) Appellant argues that although he acknowledged on direct examination that he had recently been released from prison at the time of the homicide, he did not have to do so, and "certainly would not have done so had the prosecution not already elicited the inadmissible information from Gutierrez." (AOB 96.) This assertion is belied by the record. Defense counsel expressly declined an admonition regarding Gutierrez's testimony because he did not want to emphasize the reference. (RT 3275.) Thus, it is inconceivable that appellant would volunteer similar information regarding his recent release from prison unless he had a tactical reason for doing so.

It appears that appellant did indeed have tactical reasons for emphasizing his prior criminal behavior and experiences in prison and jail in presenting his defense. Appellant offered the fact that he had "recently gotten out of prison and [his] values were not to straight as far as staying clean" as an explanation for why he would take Rose's car, which he claimed to have encountered parked on the side of the highway with the keys inside. (RT 4417.) Appellant also drew upon his experiences in prison to explain why he would go through the wallet he found in Rose's car in search of social security numbers, i.e., because people in prison and in jail used such numbers to install telephone lines. (See RT 4425-4428.)

The prosecution had presented evidence that appellant was untruthful when questioned by the police and that he repeatedly changed his statements to the police. For example, rather than providing the police with the alibi he presented at trial, appellant at one point told the police a version of events that was inconsistent with the time line he testified to at trial. (RT 4016-4017; cf.

RT 4414-4441.) In order to explain why he initially lied to the police, appellant testified that Detective Castillo had threatened to question his girlfriend as an accomplice to the murder. Appellant explained that through his time spent in jail, he had learned how long it could take an innocent person to fight a murder case, and because he loved his girlfriend he did not want this to happen to her, so he tried to lead the police on a "wild goose chase." (RT 4519-4521.) When trying to explain why he told Hernandez to continue driving during the police pursuit, he testified that he wanted to get rid of the gun because he was on parole. (RT 4515.)

In light of the fact that appellant emphasized his prior contacts with the criminal justice system to explain many of his actions in this case, appellant's claim that he was unduly prejudiced by Gutierrez's very brief and ambiguous comments about telephone calls originating from Susanville before "he got out" is unpersuasive.

Finally, the evidence of appellant's guilt was strong, making it highly unlikely that Gutierrez's brief reference to the telephone calls from Susanville caused any prejudice. Appellant was in Lancaster on the day Rose disappeared and was arrested in Bakersfield the following day in Rose's car. (RT 2676-2679, 2771.) Appellant used Rose's ATM card to withdraw money from a bank in Northridge less than two hours after Rose was last seen alive by his coworkers. (RT 2487-2491, 2685-2692.) Rose was shot in North Hollywood, just 1.2 miles from where appellant used to live. (RT 4043-4044.) Three witnesses heard the gunshots and saw a car similar to Rose's car driving away without its headlights on. (RT 2499-2504, 2517-2521, 2543-2547.) Shoe prints likely made by appellant's shoes were found at the scene of the shooting. (RT 3835-3836, 3857.) While partying with juvenile gang members in Bakersfield the day after Rose was killed, appellant bragged about shooting a man and claimed that the car he was driving was stolen and had a "murder rap"

on it. (RT 3383-3385, 3389, 3408, 3468.) Appellant passed a .38-caliber revolver around at the party at Amaya's house; such a gun was consistent with having caused Rose's gunshot wound. (RT 3305-3306, 3389-3390, 3505.)

While the Oldsmobile was being chased by the police in Bakersfield, appellant threw several incriminating items out the window, including a .38-caliber revolver, bullets, Rose's credit cards, and a watch. (RT 3312.) Appellant told the other occupants of the car that the car had a "murder rap" on it. (RT 3395, 3491, 3517.) Appellant made statements to the police evidencing his knowledge that Rose's death was caused by a gunshot wound even though the police had not revealed this information to him. (RT 4035-4036.) Finally, while awaiting trial in the instant case, appellant wrote a letter to a friend in which he provided the names and addresses of four juveniles who would testify against him (Camacho, Hernandez, Zamora, and Santana), referred to these juveniles as "rats," and asked that they be "put in check." (RT 4195-4206.) In light of this overwhelming evidence of guilt, appellant's claim that the trial court improperly denied his motion for mistrial must be rejected.

V.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT UNDER *DOYLE*[24] BY USING APPELLANT'S POST-*MIRANDA* SILENCE FOR IMPEACHMENT PURPOSES

Appellant contends the prosecutor committed misconduct by repeatedly violating his right to remain silent under *Doyle* during her cross-examination of appellant and during her guilt phase closing argument. (AOB 98-112.) Respondent disagrees. First, appellant has waived this claim by failing to object or request a curative admonition in the trial court. In any event, the prosecutor properly impeached appellant's trial testimony with his pre-trial statements to the police. Moreover, even assuming there was error, it was harmless.

A. Relevant Proceedings Below

1. Appellant's Statements To The Police

Detective Castillo interviewed appellant on two separate occasions. During the first interview on January 25, 1992, appellant waived his right to remain silent and agreed to speak to Detective Castillo. (RT 3997-4008.)

Appellant initially claimed he had just been picked up in the Oldsmobile at Third and Whitlock, and the only person he knew in the car was Zamora. (RT 3998.) Appellant stated that he had been drinking with his girlfriend at her cousin's house, and he had wanted a ride to the store. (RT 3999.) Appellant denied any involvement in a drive-by shooting. (RT 4000.) Appellant initially denied throwing a gun out the window, but later admitted he had when Detective Castillo informed him his prints had been found on the gun. (RT 4001.) Appellant repeatedly stated he had only been in the car for 10 minutes and denied knowing the car had been stolen. (RT 4003.)

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24. *Doyle v. Ohio* (1976) 426 U.S. 610 [96 S.Ct. 2240, 49 L.Ed.2d 91].

Detective Castillo told appellant the car had been stolen from Palmdale. Appellant agreed it was a coincidence that he lived in Palmdale. (RT 4004.) Appellant denied being in North Hollywood in the past three and a half years. He initially stated he had not been to Los Angeles from Palmdale, but later acknowledged going to Los Angeles once. When Detective Castillo told appellant a witness had seen him in the Oldsmobile in North Hollywood, appellant claimed any such witness was mistaken, as he had only been in the car for 10 minutes. (RT 4005.) When Detective Castillo accused appellant of murdering a man to get his wallet and car, appellant laughed and denied any part in taking the car, again claiming he had only been in the car for 10 minutes. (RT 4006.)

By the time Detective Castillo interviewed appellant the second time on January 27, he had obtained additional information, including the fact that the victim's ATM card had been used at 4:00 p.m. in Northridge, and the victim's Chevron card had been used around 9:30 p.m. in North Hollywood. (RT 4008-4010.) Detective Castillo had also learned that witnesses had identified appellant as the individual using the ATM card and the Chevron card. (RT 4011-4012.)

At the beginning of the second interview, appellant stood by the statements he had made during the first interview. (RT 4013.) Detective asked appellant to discuss the date of Thursday January 23, and to explain the $100 found in his possession at the time of his arrest. Appellant replied that his mother had given him $50 and dropped him off near Avenue I in Lancaster. Appellant claimed that he then walked around to various construction sites, earning a total of $40 from 12:00 to 4:00 p.m. (RT 4016.) Appellant stated that he went to McDonald's to eat, and then got a ride from a "construction guy" to Mojave on the 57 or 58 Freeway. From there, appellant claimed that he hitchhiked to Bakersfield, arriving at 8:00 or 9:00 p.m. at Union and Third,

and then walked to his girlfriend's house. Appellant stated that from Thursday to Friday, he did not have a car. The Oldsmobile was already in Bakersfield when he arrived. (RT 4017.) Appellant then explained his actions throughout the day on Friday, January 24. (RT 4028.)

Detective Castillo showed appellant the credit card receipt from the Chevron gas station purchase in North Hollywood. Appellant appeared frightened and initially denied that it was his signature. Detective Castillo told appellant he had been identified in a photographic lineup and accused appellant of killing Rose. At that point, appellant stated, "I will tell you." (RT 4029.) Appellant claimed that he had found the car, the gun, the wallet, and the credit in Lancaster, but he denied killing the victim. (RT 4029-4030.) Appellant explained that he saw the car with the keys in it, and he "jumped in and took it." He looked in the glove compartment and found the wallet and credit cards. He was able to use the ATM card because the PIN number was written down inside the wallet. He admitted using the ATM card in Reseda and the next day in Bakersfield, claiming he needed the money to drink. Appellant stated that he wanted to go to East Los Angeles. (RT 4030.)

2. Appellant's Alibi Defense At Trial

Sylvia Gomez and her boyfriend Joe Valle testified that appellant visited them at Gomez's East Los Angeles residence on January 23. Appellant arrived between 5:00 and 6:30 p.m. and left between 7:30 and 9:00 p.m. (RT 4219-4220, 4226, 4342.) Delgado saw appellant at a McDonald's in Hollywood at 8:30 p.m. on January 23. (RT 4322-4323.)

On direct examination, appellant testified that he arrived in Lancaster on January 23 between 10:30 and 11:00 a.m. He checked on job applications he had filled out at various businesses on Avenue I. (RT 4410.) Appellant estimated that he did this for about two to three hours. (RT 4412.) Between

1:30 and 2:00 p.m., appellant became discouraged and began walking on the Sierra Highway, hoping to hitchhike back to Palmdale. (RT 4412-4413.) Appellant saw the Oldsmobile parked on the side of the street with the keys inside. (RT 4416.)

Appellant wanted to take the car and go to "the valley" and then to Los Angeles. Although the car was locked, appellant gained entry through a back window that was slightly ajar. (RT 4417-4418.) Appellant drove the car southbound on the Antelope Valley Freeway, with the intent of going to Reseda in the San Fernando Valley. Appellant stopped for gas on the way. (RT 4420-4421.) Once in the San Fernando Valley, appellant was looking for a bank because he wanted to use the ATM card he found in a wallet in the car's glove compartment. (RT 4423, 4427.) Appellant acknowledged using Rose's ATM card at the First Interstate Bank at the corner of Tampa and Nordhoff. (RT 4429.)

After using the ATM card, appellant drove to Reseda looking for his friend Javier. He drove by Javier's house and did not believe it was his house anymore, because it was in much nicer condition than when Javier used to live there. (RT 4432.) Appellant then drove to East Los Angeles to surprise his friend Sylvia Gomez. (RT 4433.) It took just over an hour to drive there, and he arrived around 6:00 p.m. (RT 4434.) Appellant stayed at Gomez's house until 8:00 p.m., visiting with Gomez and her boyfriend, Joe Valle. (RT 4436-4437.) Although they invited him to a party, appellant declined because he wanted to go to Bakersfield. (RT 4437.)

After leaving Gomez's house, appellant drove through Los Angeles and Hollywood. (RT 4438.) He stopped at a McDonald's in Hollywood, where he ran into an old acquaintance, Delgado. Appellant got back on the freeway and then exited to buy gas in Studio City because he was familiar with the area. (RT 4439-4440.) Appellant then drove to Bakersfield, arriving at his

girlfriend's house between 11:00 and 11:15 p.m. (RT 4441, 4443.) Appellant denied that the .38-caliber revolver recovered by the police belonged to him. The first time he had seen it was at Amaya's house. (RT 4495.)

Appellant explained that he had called Gomez from jail to tell her that he might need her as a witness. He explained, "After that second interview, I found out that they told me when this guy got killed what day and I figured I better get in touch with anybody I ran into. Everybody that day I ran into, I need them. Don't know the exact time frames with them yet." Appellant continued to keep in touch with Gomez because she was a potential witness in this case. (RT 4528.)

3. Appellant's Attempt On Direct Examination To Explain His Statements To The Police

During his direct examination, appellant attempted to explain some of the statements he had made to the police. When appellant was interviewed by Detective Castillo in the early morning hours following his arrest on January 23, appellant asked why he was being questioned by police from the Hollywood homicide division. Detective Castillo said, "'Because the guy got shot and robbed for his car. We think you did it. You're the only guy from L.A. here.'" Appellant agreed to talk to Detective Castillo. Detective Castillo took down appellant's personal information and asked who he was staying with. When appellant replied that he was staying with his girlfriend, Detective Castillo said, "We want to pull her in too." Just after that point, Detective Castillo began tape recording the interview. (RT 4519-4520.)

Appellant acknowledged that he initially lied to the police in stating that he had only been in the car for 10 minutes. Appellant explained, "I would have told them the moon was blue to throw them on a wild goose chase because I figured they wanted to get my old lady and I loved her a lot." Through

appellant's prior experiences in jail, he knew how long it could take to fight a murder charge, and he did not want to put Gutierrez through such an experience because of a car he had stolen. Appellant lied to the police consistently during the first interview. (RT 4520-4521.) Appellant "denied everything" because he was sure the police would figure out he was not involved in the murder by conducting their own investigation and collecting their own evidence. (RT 4522.)

A couple of days later, appellant asked to speak to the police to find out what was happening. The police then interviewed appellant again and "started charging [him] with all kinds of charges." At the outset of this interview, appellant figured he had better tell the truth. He later changed his mind and decided "[T]he hell with them. Let these bastards do their own homework." (RT 4522-4523.) Appellant explained how he lied during the second interview:

> Q Did you essentially lie to them during the course of the second interview?
>
> A Yes, I did.
>
> Q Do you recall in what regard?
>
> A That I basically told them the same thing in the first interview. That I went to tell them the truth regarding how I found the car and I started to tell them that I found the car and the credit cards and they told me about the gun and I told them I had gotten that gun from Drifter up in Bakersfield. So I figured, you know, what the hell, so what. That's Salo's family, I'm not going to bring them into it either."

(RT 4524.)

4. The Prosecutor's Cross-examination Of Appellant

The prosecutor began her cross-examination of appellant by asking whether his testimony on direct examination had been as truthful as his

statements to Detective Castillo. (RT 4537.) Appellant replied that nothing he had told Detective Castillo was true, whereas his trial testimony was true. Appellant acknowledged that he had had a year and eight months to think about what his testimony would be at trial. (RT 4538.) Appellant stated that at the beginning of the second interview, he asked Detective Castillo to remind him of what he had said in the previous interview. He claimed that he did so because the police "have ways of twisting things." (RT 4542.) The prosecutor then asked appellant the following questions:

> Q [Appellant], if you testified something like, "I found a car on street A, I got in the car and I drove to street B and that is the truth," why do you need to be reminded that's what you said? How can they possibly confuse you about that, sir?
>
> A Well, during that first interview everything I told them was a complete lie, and when the person lies because they were in fact lying, they tend to tell another lie.
>
> Q Well, one lie tends to lead to another?
>
> A Yes.

(RT 4543-4544.)

Appellant explained that he initially lied to the police to keep them from hassling his girlfriend, Gutierrez. (RT 4637-4638.) The prosecutor later asked appellant the following series of questions:

> Q [Prosecutor]: Now, you said you denied everything to Detective Castillo because they thought you did the murder and at that point in time you said, "And they will figure out I didn't do it." How would they figure out you did not do it?
>
> A Once they went about their investigation and found the person who really did it and find some sort of evidence they would link to

someone else besides myself. I know I was not present at this man's murder.

Q Why didn't you tell them where you were?

A I tried to mention it to them. He had seemed so freaked and he kept changing the subject.

Q [Appellant], we'll play your tape of that interview.

A Of that interview?

Q Let me find - - if anybody was there challenging you out there, telling you that, questioning you for murder, why didn't you tell them where you were and let them go collect evidence and you get out of the charge?

A Every time in the past I told the police the truth, they say I am lying anyway.

Q And were you?

A At the point in time I was. You caught me offguard.

Q Yes. [Appellant], there's always a first time. I mean, we're talking about murder, [appellant] and you are not telling them where you have been and you figure they are not going to believe you because they didn't believe you in the past?

A They don't care. I wasn't going to help them in that regard. They do their own.

Q How about helping yourself, forget about helping them?

A I will see them in court. They don't care what I have to say. They don't care anyway.

Q You like staying in jail, right?

A I figured I was being at the jail behind the GTA and the credit cards, I will be doing time to fight this.

Q [Appellant], a GTA is a hell of a lot different than murder.

A That's true.

Q Okay. You enjoy being in jail?

A No.

Q Okay. Now, let's see, the second interview a couple of days later, you had asked to talk to the detectives, correct? Isn't it a fact they came and talked to you? You did not ask to see them?

A I asked to talk to Castillo and Medina and the jailer said they will get to you when they get to you.

Q You figured you would tell the truth and then decided, "The hell with the bastards, let them do their own work," right?

A Yes.

Q And then you said, you started to tell them the truth and you told them you had gotten the gun in the car because you really had gotten it from Drifter and since it was Salo's family you did not want to involve them. Is that what you told us this morning?

A Yes.

(RT 4639-4642.)

When discussing why he did not initially tell the police he was in a blue car behind the Oldsmobile at the time of the drive-by shooting in Bakersfield, appellant stated that he wanted the police to do their own homework. He explained, "My entire point is this, if they want something they have to pull teeth or do it on their own. (RT 4655.) At that point, appellant never intended to tell the police the truth. (RT 4656.)

Appellant admitted lying to the police when he told them he had not been to North Hollywood in three and a half years. (RT 4676.) He had indeed been in North Hollywood when he purchased gas on the way to Bakersfield. (RT 4679.) Appellant later claimed he did not tell the truth during the first interview because the police were trying to "railroad" him. (RT 4690.)

Appellant acknowledged that he lied to the police during the second interview when he told them he had earned money on January 23 by working at construction sites. (RT 4700.) Although he had intended to tell the truth during the second interview, appellant changed his mind when he began talking to Detective Castillo. Appellant explained, "I figured their investigation had progressed at that point in time. If I told them the truth they would probably help me, but when I first started talking to them, I could tell by their attitude they wouldn't." (RT 4706-4707.) Appellant changed his mind about telling the truth because the detectives were smiling and grinning, and because of his general feelings towards law enforcement. (RT 4708-4709.)

Appellant admitting lying to the police during the second interview when he said he had hitched a ride to Mojave, and then hitched another ride to Bakersfield, arriving there around 8:00 or 9:00 p.m. (RT 4714-4715.) Specifically, the prosecutor questioned appellant as follows:

Q Now, on this second interview you tell the detectives that you hitched a ride with someone as far as Mojave, correct?

A Yes.

Q And that was a lie, right?

A Yes.

Q And then you said you hitchhiked from the truck stop right from Mojave again, correct, and that was the other lie?

A Yes.

Q And then they asked you what time you got to Bakersfield and you told them it was about 8:00 or nine o'clock at night, correct?

A I had told them that, yes.

Q And that's a lie, right?

A Yes.

Q Because now you have told us you were at [Gomez's] house then, right?

A Between 8:00 and 9:00 I said I was en route to Bakersfield or McDonald's. Around there.

Q And, again, you kept telling them you didn't know anything about the car. You didn't know anything about the car. [¶] Do you remember that?

A Yes.

Q That was a lie also, right?

A Yes.

(RT 4714-4715.)

After Detective Castillo confronted appellant with his signature on the gas credit card voucher and told appellant he had been identified, appellant said he would tell the truth. (RT 4727.) However, appellant did not tell the truth at that point. He explained, "I would have basically told them the moon was blue if they would have believed me." Appellant told Detective Castillo that he found the car along with the gun, the wallet, and the credit card. (RT 4728.) Appellant offered to write his statement down, claiming it was not "bullshit," even though he was not telling the truth at the time. (RT 4728-4729.) Appellant did not mention anything at the time about the car being locked or having to break into it, as he had testified at trial. (RT 4730.) Appellant explained that he lied about the gun being in the car because he

didn't want to put anybody that wasn't involved in this situation into the situation. So I figured I better tell them it was in the car. I knew the gun wasn't from L.A. I figured they would figure that out on their own.

(RT 4730-4731.)

Appellant recalled the police asking him why he had gone all the way to Reseda to use an ATM machine there. Appellant acknowledged that he

responded, "There is a bank right there and I was going to go to East L.A. and visit some of my home boys." The prosecutor asked appellant why he did not mention Gomez's name at that point to the police. Appellant responded, "I didn't want to put anybody's name in this that wasn't already involved at that point in time." (RT 4733.) Appellant further explained that he did not want to help the police with their investigation. The prosecutor then asked appellant the following series of questions:

Q How would that involve [Gomez]?

A I wasn't into helping them with their investigation period. [¶] I figured I could use her for my defense because I was there.

Q How did you know you were there?

A Because I know I was there that day.

Q No. You knew you were there that evening. You said 5:00 to 8:00.

A That evening, that day.

Q [Appellant], at this point in time you don't even know what time this man has been killed unless you're the murderer.

A That is true.

Q Then how did you know you were at [Gomez's] house when the murder happened?

A I didn't know at that point in time. I talked to everybody that I run [sic] into that day. I tried to get in touch with.

(RT 4734.)

The prosecutor subsequently asked appellant the following series of questions:

Q . . . . [Appellant], do you enjoy being in jail?

A No, I do not.

Q Can you give us an explanation why you did not tell Detective Castillo that you were somewhere else?

A Because he probably would not have believed me at that point in time.

Q Did you even try?

A I figured there was no use even trying with him.

Q Why would you figure there is no use even trying? You gave him all kinds of other stories you wanted him to believe.

A Because, as you said, I did not know exactly what time that murder happened. I did not know exactly where I was at at that point in time.

Q Well, you could have done the exact same thing. Just told him everything you did the whole day.

A I imagine I could have done that, but I didn't.

Q Why not?

A I wasn't into helping him along with his investigation. He was trying to get me.

Q [Appellant], this investigator is trying to find out who committed a murder. You're his only suspect. [¶] If you knew you didn't commit the murder, why would you care if you're helping him? It is helping yourself, isn't it? It's not helping him. It's helping you.

A Past experience, every time I reach my hand out to help I get it slapped.

Q When have you reached out your hand to help the police?

A When I tried to talk to them in the past on previous arrests it's always backfired on me. [¶] When I tried to tell them the truth they always try to backfire me. When I was a [] little kid they did.

Q [Appellant], as you got older, whenever you got arrested it was generally for something you had done; isn't that true? No one ever pulled anything on you?

A Sometimes.

Q You had two interviews with this detective, didn't you?

A Yes.

Q Did he threaten you?

A He didn't threaten me directly. He insinuated that he would pick up my old lady and harass the hell out of her for however long it took until, you know, if I decide to answer his 10 questions.

Q Did he threaten you, [appellant]?

A Personally, no.

Q You have testified here last Friday, as a matter of fact, that you even asked to see him a second time; isn't that true?

A Because I wanted to find out what was happening, yes.

Q Well, and you also said that you were going to sort of tell the truth the second time, but then you changed your mind, correct?

Q Yes.

A Isn't it true, sir, you had many opportunities - - Detective Castillo gave you opportunity after opportunity to tell him where you were that entire day?

Q Yes.

A You never did, did you?

Q No, I did not.

(RT 4738-4741.) Appellant also acknowledged that after his two interviews with the police, he never sought to contact them or the prosecutor to inform them of his alibi. (RT 4741-4745.) He did not think it "would do any good" to contact Detective Castillo and provide him with his alibi. (RT 4743.)

Appellant did not attempt to tell the prosecutor about his alibi because he believed she was on Detective Castillo's "side of the street." (RT 4744-4745.)

The prosecutor asked appellant why he did not ask the police to check his alibi with Gomez. Appellant replied that he did not think the police would believe her either. He explained, "It's like once they're set it's like a shark chasing bloody meat. Once he smells it, he's going after it. He's not going to divert his course for any reason." (RT 4746.)

The prosecutor also asked appellant why he did not ask his mother, who had participated in three-way calls appellant had had with Gomez and Valle, to contact the police about appellant's alibi. Appellant replied that he had asked his mother not to have any contact with the police because they would try to "twist" her words and use her against him. (RT 4747-4748.) The prosecutor asked how the police could twist his mother's words if she gave them the name and address of the person he was visiting when the murder occurred. Appellant agreed that the police would be unable to "twist that around." (RT 4748.) The prosecutor continued to question appellant as follows:

Q That's right. They can't. So why didn't you do it?

A I told her to stay out. It's my business.

Q And you're telling us that your mother is going to listen to you and stay out of it and let her son stay in jail for almost two years on a murder he allegedly didn't commit that he's got a perfect alibi for? [¶] Is that what you want the ladies and gentlemen of the jury to believe?

A When I say something has to do with me and my life, she respects that.

Q [Appellant], that's your mother. She doesn't want you in jail. She loves you. And you're telling us that she knows you have got an alibi and you're telling her not to tell anybody about it?

A When I have told her don't mention anything to anybody about anything, you know, about the case or any information you may gather from, you know, my conversations is simply because I don't want her putting herself and other people with you so you don't have the opportunity to twist their words.

Q You don't want her doing what?

A Otherwise if she was to give up [Gomez] or [Valle] or Mr. Delgado's name to the detectives, and that would be the same thing as me doing that, I told her, "don't do that because the police may in fact try to twist whatever they are trying to say."

(RT 4748-4749.)

Upon further cross-examination, appellant explained his mother's failure to contact the police regarding his alibi because "It would be the same as divulging defense witnesses." The prosecutor asked appellant whether he was aware of the "new law" requiring defense witnesses to be divulged in advance. Appellant replied that he was not. (RT 4749.) The prosecutor continued cross-examining appellant as follows:

Q [Appellant], you know perfectly well that we have had the names of [Gomez] and [Valle] certainly for the past three months, two months or whatever. And you knew that we were going to have to get them; isn't that true?

A I figured they would come out.

Q [Appellant], how would your mother calling Detective Castillo or calling me and saying, "I have names and address of people with whom my son was when this murder happened. Check them out," what do you think would happen to your mother if she did that?

A Nothing would happen to her.

Q That's right. Then why would you stop her from doing something like that, [appellant]?

[Defense counsel]: Asked and answered. Objection.

The Court: Sustained. 352.

(RT 4749-4750.)

5. The Prosecutor's Closing Argument

During closing argument, the prosecutor referred to the many times appellant had lied, and read CALJIC No. 2.03, which allows a jury to infer consciousness of guilt based on a defendant's willfully false or deliberately misleading statement concerning the crimes for which he is being tried. (RT 5107-5108; see also CT 681.)[25/] The prosecutor then argued that appellant had lied about not being involved in the drive-by shooting, and suggested that appellant's testimony about being in a different car at the time of the shooting

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25. Specifically, the prosecutor argued:

There's a lot of other things the defendant lied about. As I told you this morning, I could spend hours and hours. But I have already promised you I only have this much more to go and I am not going to get into every lie that he told the police.

But there is another jury instruction that I do want to go over with you and it is a brief one. And it has to do with a consciousness of guilt, falsehood.

It says that:

"If you find that before this trial the defendant made a willfully false of misleading statement concerning the crimes for which he is now being tried, you may consider such statement as tending to prove a consciousness of guilt.

"However, such conduct," like the other instructions I read to you this morning, "Is not sufficient by itself to prove guilt and its weight and significance, if any, are matters for your determination."

(RT 5107-5108.)

was implausible. (RT 5108.) The prosecutor then continued her argument as follows:

> What about his explanations to you right here on the witness stand about why he didn't tell the police about his alibi. That hasn't been that long ago and I don't think you could have forgotten that.
>
> First he says they wouldn't believe him because he is an ex-con. Then he says, "Well, let them do their own god damn work. I wasn't going to help them. I would have told them the moon was blue."
>
> He's got an "alibi"? And he doesn't say a word about it?
>
> So he's an ex-con. Okay. "So why not have [Gomez]? She is not an ex-con. Why not have [Gomez] tell the cops about your alibi?"
>
> Well, maybe [Gomez] is not the world's most credible witness either.
>
> Okay. "How about your mother? How about your mother who wants to help you, who's been helping you right along?" Doesn't even ask his mother?
>
> No, he doesn't mind staying in jail because he figured he was going to do a year on his parole violation anyway, et cetera, et cetera, et cetera.
>
> This is so unbelievably ludicrous it is preposterous. And I can't believe that any one of you buy it for one moment.
>
> If you have got a righteous alibi, ladies and gentlemen, you tell it. And you keep telling it until somebody believes you because you know it's true.
>
> The reason he didn't discuss his alibi was because at that point it hadn't been formulated yet. It hadn't been totally organized.

