SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **CISCO HARTSCH,** Defendant and Appellant.	**CAPITAL CASE** S074804

Riverside County Superior Court No. CR 63743
The Honorable W. Charles Morgan, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

In June of 1995, Appellant Cisco Hartsch committed a drive-by shooting and three murders within a 48-hour period.

Hartsch and his long time friend, Frank Castaneda, were on their way to a citrus grove late one night to shoot Hartsch's gun. They drove past a residence, and Hartsch, who had an on-going feud with one of the occupants, fired four or five shots into the house. Two of the occupants were awakened by the gunfire, and none were injured. When Hartsch and Castaneda arrived at the citrus grove shortly after the drive-by shooting they happened upon Kenneth Gorman and Ellen Creque who were asleep in a pickup truck. Hartsch approached the truck and during a brief exchange with Gorman through the driver's side window Hartsch raised his .22 caliber revolver and fired multiple rounds into the truck. Hartsch then reloaded his gun and fired multiple rounds into the passenger side at Creque who could be heard screaming for God's help. After Creque was fatally silenced, Hartsch returned to Castaneda's waiting car and informed him, "The bitch wouldn't die." The bloody massacre was discovered by a maintenance worker just after dawn.

A day and a half later, Hartsch murdered 14-year-old Diana Angelica Delgado. Hartsch knew "Angelica" for a couple of years. Angelica previously

dated Hartsch's older brother Joseph and also had a sexual relationship with Hartsch. In the hours before her death, Angelica was looking for a ride home from the Hartsch residence where she had been visiting Hartsch's younger sisters. Although Angelica left the Hartsch residence on foot, she was later seen with Hartsch in his truck. Hartsch had sex with Angelica before he killed her. Hartsch shot Angelica in the head and face multiple times and left her body in the citrus grove not far from where he murdered Gorman and Creque. Before leaving the citrus grove, Hartsch took the jewelry Angelica was wearing. Later that night, Hartsch showed Angelica's jewelry to Castaneda. Hartsch gave one of Angelica's rings to his then-girlfriend. Angelica's body, which had been exposed to the elements for several days and was badly decomposed, was discovered by a maintenance worker about four days after Hartsch killed her.

As evidence in aggravation under Penal Code section 190.3, factor (b), the prosecution introduced evidence of a series of incidents beginning in 1991 that involved Hartsch's use of force or violence, including a murder in 1993 and a sexual assault in 1994.

In this automatic appeal Hartsch contends, in addition to a myriad of issues regarding the constitutionality of the death penalty that are well settled by this Court, his constitutional right to an impartial jury was violated during voir dire when the prosecutor exercised peremptory challenges against African-American potential jurors, his constitutional right to counsel was violated when the trial court ruled that the statements Hartsch made during a jail cell conversation with Castaneda were admissible, and that the trial court's refusal to sever the murder charges was fundamentally unfair in violation of his right to due process. Additionally, Hartsch raises several challenges to the trial court's evidentiary rulings and makes several claims of instructional error. None of Hartsch's claims have merit. The record demonstrates Hartsch received a fair trial and his state and federal constitutional rights were not

violated. Therefore, his convictions should be affirmed and his death sentence should be upheld.

STATEMENT OF THE CASE

On February 7, 1996, the Orange County District Attorney filed an information charging Hartsch with the murders of Kenneth Gorman (count one), Ellen Creque (count two), and Diana Angelica Delgado (count three), and alleging as to each murder count that Hartsch personally used a firearm (Pen. Code §§ 187, 1192.7, subd. (c)(8), 12022.5, subd. (a)). The information further alleged as to each count that Hartsch committed multiple murders within the meaning of Penal Code section 190.2, subdivision (a)(3) and, as to count three, that Hartsch committed Diana Angelica Delgado's murder in the commission or attempted commission of a robbery within the meaning of Penal Code section 190.2, subdivision (a)(17)(i). The district attorney also charged Hartsch with discharging a firearm at an inhabited dwelling (Pen. Code, § 246; count four), and alleged that he personally used a firearm (Pen. Code, §§ 667, 1192.7, subd. (c)(8)), and a misdemeanor graffiti violation (Pen. Code, § 594, subd. (a); count five)[1/]. (1 CT 164-167.)

Hartsch pleaded not guilty and denied the allegations and special circumstance allegations on February 8, 1996. (1 CT 170.)

On January 23, 1998, the trial court denied Hartsch's motion to set aside the information pursuant to Penal Code section 995. (4 CT 943.) That same

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1. At the conclusion of the preliminary hearing on January 25, 1996, the trial court "discharged' Hartsch on count five, finding the evidence was insufficient to support the misdemeanor graffiti violation. (1 CT 161.) Notwithstanding this ruling, as indicated above, the information filed on February 7, 1996, included count five. On July 27, 1998, Hartsch entered a plea of guilty to a misdemeanor graffiti violation (Pen. Code, § 594, subd. (a); formerly, count five). (8 RT 1326-1327; 19 CT 5302-5305.)

day, Hartsch's motion to sever the Gorman and Creque double murder (counts one and two) from the Delgado murder (count three) and to sever the drive-by shooting (count four) from the murder charges was heard. (4 CT 940.) On February 3, 1998, the severance motion was denied. (3 RT 228-229; 4 CT 956.)

On July 15, 1998, the trial court denied without prejudice Hartsch's motion for a separate penalty phase jury. (14 CT 3990.) On July 16, 1998, the trial court ruled Hartsch's speaking objections would be deemed based upon state and federal grounds. (3 CT 608-609; 15 CT 4217.)

Jury selection commenced on July 13, 1998. (5 CT 1172.) On July 22, 1998, Hartsch made a *Wheeler* [*People v. Wheeler* (1978) 22 Cal.3d 258] motion alleging that the prosecutor had exercised peremptory challenges against potential African-American jurors that the trial court denied. (18 CT 4955.) On July 29, 1998, a jury was empaneled and sworn. (19 CT 5306.)

On July, 27, 1998, at the hearing on whether Hartsch had waived his *Miranda* (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]) rights during a police interview, the trial court determined Hartsch did not invoke his right against self-incrimination and denied Hartsch's request to suppress those statements. Additionally, the trial court denied Hartsch's request to suppress statements he made during a jail cell conversation with his cohort Frank Castaneda and found that Castaneda was not an agent of the police. (8 RT 1320; 19 CT 5302-5303.)

Jury trial commenced on July 29, 1998. (19 CT 5306-5307.) On September 17, 1998, the trial court instructed the jury. (19 CT 5385.)

On September 21, 1998, the jury rendered its' verdicts of guilty on all counts and found all the allegations and special circumstance allegations to be true with the exception of the special circumstance allegation that Diana Angelica Delgado's murder was committed during the commission or attempted

commission of a robbery. (Penal Code, §§ 187, 190.2, subd. (a)(3), 667, 1192.7, subd. (c)(8), 12022.5, subd. (a); counts one through four; 19 CT 5387-5389; 20 CT 5537-5548.)

After a penalty trial, the jury returned a verdict of death. (20 CT 5650-5651; 21 CT 5790.) The trial court denied Hartsch's motion to modify the verdict, and imposed a sentence of death on November 13, 1998. (21 CT 5807-5812.) Additionally, the trial court imposed a determinate prison sentence as follows: the midterm of five years on count four, the principal count, a consecutive four-year term on the Penal Code section 12022.5, subdivision (a) enhancement related to count one, one-third the mid term, or one year and four months, on the Penal Code section 12022.5, subdivision (a) enhancement related to count two be served consecutively to the principal count, one-third the midterm, or one year and four months on the Penal Code section 12022.5, subdivision (a) enhancement related to count three be served consecutively to the principal count, and a concurrent one-year term on (former) count five to which Hartsch had pled guilty for a total determinate term of 12 years and eight months. (21 CT 5807-5808, 5813-5815.)

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

STATEMENT OF FACTS

Guilt Phase

June 14 And 15, 1995: The Drive-by Shooting And Gorman And Creque Killings

On Wednesday June 14, 1995, Hartsch, age 18, and his brother Charles "Chucky" Rushing, age 22, returned around 4:30 p.m. from their jobs at a beverage packaging plant to a garage that was converted into living quarters that they shared located behind the Hartsch family residence on La Cadena Drive in Colton. (All relevant events took place in 1995 and the reference to

1995 will hereinafter be assumed unless otherwise indicated.) Hartsch's parents, Joseph and Josephine Hartsch, and his sisters, Suzie, age 13, and Ileene, age 11, lived in the house on the property. (11 RT 1644, 1646, 1652, 1704, 1710; 12 RT 1763, 1795, 1839-1840, 1848.)

That night, Hartsch and Rushing planned to meet Tameka Ramos, age 16, whom they met at a car show a few weeks earlier. (12 RT 1849-1851; 13 RT 1987-1989.) At about 10:00 p.m., Frank Castaneda, age 20, who had known Hartsch, Rushing, and their older brother, Joseph Hartsch, Jr., for about 10 years, stopped by while Hartsch and Rushing were getting ready to go out. (16 RT 2341-2342.) Castaneda decided to join them. (16 RT 2343.)

In a stolen Honda driven by Castaneda[2/], Castaneda, Hartsch and Rushing went to a friend's house and then, at about 11:30 p.m., went to Tameka's residence in San Bernardino. (12 RT 1852; 16 RT 2344-2345.) On the way back to Hartsch's converted garage, their destination for the evening, Hartsch, Castaneda, Rushing, and Tameka stopped to pick up Tameka's cousin, Rene Velasquez, who lived in apartment complex in Colton. (12 RT 1858-1859; 13 RT 1990-1993, 2024-2025.)

Once back at the garage, they drank beer and watched a video. After about an hour, Rushing, Castaneda, and Rene decided to ingest methamphetamine supplied by Castaneda. Tameka did not want to be near them while they did methamphetamine, so she left the garage with Hartsch. (12 RT 1862-1863; 13 RT 1995-1998, 2026-2028; 16 RT 2346-2347.) Hartsch drove the stolen Honda to a lake area nearby and they talked in the car. Hartsch

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2. Castaneda's prior criminal record consisted of convictions for car theft in 1990, 1991, 1993, 1994, and 1995. Additionally, Castaneda admitted he had been involved in a shooting in 1989, a residential burglary in 1990, had brandished a weapon in 1991, had shot a man in 1993, and was convicted of being an ex-felon in possession of a firearm in 1998. (16 RT 2335; 17 RT 2600-2601.)

and Tameka were gone for one to two hours. (13 RT 1997-1998; 16 RT 2348.) About 30 minutes after Hartsch and Tameka returned to the garage, Hartsch and Castaneda left together. (12 RT 1864; 13 RT 1999, 2030.) Hartsch retrieved his .22 caliber revolver and some ammunition from his bed and brought it with him. Hartsch usually kept the gun under his pillow when he was not carrying it with him. Hartsch and Castaneda planned to go to the citrus grove in Highgrove to shoot the gun as they had done in the recent past. (12 RT 1856; 16 RT 2348, 2350, 2352; 17 RT 2487.)

Castaneda drove the stolen Honda. While in route to the citrus grove, they were held up by a passing train. Castaneda made a u-turn to avoid the delay and as they made their second pass by the Arevalo residence at 588 Prospect Street in Highgrove, Hartsch fired four or five shots at the house. (16 RT 2355.) Hartsch had an on-going feud with Steve Arevalo who lived at the residence with his mother, sister, brother-in-law, and niece and nephew. (11 RT 1598, 1602, 1610-1612, 1634, 1671-1672.) Arevalo, his sister, and mother were home asleep but only Arevalo's sister and mother were awakened by the gunshots at about 2:30 a.m. (11 RT 1601, 1629, 1635.) Hartsch fired at least three bullets that penetrated the exterior of the residence and struck the living room wall. Another bullet passed through the living room wall and into the bedroom where Arevalo's sister slept. The bullet struck the bedroom wall and, after losing its velocity, hit Arevalo's sister in the hand as it fell to the floor. (11 RT 1600, 1605, 1610.) No one was hurt. The Arevalo's did not report the incident for about a week. (11 RT 1601.)

Castaneda and Hartsch continued on to the citrus grove on Mt. Vernon Road. After they entered the citrus grove in the area of Palmyrita and Serpentine Road off of Mt. Vernon, they noticed a blue pickup truck parked near a gate. (9 RT 1424-1425, 1428; 16 RT 2357-2358.) Hartsch told Castaneda to pull over and said something about "jacking" or stealing from the

truck. (16 RT 2358-2359; 17 RT 2503.) Castaneda steered the Honda about ten feet in front of the truck at a slight angle, so that the head lights of the vehicles were facing. Hartsch got out of the Honda and walked over to the driver's side. (16 RT 2360-2361.) While the Honda idled, Castaneda illuminated the area with the Honda's high beams so that Hartsch could see into the truck. (16 RT 2362; 17 RT 2507, 2509.)

Kenneth Gorman was asleep in the driver's side of the pickup truck. Ellen Creque was in the passenger side of the truck. When Gorman awoke, he appeared angry and engaged in a brief exchange with Hartsch through the closed driver's side window. From an arm's length distance, Hartsch raised his .22 caliber revolver and shot through the window at Gorman. The glass shattered and Hartsch continued firing his gun into the pickup truck. (16 RT 2363-2364; 17 RT 2511-2512.) Castaneda backed the Honda out and told Hartsch, "Let's go, let's get out of here." (16 RT 2364, 2366; 17 RT 2519.) Hartsch stepped towards the Honda and told Castaneda, "they won't die." Hartsch reloaded his gun. Upon reloading, Hartsch pointed the gun at Castaneda and indicted to Castaneda that he had better not leave. (16 RT 2365-2366, 17 RT 2518, 2520-2521.)

Hartsch approached the passenger side of the pickup truck. Creque was screaming repeatedly, "Oh my God!" The passenger side window shattered as Hartsch fired multiple rounds into the passenger side of the pickup truck at Creque. While he was shooting Creque, Hartsch stated, "God can't help you now. Mt. Vernon is here to rob, kill and destroy." (16 RT 2366-2369, 2372; 17 RT 2521; 19 RT 2877.) Before returning to the Honda, as Creque lay dying, Hartsch reached into the passenger side of the truck, pulled down the strap of her shirt and grabbed her breast. (10 RT 1482; 16 RT 2373.)

In a matter of about two minutes, Gorman had sustained seven gunshot wounds, while Creque had suffered 13 gunshot wounds. Hartsch shot Gorman

two times behind his left ear with the muzzle of the gun so close to, or touching, Gorman's head that his flesh was scorched when the gun fired. Hartsch shot Gorman in the back of his head, neck, left back shoulder blade, right forearm, and right arm. The gunshot wounds behind Gorman's left ear, shoulder blade, and right arm were through and through wounds wherein the bullets exited Gorman's body through his right lower jaw, shoulder blade, and between his right little and ring finger, respectively. The other bullets lodged in Gorman's head, neck, and forearm. (18 RT 2645- 2647, 2650- 2652, 2654-2655, 2658.) Gorman died within two or three minutes of having been shot in the head and neck. (18 RT 2656-2657.) Hartsch shot Creque seven times in the head from a one- to 12-inch distance. One of the four bullets that Hartsch shot into the left side of Creque's face, exited on the right side of her face. Hartsch also shot Creque in the left chest through her heart and lungs. Another bullet shot through Creque's middle, ring, and little fingers on her right hand. Another bullet ricocheted in the truck and struck her right palm. In total, seven bullets lodged in Creque; a bullet lodged in her chest, top of her head, behind her ear, and four bullets lodged in the left side of her face and head. The gunshot wounds Creque sustained to her head and chest were individually fatal. Creque survived one to two minutes after being shot. (18 RT 2659, 2661-2668, 2671.)

Hartsch got back into Castaneda's stolen Honda. Castaneda was worried about the police being alerted to the area because of the earlier drive-by shooting at the Arevalo residence nearby. To avoid detection, Castaneda drove an alternate route along Pigeon Pass Road through Moreno Valley and on the freeway back to Hartsch's garage. On the way there, Hartsch told Castaneda, "The bitch didn't want to die and [. . .] she had nice tits." (16 RT 2370-2371, 2374.) Hartsch tossed shell casings out of the car window as they drove away from the citrus grove toward Pigeon Pass Road. (16 RT 2373; 19 RT 2810-2811, 2818.)

When they arrived back at Hartsch's garage, about an hour from the time they left, Hartsch assured Castaneda, who did not want to be blamed for the killings, that no one would find out about the Gorman and Creque killings. (12 RT 1865.) Hartsch told Castaneda, "It's not like they were important, like, if they were bankers or lawyers or anything like that. Nobody cared about them." (16 RT 2375.) Hartsch and Castaneda joined Rushing, Tameka and Rene in the garage. Castaneda stayed there for about 30 minutes to an hour and then left in the Honda. (12 RT 1865; 13 RT 2002, 2040; 16 RT 2376; 17 RT 2534.) Castaneda drove for about twenty minutes to Veronica Delgado's, his girlfriend's residence on Byrne Street in Glen Avon. It was still dark out when he arrived. Veronica's mother's boyfriend who resided at the residence was outside and advised Castaneda there was an argument taking place in the residence. (16 RT 2379; 17 RT 2538; 19 RT 2796-2797.) Castaneda decided to sleep in the Honda outside the Byrne Street residence. (16 RT 2378-2379.) Meanwhile, Tameka and Rene stayed at the garage with Hartsch and Rushing for about another hour before they gave the girls a ride home to Rene's residence in Colton at dawn. (12 RT 1866; 13 RT 2003-2004, 2032.)

At about 6:30 a.m., on Thursday June 15, an employee of a water company that delivers water to the citrus grove, came across a blue pickup truck that was parked by a gated entrance to the citrus grove. Upon closer examination, the employee realized that a shooting had occurred and that the occupants of the truck were dead. The employee called 9-1-1 and reported his discovery. (9 RT 1425-1429.) Riverside police officers were on the scene by 7:00 a.m. and an investigation was underway. (9 RT 1443.)

During the initial investigation at the scene of the double homicide, a Riverside Police Department evidence technician collected a .22 caliber bullet and same caliber casings from in and around the truck. (9 RT 1454, 1457, 1468, 1471.) Additionally, the victims and crime scene were photographed. (9

RT 1465, 1480-1484.) The evidence technician observed and photographed shoe impressions with a chevron pattern in approximately a men's size 9 ½ in the area around the truck. (9 RT 1475, 1478-1480; 21 RT 3119-3122, 3140, 3148, 3157, 3161.)

Hartsch and Rushing, who were employed by a beverage packaging plant, were scheduled to work at 6:00 a.m. that morning. They stopped at a friend's house for some methamphetamine after taking Tameka and Rene to Rene's apartment in Colton. (13 RT 1965; 14 RT 2051.) Hartsch and Rushing arrived at their work at about 6:30 a.m. (14 RT 2053, 2069.) They were not wearing proper work shoes. The packaging plant industry standard required that the employees don hard-soled shoes. Hartsch was wearing a pair of white tennis shoes-- one of the two pairs of size 9 ½ tennis shoes he owned, the other pair was black. Rushing was also wearing tennis shoes. A plant supervisor admonished Hartsch and Rushing for being late and for wearing unauthorized work shoes. They were sent home to change their shoes. They both returned properly attired. (11 RT 1654, 1662-1664; 12 RT 1868; 14 RT 2057-2060, 2075-2080, 2092-2093, 2099; 15 CT 4202-4203.)