(RT 5108-5109.)

B. Appellant's Claim Of *Doyle* Error Has Been Waived

Appellant acknowledges his trial counsel failed to object to the prosecutor's cross-examination or closing argument on *Doyle* grounds. (See AOB 110.) Because appellant never raised the *Doyle* issue at trial, it is waived for appellate purposes. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1207 [*Doyle* error waived where defense counsel failed to object on this ground at trial]; see also *People v. Crandell* (1988) 46 Cal.3d 833, 879, fn. 14.)

Appellant argues that the failure to object should be excused because any objection would have been futile or because an admonition would not have cured the harm caused by the misconduct. (AOB 110-111.) Appellant also argues that to the extent the absence of an objection precludes direct review of the issue, trial counsel rendered ineffective assistance in failing to object. (AOB 111-112.)

First, appellant has not demonstrated that an objection would have been futile or that an admonition would not have cured any harm. On appeal, appellant complains the prosecutor repeatedly committed error under *Doyle*. Yet, had defense counsel promptly objected on this ground at the first instance, the trial court could have evaluated the objection and made a ruling. There is no indication in the record regarding how the trial court would have ruled, and it is pure speculation to suggest that an objection would have been futile. Further, had an objection been sustained, there is no reason to believe an admonition would not have cured any harm.

Second, appellant has not demonstrated that the failure to object constituted ineffective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674].) To prevail in a claim of ineffective counsel, an appellant must demonstrate, firstly, that counsel's performance was deficient. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) In determining whether

counsel's performance was deficient, the reviewing court must generally exercise deferential scrutiny. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 690; *People v. Ledesma*, *supra*, 43 Cal.3d at p. 216.) If there is any explanation for counsel's acts or omissions or when the record is silent on the reasons for counsel's acts or omissions, the claim must be rejected. (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.) Moreover, the reviewing court should not second-guess counsel's reasonable tactical decisions, and the mere fact counsel, had he chosen another path, might have obtained a more favorable result for appellant, does not meet appellant's burden herein. (*People v. Mincey* (1992) 2 Cal.4th 408, 449; *People v. Jennings* (1991) 53 Cal.3d 334, 379-380.)

Secondly, appellant must establish prejudice. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687, 694; *People v. Ledesma*, *supra*, 43 Cal.3d at p. 217.) Appellant must show a reasonable probability that a determination more favorable to him would have resulted in the absence of counsel's failings. (*People v. Kaurish* (1990) 52 Cal.3d 648, 677.) There is a heavy presumption of adequate representation. Thus, prejudice must be affirmatively proved. (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531; *People v. Ledesma*, *supra*, 43 Cal.3d at p. 217; see also *Strickland v. Washington*, *supra*, 466 U.S. at p. 690.)

As will be shown, the prosecutor's cross-examination and argument were proper because appellant had waived his right to silence and made statements to the police that were inconsistent with his trial testimony regarding his alibi. Thus, trial counsel's failure to object was likely based on a tactical decision that an objection would be overruled. Furthermore, as will be discussed, even assuming the prosecutor's cross-examination and argument constituted *Doyle* error, appellant has not established any prejudice, as any error was harmless.

C. The Prosecutor Properly Impeached Appellant's Trial Testimony With His Failure To Mention An Alibi In His Post-arrest Statements To The Police

Even assuming appellant's claim has not been waived, it is nonetheless meritless. In *Doyle*, the United States Supreme Court held that "the use for impeachment purposes of [a defendant's] silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." (*Doyle, supra*, 426 U.S. at p. 619.) The Court based its holding on the assumption that post-arrest silence is ambiguous due to the requirement of advising a suspect of the right to remain silent, and the unfairness of allowing a defendant to be impeached by his silence after receiving an implicit assurance that he would not be penalized by the refusal to talk. (*Id.* at pp. 617-618.)

While *Doyle* prohibits questioning a defendant on his post-arrest silence, it does not prohibit cross-examination concerning post-arrest statements, including omissions in those statements. (*Anderson v. Charles* (1980) 447 U.S. 404, 409 [100 S.Ct. 2180, 65 L.Ed.2d 222]; see also *People v. Osband* (1996) 13 Cal.4th 622, 694.) In *Anderson v. Charles*, the defendant was arrested while driving a stolen car belonging to a man who had been strangled a week earlier. The defendant was found in possession of the victim's car and some of his personal property. The defendant had also boasted to other witnesses that he had killed a man and stolen his car. Following his arrest, the defendant waived his right to remain silent and told the police that he had stolen the car from a specific location. At trial, the defendant claimed he had stolen the car from a different location. (*Id.* at p. 404-405.)

On cross-examination, the prosecutor in *Anderson* questioned the defendant about why he had not come forward at the time of his arrest about where he had gotten the car. The prosecutor suggested that the defendant's trial

testimony was a recent fabrication. (*Id.* at p. 406.) In affirming the conviction and distinguishing *Doyle*, the United States Supreme Court explained:

> *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

(*Id.* at pp. 407-408.) The Court further explained that the "questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement." (*Id.* at p. 409.)

Like *Anderson v. Charles*, the present case is distinguishable from *Doyle* because appellant waived his right to remain silent and made voluntary statements to the police which were inconsistent with his testimony at trial. During his first police interview, appellant denied any part in stealing the Oldsmobile and claimed he had only been in the Oldsmobile for 10 minutes. (RT 4003-4006.) This was clearly inconsistent with his trial testimony that he found the Oldsmobile on the afternoon of January 23, and then drove the car to the San Fernando Valley, to Gomez's house, to Hollywood, and then to Bakersfield. Accordingly, the prosecutor was entitled to cross-examine appellant as to the inconsistencies between his trial testimony and his statement to the police that he had only been in the car for 10 minutes.

During appellant's second police interview, he voluntarily accounted for his whereabouts on the day of the murder. Specifically, he claimed that he worked at various construction sites in Lancaster from noon until 4:00 p.m.; he went to McDonald's to eat; he got a ride to Mojave from a construction worker; and he hitchhiked from there to Bakersfield. Had all these events really

occurred, it would not have given him sufficient time to travel to Gomez's house in East Los Angeles, which was his testimony at trial. Because appellant had waived his right to silence and voluntarily told the police of his whereabouts on the day of the murder, cross-examination on the deliberate omission of his visit to Gomez's house was proper and was not tantamount to commenting on the exercise of the right to remain silent as prohibited in *Doyle*. (*Anderson v. Charles*, *supra*, 447 U.S. at p. 409.)

Appellant admitted lying to the police during both of the interviews. He gave various explanations for doing so, which ranged from his general dislike of law enforcement, wanting the police to do their own "homework," wanting to prevent the police from hassling his girlfriend, his fear that the police would "twist" his words, his fear that the police were trying to "railroad" him, the fact that the detectives were grinning and smiling during the interviews even though they were discussing the topic of murder, the fact that he would be serving time on a parole violation anyway, and his perception that the police would not believe him if he told the truth. The prosecutor was entitled to fully cross-examine appellant on these varying explanations, especially in light of the fact that appellant acknowledged that many of his statements to the police were truthful.

Furthermore, among the many reasons appellant asserted for lying to the police rather then telling them about his alibi, appellant claimed at one point during cross-examination that he had tried to mention his alibi to the police, but "[the detective] had seemed so freaked and he kept on changing the subject." (RT 4640.) The prosecutor was entitled to cross-examine appellant about whether his statement was true that the police did not allow him to provide his alibi. A defendant's right to remain silent is a "shield" which cannot be used as a "sword" to cut-off a fair response by the prosecution to a defendant's claim that he was not given an opportunity to tell his side of the story. (*People v.*

Austin (1994) 23 Cal.App.4th 1596, 1612, citing *United States v. Robinson* (1988) 485 U.S. 25, 32 [108 S.Ct. 864, 99 L.Ed.2d 23]; see also *People v. Thompson* (1986) 183 Cal.App.3d 437, 442.)

Finally, the prosecutor's closing argument regarding appellant's failure to tell the police about his alibi at an earlier time was proper. This was merely a reference to the fact that appellant had chosen to lie to the police repeatedly about his whereabouts on the date of the murder rather than tell the police about his alibi. His explanation that he did not want to get Gomez involved was highly implausible. The fact that he gave the police a conflicting version of his whereabouts on the evening of January 23 than he did at trial led to the reasonable inference that his alibi as testified to at trial was a recent fabrication. (*Anderson v. Charles*, *supra*, 447 U.S. at p. 409.)

D. Any Error Was Harmless Beyond A Reasonable Doubt

Should this Court find that appellant's claim is not waived and the prosecutor committed *Doyle* error in this case, appellant's conviction must still be upheld because any error was harmless beyond a reasonable doubt. (*People v. Quartermain* (1997) 16 Cal. 4th 600, 621; *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].) The proper inquiry is whether the verdict rendered in this trial was surely unattributable to the error. (*People v. Quartermain*, *supra*, 16 Cal. 4th at p. 621.)

Any error in the instant case was harmless beyond a reasonable doubt. The evidence of appellant's guilt was extremely strong. Appellant was in Lancaster on the day Rose disappeared and was arrested in Bakersfield the following day in Rose's car. (RT 2676-2679, 2771.) Appellant used Rose's ATM card to withdraw money from a bank in Northridge less than two hours after Rose was last seen alive by his coworkers. (RT 2487-2491, 2685-2692.) Rose was shot in North Hollywood, just 1.2 miles from where appellant used

to live. (RT 4043-4044.) Three witnesses heard the gunshots and saw a car similar to Rose's car driving away without its headlights on. (RT 2499-2504, 2517-2521, 2543-2547.) Shoe prints likely made by appellant's shoes were found at the scene of the shooting. (RT 3835-3836, 3857.) The day after the shooting, appellant bragged to juvenile gang members in Bakersfield about shooting a man. Appellant also claimed that the car he was driving was stolen and had a "murder rap" on it. (RT 3383-3385, 3389, 3408, 3468.) The day after the murder, appellant possessed a .38-caliber revolver, and such a gun was consistent with having caused Rose's gunshot wound. (RT 3305-3306, 3389-3390, 3505.)

While the Oldsmobile was being chased by the police in Bakersfield, appellant threw several incriminating items out the window, including a .38-caliber revolver, bullets, Rose's credit cards, and a black watch. (RT 3312.) Appellant told the other occupants of the car that the car had a "murder rap" on it. (RT 3395, 3491, 3517.) Appellant made statements to the police evidencing his knowledge that Rose's death was caused by a gunshot wound even though the police had not revealed this information to him. (RT 4035-4036.) Finally, while awaiting trial in the instant case, appellant wrote a letter to a friend in which he provided the names and addresses of four juveniles who would testify against him (Camacho, Hernandez, Zamora, and Santana), referred to these juveniles as "rats," and asked that they be "put in check." (RT 4195-4206.) This was not a close case. Even if the prosecutor did err in commenting on appellant's silence in violation of *Doyle*, the guilty verdict was surely unattributable to any error in this respect. (*People v. Quartermain*, *supra*, 16 Cal.4th at p. 621.) Accordingly, appellant's claim must be rejected.

VI.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CROSS-EXAMINING APPELLANT

Appellant contends the prosecutor committed misconduct on seven separate occasions while cross-examining appellant. He further asserts that these combined acts of misconduct violated his rights to due process, to a fair jury trial, to confront and cross-examine witnesses, and to a reliable determination of guilt and death eligibility, all in violation of state law and the federal constitution. (AOB 113-122.) Appellant has waived any claim of prosecutorial misconduct by failing to object on this ground with respect to any of the alleged instances of misconduct. In any event, there was no prejudicial misconduct.

A. Controlling Principles Of Law

"Improper remarks by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [94 S.Ct. 1868, 40 L.Ed.2d 431].) A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) However, conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial error under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

In general, a defendant may not raise an issue of prosecutorial misconduct on appeal unless a timely objection was raised on the same ground

in the trial court and a request for a curative admonition was made. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) Exceptions to this rule include where an objection or request for admonition would be futile, where an admonition would not cure the misconduct, and where the court immediately overrules an objection and does not give counsel an opportunity to seek an admonition. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 820-821.) Finally, even if the reviewing court determines an admonition would not have sufficed, reversal is warranted only if, "on the whole record the harm resulted in a miscarriage of justice[.]" (*People v. Bell* (1989) 49 Cal.3d 502, 535.)

B. The Alleged Acts Of Misconduct

1. Asking Appellant Whether "Trying To Do Well" For A Month Was A "Pretty Good Record" For Him

Appellant first claims the prosecutor committed misconduct when she cross-examined him about his testimony that he had been out of prison for a month and did not have his values "too straight as far as staying clean" when he decided to steal Rose's Oldsmobile. Specifically, he challenges the following series of questions:

Q And you lasted a month before you got in this car, right?

A Yes.

Q That's a pretty good record for you, isn't it?

A Not for me. That's what happened at the time.

(RT 4557.)

Appellant did not object to these questions or request a curative admonition. (RT 4557.) Accordingly, he has waived any claim of prosecutorial misconduct, as there is no doubt that an admonition would have cured any possible harm. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.) In any event, he

cannot establish that the prosecutor committed misconduct, or that there was any prejudice.

Appellant correctly states that a prosecutor commits misconduct by cross-examining a defendant in a such a way that places inadmissible prejudicial evidence before the jury. (See AOB 113-114, citing *People v. Evans* (1952) 39 Cal.2d 242, 248-249; *People v. Johnson* (1978) 77 Cal.App.3d 866, 873-874.) However, contrary to appellant's contention, the prosecutor did not cross-examine appellant in such an impermissible manner. Rather, when evaluated in a more complete context, the prosecutor's questions were entirely appropriate in light of testimony appellant had given on direct and up until the point of the challenged question on cross-examination.

Appellant repeatedly portrayed himself as an experienced criminal who had just recently made an attempt to straighten himself out. On direct examination, appellant testified that as he was walking along the Sierra Highway in Lancaster, he saw Rose's Oldsmobile parked on the side of the road with the keys inside. (RT 4416.) Appellant explained that he "had recently gotten out of prison and [his] values were not too straight as far as staying clean." He decided to take the car so he could go to Los Angeles. (RT 4417.) He intended to visit his friend "Crazy Javier" in Reseda. (RT 4418.)

Appellant described going through the wallet in the glove compartment in order to look for money, as well as names and social security numbers that could be used to set up telephone lines. While in jail, he had learned that such information is useful. (RT 4423-4426.) Appellant acknowledged that he had felony convictions for armed robbery, assault, and possession of narcotics, and that he had spent time in custody. He explained that through his experience in custody, he had learned about the usefulness of names, addresses, and social security numbers. (RT 4428.) Appellant also acknowledged that he had been to prison. (RT 4433.)

When appellant later drove up to Bakersfield, he hid the car keys under a trash can because he did not want his girlfriend, Gutierrez, to find them and ask questions about the car. Gutierrez was trying to stay straight and wanted appellant to do the same. (RT 4444-4445.) Appellant also described concealing some of the money in his possession by giving it to Gutierrez's cousin to hold onto, because he did not want to explain the money to Gutierrez. (RT 4459.)

Petitioner again referred to time spent in prison when explaining why he had difficulty remembering names of people he met in Bakersfield, because "it becomes a blur after spending time in prison and meeting so many people and getting out on the streets, you know." (RT 4469.) In describing a gathering at the cemetery in Bakersfield, appellant again referred to the fact that he had just gotten out of prison. (RT 4473-4474.)

Appellant claimed that he had bought the .38-caliber gun from Castro in Bakersfield. (RT 4497.) Appellant allowed Castro and Veterano to use the gun and the Oldsmobile because Castro "wanted to take off in the car with his home boys and go do some stuff. They wanted to use the gun." (RT 4498.) Although appellant was invited to go along with them, he declined because he did not want to get involved with what they were about to do. He explained, "I was trying to stay halfway straight. I already screwed up stealing the car. I didn't want to dig myself in any deeper by getting involved with whatever they were doing." (RT 4500.)

Appellant testified that the reason he encouraged Hernandez to continue driving while the police were chasing the car was because he wanted to get rid of the gun because he was on parole. (RT 4515.) Appellant explained that the reason he initially lied to the police was to protect his girlfriend, Gutierrez. Appellant claimed that because he had been in jail before, he knew how long people spent fighting murder charges, whether innocent or guilty. (RT 4521.)

In explaining his motivation for writing the threatening letter from jail, appellant demonstrated broad knowledge of terminology commonly used in prison. (RT 4534-4535.)

Appellant did not consider himself to be an angel, he admitted committing crimes in the past, and admitted having gone to "the joint." He explained that this was where he had gained a lot of his knowledge and expressions. (RT 4535.)

On cross-examination, the prosecutor explored appellant's description of taking the Oldsmobile by asking the following series of questions:

Q Okay. And you said you saw the keys in the car and that's what attracted you to it, right?

A Well, what attracted me to it was it was all by itself and no other cars were there.

Q I thought you said last week or what seems like, on Wednesday you say the keys in the car and that's what attracted you to it. Is that what you said?

A I saw the car by itself and that's what originally had attracted me to it. I noticed the keys and I wanted to get it.

Q Okay. That's what looked like a birthday present, having a car sitting there, isn't that right?

A Would not call it a birthday present. I call it joy riding. It happens every day.

Q Joy riding is when somebody leaves the car with the keys in it?

A Taking the car without the owner's permission.

Q Okay. And that's what you thought you were doing, right?

A Yes.

Q You looked around and nobody was there. [¶] You said you recently had gotten out of prison. So your values still were not too straight. Is that what you said?

A Yes.

Q Are they straight today?

A Straight as they can be living in this chaos as far as the county jail.

Q When was the last time your values had been straight prior to this date?

A Probably when I was a youngster before I had been exposed to prison life and all of this other stuff.

Q When you were younger. Tell us any period of time in your life that your values were straight?

A Around 13, 14.

Q You weren't in trouble, then?

A I had been in trouble. I had been corrected on it.

Q So the last time your values were straight was when you were 13 or 14, is that what you are telling, us right?

A When I had - - well, I had made a lot of mistakes as a youngster. I went to prison behind some of those mistakes.

Q You did not go to prison when you were a youngster. You don't go to prison when you are a youngster, isn't that true?

[Defense counsel]: Objection.

[Appellant]: That's what you say. You are still a youngster at 18. That's what I consider a youngster.

Q [By the prosecutor]: Okay.

A I went to prison trying to do well, trying to settle down with [Gutierrez] and her kid.

Q [Appellant], how long had you been out of prison?

A Only a month.

Q One month to the day, correct. You got out on December 23rd?

A Yes.

Q In that whole month you were trying to do well, right?

A Yes.

Q And you lasted a month before you got in this car, right?

A Yes.

Q That's [a] pretty good record for you, isn't it?

A Not for me. That's what happened at the time.

Q Anyway you decide to see if this car is working because you are not sure if it's functioning, right?

A Yes.

Q And you want to go to Los Angeles for a spin to see your old friends specifically Crazy Javier?

A I wanted to go into the valley and then L.A., yes.

Q Still trying to make a good adjustment and be a good productive citizen, right?

A I was pretty pissed off, kind of pissed and lots of people are saying, "Get out of here. We told you before don't come back, we'll call you," in a police manner but I had been bullshitted by the best and I figured they're shining me on.

(RT 4555-4558.)

When placed in the appropriate context, the prosecutor's question about whether one month of staying straight was a "pretty good record" for appellant was proper. Appellant was the one who raised the issue of only being out of prison for a month and not having his values too straight at the time as an explanation for stealing Rose's car. (RT 4417.) Appellant was also the one

who raised the topic of how he had been trying to stay clean up until that point after being released from prison. (RT 4445-4446.) Thus, the prosecutor was entitled to explore these topics on cross-examination. (See Evid. Code, § 773, subd. (a) [on cross-examination, a witness may properly be questioned about matters within the scope of his direct examination]; *People v. Price*, *supra*, 1 Cal.4th at p. 474.)

When asked when the last time his values were straight, appellant replied that it had not been since he was 13 or 14 years old. (RT 4556.) Accordingly, the prosecutor did not introduce inadmissible evidence when she asked appellant whether one month of staying clean was a "pretty good record" for him. In light of appellant's own acknowledgment that his values had not been straight since the age of 13 or 14, the prosecutor's question was an appropriate follow-up question.

2. The Prosecutor's Reference To The Fact That Fred Rose's Life Was On The Line

One of the topics the prosecutor explored while cross-examining appellant was how Santana could have told Sergeant Coffey soon after Santana's arrest that the Oldsmobile belonged to a "dead man." Appellant replied that it could fairly be assumed that the police had suggested this information to Santana by asking "yes or no" questions. (RT 4544.) Appellant also suggested that Sergeant Coffey's testimony could not be trusted, because his interview of Santana was not recorded. The prosecutor asked appellant how Santana could have known to tell Sergeant Coffey that appellant had previously stated that he had taken a man from a liquor store. Appellant replied that he did not believe Santana truly said this; rather, Santana was one of the prosecution's "babbling puppets." (RT 4545.)

After a recess, the prosecutor returned to this topic, and asked whether appellant was suggesting that Sergeant Coffey told Santana to make a comment regarding the Oldsmobile being hot and involved in a murder. (RT 4569.) The following exchange ensued:

A I wouldn't be able to tell you as that is not a taped transcript.

Q Now, this was one particular interview that there was no tape on, correct, because there weren't enough tape recorders to go around?

A I also know, as you said, he is notoriously sloppy in his note taking. So I wouldn't know if that was accurate or not.

Q Who said he was notoriously sloppy?

A I believe you did. That was on the record or off. I do not recall. But you did mention something to that fact.

Q [Appellant], you remember almost every word that went on in this case, don't you? In this trial?

A I would hope so.

Q Okay.

A My life is on the line.

Q You have said that a few times, sir. I think the jury is aware of that already.

A I would hope so.

Q Yes. So was Mr. Rose's. [¶] Now - -

A Not in conjunction with myself.

Q Sir, there is no question pending.

(RT 4569-4570, emphasis added.) The prosecutor then continued her questioning regarding Santana's statement to Sergeant Coffey. (RT 4570-4571.)

Appellant challenges the italicized portion of the above exchange, contending that the prosecutor's remarks were argumentative, gratuitous and

inflammatory. (AOB 115-116.) Because appellant failed to object to the challenged comments or request an admonition, his claim has been waived. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.) Furthermore, to the extent the prosecutor's comments were argumentative or gratuitous, appellant cannot establish that he was prejudiced, as any misconduct was de minimis. (*People v. Osband*, *supra*, 13 Cal.4th at p. 695.)

In *People v. Osband*, the prosecutor was cross-examining the defendant about beating a woman and asked, "Did you take anything from her?" When appellant replied, "No, I didn't," the prosecutor added, "Besides her dignity, I mean." This Court found that the prosecutor's comment was gratuitous, but that the misconduct was "de minimis," noting that the jury was "well acquainted with defendant's crimes and their effect" on the victim. (*Ibid.*) As in *Osband*, the jury in the instant case was well aware that appellant's life was "on the line" and that Rose's life had been as well. Accordingly, to the extent that any misconduct occurred, it was clearly de minimis and no prejudice resulted.

3. The Prosecutor's Reference To "Scott Rockefeller"

Appellant testified that after he first withdrew $200 from Rose's bank account, he tried to withdraw more. He explained that he previously had a bank account without a daily withdrawal limit. (RT 4431, 4578.) Appellant claims the prosecutor committed misconduct by asking appellant whether his former bank account with no daily withdrawal limit was in the name of "Scott Rockefeller." (AOB 116, citing RT 4578.) This claim is waived and meritless.

First, appellant failed to object on grounds of prosecutorial misconduct or request a curative admonition. Accordingly, the issue is waived on appeal. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.) Furthermore, there was no misconduct. The prosecutor was merely highlighting the fact that appellant's explanation was implausible. In any event, any possible misconduct was

certainly de minimis. (*People v. Osband, supra*, 13 Cal.4th at p. 695.) The amount of money appellant withdrew from Rose's account was not a disputed issue at trial. Appellant admitting using Rose's ATM card on two consecutive days. Whether appellant had a daily withdrawal limit on his former bank account could not have affected the jury's verdict.

4. The Prosecutor's References To Appellant's "Thinking Real Fast" And Being A "Quick Thinker"[26]

Appellant next claims the prosecutor committed misconduct by referencing his ability to think fast when he responded to Detective Castillo's questioning. (AOB 116-117.) He also claims the prosecutor committed misconduct when asking appellant whether he was a "quick thinker" when he lied to his girlfriend and his mother about earning money by working construction jobs. (AOB 118-119.) Respondent submits there was no misconduct.

Detective Castillo testified that appellant initially denied throwing a gun out the car window during the pursuit. When Detective Castillo stated that appellant's fingerprints had been found on the gun, appellant then acknowledged that he had thrown some items out the window that were passed his way. (RT 4146-4147.) Appellant acknowledged on direct examination that he had lied repeatedly to Detective Castillo during the first interview. (RT 4521-4526.)

On cross-examination, the prosecutor asked appellant about his lies to Detective Castillo:

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26. Appellant raises these two claims in Argument VI, subarguments (4) and (6). (See AOB 116-119.) Because the two claims are very similar, respondent has combined the argument in response to these claims.

Q Okay. And then the detective says "Well, and the car stops, you know, eventually and somebody throws a gun out the front passenger side, and that's you." And you say "I didn't throw no gun out the passenger side," and that's a lie, right?

A Yes.

Q Okay. And then he says to you "Why are your prints on the gun," and you go "hug" and he starts to say "why are your - -" and it was obvious he was going to say "prints on the gun," and you interrupted him and you said "might just got passed my way." You thought real fast there, huh?

A I was throwing stuff out of the car.

Q No, what I am saying is you were thinking real fast in the answers to Detective Castillo when he said, "Why are your prints on the gun," so you had to cover?

A Yes.

Q Pretty sharp thinking, pretty smooth.

[Defense counsel]: Strike that from the record. There's no question pending. All afternoon long, she's been making editorial comments without questions.

The Court: The jury has been advised statements of counsel are not evidence.

(RT 4657.)

Later, the prosecutor cross-examined appellant on the subject of lying to his girlfriend and his mother about how he had obtained money working in construction:

Q [By the prosecutor]: Now, when you talked to [Gutierrez], what did you tell her about how you had gotten some money?

A I told her basically the same thing I told my mother.

Q What was that?

A I had got it working construction, same thing.

Q Told your mother [you] had done some odd jobs. You told [Gutierrez] you did some construction work, correct?

A I told my mother construuction [sic] sites or whatever.

Q Is there some reason you keep telling your mother about construction, [Gutierrez] construction? Did you have construction on your mind?

[Defense counsel]: Asked and answered, objection.

The Court: Overruled.

[Appellant]: I would say on my mind because I would wear the construction hat at the bank and just because there's tools, you know, it fits. I used it at that point in time.

Q [By the prosecutor]: A quick thinker, aren't you, [appellant]?

[Defense counsel]: I will object to that question, argumentative.

The Court: Sustained.

[Defense counsel]: Ask counsel be admonished.

(RT 4698-4699.)

The prosecutor did not commit misconduct. The prosecutor's questions served to highlight the ease with which appellant had lied in the past. In evaluating a witness's credibility, the jury is entitled to consider the witness's admissions of untruthfulness and statements previously made by the witness that were inconsistent with his testimony. (See Evid. Code, § 780; CALJIC No. 2.20; see also *People v. Bunyard* (1988) 45 Cal.3d 1189, 1223.) In the instant case, appellant acknowledged numerous instances of untruthfulness, including lying to the police during his various interviews, and lying to his mother and his girlfriend about how he had obtained the money he had truly stolen from Rose's

wallet and bank account. The prosecutor's questions in this regard were therefore appropriate.

Finally, even assuming the prosecutor committed misconduct, it was not prejudicial. Asking appellant whether he was a fast thinker may have been argumentative, but such comments were de minimis in the context of the entire trial. (*People v. Osband*, *supra*, 13 Cal.4th at p. 695.)

5. Asking Appellant Whether He Wanted To Go By The Murder Scene To See If The Police Had Found The Victim's Body

Appellant contends the prosecutor committed misconduct by asking whether the reason he went to the Chevron station in North Hollywood was because he wanted to drive by the murder scene to see if the police had found the victim's body. (AOB 117-118.) This claim has been waived due to the failure to object on grounds of prosecutorial misconduct or to request a curative admonition. In any event, there was no misconduct.

The prosecutor asked appellant the following questions about his choice of gas stations:

Q And when you left McDonald's, you then got on the freeway to go back to the valley, correct?

A To head towards Bakersfield, yes.

Q That's when you stopped at a gas station correct?

A Yes.

Q And then of course you stopped at a Chevron. That's the card you had?

A Yes.

Q Of the victim's. Isn't that a fact, sir, there are a couple of Chevron gas stations before you ever got to McDonald's right on the route that you took?

A Yes.

Q Any reason you did not stop at those?

A I was on the freeway heading towards Bakersfield. I looked at the tank and was low on gas again.

Q How about when you left McDonald's at Highland and Hollywood Boulevard, there's a big Chevron gas station right there. Any reason you did not stop there before getting to the freeway?

A I was not thinking at the time. I was busy eating.

Q I thought you ate at McDonald's?

A I was also eating.

. . . .

Q [By the prosecutor]: How much gas do you figure you used from the time you left McDonald's at Hollywood and Highland until you got to the Moorpark Chevron station?

A Not that much. The gas from the last time I had gotten gas through the valley all the way through east L.A. and cruising back east L.A., I was getting kind of low.

Q If you were that low at the time you left McDonald's, is there any reason you didn't get gas at that Chevron station before you got to Moorpark.

[Defense counsel]: Asked and answered, objection.

The Court: Overruled.

[Appellant]: Probably I assume it was busy. I knew the area around there. It's a real busy area . . . .

Q [By the prosecutor]: A moment ago you were thinking. Which was it, sir?

A Can't really recall my thought process. Was about at that point in time I was thinking and thinking about going to Bakersfield. Maybe

I saw the gas station. Assumed I could get to the valley, had enough gas, you know.

Q Or maybe you wanted to go right by the murder scene to be sure the cops had found the body, yes?

[Defense counsel]: No question pending, objection.

The Court: Sustained.

(RT 4697-4698.)

Appellant argues that the prosecutor committed misconduct by presenting potentially prejudicial argument to the jury in the form of a question. (AOB 117-118.) Appellant has waived his claim of prosecutorial misconduct by failing to object on grounds of prosecutorial misconduct or request a curative admonition. His objection on evidentiary grounds was insufficient to preserve his claim of misconduct on appeal. (*People v. Gionis*, *supra*, 9 Cal.4th at p. 1215.)

Furthermore, there was no misconduct. Contrary to appellant's assertion, the prosecutor did indeed have a factual basis for asking whether appellant had returned to the scene of the crime. The gas station where appellant chose to go was less than a mile from the scene of the shooting. (RT 4043-4044.) Appellant was somewhat equivocal in explaining why he would have gone to a Chevron station in North Hollywood rather than a Chevron station right next to where he had just eaten at McDonald's. (RT 4697-4698.) Immediately after purchasing gas, appellant left town for Bakersfield. Thus, this was not an instance where the prosecutor had no evidence to support her theory that appellant chose this particular gas station due to its close proximity to the murder scene and his desire to determine whether the victim's body had been discovered. There was no misconduct.

In any event, even if the prosecutor's question constituted misconduct, there was no prejudice. The jury was instructed that statements made by

counsel were not evidence. (CT 675; CALJIC No. 1.02.) It is not conceivable that the prosecutor's comment affected the verdict.

6. Asking Whether Gomez Had Lied During Her Testimony And Whether It Was True That Only The Murderer Would Know What Time The Shooting Occurred

Finally, appellant contends the prosecutor committed misconduct by asking appellant whether Gomez had lied and whether it was true that only the murderer would have known what time the victim had been shot. (AOB 119-120.) This claim has been waived due to the failure to object on grounds of prosecutorial or to request a curative admonition. Furthermore, there was no prejudicial misconduct.

Gomez testified that appellant told her on January 26 that the homicide for which he had been arrested had been committed while appellant was at Gomez's house. (RT 4247-4248.) While addressing the subject of why appellant did not initially tell the police he had been at Gomez's house at the time of the murder, the prosecutor asked appellant the following questions:

Q Nothing about [Gomez]. Is there some reason for that?

A I didn't want to put anybody's name in this that wasn't already involved at that point in time.

Q Well, you just told us a minute ago you didn't want to give them anybody's name who was involved. Now you don't want to give us any names who wasn't involved. How was that - -

A Into helping them at all.

Q How would that involve [Gomez]?

A I wasn't into helping them with their investigation period. [¶] I figured I could use her for my defense because I was there.

Q How did you know you were there?

A Because I know I was there that day.

Q No. You knew you were there that evening. You said 5:00 to 8:00.

A That evening, that day.

Q [Appellant], at this point in time you don't even know what time this man has been killed unless you're the murderer.

A That is true.

Q Then how did you know you were at [Gomez's] house when the murder happened?

A I didn't know at that point in time. I talked to everybody that I run into that day. I tried to get in touch with.

Q [Appellant], when you called [Gomez] on January 26th from the jail, you told her that you were supposed to have killed some man when you were at her house. [¶] Do you remember she testified to that?

A I'm not sure if I said it in those exact words. That might have come out later in [a] different conversation with her.

Q [Appellant], Miss Gomez has testified that when she talked to you, you told her that the murder was supposed to have happened the night you were at her house.

A I said that is very probable. I probably told her that at a later conversation.

Q No. She is talking about this first phone call on January 26th.

A She obviously would be mistaken.

Q [Appellant], she testified that on January 26th you told her when you called her that you were arrested for some murder and that the murder had happened when you were at her house. [¶] Now, how did you know the murder had happened when you were at her house?

A I did not know at that point in time.

Q Then how could you possibly tell her that on that date.

A I don't believe that I did tell her that on that date.

Q Then she is lying also, right?

A I believe she is mistaken of what telephone call she actually got the information from me.

Q [Appellant], only the murderer would have known that the murder occurred sometime between 5:00 and 6:30 or 5:00 and 7:00. Only the murderer and the people who heard the shots.

[Defense counsel]: There is no question pending. Ask the comment of counsel be stricken.

The Court: It will be stricken.

(RT 4733-4736.)

Appellant first argues that the prosecutor committed misconduct by asking him to comment on whether Gomez had been lying when she testified that appellant told her on January 26 that he had been at her house when the murder occurred. (AOB 120.) Appellant did not object to this testimony or request a curative admonition. Accordingly, any claim of prosecutorial misconduct has been waived. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.) Furthermore, there was no prejudicial misconduct.

Appellant relies primarily on decisions of the lower federal courts in asserting that it is improper to force a defendant to comment on the veracity of another witness's testimony. (AOB 120, citing *United States v. Henke* (9th Cir. 2000) 222 F.3d 633, 643 and *United States v. Sanchez-Lima* (9th Cir. 1998) 161 F.3d 545, 548-549.) While decisions of lower federal courts interpreting federal law are persuasive authority, they are not binding on state courts. (*People v. Zapien* (1993) 4 Cal.4th 929, 989; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352.) Appellant also relies on *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40, for the proposition that lay opinion about the veracity of particular statements made by another is inadmissible. (AOB 120.) This case

is distinguishable because it involved police officers testifying about whether, in their opinion, a child victim's account of an assault was truthful. (*Id.* at p. 38.) Those officers were not present at the time of the alleged offense and would have had no way of knowing whether the victim's account was truthful.

In contrast, appellant participated in the conversation with Gomez on January 26 when he either did or did not tell her that he had been charged with a crime that occurred while he was at her house. Appellant fails to cite any controlling authority holding that a prosecutor commits misconduct by asking a defendant to comment on another witness's veracity under such circumstances.

In any event, even assuming the prosecutor's question was improper, it could not have caused any prejudice. It was clear that appellant's position was that Gomez was mistaken in her testimony, and that he denied making such a comment to Gomez during the January 26 conversation. Asking appellant to comment on Gomez's veracity in this regard could not have affected the verdict.

Appellant next claims that the prosecutor was simply arguing her case through cross-examination. (AOB 120.) This claim has also been waived due to the failure to object or request a curative admonition. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.) Furthermore, the claim is meritless.

Appellant changed his testimony about why he did not initially tell the police about Gomez being his alibi. He first stated that he did not want her to get involved. Once the prosecutor reminded him that he would not have known during his second interview what time the shooting occurred unless he had been involved, appellant changed his explanation. Instead of focusing on the fact that he did not want to get Gomez involved, he claimed that he would not have known what time the killing occurred. The prosecutor was entitled to cross-examine appellant about Gomez's testimony that he had told her as early as January 26 that the murder had occurred while he was at her house, which was

before appellant had learned from law enforcement about the time of the offense. The prosecutor's questions were appropriate in light of the fact that appellant had just changed his explanation for not telling the police about his alibi. Accordingly, the prosecutor did not commit misconduct. Finally, to the extent that the prosecutor's questioning was improperly argumentative, it was not prejudicial. Rather, any misconduct was de minimis. (*People v. Osband*, *supra*, 13 Cal.4th at p. 695.)

C. There Was No Cumulative Prejudice Resulting From The Alleged Acts Of Prosecutorial Misconduct

In an effort to excuse his failure to object to any of the preceding alleged instances of prosecutorial misconduct on those grounds, appellant claims the combined effect of the prosecutor's acts constituted a "constant barrage" of unethical conduct that could not have been cured by admonition. (AOB 120-122, citing *People v. Hill*, *supra*, 17 Cal.4th at p. 819.)

The challenged conduct in the present case does not even remotely approach that of the "unusual circumstances" in *Hill* which led this Court to conclude that defense counsel "must be excused from the legal obligation to continually object, state the grounds of his objection, and ask the jury be admonished." (*People v. Hill*, *supra*, 17 Cal.4th at p. 821.) The *Hill* Court explained that defense counsel,

> was subjected to a constant barrage [of the prosecutor's] unethical conduct, including misstating the evidence, sarcastic and critical comments demeaning defense counsel, and propounding outright falsehoods. With a few exceptions, all of [the prosecutor's] misconduct occurred in front of the jury. Her continual misconduct, coupled with the trial court's failure to rein in her excesses, created a trial atmosphere so poisonous that [defense counsel] was thrust upon the horns of a

> dilemma. On the one hand, he could continually object to [the prosecutor's] misconduct and risk repeatedly provoking the trial court's wrath, which took the form of comments before the jury suggesting [defense counsel] was an obstructionist, delaying the trial with "meritless" objections. These comments from the bench ran an obvious risk of prejudicing the jury towards his client. On the other hand, [defense counsel] could decline to object, thereby forcing defendant to suffer the prejudice caused by [the prosecutor's] constant misconduct. Under these unusual circumstances, we conclude [defense counsel] must be excused from the legal obligation to continually object, state the grounds of his objection, and ask the jury be admonished. On this record, we are convinced any additional attempts on his part to do so would have been futile and counterproductive to his client.

(*Ibid.*)

Unlike the circumstances of *Hill*, here the trial court never chastised defense counsel in front of the jury or made comments detrimental to the defense following defense objections. (See *People v. Hill*, *supra*, 17 Cal.4th at pp. 821-822.) Accordingly, the failure to object on grounds of prosecutorial misconduct to any of the above alleged instances of prosecutorial misconduct waives these claims on appeal.

However, even if it is assumed, arguendo, that prosecutorial misconduct occurred in the present case and that appellant did not waive the issue by failing to object and request an admonition, it is not reasonably probable that a result more favorable to appellant would have occurred in the absence of the alleged misconduct. At most, the prosecutor made a few isolated remarks during cross-examination that may have been gratuitous or argumentative. However, her tactics were not deceptive. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 180.) Furthermore, defense counsel had the opportunity to mitigate any harm through

redirect examination, argument and requests for curative admonitions. Accordingly, the judgment should not be reversed for prosecutorial misconduct. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Gionis*, *supra*, 9 Cal.4th at pp. 1214-1215.)

Furthermore, the overwhelming evidence supporting appellant's guilt in this case precludes the possibility that the alleged misconduct could have caused a miscarriage of justice. The strength of the evidence can eliminate any prejudice from extraneous remarks. (*People v. Hines* (1997) 15 Cal.4th 997, 1036-1038 [erroneous implication from prosecuting attorney's direct examination of witness was harmless, under *Watson*,[27] given overwhelming evidence of guilt]; *People v. Hardy* (1992) 2 Cal.4th 86, 172-173 [though prosecutor's conduct occasionally crossed the line of appropriate advocacy, none of the claims of misconduct contributed to the verdict].) Appellant's claim must be rejected.

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27. *People v. Watson* (1956) 46 Cal.2d 818, 836.

VII.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING HER GUILT PHASE ARGUMENT

Appellant contends the prosecutor committed at least three acts of misconduct by referring to evidence outside the record and using for improper purposes evidence which was admitted for a limited purpose. Appellant claims the alleged misconduct violated his rights to confront and cross-examine witnesses, to a fair trial, to due process, and to reliable determinations of guilty and death eligibility under the state and federal constitutions. (AOB 123-134.) Appellant's claims of prosecutorial misconduct are waived due to his failure to object on this ground and request a curative admonition. In any event, there was no prejudicial misconduct.

A. Controlling Principles Of Law

A prosecutor is given wide latitude during argument and argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) Counsel may state matters not in evidence which are based on common knowledge or are illustrations drawn from common experience, history or literature. (*Ibid.*)

In general, a defendant may not raise an issue of prosecutorial misconduct on appeal unless a timely objection was raised on the same ground in the trial court and a request for a curative admonition was made. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841; *People v. Berryman*, *supra*, 6 Cal.4th at p. 1072.) Exceptions to this rule include where an objection or request for admonition would be futile, where an admonition would not cure the misconduct, and where the court immediately overrules an objection and does not give counsel an opportunity to seek an admonition. (*People v. Hill*, *supra*,

17 Cal.4th at pp. 820-821.) Finally, even if the reviewing court determines an admonition would not have sufficed, reversal is warranted only if, "on the whole record the harm resulted in a miscarriage of justice[.]" (*People v. Bell*, *supra*, 49 Cal.3d at p. 535.)

B. The Alleged Acts Of Misconduct

1. The Reference To Michael Hernandez Changing His Shirt

Appellant first claims the prosecutor committed misconduct by referring to facts outside the record when she argued that Michael Hernandez was so fearful of appellant that he had asked to change his shirt and ended up turning his shirt inside out to hide the name of the institution where he was being housed. (AOB 123-124, citing RT 5085.) This claim has been waived due to the failure to object or request a curative admonition. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) In any event, the prosecutor's argument constituted fair comment on the evidence.

On direct examination, Michael Hernandez testified that he was scared when he was initially interviewed by the police following his arrest. He was afraid that because he had been inside the Oldsmobile, he would "get pinned with the murder-rap too." (RT 3521.) Five days after Hernandez was released from juvenile hall, he spoke to Detectives Castillo and Medina. He was still scared at this point because he had heard that appellant was trying to blame the murder on him and his friends. Hernandez also feared that contracts had been taken out to kill him and his friends. (RT 3521-3522.) Hernandez did not want to testify at the preliminary hearing. He was in custody at the time, and he was scared to come out because he believed appellant had a contract out on him. (RT 3522.) Hernandez was still scared as he testified at trial. (RT 3522.) When asked why he was scared, Hernandez explained, "Just scared, man. Afraid of being here. Being around him. Afraid what he might do after this is

all over." (RT 3523.) The prosecutor then asked Hernandez the following series of questions:

Q [By the prosecutor]: Do you believe it's easier to get to you because you are in custody?

A Yes, ma'am.

Q Just before you took the witness stand did you ask if you could change clothes so that he wouldn't know where you are now?

A Yes, ma'am.

Q Do you believe that he has the ability to have a contract taken out on you?

[Defense counsel]: Objection. Speculation.

The Court: You may answer.

[Hernandez]: Yes, ma'am.

(RT 3523.)[28/]

Defense counsel cross-examined Hernandez about whether he was truly afraid of appellant, in light of the fact that Hernandez had at one point retaliated against a rival gang member with a baseball bat. Hernandez confirmed that he was afraid of appellant, noting that appellant had access to him. (RT 3581.) On redirect, the prosecutor asked Hernandez, "In fact, before you testified today were you that afraid that you asked for another shirt because you didn't want him to know where you were in jail right now?" Defense counsel's objection on grounds that the question had been asked and answered was sustained. (RT 3581-3582.)

During a break in Hernandez's testimony, the prosecutor sought guidance from the court regarding what additional questions she could ask

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28. At this point, the trial court instructed the jury that Hernandez's testimony was not received for the truth of the matter, but rather to understand Hernandez's state of mind. (RT 3523.)

Hernandez about his fear of appellant. It was the prosecutor's theory that Hernandez's fear of appellant affected his demeanor on the stand, the statements he initially made to the police, and his testimony in court. (RT 3582-3590, 3594.) The court and counsel questioned Hernandez outside the presence of the jury. Hernandez confirmed that he was very fearful of appellant because he believed appellant could put a "contract" out on either himself or his family. Hernandez referred to the fact that appellant had documentation that Hernandez had cooperated with the police. Hernandez was especially fearful of appellant because Hernandez was currently in jail, and therefore appellant would have easy access to him. In addition, a contract taken out by one person in jail on another person in jail was something that was honored. (RT 3598-3610.) At the end of this examination, the trial court reserved its ruling but noted that Hernandez was visibly shaking while answering the court's questions, and his demeanor had been hesitant or frightened when testifying in front of the jury. (RT 3611.) The following day, the court ruled that the prosecution was allowed to ask Hernandez the areas of his concern because it was relevant to evaluate his demeanor and truthfulness. (RT 3615.)

During closing argument, the prosecutor argued that all of the Bakersfield juveniles feared appellant, and Zamora and Hernandez were particularly afraid. (RT 5083-5084.) With respect to Hernandez, the prosecutor argued:

> Do you remember when Michael Hernandez first testified. You know, you were told to watch body language. If I can for a moment, when he was on direct examination, this is how he sat. This man is sitting like that. He was afraid to even look in that direction. Was there any doubt in your mind this man was afraid. You heard him testify he was wearing a tee shirt when he came to court that had the name of the institution that he is in on it and he asked for another shirt. We didn't

have one and he put the shirt on inside out hoping that would hide the name of where he was. You heard him testify how scared he was and how when he was in custody, "It's even easier to put a hit out on you." (RT 5084-5085.)

As shown above, Hernandez had indeed testified that he was currently in custody and had asked to change his clothes prior to testifying so that appellant would not know where he was located. (RT 3523.) Hernandez also testified that he believed it was easier for appellant to get to him because he was in custody. (RT 3523, 3632.) The jury would have been able to observe the fact that Hernandez had his shirt on inside out when he testified. Thus, the prosecutor's argument was based on the evidence presented at trial, and appellant's claim to the contrary is groundless.

Moreover, any improper argument was harmless. Assuming the prosecutor commented on facts outside the record by mentioning that Hernandez had turned his shirt inside out, any harm was clearly de minimis in light of Hernandez's extensive testimony about his fear of appellant.

2. The Prosecutor's Argument Regarding Appellant Throwing A Watch Out The Window During A Pursuit

Appellant contends the prosecutor committed misconduct by referring to facts not in evidence when she argued that Zamora had affirmatively stated to the police that appellant had thrown a watch out the car window during the pursuit. (AOB 124-128.) Once again, appellant has waived this claim by failing to object on grounds of prosecutorial misconduct or request a curative admonition. In any event, appellant has not demonstrated prejudicial misconduct.

Sergio Zamora testified on direct examination about items appellant had thrown out the window during the police pursuit. When asked to describe these

items, Zamora replied, "Credit cards and I think a watch." The prosecutor asked what kind of watch it was, and Zamora replied, "a black watch." (RT 3312.) The prosecutor showed Zamora a Casio G-Shock watch that was the same brand and model that Rose typically wore, but which Rose was not wearing at the time of his death. (See RT 3532, 3535-3536.) When asked whether it looked like the watch appellant had thrown out of the car, Zamora stated that he had just seen the wristband. (RT 3312-3313.)

On cross-examination, appellant testified that he had never thrown a watch out the window, and that Zamora invented that portion of his testimony, with the help of the detectives. Appellant suggested there was a very good possibility that the detectives used "prodding and pumping and suggestive questions." (RT 4634-4635.) Later, the prosecutor returned to the subject of the watch and asked appellant the following series of questions:

Q On Friday, [appellant], there was some discussion about how it's possible that Mr. Zamora knew anything about a watch having been thrown out of the car. Do you remember that?

A Yes, ma'am.

Q And you said possibly someone had fed him that information or words to that affect. Is that an accurate synopsis of our discussion Friday?

A Yes, ma'am.

Q All right. I told you I would bring up the transcripts so we could get to that and this one is on tape unlike Mr. Coffey's with Mr. Santana. Do you recall that?

A Yes, ma'am.

Q Page 12 of the interview with Mr. Zamora, and I am referring to the interview which took place on January 25th at 2:15 a.m. at Bakersfield Jail, Mr. Zamora said, he's asked basically what had been

thrown out of the car and he says, "and a watch," and the detective says "yes?" Does that sound like the detective told him what's been thrown out?

A No, it does not.

Q You don't know what?

A No, it does not.

Q Okay. Do you have any idea how Mr. Zamora possibly knew anything about a watch?

A Like I believe I stated Friday, he was pretty drunk, I don't know how he came, how he came to that conclusion or he got that idea from.

Q All right. So someone who is drunk and passed out just happens to see a watch being thrown out of a car which happens to be almost identical or identical to one our victim had?

A I don't believe he ever saw a watch being thrown out of that car. I didn't throw a watch out of that car.

(RT 4664-4665.)

During defense counsel's closing argument, he challenged the prosecution's theory that appellant threw Rose's watch out the window during the pursuit:

> The one other element and this item of a watch, is rather difficult to deal with because it's obviously mentioned by one witness. That's Sergio Zamora who in his testimony said that [appellant] had said something or [appellant] threw it out the window of the car, a wallet, credit card and I think a watch. When he was asked about that by the prosecution, she showed him a watch and indicates something about a band that he had seen. You have to factor into his answer his state of sobriety, the fact that his comment and statement cannot be reconciled with anybody else, and number 2, it's interesting that the gun went out

the window, of course, that is an item which is at least presumptively at a different place from the glove compartment. I jumped to that conclusion whether it's justified or not. I don't know that was jettisoned somewhere in the projects for obvious reasons.

The other items, the items that were either here in the glove compartment or in the possession or close to [appellant], we know were found very close to that car which hit that chain link fence and became intertwined in it, and no one has found a watch. There's no evidence of any watch being found. Practically there's not even any evidence that Mr. Rose was wearing a watch other than the fact that that was a common pattern and his common behavior. Nevertheless, if the watch is in the glove compartment with credit cards and wallet, may be interesting to question why that is not found with his other items.

(RT 5188-5189.)

During her rebuttal argument, the prosecutor addressed the issue of the watch as follows:

I'm not going to go over everything to pick apart what the youngsters from Bakersfield said, but there were a couple of areas I thought were significant where there was a misstatement by the defense. I don't think [defense counsel] did it deliberately, but I've got to point it out.

The first one he said yesterday, and he repeated it again this morning, had to do with the watch.

He said that [Zamora's] exact statement about the watch was that, "The defendant threw out, I think, a watch."

That is totally utterly false. [Zamora's] statements on page 12 of his interview of January 25th, which was read into the record here, goes as follows:

Detective Castillo is questioning him. They are talking about property that the defendant threw out of the car: the bullets, the credit cards.

And [Zamora] then says at line 10, "and a watch." Not, "I think," but, "and a watch."

And Detective Castillo says, "Yeah." [¶] And Zamora says, "Stuff like that." [¶] Detective says, "He threw all that stuff out?"

[Zamora] says, "Uh-hum." [¶] "Castillo: Why?" [¶] "[Zamora]: Huh?" Remember he's very bright this kid. [¶] "Detective: Why?" [¶] "[Zamora]: Just threw it out. No evidence, you know, in the car."

He didn't say he thought it was a watch. He said "a watch."

(RT 5234-5235.)

Defense counsel never objected to the prosecutor's argument on any ground, let alone on grounds of prosecutorial misconduct. Nor did he request a curative admonition. Because an admonition would have cured any harm, appellant has waived the issue on appeal. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) Furthermore, appellant's claim fails on the merits as well, as there was no prejudicial misconduct.

Any confusion as to whether Zamora's interview statements had been entered into evidence as opposed to being used to impeach appellant's testimony that the police used suggestive methods in inducing Zamora to state that he had seen appellant throw a watch (see RT 4663-4664) did not amount to prejudicial misconduct. Even if the prosecutor argument referred to extrajudicial statements not admitted at trial, implicating the defendant's right to confront witnesses and cross-examination under the Sixth Amendment, reversal is not required if the court is satisfied beyond a reasonable doubt that the misconduct did not affect the verdict. (*People v. Harris* (1989) 47 Cal.3d

1047, 1083.) Here, any improper argument was harmless beyond a reasonable doubt.

The point the prosecutor was making was that Zamora's testimony regarding the watch had not been equivocal. When the prosecutor asked Zamora on direct examination what appellant had grabbed from the glove compartment, Zamora replied, "Credit cards and I think a watch." Thus, this initial answer regarding the watch could be construed as equivocal. However, the next question the prosecutor asked was, "What kind of a watch; do you know?" Zamora then responded without equivocation, "A black watch." (RT 3312.) When asked to identify whether the watch he had seen looked like a watch similar to the one Rose used to wear, Zamora responded without equivocation, "I just seen the bottom," and he later clarified that he meant that he had seen the wristband. The prosecutor then asked Zamora again, "Talking about the wristband part." Zamora replied, "Yes, ma'am." (RT 3313.) The fact that Zamora was able to recall that he had seen a black watch and that he had specifically seen the wristband of the watch eliminated any equivocation regarding whether Zamora had indeed seen a watch.

Furthermore, whether Zamora had seen appellant throw a watch out the window was not a crucial piece of evidence. While this was indeed an incriminating piece of circumstantial evidence, there was an abundance of much more damaging evidence establishing appellant's guilt beyond a reasonable doubt. Appellant threw Rose's wallet and credit cards out the window during the police pursuit. Thus, the fact that he also threw Rose's watch out the window was somewhat cumulative. Appellant was arrested in Rose's car the day after Rose's murder. He had been in Lancaster at the time of Rose's disappearance. Appellant used Rose's ATM card in Northridge, an hour-long drive from Lancaster, less than two hours after Rose was last seen in Lancaster. Shoe prints likely made by appellant's shoes were found at the scene of the

shooting. Three witnesses saw a car similar to Rose's car driving away from the scene of the shooting. Appellant bragged to numerous people that the car had been stolen and had a murder rap on it. Appellant had a gun in his possession that was consistent with causing the victim's gunshot wound. This was not a close case. Accordingly, any misconduct was harmless beyond a reasonable doubt. (See *People v. Harris*, *supra*, 47 Cal.3d at p. 1083.)

3. The Prosecutor's Reference To Appellant's Prior Robbery Conviction

Finally, appellant contends the prosecutor committed misconduct by arguing that appellant's prior robbery conviction provided motive to commit the murder in the instant case, to avoid a return to prison. (AOB 128-131.) This claim has been waived due to appellant's failure to object on grounds of prosecutorial misconduct. In any event, there was no misconduct.