Meanwhile, at about 6:30 a.m., Castaneda, asleep in the Honda in front of the Byrne Street residence, was awakened by his friend and Veronica's brother, Gabriel Delgado, age 16, who was tapping on the car window. Delgado had two friends with him who eventually left so that Castaneda and Delgado were alone. Castaneda told Delgado that Hartsch shot two people in the citrus grove with the .22 caliber revolver that Delgado had given Hartsch several weeks earlier. (16 RT 2381-2383; 17 RT 2538, 2540; 19 RT 2833, 2836; 24 RT 3485-3486.) Castaneda said that when he and Hartsch drove into the citrus grove, they saw a truck and pulled over. He told Delgado that Hartsch shot and killed a man and a woman that were in the truck. (24 RT 3487-3489.) Later that morning, Castaneda and Delgado met up with

Castaneda's brother-in-law, Manuel Rescindez. Castaneda told Rescindez that Hartsch killed two people in the citrus grove. The three men then went to the scene of the double murder in Rescindez's truck. When they saw Riverside Police on the scene conducting an investigation and surrounding the blue pickup truck, they left the area. (16 RT 2384-2385; 19 RT 2836-2837; 21 RT 3052.) Castaneda returned to the Byrne Street residence. That night, he left with Delgado, and two other friends to steal car stereos. Before leaving, Castaneda ingested methamphetamine with the men. He also had a brief conversation with Veronica's younger sister, Diana Angelica Delgado (hereinafter referred to as "Angelica"). By 2:00 a.m., Castaneda had returned to Byrne Street with various stolen goods. (16 RT 2387-2390; 17 RT 2545, 2547.)

Hartsch worked at the packaging plant until about 8:30 p.m. on June 15. (14 RT 2056.) Rushing worked until about 4:30 p.m. That night Rushing went out with his friends in Colton and did not see Hartsch. (13 RT 1887-1888.)

June 16, 1995: Angelica's Disappearance

On Friday morning, June 16, Castaneda went to a convenience store and, along with several items that he stole from the store, picked up a newspaper. Back at the Byrne Street residence, Castaneda clipped a report of the Gorman-Creque murders from the newspaper. He showed the clipping to Veronica and told her that the story was about him and Hartsch. Veronica became upset by Castaneda's claim so he told her that he was lying. (16 RT 2391-2392; 17 RT 2547-2549.) That afternoon, at about 1:00 p.m., Castaneda left the Byrne Street residence. Castaneda "cruised" around in the Honda that day by himself. He stopped by his mother's residence on Arliss Street in Highgrove. (16 RT 2353, 2393; 17 RT 2550.) He also stopped by Veronica's and Angelica's grandmother's residence on Pennsylvania Street where their brother, Jesse Melgoza, was staying. Melgoza was in a car accident the previous night and

was recuperating at the residence. Family members were taking turns checking in on Melgoza. Castaneda was friendly with Melgoza and visited him briefly at the Pennsylvania Street residence at about 7:30 or 8:00 p.m. Also, based on his brief conversation with Angelica the day before, Castaneda thought that she needed a ride home but she had already left the residence. (15 RT 2196-2198, 2202, 2208; 16 RT 2295-2299, 2325-2326, 2390; 17 RT 2552-2553.) Earlier that evening, Angelica was there with Melgoza but left with some friends in a car when her and Melgoza's aunt arrived to be with Melgoza at about 5:00 or 6:00 p.m. (15 RT 2244-2246; 16 RT 2298.) After his brief visit, Castaneda returned to his mother's residence on Arliss Street and met up with his sister Alvina Martinez. (16 RT 2393; 21 RT 3053.)

At about 5:00 or 6:00 p.m., Angelica was picked up at the Pennsylvania Street residence by three male friends and they went "cruising" for a few hours. They made a stop at the Hartsch residence. Angelica went inside to see if Suzie, Hartsch's sister, would join them. (15 RT 2254, 2257-2258, 2260-2262.) Suzie did not go with Angelica. (12 RT 1807, 1809; 15 RT 2263.) Then they drove to Armanda Ramirez's residence to see if she would come out. Armanda was Angelica's friend and Hartsch's former girlfriend. Armanda did not join Angelica that evening. (12 RT 1798-1799; 16 RT 2270-2271, 2276.) By 8:00 or 9:00 p.m., Angelica and her friends were tired of driving around. Angelica asked them to drop her off at the Hartsch residence which they did. (16 RT 2272.)

Suzie heard Angelica tapping on the bedroom window and let her in the house. (12 RT 1777, 1785, 1810.) The girls talked and made phone calls for a while. During her visit with Suzie, at about 9:00 p.m., Angelica called Melgoza at the Pennsylvania Street residence. Angelica needed a ride back to the Pennsylvania Street residence and asked Suzie if Hartsch or Rushing could give her a ride there. Neither Hartsch or Rushing were home at that time. (12

RT 1792, 1810, 1815-1816; 13 RT 1904-1906, 1909, 1915, 1917, 1919; 15 RT 2210, 2234; 16 RT 2300-2301.) Soon after, Angelica left the Hartsch residence on foot. (12 RT 1817, 1826-1827.)

By about 10:00 p.m., Castaneda and Alvina left the Arliss Street residence in the Honda to get cigarettes and methamphetamine. (16 RT 2394; 17 RT 2613.) While driving on Main Street in Highgrove, they saw Hartsch driving towards them in one of the Hartsch family vehicles, a Mitsubishi truck. After Hartsch approached, he made a u-turn and pulled up next to the passenger side of the Honda. Angelica was with Hartsch. (11 RT 1645, 1706; 16 RT 2395; 17 RT 2614-2615.) Hartsch asked if they wanted "to party" with him. When Castaneda and Alvina told him "no," Hartsch said that he was going to the orange grove to have sex. Angelica did not appear distressed while Hartsch made his comments. Hartsch told Castaneda that he would come by the Arliss Street residence when he was done and drove off with Angelica. (16 RT 2396-2397; 17 RT 2616-2617.) After buying cigarettes and methamphetamine Castaneda and Alvina returned to the Arliss Street residence. (16 RT 2397.) There, Castaneda and Alvina split the methamphetamine and talked briefly before Alvina went to her room. Castaneda sorted through some of his belongings and took a shower. (16 RT 2398-2399; 17 RT 2617, 2619.)

At about midnight, Hartsch came over to the Arliss Street residence. He was alone. (16 RT 2400.) During his visit, Hartsch showed Castaneda some jewelry that he had in his pocket. Hartsch had a necklace that Castaneda recognized as Angelica's. Angelica was known to wear a lot of jewelry, and rings in particular. (15 RT 2207; 22 RT 3206-3207.) When Castaneda asked Hartsch where the jewelry came from, Hartsch only smiled. When Castaneda asked Hartsch if he could see the jewelry again Hartsch said, "no." Castaneda left his mother's house and noticed that Hartsch had driven his older GMC truck over to the residence, a different vehicle than the one that he saw Hartsch

driving earlier that night with Angelica. Castaneda went to visit Veronica at the Byrne Street residence where he spent the night. (11 RT 1645, 1706; 16 RT 2401-2403; 17 RT 2557; 20 RT 2955.)

As they had in the past, on the morning of Saturday June 17, Veronica and Castaneda discussed moving to Texas together. They both had relatives who lived in Texas. (16 RT 2407-2408; 20 RT 2925.) Veronica had an infant daughter and was using methamphetamine daily. Castaneda was also ingesting methamphetamine regularly. Veronica expressed that she wanted to leave because of the drug use and that she had a baby. (20 RT 2923-2924, 2926.) Castaneda and Veronica packed up the stolen Honda and drove around for most of the day visiting family members in an effort to put together some money for their trip. They collected $80 or $90 dollars total from Castaneda's sisters, his mother, and his aunt. They also visited Veronica's father but he did not give them any money. By about 3:00 p.m., they were on the road for Texas. (20 RT 2927-2932.)

Veronica did not tell her mother, Diana Madrid, that she was leaving with Castaneda and her baby because she did not want to get in trouble with Madrid since she was only 17-years-old. (20 RT 2936.) A day or so later, Madrid learned that Castaneda and Veronica went to Texas after they called Melgoza. During the call, Melgoza mentioned that Angelica was missing. Castaneda did not offer that he saw Angelica with Hartsch the night of June 16. (15 RT 2211-2212; 16 RT 2304, 2329.)

On the road, Castaneda and Veronica made rest stops in California and in New Mexico. During one stop in New Mexico, Castaneda stole souvenirs made of pewter from a shop. (17 RT 2419; 20 RT 2933-2934.) By Monday evening, June 19, they arrived at Castaneda's aunt's residence in Laredo, Texas. (17 RT 2420; 20 RT 2935.) After they arrived, Castaneda contacted Hartsch because he needed money. Hartsch wired Castaneda $60. (17 RT 2421-2422.)

In the meantime, Madrid was looking for Angelica whom she had not seen since the late afternoon of Friday, June 16. Madrid contacted some of Angelica's friends and visited the Hartsch residence to determine if Hartsch's mother or sisters had any idea as to Angelica's whereabouts. The last time Hartsch's mother or sisters had seen Angelica was at their residence on Friday, June 16, no later than 10:00 p.m. (12 RT 1751, 1777, 1810.) At the time Madrid made her inquiry at the Hartsch residence, Hartsch was there but did not offer her any information. (12 RT 1740, 1758; 13 RT 1900-1901; 15 RT 2210-2211.)

June 20, 1995: The Discovery Of Angelica's Body

On Tuesday, June 20, at about 6:30 a.m., a maintenance worker watering in the citrus grove came across a dead body. (10 RT 1505, 1509, 1514.) When Riverside County Sheriff's investigators (who, instead of Riverside Police, had jurisdiction of the unincorporated area where the body was located) arrived, they observed a fully dressed young female laying on the ground in a row of trees about 20 feet from a dirt road meant for maintenance vehicles. The body was so badly decomposed that investigators were unable initially to determine the young woman's race. (10 RT 1530, 1537, 1541; 14 RT 2117.) The blood stains on the victim's clothing indicated that the victim, who appeared to have suffered severe head trauma, was killed while in an upright position. Additionally, she appeared to have been killed where she was discovered by the grove maintenance worker; there were no signs of a struggle or drag marks. (10 RT 1542, 1547.) Shoe impressions next to the body and in a path leading to, or from, the body were the same length as and had a chevron pattern similar in its arrangement to the chevron patterned shoe impressions observed at the Gorman-Creque murder scene. (10 RT 1549, 1551-1564; 21 RT 3115, 3127, 3137-3140, 3151, 3161.)

Later that day, a grove worker Madrid knew informed her about the discovery of a body. Madrid contacted the Sheriff's office and said that her daughter was missing. It was confirmed that it was Angelica's body in the citrus grove. (15 RT 2214-2215; 16 RT 2305.) Angelica had been shot five times in her head. She suffered four gun shot wounds to the top of her head, which were individually fatal, and one in the center of her face at the bridge of her nose. The order of the gunshots was undetermined. (18 RT 2710-2714, 2723.) Since the gunshot wound to the center of her face was not necessarily fatal, she could have remained conscious after suffering it. Most likely, Angelica lost consciousness after suffering the first gunshot wound to her brain. (18 RT 2724.) Three small caliber bullets, consistent with a .22 caliber firearm, and three bullet fragments had lodged in Angelica's head. A small caliber bullet had lodged in her nasal cavity. (18 RT 2716-2719, 2745.) She had nine abrasions on her back, buttocks, right thigh, back right calf, left shin, and back right forearm. The abrasions ranged from minor or small to large. (18 RT 2706-2707.)

Madrid contacted Castaneda and Veronica in Texas and told them Angelica had been found dead. Although Angelica was confirmed dead, Castaneda never told Veronica or Madrid that he saw Angelica with Hartsch the night of June 16 or that he saw Hartsch later that night, alone, with Angelica's jewelry. Castaneda and Veronica decided to return to California and left Texas the next morning. (17 RT 2423, 2557, 2578; 20 RT 2936-2937, 2976.)

On the way back to California, Castaneda was arrested by a Texas state trooper during a traffic stop. Castaneda was taken into custody and brought to the Sonora County Jail. Veronica took the Honda, which police had yet to discover was stolen, and spent the night at a hotel with her baby. Once Texas police realized the Honda was stolen, they impounded it. Veronica returned to California the next day. (17 RT 2423-2425; 20 RT 2938-2939.)

The Murder Investigations

When Sheriff's investigators contacted Angelica's family members during the initial stages of Angelica's murder investigation, Melgoza told them about the telephone conversation he had with Angelica while she was at the Hartsch residence the evening of June 16 regarding her getting a ride to the Pennsylvania Street residence. (16 RT 2305.) Additionally, Veronica and Delgado were interviewed and they each told the investigators what Castaneda had said about the Gorman-Creque murders. Veronica told the police about the newspaper clipping Castaneda had shown her. (20 RT 2940, 2942.) Delgado provided a detailed statement based upon what Castaneda had told him. At first, however, Delgado lied to the investigators and told them that Hartsch told him about the double murder. Delgado later admitted that he had lied about Hartsch telling him about the double murder so as to not implicate Castaneda and that Castaneda was the source of the information. (19 RT 2843-2847, 2861-2867, 2873-2879, 2896; 20 RT 2940.)

Since the Hartsch residence was the last place Angelica was known to be alive, Sheriff's investigators visited the residence the afternoon of Wednesday June 21. No one was home when investigators arrived. The investigators noticed shoe impressions around the residence with a chevron pattern similar to the impressions observed near Angelica's body. (14 RT 2110-2113.) When Hartsch's mother arrived home, she was informed of Angelica's death, and she consented to a search of the residence. At that time, the investigators were not aware that the garage had been converted to Hartsch's living quarters and the area was not searched. Nothing of evidentiary value was removed from the Hartsch residence on June 21. Hartsch's mother and sisters agreed to go to the Sheriff's office for interviews. (14 RT 2115-2116.)

On Friday June 23, a Sheriff's investigator contacted Hartsch while he

was working at the packaging plant and informed him they were investigating Angelica's death. Hartsch explained that he had known Angelica for a couple of years and that they had "gone out" sporadically during that time. Angelica had dated Hartsch's brother Joe, but after Joe was placed in custody they broke up. (14 RT 2083-2085; 15 CT 4184.) Hartsch said his mother had informed him of Angelica's death. He said that the last time he saw Angelica was at the Orange Show in late May. Hartsch said that at that time he became upset with Angelica because she was siding with his former girlfriend Armanda who was causing other girls to not want to go out with him by spreading rumors that she was pregnant by him. During an argument at the Orange Show, Hartsch yelled profanities at them and Angelica made an obscene gesture with her finger. (14 RT 2085-2086, 2087-2088, 2095-2096; 15 CT 4185-4187, 4191, 4195.) Hartsch claimed that on Friday, June 16, he worked until 4:30 p.m., went home, showered and left at about 6:00 or 7:00 p.m. Hartsch said he went out with his friends and Rushing in San Bernardino to pick up girls and returned home at about 4:00 a.m. on Saturday, June 16. He denied that he saw Angelica at his house that Friday. (14 RT 2089-2090, 2101-2103; 15 CT 4192-4193.)

By Saturday June 24, Riverside police detectives had obtained a search warrant for the Hartsch residence. With the assistance of the Riverside Sheriff's office, the warrant was executed at about 11:30 a.m. (14 RT 2116-2117.) When the warrant was executed, the police had learned that the garage had been converted into a living space. They entered the garage, where Hartsch was inside sleeping. (14 RT 2117, 2119, 2123, 2131.) During the search, a pair of black, size 9 ½, Nike tennis shoes, two letters addressed to Hartsch, a small box containing a .22 caliber magazine with six live rounds, and an expended .22 caliber shell casing were located in the garage and seized. (14 RT 2118-2119, 2129-2130, 2134) Hartsch was arrested and taken into custody during the execution of the search warrant. Hartsch waived his *Miranda* rights

and agreed to an interview. (22 RT 3217, 3219; 15 CT 3999.)

During his police interview, Hartsch denied any knowledge of the Gorman-Creque double murder. Hartsch essentially retold the story of what happened in the hours leading up to and during the night of June 14 and early hours of June 15 with Rushing, Castaneda, Tameka, and Rene in the converted garage. He denied leaving the garage with Castaneda and said that after he and Rushing brought the girls home, they went to work but were sent home for wearing the wrong shoes. (22 RT 3219-3225; 15 CT 4000-4006, 4009.) Hartsch admitted that he had received a revolver from Delgado since Delgado had borrowed his .22 caliber rifle and never returned it. According to Hartsch, he sold the revolver to a black man at a San Bernardino liquor store two weeks earlier for $60. (22 RT 3226.) Hartsch claimed to have been "blacked out" and without a recollection of events around the time of the double murder due to being intoxicated. Hartsch was informed early on during the lengthy interview, that shoe prints from the murder scene matched a pair of shoes that were seized during the execution of the search warrant. Hartsch became fixated on the shoe impression evidence mentioned by detectives. At one point, Hartsch exclaimed that the shoes the detectives had would "prove" that he was not present at the scene of the double murder. (22 RT 3227-3237; 15 CT 4026, 4037, 4064, 4067, 4074, 4079, 4084, 4092, 4107, 4119, 4121.)

In the meantime, on June 24, Riverside Police detectives went to Sonora, Texas, where Castaneda was in custody, to investigate the Gorman-Creque killings. When the police initially contacted Castaneda that evening, Castaneda, who did not want to incriminate himself, told the detectives that he did not want to talk to them without an attorney. As part of their investigation, the detectives obtained a search warrant for the Honda. After conducting a search of the Honda the next day, they told Castaneda they were returning to California. Shortly before the detectives' intended departure, Castaneda changed his mind

and told them he would talk. A tape-recorded interview was conducted wherein Castaneda relayed information relating to the Gorman-Creque murders and the drive-by shooting. When Castaneda was questioned about Angelica's murder, he did not tell the detectives that he saw Angelica with Hartsch around the time of her disappearance or that Hartsch had her jewelry and was at his house on the night of June 16. Castaneda agreed to waive extradition, return to California, and assist in the Gorman-Creque murder investigation. (17 RT 2426-2429, 2433-2434; 19 RT 2805-2807.) Castaneda was not offered anything in exchange for his cooperation. (17 RT 2602-2605.)

When Castaneda returned to California that night, he showed the Sheriff's detectives the route that he drove to the citrus grove after leaving the converted garage with Hartsch. He pointed out the Arevalo residence at which Hartsch shot, where the Gorman-Creque killings occurred, and two areas along a different route back to Hartsch's converted garage where Castaneda thought that Hartsch had tossed shelled casings out of the car. (17 RT 2430-2431; 19 RT 2808-2810.) Three .22 caliber shell casings were collected from one of the areas that Castaneda had indicated which was about 200 yards from the scene of the Gorman-Creque killings. (19 RT 2811, 2815, 2818.) In subsequent interviews, Castaneda had not offered any information regarding having seen Hartsch with Angelica the night she went missing and Hartsch's possession of her jewelry later that night. (17 RT 2434.)[3/]

A Riverside Police detective arranged for Castaneda and Hartsch to be housed together in a jail cell and secretly recorded for the purpose of testing Castaneda's veracity and to see if Hartsch would incriminate himself. Castaneda was not made aware of this arrangement. (17 RT 2439; 22 RT 3240-

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3. It was not until July 3, that Castaneda initiated contact with a detective to discuss what he knew about Angelica's disappearance. At that time, Hartsch had not yet been charged with her murder. (17 RT 2435, 2589; 1 CT 1-2.)

3241.) On June 27, Hartsch was in a jail cell on the telephone with various family members. Hartsch told his sister Ileene to buy a newspaper because his name was in it (in connection with the double murder), he spoke to his father about the newspaper article and asked about Rushing and his new girlfriend. (22 RT 3242; 15 CT 4145-4146.) At that point, Castaneda entered the jail cell. Hartsch was excited to see Castaneda and told him his "case" had "come out in the paper." Hartsch then spoke to Rushing on the phone. (22 RT 3242-3243; 15 CT 4146-4147.) In his conversation with Rushing, Hartsch told him that they had "the wrong shoes." He then directed Rushing to go to a phone booth because the police would be following him, contact "Little Mikey," and "tell him to get the fuckin' rid of that shit." (22 RT 3243; 15 CT 4147.) Castaneda understood the reference to mean the .22 caliber revolver. (17 RT 2438.) After ending the call with Rushing, Hartsch told Castaneda he was in custody on two counts of murder. He also told Castaneda that his mother had disposed of his tennis shoes and "[t]hey ain't got no evidence." (17 RT 2436, 2438; 22 RT 3246; 15 CT 4148, 4151.)

Firearms experts analyzed the forensic evidence from the Gorman-Creque double murder and Angelica's murder. One of the experts determined conclusively that the same firearm was used in Gorman-Creque killings and Angelica's murder. (22 RT 3179.) The other expert determined that the same firearm "probably" had been used in the Gorman-Creque double murder and in Angelica's murder. (21 RT 3110, 3115.)[4/] Analysis of the shoe impressions from the Gorman-Creque murder scene and the site where Angelica's body was discovered indicated there were similarities in the chevron pattern and the shoe size, which was determined to be about a men's size 9 ½, and the impressions

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4. In closing argument, the defense conceded that the same firearm was used in the Gorman-Creque double murder and Angelica's murder. (26 RT 3764.)

at each site could have been made by the same shoe. (21 RT 3127.) The length of the shoe impressions from the Gorman-Creque murder scene and in the area where Angelica's body was found and the related approximate size of 9 ½ is inconsistent with Castaneda's shoe size, who, at 6'3" and 260 pounds, wears a size 12. (17 RT 2432.)

Biological specimens were gathered from Angelica's mouth, vagina, rectum, and pubic area. Tests indicated that sperm was present in Angelica's vagina. The concentration of sperm present revealed that it had been deposited no more than three days before her death. (18 RT 2731-2732, 2745; 19 RT 2782, 2784.) Blood samples were taken from Hartsch and Casteneda for DNA profiling. (20 RT 3021.) Based on the results of DNA testing, Castaneda was conclusively excluded as a sperm donor. Hartsch could not be excluded as a donor. Statistically, out of the Caucasian, Hispanic and Black populations, there was a probability of less than one in a billion "plus"[5/] that someone other than Hartsch was the donor. (21 RT 3041-3042, 3044.)

On June 29, five days after he was taken into custody, Hartsch wrote a letter to his then-girlfriend, Larissa Gonzalez, to whom he had given a heart-shaped ring around the time of Angelica's disappearance that was later identified as Angelica's. In the letter, Hartsch wrote that he had a gun and about a girl that was driving him insane. Hartsch wrote: "I didn't give a fuck anymore. I lost it. . . . I just got too stressed out, I guess. I flipped out, lost it, went insane. . . . My brother, oh boy, I'm glad he wasn't a part of it." (15 RT 2207; 22 RT 3185, 3187-3188, 3190, 3194-3197, 3204.) On the back of the

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5. The DNA expert testified that the probability of randomly picking someone from the Caucasian, Hispanic or Black populations that matched Hartsch's DNA profile was less that one in a billion or "quite higher." For the purposes his explanation, he rounded the population figure down to one billion without objection by the defense or further inquiry by the defense on cross-examination. (19 RT 3042-3044.)

last page of the letter Hartsch wrote: "I shocked everyone. No one can believe what I did." (22 RT 3197.)

In October of 1995, Hartsch was housed at the Southwest Detention Center in Temecula. At 6:00 a.m. one morning during the breakfast lineup, a corrections deputy observed that Hartsch had "1-8-7," the Penal Code section number for murder, shaved into the top of his head Mohawk-style. Before the deputy had an opportunity to photograph Hartsch, however, Hartsch had already shaved his head completely bald. (29 RT 2787, 2790-2791.)

Defense

The defense theory of the case was that Castaneda and Delgado killed Gorman and Creque and that Castaneda was responsible for Angelica's murder. (9 RT 1402, 1404-1405; 26 RT 3789.) The defense presented the theory largely by attacking Castaneda's credibility and attempting to show that the evidence corroborating Castaneda's version of events was weak. (26 RT 3764, 3771, 3773.) As to the Gorman-Creque killings, the defense attempted to establish a time line that was inconsistent with the prosecution's evidence to show that Castaneda had left the converted garage alone with time to meet up with Delgado and commit the double homicide. (22 RT 3277, 3282, 3288-3289; 26 RT 3778.)

In support of the defense theory that Castaneda had murdered Angelica, the defense presented evidence that Angelica was known to collect pewter and crystal figurines and there were two such figurines located in the stolen Honda when it was searched in Texas. Additionally, a purse that had belonged to Angelica was located after her death at Castaneda's mother's house. (22 RT 3304-3305; 23 RT 3334, 3336, 3351-3352, 3362.) Regarding Castaneda's motive for killing Angelica, the defense presented evidence that Castaneda had inquired of Angelica's mother Madrid as to the value of one of Angelica's rings

that had a diamond in it. Madrid told Castaneda at the time that it was worth approximately $1,200. (23 RT 3365-3366.) There was also evidence presented by the defense that a few weeks before her disappearance, Castaneda and Veronica had an argument in which Angelica became involved. Angelica became so upset that she ran out of the house. Castaneda went after her. They returned about 45 minutes later and Angelica still looked upset. (23 RT 3368-3370.)

Prosecution's Rebuttal

In rebuttal, the prosecution presented evidence to clarify the origin of the pewter objects located in the Honda as the items stolen from the New Mexico souvenir shop visited by Castaneda and Veronica while on their way to Texas. (26 RT 3695, 3698-3701, 3706-3707.) Additionally, evidence was presented that the Motel 6 parking lot, where an employee who testified on behalf of the defense said he saw Creque around 2:30 a.m. the night she was murdered, was 3 ½ miles from where her body was later discovered. (26 RT 3709.)

Penalty Phase

Prosecution's Case

Kenneth Gorman's sister and brother, and Ellen Creque's brother and daughter testified to the manner in which they were affected by the murders. Diane Chapman, the oldest of Gorman's five siblings, testified that Gorman had a difficult childhood after their mother and Gorman's father divorced when she was 13 and Gorman was three. Gorman and his brother were sent to live in foster care where they were molested by their foster father during the nine years they lived with him. Chapman was unsuccessful in her attempt to get custody of Gorman after the molestations were exposed. She attended the molestation

trial and supported Gorman who testified against his molester. Chapman felt that Gorman was like her own child. (28 RT 4328-4333.)

Curtis Gorman, who, along with Gorman, endured being molested by the foster father in their foster home, testified that he was very close with Gorman and that they shared everything. When they spent time together, they worked on cars. Gorman had Curtis's blue pickup truck, which was the vehicle in which he slept when Hartsch murdered him. Gorman's murder affected him deeply in that he became depressed, was unable to attend his classes at Valley College, was taking medication, and had become suicidal. (28 RT 4334-4339.)

Ellen Creque had four younger siblings. Her brother, Jerry Gower, testified that in the one or two years before the murder he and Creque had been getting along well. Four days before Creque was murdered she had a day-long visit with Gower at his residence. After he learned of Creque's murder, Gower, who had been sober for nine years, started drinking again and ultimately lost his landscape business. Gower testified that since Creque's murder, he no longer trusts people or helps anyone. (28 RT 4341-4347.)

Misty Gower, the oldest of Creque's four children, who was 21-years-old at the time of trial, testified that her mother was kind and helped out homeless people. (28 RT 4348-4349.) Once Misty was informed of her mother's murder, she cried for two to three days and then avoided how she was affected by her mother's death by immersing herself in her schoolwork. Misty testified that she missed being able to talk to her mother about her problems. (28 RT 4349-4350.)

Angelica's sister and mother testified as to the impact of Angelica's murder. Veronica testified that she missed Angelica and that before her death they were together all the time. Madrid testified that her daughter Angelica was the "soul" of the family. Since the murder, life was now chaotic. (28 RT 4353-4358.)

The prosecution presented evidence of Hartsch's prior criminal activity involving force or violence from 1991 to 1995. The first incident of force or violence occurred in May of 1991. Carol Smaniotto, who worked at a Riverside restaurant, parked her Toyota pickup truck at the parking lot across the street from the restaurant during work hours. On May 16, at about 7:30 p.m., a co-worker alerted Smaniotto that her truck was being vandalized. Smaniotto and two co-workers ran over to the parking lot and saw two or three men near her truck. The window of Smaniotto's truck was shattered. (27 RT 4015-4017, 4021, 4025-4026, 4033-4034.) The men made their get-away by jumping into the bed of the nearby pickup truck, but one of them, a heavy-set individual, did not make it into the truck. The get-away pickup truck drove off and the man, now being chased by Smaniotto's co-workers, ran in its direction. When Smaniotto's co-workers caught up to the lone vandal, he brandished a knife and got away. During the incident, one of Smaniotto's co-workers got into his car and followed the get-away truck. (27 RT 4017-4019, 4027, 4030, 4035.) Police on patrol nearby were alerted to the incident and observed the suspect get-away truck. The co-worker that had followed the get-away truck pulled in front of the truck to block it after it made a u-turn in an attempt to change direction. The police contacted two males in the passenger compartment of the get-away truck and four males in the bed of the vehicle, including Hartsch and Castaneda. There was a crescent wrench, slide hammer, knife and sheath, and an aluminum baseball bat in the truck. Hartsch admitted he had the bat. (27 RT 4038, 4040-4043, 4047-4049.)

The second incident occurred on January 11, 1992, when Hartsch, his father, Joseph Hartsch, Sr., and Rushing, went to an apartment complex in Highgrove at about 11:30 p.m. Armed with a .22 caliber gun, Hartsch, Sr. had driven there with his sons with the intention of confronting an individual known as "Halfman" who, along with his associates, had shot at Hartsch and

one of his friends about a week earlier. The truck had a bench seat; Rushing was seated between Hartsch, Sr. and Hartsch. (27 RT 4059-4060, 4062, 4067-4069.) Hartsch, Sr. drove the truck onto a grassy area of the apartment complex and yelled for Halfman to come out of his apartment. (27 RT 4061-4062, 4070-4071.) Mary Palacio, a complex resident, testified that she heard the commotion outside her apartment. Palacio was there with her three grandchildren, all under the age of twelve. Hartsch, Sr. had pulled the truck alongside Palacio's apartment door by two or three feet so that the passenger's side was facing her door. Palacio testified that when she opened her door the individual seated in the passenger seat was pointing a gun at her. Palacio closed the door and called police. (27 RT 4072, 4077-4079.) Gunshots were fired. (27 RT 4080-4081, 4089.) The police contacted Hartsch, Sr., Rushing and Hartsch in an alley near the complex. Hartsch, Sr. lied and told police that they were in the area to visit Tommy Gomez. (27 RT 4065, 4084, 4086-4087.) The men were detained and the truck was searched. A .22 caliber semiautomatic gun was found with one bullet in the chamber. When Hartsch was searched police found three magazines of .22 caliber ammunition in his left front jacket pocket. One of the magazines was missing a round of ammunition. (27 RT 4092, 4096-4097.)

The third incident of force or violence occurred on September 25, 1993. Adeline Tafolla and her boyfriend, Chris Runyon, were walking near 16th Street and Mt. Vernon in San Bernardino at about 12:30 a.m. They were homeless and looking for a place to sleep. A truck passed them as they walked. The truck returned and pulled alongside them. There were at least six individuals, including Hartsch, in the truck; some were seated in the cab and the others were in the bed of the truck. Three men got out of the bed of the truck and started harassing and threatening Tafolla and Runyon. (27 RT 4104-4106.) The men wanted Tafolla's jacket which had a team emblem and Runyon's U.S.C.

sweatshirt and pendleton-type jacket. One of the assailants had his hand in his jacket pocket. Tafolla's jacket was taken from her but she was able to run to a nearby motel. The men beat Runyon and took his sweatshirt and jacket. Runyon ran to the motel. He had small stab wounds in his chest area. (27 RT 4107-4111, 4114.) The police were contacted and arrived in the area within a few minutes. They stopped the suspect truck, Hartsch's 1956 GMC pickup, after it sped past them without its lights illuminated and went through a red light. There were three males in the front and three sitting in the bed of the truck. One of the males was wearing Runyon's U.S.C. sweatshirt, one of them was wearing Tafolla's team jacket, and Hartsch was wearing Runyon's pendleton-type jacket. (27 RT 4111, 4116-4119, 4121.) They were arrested. After Hartsch was taken into custody and handcuffed, he struggled with the police by swinging his arms and body. When officers tried to put Hartsch in the police vehicle, he became violent by kicking his legs and twisting his body. He tried to spit an at an officer. The police subdued Hartsch with pepper spray. (27 RT 4120-4121.)

The fourth incident of force or violence was referred to by the prosecution as "murder number 4." (27 RT 4008.) Hartsch shot and killed 20-year-old Michael Wheeler. On May 24, 1993, around 10:00 or 11:00 p.m., Wheeler, who had a severe learning disability, was walking through the parking lot of an elementary school when he was beaten, robbed, and shot dead. Wheeler was wearing a jacket with a team emblem on it. Wheeler's mother testified that Wheeler usually wore rings on his fingers and carried a wallet with his identification and photographs. (28 RT 4223-4226, 4241-4245.) When Wheeler's body was discovered, he was not carrying his wallet, there were no rings on his fingers, and he was not wearing the team jacket. (28 RT 4270-4271.) Wheeler was shot in the back of his head, which caused his death, and in his left armpit area. There was blunt force trauma to the left side of his head.

(28 RT 4278-4284, 4287.)

While in custody for the Gorman-Creque double murder and Angelica's murder, Hartsch told Robert Medina, an inmate in a neighboring cell, about those murders and another murder he had committed. Hartsch told Medina that he saw a black man in an elementary school lot and wanted to rob him. When Hartsch demanded his wallet, the man said he didn't have any money. Medina testified that Hartsch told him he hit the man with his gun, shot him, and took the man's ring and team jacket. Hartsch told Medina that he remembered the day, May 24, 1993, because his uncle had died that day. (28 RT 4290-4293, 4323.)

The fifth incident of force or violence occurred on October 6, 1994. Hartsch was placed by the juvenile court in Rite of Passage, an alternative youth rehabilitation program, in Nevada. After Hartsch progressed through the first two levels of the program and obtained the highest level recognized by the program, he was eligible to participate in a ten-day trip with the program's cycling team and counselors from Carson City to the Grand Canyon. (28 RT 4658-4161, 4168-4169.) While camping on the last night of the trip, Hartsch confronted one of his three tent mates, Shane A., and demanded Shane give Hartsch "three reasons why [he] shouldn't kick [Shane's] ass." Hartsch was called out of the tent to do chores. (28 RT 4178-4179.) When he returned, Shane testified Hartsch hit him in the face and ordered him "to suck his dick." Hartsch threatened Shane. Shane succumbed and orally copulated Hartsch. (28 RT 4181-4182.) Shane testified that about three weeks later back at the program campus he requested a housing change because he was ashamed and scared of Hartsch who resided in the same dorm. Staff members were then made aware of the sexual assault that occurred on the cycling trip. (28 RT 4183.) Hartsch provided a written statement of the incident. Hartsch admitted that he threatened Shane , hit Shane multiple times, and made the demand, to

which Shane complied, that Shane orally copulate him. (28 RT 4211-4215.)

The last incidents of Hartsch's use of force or violence presented by the prosecution occurred in 1995 and involved Hartsch's former girlfriend Armanda Ramirez. About two weeks before the murders Hartsch had broken up with Armanda. However, both during and after their relationship had ended Hartsch hit Armanda during at least two arguments and, on one of the those occasions, also pulled her hair and drew his gun on her. (28 RT 4127-4131.)

Defense Case

The defense presented three witnesses who testified to Hartsch's positive response to structure and supervision. These witnesses included his manager at the beverage packaging plant, his probation officer, and a former Rite of Passage case manager. The defense presented evidence of Hartsch's school records from 1990 through 1993, including his attendance at the elementary school where he later beat, robbed, shot and killed Michael Wheeler. (29 RT 4457-4469.) Hartsch's mother testified on his behalf and described Hartsch's years growing up as lacking in supervision and positive role models. Hartsch's sisters, his current girlfriend, who claimed she was going to marry Hartsch within days of the proceedings, and Castaneda testified on his behalf to demonstrate Hartsch's emotional sensitivity and character for being a family man.

Filiberto Robles, Hartsch's manager at the packaging plant he worked at the time he committed the murders, testified that Hartsch had never been late for, or missed, work before the day he was sent home for wearing the wrong shoes. Robles testified that Hartsch was a "very good employee." (29 RT 4438-4439.)

Hartsch's probation officer, Rodney Hopkins, testified that while under his supervision, Hartsch was cooperative and responded well to structure.

Hopkins noted that Hartsch was poorly supervised at home by his parents. Beginning in 1989, when Hartsch was 12-years-old, through 1993, he was within the juvenile justice system at least every six months. As far as Hartsch's potential for future criminal behavior was concerned, Hopkins opined in 1993 that Hartsch was "out of control" and "needed further intervention." (29 RT 4442-4445, 4450-4451.)

Cliff Grady was employed by the Rite of Passage program in 1994 and acted as Hartsch's case manager. Grady testified that Hartsch was cooperative, quiet and artistically inclined. Hartsch was always honest about his intention to return to the gang lifestyle once he was released from the program. (29 RT 4509, 4513, 4515, 4520.) Grady noted that Hartsch was not willing to push himself to achieve, rather, Hartsch maintained a gang or prison-like mentality. (29 RT 4515, 4522, 4524.)

Josephine Hartsch testified that she and Hartsch's father, Hartsch, Sr. broke up when Hartsch, Sr. was imprisoned when Hartsch was three years old. Mrs. Hartsch became involved with James Silva, who fathered Suzie and Ileene. Hartsch did not get along with Silva, who required that Hartsch and his brother, Joe, not watch television, go to bed early, and get up early to do chores. Silva, who drank alcohol, also "picked on" Hartsch and Joe and hit them. Mrs. Hartsch testified that Silva came home every Friday and beat her up. (29 RT 4480-4483.) When Hartsch was eight or nine years old, Hartsch, Sr. was released from prison. Hartsch and Joe, who were close, went to live with their father. About a year later, Mrs. Hartsch got back together with Hartsch, Sr. Hartsch and Joe were involved in karate together around that time. Joe was placed in the California Youth Authority when he was 14 and Hartsch, Sr. returned to prison. (29 RT 4484-4488.) Hartsch did not obey the house rules and was free to come and go as he pleased. Mrs. Hartsch did not know all of Hartsch's friends but acknowledged that Hartsch was a gang member of the Mt.

Vernon West Side Verdugo from the age of 12 or 13. Mrs. Hartsch did not force Hartsch to go to school. Mrs. Hartsch permitted Hartsch to drink alcohol at home. When Hartsch was 16-years-old, he moved into the converted garage and totally covered the walls with gang graffiti and slogans. (29 RT 4490-4492, 4499-4501.)

Suzie Silva, Hartsch's younger sister, testified that she had a "nice" relationship with Hartsch and that he used to take her, her sister, and nephew out to do things. (29 RT 4527-4528.) Diane Ramirez, Hartsch's older sister, testified that when they lived together as teenagers they fought a lot, but, as of 1995, Ramirez had three children under four years of age that Hartsch spent time with by coming over to their house and playing with them. (29 RT 4536-4539.)

Melissa Burns, Hartsch's girlfriend at the time of trial, had known Hartsch for about six years. The only contact they had with one another until September of 1998 was through letters and telephone calls. Burns testified that when she was contacted by an investigator from the District Attorney's office in connection with the case, she did not want contact with Hartsch because they had not been writing to each other. However, once Burns visited Hartsch at jail during trial in September of 1998, she "fell in love with him all over again." Burns, who was 20 years old, testified that they were planning to marry in a few days. She testified that through the years Hartsch had "matured immensely." Burns stated that her intention, regardless of the outcome of the penalty trial, was to follow Hartsch wherever he was imprisoned. (29 RT 4529-4533.)

Castaneda testified on Hartsch's behalf. He recalled that when Hartsch returned to the converted garage after being with Tameka on June 14, Hartsch was sad and depressed. Hartsch had also expressed to Castaneda that he was upset because Armanda Ramirez was stalking him. Castaneda said that he had

the idea to go target shooting in the citrus grove with Hartsch to alleviate some of the tension he believed Hartsch was under. (29 RT 4541-4543.)

ARGUMENT

I.

THE DEFENSE *WHEELER* MOTION WAS PROPERLY DENIED

Hartsch contends his state and federal constitutional rights to be tried by an impartial jury were violated by the prosecutor's discriminatory use of peremptory challenges in contravention of *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69]. He claims reversal is required because the trial court erroneously denied his *Wheeler* motion when it failed to find a prima facie claim of discrimination was established. (AOB 30-57.) Since Hartsch failed to establish a prima facie case giving rise to the inference of a discriminatory purpose on the part of the prosecution in exercising its peremptory challenges against African-American potential jurors, the trial court's ruling was proper.