During her closing argument in the guilt phase, the prosecutor suggested that the reason Rose may have cooperated with appellant was because his wallet contained his home address and information revealing that he was married with three children. The prosecutor surmised that Rose may have felt that by cooperating, he would save his life and avoid appellant harming his family. (RT 5098-5099.) The prosecutor continued her argument as follows:

> And you have to remember that Fred Rose didn't know this defendant. He knew nothing about his background. Didn't know about his prior robbery with a gun, and perhaps his decision that he wasn't going to leave any witnesses alive this time.

(RT 5099-5100.)

Defense counsel did not object to the above argument. (See RT 5100.) Instead, he included the following comments in his own closing argument:

You have an instruction and you will read that instruction is that the prior record of a witness, be it [appellant] or anybody else, has a limited evidentiary value and it has a bearing upon the truthfulness of that witness on the stand. It's a principle of law with which the defense frequently disagrees. We will tell you it's perfectly common to have someone who has committed a terrible crime be completely truthful and somebody never convicted of any crime be a complete liar, but nonetheless, that's the law and you have been so instructed.

The prosecution has gone just a little bit beyond that and they have said, "Well, what has happened in this particular situation is what [appellant] could not afford, did not want to leave a witness against him," and that it's his motivation and the cause and the explanation for the death of Fred Rose. What we're trying to do is meet the prosecution at all levels, whatever level they take. If they want to talk about a drive-by, let's talk about a drive-by. You want to talk about a prior record, we're talking about prior record. We're not afraid of that, if that is basically true.

(RT 5195-5196.)

During rebuttal argument, the prosecutor addressed defense counsel's argument that she had "done something wrong because [she] may have gone beyond this defendant's prior conviction and argued . . . that he could not afford to leave a witness behind him this time." She continued,

Well, think about it. If you were a young man his age and you had just gotten out of prison for an armed robbery and you had just robbed someone else and kidnapped them, would you want to leave that person alive to identify you so you could go back to prison?

Not this man. He's too fond of his freedom and partying. No way is he going to leave someone alive this time.

Obviously, the way he went to prison the first time someone must have identified him. He is not going to take that risk again.

(RT 5258-5259.)

At this point, defense counsel asked to approach the bench, and he subsequently made the following comments in chambers:

[Defense counsel]: I think counsel is saying what may have been implied yesterday and that is that because of his prior episode of criminality, that he had a predisposition to repeat that criminality. And that somehow would cause him to commit a murder as a consequence of it.

I think that's in direct contravention of the instructions and the law. I think it is an impermissible use of the prior conviction. And I would ask that the jury be admonished in that regard.

(RT 5259.)

The prosecutor responded as follows:

[Prosecutor]: I don't think so at all. I think counsel opened this up by indicating that I overreached by implying that because he had this prior conviction he had a motive to murder Mr. Rose.

That's what counsel said this morning. And my argument is as logical as an argument could be. I'm not saying that he was identified before. I'm just saying it is obvious that that was his motive. A jury can reach a contrary conclusion, but I don't think there was anything impermissible in that argument whatsoever.

(RT 5259-5260.) The prosecutor further clarified that she was not arguing that appellant was a bad person due to the prior conviction who was more likely to reoffend. The trial court observed that eliminating a witness and avoiding apprehension established a motive for murder regardless of whether appellant had previously been convicted of a felony and done time in prison. (RT 5260.)

The trial court further stated, "And the jury, I believe, has been instructed, and if you want I can reread the instruction, that says that the limited instruction concerning how they can use a felony conviction." (RT 5260-5261.) Defense counsel replied, "I think that would be appropriate." (RT 5261.)

The trial court did not instruct the jury at that point. The prosecutor continued her argument as follows:

> [Prosecutor]: Ladies and gentlemen, one of the instructions you're going to get from the judge and you will have it in the jury room has to do with [appellant's] prior conviction. And for what purposes you can consider it.
>
> And you are not to consider it merely to show that he is a person who is predisposed to commit crimes.
>
> So the argument that I just gave to you has nothing to do with his actual conviction. What I'm arguing to you is that inferences that I believe common sense tells you why somebody who has been in prison before would not want to go back and would therefore want to eliminate a witness.

(RT 5261-5262.) Defense counsel posed no objection to the above argument.

At the close of the prosecutor's rebuttal argument, the trial court instructed the jury as follows:

> I will conclude my instructions. I will, first of all, reread the instruction concerning evidence of other crimes because it was referred to just now during argument. I don't mean to emphasize or single out this instruction for special importance. It should be considered in the context of all the other instructions.

"Evidence has been introduced for the purpose of showing that the defendant committed a crime or crimes other than that for which he is on trial.

"Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes.

"Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show the identity of the person who committed the crime of which defendant is accused.

"The defendant had knowledge of the nature of the things found in his possession.

"The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged.

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

(RT 5276-5277.) Defense counsel did not object to the manner in which the trial court admonished the jury.

First, appellant's claim has been waived due to his failure to object on grounds of prosecutorial misconduct. Although defense counsel did object at one point, he did not do so on grounds of prosecutorial misconduct. (RT 5259.) An ordinary evidentiary objection is insufficient to preserve a claim of prosecutorial misconduct. (*People v. Gionis*, *supra*, 9 Cal.4th at p. 1215.) Furthermore, defense counsel asserted that the prosecutor had improperly argued that appellant's prior criminality meant he was predisposed to repeat that criminality, and that this constituted an improper use of the prior conviction. He asked that the jury be admonished in that specific regard. (RT 5259.) The

trial court later instructed the jury that evidence of appellant's prior crimes "may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes." (RT 5276.) Thus, the trial court admonished the jury as requested by defense counsel. To the extent defense counsel was unsatisfied with this instruction, he could have requested more specific language, yet he declined to do so. Accordingly, appellant's claim has been waived.

In any event, the prosecutor did not commit misconduct by referring to appellant's prior robbery conviction as evidence of appellant's motivation to kill Rose, i.e., to avoid leaving a witness who might lead to a return to prison. Evidence Code section 1101, subdivision (a), provides that, but for certain enumerated exceptions, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." However, subsection (b) of Evidence Code section 1101 expressly allows for the admission of evidence that a person committed a crime or other act, "when relevant to prove some fact (such as motive ...) other than his or her disposition to commit such an act."[29/]

Evidence of appellant's recent release from prison following a robbery conviction was clearly relevant to establish his motive for killing the victim, i.e., to escape having to return to prison. (See, e.g., *People v. Heishman* (1988) 45 Cal.3d 147, 168 [court found no prejudicial error resulted from the admission

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29. Appellant correctly notes that the prosecutor at one point stated during the discussion of jury instructions that the evidence of appellant's prior convictions was not being admitted pursuant to Evidence Code section 1101, subdivision (b). (AOB 128, fn. 26, citing RT 4860.) In making this statement, though, it appears the prosecutor was referring to the fact that evidence of appellant's prior crimes were not relevant to a common scheme, plan, or design. She did not mention motive. (RT 4860-4861.)

of an abstract of judgment showing defendant had a prior conviction for rape where defendant was charged with first degree murder with the special circumstance that he killed the victim to prevent her from testifying against him in a rape case, the court noting that, "[h]ere, defendant was not charged with rape or attempted rape and the prior was not admitted for the purpose of showing defendant had a propensity to commit rape but to show his motive for committing murder - - to avoid having to return to prison."]; see also *People v. Durham* (1969) 70 Cal.2d 171, 189 [parole status and recent criminal activity relevant to show premeditated murder of police officer]; *People v. De La Plane* (1979) 88 Cal.App.3d 223, 245-246 [evidence of prior robberies admissible to show motive to murder witnesses].)

Furthermore, to the extent appellant claims that the prosecutor argued evidence outside the record by mentioning the fact that appellant committed a prior robbery with a gun (see AOB 128, fn. 27), this assertion is groundless. Appellant testified that he committed a prior armed robbery with a gun. (RT 4565.) Accordingly, the prosecutor's argument in this regard was based on the evidence.

Even assuming the prosecutor's argument was improper, any error was clearly harmless in that it is not reasonably probable that the jury would have reached a more favorable result had the prosecutor not argued that appellant's prior robbery conviction provided motive for the murder of the victim in this case. For the reasons set forth in the preceding section (see Arg. VII (B)(2), the evidence of appellant's guilt was compelling. Appellant's claim must be rejected.

VIII.

THE TRIAL COURT HAD NO DUTY TO INSTRUCT THE JURY THAT IT MUST UNANIMOUSLY AGREE WHETHER THE MURDER WAS PREMEDITATED AND DELIBERATE MURDER OR FELONY MURDER

Appellant contends the trial court erred in failing to instruct the jury that it must unanimously agree whether appellant was guilty of murder under a theory of premeditated and deliberate murder or felony murder. (AOB 135-144.) This claim must fail, as appellant has offered no compelling reason for this Court to reconsider the many cases in which this issue has already been rejected.

Section 189 defines both felony murder and deliberate and premeditated murder as murder in the first degree. The jury was instructed on both theories of murder in this case. (CT 812-814.) It is well established that a jury need only agree as to the elements of the crime of murder, and need not agree on a theory of first degree murder as either felony murder or deliberate and premeditated murder. (*People v. Nakahara* (2003) 30 Cal.4th 705, 730; *People v. Lewis* (2001) 25 Cal.4th 610, 654; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395; *People v. Pride* (1992) 3 Cal.4th 195, 250.)

It is also established that the Due Process Clause of the United States Constitution does not require that a jury determine between premeditation and felony murder theories in finding a defendant guilty of capital murder. (*Schad v. Arizona* (1991) 501 U.S. 624, 631-632 [111 S.Ct. 2491, 115 L.Ed.2d 555] (plur. opn. of Souter, J.) ["We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone." quotation marks and citation omitted]; *id.* at pp. 649-650 (conc. opn. of Scalia, J.) ["As the plurality observes, it has long been the general rule that when a single crime can be committed in various ways, jurors need not

agree upon the mode of commission. That rule is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict," citations omitted].)

In light of the above authority, and in the absence of any compelling reason for this Court to reconsider its previous rulings on this issue, appellant's claim of instructional error must be rejected.

IX.

EVIDENCE OF THE MOLOTOV COCKTAIL INCIDENT WAS PROPERLY ADMITTED DURING THE PENALTY PHASE

Appellant contends the trial court erred in allowing evidence of the Molotov Cocktail incident during the penalty phase. (AOB 145-158.) First, appellant argues there was insufficient evidence that the device involved in this incident was a destructive device under sections 12303.3 and 12301. (AOB 148-151.) Second, he argues that the trial court erred in failing to adequately instruct the jury on the definition of a destructive device. (AOB 151-153.) Lastly, appellant argues that possession of the liquid-filled bottle was not a crime of violence under section 190.3, subdivision (b). (AOB 153-158.) Respondent submits the evidence of the Molotov Cocktail incident was properly admitted.

A. Testimony Regarding The Molotov Cocktail Incident

At 9:00 p.m. on April 20, 1986, Lisa Nevolo was sitting in her car outside a laundromat in a strip mall at Moorpark and Tujunga in North Hollywood. Appellant and a group of other juveniles pulled up. Appellant and one other person went into laundromat while the other juveniles stayed outside. Appellant exited the laundromat and stood by Nevolo's car with a Molotov Cocktail in his hand. Nevolo described the Molotov Cocktail as a glass bottle (the size of a Coke bottle) filled with fluid, with a rag stuck in the top. Appellant and another juvenile ran along the strip mall out of Nevolo's sight. Two to three minutes later, there was a flash. Nevolo thought an apartment building next to the parking lot had caught on fire. Immediately after the flash, appellant and the other juvenile ran back past Nevolo and jumped into a car that

had just pulled up next to Nevolo's car. Appellant no longer had anything in his hands. The car then drove away. (RT 5658-5662, 5668, 5670.)

Fred Joseph operated a liquor store in the same strip mall were the laundromat was located. (RT 5432, 5663-5664.) That evening, Joseph saw two carloads of young men drive into the parking lot, head to the trash can area, and jump out of their cars. Three weeks earlier, appellant and Joseph had been involved in a confrontation at the store, and Joseph had asked appellant to leave the premises. Thus, although Joseph was unable to identify appellant as one of the young men in the parking lot that evening, he assumed appellant was present. Fearing he would be attacked, Joseph ran back inside of his store. (RT 5337-5338.)

Joseph called the police. When the police arrived, Joseph went to the parking lot and discovered that a huge area had been burned near some trash cans. The fire had been in an area where Joseph's customers parked and near an apartment building, which was just over a wall from the parking lot. In the parking lot, Joseph saw a glass bottle "with a stain where it had been burned." Joseph's store was still open when this incident occurred. (RT 5339-5357.)

Sergeant John Mosley of the Los Angeles Police Department responded to the call. He went to the parking lot behind Joseph's market and observed a portion of the parking lot had been burned as a result of a Molotov Cocktail having been thrown. He recovered a glass bottle fragment, part of a bottle cap, and a rag that was inside the bottle. He opined that these items were a Molotov Cocktail or a fire bomb. He explained that a Molotov Cocktail is made by filling a glass container with flammable liquid and a wick. The wick is soaked in the flammable liquid and is lit when the object is thrown. Molotov Cocktails are typically usually used for terrible acts of violence, such as burning down buildings. (RT 5674-5678.)

B. The Testimony Was Properly Admitted

Section 190.3, subdivision (b), permits the penalty phase jury to consider "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (See *People v. Hughes* (2002) 27 Cal.4th 287, 381.) Evidence of prior criminal behavior is relevant if it shows conduct that demonstrates the commission of an actual crime other than the capital crime for which the defendant is on trial. (*Ibid.*, citing *People v. Pensinger* (1991) 52 Cal.3d 1210, 1259; *People v. Anderson* (2001) 25 Cal.4th 543, 584.) The court must instruct that "no juror may consider any alleged other violent crime in aggravation of penalty unless satisfied beyond a reasonable doubt that the defendant committed it." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 584.) However, there is no requirement that the court instruct sua sponte on the criminal elements of the alleged conduct in that these types of instructions may place undue emphasis on the prior unadjudicated conduct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1175; *People v. Osband*, *supra*, 13 Cal.4th at p. 704.) It may be advisable for the court to conduct a preliminary inquiry to determine whether there is substantial evidence of criminal activity, however, such a procedure "is strictly a matter of trial court discretion." (*People v. Sanders* (1995) 11 Cal.4th 475, 542; *People v. Fauber*, *supra*, 2 Cal.4th at p. 849.) Claims that admitted conduct did not satisfy the "crime" or "violence" requirement must be rejected on appeal "where there is substantial evidence from which a jury could conclude beyond a reasonable doubt that violent criminal activity occurred." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 587.)

Turning to appellant's first challenge to the admission of the evidence regarding the Molotov Cocktail incident, appellant argues "there was no substantial evidence presented that the flashpoint of the liquid in the bottle was 150 degrees Fahrenheit or less," as required by section 12301, subdivision

(a)(5). (AOB 150, footnote omitted.) Furthermore, appellant argues there was no evidence of what the liquid in the bottle was beyond the fact that it ultimately burned. (AOB 150-151.) Contrary to appellant's argument, sufficient evidence was presented that showed that appellant possessed a "destructive device."

Section 12303.3 states as follows:

> Every person who possesses, explodes, ignites, or attempts to explode or ignite any destructive device or any explosive with intent to injure, intimidate, or terrify any person, or with intent to wrongfully injure or destroy any property, is guilty of a felony . . . .

Section 12301 provides a list of objects which may constitute a "destructive device" as used in section 12303.3. At the time of the incident, section 12301 stated as in pertinent part as follows:

> (a) The term "destructive device," as used in this chapter, shall include any of the following weapons:
>
> (1) Any projectile containing any explosive or incendiary material or any other chemical substance, including, but not limited to, that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns.
>
> (2) Any bomb, grenade, explosive missile, or similar device or any launching device therefor.
>
> (3) Any weapon of a caliber greater than .60 caliber which fires fixed ammunition, or any ammunition therefor, other than a shotgun or shotgun ammunition.
>
> (4) Any rocket, rocket-propelled projectile, or similar device of a diameter greater than 0.60 inch, or any launching device therefor, and any rocket, rocket-propelled projectile, or similar device containing any explosive or incendiary material or any other

chemical substance, other than the propellant for such device, except such devices as are designed primarily for emergency or distress signaling purposes.

(5) Any breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.

Appellant relies on subdivision (a)(5) to establish his insufficiency of the evidence claim. However, the device that was used is not limited to this subsection. Section 12301, subdivision (a), states that a "destructive device" can include *any* of the five examples listed in the subdivision. Here, the evidence supported a finding that the device qualified as a projectile containing incendiary material (§ 12301, subd. (a)(1)), a "bomb" (§ 12301, subd. (a)(2)), *and* a breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and has a wick or similar device capable of being ignited (§ 12301, subd. (a)(5)).

First, there was ample evidence the bottle fell within the definition of a projectile containing incendiary material, within the meaning of section 12301, subdivision (a)(1). Nevolo saw appellant carrying a "Molotov Cocktail," or a glass bottle filled with liquid and a rag stuffed into the top, two to three minutes before she saw a "flash" which she initially feared would cause an apartment building to catch on fire. (RT 5660-5662.) Joseph testified that a huge area of the parking lot had been burned, and he saw a glass bottle that was stained from being burned. (RT 5340.) Sergeant Mosley testified that a portion of the parking lot had been burned as a result of a Molotov Cocktail having been thrown. Evidence supporting this conclusion included his recovery of a glass bottle fragment with a rag inside and part of a bottle cap. He opined that these

items comprised a Molotov Cocktail or a fire bomb. He explained how a typical Molotov Cocktail is made, i.e., by filling a glass container with flammable liquid and a wick. The wick is soaked in the flammable liquid and is lit when the object is thrown. (RT 5674-5678.)

The device described by Sergeant Mosley, which was consistent with Nevolo's observation that the glass bottle appellant was carrying contained liquid and a rag, would easily fit under the first definition of "destructive device" listed under section 12301, subdivision (a)(1): a projectile containing incendiary material. Evidence was presented that showed the "projectile" and "incendiary" nature of the materials. Sergeant Mosley testified about how a Molotov Cocktail typically works, i.e., by filling a glass container with a flammable liquid and a wick, lighting the wick, and throwing the bottle; when the glass container is thrown and hits the ground it breaks; the flammable liquid inside the glass container then starts a fire. (RT 5675-5676.) The fact that the glass bottle was broken could lead to the reasonable inference that the bottle was thrown rather than planted. Furthermore, such a conclusion was consistent with Sergeant Mosley's testimony that such devices as the one recovered at the scene are thrown before detonation to light the wick. (RT 5675-5676.)

In addition, there was evidence that the projectile contained "incendiary" material. Incendiary is defined alternatively as follows: "of, relating to, or involving a deliberate burning of property," "tending to excite or inflame : inflammatory," "igniting combustible materials spontaneously," and ""of, relating to, or being a weapon (as a bomb) designed to start fires." (Merriam-Webster's Collegiate Dictionary (1997) 10th Ed., p. 587.) Thus, any projectile containing a flammable liquid would meet the definition of section 12301, subdivision (a)(1). Although none of the witnesses described the nature of the liquid inside the bottle, a reasonable trier of fact could conclude the liquid was flammable, due to the fact that the bottle found in the parking lot was stained

as if it had been burned. (RT 5340.) Furthermore, the cloth that was inside the bottle was charred. (RT 5677.) Finally, Sergeant Mosley, who was familiar with Molotov Cocktails, opined that the device causing the fire in this case was consistent with a Molotov Cocktail, which contains a flammable liquid. (RT 5675-5676.) Thus, because there was ample evidence that the device was a projectile containing incendiary material, there was sufficient evidence that the device was a "destructive device" as described under subdivision (a)(1).

Furthermore, the device would also fit under section 12301, subdivision (a)(2) as "Any bomb, grenade, explosive missile, or similar device or any launching device therefor." The dictionary defines a "bomb" as "an explosive device fused to detonate under specified conditions." (Merriam-Webster's Collegiate Dictionary (1997) 10th ed., p. 129.) This word "involves no unconstitutional vagueness." (*People v. Quinn* (1976) 57 Cal.App.3d 251, 259.) The evidence established that the bottle was an explosive device fused to detonate under specified conditions. Sergeant Mosley explained how a Molotov Cocktail worked, and testified that the evidence found in this case was consistent with having been lit and thrown, as a Molotov Cocktail is. Moreover, Sergeant Mosely used the terms Molotov Cocktail and "fire bomb" interchangeably. (RT 5675.) As such, there was ample evidence from which the jury could conclude the bottle containing liquid and a rag was a "bomb" within the meaning of section 12301, subdivision (a)(2), where the bottle was later found broken and burned in the parking lot, and a large area of the parking lot had been burned.

Additionally, there was circumstantial evidence from which a reasonable trier of fact could conclude that the bottle contained "a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less," within the meaning of section 12301, subdivision (a)(5). According to Merriam-Webster's Collegiate Dictionary, a "flash point" is "the lowest temperature at which vapors above a

volatile combustible substance ignite in air when exposed to flame." (Merriam-Webster's Collegiate Dictionary (1997) 10th ed., p. 443.) Nevolo saw appellant carrying a bottle containing liquid and a rag. Two to three minutes later, there was a "flash." A portion of the bottle found in the parking lot contained a charred rag and the bottle itself was stained from being burned, and a large area of the parking lot was burned. The jury could reasonably conclude that when the bottle broke, a fire was fueled from the flammable liquid inside the bottle. Although the temperature on that particular night in April was not established at trial, a reasonable jury could conclude that it was not greater than 150 degrees Fahrenheit. And because the gasoline in the device was lit while the temperature of the environment was less than 150 degrees Fahrenheit (i.e., the temperature in which gasoline vapors were still emitting), there was no need for direct testimony establishing the flashpoint of the liquid within the bottle. Accordingly, the evidence was sufficient to support a finding of a destructive device under section 12301, subdivision (a)(5).

Appellant next argues that the trial court failed to adequately instruct the jury on the definition of a destructive device. (AOB 151-153.) This claim is easily rejected, as a trial court has no duty to sua sponte instruct the jury on the elements of prior criminal conduct presented under section 190.3, subdivision (b). The reason behind this rule is the recognition that the defense may fear that these types of instructions may place undue emphasis on the prior unadjudicated conduct. (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1175; *People v. Osband*, *supra*, 13 Cal.4th at p. 704.) Defense counsel expressly declined to have the trial court instruct the jury on the elements of the crimes presented pursuant to section 190.3, subdivision (b), despite the fact that the trial court had indicated its willingness to give such instructions upon request. (See RT 6146-6149.) Furthermore, during closing argument, defense counsel made it clear he did not intend to "dwell on the definition of the offenses involved or the definitions or

applicable defenses that could be brought to bear because I don't think they are particularly important in this case." (RT 6316.) Accordingly, appellant's claim of instructional error must fail.

Finally, appellant argues there was insufficient evidence that possession of the liquid-filled bottle was a crime of violence under section 190.3, subdivision (b). Section 12303.3 prohibits possessing, exploding, or igniting a destructive device with the intent to injure, intimidate, or terrify any person, or with intent to wrongfully injure or destroy property. Appellant claims that at most, the evidence in this case showed his intent to injure or destroy property, and thus, did not constitute a crime of violence. (AOB 153-157.) This claim is meritless.

Three weeks before the incident, appellant and Joseph had been involved in a confrontation at Joseph's store. On the evening of the incident, Joseph was in the parking lot outside his store on his way to the trash can area when two carloads of young men drove up and began exiting their cars. (RT 5337.) Shortly thereafter, a Molotov Cocktail was thrown in the parking lot area, causing a fire near the trash cans. This was an area where Joseph's customers parked, and was just on the other side of a wall from an apartment building. (RT 5340, 5359.) Moments before the fire began, Nevolo saw appellant in the area with a Molotov Cocktail in his hand. (RT 5660-5662.) From this evidence, a reasonable trier of fact could conclude that appellant had the intent to intimidate or terrify either Joseph, his customers, or the occupants of the apartment building on the other side of the wall from the trash bin. This constituted an implied threat of violence within the meaning of section 190.3, subdivision (b). (See *People v. Stanley* (1995) 10 Cal.4th 764, 824 [arson carried implied threat of violence against a person, where jury could infer intent to intimidate].)

Finally, even assuming evidence of the Molotov Cocktail incident was improperly admitted, any error was harmless, as it was not reasonably possible the jury would have reached a more favorable verdict had the evidence not been admitted in light of the circumstances of the current offenses and appellant's substantial, properly-admitted criminal history. (See *People v. Barnett*, *supra*, 17 Cal.4th at pp. 1172-1173; *People v. Medina* (1996) 11 Cal.4th 694, 768; *People v. Pinholster* (1992) 1 Cal.4th 865, 962-963.) This was only one of many incidents introduced by the prosecution as evidence of appellant's prior violent criminal activity. The offense was committed while appellant was still a juvenile, and no one was actually injured. The callous nature of the murder in the instant case, combined with the properly admitted evidence of appellant's past violent criminal acts and prior felony convictions, along with the absence of mitigating factors, would have compelled the jury to impose the death penalty even if evidence of the Molotov Cocktail incident had not been admitted. Accordingly, appellant's claim must be rejected.

X.

THE TRIAL COURT PROPERLY ALLOWED EVIDENCE OF THE INCIDENT AT SOUTH GATE HIGH SCHOOL

Appellant contends the trial court erred in admitting evidence relating to his possession of a concealed weapon at South Gate High School during the penalty phase. Appellant argues that the prosecution failed to present sufficient evidence to establish a violation of a penal statute. He further argues that incomplete and misleading jury instructions allowed the jury to rely on this incident as an aggravating factor without finding that it constituted criminal activity involving violence under section 190.3, subdivision (b). He also argues that even if the evidence established that appellant possessed a concealed weapon under section 12020, subdivision (a), the evidence was insufficient to constitute a crime involving violence under section 190.3, subdivision (b). (AOB 159-167.) These claims must be rejected, as the incident at South Gate High School qualified as criminal activity involving the threat of violence. Furthermore, appellant waived any claim of instructional error by acquiescing to CALJIC No. 8.87 and failing to request additional instructions on the elements of the other crimes presented pursuant to section 190.3, subdivision (b). Finally, any possible error was harmless.

A. Relevant Proceedings Below

Before opening statements in the penalty phase, the trial court asked the prosecutor to specify the "other crimes" evidence she would be presenting at the penalty phase. The prosecutor responded that she would present evidence of the Molotov Cocktail incident, "an incident involving a knife in '86," a robbery at a mini-market followed immediately by an assault, the "use of a knife or attempted use of [a] knife in trying to agitate somebody into a fight," an attempt

to "knife someone at a bus bench," "three episodes at Wayside," and the robbery of Sandra Trujillo. (RT 5317.) At that time, defense counsel only challenged the admission of the Molotov Cocktail evidence. (RT 5319, 5328.)

After Fred Joseph testified about the Molotov Cocktail incident, defense counsel objected to the admission of the incident as an aggravating circumstance because it did not constitute violence against a person as opposed to property. (RT 5364-5384.) After hearing argument from each side, the trial court asked for briefing on the issue:

> The Court: I will let the jury go and we can proceed with the others. I would like it briefed what the objection to it is and what the logic is and I think for me it's a close call and it's bringing in a number of things that were not noticed before and that gives me some concern.

(RT 5384-5385.)

The trial court asked if there were any other incidents about which counsel anticipated "problems." The following discussion ensued:

> [Defense counsel]: Let me bring up one more point. I've second thoughts about that. Counsel chronologically listed her witnesses and the next witness with regard to an episode in which a CRASH unit or the CRASH officer makes contact with the defendant and he is in possession of a knife. That is essentially the sum total and substance of this one individual witness. You know which one I am talking about. There are other episodes where there is possession of a knife. It's in concert with other activity.
>
> The Court: Possession of a knife alone is not enough as I understand *Mason* and *Boyd*.
>
> [Defense Counsel]: There is a subsequent conversation according to police reports with [appellant] being where he is and having his knife and he indicated he is affiliated with the Clantone gang and he has the

knife because it's needed for protection against rival organizations. Essentially what it is.

(RT 5385-5386.) The prosecutor agreed and stated, "counsel is correct, that's all we have in the next episode." (RT 5386.) The trial court then stated,

> You leave that also until you can brief it. I've asked if there were any objections last week and everything was settled and all of a sudden I mean serious issues that require at least for me to do some research because I haven't. For me is a new arena.

(RT 5386.)

The following day, the prosecution called South Gate Police Officer David Dattola as a witness regarding the incident at South Gate High School. No discussion preceded this testimony, and defense counsel did not object to it. (RT 5390.) Nor did defense counsel provide any briefing specifying the legal grounds for his "second thoughts" voiced the previous day about the admission of this incident, despite the fact that the trial court had asked for briefing prior to issuing a ruling. (See RT 5385-5386.)

Officer Dattola testified that on January 13, 1989, he responded to South Gate High School and encountered appellant yelling, screaming, and challenging another individual to fight. (RT 5390-5393.) The other individual appeared to be more passive. Appellant began to walk away, and Officer Dattola followed him. Officer Dattola asked appellant to stop, but appellant refused and responded with profanity. Officer Dattola radioed for his partner to join him, and together, they placed appellant under arrest. Appellant had a pocket knife in his pocket with the blade in an open position. (RT 5394-5398.)

B. Appellant's Claim Has Been Waived

In order to preserve a challenge to evidence of prior violent criminal activity admitted pursuant to section 190.3, subdivision (b), a defendant must

make a timely and specific objection on the grounds asserted on appeal. (*People v. Pinholster*, *supra*, 1 Cal.4th at p. 960; *People v. Mickey* (1992) 54 Cal.3d 612, 685.) Defense counsel failed to make a timely and specific objection in this case. Although defense counsel voiced his "second thoughts" about the admissibility of the South Gate High School incident, he failed to identify the specific grounds for his concern. Although the trial court requested briefing on the issue, defense counsel failed to provide any. (See RT 5385-5386.) Furthermore, even assuming defense counsel's comments were sufficient to constitute an objection, he failed to renew his objection at the time the evidence was actually offered. As such, his claim has been waived on appeal. (See *People v. Turner* (1990) 50 Cal.3d 668, 708 [because in limine motions are subject to reconsideration upon full information at trial, evidentiary objection must be renewed when evidence is actually offered]; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1172 [even though objection raised at outset of trial, failure to renew objection at Evidence Code section 402 hearing waived issue on appeal].)

C. The South Gate High School Incident Involved Criminal Activity And The Threat Of Force Or Violence

Even assuming appellant's claim has not been waived, it is nevertheless meritless. Section 190.3, subdivision (b) allows the trier of fact to take into consideration the following factor, if relevant: "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (See also *People v. Boyd* (1985) 38 Cal.3d 762, 776 [criminal activity must involve use or attempted use of force or violence, or the express or implied threat to use force or violence].) As appellant correctly observes (see AOB 161), evidence of other criminal activity is limited to evidence of conduct that demonstrates the

commission of an actual crime. (*People v. Phillips* (1985) 41 Cal.3d 29, 72.) Appellant argues the evidence of the South Gate High School incident was improperly admitted, because there was insufficient evidence that he had possessed a concealed weapon within the meaning of section 12020. (AOB 161.) While this is true, the evidence was still sufficient to establish the commission of an actual crime which involved the threat of violence.

Respondent agrees the evidence in this case was insufficient to establish that appellant had committed a violation of section 12020, because at the time the offense was committed, a pocket knife did not fall within the statutory definition of a concealed weapon. (See *People v. Bain* (1971) 5 Cal.3d 839, 851-852; *People v. Forrest* (1967) 67 Cal.2d 478, 480-481.) The evidence was sufficient, however, to establish a violation of section 415, which states as follows:

> Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars ($400), or both such imprisonment and fine:
>
> (1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight.
>
> (2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.
>
> (3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.

Here, Officer Dattola testified that when he arrived at South Gate High School, appellant was yelling obscenities and waving his arms in an attempt to initiate a fight with a more passive individual. (RT 5392-5394.) This evidence was undisputed and unquestionably established a violation of section 415. Furthermore, this crime involved the threat of violence. (See *People v. Stanley, supra,* 10 Cal.4th at p. 824 [violation of section 415 admissible under section

190.3, subdivision (b)].) Evidence relating to appellant's possession of the knife, even if not a separate crime, was properly elicited as it was part of the section 415 crime. (*People v. Melton*, *supra*, 44 Cal.3d at pp. 754-755.) Not only did appellant challenge a passive individual to fight, he did so with knowledge that he was armed with a concealed pocketknife in an open position in his pants pocket. Appellant's attempt to initiate what would likely be an uneven fight due to the fact that he was armed could easily be construed as the attempted use of force or violence. Accordingly, the evidence was properly admitted as prior violent criminal activity.

The fact that the wrong label for the criminal activity was used does not constitute prejudicial error where the evidence establishes criminal activity involving force or violence. (See *People v. Hughes*, *supra*, 27 Cal.4th 287, 383-384 [although evidence was insufficient to establish violation of section 4502, it was sufficient to establish violation of section 4574; any error in instructing the jury on elements of section 4502 rather than 4574 was harmless]; *People v. Cain* (1995) 10 Cal.4th 1, 73 ["The proper focus for consideration of prior violent crimes in the penalty phase is on the facts of the defendant's past actions as they reflect on his character, rather than on the labels to be assigned the past crimes"]; *People v. Clair* (1992) 2 Cal.4th 629, 680-681.)

D. Error, If Any, Was Harmless

Finally, even assuming evidence of the South Gate High School incident was improper, any error was harmless in light of the other properly admitted evidence of appellant's prior violent criminal activity and the circumstances of the murder appellant committed in this case. (See *People v. Medina*, *supra*, 11 Cal.4th at p. 768; *People v. Pinholster*, *supra*, 1 Cal.4th at pp. 962-963.) The evidence regarding the South Gate High School incident was extremely brief

and consisted of one witness. It is almost inconceivable that the evidence affected the verdict. Accordingly, appellant's claim must be rejected.

XI.

THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT AT THE PENALTY PHASE DURING HER CROSS-EXAMINATION OF DEFENSE WITNESS JAMES PARK

Appellant contends the prosecutor committed misconduct during the penalty phase when she cross-examined James Park, a defense expert on the California Department of Corrections, by asking him if he was familiar with a 30-year review procedure for inmates serving sentences of life in prison without the possibility of parole. (AOB 168-179.) This claim has been waived due to defense counsel's failure to object. Furthermore, there was no prejudicial misconduct.

A. Relevant Proceedings Below

The defense called James Park as a witness during the penalty phase. Prior to doing so, defense counsel explained that Park's testimony would focus on his familiarity with the prison system and his extensive knowledge of classification within the prison, and his opinion as to whether appellant would pose a danger within the system itself if incarcerated for a period of life without the possibility of parole. Defense counsel further proffered that Park would discuss whether the prison itself had certain protections for inmates and employees. (RT 5741-5742.) When the prosecutor stated that any prediction of appellant's adjustment to state prison would require a foundational showing that Park had interviewed appellant, defense counsel disagreed and stressed that Park's opinion would be based entirely on classification and appellant's records. (RT 5745.)

Park testified that he was a prison consultant primarily on the nature of adult male prisons. (RT 5748.) In listing his qualifications, Park testified that he had worked in the field of adult prisons for 41 years, with 31 years spent

working in the California Department of Corrections. (RT 5749.) Park retired from the California Department of Corrections in 1983. (RT 5751.) He explained the importance of classification in maintaining security within the prison system. (RT 5750-5751.)

Park described the four levels of security classifications within the California Department of Corrections. Level one, or a forestry camp, was the minimum level of security. (RT 5751.) A level two prison had "some fences and gun towers." A level three prison was "a little bit tougher" and had "cells, fences and gun towers." A level four prison was the maximum security level. There was an objective point system for classifying prisoners. A prisoner had points subtracted from his security score based on positive factors, such as being married, being over the age of 26, the nature of the offense, and adjustment during previous prison or jail terms. A prisoner sentenced to life in prison without the possibility of parole would receive the maximum number of points and would automatically go to a level four prison. (RT 5752, 5756.)

Each institution had a classification committee to review a prisoner's progress. If the prisoner behaved poorly, he would have points added and eventually go to a higher level of security. A prisoner who worked would have points subtracted and would eventually get to a lower level of security. (RT 5753.) Prisoners who worked could earn eight points a year, and eventually work their way down to a lower level of security. Prisoners sentenced to life without the possibility of parole could reach a lower level of security, but it was not based solely on points. They would have to have excellent behavior and any reduction in security level would have to be approved by the director's office in Sacramento. (RT 5757.) The goal of the classification system was security, and putting the prisoner in a situation where he could not harm others or where such risk was reduced. (RT 5754.)

When Park worked for the Department of Corrections, the classification system involved several different prison officials meeting with the prisoner and forming an agreement on the person's level of security. Park would then review these opinions, along with other records, and make a final determination. This system had since been replaced by the point scale system. (RT 5755.) The point system "started in around 1980 to '83 [and] was put into practice then after some research." (RT 5756.)

Park described in detail the specific security arrangements at the five level four prisons in California. (RT 5757-5758.) The main difference between a level three and a level four prison was the freedom of movement, amount of programs, and presence of a "night program." (RT 5759.) After Park had discussed the design and structure of level four prisons, defense counsel asked whether these prisons were sufficient to guarantee the safety of the community. Park replied that the safety of the community was "absolutely" guaranteed, as no one had ever escaped from a level four prison. (RT 5769.) Park added that the staff was "reasonably well protected" as guards at level four prisons were highly trained, and they were "under the protection of the rifle all the time." Park's discussion of the security of other inmates focused on level four prisons. (RT 5770.)

Park had reviewed appellant's county jail records, which reflected some disciplinary problems. Park explained, "I think in the county he has been fooling around a little bit, and I think when he gets into level four prison, he is not going to do that, because he is going to have some pretty heavy competition in there." (RT 5776-5777.) Defense counsel later asked Park whether his review of appellant's records led him to believe that appellant would constitute a threat to society, prison employees, or other inmates "*within the structured setting of a level four prison.*" (RT 5779, emphasis added.) Park replied, "I don't see that." (RT 5779.)

On cross-examination, the prosecutor asked whether a prisoner sentenced to life in prison without the possibility of parole could be reclassified and sent to a level three prison. Park acknowledged this was possible, and would result in the prisoner being grouped with 200 people rather than 60. (RT 5787.) Park further acknowledged that a level four prison has more staff because it is divided into smaller units. (RT 5788.) Park also testified that it was possible to be classified as a level four prisoner and be housed in a level three prison. (RT 5789.) Park further acknowledged that it was possible, but uncommon, for a level four prisoner to work his way down to a level two prison. (RT 5789-5790.)

During a break in the proceedings, the trial court asked the prosecutor to explain the relevance of Park's testimony in other cases, an area which the prosecutor had been exploring before the court interrupted her and ordered her to proceed to the next area of inquiry. (RT 5809; see RT 5803.) The prosecutor stated that she was trying to show Park's bias, to the extent his testimony in all prior cases, regardless of the individual defendant's history, has been the same with respect to whether level four prison security is adequate. (RT 5810, 5814.)

After the break, the prosecutor again questioned Park about the point scale classification system, and the differences in different levels of prison security. (RT 5819-5826.) The prosecutor then asked Park to describe the daily routines and activities in prison. (RT 5826-5829, 5832-5835.) Park discussed security in level four prisons. (RT 5835.) Park testified about reviewing appellant's prior prison and jail records, and his interpretation of those records. (RT 5836-5838.) Park described the security housing unit within the state prison system as a disciplinary tool. (RT 5839-5840.) Park reiterated his belief that nothing in appellant's records indicated that he would be a serious potential problem in state prison, any more so than other level four prisoners. (RT 5840.)

Park testified that there was a great deal of interaction between prisoners in the general population in a level four prison. (RT 5841.)

Park described the privileges allowed for level four prisoners, such as televisions, radios, VCRs, reading materials, educational and vocational programs, church, visitors, and conjugal visits. (RT 5843-4844.) The prosecutor asked Park the following series of questions:

Q Are you familiar with the concept of the 30 year review proceedure [sic] ?

A The 30 year review proceedure [sic]? By the adult Board of Prison Terms?

Q Yes.

A Not in detail. I know they do feel they ought to review prisoners from time to time even though they have no parole opportunity.

Q And that basically means from the minute they get into the prison system that particular 30 year date is set; isn't that correct?

A For a review by the Board of Prison Terms.

Q Then thereafter there is a review every five years, correct?

A I will accept that. I'm not sure.

Q Now, are you aware, Mr. Park, that right now the Department of Corrections is in the process of redoing the classification system?

A They should be. They should be studying it constantly.

Q Are you aware that they are doing that?

A No, I'm not aware of what they are doing at the moment.

(RT 5843-5845.)

After the prosecutor asked Park if he was aware of a recent escape from the Lancaster prison, defense counsel objected and asked to approach the bench. (RT 5846.) After the prosecutor attempted to make an offer of proof regarding the escape issue, the trial court stated it would appreciate such an

offer in advance of the question being asked. The prosecutor stated, "I wasn't aware I was required to tell the court every question I'm going to ask on cross-examination." (RT 5847.) The court acknowledged that she was not required to, and then engaged in the following colloquy with the prosecutor regarding her questions about the 30-year review procedure:

> [The Court]: What is this thing about a 30 year review procedure? Is the jury supposed to now speculate life without parole means something other than that? [¶] Where is that coming from? A 30 year review procedure. I know it is improper to suggest that life without possibility of parole means something other than that.
>
> [Prosecutor]: I did not suggest this. There is a difference between the governor's power to commute and the 30 year review.
>
> The Court: That is disingenuous. Whatever the source is you have now introduced to the jurors the suggestion that there is such a thing as a 30 year review which, again, is reviewed at 35 years and thereafter every five years. [¶] The implication is this is a review for something like release. What other reasonable - - I'm shocked that you would do this, frankly.
>
> [Prosecutor]: I'm surprised that the court is shocked. I did not get into it. I did not ask questions about it.
>
> The Court: I don't want to discuss it. You're a very brilliant lawyer. I don't know why you are resorting to this innuendo. You have done a fabulous job. You are capable of presenting your evidence without resorting to this type of stuff. [¶] To me, I'm a little bit - - you know, I'm startled by it. But that's past.

(RT 5847-5849.) The trial court subsequently asked the prosecutor to explain the possible relevance of her question, and whether the jury would wonder whether appellant could be released after a 30 year review even though he had

been sentenced to life without the possibility of parole. (RT 5849.) The following exchange ensued:

> [Prosecutor]: The relevance of the question, if you want to know, is whether this man is aware. This man is holding himself out as an expert. I don't believe he is that kind of an expert.
>
> The Court: That is really reaching for straws. To ask him about, you know - - something like a 30 year review procedure, I think that's - -
>
> [Prosecutor]: It's not anything that - - I'm, frankly, surprised no one here is even aware of this. It is not anything that's new or unique.
>
> The Court: I'm not aware of it.
>
> [Prosecutor]: I was told by - -
>
> The Court: But I'm having - - I'm aware a big issue is what to do with respect to the jurors wondering about whether or not LWOP means LWOP and whether or not the death penalty will be carried out. [¶] These are issues that are very clearly focused upon by the Supreme Court. They are issues that come up in almost every trial. They are issues that we dealt with on voir dire in this particular case. [¶] So in any event, I disapprove of that question. I think you know my impression - - I think - -
>
> [Prosecutor]: I'm sorry. I did not think it was a question that was out of line. If the court believes it is, I apologize.
>
> The Court: I think it can be cured by instruction. But that is I think a real danger area to get into.

(RT 5849-5850.)

After discussing the topic of the recent escape from the Lancaster prison, defense counsel inquired what would be done about the 30-year review issue. The trial court observed that it was unclear what the purpose of the review was; it could mean federal standards of review, a review for quality control, or a

review to consider recommendation for parole. The court inquired how long the current "LWOP" law had been in effect. The prosecutor replied that it had been in effect since 1978, when the new death penalty came into effect. (RT 5853.) The court then noted that there was no "track record" for what would be done at a 30-year review. Defense counsel asked if there would be an admonition. (RT 5854.) The court responded as follows:

> The Court: There are two ways of doing it. One is whether or not the review has been administered just to make sure the guy didn't get lost in the shuffle somehow and clear it up. I would like to know that. [¶] Whether the jury knows it or not is a different issue. [¶] Then at that point I would certainly be willing to give an instruction that advises them that this is an administrative review, but it is not a parole - - in fact, it is not a parole review. And they must presume that life without possibility of parole means exactly that.

(RT 5854.)

Outside the presence of the jury, the trial court asked Park the following questions:

> The Court: Sir, there was a question asked of you concerning a 30 year review procedure. [¶] And reference was made to a 30 year review procedure and subsequent periodic five year review periods. [¶] Can you tell us what that's all about?
>
> [Park]: Well, in general - - now, again, I'm not up on the exact policies following. But the Board of Prison Terms following adult authority and others feel that they wanted to review the cases of prisoners. [¶] And it would be wrong to imply that there was any parole consideration being given at that review. It is simply a review. That the Board of Prison Terms is exerting it's [sic] right to have some control

over all prisoners. [¶] I think it is a matter of power more than anything else.

The Court: Does it have anything to do with making sure that somebody just doesn't get lost in terms of classification?

[Park]: I think the board would say, yes, that is part of their purpose for reviewing. And I really don't know the scope. [¶] But just knowing from past experience with parole boards, they do like to keep a string on everybody. But certainly it has nothing to do with parole. It is more than what the board thinks it's [sic] responsibility toward prisoners in general is.

(RT 5856-5857.)

The trial court advised both counsel that either of them may wish to elicit the above information. The trial court further stated that it would "instruct to make sure that the jury understands that." (RT 5857.) The prosecutor stated that if Park was going to testify that the review had nothing to do with parole, it was unnecessary to instruct the jury on the issue. The trial court replied, "No. I just want to make it clear. Because his saying 'I don't think so,' I think it's a matter of - - I mean you heard the tenor of his answer. [¶] I think it ought to be clear to them." (RT 5858.) The prosecutor suggested that she could ask Park a leading question that the 30-year review was intended to "keep tabs" and make sure a prisoner was still in prison as opposed to anything to do with parole. (RT 5858-5859.) The trial court replied, "That's permissible, but I think this is sensitive enough that I think, especially upon request, that I ought to instruct them." (RT 5859.) Defense counsel agreed, especially in light of the fact that Park was no longer an employee of the Department of Corrections. Defense counsel added, "I don't think either one of us has any disagreement with what the gentleman has just said. That he's accurate." (RT 5859.)

The court indicated that because the issue had been raised by the prosecution, it would instruct the jury that it must assume that a sentence of life without possibility of parole means exactly that and for purposes of determining the sentence, it must assume appellant would never be paroled. (RT 5862.) The prosecutor reiterated that Park would testify that the 30-year review procedure had nothing to do with parole, and therefore, an instruction was unnecessary. (RT 5866.) The following proceedings ensued:

> The Court: Okay. [¶] I understand that you are entitled to argue as vehemently and as cogently as you can, and I understand your argument. [¶] However, I think your position is incorrect. [¶] You suggested to this jury there was a thirty-year review with five year subsequent periods. [¶] In addition to that you have suggested to the jury that administrations change, regulations change, and the inference is that life without the possibility of parole can mean something other than that. [¶] That to me is potentially reversable [sic] error.
>
> [Prosecutor]: You are taking what I questioned this witness on totally out of context. [¶] The fact that administrations change and the point system changes only goes to whether someone can go from a level four to a level three to a level two. [¶] It has absolutely no bearing on life without possibility of parole or the possibility of potential parole and in no way, shape or form did I ever intimate that.
>
> The Court: I understand that is your view. [¶] However, I don't know how you keep thinking people from putting one and one together so that they add up to two.
>
> [Defense counsel]: For the record defense wishes to move for mistrial.
>
> The Court: At this time the motion is denied.
>
> [Defense counsel]: Thank you.

The Court: It appears to me that this can be cured by instructing the jury. [¶] With respect to the proposed instruction, is there anything the defense wishes to add?

[Defense counsel]: The defense submits, your honor.

(RT 5866-5867.)

On redirect, defense counsel asked Park about the 30-year review process:

Q With regard to a thirty-year date or a thirty-year evaluation, sir, does that have anything at all to do with parole status?

A No, sir. That is not a parole hearing in any way. [¶] It is simply the paroling authority feels it has some responsibility for all prisoners, whether or not they could consider them for parole.

Q What would be the general administrative purpose of a thirty-year review or five year reviews after that point in time?

A Well, I really can't answer directly as to what the policy goals are. [¶] I am assuming again from past experience with adult authority parole board reviews that they simply want to be assured that the prison system is working properly for that particular prisoner whether within program or security or so forth. [¶] Let me give an example. [¶] Again in my experience with the previous parole boards they get a little upset if they see a prisoner has been around 25 years and still doesn't read or write. [¶] They would like to know why hasn't the department done something about him. [¶] That's the kind of thing they might get into.

(RT 5873-5874.)

At the conclusion of Park's testimony, the trial court addressed the jury as follows:

Ladies and gentlemen, I want to cover an issue at this point. [¶] It will be covered later or it may be covered later in instructions. [¶] Life

without possibility of parole means exactly that, and for purposes of determining the sentence in this case, you must assume the defendant will never be paroled.

(RT 5876.)

B. Appellant's Claim Has Been Waived

A defendant must make a timely objection on grounds of prosecutorial misconduct and request that the jury be admonished in order to preserve a claim of prosecutorial misconduct on appeal. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.) A motion for mistrial does not preserve a claim of prosecutorial misconduct. (*People v. Williams*, *supra*, 16 Cal.4th at p. 254.) Here, appellant did not object on grounds of prosecutorial misconduct. Rather, he moved for a mistrial. (RT 5867.) Accordingly, his claim of prosecutorial misconduct has been waived. (*Ibid.*) Moreover, as will be shown, the trial court's instruction cured any possible harm resulting from the prosecutor's questions regarding a 30-year review procedure.

C. The Prosecutor Did Not Commit Misconduct By Asking If Park Was Familiar With A 30-year Review Procedure

It is misconduct for a prosecutor to intentionally elicit or attempt to elicit inadmissible evidence. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839; *People v. Silva*, *supra*, 25 Cal. 4th at p. 373.) In *People v. Ramos* (1984) 37 Cal.3d 136 (*Ramos*), this Court held that what had become known as the "*Briggs* instruction," which informed the jury that the governor had the power to commute a sentence of life in prison without the possibility of parole, violated state due process and should not be given to juries as part of normal penalty

phase instructions.[30/] While instructional reference to commutation power is reversible per se, the same is not true for brief and isolated references by the prosecutor. (*People v. Keenan, supra,* 46 Cal.3d at p. 508 (*Keenan*).)

In *Keenan*, the prosecutor began cross-examining a defense witness on his opinion that prisoners sentenced to life in prison without possibility of parole tend to be stable elements of the prison population because they know they will not be leaving the institution. The prosecutor asked the witness what he based his opinion on that such "lifers" would never be going home. The witness explained that it was based on how the law was written. The prosecutor began to ask whether the law included the governor's authority; defense counsel interrupted with an objection and the jury was admonished to disregard the prosecutor's last question. (*Keenan*, *supra*, 46 Cal.3d at pp. 507-508.) The People conceded that such a reference to the governor's power to commute a life sentence was improper under *Ramos*. This Court found that the error was harmless, however, because unlike a *Ramos* instructional error, the prosecutor's remark was brief and isolated, and the jury was admonished to disregard it. Thus, the misconduct was harmless under any standard. (*Keenan*, *supra*, 46 Cal.3d at p. 508.)

Here, the prosecutor did not commit misconduct by eliciting testimony regarding the governor's power to commute a sentence of life in prison without possibility of parole. Rather, she asked about Park's awareness of a 30-year review procedure with subsequent reviews at five-year intervals, which had

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30. The Briggs instruction was derived from section 190.3, and provided in pertinent part:

> The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

(See *People v. Ramos*, *supra*, 37 Cal.3d at p. 150.)

nothing to do with the governor's power of commutation. Park acknowledged there was a 30-year review procedure. (RT 5844.) Outside the presence of the jury, Park explained that the review had nothing to do with parole consideration, and agreed that part of the scope was to ensure that no prisoner was lost in terms of classification. Park reiterated that the review had nothing to do with parole. (RT 5856-5857.) Defense counsel stated that there was no disagreement over whether Park's assessment was accurate in this regard. (RT 5859.)[31] Park later clarified on redirect that the 30-year review "was not a parole hearing in any way." Rather, it was a way to make sure that the prison system was working for a particular individual. (RT 5873-5874.)

Park unequivocally explained that the 30-year review had nothing to do with parole. Nor did he mention anything about the governor or his power of commutation. Rather, he stated that the review was a general administrative review designed to ensure the prison system was adequately addressing the needs of a prisoner. Accordingly, the prosecutor could not have committed misconduct by asking Park about his awareness of such a review procedure. Her questions up until that point and immediately thereafter had focused on classification within the prison system, including the possibility that a prisoner sentenced to life in prison without the possibility of parole could work his way down to a lower security level. As much of Park's testimony on direct was focused on the security measures in level four prisons, his knowledge of the classification system and possible review procedures was highly relevant. Thus,

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31. Appellant now suggests for the first time that the prosecutor was referring to former California Code of Regulations, title 15, section 2817. (AOB 174.) However, he agreed in the trial court that the 30-year review procedure raised by the prosecutor and discussed by Park had nothing to do with the governor's power of commutation. (See RT 5856-5859.) Moreover, it appears that the provisions of former California Code of Regulations, title 15, section 2817 would not apply to appellant, because he had been convicted of more than one felony.

the prosecutor's questions about the 30-year review procedure did not amount to misconduct.

In any event, appellant cannot establish any prejudice. Assuming the prosecutor's references were improper under *Ramos*, the questions were brief and isolated. (*See Keenan*, *supra*, 46 Cal.3d at p. 508.) Moreover, any harm was cured by the trial court's instruction that the jury must assume for purposes of determining the proper sentence in this case that appellant would never be paroled. (RT 5876.)

Appellant argues that the admonition did not adequately cure the harm because it only addressed the possibility of parole, but did not address any concerns the jurors might have had that the 30-year review period could otherwise assist appellant in obtaining a release from prison, such as clemency from the Governor. (AOB 177.) This concern is unfounded, as it overlooks the first portion of the trial court's admonition, "Life without possibility of parole means exactly that . . . ." (RT 5876.) Furthermore, to the extent appellant complains the admonition was insufficient, he has waived such a claim. He was given a chance to comment on the wording of the admonition and merely submitted the matter. (RT 5867.) Thus, he cannot now argue that the admonition failed to cure the harm. Finally, there was no testimony whatsoever regarding the Governor's power to grant clemency. Although appellant now contends that the 30-year review was really a reference to the Governor's clemency power, there was no evidence before the jury to suggest this was the case. Accordingly, it was not necessary to specifically admonish the jury that it should not consider the Governor's clemency power. Appellant's claim must be rejected.

XII.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY ARGUING APPELLANT'S LACK OF REMORSE COULD BE CONSIDERED AS AN AGGRAVATING FACTOR

Appellant contends the prosecutor committed misconduct by arguing to the jury that it could consider appellant's lack of remorse as evidence in aggravation at the penalty phase. (AOB 180-185.) This claim has been waived by defense counsel's failure to object and request an admonition. Furthermore, the claim is meritless. The prosecutor properly argued that appellant's lack of remorse could be considered as a factor relating to the circumstances of the current crime under section 190.3, subdivision (a). In addition, the prosecutor properly argued that appellant lacked remorse, and therefore, the jury could not rely on remorse as a factor in mitigation. And finally, any error was harmless.