The use of peremptory challenges to strike prospective jurors on the basis of bias against an identifiable group of people, distinguished on racial, religious, ethnic or similar grounds, violates the right of a criminal defendant to be tried by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution, and the right to equal protection under the United States Constitution. (*People v. Avila* (2006) 38 Cal.4th 491, 541, citing *Wheeler, supra*, 22 Cal.3d at pp. 276-277; *People v. Griffin* (2004) 33 Cal.4th 536, 553; *Batson, supra*, 476 U.S. at p. 88.) When the defendant believes the prosecution's sole reason for exercising a peremptory challenge is based upon such discrimination, a timely motion must be made. (*People v. Young* (2005) 34 Cal.4th 1149, 1172.) Such motions are typically referred to as "*Wheeler*" or "*Batson*" motions, and even though Hartsch only referred to *Wheeler* when making his motion, this Court reviews such motions in the context of the federal law as articulated in *Batson* and its

progeny. (*People v. Cornwell* (2005) 37 Cal.4th 50, 66, fn. 3.)[6/]

A *Wheeler* motion involves a three-step process, and the defendant carries the burden of establishing that the prosecutor exercised a peremptory challenge based solely upon group bias. (*Rice v. Collins* (2006) 546 U.S. 333 [126 S.Ct. 969, 973-974 , 163 L.Ed.2d 824], *Purkett v. Elem* (1995) 514 U.S. 765, 767-768 [115 S.Ct. 1769, 131 L.Ed.2d 834].) First, the defendant must make a prima facie case, showing the totality of relevant facts gives rise to an inference of a discriminatory purpose. Second, once the defendant has made out a prima facie case, the burden shifts to the state to explain adequately the challenge by offering permissible race-neutral reasons for the strike. Finally, if a race-neutral reason is tendered, the court must decide whether the defendant has proved purposeful racial discrimination. (*People v. Avila, supra,* 38 Cal.4th at p. 541, citing *Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129] (*Johnson*).)

If the defendant establishes a prima facie case, the prosecution's race-neutral explanation must relate to the particular juror and to the case. (*People v. Alvarez* (1996) 14 Cal.4th 155, 197.) "'[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause.'" (*People v. Williams* (1997) 16 Cal.4th 635, 664, quoting *Batson, supra,* 476 U.S. at p. 97.) "Rather, adequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation omitted], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias." (*People v. Williams, supra,* 16 Cal.4th at p. 664.)

Excluding even a single juror for impermissible reasons under *Batson* and *Wheeler* requires reversal. (*People v. Huggins* (2006) 38 Cal.4th 175, 227,

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6. For purposes of consistency and simplicity, references will simply be made to the "*Wheeler*" motion but this term refers to both the state and federal law for purposes of this argument.

citing *People v. Silva* (2001) 25 Cal.4th 345, 386.)

There are several components to establish a step one prima facie showing. (*People v. Gray* (2005) 37 Cal.4th 168, 186; *People v. Young*, *supra*, 34 Cal.4th at p. 1172.) The movant must raise the issue in a timely fashion, make as complete a record as feasible, establish that the excused potential juror or jurors are a member of a cognizable class, and produce evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (*People v. Gray*, *supra*, 37 Cal.4th at p. 186, citing *Johnson v. California*, *supra*, 545 U. S. at p. 169.) When a *Wheeler* motion is denied because the movant failed to establish a prima facie showing that the peremptory challenge was exercised on the basis of group bias, this Court reviews the entire record of the voir dire for evidence supporting the trial court's ruling. (*People v. Gray*, *supra*, 37 Cal.4th at p. 186; *People v. Crittenden* (1994) 9 Cal.4th 83, 116.)

As a threshold matter, Hartsch argues this Court should review the issue de novo. Hartsch claims that since the trial court applied the wrong standard in denying his motion, this Court must review the ruling de novo, rather than deferentially. (AOB 53.) The standard necessary to establish a prima facie showing for establishing a party is exercising peremptory challenges based on group bias, was addressed by the United States Supreme Court in *Johnson v. California*, *supra*, 545 U.S. at p. 168 after Hartsch's trial took place. The High Court in *Johnson* held California's "more likely than not" standard for establishing a prima facie showing was an inappropriate standard. (*Ibid.*) The proper standard to make a prima facie showing requires establishing facts about the peremptory challenge raising an inference that discrimination motivated the challenge. (*Johnson v. California*, *supra*, 545 U.S. at p. 169.)

Since the *Johnson* decision, this Court has addressed cases in which the trial court did not find a prima facie showing in accordance with step one of *Wheeler*. (*People v. Avila, supra,* 38 Cal.4th at pp. 553-555; *People v. Gray*,

supra, 37 Cal.4th at p. 186; *People v. Cornwell*, *supra*, 37 Cal.4th at pp. 67, 69.) In these cases, this Court has consistently held that when the trial court denies a *Wheeler* motion on the basis of the moving party failing to make an initial prima facie showing, it reviews the entire record of the voir dire to determine whether it supports the trial court's determination.

In *Gray*, this Court specifically referenced *Johnson*, finding this "view is consistent with the high court's recent reiteration of the applicable rules, which require the defendant to attempt to demonstrate a prima facie case of discrimination based on the 'totality of the relevant facts. [Citation.]'" (*People v. Gray*, 37 Cal.4th at p. 186.) In *Avila*, when the appellant challenged the standard applied when the trial court found a failure to establish a prima facie showing, this Court reviewed the ***legal question*** of whether the record supported an inference that the prosecutor excused a juror on the basis of group bias – the standard articulated in *Johnson* – and found none. (*People v. Avila*, *supra*, 38 Cal.4th at p. 553-556.) Therefore, Hartsch's argument and analysis claiming this Court should review de novo the denial of the trial court's *Wheeler* motion without consideration of whether a review of the entire voir dire supports the trial court's determination should be rejected. Just as in *Gray* and *Avila*, regardless of the standard employed by the trial court – which is not stated on the record at the point Hartsch made his motion and the court denied it – a review of the record in light of the proper standard establishes that it does not support an inference the prospective African-American jurors were excused on the basis of race.

A. Voir Dire Procedural History

An overview of the jury selection process establishes that of the 91

individuals in the jury venire[7], 14 were excused for cause[8], five were excused for hardship or health concerns[9], and two potential jurors were excused due to language comprehension concerns[10]. Of the 70 remaining potential jurors, 49 identified themselves ethnically as non-minority white people. Among them, potential juror Terry Beatty identified herself ethnically as "White/Native American." (12 CT 3266.) Potential juror Gregory Perez identified himself as "Irish, Italian, Mexican." (10 CT 2755.) Likewise, potential juror Lorrie Stolle identified herself as "English, Welch, Mexican." (17 CT 4659.) For the purposes of this discussion they are included in the non-minority white category. There were 21 potential jurors who identified themselves ethnically as other than non-minority white in the jury questionnaires. The prosecutor exercised a total of 21 peremptory challenges during jury selection; 20 to select the 12 jurors and one to select the alternates. The defense exercised a total of 21 peremptory challenges during the selection process; 20 to select the 12 jurors

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7. Hartsch correctly states there are 91 juror questionnaires in the record on appeal. Hartsch states that the record does not contain potential juror Angela Garcia's questionnaire and presumes that she is an Hispanic. Angela Garcia Bouman's questionnaire appears at 8 CT 2073 - 2114, wherein she identifies herself as Hispanic. (8 CT 2077.)

8. The potential jurors excused for cause by the defense are Edward Currall (6 RT 1036), Bruce Axelrod (6 RT 1037), Tamra Marlar (6 RT 1083), Diana Yegge (6 RT 1083), Tharon Main (6 RT 1114), Patricia Stanley (6 RT 1114), Donald Ainsworth (7 RT 1184), Heidi Wills (7 RT 1184), and, Louis Ingenhousz (7 RT 1255). The prosecution excused for cause potential jurors Yolanda Ramirez (6 RT 1037), Melinda Casillas (6 RT 1037), Ellen McMullen (6 RT 1114), John Barth (6 RT 1115), and Teresa Trujillo (7 RT 1185).

9. Potential jurors Kevin McGuire, Michael Sutter, William Miller, George Wunderlich, and Judy Steele were excluded under these circumstances. (6 RT 1042, 1058, 1077, 1079-1080; 7 RT 1195.)

10. Potential jurors Ruben Punsalan and Quirobin Valencia were dismissed due to language comprehension concerns. (6 RT 952; 7 RT 1145.)

and one to select the alternate jurors.

Ten of the 21 potential jurors who identified themselves ethnically as other than non-minority white in the jury questionnaires were African-American. Those potential jurors are as follows: Juror Number Two (hereinafter "JN2"; 5 CT 1179); T. J. Anderson (10 CT 2544); Jacqueline Brown (17 CT 4615); Odie Lee Brown (7 CT 1779); Robert Louis Clark (18 CT 5089); George Clarke (18 CT 5003); John Collier (12 CT 3310); Alex Hardy (14 CT 3865); Regina (Pender) Purdum (13 CT 3565); and, Katrina Williams (18 CT 5047). Eight of the 21 potential jurors who identified themselves ethnically as other than non-minority white in the jury questionnaires were Hispanic: JN3 (15 CT 4230); JN5 (5 CT 1265); JN6 (5 CT 1308); Victor Ahumada (14 CT 3823); Jose Betancourt (11 CT 2968); Angela Garcia Bouman (8 CT 2077); Belinda Marquez (9 CT 2288); and, Guadalupe Martinez (17 CT 4746). The remaining three potential jurors who identified themselves ethnically as other than non-minority white in the jury questionnaires were Karen Yoshiye Madokoro, who identified herself as Japanese (8 CT 2035); Roy Sakaguchi, who identified himself as Japanese (8 CT 2162); and, Dwarika Prasad, who identified himself as Asian-Indian (16 CT 4531).

1. Statistical Breakdown Of Peremptory Challenges

In support of his argument that the defense met its step one prima facie burden under *Wheeler*, which would then require that, under step two, the burden shift to the prosecution for an explanation of its peremptory challenges, Hartsch relies upon statistical information gleaned from the record of the voir dire proceedings. (AOB 42-45.) Hartsch purports to do a statistical analysis which indicates the prosecutor was disproportionately excusing African-Americans. Hartsch cites *Miller-El v. Dretke* (2005) 545 U.S. 231, 238-240

[125 S.Ct. 2317, 2324-2325,162 L.Ed.2d 196] (*Miller-El*) as authority supporting his claim the statistical disparities in the prosecutor's use of peremptory challenges was sufficient to establish a prima facie case of intentional discrimination. (AOB 40.) The statistics apparent from the record are insufficient to raise an inference of purposeful discrimination. Moreover, *Miller-El* does not assist Hartsch in his attempt to rely upon alleged statistical disparities for the first time on appeal.

In *Miller-El*, a federal habeas corpus proceeding, the United States Supreme Court held that, in the context of a challenge of an African-American prospective juror, the defendant had established purposeful discrimination under *Batson* and was entitled to relief on that ground and reversed the trial court's finding that, under step three of the *Batson* inquiry, there was no purposeful discrimination. (*Miller-El, supra,* 545 U.S. at p. 235.) In so holding, the High Court engaged in a comparative analysis of potential jurors. This "side by side" comparison was examined to determine if prospective jurors were similarly situated. (*Id.* at p. 241.) The High Court explained,

> If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.

(*Ibid.*) It is an open question whether comparative analysis must be done when the defense has failed to make a prima facie showing of discrimination or for the first time on appeal. (*People v. Gray, supra,* 37 Cal.4th at p. 189 and see *People v. Avila, supra,* 38 Cal.4th at p. 546.) Additionally, while this Court has engaged in comparative analysis asserted for the first time on appeal, that analysis is distinctly different from the statistical analysis approach Hartsch undertakes in his opening brief for the first time on appeal. Nonetheless, respondent disputes Hartsch's statistical analysis.

Statistically, African-Americans constituted 14 percent (10/70) of the

potential jurors, six percent (1/16) of the sworn jurors plus the alternates, and eight percent (1/12) of the sworn jurors, not including the alternates. The prosecutor's use of six peremptories to exclude African-Americans constituted 29 percent (6/21) of his total peremptory challenges.[11/]

An overview of the prosecutor's peremptory challenges demonstrates that the prosecutor used 29 percent (6/21) of his peremptories to excuse African-Americans, nineteen percent (4/21) of his peremptories to exclude Hispanics, and five percent (1/21) or one of his peremptories to exclude a potential juror who identified himself as Asian-Indian. Non-minority whites constituted 70 percent (49/70) of the potential jurors, and the prosecutor exercised 48 percent (10/21) of his peremptory challenges to excuse non-minority whites. Considering statistically the number of African-Americans available to serve on the jury (10) with the number of peremptory challenges exercised by the prosecutor excusing African-Americans (6) and that an African-American actually served on the jury (JN2), a statistical comparison does not support Hartsch's argument that an inference the prosecutor engaged in purposeful discrimination existed.

2. Factual Background

After the prosecutor exercised his 17th peremptory challenge to excuse African-American prospective juror George Clarke, the fourth African-American prospective juror to be challenged by the state, the defense noticed a motion under *Wheeler*. (7 RT 1185-1186.) Specifically, the prosecutor exercised his 6th peremptory challenge when he excused Jacqueline Brown, the

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11. Hartsch challenges the peremptories exercised against African-Americans during regular jury selection. For the purpose of the discussion, respondent includes the peremptory challenge exercised against African-American potential juror Alex Hardy during the alternate juror selection process. (14 CT 3865; 7 RT1257.)

first African-American prospective juror excused by the state; his 9th peremptory challenge to excuse Odie Lee Brown, the second African-American prospective juror excused by the state; and, his 12th peremptory challenge to excuse T.J. Anderson, the third African-American prospective juror excused by the state. (6 RT 1084-1085 [Jacqueline Brown, Odie Lee Brown], 1115 [T.J.Anderson].) After another round of peremptory challenges, the prosecution accepted the jury as constituted and including, at that point in the selection process, African-American potential juror John Collier. Nonetheless, jury selection continued. Following a defense peremptory challenge, the prosecution exercised its 19th peremptory strike against prospective juror Katrina Williams, the fifth African-American to be excused by the state. (7 RT 1187.)

During a recess in the proceedings, the defense argued in support of its *Wheeler* motion that nine of 91 prospective jurors indicated on their questionnaires they were of African-American descent[12] and that the prosecution had exercised peremptory challenges against all of the individuals who were African-American that were seated amongst the 12 prospective jurors in the jury box except potential juror John Collier. The defense claimed this potential juror had not been challenged by the prosecution because he was a school resource officer, a job "akin" to law enforcement. The defense indicated that another African-American prospective juror, Regina (Pender) Purdum (who was seated outside the jury box), had been unsuccessfully challenged for cause by the defense. The defense stated there were three African-American potential jurors yet to be called up for selection and subjected to oral voir dire. (7 RT 1187-1189.) The trial court denied the *Wheeler* motion without

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12. Trial counsel was mistaken, there were in fact ten prospective jurors who indicated on their juror questionnaires that they were African-American. (5 CT 1179; 7 CT 1779; 10 CT 2444; 12 CT 2210; 13 CT 3565; 14 CT 3865; 17 CT 4615; 18 CT 5003, 5047, 5089.)

comment. (7 RT 1189.)

Before jury selection resumed, the defense expressed a concern with African-American potential juror Robert Clark, who had a niece in a recent drunk driving accident where a police officer was killed, and JN2, who was an African-American law student. Rather than enter into a stipulation with the prosecution to excuse these two African-American potential jurors, jury selection continued. (7 RT 1191-1193.) The three remaining African-American potential jurors were called in this group: JN2, Robert Clark, and Alex Hardy. (7 RT 1203.) The prosecutor's challenge for cause against African-American potential juror Robert Clark was denied by the trial court. (7 RT 1255.) Thereafter, African-American potential juror Regina (Pender) Purdum was excused when the defense exercised its 19th peremptory challenge against her. (7 RT 1255.) Additionally, the defense exercised its 20th peremptory challenge against African-American potential juror John Collier. (7 RT 1255.)

The selection process moved to picking alternates. After the parties accepted Alternate JN1, the prosecution exercised its 21st and final peremptory challenge against African-American potential juror Alex Hardy. (7 RT 1257.) After the prosecutor accepted Alternate JN2 and the parties accepted Alternate JN3, the defense exercised its final peremptory challenge against a white male prospective juror. (7 RT 1268.) Thereafter, the prosecutor accepted Alternate JN4 and the jury was constituted. (7 RT 1269.)

B. The Trial Court Properly Found Hartsch Failed To Establish The Requisite Step One Prima Facie Showing When He Made His *Wheeler* Motion

Preliminarily, Hartsch contends that the statistical evidence supports and inference of purposeful discrimination. (AOB 42-45.) As discussed above, however, the statistical breakdown of the prosecutor's peremptory challenges

does not support his argument. Hartsch argues alternatively that the mere fact the prosecutor excused five of seven African-Americans at the time he made his *Wheeler* motion is sufficient by itself to raise an inference of purposeful discrimination. He asserts that the juror questionnaires and "desultory" voir dire by the prosecution contained no relevant circumstances to rebut this inference. (AOB 45-49.) Hartsch's characterization of the record is misleading.

At the time Hartsch made his *Wheeler* motion, the prosecutor had exercised peremptory challenges against five of the 10 African-Americans available to sit as jurors. An inference of purposeful discrimination is not supported by this fact. In other words, although the prosecutor had removed five African-American potential jurors when Hartsch's *Wheeler* motion was argued, there were five African-American potential jurors, or half of the African-American potential jurors, still remaining in the venire. Indeed, the prosecutor's exercise of his 19th peremptory challenge against the fifth African-American potential juror excused does not on its face raise an inference of purposeful discrimination as Hartsch asserts. Furthermore, the juror questionnaires, combined with oral voir dire by the trial court, trial counsel, and/or the prosecutor, i.e., the record of the entire voir dire proceedings, establish the relevant circumstances under which the African-American jurors were permissibly challenged and excused by the state. The juror questionnaire of potential juror Jacqueline Brown, who is the only African-American potential juror that was not subjected to any of the aforementioned oral voir dire, supports a permissive challenge. Hartsch's argument should be rejected.

Implicit in the trial court's ruling denying the motion was that the defense had not made a prima facie showing that the prosecutor's use of peremptory challenges was improper. A trial court's denial of a *Wheeler* claim, without making a prima facie finding, is reviewed with "considerable

deference" because such a motion calls upon the trial court's personal observations. If the record suggests grounds upon which the prosecutor might have reasonably challenged the jurors in question, the reviewing court affirms. (*People v. Cleveland* (2004) 32 Cal.4th 704, 733; *People v. Crittenden*, *supra,* 9 Cal.4th at p. 117.) In the instant case, a review of the entire voir dire supports the trial court's determination. (*People v. Gray, supra,* 37 Cal.4th at pp. 186-187.) In support of its *Wheeler* motion, the defense indicated, incorrectly, that 9 of the 91 venire persons were African-American (there were 10 African-Americans in the jury venire) and pointed out that the prosecution had exercised peremptory challenges of every African-American juror seated amongst the 12 prospective jurors in the jury box, except for African-American prospective jurors John Collier who, the defense noted, was a school resource officer and "akin to law enforcement," and Regina (Pender) Purdum, whom the defense had unsuccessfully challenged for cause. Hartsch's argument was inadequate. This Court has ruled that there is no prima facie showing where the only stated bases for disputing the peremptory challenges were (1) that four of the first five peremptory challenges were against African-Americans, and (2) a small minority of the panel members were African-American. (*People v. Farnam* (2002) 28 Cal.4th 107, 136-137.)