A. Relevant Proceedings Below

During her penalty phase argument, the prosecutor argued in pertinent part as follows:

> Now, let me very briefly, if I might, go over this particular instruction with you ladies and gentlemen.
>
> The law is very specific as to what aggravating factors you can use. You will recall during jury selection we talked about aggravating factors and mitigating factors.
>
> The law is very specific about what can be used. It is not unlimited.
>
> I cannot bring in every single bad thing this defendant has done throughout his entire life to convince you to give him the death penalty. I'm limited to factors A, B and C up there on the chart.

Now, factor A says, "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true."

Now, when we say the "circumstances of the crime" we are not just talking about the robbery or the murder of Fred Rose that you heard about at the guilt phase.

We are also talking about, and you are allowed to consider, the impact to the victim and to the victim's family.

You are allowed [to] consider whether the defendant expressed any remorse or not. And other things which directly relate to that particular crime.

Factor B - -

(RT 6219.) At that point, the trial court interrupted and asked counsel to approach. A conference was subsequently held in chambers. (RT 6219-6220.) The trial court advised the prosecutor of its belief that the presence of remorse was a factor in mitigation, and the absence of remorse constituted the absence of mitigation, but the lack of remorse was not a factor in aggravation. The prosecutor agreed that the absence of remorse was not a factor in aggravation, although it was something the jury was allowed to consider. (RT 6220.) The prosecutor then made the following comments:

I want to go on the record, your Honor, right now, very simply. I have not done this for a long time, although I have been very tempted to do so.

Now, I have not done that because of my personal regard for this Court. But it has not escaped either my attention or the attention of my colleagues that this Court is very anti death penalty.

And because of that, frankly, throughout this trial and certainly throughout the penalty phase I have felt as though I am opposing two

lawyers: you and Mr. Hill. [¶] Where Mr. Hill has not objected, you have done so.

May I further add we are not exactly speaking of a neophyte attorney here. Mr. Hill is a most - - I'd like to finish, your Honor.

The Court: You stated this.

[Prosecutor]: No, I have not. [¶] Mr. Hill is a most experienced trial attorney. He has tried countless death penalty cases. If he wishes to object to something, Mr. Hill certainly has a mouth and may do so.

Your honor, you are permitting your personal opinions, in my opinion, with reference to the death penalty to influence your decision with regard to jury instructions.

And now it appears as though you're going to interrupt me every time I say something the court does not like during my argument.

I feel extremely constrained. I'm following arguments that have been given by countless other prosecutors, none of which have ever been objected to.

(RT 6220-6221.)

The trial court disagreed with the prosecutor's characterizations and stated that it had "bent over backwards to be fair to both sides." The trial court stated its preference to address the matter on its legal merits. The trial court further stated, "I don't know whether there is no objection, but that is an incorrect argument at this point." (RT 6222.) The prosecutor then responded,

Factors relating to the circumstances of the crime whether the defendant right after the crime may have gone to someone and said, "I'm sorry" are all things a jury can consider. [¶] You are precluding me from telling them that. And that is not correct.

(RT 6222.) The trial court invited a response from the defense, to which defense counsel replied, "Submitted." The trial court then stated, "You may proceed. There is a difference between - - never mind. Go ahead." (RT 6222.)

The prosecutor's closing argument later returned to the issue of appellant's lack of remorse, when she argued in pertinent part as follows:

> Now, you know, remorse is probably a factor that reasonably moral people would like to use for assessing whether someone is deserving of mercy. Lack of remorse, I can express to you is not, not, I repeat not a separate aggravating factor. But it's an indicator of character. It's something that you can consider. Have you seen any remorse here? This defendant has never expressed one iota of remorse, and I submit to you if he had ever done so, evidence of that would have been presented by the defense. You have heard from witnesses that he has never been remorseful for anything he has ever done. He has lied, he has denied his involvement in everything since he was a kid. He always blamed everybody else. He does not know the meaning of the word remorse. You know that word remorse is a short word but it's probably the one potential mitigating factor that more than anything else would go to whether mercy should be considered, and it's not here. It's simply not here.

(RT 6284.)

B. Appellant's Claim Of Prosecutorial Misconduct Is Waived; In Any Event, No Misconduct Occurred

A defendant may not complain on appeal of prosecutorial misconduct unless he or she timely objects and requests the jury be admonished. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820; *People v. Clair*, *supra*, 2 Cal.4th at p. 662;

People v. Ghent (1987) 43 Cal.3d 739, 762.) There is no exception to this rule for capital trials. (*People v. Clair*, *supra*, 2 Cal.4th at p. 662.)

Despite the fact that the trial court alerted defense counsel to the possibility that the prosecutor had engaged in improper argument and invited a response from the defense following the prosecutor's first reference to appellant's lack of remorse, defense counsel merely "submitted" the matter, failing to raise any objection or to request an admonition. (RT 6222.) Furthermore, defense counsel made no objection to the prosecutor's second reference to appellant's lack of remorse. (See RT 6284.) Because timely objections and admonitions could have cured any harm flowing from the prosecutor's challenged statements, appellant's claims of prosecutorial misconduct are barred on appeal. (*People v. Cain*, *supra*, 10 Cal.4th at p. 78; *People v. Hardy*, *supra*, 2 Cal.4th at pp. 208-209.) Moreover, even assuming appellant's claim is not waived, it is meritless.

A prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in section 190.3. (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 772-776.) However, it is permissible to comment upon a defendant's overt lack of remorse as a circumstance of the offense. (§ 190.3, subd. (a); *People v. Cain*, *supra*, 10 Cal.4th 1, 76-79; *People v. Webster* (1991) 54 Cal.3d 411, 452; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231-1232 (*Gonzalez*).) "A murderer's attitude toward his actions and the victims at the time of the offense is a 'circumstance[] of the crime' (§ 190.3, factor (a)) that may be either aggravating or mitigating." (*People v. Cain*, *supra*, 10 Cal.4th at p. 77, citing *Gonzalez*, *supra*, 51 Cal.3d at pp. 1231-1232.)

In *Gonzalez*, the prosecutor suggested during argument that the defendant's lack of remorse, as shown by his defiant behavior when captured and his boasts of "bagging a cop" who "had it coming," along with the fact that

he had maintained a gang attack defense, could be considered in aggravation. This Court held,

> Insofar as the prosecutor was urging defendant's *overt* remorselessness *at the immediate scene of the crime*, the claim of aggravation was proper. Overt remorselessness is a statutory sentencing factor in that context, because factor (a) of section 190.3 allows the sentencer to evaluate *all aggravating and mitigating aspects* of the *capital crime itself.* Moreover, there is nothing inherent in the issue of remorse which makes it mitigating only. The defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed.

(*Ibid*, italics in original.) However, this Court found that because postcrime evidence of remorselessness did not fit into any statutory sentencing factor, the prosecutor "may have overstepped by suggesting that defendant's claim of mistaken identity showed lack of remorse," but nevertheless found any error to be harmless. (*Id.* at p. 1232.)

In *People v. Cain*, the prosecutor argued that the defendant's words and actions demonstrated a lack of remorse for his role in killing his victims. The prosecutor asserted that the defendant's remorselessness and attitude toward the crime after it had been committed was a strong aggravating factor. (*People v. Cain*, *supra*, 10 Cal.4th at pp. 76-77.) This Court found no misconduct:

> From the evidence that defendant, still bloody from the killings, returned to his friends and boasted of what he had just done, the jury could infer his attitude during the crimes was one of callousness towards the victims. Similarly, Detective Tatum's question related to defendant's emotions during the second burglary on Saturday morning, and defendant's answer tended to show his attitude at that time. The prosecutor did not misconduct himself in arguing from this evidence.

(*Id.* at pp. 77-78.)

In the instant case, there was abundant evidence of appellant's callousness toward the victim at the time of the offense. Rose was kept alive for several hours after he was kidnapped in Lancaster and was ultimately shot in North Hollywood. Appellant used Rose's ATM card before shooting Rose, and continued to use Rose's ATM card, Chevron card, and Oldsmobile after shooting Rose. Appellant drove to Bakersfield on the evening of the shooting and the next day bragged about the murder and partied with juvenile gang members. From this evidence, the jury could easily infer that appellant lacked remorse at the time the offense was committed.

The prosecutor's first reference to lack of remorse was in the context of section 190.3, subdivision (a). The prosecutor argued that the jury was allowed to consider the circumstances of the crime, which included whether appellant "expressed any remorse or not. And other things which directly relate to that particular crime." (RT 6219.) Because the prosecutor discussed lack of remorse in the context of the circumstances of the instant offense, and because there was ample evidence of overt remorselessness, this first reference was proper. (*People v. Cain*, *supra*, 10 Cal.4th at pp. 76-79; *People v. Gonzalez*, *supra*, 51 Cal.3d at pp. 1231-1232.)

As to the prosecutor's second reference to appellant's lack of remorse, such argument was simply a comment on the absence of remorse as it related to being a factor in mitigation, not as a factor in aggravation. In fact, the prosecutor stressed the fact that lack of remorse was not a separate aggravating factor. The prosecutor then discussed the evidence which pointed to appellant's lack of remorse. The prosecutor then argued that remorse was "probably the one potential mitigating factor that more than anything else would go to whether mercy should be considered, and it's not here. It's simply not here." (RT 6284.) Read in context, the prosecutor was merely arguing that the jury

could not consider remorse as a factor in mitigation, because there was no evidence of remorse. Such argument was proper. (*People v. Frye* (1998) 18 Cal.4th 894, 1019-1020 [presence or absence of remorse is a factor universally deemed relevant to penalty phase jury's determination; prosecutor is entitled to argue defendant's lack of remorse]; *People v. Marshall* (1996) 13 Cal.4th 799, 855; accord *People v. Welch* (1999) 20 Cal.4th 701, 763; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 467-468; *People v. Holt* (1997) 15 Cal.4th 619, 691.)

C. Error, If Any, Was Harmless

Even assuming the prosecutor's argument was improper, a reasonable jury would not have been misled, and there appears no reasonable possibility the penalty verdict was affected. (*People v. Brown*, *supra*, 46 Cal.3d at p. 448.) As this Court has previously concluded,

> [R]emorse is universally deemed a factor relevant to penalty. The jury, applying its common sense and life experience, is likely to consider that issue in the exercise of its broad constitutional sentencing discretion no matter what it is told.

(*People v. Keenan*, *supra*, 46 Cal.3d at p. 510.)

The prosecutor's argument regarding appellant's lack of remorse was rather brief. Furthermore, in view of the overwhelming amount of valid aggravating evidence, as compared to the mitigating evidence, there is no reasonable possibility the prosecutor's comments affected the penalty verdict. (*People v. Turner*, *supra*, 50 Cal.3d at p. 714; see *People v. Marshall*, *supra*, 13 Cal.4th at p. 855 [prosecutor's comment regarding remorse could not have materially lessened the reliability of the death judgment].) Appellant's argument should be rejected.

XIII.

THE PROSECUTOR'S COMMENTS REGARDING VENGEANCE DID NOT CONSTITUTE MISCONDUCT

Appellant contends the prosecutor committed misconduct by urging the jury to render a verdict based on vengeance. Appellant argues this misconduct deprived him of his rights to due process, a fair penalty trial, and a reliable penalty determination in violation of article I, sections 15, 16, and 17 of the California Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. (AOB 186-192.) Conceding that defense counsel failed to object to the prosecutor's argument, appellant asks this Court nevertheless to review this claim on the grounds that an admonition would not have cured the error, and under the doctrine of "plain error." (AOB 191-192.) Respondent submits first that appellant has waived any challenge to the prosecutor's remarks by failing to object at trial. Moreover, the prosecutor's comments did not amount to prejudicial misconduct and therefore reversal is not required.

A. Relevant Proceedings Below

The prosecutor's opening penalty phase argument lasted approximately two and a half hours and encompassed seventy-one pages of reporter's transcript. (RT 6216-6293.)[32/] At the outset, the prosecutor emphasized that the aggravating factors the jury could consider were limited by statute. (RT 6218-6219.) The prosecutor discussed the prior violent criminal acts appellant had committed which fell within the meaning of section 190.3, subdivision (b), and

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32. The prosecutor's argument began at 9:20 a.m. and concluded at 12:00 p.m. (RT 6216, 6293.) A brief discussion regarding the prosecutor's argument relating to remorse comprised three pages of transcript. (RT 6220-6222.) Later, a 15-minute recess was taken, during which a discussion outside the presence of the jury comprised three pages of transcript. (RT 6260-6262.)

the prior felony convictions which fell within the meaning of section 190.3, subdivision (c). (RT 6223-6224, 6247-6258.) She discussed the possible statutory mitigating factors and argued why they were inapplicable. (RT 6225-6235, 6258-6259, 6268, 6277-6278-6281.) The prosecutor then discussed the circumstances of the current crime, which fell within the meaning of section 190.3, subdivision (a). (RT 6235-6247, 6281.) The prosecutor suggested that appellant's predatory behavior would continue if sentenced to prison. (RT 6263-6268, 6270-6276.) She invited the jury to contrast the aggravating factors with any mitigating factors, and stated that the factors in aggravation must substantially outweigh the factors in mitigation in order to even consider the death penalty. (RT 6268, 6276-6277.) She argued that appellant was not deserving of sympathy. (RT 6269-6270, 6276.)

In the last segment of her argument, following the morning recess, the prosecutor told the jury she was going to address the concept of vengeance. Specifically, the prosecutor argued in pertinent part as follows:

> Just a couple of more concepts I want to discuss with you before I close, ladies and gentlemen. One of them is vengeance. Now, most of us have been raised to believe that vengeance is a bad thing, that it's not appropriate. I suggest to you, that under certain circumstances it's not only appropriate but in fact quite healthy. It has a legitimate place in our society and has a legitimate role within our criminal justice system. Don't let me kid you, when any prosecutor gets up in front of a jury or any court and asks that jury to come back with a verdict of death, that vengeance isn't involved. Because what this prosecutor is saying to you, ladies and gentlemen, is that someone did something so bad, so bad that it has to be done back to them. Now because I am not as eloquent as others ahead of me, before me, sorry about that.

I want to quote to you from somebody who was very eloquent and how they felt about vengeance, and this is the quote; "We have been plied and belabored with the notion that anger is invariably a dysfunction, a failure to cope with our environment. Great literature from Homer on teaches otherwise. It teaches that anger can be necessary for coping. We are told the desire for vengeance is primitive and shameful, but when the society becomes like ours, uneasy about calling prisons penitentiaries or penal institutions and instead calls them correction facilities, society has lost its bearings. The idea of punishment is unintelligible if severed from the idea of retribution, which is inseparable from the concept of vengeance which is an expression of society's anger. If you have no anger, you have no justice. The society incapable of sustained focused anger in the form of controlled vengeance is decadent. If we lived in a world in which vengeance was really senseless, so would life be, or as Macbeth said, life would be a tale told by an idiot."

I am going to go away from the quote for just a moment. We don't have to take Shakespeare's words for it, we don't need Macbeth. Think about Clint Eastwood and all the Dirty Harry movies and Charles Bronson where he is an architect and goes out killing all these people because his wife has been murdered. Clint Eastwood in Dirty Harry, he has made millions of dollars playing this Dirty Harry, playing a kind of shall we say cop who uses pre-*Miranda* tactics on his prisoner. And why has he made all this money? Because it satisfies this longing for justice that we all have, this anger that we have.

Let me go back to the quote here, "We should use the criminal justice system to protect society from physical danger and to strengthen society by administering punishments that express and nourish through

controlled indignation the vigor of our values. We should be ashamed to live in a society that does not intelligently express through its institutions the public's proper sense of proportionate punishment for the likes of people like this defendant."

(RT 6282-6284.)

After discussing how appellant's lack of remorse prevented the jury from considering remorse as a mitigating factor (see RT 6284-6285), the prosecutor argued in pertinent part as follows:

Now, another area I want to talk to you about is the social impact of your decision. Somehow it's a main point that by being a part of civilization, we give up something, but we give it up because we do get something in return and at some unknown point in our evolution from beast to man we voluntarily surrendered, we surrendered our right to individual justice. When man gave up this right to personal vengeance, he may have given up a great deal psychologically and the state's efforts can never ever give you the same feeling you get by exacting personal vengeance, but in return the state did give man two things. One, it lends us its powers so even the weak may have revenge, and secondly it does impose reason and order on its process of vengeance.

Now, the Rose family, is part of this social contract. They have given up their right to take personal vengeance on the defendant because they're law abiding. In return, they're entitled to action of the state that serves the same purpose. They're entitled to vengeance, plain and simple. They're not allowed to take this defendant to Clybourn and Chandler in North Hollywood and shoot a bullet into his head. They gave up their right for vengeance like we all did because we are law abiding, but we owe them something in return and something that they are not entitled to get on their own.

(RT 6285-6286.)

B. Appellant's Claim Has Been Waived

Appellant contends the prosecutor violated his constitutional rights to due process, a fair trial and a reliable penalty verdict by arguing the concept of vengeance in her penalty phase argument. (AOB 186-192.) However, appellant failed to object to the prosecutor's remarks. Because an admonition could easily have cured any harm from any misconduct, appellant has waived this issue on appeal. (*People v. Riel* (2000) 22 Cal.4th 1153, 1212 (*Riel*); *People v. Gionis*, *supra*, 9 Cal.4th at p. 1215.)

Nevertheless, citing to *People v. Hill, supra,* 17 Cal.4th at p. 821 (*Hill*), appellant argues that this Court may consider the issue because an admonition would not have cured the error. Appellant further argues that the "plain error" doctrine permits review of the issue because the error was one that seriously affected the fairness of the proceeding. (AOB 191-192.) Appellant's reliance on *Hill* and the plain error doctrine is misplaced.

As this Court found in *Riel*, *Hill* was an extreme case. (*Riel*, *supra*, 22 Cal.4th at p. 1212.) This Court explained:

> [In *Hill*], defense counsel made a number of objections, although he did not continually object to pervasive misconduct. We found that the prosecutor's "continual misconduct, coupled with the trial court's failure to rein in her excesses, created a trial atmosphere so poisonous" that continual objections "would have been futile and counterproductive to his client." "Under these unusual circumstances," we concluded that defense counsel "must be excused from the legal obligation to continually object, state the grounds of his objection, and ask the jury be admonished." [Citation.]

(*Ibid.*)

As was the case in *Riel*, the instant case presents no such *unusual* circumstances. "The trial atmosphere was not poisonous, defense counsel did not object at all, and the record fails to suggest that any objections would have been futile." (*Id.* at p. 1213.) Certainly, an objection by defense counsel when the prosecutor first mentioned vengeance, and an admonition by the trial court, would have cured any error. Consequently, in this "not so unusual" case, appellant has waived this issue on appeal.

Moreover, as discussed below, there was no misconduct, much less an error that seriously affected the fairness or integrity of the proceedings. Accordingly, the plain error doctrine is inapplicable.

C. The Prosecutor's Comments Did Not Amount To Prejudicial Misconduct

Even on the merits, appellant's argument should be rejected. To be reversible under the federal Constitution, a prosecutor's improper comments must so infect the trial with unfairness as to make the resulting conviction a denial of due process. (*Darden v. Wainwright, supra*, 477 U.S. at p. 181; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643; *People v. Frye, supra*, 18 Cal.4th at p. 969.) In addition, conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000; *People v. Earp* (1999) 20 Cal.4th 826, 858.)

In *People v. Floyd*, the prosecutor urged the jury to return a verdict of the death penalty based in part on principles of retribution. (*People v. Floyd* (1970) 1 Cal.3d 694, 722, disapproved on other grounds in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.) The prosecutor's argument comprised 28 pages of transcript and included the following statements:

> Don't forget about this man here, Mr. Hartzel, who is now six feet under. He cries out for justice and Mrs. Hartzel, his wife, you think a day will pass the rest of her life when she won't be reminded of the horror of what happened to her husband and suffer very much for it? . . . The question is what would be equal punishment for that act. We are not only talking about avenging Mr. Hartzel's death, but Mrs. Hartzel. A great, great, an enormous loss. Sometimes it is too easy to forget about the victim and his loved ones . . . . Should these defendants be permitted to live like that [in the prison where it is not that bad], we should say that Mr. Hartzel would never eat another meal, never see his wife again, never listen to music again, never see another sunrise.

(*Id.* at p. 721, internal quotation marks omitted.) This Court noted that although it had never found it improper to argue principles of retribution and vengeance in support of the death penalty, in other contexts it had stated that there was no place for punishment for its own sake, merely for purposes of vengeance or retribution, and that retribution is no longer considered the primary objective of criminal law. (*Id.* at p. 722.) This Court concluded, however, that the prosecutor had not committed misconduct in arguing principles of retribution, because he had relied on other factors as well:

> Although the prosecutor asked the jury to consider retribution in deciding whether to impose the death penalty, he also discussed other pertinent factors, including defendants' commission of other crimes, their premeditation and intent to kill, their lack of remorse, and their amenability to rehabilitation. In these circumstances, the prosecutor's remarks concerning the widow of the slain busdriver did not constitute misconduct.

(*Ibid.*)

In *People v. Ghent*, the defendant argued that the prosecutor had committed misconduct by making occasional references to "retribution" and "community outrage" during closing argument of the penalty phase. (*People v. Ghent*, *supra*, 43 Cal.3d at p. 771.) This Court disagreed, observing that isolated and brief references to retribution or community vengeance, although potentially inflammatory, do not constitute misconduct so long as such arguments do not form the principal basis for the prosecutor's argument in support of imposing the death penalty. (*Ibid.*, citing *People v. Floyd*, *supra*, 1 Cal.3d at p. 722; accord *People v. Davenport*, *supra*, 11 Cal.4th at p. 1222; *People v. Sanders*, *supra*, 11 Cal.4th at p. 550, fn. 33; *People v. Wash* (1993) 6 Cal.4th 215, 261-262.)

Here, the concept of vengeance did not form the principal basis of the prosecutor's argument. Rather, as in *Floyd*, the majority of the prosecutor's argument focused on statutory factors in aggravation and mitigation, including the circumstances of the current crime, appellant's commission of other violent crimes, appellant's prior felony convictions, and the absence of any mitigating factors. The prosecutor also focused on the fact that appellant was likely to pose a danger to other inmates and staff if sentenced to life in prison, and the fact that appellant was not deserving of the jury's sympathy. The prosecutor emphasized that the jury was bound by the statutory factors of section 190.3 and must find that the factors in aggravation must substantially outweigh the factors in mitigation before the jury could even consider imposing the death penalty. Thus, far from being the principal basis of the prosecutor's argument, vengeance was merely a concept the prosecutor briefly discussed in relation to the remainder of her argument.

Appellant argues that the prosecutor's use of vengeance was similar to cases in which the prosecutor has relied upon biblical references in urging the death penalty. (AOB 190.) This Court has found that generally biblical

references have no proper place at the penalty phase. (See *People v. Riel*, *supra*, 22 Cal.4th at p. 1213; *People v. Welch*, *supra*, 20 Cal.4th at p. 761; *People v. Sandoval*, *supra*, 4 Cal.4th at p. 194.) An appeal to religious authority in support of the death penalty has been found to be improper because it tends to diminish the jury's personal sense of responsibility for the verdict, and carries the potential that the jury will believe a higher law should be applied, ignoring the trial court's instructions. (*People v. Welch*, *supra*, 20 Cal.4th at p. 761; *People v. Roybal* (1998) 19 Cal.4th 481, 520; *People v. Sandoval*, *supra*, 4 Cal.4th at p. 194; see also *Sandoval v. Calderon* (9th Cir. 2001) 241 F.3d 765, 776-777.) However, nowhere in the prosecutor's remarks did the prosecutor imply or suggest that another, higher law, should be applied instead of the law in the court's instructions. (Compare *People v. Wash*, *supra*, 6 Cal.4th at pp. 259-261.) Moreover, in contrast to the situation where the text of the Bible is used by an attorney as express authority sanctifying and/or compelling the imposition of the death penalty, i.e., the Bible demands this punishment, the prosecutor here merely used examples of vengeance to articulate the debate over the value and social function of punishment.

In any event, even if deemed misconduct, the prosecutor's argument could not have prejudiced the verdict. The references to vengeance were brief and comprised five pages of a seventy-one-page opening argument. Most of the prosecutor's argument was taken up with a discussion of the circumstances of the current offense, factors in aggravation, and the lack of mitigation. The prosecutor repeatedly referred to the trial court's instructions and argued that the jury's decision was guided by these instructions. And, defense counsel's own argument that the concept of vengeance was not applicable in this case because it was not included in the instructions given by the trial court (see RT 6315-6316) neutralized any impact the prosecutor's comments may have had. Finally, in response to the jury's question of how much consideration it should

give to the law as interpreted by counsel during argument (see CT 1064), the trial court responded, "You can consider counsel's argument to the extent that they apply the facts to the law as given to you by the court. The law comes from the court." (RT 6418.) Given the magnitude of penalty phase evidence against defendant, the relatively minor place of the vengeance argument in the penalty phase argument as a whole, the balancing effect of defense counsel arguing that vengeance was not applicable in this case, and the trial court's instruction that "the law comes from the court", there is no reasonable possibility that the jury would have chosen the lesser verdict if it had not heard the prosecution's vengeance references. (*People v. Welch*, *supra*, 20 Cal.4th at p. 762.) Any error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XIV.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY ARGUING THAT THE JURY SHOULD SHOW APPELLANT THE SAME MERCY HE SHOWED THE VICTIM

Appellant contends the prosecutor committed misconduct by arguing that the jury should show appellant the same mercy he showed for the victim. (AOB 193-200.) As appellant acknowledges (see AOB 196-197), this claim has been considered and rejected by this Court in *People v. Ochoa*, *supra*, 19 Cal.4th at pp. 464-465, and most recently in *People v. Hughes*, *supra*, 27 Cal.4th at p. 395. Since appellant has offered no compelling reason for this Court to reconsider its previous rulings in *Ochoa* and *Hughes*, appellant's claim should likewise be rejected.

A. Relevant Proceedings Below

The trial court instructed the jury that pursuant to section 190.3, factor (k), it could consider as a factor in mitigation:

> any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. [¶] Such circumstances include, but are not limited to such factors as (1) defendant's developmental history and (2) lingering doubt as to defendant's guilt.

(CT 1093.) The trial court also instructed the jury that it "may decide that a sentence of life without the possibility of parole is appropriate for the defendant based upon the sympathy, compassion and mercy you may have felt as a result of the evidence." (CT 1089.)

During her penalty phase argument, the prosecutor referred to these instructions and argued in pertinent part as follows:

> And even after a finding of guilt beyond a reasonable doubt, and even after a finding of true as to the special circumstances beyond a reasonable doubt, a defendant is still allowed, still allowed to present everything possible to you to compare and to spare his life. And that's what falls under [factor] K.
>
> And in totality, what [factor] K really tells you, ladies and gentlemen, is if you can find, if you can glean enough mercy and enough sympathy from that which the defendant has presented to you by way of his background, you are entitled to use that as sufficiently mitigating to overcome any aggravating circumstances and to spare his life.
>
> Now, in addition to factor K you also heard the court read you another instruction which dealt with sympathy and mercy.
>
> And it told you that at this penalty phase you shall consider those emotions. It doesn't tell you that you have to find that they exist or that you have to find them, but it does tell you to consider them. And you must do that.
>
> Let me say to you, ladies and gentlemen, that when it comes to sympathy and when it comes to mercy, I as a representative of the people of the state of California will be satisfied if you extend to this defendant the same sympathy and the same mercy that he extended to Fred Rose. And the same sympathy and the same mercy that he extended to everyone throughout his life. I will be satisfied if you do that.

(RT 6229-6230.) The prosecutor continued with her argument. At a subsequent break in the proceedings, defense counsel made a belated objection to the prosecutor's argument that the jury should give appellant the same consideration he had given the victim. Defense counsel stated that such

argument had been found to constitute prosecutorial misconduct in *Lesko v. Lehman* (3d Cir. 1991) 925 F.2d 1527. Defense counsel asked for the court to admonish the jury to disregard the prosecutor's comment that it "should give to [appellant] the same courtesy he provided to Mr. Rose." (RT 6260-6261.) The trial court responded,

> Your objection is noted. Anything further with respect to any curative instructions? If there's any additional instructions that either side wishes to submit at the end of argument, I will entertain them. I think it's premature and I don't see the need for them.