Moreover, underlying trial counsel's bald assertion of purposeful discrimination was the notion that there were at least two African-American potential jurors unchallenged by the prosecution but otherwise unacceptable to the defense and subject to defense challenge. Any strategic reason defense trial counsel may or may not have had for deeming these African-American potential jurors as unacceptable does not demonstrate a reasonable inference of purposeful discrimination of the jurors in question who had actually been excused by the prosecutor. Indeed, a prosecutor's acceptance of African-American jurors is an indication of the prosecutor's good-faith in exercising

peremptory challenges. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 236.) And, although not dispostive, in making a prima facie determination, it is appropriate for the trial court to consider the fact that both sides had excused African-American prospective jurors and that the prosecutor had accepted the jury when it included several African-Americans. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1201; *People v. Turner* (1994) 8 Cal.4th 137, 168.) Thus, in light of Hartsch's sole argument in support of his motion that half of the African-American potential jurors in the venire had been excused by the prosecutor, the trial court's ruling that he had not met his prima facie burden of purposeful discrimination was proper.

Additionally, substantial evidence from the record of voir dire supports that trial court's determination that an inference of purposeful discrimination had not been raised. (*People v. Box* (2000) 23 Cal.4th 1153, 1188.) Neutral explanations for the prosecutor's peremptory challenges are apparent from the record. In the order in which they were challenged and excused, the potential jurors in question, discussed in greater detail below, are as follows: Jacqueline Brown, Odie Lee Brown, T.J. Anderson, George Clarke, and Katrina Williams.

Jacqueline Brown indicated in her juror questionnaire that she was employed at Loma Linda Hospital as a medical records technician. (17 CT 4617.) She had been the victim of car theft in the past. (17 CT 46 23.) Ms. Brown, a gun owner, believed guns were too readily available and that there should be more restrictions on availability. (17 CT 4625.) Ms. Brown stated that her bad back would be a source of distraction for her if she were selected to sit on Hartsch's jury. (17 Ct 4635.)

In Ms. Brown's opinion, the judicial system needed to impose more consistent punishments when the same crime is committed. (17 CT 4626.) She believed that the death penalty was imposed "unevenly." (17 CT 4638.) When it is imposed, she indicated it was "too seldom," leaving the victim's families

without closure. Ms. Brown stated that she was "moderately" in favor of the death penalty. (17 CT 4639.)

In the first round of peremptory challenges, the prosecutor accepted the jury as constituted, with Ms. Brown seated as juror number eight. (6 RT 1039.) Jury selection continued. Ultimately, Ms. Brown was the first African-American potential juror excused when the prosecutor exercised his sixth peremptory challenge against her. (6 RT 1084.)

Odie Lee Brown indicated in his juror questionnaire that he would have difficulty keeping an open mind. (7 CT 1783.) Mr. Brown, age 80, stated that he had an unpleasant experience with the police when he was standing at a bus stop and searched for no apparent reason. Mr. Brown stated that he was not pleased with what had happened. (7 CT 1791.) Mr. Brown did not respond to number 40 on the questionnaire which asked whether the respondent had any bias toward the prosecution. His response to number 44 on the questionnaire which related to the presumption of innocence was unintelligible. (7 CT 1795.) Mr. Brown indicated that he maintained a "neutral" philosophy on the death penalty. (7 CT 1803.)

The trial court inquired of Mr. Brown. When questioned by the trial court regarding his response on the juror questionnaire that he would automatically vote "not true" on the special circumstance allegations to avoid the death penalty, Mr. Brown said that he changed his position. When the trial court inquired if his response in the juror questionnaire was in error, Mr. Brown said it was. (6 RT 1059.) When the defense inquired of Mr. Brown, he indicated that he could vote as an individual. (6 RT 1067.) When questioned by the prosecution, Mr. Brown stated that he was "okay" with the beyond reasonable doubt standard of proof. (6 RT 1075.) The prosecutor exercised its ninth peremptory challenge against Mr. Brown.

In his juror questionnaire, T. J. Anderson indicated that his son had been

convicted and sentenced to state prison for three years for an attempted armed robbery. Anderson said that his son received a fair hearing and legal representation. (10 CT 2550.) He stated that he had contact with the police when they were looking for his son, and that the police contact was not a positive experience, but that it was not unpleasant. (10 CT 2555-2556.) Anderson indicated that he was awaiting the results of a CT scan for lung cancer and that this would be a distraction for him if were to sit for the trial. (10 CT 2564-2565.)

Anderson stated in his juror questionnaire that he was "strongly against" the death penalty. He indicated that he did not believe in it and that he could not reconcile the death penalty with his religious beliefs. (10 CT 2567-2568.) He stated that his views on the death penalty would not prevent him from voting on Hartsch's guilt or innocence, but that this process would require some "soul searching." (10 CT 2570.) Anderson said that he could set aside his personal beliefs and follow the law. (10 CT 2572.)

The trial court inquired of Anderson and observed that his responses in the juror questionnaire were almost identical to another potential juror's responses (potential juror Ellen McMullen) who had indicated that she could not impose the death penalty.[13] Anderson clarified that although he was not in favor of the death penalty, he would not automatically exclude it as punishment. (6 RT 1090-1092.) When the prosecutor questioned Anderson, he stated that he had "serious reservations" about the death penalty. (6 RT 1109.) Thereafter, the prosecutor exercised his 12th peremptory challenge against prospective juror T. J. Anderson. (6 RT 1116.)

George Clarke stated on his juror questionnaire that he would have

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13. The prosecution's subsequent for cause challenge of potential juror Ellen McMullen, a non-minority white individual, was granted. (6 RT 1114-1115.)

difficulty keeping an open mind and that if he had heard something about Hartsch's case he would not be able to disregard it. (18 CT 5007.) He indicated that in the past he had been falsely accused of battery. Clarke's brother had been accused of drunk driving. Clarke felt that his brother had not been treated well by the criminal justice system. (18 CT 5008-5009; 7 RT 1136.) Clarke said that he owns "all kinds of guns." (17 CT 5013.) His daughter was employed by a private attorney. (18 CT 5003, 5018.)

Clarke stated that he was unwilling to resolve conflicts in the evidence and decide which evidence is to be believed. Additionally, he said that he would not be comfortable listening to scientific evidence. (18 CT 5020.) Clarke indicated that he was "strongly" in favor of the death penalty. (18 CT 5026.) Clarke failed to respond to the questions based upon a hypothetical penalty phase scenario. (18 CT 5029-5031.)

The trial court inquired of Clarke's response that he was uncomfortable with scientific evidence. Clark changed his response as it was reflected in his juror questionnaire and stated that he could listen to scientific evidence and related expert testimony. (7 RT 1136-1137.) The trial court posed the questions related to the hypothetical in the juror questionnaire to which Clarke responded. (7 RT 1137-1139.) Clarke admitted it would be difficult for him to not discuss the case with anyone during a trial. (7 RT 1139.) Clarke was excused after the prosecutor exercised its 17th peremptory challenge against him. Following this peremptory challenge, the defense noticed its *Wheeler* motion. (7 RT 1185-1186.)

Katrina Williams indicated on her juror questionnaire that she was a single mother with a two and-a-half-year-old son. (18 CT 5047.) Williams indicated that she was open minded, and would not make a decision without hearing both sides. (18 CT 5051.) Williams' third cousin had been convicted of murder and sentenced to prison for seven to 15 years. Williams felt that her

cousin was treated fairly and had received her day in court. (18 CT 5053.) Under the mistaken impression that it is the lawyers' "job," she stated that she was unwilling to resolve conflicts in the evidence and determine what evidence is to be believed. (18 CT 5064.)

In Williams' opinion, sometimes the criminal justice system works, and sometimes it does not but, it "balances out." (18 CT 5058.) Williams responded in the juror questionnaire that she had a "neutral" philosophy on the death penalty. (18 CT 50570.)

When questioned by the trial court, Williams clarified that she could resolve conflicts in the evidence by discussing the evidence with her fellow jurors and reaching a rational conclusion. (7 RT 1149.) In response to the defense voir dire, Williams stated that she could render a verdict in favor of the death penalty or, if appropriate, life without the possibility of parole. (7 RT 1165.) Williams was excused after the prosecutor exercised his 19th peremptory challenge against her. (7 RT 1187.)

Peremptory challenges may be based on a juror's manner of dress, a juror's unconventional lifestyle, a juror's experiences with crime or with law enforcement, or simply because a juror's answers on voir dire suggested potential bias. (*People v. Wheeler, supra*, 22 Cal.3d at p. 275.) Peremptory challenges may be predicated on evidence suggestive of juror partiality that ranges from "the virtually certain to the highly speculative." (*Ibid.*) The point is that a party may exercise a peremptory challenge for any permissible reason or no reason at all. (*People v. Huggins, supra*, Cal.4th at p. 227, citing *Purkett v. Elem, supra*, 514 U.S. at p. 768 and *People v. Jones* (1998) 17 Cal.4th 279, 294.)

Here, the record of voir dire demonstrates permissible or neutral explanations for the prosecutor excusing the African-American potential jurors in question. Ms. Brown viewed the criminal justice system as inconsistent

when meting out punishments for the same crime. Specifically, she felt that the death penalty was imposed "unevenly" and was only "moderately" in favor of capital punishment. Despite her assurance in her juror questionnaire that she would be an impartial juror, Ms. Brown's responses regarding inconsistent punishments called into question her ability to be impartial especially in light of the facts of the case that implicated Castaneda in the Gorman-Creque double murder and the defense position that Castaneda was responsible for all three murders.

Mr. Brown's juror questionnaire also raised a question as to his ability to be impartial. Mr. Brown appeared intent on focusing on the jury as a working group suggesting Mr. Brown may have had a tendency to vote with the group rather than against it. Furthermore, Mr. Brown described an experience which suggested he was harassed by the police and the victim of racial profiling which could lead one to a general distrust of law enforcement.

Anderson indicated in his juror questionnaire that he was "strongly against" the death penalty. Although he stated during oral voir dire that he would not automatically exclude death as punishment, he admitted that he had "serious reservations" about the death penalty. Also, as a result of an attempted robbery conviction, Anderson's son was incarcerated. Anderson's responses would lead a prosecutor to rationally conclude that Anderson would not be sympathetic to the state's position despite his assurances of impartiality.

Clarke indicated that he had been falsely accused of battery and that his brother, a drunk driving offender, had not been treated well by the criminal justice system. Clarke appeared to be an avid gun owner. Additionally, he failed to complete a substantial portion of the juror questionnaire. Although he indicated he was "strongly" in favor of the death penalty, he stated in his juror questionnaire that he was not comfortable with scientific evidence. In oral voir dire, Clarke changed his position regarding scientific evidence. Under the

circumstances, a prosecutor would question the commitment of this potential juror and relative bias based upon his stated exposure to the criminal justice system.

And, lastly, although Williams expressed that she had positive experiences with law enforcement in the past, could remain impartial, and maintained a "neutral" position on the death penalty, she indicated that her third cousin had been convicted of murder and sentenced to seven to 15 years in prison. (See, e.g., *People v. Farnam*, *supra,* 28 Cal.4th at pp. 138, 121 ["close relative's adversary contact with the criminal justice system" is one ground upon which the prosecutor might reasonably have challenged prospective jurors].) Williams stated that she believed her cousin was treated fairly. However, in a somewhat ambiguous response, Williams indicated that, generally, she believes sometimes the criminal justice system works and sometimes it does not. Williams ambiguous response and the fact that she had a family member prosecuted and incarcerated for murder provided a permissive reason to challenge her.

Contrary to Hartsch's assertion that the five African-American potential jurors in question were "unobjectionable" (AOB 50), the record demonstrates reasonable explanations for the prosecution's challenges. The trial court– having the benefit of all of the relevant circumstances– was in the best position to observe voir dire, the answers given by the prospective jurors, the interaction of the prosecutor with the prospective jurors, and the prosecutor's exercise of the peremptory challenges. (*Johnson v. California, supra,* 545 U.S. at p. 170.)

In further support of the prosecutor's good-faith intent in excusing the five African-American potential jurors, the record demonstrates that the prosecutor accepted the jury more than once with African-American potential jurors seated. (See *People v. Snow* (1987) 44 Cal.3d 216, 225 [that the prosecutor accepted a jury containing minorities "may be an indication of the

prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection, [although] it is not a conclusive factor"].) Additionally, jury selection was well underway before the prosecutor exercised a peremptory challenge against any African-American prospective juror. Ms. Brown was the first African-American to be excused when the state exercised its sixth peremptory challenge against her. At the time Williams was challenged, five African-American prospective jurors remained in the venire. (*People v. Avila, supra*, 38 Cal.4th at p. 555.) Additionally, an African-American, who had expressed that he was "moderately" against the death penalty in his juror questionnaire, did in fact sit on the jury. (5 CT 1203.) Substantial evidence supports the trial court's determination that Hartsch failed to establish the requisite, step one prima facie showing necessary to move on to step two of the *Wheeler* motion process. (*People v. Box, supra,* 23 Cal.4th at p. 1188.)

Hartsch attempts to analogize *Johnson,* where the Court found that inferences of discrimination were sufficient to establish a prima facie case. (AOB 49-50; *Johnson v. California, supra*, 545 U.S. at p. 173.) However, the facts of that case are distinguishable. In *Johnson*, an all white jury sat in judgment of an African-American defendant who was charged with the murder and assault of his white girlfriend's 19-month old child. All three of the African-American prospective jurors were removed by the prosecution. (*Id.* at pp. 166-167.) After the second African-American prospective juror was excused by the prosecutor during jury selection, the defense made a motion under *Wheeler* which was denied by the trial court for failure of the defense to meet its burden under step one of *Wheeler,* although the trial court indicated that it was a "close" case. (*Id.* at p. 164-165.) When the third African-American prospective juror was removed, the defense made another motion under *Wheeler*. The trial court did not require the prosecutor to state its reasons

but instead noted that the record supported race-neutral reasons for the excusal. (*Johnson v. California, supra*, 545 U.S. at pp. 165-166.) This Court had reviewed the issue under the strong likelihood test and although the Court deemed the facts "suspicious" and the statistics "troubling" deferred to the trial court's ruling. (*Johnson v. California, supra*, 545 U.S. at p. 167.)

In the instant case, the crime of murder was committed against white and African-American victims. Additionally, the Arevalo's, an Hispanic family, were the victims of a drive-by shooting. The jury as constituted in this case included whites, Hispanics, and an African-American. The prosecutor did not challenge every African-American potential juror in the selection process. Moreover, non-race based explanations were apparent from the record as to those challenges that were exercised against African-Americans.

Finally, Hartsch argues the trial court applied the improper and impermissibly stringent pre-*Johnson* standard for determining whether a prima facie showing had been established. Hartsch asserts this Court should reject the trial court's determination that a prima facie case was not established because it was in error and reverse his convictions, special circumstance findings, and death sentence. Hartsch contends that since the record demonstrates he established a reasonable inference of discrimination and the trial court failed to consider his *Wheeler* motion, the error is structural and not subject to harmless error review by this Court. (AOB 56-57.) Hartsch's argument should be rejected. Even if, assuming arguendo, the strong likelihood test was employed by the trial court, error in its application was clearly harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23 [87 S.Ct. 824, 17 L.Ed.2d 705].) The record supports the trial court's determination that a prima facie case was not made by Hartsch because a reasonable inference of purposeful discrimination does not exist under the facts of the case. (*People v. Cornwell, supra*, 37 Cal.4th at p. 73; *People v. Gray, supra*, 37 Cal.4th at p.

187.) Hartsch fails to establish the trial court committed error by finding Hartsch did not establish a step one prima facie showing that the prosecutor exercised peremptory challenges to excuse the African-American prospective jurors based on group bias under *Wheeler*. Accordingly, his argument should be rejected.

II.

CASTANEDA WAS NOT A GOVERNMENT AGENT ACTING UNDER A PRE-EXISTING ARRANGEMENT AND WITH THE EXPECTATION OF RECEIVING A BENEFIT AND HARTSCH'S INCRIMINATING JAIL CELL STATEMENTS WERE NOT ADMITTED IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL

Hartsch contends the trial court committed prejudicial error in admitting statements taken in violation of his Sixth Amendment right to counsel. (AOB 58-74.) He argues that the statements he made during a jail cell conversation with Castaneda that were secretly recorded should have been excluded because Castaneda, acting as a police agent, deliberately tried to elicit incriminating statements. Hartsch's Sixth Amendment right to counsel was not violated. Hartsch cannot establish a secret interrogation occurred in the jail cell or that Castaneda was acting as an agent of law enforcement or had a pre-existing arrangement with an expectation of receiving a benefit for acting as an informant.

Prior to trial, the defense raised a motion to exclude statements that Hartsch made to the police on June 24, 1995. The defense asserted that Hartsch's statements were taken in violation of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*). (20 CT 521-568.) At the hearing on the motion, the trial court determined that Hartsch waived his rights under *Miranda*. (8 RT 1289.) The defense then

asserted a due process argument in support of his motion to suppress Hartsch's incriminating statements and called Riverside County Sheriff's Detectives John Schultz and Mike Everlund to testify. (8 RT 1290.) Both detectives had participated in Hartsch's June 24th interview. (8 RT 1292, 1303.) Detective Everlund indicated in his testimony that as part of the investigation, he requested that Hartsch and Castaneda be placed in the same jail cell. Detective Everlund made arrangements for a tape recorder to secretly record any conversation between Hartsch and Castaneda. (8 RT 1306-1307.) At that point in the investigation, Castaneda had implicated Hartsch in the Gorman-Creque murder, but Hartsch denied murdering Gorman and Creque or even being present. Detective Everlund wanted to see if Hartsch would make incriminating statements to Castaneda and also, test the veracity of Castaneda's statements to police. (8 RT 1307, 1311.) Castaneda was never told that the conversations with Hartsch would be recorded. (8 RT 1308-1309.) Castaneda was never asked to discuss specific topics with Hartsch. (8 RT 1309, 1311.)

In addition to his due process argument to suppress Hartsch's interview statements, the defense argued as an "afterthought" that since the police arranged to obtain information by secretly tape recording the jail cell conversation between Hartsch and Castaneda, Hartsch's statements made during the jail cell conversation should be suppressed. (8 RT 1317.) The prosecution argued as to the jail cell conversation that even though Castaneda was purposefully housed with Hartsch, Castaneda was never made aware that the conversation would be recorded. Additionally, Castaneda was never directed by law enforcement to ask Hartsch questions that would elicit incriminating responses. The purposes for which law enforcement secretly recorded the jail cell conversation, to see if Hartsch would make any incriminating statements and to test the veracity of Castaneda's statements, were entirely permissible. (8 RT 1318-1319.) In denying Hartsch's suppression

motion in its entirety, the trial court ruled that Castaneda was not acting as an agent of the police, and therefore there was no violation of Hartsch's rights. (8 RT 1320.)

In *Massiah v. United States* (1964) 377 U.S. 201 [84 S.Ct.1199, 12 L.Ed.2d 246] (*Massiah*), the United States Supreme Court held that once an adversarial proceeding has been initiated against the accused, the defendant's constitutional right to the assistance of counsel has attached, and any incriminating statements the government deliberately elicits from the defendant in the absence of counsel is inadmissible at trial against the defendant. (*Massiah v. United States, supra*, 377 U.S. at pp. 206-207.) The "primary concern" of the *Massiah* line of cases "is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459 [106 S.Ct. 2616, 91 L.Ed.2d 364].)

Thus, in order to prove a violation, the defense must establish that an informant was acting as a government agent. That is, he must show the informant was acting under the direction of the government pursuant to a pre-existing arrangement and with the expectation of a resulting benefit or advantage. Conversely, where an informant acts on his own initiative, even where he interrogates the accused, the government is not deemed to have deliberately elicited the statement. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1247.) The Sixth Amendment "is not violated whenever - by luck or happenstance - the State obtains incriminating statements from the accused after the right to counsel has attached." (*Maine v. Moulton* (1985) 474 U.S.159, 176 [106 S.Ct. 477, 88 L.Ed.2d 481].) The defendant "must demonstrate" "some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." (*Kuhlmann v. Wilson, supra*, 477 U.S. at pp. 384-385.) There is no such showing in this case.

A trial court's ruling on a motion to suppress the accused incriminating

statements on *Massiah* grounds is a factual determination entitled to deferential review. (*People v. Coffman* (2004) 34 Cal.4th 1, 67 citing *People v. Fairbank, supra*, 16 Cal.4th at pp. 1247-1248.)