(RT 6261.)

B. The Prosecutor's Comments Regarding Mercy Did Not Commit Misconduct

In *People v. Ochoa*, this Court concluded that the prosecutor's request, during closing argument in the penalty phase of a capital murder trial, that the jury show the same mercy to the defendant that the defendant had shown to the victim, was proper argument in that the defendant did not deserve mercy or sympathy, and was not an improper appeal to juror sympathies. (*People v. Ochoa*, *supra*, 19 Cal.4th at pp. 464-465.) Likewise, in *People v. Hughes*, this Court recently reaffirmed its holding in *Ochoa*, rejecting a defendant's claim that the prosecutor's argument that the jury should grant defendant as much sympathy and mercy as he gave the victim while she was being terrorized constituted an improper appeal to the jury's passion and prejudice. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 395.)

As in *Ochoa*, the jury in the instant case was instructed that it could consider sympathy and mercy in the penalty phase. Accordingly, the prosecutor was permitted to argue that appellant was not entitled to sympathy or mercy

given the circumstances of his offense. (*Id.* at p. 465; *People v. Hughes*, *supra*, 27 Cal.4th at p. 395.) Appellant's claim must be rejected.

XV.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN ARGUING THAT FRED ROSE WAS KILLED EITHER WHILE ON HIS KNEES BEGGING FOR MERCY OR WHILE RUNNING AWAY IN FEAR

Appellant contends the prosecutor committed misconduct by relying on inflammatory facts not in evidence in support of her argument that the death penalty should be imposed. (AOB 201-205.) This claim must be rejected, as the prosecutor's argument was based on the evidence presented at trial.

A. Relevant Proceedings Below

The coroner testified that Fred Rose was shot in the back of the head, with the bullet entering the upper right portion of the head, and exiting through the forehead on the right side. (RT 3873.) Rose also had abrasion on his right knee and various knuckles, as well as a bruise on his left elbow. (RT 3877.) Assuming Rose was standing with his hands down at his sides and was looking straight ahead, the trajectory of the gunshot was back to front, slightly left to right, and slightly downward. The gunshot was consistent with the shooter being slightly taller than Rose or holding a weapon slightly over the head. It was also consistent with the shooter and victim being the same size, but with the victim kneeling, which would account for the abrasion on the victim's knee. (RT 3878.)

On cross-examination, the coroner acknowledged that the position of the victim's body and head would greatly impact the track the bullet followed within the body. The coroner agreed that there were "probably millions of different possibilities depending upon the position of the weapon and the position of the body and specifically the head of the person who was struck." (RT 3880-3881.)

During her penalty phase argument, the prosecutor argued in pertinent part as follows:

> In one instant, in one calculating moment this defendant robbed Fred Rose no only of his life, but of all the other rights that are basic rights that all of us should have.
>
> You know, he took Fred Rose's life and he never looked backwards. He pulled that trigger with about as much introspection as you or I would have in swatting a fly or stomping a cockroach.
>
> He killed Fred Rose in the back of the head. When, based on the evidence Mr. Rose was either on his knees pleading for mercy or running away in fear from this defendant - -

(RT 6236-6236.) At this point, defense counsel stated, "To which there is an objection, your honor." The trial court responded, "The jury has already heard previously that statements of counsel are not evidence." The prosecutor then continued her argument by adding, "He executed this father of three and then he went out and partied." (RT 6237.)

B. Appellant's Claim Has Been Waived

As a general rule, "a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 851; *People v. Berryman*, *supra*, 6 Cal.4th at p. 1072.) The failure to make a timely objection or request for admonition is excused if either would be futile or an admonition would not have cured the harm caused by the misconduct. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

In the instant case, defense counsel objected on unspecified grounds to the prosecutor's comment that the victim was shot either while he was on his

knees pleading for mercy or while running away in fear from appellant. However, he did not object on grounds of prosecutorial misconduct or request an admonition. Further, no objection at all was made to the prosecutor's subsequent comment that appellant "executed" the victim. (RT 6237.) Although defense counsel failed to request an admonition, the trial court nevertheless provided one, announcing, "The jury has heard previously that statements of counsel are not evidence." (RT 6237.) Appellant suggests this comment was directed at counsel rather than the jury, and thus, cannot be considered an admonition to the jury. (AOB 204.) Assuming appellant's assertion is true, his claim of misconduct is waived, as an admonition could have cured any harm. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 851.)

C. The Prosecutor's Argument Constituted Fair Comment On The Evidence

A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Samayoa*, *supra*, 15 Cal.4th 795, 841.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Ibid.*)

A prosecutor commits misconduct by mischaracterizing the evidence or arguing facts not in evidence. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 823, 827-828.) However, the prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be shown therefrom and may vigorously argue its case using appropriate epithets warranted by the evidence. (*People v. Welch*, *supra*, 20 Cal.4th at p. 753; *People v. Thomas*, *supra*, 2 Cal.4th at p. 526.)

> [T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the conclusions are illogical because these are matters for the jury to determine.

(*People v. Lewis* (1990) 50 Cal.3d 262, 283.)

Moreover, to prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Frye*, *supra*, 18 Cal.4th at p. 970; *People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) In conducting this inquiry, the reviewing court will not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. (*People v. Frye*, *supra*, 18 Cal.4th at p. 970.)

In *People v. Thomas*, the defendant argued that the prosecutor engaged in misconduct by inviting the jury to speculate, in the absence of supporting evidence, that the victim's murder was sexually motivated. The prosecutor noted that the fastener and zipper of the victim's shorts were undone, suggesting she had been beaten and murdered for resisting the defendant's sexual advances. This Court found that although the inference was far from compelling, the prosecutor's argument did not constitute misconduct, as the comments had a sufficient evidentiary basis. (*People v. Thomas*, *supra*, 2 Cal.4th at pp. 526-527.)

Likewise, the challenged comments at issue here were reasonable inferences based on the evidence presented at trial. Rose was last seen leaving his Lancaster office around 2:15 p.m. Appellant drove Rose's car to Northridge and used Rose's ATM card to withdraw money shortly after 4:00 p.m. Rose

was shot between 6:00 and 6:30 p.m. in North Hollywood. The coroner testified that Rose's gunshot wound was consistent with him being in a kneeling position, which would also be consistent with the abrasion on Rose's knee. The coroner also acknowledged that there were "probably millions" of possibilities regarding the position of the victim's body at the time he was shot. Finally, the victim was shot from a distance of 18 inches to 100 feet away. (RT 3887-3888.)

Based on the above evidence, the prosecutor could reasonably infer that Rose was shot while he was on his knees pleading for mercy, or while running away in fear from appellant. The coroner's testimony regarding the position of the victim's body at the time of the shooting was consistent with either scenario. Furthermore, such inferences were logical assumptions based on the fact that appellant, armed with a gun, had held Rose for four hours against his will. It is simply common sense that a victim in such a situation would plead for mercy or attempt to run away in fear at the moment it appeared appellant was about to kill him.

To the extent appellant suggests the prosecutor argued these were the *only* two ways in which the shooting could have occurred (AOB 201), this claim is unavailing, as there is no reasonable likelihood the jury understood or applied the prosecutor's comments in such a manner. (*People v. Frye*, *supra*, 18 Cal.4th at p. 970; *People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) As appellant acknowledges, there was very limited evidence on how the shooting occurred. (See AOB 201.) Furthermore, the coroner agreed with defense counsel that the position of the victim's body was consistent with "probably millions of different possibilities." (RT 3880-3881.) Accordingly, there is no reasonable likelihood the jury interpreted the prosecutor's comments to imply that the *only* way the victim could have been killed was while kneeling and begging for mercy or while running away in fear. Furthermore, when defense

counsel objected to the prosecutor's argument, the trial court reiterated that comments made by counsel were not to be considered as evidence. (RT 6237.) Finally, this was a very brief portion of the prosecutor's argument, and it is highly unlikely that these comments swayed the jury into setting the penalty at death. Accordingly, appellant's claim should be rejected, as no prejudicial misconduct occurred. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 970; *People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.)

XVI.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN HER PENALTY PHASE ARGUMENT BY OBSERVING THAT SHE COULD NOT "BRING IN EVERY SINGLE BAD THING" APPELLANT HAD DONE THROUGHOUT HIS ENTIRE LIFE TO CONVINCE THE JURY TO IMPOSE THE DEATH PENALTY

In his final claim of prosecutorial misconduct, appellant contends the prosecutor argued facts not in evidence during her penalty phase argument when she informed the jury, "I cannot bring in every single bad thing this defendant has done throughout his entire life to convince you to give him the death penalty." (AOB 206-210, quoting RT 6219.) Appellant claims this statement constituted misconduct and violated his state statutory rights under section 190.3, as well as his rights to confront and cross-examine witnesses, to a fair jury trial, and to due process and a reliable penalty determination under both the state and federal constitutions. (AOB 206-210.) This claim has been waived, due to appellant's failure to object or request an admonition. Furthermore, the claim fails on the merits, as the prosecutor's statement was a fair comment on the penalty phase instructions and did not imply the existence of evidence known to the prosecutor but not the jury.

A. Relevant Proceedings Below

Near the outset of her penalty phase argument, the prosecutor made the following statements:

> Now, you are going to have a difficult job because, as I said, this is not an easy decision anyone ever has to make.
>
> But I think in some ways it may be made a little easier for you by virtue of the instructions which the court gave you. And one specifically

which tells you those things that you are permitted to consider at this particular phase.[33/]

I have had the jury instruction enlarged. And I will put it up here. It goes two pages.

. . . .

Now, let me very briefly, if I might, go over this particular instruction with you, ladies and gentlemen.

The law is very specific as to what aggravating factors you can use. You will recall during jury selection we talked about aggravating factors and mitigating factors.

The law is very specific about what can be used. It is not unlimited. [¶] I cannot bring in every single bad thing this defendant has done throughout his entire life to convince you to give him the death penalty. I'm limited to factors A, B and C up there on the chart.

---

33. It appears the prosecutor was referring to CALJIC No. 8.85, which stated in pertinent part as follows:

> In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be otherwise instructed]. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.
>
> (b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(CT 1091-1092.)

(RT 6218-6219, footnote added.) Defense counsel did not object to this portion of the prosecutor's argument. (RT 6219.)

B. Appellant's Claim Has Been Waived

A defendant may not complain on appeal of prosecutorial misconduct unless he or she timely objects and requests the jury be admonished. (*People v. Hill*, *supra*, 17 Cal.4th at p. 820; *People v. Clair*, *supra*, 2 Cal.4th at p. 662; *People v. Ghent*, *supra*, 43 Cal.3d at p. 762.) There is no exception to this rule for capital trials. (*People v. Clair*, *supra*, 2 Cal.4th at p. 662.) Because appellant did not object or request an admonition, his claim has been waived, as any possible harm could have been cured by an admonition.

C. The Prosecutor's Comment Was Based On A Reasonable Interpretation Of CALJIC No. 8.85 And Did Not Constitute Misconduct

In any event, the prosecutor did not commit misconduct. A prosecutor commits misconduct by arguing facts not in evidence. (*People v. Hill*, *supra*, 17 Cal.4th at p. 823; *People v. Bolton*, *supra*, 23 Cal.3d at p. 212 (*Bolton*).) In *Bolton*, the victim in an assault with a deadly weapon case was impeached with his prior felony convictions. In closing argument, the prosecutor hinted twice during closing argument that but for certain rules of evidence, he could have presented evidence that the defendant was a man with prior felony convictions or a propensity for violence. The prosecutor referred to the fact that the victim had been impeached with a prior felony conviction involving threatening behavior. The prosecutor then argued to the jury, "I objected to that, because I think it is unfair, because I can't do the same thing to the defendant, and there are certain rules of court that favor one side or the other, and I can't do that."

(*Bolton*, *supra*, 23 Cal.3d at p. 212 & fn. 1.) The prosecutor proceeded to argue,

> You people don't know whether or not [the victim] could be afraid of [the defendant]. You don't know, because that's just the way we do things here. For all you know, he may be just as bad a guy as [the victim].

(*Id.* at p. 212, fn. 1.) This Court found that the prosecutor's comments constituted misconduct, because he implied that there was additional evidence about the defendant which was known to him, but not the jury, essentially making the prosecutor his own witness. (*Id.* at p. 213.) This Court nevertheless found any error to be harmless. (*Id.* at p. 214.)

In *People v. Taylor* (1961) 197 Cal.App.2d 372 (*Taylor*), evidence was presented that the victim in a manslaughter case had a reputation for violence. Defense counsel emphasized this evidence in his argument to the jury. In response, the prosecutor argued that unlike defense counsel, the prosecution was precluded from bringing in "evidence along that same line." He further argued that defense counsel could "bring in all the evidence he wants about the bad reputation of one of the parties in this type of situation, but the prosecution, according to law, can't do the same." (*Id.* at pp. 381-382, internal quotation marks omitted.) The court of appeal found the error was not harmless and reversed. (*Id.* at pp. 382-383.)

The instant case is easily distinguishable from *Bolton* and *Taylor*, the primary cases upon which appellant relies. Unlike the noncapital cases of *Bolton* and *Taylor*, the prosecutor here was permitted in the penalty phase to present certain evidence in aggravation, provided it fell within the statutory provisions of section 190.3. The prosecutor's comment that she could not "bring in every single bad thing this defendant has done throughout his entire life to convince you to give him the death penalty" accurately stated the law.

Viewed in context, the prosecutor was attempting to focus the jury on the jury instructions, and in particular factors (a), (b), and (c) of CALJIC No. 8.85, to the extent there were limited aggravating factors the jury could consider in determining the appropriate penalty. Moreover, through this comment, the prosecutor did not imply the existence of additional evidence known to her but not the jury. Throughout the trial, the defense presented instances of appellant's behavior which would qualify as "bad thing[s]." For example, the defense presented evidence at the penalty phase that as a juvenile, appellant had experienced problems in school and with the law and that he had been involved with drugs and gangs. (RT 5571-5572.) The prosecutor's argument accurately reflected the fact that the prosecution could not rely on such "bad things" in urging the jury to impose the death penalty.

Moreover, there is no reasonable possibility that the jury interpreted the prosecutor's comment in the improper manner appellant suggests. (*People v. Frye*, *supra*, 18 Cal.4th at p. 970; *People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) Unlike the prosecutors in *Bolton* or *Taylor*, the prosecutor in this case did not express frustration to the jury about her inability to present to them additional evidence of "bad things" appellant had done. Rather, she implicitly endorsed this limitation by arguing that the jury's very difficult task of determining the appropriate penalty would be made easier by the fact that the jury could only consider specific factors in aggravation. (RT 6218-6219.) Furthermore, unlike the references in *Bolton* and *Taylor*, here the prosecutor's reference to "bad things" was vague and hypothetical, and did not imply that she had knowledge of additional evidence that would support the death penalty. Accordingly, appellant cannot demonstrate that any prejudicial misconduct occurred. (*People v. Frye*, *supra*, 18 Cal.4th at p. 970; *People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.)

XVII.

ANY ERROR IN FAILING TO REINSTRUCT AT THE PENALTY PHASE WITH APPLICABLE GUILT-PHASE INSTRUCTIONS WAS INVITED BY APPELLANT; IN ANY EVENT, THERE WAS NO ERROR BECAUSE THE JURY IS PRESUMED TO BE GUIDED BY THE APPROPRIATE GUILT-PHASE INSTRUCTIONS

Appellant contends the trial court erred in failing to instruct the jury at the penalty phase regarding general principles of law relevant to the evaluation of evidence. (AOB 211-216.) Respondent submits any error was invited by defense counsel's express preference that the jury not be reinstructed at the penalty phase regarding the general principles of law. (See RT 6063-6065.) Furthermore, this claim fails on the merits, because the jury is presumed to be guided by the appropriate guilt-phase instructions.

A. Relevant Proceedings Below

During a discussion of penalty phase instructions, the trial court advised counsel that there were "two basic models" with respect to penalty phase instructions. The court indicated it could either 1) not repeat all the instructions and instead instruct the jury it should be guided by the previously-given instructions which applied and were pertinent to determination of penalty but to completely disregard any instructions which prohibited consideration of pity, sympathy, and mercy; or 2) repeat general instructions concerning evaluation of the evidence. (RT 6063-6064.) Defense counsel stated that he preferred the first of the trial court's two approaches, noting that he did not think it was advisable "to go into a lengthy dissertation with respect to instructions already given." He specifically expressed concern regarding the rereading of CALJIC No. 2.11 (which states the prosecution has no duty to produce all available evidence). (RT 6064-6065.) The prosecutor agreed with defense counsel's

preference not to have all guilt phase instructions reread but for different reasons. The prosecutor stated, "I think instructions become unduly burdensome on the jury and I would not favor the rereading of all the instructions that were previously given." (RT 6065.) The court stated,

> I will tell them as a general rule, start off with a proposition they're to be guided by the previous instructions given at the first phase which are applicable and pertinent to the determination of the penalty, however, to the extent any of those instructions conflict with these instructions, these instructions prevail and further, that they're to disregard any instructions which prohibit them from considering any factors now they should consider.

(RT 6066.)

Without objection, at the conclusion of the penalty-phase evidence, the jury was instructed as follows:

> Ladies and gentlemen, I will now instruct you on the law. This is going to take substantially less than what I had initially projected because I will not read to you again the instructions that were given to you here in the first phase of the trial.
>
> I will instruct you on how to deal with those previous instructions in a few moments. And those instructions will be available to you if you request them.

(RT 6197.) The jury was subsequently instructed pursuant to a modified version of CALJIC No. 8.84.1 as follows:

> You are to be guided by the previous instructions given in the first phase of this case which are applicable and pertinent to the determination of penalty.
>
> To the extent that the instructions I am now giving to you conflict with my earlier instructions, today's instructions shall prevail.

You are to completely disregard any instructions given in the first phase which had prohibited you from considering pity or sympathy for the defendant.

An appeal to the sympathy or passions of the jury is inappropriate at the guilt phase of the trial. However, at the penalty phase, you shall consider sympathy, compassion, or mercy for the defendant or his family that has been raised by any aspect of the evidence.

(RT 6198; CT 1088.)

After penalty phase arguments had concluded, the trial court instructed the jury that it would not reread the guilt phase instructions, but informed them that they would be available in the jury room. The trial court encouraged the jury to read the instructions and consider them as a whole. (RT 6351.)

B. Appellant Has Invited Any Error

Now, for the first time, appellant claims the trial court erred by failing to instruct the penalty jury concerning applicable guilt-phase instructions. (AOB 211-216.)[34/] During the discussion of the proposed jury instructions, the court gave counsel the option of rereading the applicable guilt phase instructions, and defense counsel expressly declined the offer. Although *People v. Babbitt* (1988) 45 Cal.3d 660, 718, fn. 26, and the use note to CALJIC No. 8.84.1, suggest applicable guilt-phase instructions may be repeated at the conclusion of the penalty phase, there was no objection here to CALJIC No. 8.84.1 or any request that prior instructions be provided to the jury. (RT 6064-6066.) Accordingly, any error in this case should be deemed invited by appellant. (See *People v. Catlin* (2001) 26 Cal.4th 81, 149 [defense request to

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34. The only guilt-phase instruction appellant specifically identifies is CALJIC No. 2.01 regarding the sufficiency of circumstantial evidence. (AOB 214-215, fn. 44.)

omit instruction invited error in failing to provide omitted instruction]; *People v. Wader* (1993) 5 Cal.4th 610, 657-658 [when defense foregoes a particular instruction, invited error doctrine bars argument on appeal that instruction was omitted in error]; *People v. Cooper* (1991) 53 Cal.3d 771, 831 [conscious choice in rejecting instruction bars claim on appeal that instruction was improperly omitted].) For the same reasons, any contention that the trial court's failure to repeat the guilt-phase instructions resulted in the violation of appellant's constitutional rights must also be deemed forfeited on appeal. (See *United States v. Olano* (1993) 507 U.S. 725, 731 [113 S.Ct. 1770, 123 L.Ed.2d 508; *People v. Saunders* (1993) 5 Cal.4th 580, 589-590.)

C. The Trial Court Had No Duty To Repeat The Guilt Phase Instructions

In any event, this Court has repeatedly rejected this claim on the merits. In *People v. Sanders*, *supra*, 11 Cal.4th 475, this Court addressed a capital defendant's claim that the trial court erred in failing to repeat instructions on the credibility of witnesses and circumstantial evidence, which it gave at the guilt phase, at the conclusion of the penalty trial. (*Id.* at p. 561.) The claim was found to be meritless with the following explanation:

> "Because none of these instructions was, by its terms, limited to the guilt phase, and because no penalty phase instructions contradicted those instructions, 'we believe a reasonable jury would correctly assume those "generic" instructions continued to apply.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 600 [].) [Footnote omitted.]

(*People v. Sanders*, *supra*, 11 Cal.4th at p. 561.) The Court also found the claim did not implicate the defendant's state and federal constitutional rights. (*Id.* at p. 561, fn. 41.) In addressing an essentially identical claim in *People v. Kirkpatrick* (1994) 7 Cal.4th 988, regarding the failure to reinstruct on the

presumption of innocence and the meaning of reasonable doubt, this Court held that:

> a reasonable juror would assume that "generic" instructions given at the guilt phase continue to apply at the penalty phase, and therefore it is not prejudicial error for the trial court to fail to reiterate those instructions.

(*Id.* at p. 1020.)

In *People v. Hawthorne* (1992) 4 Cal.4th 43, this Court questioned whether failure to reinstruct at the penalty-phase with guilt-phase instructions constituted error:

> We are unpersuaded that the lapse of time between the guilt and penalty phases impaired the jurors' memories or otherwise undermined the reliability of their deliberations. The jurors did not merely hear the instructions in a vacuum; presumably, they utilized them as directed in determining defendant's guilt and thereby developed a sufficient awareness of their relation to the deliberative process.

(*Id.* at p. 74.) Even in *People v. Danielson* (1992) 3 Cal.4th 691, where two months had elapsed after the jury had heard the guilt-phase instructions, and the trial court refused the defense's request to repeat the guilt-phase instructions, this Court reiterated that there is a presumption that "the jury applied to the penalty determination any applicable guilt phase instructions." (*Id.* at p. 722.) The Court clarified that because there was nothing in the record indicating that the "jury was confused or misled by the court's failure to reinstruct" the claim of error had to be rejected. (*Ibid*; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 460.)

Here, the jurors have to be presumed to be intelligent people, and also have to be presumed to have fully considered all guilt-phase instructions during their deliberations on appellant's guilt. They were properly instructed at the conclusion of the penalty trial to consider the applicable instructions previously

provided to them at the time of the guilt-phase trial, which were available to them in the jury room during the penalty phase deliberations. There is nothing in the record to indicate the jury was confused about what instructions to follow, nor did they request any reread of the instructions. Accordingly, there could have been no error in failing to reinstruct the jury at the penalty-phase with CALJIC No. 2.01, or any of the other unspecified instructions appellant asserts should have been reread. For the same reasons, even assuming cognizable error, appellant could not have been prejudiced by the court not repeating all of the guilt-phase instructions at the conclusion of the penalty phase.

XVIII.

THE TRIAL COURT DID NOT ERR IN FAILING TO DELETE THE WORD "EXTREME" FROM CALJIC NO. 8.85

Appellant contends that inclusion of "extreme mental and emotional disturbance" as a mitigating factor under factor (d) of section 190.3 and CALJIC No. 8.85 precludes the jury from considering as mitigating evidence a mental or emotional disturbance which is less than extreme. He thus submits that CALJIC No. 8.85 violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 217-220.) Respondent submits the jury was properly instructed.

This Court has established that while factor (d) of section 190.3 and CALJIC No. 8.85 only permits consideration of "extreme mental or emotional disturbance," factor (k), the catch-all provision, permits "consideration of nonextreme mental or emotional conditions." (*People v. Turner* (1994) 8 Cal.4th 137, 208, quoting *People v. Clark* (1992) 3 Cal.4th 41, 163; see also *People v. Lucero* (2000) 23 Cal.4th 692, 727-728; *People v. Mayfield* (1997) 14 Cal.4th 668, 806; *People v. Davenport, supra*, 11 Cal.4th at p. 1203; *People v. Mayfield* (1993) 5 Cal.4th 142, 184- 185; *People v. Ashmus* (1991) 54 Cal.3d 932, 1001; *People v. Nicolaus* (1991) 54 Cal.3d 551, 586; *People v. Frank* (1990) 51 Cal.3d 718, 740; *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1033; *People v. Ghent, supra*, 43 Cal.3d at p. 776.) Appellant's argument to the contrary is thus clearly at odds with the position of this Court.

Furthermore, the United States Supreme Court rejected an identical argument in *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 308 [110 S.Ct. 1078, 108 L.Ed.2d 255], holding that a similar catch-all provision in Pennsylvania's jury instruction was in accord with the Eighth Amendment. The corresponding California provision, factor (k) of section 190.3 and CALJIC No.

8.85, was similarly upheld as constitutional in *Boyde v. California* (1990) 494 U.S. 370, 381-383. For these reasons, appellant's argument must be rejected.

XIX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON ITS SENTENCING DISCRETION PURSUANT TO CALJIC NO. 8.88

Appellant contends that the trial court's use of CALJIC No. 8.88 in instructing the jury at the penalty phase resulted in numerous errors due to alleged flaws in that instruction.[35/] (AOB 221-230.) Because similar challenges to this instruction have been repeatedly rejected by this Court, appellant's contention likewise should be rejected.

Appellant claims the instruction is too vague when it informs the jury that to return a verdict of death, each juror must be persuaded the aggravating circumstances are "so substantial" in comparison with the mitigating circumstances that it warrants death rather than life without the possibility of parole. (AOB 222-226.) Appellant contends the instruction's use of the phrase "so substantial" is impermissibly imprecise. This contention has been previously rejected by this Court and appellant offers no persuasive reason for reconsideration of the prior rulings. (See *People v. Carter*, *supra*, 30 Cal.4th at p. 1226; *People v. Boyette* (2002) 29 Cal.4th 381, 465.)

Appellant contends that the instruction told the jurors they could return a judgment of death if persuaded the aggravating circumstances were so substantial in comparison to the mitigating circumstances that it "warrants" death, and the use of the word "warrants" did not inform them they could return a verdict of death only if they found that penalty was appropriate, not merely authorized. (AOB 226-228.) This claim has been previously rejected (see *People v. Boyette*, *supra*, 29 Cal.4th at p. 465), and should be rejected in this case, especially since the trial court below expressly informed the jury that "[i]n

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35. The text of CALJIC No. 8.88, as read by the trial court, is set forth in its entirety at RT 6209-6211. (See also CT 1113-1115.)

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." (RT 6210, emphasis added.)

Appellant also complains the instruction failed to inform the jury it could impose a life sentence even if the aggravating evidence outweighed the mitigating evidence. (AOB 228-229.) No such instruction was required. (*People v. Arias* (1996) 13 Cal.4th 92, 170-171; *People v. Medina*, *supra*, 11 Cal.4th at pp. 781-782; see also *People v. Hendricks* (1988) 44 Cal.3d 635, 654-655.)

Finally, appellant contends the instruction should have told the jury that neither party had the burden of proof at the penalty phase, and the failure to do so might have resulted in the jury assigning the burden to the defense to show death was not the appropriate punishment. (AOB 229-230.) This Court has held that except for proof of other crimes, a trial court should not instruct at all on the burden of proof at the penalty phase, because the sentencing decision is inherently a moral and normative one rather than a factual one, and is thus not susceptible to such quantification. (*People v. Box* (2000) 23 Cal.4th 1153, 1216; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418.) Insofar as appellant cites *People v. Hayes* (1990) 52 Cal.3d 577, 643, for the proposition that the jury must be given an instruction on the lack of burden of proof at the penalty phase (AOB 229), the case does not hold that such an instruction must be given.

Based on the foregoing, appellant's challenge to CALJIC 8.88 should be rejected.

XX.

CALIFORNIA'S DEATH PENALTY LAW IS NOT UNCONSTITUTIONAL

Appellant, recognizing this Court has previously rejected "some or all" of his claims, raises numerous challenges to the constitutionality of California's death penalty law, "to allow the Court to reconsider its prior rulings, and to preserve those claims for any possible federal review." (AOB 231, fn. 50.) Because appellant offers no compelling reason for reconsideration, his claims should be rejected.

In Argument XX (A), appellant contends section 190.3, subdivision (a), as applied, allows arbitrary and capricious imposition of the death penalty. (AOB 231-233.) This argument has been previously rejected and should be rejected here. (See *People v. Maury* (2003) 30 Cal.4th 342, 439; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1053.)

In Argument XX (B), appellant asserts there are insufficient safeguards against arbitrary and capricious sentencing. (AOB 233-241.) Insofar as he incorporates the preceding argument regarding the alleged infirmities of section 190.3, subdivision (a), that claim has been rejected in the cases cited. The following claims also have been previously rejected by this Court: the requirement of written findings by the jury (see *People v. Snow* (2003) 30 Cal.4th 43, 126); the necessity for jury unanimity as to aggravating factors (see *People v. Maury*, *supra*, 30 Cal.4th at p. 440); a proof-beyond-a-reasonable-doubt requirement for finding the existence of an aggravating circumstance (see *People v. Snow*, *supra*), that aggravating circumstances outweigh mitigating ones (*ibid.*), and that death is the appropriate punishment (see *People v. Box, supra*, 23 Cal.4th at p. 1216; *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418); and intercase proportionality review (see *People v. Snow, supra,* at pp. 126-127).

Appellant continues his Argument XX (B) by claiming, in sections (B)(1) through (B)(3), that the jury should have been instructed on some standard of proof, even if not proof-beyond-a-reasonable-doubt, to guide its decisions on whether aggravating circumstances existed to guide its decisions on whether aggravating circumstances existed, whether aggravating circumstances outweighed mitigating ones, and whether death was the appropriate sentence. (AOB 234-235.) This claim has been rejected in prior decisions of this Court, and should be rejected here. (*People v. Box*, *supra*, 23 Cal.4th at p. 1216; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 417-418.) Insofar as appellant contends that *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 148 L.Ed.2d 435] compel a different conclusion (see AOB 237-238), appellant is mistaken. This Court has found that *Ring* and *Apprendi* "do not affect California's death penalty law." (*People v. Smith* (2003) 30 Cal.4th 581, 642.)

In Argument XX (C), appellant contends jury unanimity is required as to aggravating factors. (AOB 241-246.) This claim has been previously rejected and should be rejected here. (See *People v. Maury*, *supra*, 30 Cal.4th at p. 440.) As previously noted, appellant's reliance on *Ring* and *Apprendi* (see AOB 242-243) is unavailing, as those cases have been found to be inapplicable to California's death penalty law. (See *People v. Smith*, *supra*, 30 Cal.4th at p. 642.)

In Argument XX (D), appellant complains about the lack of written jury findings on aggravating factors. (AOB 246-248.) This claim has been previously rejected and should be rejected here. (See *People v. Snow*, *supra*, 30 Cal.4th at p. 126.)

In Argument XX (E), appellant challenges the lack of intercase proportionality review. (AOB 248-251.) This Court has previously rejected the

claim that such review is required. (See *People v. Snow*, *supra*, 30 Cal.4th at pp. 126-127.)

In Argument XX (F), appellant contends the absence of "previously addressed procedural safeguards" resulted in a denial of equal protection, because, according to appellant, those safeguards are provided to non-capital defendants. (AOB 252-257.) Insofar as these unspecified "procedural safeguards" relate to penalty phase procedures, capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243.) Insofar as appellant argues the lack of intercase proportionality review in capital cases amounts to a violation of equal protection, this Court has previously rejected this claim and should do so here. (See *People v. Cox* (2003) 30 Cal.4th 916, 970.)

For the foregoing reasons, appellant's challenge to California's death penalty procedures should be rejected.

XXI.

NO REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ALLEGED ERRORS

Appellant contends his conviction and death sentence should be reversed based upon the cumulative effect of alleged errors. (AOB 258-260.) For the reasons stated as to each of the arguments appellant has raised in this appeal, there were no errors requiring reversal of the guilt or penalty verdicts.

XXII.

REMAND TO THE TRIAL COURT FOR A NEW REVIEW BY THE TRIAL JUDGE PURSUANT TO PENAL CODE SECTION 190.4, SUBDIVISION (E) IS NOT NECESSARY

Appellant contends the case must be remanded to the trial court for a new review by the trial judge pursuant to section 190.4, subdivision (e). (AOB 261-277.) Respondent disagrees, as a remand is not warranted.

A. Relevant Proceedings Below

Judge Leon Kaplan presided over appellant's trial. During a few instances throughout the trial, and always outside the presence of the jury, the prosecutor expressed her dissatisfaction with Judge Kaplan's actions and rulings and questioned whether Judge Kaplan's personal feelings against the death penalty were interfering with his ability to be fair to the prosecution. (See, e.g., RT 69 [prosecutor expresses concern over court's attempt to encourage plea negotiations and inquires whether court has ambivalent feelings about the death penalty; court indicates it has ambivalent feelings, but does not believe they will preclude objectively carrying out law]; RT 6419 [prosecutor complains that court has given "defense loaded" instructions during penalty phase, some of which do not accurately state the law; prosecutor advises court that three witnesses informed her that judge was rolling his eyes, thumbing through papers, and looking at his watch during her closing argument]; RT 6420 [prosecutor alleges that the court has effectively attempted to prevent the prosecution from obtaining a death penalty through the instructions given and answers to jury's questions, due to court's "obvious feeling against the death penalty"]; RT 6470-6474 [trial judge accuses prosecutor of making off-the-record comment that she hoped he would have children who would be murdered so he would understand what it was like to be a victim; prosecutor

denies making such a statement; she explains that court had asked her why she did not let God decide when appellant died, and she responded, because appellant did not let God decide when Fred Rose died; prosecutor also explains that in the context of discussing the hurt and anger felt by Rose's mother and wife, she may have stated that the judge would better understand their feelings if he had children, but she never wished that the judge would have children who would be murdered].

After Judge Kaplan granted appellant's motion for new trial (RT 6742-6755), the prosecutor argued at length about why this ruling was legally erroneous (RT 6757-6760). She concluded her argument with the following statement:

> I don't think anyone can doubt that what this Court is doing is twisting and torturing out of all shape what has occurred in this case in order to reach this court's decision not to impose the death penalty on this defendant because of this Court's personal beliefs.

(RT 6760.) Judge Kaplan stated that he would refrain "from succumbing to the temptation to respond to personal attacks on this Court which have been ongoing and relentless." (RT 6760.) Judge Kaplan then gave additional reasons supporting his decision to grant appellant's motion for a new penalty trial. (RT 6760-6762.) Judge Kaplan then recused himself from the case, with the following statement:

> I have one last statement to make and that is that in light of the personal attacks against the court, I feel that justice would be best served if I would recuse myself from further hearings in this case. The People may wish to consider reassigning this case but that is something that is entirely and exclusively within their province. As for myself, I am going to recuse myself from presiding over further proceedings, however I do not recuse myself from availability to making any supplemental or

additional findings that may be required by any reviewing court. Thank you very much.

(RT 6762-6763.)

When Judge Kaplan recused himself, the case was initially reassigned to Judge Sandy Kriegler in his capacity at the time as the supervising judge of the criminal courts in Van Nuys. (RT 6765, 6928.) On November 18, 1996, the case was remanded to the trial court after the California Court of Appeal reversed the trial court's grant of appellant's motion for new trial. (RT 6928.) Judge Kriegler stated that he was no longer the supervising judge, and had been replaced in that capacity by Judge Darlene Shempp. Judge Kriegler stated that he had notified Judge Shempp that the case was ready to proceed, and she indicated that she had assigned the case to Judge Howard Schwab. (RT 6928.) Defense counsel objected to the case being assigned to anyone other than Judge Kaplan. He argued that Judge Kaplan was familiar with the case and was in the best position to rule on appellant's automatic motion for modification of the verdict pursuant to section 190.4, subdivision (e) (hereafter 190.4(e) motion). (RT 6929-6932.) Judge Kriegler responded to this objection as follows:

> [Defense counsel], I believe once a judge disqualifies himself or herself they remain disqualified, and in accordance with Judge Schempp's order, therefore, it will be transferred to Judge Schwab. [¶] And if you have a question as to whether it should go to Judge Schwab or back to Judge Kaplan, I assume your remedy is to seek a writ in the court of appeal, if you feel that's worth the effort.

(RT 6934.)

The matter was then transferred to Judge Schwab. (RT 6940.) Defense counsel reiterated his objection that appellant's 190.4(e) motion should be heard by Judge Kaplan. (RT 6941, 6946-6959.) The prosecutor responded to defense counsel's argument, asserting, inter alia, that Judge Kriegler had already ruled

on this issue, and that Judge Schwab lacked jurisdiction to reconsider that decision. (RT 6959-6962.) Judge Schwab made his own independent ruling that Judge Kaplan had recused himself. Furthermore, Judge Kaplan's "sincere recusal" constituted unavailability, such that another judge should hear the matter. (RT 6963.)

B. Appellant's 190.4(e) Motion Was Properly Considered And Denied By Judge Schwab, As Judge Kaplan's Recusal Made Him Unavailable

When the defendant in a capital case moves to modify the death verdict by way of a 190.4(e) motion,

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

(§ 190.4, subd. (e).)

Although section 190.4(e) is silent on the issue, this Court has held that a 190.4(e) motion should be heard by the judge who presided over the trial, if available. (*People v. Brown* (1988) 45 Cal.3d 1247, 1264, fn. 7.) However, this Court has repeatedly confirmed that, if the trial judge is unavailable, a different judge may hear the 190.4(e) motion. (E.g., *People v. Crew*, *supra*, 31 Cal.4th at p. 858; *People v. Espinoza*, *supra*, 3 Cal.4th at pp. 827-830 [after trial judge became ill during guilt phase of capital trial, different judge substituted in, reviewed transcripts of previous proceedings, heard the rest of the evidence, and imposed death judgment; no constitutional or statutory violation resulted from that judge ruling on 190.4(e) motion, even though original judge subsequently recovered]; *People v. Brown*, *supra*, 45 Cal.3d at p. 1264, fn. 7 [recognizing that "practical difficulties arise when the trial judge dies or

becomes unavailable before the section 190.4(e) motion has been decided," and that in such cases the motion may be heard by a different judge]; *People v. Lewis*, *supra*, 50 Cal.3d at p. 287 [different judge may hear 190.4(e) motion on remand after appeal if trial judge is unavailable]; *People v. Bonillas* (1989) 48 Cal.3d 757, 801, fn. 14 [same].)

In *People v. Espinoza*, this Court explained in detail why the judge who presided at trial need not rule on a 190.4(e) motion:

> A judge ruling on an application for modification of a jury verdict of death does not make an independent and de novo penalty determination, but rather independently reweighs the aggravating and mitigating evidence to decide whether "in the judge's independent judgment, the weight of the evidence supports the jury verdict." [Citations]. As we have acknowledged in cases that were reversed and remanded for reconsideration of an application for modification of a death verdict, it is not always possible that the judge who conducted the penalty phase in a capital case be the one to reconsider the application on remand; in that event, "the matter may be heard before another judge of the same court." [Citations].
>
> In this case, defendant's application for modification of the jury's verdict of death was considered by Judge Saiers who, after replacing the seriously ill Judge Ferguson, reviewed the transcripts of the trial proceedings before his substitution and presided over the remainder of the guilt phase and the entire penalty phase. Under these circumstances, we reject defendant's contention that Judge Saiers could not fully exercise his independent judgment of the evidence for the purpose of ruling on defendant's application for modification of the jury's verdict of death.

(*People v. Espinoza*, *supra*, 3 Cal.4th at p. 830.)

Thus, the issue presented here is whether Judge Kaplan's recusal made him unavailable for purposes of ruling on appellant's 190.4(e) motion. Under the applicable statutes governing disqualification of judges, Judge Kaplan was clearly unavailable. Code of Civil Procedure section 170.1 sets forth the circumstances under which a judge may be disqualified:

> (a) A judge shall be disqualified if any one or more of the following is true:
>
> . . . .
>
> (6) For any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.

(Code Civ. Proc., § 170.1, subd. (a).)

Once Judge Kaplan determined there was good cause to recuse himself, his ability to preside over further proceedings in this case was limited by Code of Civil Procedure section 170.3, subdivision (a)(1), which states as follows:

> Whenever a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge of the court of his or her recusal *and shall not further participate in the proceeding, except as provided in Section 170.4*, unless his or her disqualification is waived by the parties as provided in subdivision (b).

(Code Civ. Proc. § 170.3, subd. (a)(1), emphasis added.) None of the exceptions contained in Code of Civil Procedure section 170.4 are applicable here.[36/] Even assuming that Judge Kaplan intended to retain limited jurisdiction

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36. Code of Civil Procedure section 170.4, subdivision (a) provides in pertinent part as follows:

over this case for purposes of any 190.4(e) motion, this was unauthorized under the law. (See *Geldermann v. Bruner* (1991) 229 Cal.App.3d 662, 665-666 [despite trial judge's intent to recuse himself on limited basis, such a limited recusal was unauthorized under Code of Civil Procedure sections 170.3 and 170.4].)[37]

(a) A disqualified judge, notwithstanding his or her disqualification may do any of the following:

(1) Take any action or issue any order necessary to maintain the jurisdiction of the court pending the assignment of a judge not disqualified.

(2) Request any other judge agreed upon by the parties to sit and act in his or her place.

(3) Hear and determine purely default matters.

(4) Issue an order for possession prior to judgment in eminent domain proceedings.

(5) Set proceedings for trial or hearing.

(6) Conduct settlement conferences.

37. Furthermore, respondent strongly disputes appellant's contention that Judge Kaplan intended to retain such jurisdiction. Judge Kaplan announced his recusal as follows:

> I have one last statement to make and that is that in light of the personal attacks against the court, I feel that *justice would be best served if I would recuse myself from further hearings* in this case. The people may wish to consider reassigning this case but that is something that is entirely and exclusively within their province. As for myself, *I am going to recuse myself from presiding over further proceedings, however I do not recuse myself from availability to making any supplemental or additional findings that may be required by any reviewing court.*" (RT 6762-6763, emphasis added.)

The most logical interpretation of this statement is that Judge Kaplan did not intend to *preside* over any further proceedings, although he would be available if a reviewing court requested findings of a factual nature. It does not appear that Judge Kaplan contemplated presiding over a 190.4(e) motion. Indeed, it would not make sense if he had. Judge Kaplan found good cause to disqualify himself from "further hearings" and from "presiding over further proceedings." The reasons justifying Judge Kaplan's recusal would undoubtedly still exist at a hearing on a 190.4(e) motion.

Acknowledging the statutory prohibition against limited recusals, appellant argues that the "statutory limitation, however, cannot prevail in light of the constitutional considerations underpinning the general requirement that the trial judge conduct the 190.4(e) review." (AOB 276.) This argument is unpersuasive. In light of Judge Kaplan's recusal, applicable statutory law made him unavailable to rule on appellant's 190.4(e) motion. Judge Schwab, a judge of that same court, was authorized to rule on the motion. (See *People v. Crew*, *supra*, 31 Cal.4th at p. 858; *People v. Espinoza*, *supra*, 3 Cal.4th at pp. 827-830; *People v. Brown*, *supra*, 45 Cal.3d at p. 1264, fn. 7; *People v. Lewis*, *supra*, 50 Cal.3d at p. 287; *People v. Bonillas*, *supra*, 48 Cal.3d at p. 801, fn. 14.)

Such a procedure did not violate appellant's right to due process. In order to create a constitutionally protected "liberty interest," the state procedural right must be "unqualified." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746-747 [110 S.Ct. 1441, 108 L.Ed.2d 725] [state supreme court invalidated one aggravating factor considered by jury in imposing death sentence, then determined any error was harmless; since state law allowed for harmless error review on appeal, defendant did not have an unqualified liberty interest in a new sentencing proceeding before a jury]; see also *Jeffers v. Lewis* (9th Cir. 1994) 38 F.3d 411, 415-416 [no liberty interest in new penalty phase after state supreme court invalidated one aggravating factor, because Arizona does not have "uniform" policy of remand and may uphold judgment after court independently reweighs factors on appeal].) The state procedure here merely creates a preference for the same judge to rehear the 190.4(e) motion if possible; it clearly does not establish an unqualified right. (See *People v. Crew*, *supra*, 31 Cal.4th at p. 858; *People v. Espinoza*, *supra*, 3 Cal.4th at pp. 827-830; *People v. Brown*, *supra*, 45 Cal.3d at p. 1264, fn. 7; *People v. Lewis*, *supra*, 50 Cal.3d at p. 287; *People v. Bonillas*, *supra*, 48 Cal.3d at p. 801, fn.

14.) Therefore, no liberty interest is involved. (*Clemons v. Mississippi*, *supra*, 494 U.S. at pp. 746-747.)

Finally, appellant claims in the alternative that this matter should be treated like a mistrial in which the prosecutor has intentionally caused the mistrial. In support of this contention, appellant relies on *Oregon v. Kennedy* (1982) 456 U.S. 667, 676 [102 S.Ct. 2083, 72 L.Ed.2d 416] and *People v. Hathcock* (1973) 8 Cal.3d 599, 614, fn. 14. (AOB 277.) Because both of these cases are inapposite, appellant's claim must be rejected.

In *Oregon v. Kennedy*, the defendant's motion for mistrial was granted after the prosecutor asked a witness if the reason he had never done business with the defendant was because the defendant was a "crook." (*Oregon v. Kennedy*, *supra*, 456 U.S. at p. 669.) The issue before the United States Supreme Court was whether the prosecutor's conduct barred a retrial under principles of double jeopardy. The United States Supreme Court concluded that harassing or overreaching prosecutorial conduct, even if sufficient to justify a mistrial on the defendant's motion, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. (*Id.* at p. 675-676.) The Court explained that double jeopardy will bar a second trial only where the prosecutor's conduct is intended to "goad" the defendant into moving for a mistrial. (*Id.* at p. 676.)

In *People v. Hathcock*, the trial court granted the defendant's motion for mistrial on grounds of prosecutorial misconduct, and he was convicted upon retrial. (*People v. Hathcock*, *supra*, 8 Cal.3d at pp. 602-603, 614.) On appeal, the defendant claimed that his constitutional right not to be placed twice in jeopardy was violated because he was compelled to move for a mistrial based on the prosecutor's actions in the first trial. This Court rejected the claim as follows:

> We have no occasion on the instant record to determine whether the general rule, barring a defendant's resort to the double jeopardy protections after a mistrial has been granted on his motion, is applicable in a case in which the prosecutor has deliberately caused the mistrial for the purpose of obtaining a fresh start. Although submitting this allegation, defendant points to no evidence in the record supporting such a characterization of the prosecutorial behavior and we have found no indication of such improper motivation in our review of the proceedings.

(*Id.* at p. 614, fn. 14.)

Unlike a situation where a motion for mistrial is granted and the prosecutor gets a "fresh start," Judge Kaplan's recusal did not result in such a fresh start. Rather, any judge reviewing a 190.4(e) motion is limited to considering the same evidence presented to the jury and independently reweighing the aggravating and mitigating evidence to decide whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict. (*People v. Espinoza*, *supra*, 3 Cal.4th at p. 830.)

Furthermore, there is no indication that the prosecutor's actions were intended to "goad" Judge Kaplan into recusing himself on an improper basis. Although the prosecutor disagreed with a number of Judge Kaplan's rulings and expressed concern regarding his ability to be fair to the prosecution on several occasions, it appears that such comments were made with the intent of establishing a record for purposes of future appellate review, rather than to prompt Judge Kaplan to disqualify himself. Indeed, the prosecutor could have moved to disqualify Judge Kaplan for cause pursuant to Code of Civil Procedure section 170.1 at any time but declined to do so.

Appellant surmises that Judge Kaplan recused himself within the meaning of Code of Civil Procedure section 170.1, subdivision (a)(6)(A) because it would further the interests of justice to avoid the inevitable continued

"attacks" by the prosecutor rather than his belief that there was a substantial doubt as to his ability to be impartial (Code Civ. Proc., § 170.1, subd. (a)(6)(B)) or because a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial (Code Civ. Proc., § 170.1, subd. (a)(6)(C)). (AOB 273-274.) In reality, it is unclear exactly why Judge Kaplan recused himself. Judge Kaplan did not elaborate on his decision, beyond noting that because of the "personal attacks" levied against him, "justice would be best served if I would recuse myself from further hearings in this case." It is important to note that he did not specify that the "personal attacks" had all originated from the prosecutor in this case. Indeed, Judge Kaplan intimated that his recusal would take place regardless of whether the case was reassigned to another prosecutor. In addition, attached to the prosecutor's written response to appellant's motion for new trial were five separate letters submitted by individuals who had observed the trial proceedings and who all called into question Judge Kaplan's demeanor and ability to be unbiased. (See CT 1279-1285.) Thus, it is far from clear that the prosecutor's personal attacks alone prompted the recusal. (RT 6762-6763.) It is just as likely that in light of the five citizens who observed the proceedings and wrote letters complaining about Judge Kaplan's demeanor and possible bias, that recusal was appropriate under Code of Civil Procedure section 170.1, subdivisions (a)(6)(B) and (C).

In any event, assuming the prosecutor's concerns regarding Judge Kaplan's bias were unfounded, as appellant suggests, the prosecutor could not have anticipated that her critical comments, most of which were made in chambers and all of which were made outside the presence of the jury, would result in Judge Kaplan recusing himself. To the extent that the prosecutor's critical comments were inappropriate, Judge Kaplan had numerous options short of recusing himself. However, at no time during the trial did Judge Kaplan attempt to impose sanctions on the prosecutor and he never found her

to be in contempt of court. (See, e.g., Code Civ. Proc., §§ 177.5, 1209; Bus. & Prof. Code, § 6068, subd. (b).) Accordingly, it cannot be said that the prosecutor intentionally caused Judge Kaplan to recuse himself through her conduct, as the expected response would be something short of the drastic measure of the court recusing itself. Appellant's claim should be rejected.

XXIII.

APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW

Appellant claims California's death penalty procedure violates the International Covenant of Civil and Political Rights ("ICCPR"), an international treaty to which the United States is a party. (AOB 278-280.) Appellant fails to demonstrate that he raised this specific constitutional claim in the trial court; respondent therefore submits that his claim is not cognizable on appeal. (See *People v. Burgener* (2003) 29 Cal.4th 833, 869 ["It is elementary that defendant waived these claims by failing to articulate an objection on federal constitutional grounds below"]; *People v. Catlin*, *supra*, 26 Cal.4th at p. 122; *People v. Clark*, *supra*, 5 Cal.4th at p. 988, fn. 13.) Moreover, assuming for argument's sake his claim is reviewable, this Court has rejected the notion that California's death penalty statute somehow violates international law.

Appellant has failed to establish the basic prerequisite: that his trial involved any violations of state and/or federal law. (See *People v. Bolden*, *supra*, 29 Cal.4th at p. 567; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1055.) Morever, he fails to demonstrate standing to invoke the jurisdiction of international law in this proceeding because the principles of international law apply to disputes between sovereign governments, not individuals. (*Hanoch Tel-Oren v. Libyan Arab Republic* (D.C. 1981) 517 F.Supp. 542, 545-547.) Appellant does not have standing to raise claims that his conviction and sentence resulted from violations of international treaties. Article VI, section 2, of the United States Constitution provides, in pertinent part, that the Constitution, the laws of the United States, and all treaties made under the authority of the United States are the supreme law of the land. Treaties are contracts among independent nations. (*United States v. Zabaneh* (5th Cir. 1988) 837 F.2d 1249, 1261.) Under general

principles of international law, individuals have no standing to challenge violation of international treaties in absence of a protest by the sovereign involved. (*Matta-Ballesteros v. Henman* (7th Cir. 1990) 896 F.2d 255, 259; *United States ex rel. Lujan v. Gengler* (2d Cir. 1975) 510 F.2d 62, 67.)

Treaties are designed to protect the sovereign interests of nations and it is up to the offended nations to determine whether a violation of sovereign interests occurred that requires redress. (*Matta-Ballesteros v. Henman, supra*, 896 F.2d at p. 259, and cases cited therein.) It is only when a treaty is self-executing, that is when it prescribes rules by which private rights may be determined, that it may be relied upon by individuals for the enforcement of such rights. (*Dreyfus v. Von Finck* (2nd Cir. 1976) 534 F.2d 24, 30.)

In order for a provision of a treaty to be self-executing without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts. (*Fujii v. State of California* (1952) 38 Cal.2d 718, 722.)

In determining whether a treaty is self-executing, courts look to the following factors: (1) the language and purpose of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute. (*Frolova v. Union of Soviet Socialist Republics* (7th Cir. 1985) 761 F.2d 370, 373; *American Baptist Churches in the U.S.A. v. Meese* (N.D.Cal. 1989) 712 F.Supp. 756, 770.)

In this case, appellant fails to cite any persuasive authority that the treaty he relies upon is self-executing. No language in the ICCPR appears to create

rights in private persons. Therefore, appellant is incapable of asserting a personal cause of action under the ICCPR.

Finally, as previously decided by this Court, this claim lacks merit. (See *People v. Snow*, *supra*, 30 Cal.4th at p. 127 ["International law does not compel the elimination of capital punishment in California."]; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 778-779; *People v. Ghent*, *supra*, 43 Cal.3d at pp. 778-779; see also *People v. Ochoa*, *supra*, 26 Cal.4th at p. 462.) In *Ghent*, this Court held that international authorities similar to those now invoked by appellant do not compel elimination of the death penalty and do not have any effect upon domestic law unless they are either self-executing or implemented by Congress. (*People v. Ghent*, *supra*, 43 Cal.3d at p. 779; *People v. Hillhouse, supra*, 27 Cal.4th at p. 511; see *People v. Ochoa*, *supra*, 26 Cal.4th at p. 462 [rejecting claim that California's death penalty law violates international norms].)

In sum, appellant waived this claim and has no standing to invoke international law as a basis for challenging his state conviction and judgment of death. Moreover, appellant has failed to state a cause of action under international law for the simple reason his claims of due process violations asserted throughout the appeal are without merit. Further, this Court is not a substitute for international tribunals and, in any event, American federal courts carry the ultimate authority and responsibility for interpreting and applying the American Constitution to constitutional issues raised by federal and state statutory or judicial law. Finally, this Court's earlier conclusions in *Ghent*, *Hillhouse*, *Jenkins*, *Ochoa*, and *Snow* preclude relief.

For all the foregoing reasons, appellant's challenges to the death penalty, if reviewable, are meritless. (See *People v. Price*, *supra*, 1 Cal.4th at p. 490; *People v. Pride*, *supra*, 3 Cal.4th at pp. 268-269.)

CONCLUSION

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

Dated: June 24, 2004.

Respectfully submitted,

BILL LOCKYER
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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 81,399 words.

Dated: June 24, 2004.

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL
DEATH PENALTY CASE

Case Name: People v. Scott Forrest Collins
California Supreme Court Case No.: S058537
Los Angeles Superior Court Case No.: LA009810

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

On **June 25, 2004**, I placed two (2) copies for service of defense counsel and copy (1) for service on the Court of Appeal of the attached:

RESPONDENT'S BRIEF ON DIRECT APPEAL

in the internal mail collection system at the Office of the Attorney General, 300 South Spring Street, Suite 1702, Los Angeles, California 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Mr. Kent Barkhurst
Deputy State Public Defender
Office of the State Public Defender
221 Main Street, Tenth Floor
San Francisco, California 94105

Counsel of Record Defendant/
Appellant *SCOTT FORREST COLLINS*

and that I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **June 25, 2004** in Los Angeles, California.

ADRIENNE DANIELLE MAYR — Adrienne Danielle Mayr
Declarant — Signature
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