Hartsch argues there was a tacit agreement between Castaneda and the police from which it may be inferred he was acting as a police agent. (AOB 62.) In support of this argument, he asserts Castaneda had an incentive to assist the police in incriminating Hartsch since Castaneda was the only other suspect. (AOB 64.) He claims that the message conveyed by the police to Castaneda was "get [Hartsch] to say something incriminating and you can help yourself." (AOB 65.) Hartsch's argument fails. The trial court's ruling that an agency relationship did not exist should be upheld by this Court.

First, Hartsch's claim that the police urging of Castaneda to help himself during his interview is somehow transformed into an implicit directive to get Hartsch to incriminate himself is unreasonable. (*See People v. Williams* (1988) 44 Cal.3d 1127, 1141 ["[A] general policy of encouraging inmates to provide useful information does not transform them into government agents[.]") Second, the record clearly establishes that the police did not inform Castaneda that (1) he was being housed with Hartsch in a jail cell and (2) that any jail cell conversation between them would be secretly recorded. Indeed, one of the explicit purposes of the conversation being secretly recorded was to test the veracity of Castaneda's statements. There was also the possibility that Castaneda could have made incriminating statements. There simply is no basis for Hartsch's claim that Castaneda was acting as an agent of the police or that it was his purpose to cooperate with the police and elicit incriminating statements from Hartsch.

Even assuming, arguendo, that Castaneda assumed that if he elicited incriminating statements from Hartsch during their time together in the jail cell he would be "helping himself," there was no evidence of any express or implied

offer of leniency or any benefit in exchange for such incriminating statements. Castaneda may have been motivated during his police interviews to cooperate with the police to avoid criminal liability, but his cooperation does not translate into a tacit agreement; no law enforcement official ever asked Castaneda to perform any service or suggested that an offer of leniency was on the table. Despite Hartsch's claim to the contrary, there is no basis to hold the police accountable for the conversation that took place between Castaneda and Hartsch. (*People v . Williams, supra*, 16 Cal.4th at pp. 204-205.)

Moreover, Castaneda did not even elicit the two most incriminating and intelligible statements made by Hartsch. As Castaneda sat by idly, Hartsch was recorded while on the telephone with his brother when he made the statements directing Rushing to go to contact Little Mikey and tell him to get "rid of that shit," which Castaneda later testified he understood to be the gun. (15 CT 4147; 27 RT 2438.) Additionally, Hartsch volunteered to Castaneda that the police had the wrong shoes and that his mother had disposed of his "other" shoes. (15 CT 4148.) Nevertheless, Hartsch claims Castaneda's comments and questions throughout the duration of the conversation were an attempt to "prod and probe" Hartsch in violation of his rights. (AOB 69-71.) However, as discussed above, Hartsch fails to establish Castaneda's comments and questions were deliberately designed to elicit incriminating remarks at the direction of law enforcement in exchange for any benefit. (*Kuhlmann v. Wilson, supra*, 477 U.S. at p. 459.) Respondent notes that even if Castaneda attempted to elicit incriminating statements from Hartsch, he did so on his own initiative, without an express or implied pre-existing arrangement. Such a unilateral act does not satisfy the agency requirement. A defendant's Sixth Amendment right to counsel is not violated when law enforcement officials "'merely accept information elicited by the informant-inmate on his or her own initiative, with no official promises, encouragement or guidance.'" (*People v. Coffman, supra*,

34 Cal.4th at p. 67 quoting *In re Neely* (1993) 6 Cal.4th 901, 915.)

In short, the police set up Hartsch and his cohort for the purpose of eavesdropping, which is irrelevant to Sixth Amendment concerns. (*People v. Lucero* (1987) 190 Cal.App.3d 1065, 1068 [Where suspects in back of police car surreptitiously recorded] and *see People v. Boulad* (1965) 235 Cal.App.2d 118, [Accomplices were arrested, put in adjoining cells and had their conversation secretly recorded by the police]; *People v. Apodaca* (1967) 252 Cal.App.2d 656, [Jail conversation between defendant and visitor secretly recorded]; *People v. Califano* (1970) 5 Cal.App.3d 476, 482, [Co- perpetrator arrestees put in police interview room with hidden microphone]; *People v. Todd* (1972) 26 Cal.App.3d 15, 17, [Hidden tape recorded conversation of suspects in back of police car].) Accordingly, Hartsch's Sixth Amendment right to counsel was not violated when his incriminating statements were used against him. The trial court's ruling that Castaneda was not acting as an agent of law enforcement should be affirmed by this Court.

III.

THE TRIAL COURT PROPERLY DENIED HARTSCH'S MOTION TO SEVER THE GORMAN-CREQUE DOUBLE MURDER CHARGES FROM THE ANGELICA DELGADO MURDER CHARGE

Hartsch contends the trial court abused its discretion when it denied his motion to sever the Gorman-Creque double murder charges from the Angelica Delgado murder charge. Aside from his attack on the trial court's denial of severance, Hartsch urges this Court to find that joinder offended equal protection, and that he was deprived of due process and a fair an impartial trial under the state and federal constitutions. (AOB 76.) Hartsch did not, however, advance any equal protection argument before the trial court, limiting his constitutional arguments to the right to a fair trial and due process analysis. (2

CT 432, 438, 443, 447-448.) As such, he has waived his equal protection claim. (Evid. Code, § 353; see *People v. McPeters* (1992) 2 Cal.4th 1148, 1174.) Hartsch further contends as a basis for reversal that he was deprived of his right to a fair and reliable penalty phase determination under the state and federal constitutions since the evidence of both the Gorman-Creque double murder and Angelica's murder had to have influenced the jury's penalty determination. (AOB 75-97.) The murder counts were properly joined pursuant to Penal Code section 954, and Hartsch fails to establish the trial court abused its discretion or that joinder resulted in a denial of equal protection, due process or a fundamentally unfair trial.

Hartsch moved to sever as three separate offenses the Gorman-Creque murders (counts one and two), Angelica's murder (count three), and the drive by shooting (count four). The defense conceded that joinder was permissible but contended that joinder would prejudice Hartsch and deprive him of his constitutional rights to a fair trial and due process of law. (2 CT 431-432.) In the severance motion, the defense argued that the offenses had separate and distinct motives, there was no significant cross-admissible evidence, that joinder strengthened the overall weakness of the charges that were largely dependent upon Castaneda's unreliable accomplice testimony, and the Gorman-Creque murders (counts one and two) constituted a capital case by satisfying the multiple murder special circumstance requirement. The defense also argued that the evidence Hartsch had sexual relations with Angelica, a minor, at some point before her murder and the evidence of gang membership related to the drive by shooting was unduly prejudicial. The defense requested an in camera hearing to present an ex parte offer of proof as to Hartsch's defense to only some of the charges. The defense claimed that a defense to some of the charges but not to all would unduly prejudice Hartsch. (2 CT 435-445.)

The prosecution asserted in its opposition to Hartsch's motion to sever

that there were similarities in the offenses and relied on Evidence Code section 1101, subdivision (b), arguing the was admissible with respect to identity, intent, and common plan. Although cross-admissibility was not a requirement for joinder, the prosecution argued that the Gorman-Creque murders were cross-admissible with the drive by shooting since the offenses involved a continuous course of conduct. Likewise, the Gorman-Creque murders were cross-admissible with Angelica's murder to establish identity, intent, common plan, and the multiple murder special circumstance. (4 CT 927-933.) The prosecution pointed out that differing motives does not mandate severance of charges and that the evidence of the murders was equally inflammatory. (4 CT 933, 935.) As to Hartsch's contention that the weaknesses in the evidence were impermissibly bolstered by joinder, the prosecution argued that the defense had not met its burden in establishing that the Gorman-Creque murders were any weaker or stronger than Angelica's murder. (4 CT 936.) Nor was the evidence that Hartsch had sex with a minor or was affiliated with a gang so inflammatory that severance was required. (4 CT 936-937.) The prosecution objected to Hartsch's request for an in camera hearing on the defense ex parte offer of proof as to the nature of Hartsch's defense. (4 CT 938.)

At the hearing on the motion, the trial court's only explicit concern was with the joinder of the drive by shooting count (count four). (3 RT 208-209.) The defense pointed out that Castaneda's testimony at the preliminary examination indicated that the Gorman-Creque murders and the drive by shooting were not planned. (3 RT 209.) The defense then argued there were different motives and addressed the prosecution's Evidence Code section 1101, subdivision (b), argument. (3 RT 210-211.) The defense argued the commonality of the offenses was Castaneda, and joinder bolstered the prosecution's case. (3 RT 213.) In response to the defense argument that the Gorman-Creque murders constituted a multiple murder special circumstance

case which disposed of the necessity of joining the Angelica Delgado murder case for the purposes of a capital trial, the prosecution indicated that even if severance was granted, under its charging discretion it fully intended to allege the Gorman-Creque murders as a special circumstance in Angelica's murder case and vice-versa. Therefore, the cases were cross-admissible and joinder would actually conserve judicial resources. (3 RT 214-215.)

The trial court expressly stated its concern that the gang affiliation evidence would not be before the trier of fact but for the drive by shooting count (count four). The prosecution discussed the continuous course of conduct rationale as it related the Gorman-Creque murders and the drive by shooting. Additionally, since the defense position was that Castaneda committed the murders, evidence of the drive by shooting and Hartsch's gang history with the rival gang member residents of the household where the drive by shooting occurred would refute the defense. Alternatively, the prosecution suggested that the drive by shooting count be sanitized rather than severed. The prosecution maintained that the gang membership evidence was relevant in the guilt phase independent of the drive by shooting. (3 RT 218-222, 226-227.)

The trial court rejected Hartsch's request for an in camera hearing on his ex parte offer of proof but, upon Hartsch's unopposed request, permitted the offer of proof to be placed under seal for the purposes of the appellate record. (3 RT 223.) The trial court denied Hartsch's severance motion in its entirety. In doing so, the trial court provided the prosecution an election: the drive by shooting count would be severed if the prosecution sought to introduce any gang evidence, otherwise severance would be denied. The trial court accepted the prosecution's election to proceed on the drive by shooting count absent the gang evidence. (3 RT 228-230.)

The law prefers consolidation of charges because it ordinarily promotes

efficiency. Joinder is governed by Penal Code sections 954[14] and 954.1[15]. Whether a trial court properly joined crimes under Penal Code section 954 concerns a question of law and is subject to independent review on appeal, but whether severance was required in the interests of justice is reviewed for an abuse of discretion. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 188.) In determining whether the trial court abused its discretion in denying a severance motion, the record before the trial court at the time it ruled on the motion is

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14. Penal Code section 954 provides:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count.

15. Penal Code section 954.1 specifically provides:

> In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact.

examined. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120.)

> The severance provisions of [Penal Code] section 954 reflect 'an apparent legislative recognition that severance may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial.

(*People v. Hawkins* (1995) 10 Ca.4th 920, 940, quoting *People v. Bean* (1988) 46 Cal.3d 919, 935; *United States v. Lane* (1986) 474 U.S. 438, 446 fn. 8 [106 S.Ct. 725, 88 L.Ed.2d 814] ["Improper joinder does not, in itself, violate the Constitution" but rather "rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."].) The defendant bears the burden to make a "clear showing of prejudice" to prevent consolidation of properly joined charges. (*People v. Ochoa* (1998) 19 Cal.4th 353, 408-409.)

The criteria used to evaluate whether there was an abuse of discretion are:

> (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of the aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.

(*People v. Manriquez* (2005) 37 Cal.4th 547, 574.)

Cross-admissibility is a factor affecting prejudice. Ordinarily, cross-admissibility dispels any inference of prejudice; however, the absence of cross-admissibility alone does not demonstrate prejudice. (*People v. Stitely* (2005) 35 Cal.4th 514, 531-532.) Penal Code section 954.1 specifically provides that evidence concerning one offense need not be admissible as to any other offense in order to be tried together, that is, cross-admissibility of evidence is not dispositive in determining whether to join offenses. Additionally, the "joinder

of a death penalty case with noncapital charges does not by itself establish prejudice." (*People v. Valdez* (2004) 32 Cal.4th 73, 119-120; *People v. Marshall* (1997) 15 Cal.4th 1, 28.)

Hartsch concedes in his opening brief, as he did at trial, that the three murder counts against him were properly joined under Penal Code section 954. (AOB 82; 2 CT 431-432.) Indeed, the crimes were of the same class, so as a matter of law, they were properly joined; of this there is no dispute. (*People v. Stitely, supra*, 35 Cal.4th at p. 531.) The issue, therefore, is whether the trial court abused its discretion by not severing counts. It did not.

Offenses committed at different times and places against different victims are "connected together in their commission" when they are linked by a "common element of substantial importance." Crimes committed in a "close time frame" (here, over the course of a 48 hour period) can be a "continuing course of criminal conduct." (*People v. Mendoza* (2000) 24 Cal.4th 130, 160; *People v. Lucky* (1988) 45 Cal.3d 259, 276 [multiple robberies, attempted robberies, and murder properly joined considering underlying facts: "armed robber, usually joined by an accomplice, victimized small businesses which were managed by few employees, sold specialized merchandise, and were located in same geographical area."].) In the instant case, there were common elements of substantial importance.

As the prosecutor asserted prior to trial, the evidence established the circumstances surrounding the murders were similar. The murders occurred in a citrus grove in the Highgrove area near Hartsch's residence. The Gorman-Creque killings occurred at night on June 15 and Angelica was murdered on the night of June 16. (1 CT 50-51.) After Hartsch murdered his victims, he left their bodies in the citrus grove. The bodies of Gorman and Creque were discovered by grove workers at dawn on June 15. (1 CT 34, 46, 69.) After killing Angelica, Hartsch left her body in the grove and it was discovered by

grove workers at dawn on June 20. (1 CT 49.) All of the murder victims suffered multiple gunshot wounds. Hartsch owned a .22 caliber gun. Hartsch had the gun with him on the night of the Gorman-Creque murders. Expert testimony established that the murder weapon for all three murders was the same .22 caliber gun. (1 CT 39, 53, 72, 150-151.) Not only this but, Castaneda's testimony at the preliminary examination shed light on the details of the double murder and linked Hartsch to Angelica's murder by placing him with her the last time she was seen alive. Castaneda testified that he saw Angelica with Hartsch at about 11:00 p.m. on June 16. At that time, Hartsch told Castaneda that he was going to the citrus grove to have sex. Castaneda's sister was present and confirmed that she saw Hartsch and Angelica together. About an hour later, Hartsch appeared at Castaneda's mother's residence alone. He had Angelica's jewelry. (1 CT 84-87.) A vaginal slide from Angelica's autopsy confirmed the presence of Hartsch's sperm. (1 CT 156-157.) Additionally, it was during the investigation of Angelica's murder that the police received a tip from Angelica's family that linked Hartsch to the Gorman-Creque killings. (1 CT 40.) Castaneda testified at the preliminary examination that he was with Hartsch when Hartsch committed the double homicide on June 15. Castaneda described the circumstances of the events leading up to and the double homicide in great detail at the preliminary examination. (1 CT 77-79; 4 CT 927.)

Without question, the charges were properly joined given these common elements of substantial importance, i.e., the killer's identity, the time and locations of the murders, the manner of killing, and the murder weapon which was substantiated by eyewitnesses' testimony and the physical evidence. Hartsch cannot establish error because he cannot establish a clear showing of prejudice. (*People v. Valdez, supra,* 32 Cal.4th at p. 199.) That is, based upon the record before the trial court at the time of the motion, Hartsch cannot show

a substantial danger of prejudice compelled severance such that the denial of severance was an abuse of discretion. (*People v. Stitely, supra*, 35 Cal.4th at p. 531.)

The evidence before the trial court at the time it denied Hartsch's motion to sever supports the denial of the motion. (*People v. Stitely, supra*, 35 Cal.4th at p. 531.) The trial court expressly considered the appropriate facts– the potential of some of the offenses and related evidence to inflame the jury, the joining of a weak case with a strong case and the potential for spillover– when denying the motion. (3 RT 216, 218.) In fact, the trial court ruled that if the prosecution wanted to present evidence of gang affiliation as it related to the drive by shooting, the count would be severed so as to not inflame the jury. The prosecution elected to move forward absent the gang affiliation evidence. (3 RT 228-229.)

Hartsch's argument in support of severance is based upon the premise that the murders were unrelated and the evidence was weak. It ignores the substantial importance of the temporal proximity of the murders, the same manner of killing, the same weapon having been used and the same location of the murders. Hartsch was on a killing spree. Nevertheless, Hartsch concludes that evidence of the crimes would not be cross- admissible in separate trials. Given the similarity of the offenses and the tendency of the facts of the offenses to establish identity, opportunity, plan, and intent, Hartsch's argument is not persuasive. Trial courts may admit evidence of prior criminal acts to prove facts such as motive, opportunity, intent, preparation, plan, or knowledge, but not to prove a defendant committed crimes in conformity with a character trait. (Evid. Code, § 1101; *People v. Lewis* (2001) 25 Cal.4th 610, 636.)

> To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. . . . [ ] . . . [ ] A lesser degree of similarity is required to establish relevance on the issue of common design or plan. . . . [ ] The least degree of similarity is required to establish relevance on the issue of intent. [Citation.] For this purpose,

> the uncharged crimes need only be sufficiently similar [to the charged offenses] to support the inference that the defendant probably harbored the same intent in each instance. [Citations.]

(*People v. Kipp* (1998) 18 Cal.4th 349, 369-371 [internal quotes omitted]; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 379.) When admitted to prove a common scheme, prior bad acts evidence may establish that the defendant committed a charged offense. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2, citing 2 Wigmore, Evidence, (Chadbourn rev. ed. 1979) 300, p. 238.)

Notwithstanding Hartsch's attempts to impugn the proof of the individual offenses, the interdependent evidence presented by the prosecution did not render any of the individual cases weak. The People could have prosecuted each transaction individually, introducing evidence of uncharged acts under Evidence Code section 1101, subdivision (b), as necessary. (See 4 CT 929-932 [Prosecution's Opposition to Severance demonstrating Evidence Code section 1101, subdivision (b), admissibility on issues of identity, intent, and plan].) Such an undertaking would have represented an enormous waste of judicial resources. (Cf. *People v. Bean*, *supra*, 46 Cal.3d at pp. 935-936.) In fact, "The first step in assessing whether a combined trial [would have been] prejudicial" requires the reviewing court "to determine whether evidence on each of the joined charges" was admissible under section 1101, "in separate trials on the others. If so, any inference of prejudice is dispelled." (*People v. Osband* (1996) 13 Cal.4th 622, 666 [internal quotations and citations omitted].)

The evidence in the instant case was cross-admissible. In the typical severance case, the People can establish cross-admissibility simply by comparing the crimes and noting the common features, as discussed above. (See e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 424.) Additionally here, the individual murders would be alleged as multiple murder special circumstances in separate trials. (Pen. Code, § 190.2, subd. (a)(3).) Thus, there would be separate murders heard by separate juries if the trial court had severed the

counts.

In any event, even if this Court were to conclude that evidence of each offense would not have been cross-admissible in the separate trial of charges, it does not follow that the trial court abused its discretion in denying Hartsch's severance motion. This is so because the trial court's discretion in denying severance is broader that its discretion in admitting evidence of uncharged offenses. This Court explained in *People v. Walker* (1988) 47 Cal.3d 605:

> [A] ruling on a motion to sever is based on a weighing of the probative value as against the prejudicial effect, but in the weighing process the beneficial results from joinder are added to the probative-value side. This requires the defendant to make an even stronger showing of prejudicial effect than would be required in determining whether to admit other-crimes evidence in a severed trial. [Internal quotations and citations omitted.]

(*People v. Walker, supra*, 47 Cal.3d at p. 623.)

If the trial court's pretrial ruling was correct, Hartsch's convictions cannot be reversed unless joinder was so grossly unfair as to deny due process. (*People v. Stitely, supra*, 35 Cal.4th at p. 531.) Improper joinder does not, by itself, violate the federal Constitution, but raises a constitutional violation only if it results in prejudice so great as to deny a fair trial. (*People v. Sapp* (2003) 31 Cal.4th 240, 259-260, citing *United States v. Lane, supra,* 474 U.S. at p. 446, fn. 8.) Even if the trial court abused its discretion in refusing to sever, reversal is unwarranted unless, to a reasonable probability, the defendant would have received a more favorable result in a separate trial. (*People v. Avila, supra*, 38 Cal.4th at p. 575.) Considering the facts before the trial court at the time Hartsch made his motion to sever, Hartsch fails to establish the trial court abused its discretion when refusing to sever the charges. Hartsch fails to establish that the trial court's ruling fell outside the bounds of reason. (*People v. Manriquez, supra,* 37 Cal.4th at p. 574; *People v. Bradford* (1997) 15 Cal.4th 1229, 1315.) Neither can Hartsch establish the joinder of his offenses resulted

in prejudice so great as to deny him a fair trial.

The thrust of Hartsch's argument on appeal is that he was unduly prejudiced by the joinder because the jury heard inflammatory details of the Gorman-Creque killings that they would not have been able to consider had Angelica's murder been tried separately. (AOB 91-93.) Namely, Hartsch complains of the evidence relating to his conduct and sexual comments towards Creque. (See 1 CT 78, 80-81.) Conversely, he complains he was actually prejudiced by the jury considering evidence of Angelica's murder in deciding whether he was guilty of the Gorman-Creque slayings. (AOB 95.) Hartsch contends that the evidence created a spillover and rendered his trial fundamentally unfair. (AOB 95.) Essentially, he argues that joinder of the incidents supported by weak proof and involving inflammatory details prevented the jury from compartmentalizing the evidence. The foundation of Hartsch's argument lacks substance. The evidence as to all counts was strong and every charge involved inflammatory evidence. For example, Hartsch's conduct of grabbing Creque's breast after he killed her and his related sexual comment in the get-away car goes to the cold-blooded nature of the killing and was not unduly prejudicial. This evidence could not have unusually inflamed the jury in light of his more shocking conduct of gunning down two defenseless people asleep in their truck. Likewise, Hartsch's sexual activity with a minor before her death is no more inflammatory than the killing of two defenseless people. Yet Hartsch argues that Castaneda's testimony relating to Hartsch's conduct and comments towards Creque during and after the Gorman-Creque killings served only to inflame the jury and secure a first degree murder conviction on the murder count related to Angelica Delgado. According to Hartsch, the inflammatory evidence from Angelica's murder assisted the jury in overcoming any doubt concerning the veracity of Castaneda's testimony that Hartsch shot Gorman and Creque to death. Hartsch's argument ignores two

important considerations: First, the independent evidence of the temporal proximity of the murders and the proximity of the murders to Hartsch's home, the murder weapon, ballistics, shoe impressions, and Hartsch's own incriminating statements, all tying him to the murders. Second, the jury's inability to find the special circumstance allegation true that Hartsch murdered Angelica in the commission of a robbery, refutes Hartsch's concern over spillover and aggregating the evidence of the murders. (See *People v. Ruiz* (1988) 44 Cal.3d 589, 606-607 [where jury's verdicts strongly suggested jury was capable of differentiating between different degrees of murder].) In this regard, Hartsch's argument that he was denied his right to an impartial penalty phase determination by the joinder of the charges should also be rejected since the record demonstrates the jury could not have been unusually inflamed in reaching a penalty decision by the joinder of the charges.

In sum, Hartsch fails to establish "a clear showing of potential prejudice," or that the trial court's denial of his severance motion was "outside the bounds of reason." (*People v. Manriquez, supra*, 37 Cal.4th 547, 576 citing *People v. Ochoa* (2001) 26 Cal.4th 398, 423; and see also *People v. Catlin* (2001) 26 Cal.4th 81, 110-113, 109 [upholding trial court's denial of the defendant's motion to sever one murder count from a second murder count].) Even if this Court were to assume that the trial court erred in denying Hartsch's severance motion, the evidence linking Hartsch to each homicide was strong, and none was potentially inflammatory vis-a-vis the other. (*People v. Manriquez, supra*, 37 Cal.4th 547, 576.) Accordingly, error, if any, in denying the severance motion is harmless, because it is not reasonably probable that Hartsch would have received a more favorable result as to any of the offenses even had he been tried separately as to each one. (*Ibid; People v. Avila, supra*, 38 Cal.4th at p. 575.) Nor is there any basis for finding Hartsch would have enjoyed a different penalty verdict but for the joinder of the charges. This

Court should reject Hartsch's claim of prejudicial error.

IV.

THE TRIAL COURT EXERCISED SOUND DISCRETION IN EXCLUDING MADRID'S TESTIMONY REGARDING AN ALLEGED INCIDENT BETWEEN CASTANEDA AND ANGELICA A FEW WEEKS BEFORE HER MURDER

Hartsch contends the trial court prejudicially erred in excluding Diana Madrid's testimony concerning an incident between Castaneda and Angelica that occurred a few weeks before Angelica's murder. He argues that since the defense theory of the case was that Castaneda committed the murders, he was deprived of his state and federal constitutional rights when he was precluded from presenting evidence that raised an inference Castaneda had assaulted and/or raped Angelica during the incident. (AOB 98-105.) The majority of the proffered evidence was irrelevant and highly speculative as it had no tendency to prove Castaneda had ever assaulted and/or raped Angelica. The trial court exercised sound discretion when it excluded the details of the incident proffered by the defense and limited Madrid's testimony to describing Angelica's demeanor after an argument with Castaneda. Hartsch's constitutional rights were not affected.

During the defense case and outside the presence of the jury, the prosecution made a relevance objection and sought to exclude Madrid's testimony proffered by the defense relating to an incident that occurred between Angelica and Castaneda a few weeks before her death wherein the defense intimated that Castaneda had raped Angelica. (23 RT 3314-15.) The defense argued that based on the proffered testimony, there was an inference that Castaneda had either raped or assaulted Angelica after an argument. The defense indicated there was evidence that Angelica returned to the residence

with Castaneda after an argument looking upset, disheveled, and with plant debris on her clothing. The defense contended that Angelica told Castaneda that she was going to tell her mother what had happened, but instead told Madrid she could not talk about it and took a two-hour shower. Castaneda had previously testified that he did not follow Angelica out of her family's residence after an argument and return with her two hours later. The defense contended that Madrid's testimony would impeach Castaneda. (23 RT 3316-3317.) The trial court found that Angelica's relationship with Castaneda a few weeks before her death to be relevant. The trial court determined however that it was not reasonable to infer a rape or assault occurred based on the facts proffered by the defense. The trial court determined the circumstances surrounding the incident were relevant to the extent the incident established the relationship that existed between Castaneda and Angelica. The trial court ruled that eyewitness testimony of a heated argument that occurred between Angelica and Castaneda was relevant. The trial court specifically excluded as irrelevant any testimony regarding Angelica's alleged disheveled appearance after the argument. (23 RT 3317.)

Madrid was called by the defense and testified that Angelica was angry with her sister Veronica and the situation involving Castaneda. A few weeks before her death, Angelica became involved in an argument that Veronica was having with Castaneda. Angelica left the house upset and in a hurry. Castaneda said he would bring her back to the residence. He took Madrid's keys and left. About 45 minutes later, Angelica returned with Castaneda and she still appeared upset. (23 RT 3368-3370.)

Hartsch argues the trial court committed prejudicial error in excluding the proffered testimony that, after an argument, Angelica returned with Castaneda looking upset and disheveled and proceeded to take a two-hour long shower. Hartsch maintains the testimony, offered to impeach Castaneda, would

have tipped the balance of the evidence in his favor if it had been admitted. (AOB 102-105.) The evidence was not relevant and the trial court's ruling excluding the evidence was proper.

Only relevant evidence is admissible. Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) Under the general rule:

> the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission in evidence in the interests of orderly procedure and the avoidance of prejudice. [Citation.]

(*People v. Lawley* (2002) 27 Cal.4th 102, 155.)

Thus, the trial court has broad discretion in determining the relevance of evidence but lacks discretion to admit irrelevant evidence. (*People v. Crittenden, supra,* 9 Cal.4th at p. 132.) The trial court's discretion will not be disturbed on appeal unless its exercise is arbitrary, capricious, or absurd and results in a miscarriage of justice. (*People v. Cash* (2002) 28 Cal.4th 703, 727; *People v. Brown* (2003) 31 Cal.4th 518, 534.) The trial court "retains discretion to admit or exclude evidence offered for impeachment" and any "exercise of discretion in admitting or excluding evidence" is reviewed under the abuse of discretion standard. (*People v. Brown, supra,* 31 Cal.4th at p. 534 quoting *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Here, there was no abuse of discretion in the trial court limiting the extent of Madrid's testimony concerning the argument that occurred a few weeks before Angelica's murder. The evidence was offered to impeach

Castaneda who previously testified that he had not returned to the residence with Angelica after an argument. (17 RT 2587; 23 RT 3316.) The evidence was also offered to support the defense theory of the case that Castaneda killed Angelica. In this regard, the evidence was irrelevant as it had no tendency to prove the killer's identity, intent, or motive. According to the proffered evidence, and to which Madrid eventually testified, the incident took place a few weeks before Angelica's murder. (23 RT 3314-3316, 3368.) The evidence was highly speculative of Castaneda's conduct and any suggestion that Castaneda assaulted or raped Angelica was unreasonable. In response to the defense proffer, the trial court stated as follows:

> You can show the relationship between the two of them and how good or how bad that was you want to paint it; how bad that relationship or how far it deteriorated. That's fine. You may do so. But there has to be more to it as to– and she came back and she was upset. In other words, if they came back together, and she's upset with him, shows their relationship. But I don't think anything more than that– anything more than that at this point, from the offer, is irrelevant.
> [. . . ¶] They come back together. She's upset. She's angry with him and it shows. All that can be– you can go into.

(23 RT 3318.)

The trial court did not abuse its discretion in excluding the details of the proffered evidence. The defense was still permitted to question Madrid about Angelica's demeanor after she returned to the residence with Castaneda. The jury heard evidence that Angelica returned with Castaneda 45 minutes after leaving the residence and still appeared upset. (23 RT 3370.) From this evidence the jury could have reasonably inferred that Castaneda was not as "close" to Angelica as he claimed in his testimony since she did not appear to be calmed down or that he was continuing to upset her. (17 RT 2584.) Either inference sheds some light on the relationship between Castaneda and Angelica that is beneficial to the defense.

Moreover, the defense had ample opportunity to impeach Castaneda not

only on this point but at another point in Madrid's testimony when she stated that Castaneda had inquired as to the value of Angelica's diamond ring. Madrid testified that she told Castaneda she believed it was worth $1,200.00. Castaneda had previously testified that he never asked about the value of Angelica's diamond ring. (16 RT 2583; 23 RT 3365-3366.) Also, the defense pointed out during cross-examination of Castaneda that his trial testimony was inconsistent with his preliminary hearing testimony on the matters of how Castaneda obtained possession of the stolen Honda and Hartsch's level of intoxication the night of the Gorman-Creque murders. (16 RT 2453, 2475.) Castaneda's credibility also came under attack when the defense questioned him about being laid off from his job at the packaging plant, when Hartsch was not, and the purchase of a car with continual mechanical problems from the Hartsches thereby suggesting Castaneda held a grudge against Hartsch and was biased. (16 RT 2458-2459.)

As discussed above, Hartsch had ample opportunity to impeach Castaneda's credibility and promote his theory of the case. The jury was made aware of the incident involving Castaneda and Angelica, the inconsistencies in Castaneda's testimony, and possible bias he had against Hartsch. Accordingly, even assuming that the trial court's ruling excluding the details of the proffered evidence was in error, the error was harmless under the state standard of error set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, that in the absence of the error complained of, a different verdict was not reasonably probable. And, assuming arguendo that the error implicated defendant's rights under the federal Constitution, the error was harmless beyond a reasonable doubt under the standard set forth in *Chapman v. California, supra,* 386 U.S. at pp. 23-24. (*People v. Cash, supra*, 28 Cal.4th at p. 729.) Hartsch's convictions and sentence should be affirmed.

V.

THE TRIAL COURT PROPERLY REFUSED THE INSTRUCTIONS REQUESTED BY THE DEFENSE BECAUSE THE INSTRUCTIONS WERE INAPPLICABLE, ARGUMENTATIVE, AND DUPLICATIVE

Hartsch contends the trial court's refusal to instruct the jury with CALJIC No. 8.27 [First Degree Felony Murder -- Aider And Abettor] and 11 special jury instructions proffered by the defense, resulted in reversible error under state statutory law and denied him his rights to due process and against cruel and unusual punishment under the state and federal constitutions. (AOB 106-131.) The trial court properly refused the defense requested instructions. The pattern jury instruction on aiding and abetting felony murder, CALJIC No. 8.27, was inapplicable under the circumstances where the prosecution's theory was that Hartsch was the perpetrator of the Gorman-Creque murders and Castaneda was not on trial. Additionally, Hartsch's special jury instructions were duplicative, argumentative and properly refused. The prosecution's burden of proving Hartsch's guilt was adequately covered in the standard CALJIC reasonable doubt instruction. Hartsch's state and federal constitutional rights were not violated.

Hartsch argues the trial court erred in not providing CALJIC No. 8.27[16/]

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16. CALJIC No. 8.27, as requested by the defense, states as follows:

> If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of [attempted robbery / robbery], (felony) all persons, who either directly and actively commit the act constituting that crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the

as requested by the defense (see 20 CT 5500; 25 RT 3620-3626) because the instruction would have made it clear to the jury that Castaneda could be found to be an accomplice to felony murder. (AOB 106-114.) As the trial court properly determined, the accomplice and aiding and abetting instructions provided were sufficient in light of the defense theory that Castaneda was the killer and to make Hartsch's point that Castaneda's credibility was in issue and that his testimony should be evaluated with caution.

During discussions on jury instructions, the defense indicated that it would be asking the jury to find that Castaneda was an accomplice. The trial court ruled that Castaneda was not an accomplice as a matter of law. (25 RT 3610.) The trial court found that there was evidence to support that Castaneda was an accomplice and that the jury could make that determination and evaluate his testimony accordingly. (25 RT 3622.) According to the defense, under the requested instruction the jury would be able to find that Castaneda could be prosecuted for the same offenses as Hartsch. The defense asserted that if the jury found Castaneda aided and abetted in a robbery under the requested instruction, then they would also be able to find that he aided and abetted in felony murder. (25 RT 3620-3621.) The defense argued that the jury instruction defining aiding and abetting (CALJIC No. 3.31) was inadequate under the circumstances of this case. (25 RT 3621.) The defense explained that if the jurors found that Castaneda aided and abetted in an attempted robbery,

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killing is intentional, unintentional, or accidental.

[In order to be guilty of murder, as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the [felony] at the time the fatal [blow was struck] [wound was inflicted].] [However, an aider and abettor may still be jointly responsible for the commission of the underlying [felony/ felonies] based upon other principles of law which will be given to you.]

(20 CT 5500.)

under the definition of accomplice, he could be prosecuted for the same offense for which Hartsch is on trial. However, Hartsch was not being tried for robbery, therefore, according to the defense the jury had "no instruction to make the leap from aiding and abetting a robbery to aiding and abetting a murder." (25 RT 3623.)

The prosecution argued that the instruction was inappropriate because Castaneda was not on trial. The instruction was intended to explain how the *accused* can be held liable for the commission of a crime on a theory of aiding and abetting. (25 RT 3621.) The prosecution maintained that it would not argue Hartsch was guilty of the Gorman-Creque murders on a theory of aiding and abetting liability, rather, Hartsch was the perpetrator. The prosecution argued Castaneda's criminal liability was not within the purview of Hartsch's jury. The prosecution pointed out that the aiding and abetting and accomplice instructions to be provided by the trial court were formulated to assist the jury in how to evaluate accomplice testimony. (25 RT 3622-3623.)

The trial court stated that there were two theories upon which the jury could find Castaneda was an accomplice, a conspiracy theory and an aiding and abetting theory. Both of these concepts were defined in other instructions. The trial court noted that CALJIC No. 8.27 as requested by the defense instructed on the specific mental state required for aiding and abetting liability. In other words, it was intended for an aider and abettor on trial for a criminal offense. The jury would not reach that issue since Castaneda was not the accused on trial. (25 RT 3622.) In denying the defense request, the trial court indicated that the instructions to be provided and when considered as a whole were sufficient to assist the jury in evaluating Castaneda's testimony with caution since it was the defense's theory that he was killer. (25 CT 3625-3626.)

Pursuant to the accomplice and aiding and abetting instructions Hartsch's jury was instructed that an accomplice could be prosecuted for the

same offense as the defendant "by reason of aiding and abetting" (CALJIC No. 3.01 [Aiding And Abetting–Defined]; 26 RT 3857-3858; 20 CT 5436) and an aider and abettor acts with knowledge and intent and actively promotes the commission of an offense, mere presence is insufficient (CALJIC Nos. 3.10 [Accomplice–Defined]; 26 RT 3857; 20 CT 5435; 3.14 [Criminal Intent Necessary To make One An Accomplice]; 26 RT 3859; 20 CT 5439). Hartsch's jury was specifically instructed that accomplice testimony must be corroborated, should be viewed with distrust and examined with caution "in light of all of the evidence in the case" (CALJIC Nos. 3.11 [Testimony of Accomplice Must Be Corroborated]; 26 RT 3858; 20 CT 5437; 3.18 [Testimony Of Accomplice To Be Viewed With Distrust]; 26 RT 3859; 20 CT 5440). Furthermore, in determining whether accomplice testimony has been corroborated, the jury was instructed to "[remove it] from the case" and then "determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime" (CALJIC No. 3.12 [Sufficiency Of Evidence To Corroborate An Accomplice]; 26 RT 3858-3859; 20 CT 5438). Finally, Hartsch's jury was provided instruction that the defendant has the burden to prove whether the witness is an accomplice by a preponderance of the evidence (CALJIC Nos. 3.19 [Burden To Prove Corroborating Witness Is An Accomplice]; 26 RT 3859; 20 CT 5441; 2.50.2 [Definition Of Preponderance Of The Evidence]; 26 RT 3859-3860; 20 CT 5442).

It is well-settled that in criminal cases that, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. In other words, "those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531; *People v. Ervin* (2000) 22 Cal.4th 48, 90; *People v. Brown, supra,* 31 Cal.4th at p. 558.)

In the instant case, there was no suggestion by the prosecution that Hartsch was anything other than the perpetrator of the Gorman-Creque murders. Castaneda was not on trial and was not charged with the murders as either the perpetrator or an accomplice. The jury heard Castaneda's detailed testimony which incriminated Hartsch in the murders. (16 RT 2349-2375.) The evidence established that on the night of the Gorman-Creque killings, Hartsch carried his .22 caliber handgun with him, shot at the Arrevalo residence and, once at the citrus grove, walked up to Gorman's parked truck, and shot Gorman so many times he had to stop and reload his gun to finish off Creque while she screamed for her life. The shoe impressions in the area of the Gorman-Creque murder scene matched Hartsch's shoe size and style of shoe. It was established that the length of the shoe impressions was comparable to a men's size 9 ½. Castaneda wore a size 12 shoe. (17 RT 2432; 21 RT 3127.)

The evidence also established that Hartsch killed Angelica with the same gun. (22 RT 3179; 26 RT 3764.) Angelica, who was last seen alive with Hartsch, was shot multiple times in the citrus grove by Hartsch close to the area where he murdered Gorman and Creque a day and a half earlier. Hartsch, who told Castaneda and Martinez he was going to the citrus grove to have sex the last time Angelica was seen alive, had sex with Angelica before he killed her. The shoe impressions in the area of Angelica's corpse matched Hartsch's size and shoe style. Hartsch gave Angelica's jewelry to a girlfriend around the time of the murder. (18 RT 2731-2732, 2745; 19 RT 2782, 2784; 21 RT 3041-3042, 3044, 3127; 22 RT 3187.)

Additionally, Hartsch incriminated himself while in jail when he instructed his brother to call Little Mikey from a phone booth and tell him to get rid of the "shit." Hartsch also made statements to Castaneda during a jail cell conversation which indicated he believed the police did not have evidence against him since him mother disposed of his shoes. (17 RT 2436, 2438; 22 RT

3243, 3246; 15 CT 4147-4148, 4151.)

Hartsch concedes in his opening brief that CALJIC No. 8.27 was not intended to be used in the way the defense requested here and that, ordinarily, the instruction is utilized when the prosecution seeks to hold a defendant liable for the acts of a cohort. (AOB 111.) However, he contends CALJIC No. 8.27 was necessary for the jury to properly consider Castaneda's testimony. In particular, Hartsch argues the instruction was necessary for the juror's to fully comprehend that since Castaneda was potentially liable for the Gorman-Creque murders as an aider an abettor he had great incentive to testify falsely and assist the prosecution in securing a death verdict. (AOB 110-112.) Hartsch ignores the fact that the accomplice and aiding and abetting instructions the jury was provided adequately instructed them on evaluating Castaneda's testimony.

The trial court instructed the jury with CALJIC No. 3.19, which allowed the jury to find Castaneda was an accomplice by a preponderance of the evidence, and with CALJIC Nos. 3.11, 3.12, and 3.18 which instructed as to the corroboration requirement and explicitly instructed that accomplice testimony is to be viewed with "distrust" and evaluated with "caution" in light of all of the evidence. Where, as here, the jury was thoroughly instructed on the issues of accomplice testimony and aiding and abetting, there is no reason to believe the jury did not evaluate Castaneda's testimony as suspect and with considerable caution. Hartsch fails to rebut the presumption that the jury's did in fact understand and faithfully follow the trial court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

In sum, CALJIC No. 8.27 was properly refused by the trial court. "[T]he general rule is that a trial court may refuse a proffered instruction if it ... is duplicative." (*People v. Brown, supra*, 31 Cal.4th at p. 560 quoting *People v. Gurule* (2002) 28 Cal.4th 557, 659.) The trial court did not err in refusing to give CALJIC No. 8.27 since the jury was provided the appropriate accomplice

and aiding and abetting instructions. Contrary to Hartsch's argument, the requested instruction was not so closely and openly related to the facts to make it necessary to the jury's understanding of the case. (*People v. Brown, supra,* 31 Cal.4th at p. 558.) Thus, the trial court had no duty to provide the requested instruction. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1158.)

Even assuming arguendo that the trial court's refusal to instruct the jury under CALJIC No. 8.27 was error, the error was harmless because, as demonstrated above, Castaneda's testimony was sufficiently corroborated. (*People v. Brown supra,* 31 Cal.4th at p. 560.) Accordingly, Hartsch's claim that the trial court prejudicially erred in refusing to provide CALJIC No. 8.27 should be rejected.

Hartsch next argues that the trial court committed reversible error in refusing the defense's requested Special Instructions F through O and Z. Specifically, Hartsch asserts these defense special instructions were not covered in any other jury instructions provided, were not argumentative, and pinpointed Hartsch's third-party culpability theory, rather than specific evidence. (AOB 115-131.) Hartsch's assertion is not supported by the record. The special instructions requested by the defense were properly refused by the trial court since the special instructions were argumentative as they tended to focus the jury's attention on specific evidence and invited the jury to draw inferences in favor of the defense. Additionally, the requested special instructions attempted to convey concepts that were already covered in the standard CALJIC instructions.

Upon request, a defendant is entitled to an instruction that pinpoints his or her theory of the case. (*People v. Ledesma* (2006) 39 Cal.4th 641, 720; *People v. Wright* (1988) 45 Cal.3d 1126, 1137.) The trial court may properly refuse an instruction that highlights or directs the jury to consider certain evidence. (*People v. Ledesma, supra*, 39 Cal.4th at p. 720.) Because the latter

type of instruction "invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence," it is argumentative and therefore should not be given. (*People v. Earp* (1999) 20 Cal.4th 826, 886 quoting *People v. Gordon* (1990) 50 Cal.3d 1223, 1276 overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835; accord, *People v. Mincey* (1992) 2 Cal.4th 408, 437.) A proper instruction pinpoints the theory of the defendant's case rather than specific evidence. (*People v. Ledesma, supra*, 39 Cal.4th at p. 720.)

During discussions on jury instructions, the defense explained that Special Instructions F through O were modifications on the CALJIC and were designed to ask the jury to weigh the evidence as to Castaneda's guilt.[17/] The

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17. The defense third-party culpability special instructions refused by the trial court are as follows:

> If you should find that before this trial a witness made willfully false or deliberately misleading statements concerning the crime(s) for which the defendant is now being tried, you may consider such statement(s) as a circumstance tending to prove a consciousness of guilt on the part of said witness. Such conduct may be considered by you in light of all other proven facts, in deciding whether or not the defendant's guilt has been proven beyond a reasonable doubt. The weight and significance of such evidence, if any, are matters for your determination.

(Defendant's Special Instruction No. F; 20 CT 5514.) [CALJIC No. 2.03 supplemented.]

> If you should find that before this trial a witness attempted to or did persuade, another witness to testify falsely or attempted to, or did fabricate, evidence concerning the crime(s) for which the defendant is now being tried, you may consider such conduct as a circumstance tending to prove a consciousness of guilt on the part of said witness. Such conduct may be considered by you in light of all other proven facts, in deciding whether or not the defendant's guilt has been proven beyond a reasonable doubt. The weight and significance of such evidence, if any, are matters for your determination.

(Defendant's Special Instruction No. G; 20 CT 5515.) [CALJIC No. 2.04 supplemented.]

> If you should find that before this trial a witness attempted to, or did, suppress evidence concerning the crime(s) for which the defendant is now being tried, you may consider such conduct as a circumstance tending to prove a consciousness of guilt on the part of said witness. Such conduct may be considered by you in light of all other proven facts, in deciding whether or not the defendant's guilt has been proven beyond a reasonable doubt. The weight and significance, if any are matters for your determination.

(Defendant's Special Instruction No. H; 20 CT 5516.) [CALJIC No. 2.06 supplemented.]

> As a juror in this case, you are to judge and determine whether or not the prosecution, based upon the evidence presented, has proven the defendant guilty of the crimes charged beyond a reasonable doubt. You are not called upon to return a verdict as to whether the guilt of any other person or persons has been proven.
>
> If the evidence presented in this case convinces you beyond a reasonable doubt that the defendant is guilty, you should so find, even though you believe that one or more other persons are also guilty.
>
> On the other hand, if you entertain a reasonable doubt of the guilt of the defendant after an impartial consideration of all of the evidence presented in the case, including any evidence of the guilt of another person or persons, it is your duty to find the defendant not guilty.

(Defendant's Special Instruction No. I; 20 CT 5517.) [CALJIC No. 2.11.5 supplemented.]

> If you find that an individual was in conscious possession of recently stolen property, the fact of such possession, together with corroborating evidence tending prove he committed the theft, is sufficient to permit an inference that he stole the property. The corroborating evidence referenced need only be slight, and need not by itself be sufficient to warrant a finding that he committed the theft.
>
> As corroboration, you may consider the attributes of

possession- time, place, and manner, that he had an opportunity to commit the theft, his conduct, his false or contradictory statements, if any, and other statements he may have had with reference to the property, a false account of how he acquired possession of the stolen property, and any other evidence which tend to connect him with the theft of the property.

(Defendant's Special Instruction No. J; 20 CT 5518.) [CALJIC Nos. 2.20/2.15 supplemented.]

In judging the statement made by any witness who testified against the defendant, if you should have any reasonable doubt as to the credibility or truthfulness of any such statement, you must resolve that doubt in favor of the defendant, and find such statement to be untrue.

(Defendant's Special Instruction No. K; 20 CT 5519.) [CALJIC No. 2.21.2 supplemented.]

If you should find that during the course of this trial a witness' testimony was willfully false or deliberately misleading, in whole or in part, you may consider such testimony in assessing the witness' credibility. Such evidence of a witness' false or misleading testimony may not be considered as a circumstance tending to prove the guilt of the defendant.

The weight and significance of such evidence, if any, are matters for your determination.

(Defendant's Special Instruction No. L; 20 CT 5520.) [CALJIC 2.21.2 supplemented.]

Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive in the defendant or another person may tend to establish that person's guilt. Absence of motive in the defendant may tend to establish his innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(Defendant's Special Instruction No. M; 20 CT 5521.) [CALJIC 2.51 modified.]

The flight of a person immediately after the commission of a crime, although not sufficient to establish his guilt, is a fact which, if proved, may be considered by you in light of all other

defense argued that because of the defense that Castaneda was the killer, if the jury found reasonable doubt existed as to Hartsch's guilt, an acquittal would result. (25 RT 3644-3645.) The prosecution objected to the Special Instructions F through O on the ground they were argumentative. The prosecution pointed out that Castaneda was not on trial and the pattern CALJIC instructions provide sufficient instruction on the credibility of witnesses. The prosecutor maintained that the point was to ask the jury to determine Castaneda's status as an accomplice which related to his trustworthiness and reliability as a witness, not to ask the jury to determine Castaneda's guilt. (25 RT 3646.)

In refusing the defense's bundle of Special Instructions F through O, the

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> proved facts in judging the testimony, credibility, and culpability of the witness. The weight to which this circumstance is entitled is a matter for your determination.

(Defendant's Special Instruction No. N; 20 CT 5522.) [CALJIC No. 2.52 supplemented.]

> If, during the course of this trial, you should find that a witness has failed to explain or deny any evidence which tended to incriminate him, and which he can reasonably be expected to deny or explain because of facts within his knowledge, you nay (*sic,* may) take that failure into consideration as tending to indicate the truth of his testimony and, as indicating that, among the inferences that may be reasonably drawn therefrom, those unfavorable to the witness are the more probable.
>
> The failure of a witness to deny or explain evidence against him does not, by itself, warrant an inference of his guilt, however, it is a fact which you may consider in judging the testimony, credibility, and culpability of the witness.
>
> If the witness does not have the knowledge that he would need to deny or to explain the evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence.

(Defendant's Special Instruction No. O; 20 CT 5523.) [CALJIC No. 2.62 supplemented.]

trial court recognized the defense theory of the case that Castaneda was the killer but determined the CALJIC instructions were adequate to provide instruction on the defense theory of the case. Additionally, the trial court found that the defense Special Instructions F through O bordered on being argumentative. (25 RT 3647.)

The defense proffered Special Instruction Z, which as the trial court observed, "point[ed] a finger" at Castaneda.[18/] (26 RT 3658.) The prosecution argued the special instruction was argumentative, covered in other jury instructions, confusing in light of the other jury instructions, and not supported by the law. (26 RT 3657-3658.) The trial court denied the special instruction and stated that the CALJIC instruction providing that the People have the burden of proving the defendant's guilt beyond a reasonable doubt was appropriate. (26 RT 3658.)

The defense proposed Special Instructions F, G, H, and Z citing as authority the decisions in *People v. Hall* (1986) 41 Cal.3d 826, and *People v. Edelbacher* (1989) 47 Cal.3d 983. In those cases, this Court stated that evidence of third-party culpability need only be capable of raising a reasonable

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18. Special Instruction Z, as requested by the defense, states as follows:

> Evidence has been presented during the course of this trial indicating or tending to prove that someone other than the defendant committed, or may have had a motive and opportunity to commit the offense(s) charged. In this regard, it is not required that the defendant prove this fact beyond a reasonable doubt.
>
> The weight and significance of such evidence are matters for your determination. If after consideration of all of the evidence presented, you have a reasonable doubt that the defendant committed the offense(s) charged, you must give the defendant the benefit of the doubt and find him not guilty.

(Defendant's Special Instruction No. Z; 20 CT 5536.)

doubt of defendant's guilt to be admissible. (*People v. Hall, supra*, 41 Cal.3d at p. 833, *People v. Edelbacher, supra*, 47 Cal.3d at p. 1017.) The Court did not discuss any necessity for a particularized jury instruction regarding such evidence. Here, inasmuch as Special Instructions F, G, and H state that false or misleading statements, attempts to dissuade witness testimony or fabricate evidence, and efforts to suppress evidence indicate a consciousness of guilt of a witness in the context of evaluating Hartsch's guilt beyond a reasonable doubt, CALJIC No. 2.90 [Presumption Of Innocence-- Reasonable Doubt-- Burden Of Proof] adequately covers these subjects. (26 RT 3857; 20 CT 5434.) Likewise, related Special Instruction Z is adequately covered by CALJIC No. 2.90. Moreover, the special instruction was argumentative because it directed the jury to consider evidence that another person had the motive and opportunity to commit the murders in determining whether there was reasonable doubt as to Hartsch's guilt. (*People v. Ledesma, supra*, 39 Cal.4th at p. 720.)

As to the defense Special Instruction No. I, the defense cited *People v. Carrera* (1989) 49 Cal.3d 291, 312, n. 10, *People v. Sully* (1991) 53 Cal.3d 1195, 1218, and *People v. Price* (1991) 1 Cal.4th 324, 446, in support of the proposed instruction. The defense also indicated the requested instruction supplemented CALJIC No. 2.11.5 [Unjoined Perpetrators Of Same Crime] the purpose of which is to discourage the jury from speculating as to the prosecution's reasons for not prosecuting those shown by the evidence to have participated in the offenses and "the eventual fates of the unjoined perpetrators." (*People v. Price, supra,* 1 Cal.4th at p. 446 citing *People v. Cox* (1991) 53 Cal.3d 618, 668.) Here, an unjoined perpetrators instruction was not given pursuant to CALJIC No. 2.11.5 by the trial court or requested by the parties. Nor would such an instruction been appropriate. (See CALJIC No. 2.11.5 Use Note ["Do not use this instruction if the other person is a witness for

either the prosecution or the defense."].) The authority advanced in support of the Special Instruction I relates to the giving of CALJIC No. 2.11.5 and does not support the language of the requested instruction. Special Instruction I essentially provides that if the jury has a reasonable doubt as to whether Hartsch committed the offenses they should acquit him. (20 CT 5517.) Hence, CALJIC No. 2.90, which Hartsch's jury was instructed under, adequately conveys the concept of reasonable doubt. (*People v. Wright, supra*, 45 Cal.3d at p. 1134.) Accordingly, Hartsch's requested instruction was duplicative.

In Special Instruction J, Hartsch requested that the jury be instructed on "conscious possession of recently stolen property." The special instruction was intended to supplement CALJIC No. 2.20 [Believability Of Witness] under which the jury was instructed. (26 RT 3851-3852; 20 CT 5418.) The language of the requested special instruction was properly refused as argumentative as it tends to focus the jury's attention on specific evidence and "invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence" (*People v. Earp, supra,* 20 Cal.4th at p. 886.)

The defense Special Instructions K and L regarding the credibility of witness' testimony against the defendant and reasonable doubt was adequately covered by CALJIC Nos. 2.90 and 2.20. (26 RT 3851-3852, 3857; 20 CT 5418, 5434, 5519-5520.) The special instructions were duplicative and therefore properly rejected by the trial court. (*People v. Moon* (2005) 37 Cal.4th 1, 30-31 [Trial court properly refused pinpoint instruction because in a general way the concepts were incorporated in the pattern instructions.].)

The trial court properly refused the defense Special Instructions M and N that instructed the jury, for the purpose of determining whether there was reasonable doubt as to Hartsch's guilt, to consider evidence that another person had a motive to commit the crime and the flight of a person immediately after the commission of a crime. (20 CT 5521-5522.) "An instruction that asks the

jury to 'consider' certain evidence is properly refused as argumentative." (*People v. Ledesma, supra*, 39 Cal.4th at p. 720 quoting *People v. Wright, supra*, 45 Cal.3d at p. 1135.) Likewise, Special Instruction O was argumentative and properly refused. (20 CT 5523.) The instruction was improper because it invited the jury to draw inferences from the evidence that were favorable to Hartsch. (*People v. Earp, supra,* 20 Cal.4th at p. 886.)

Even if any of the defense's requested special instructions properly pinpointed Hartsch's theory of the case without focusing on specific evidence and the trial court erred in refusing them, any error was harmless. This Court held in *People v. Earp, supra,* 20 Cal.4th at p. 887, the failure to give a requested pinpoint instruction on third-party culpability was harmless under the reasonable probability test where the jury was instructed with CALJIC No. 2.90 that the prosecution had the burden of proving a defendant's guilt beyond a reasonable doubt and defense counsel's argument conveyed the defense theory that someone else committed the crime. Other cases have held the failure to give a requested third-party culpability instruction is not error because the concept is covered by CALJIC No. 2.90 alone or CALJIC No. 2.90 and other standard instructions. (*People v. Wright, supra*, 45 Cal.3d at p. 1134 [concept covered by CALJIC 2.90]; *People v. London* (1988) 206 Cal.App.3d 896, 908 [concept covered by CALJIC Nos. 2.90 and 2.91]; *People v. Kegler* (1987) 197 Cal.App.3d 72, 80 [concept covered by CALJIC Nos. 2.90, 2.91, 2.92 and 4.50]; *People v. Martinez* (1987) 191 Cal.App.3d 1372, 1378 [concept covered by CALJIC 2.90].) Here, the jury was instructed with CALJIC No. 2.90. (26 RT 3557; 20 CT 5434.) Because the general instruction on the presumption of innocence and burden of proof is sufficient to inform the jury that the People have to prove a defendant's guilt beyond a reasonable doubt and that a defendant does not have to prove his innocence or the guilt of a third-party, Hartsch cannot demonstrate prejudicial error occurred.

Hartsch presented evidence of third-party culpability; Hartsch attempted to show that Castaneda was the true ring leader the night of the Gorman-Creque killings, and that he was the shooter. The defense also attempted to establish that Castaneda killed Angelica. (26 RT 3764, 3771, 3773, 3778-3779, 3789.) The jury was well aware of the defense theory of the case that Castaneda was responsible for the murders. In addition, the jury was instructed on accomplice liability and aiding and abetting, and that the testimony of accomplices should be viewed with distrust. (26 RT 3857-3860; 20 CT 5435-5440.) Accordingly, there is no reasonable probability that a result more favorable to Hartsch would have been reached had the jury been instructed on the defense's requested third-party culpability special instructions. (*People v. Earp, supra*, 20 Cal.4th at p. 887; *People v. Ledesma, supra,* 39 Cal.4th at p. 721.) Hence, this claim fails.

In summary, Hartsch's request that the jury be instructed under CALJIC No. 8.27 was properly refused. Castaneda was not on trial and the instructions provided adequately conveyed Hartsch's point, in keeping with the defense theory that Castaneda was the killer, that Castaneda's credibility was in issue and that his testimony should be evaluated with caution. Hartsch's Special Instructions F through O, and Z were argumentative and tended to focus the jury's attention on specific evidence and invited the jury to draw inferences in favor of the defense. Additionally, the concepts that the requested special instructions attempted to convey were already covered in the standard CALJIC instructions. Thus, they were inappropriate pinpoint instructions and were properly refused by the trial court. Accordingly, Hartsch's state and federal constitutional rights were not violated. His claim to the contrary should be rejected.

VI.

THERE WAS NO CUMULATIVE ERROR

Hartsch contends that the cumulative effect of the trial court's alleged errors asserted in Arguments IV and V of Hartsch's opening brief compels reversal of the judgment. (AOB 132-134.) Hartsch's contention lacks merit, as there was neither error nor prejudice.

As discussed above, there was no error in the trial court's exclusion of the evidence offered by the defense that suggested Castaneda raped and/or assaulted Angelica a few weeks before her death. The trial court properly limited the evidence of the incident to what Madrid actually witnessed. Moreover, the defense had ample opportunity to impeach Castaneda on other matters. The trial court did not commit prejudicial error in refusing to instruct the jury with CALJIC No. 8.27 as requested by the defense and Hartsch's requested Special Instructions F though O and Z. The requested instructions were duplicative and argumentative. The concepts of reasonable doubt and credibility of the witnesses were adequately conveyed in the pattern CALJIC instructions the jury was provided. "If none of the claimed errors [are] individual errors, they cannot constitute cumulative errors that somehow effected the . . . verdict." (*People v. Beeler* (1995) 9 Cal.4th 953, 994.)

Even assuming that the trial court erred in some respect, Hartsch has not shown that he was denied his right to due process or to a fair trial. (See *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349 [""the litmus test is whether defendant received due process and a fair trial""].) A defendant is entitled to a fair trial, not a perfect one. (*People v. Mincey*, *supra*, 2 Cal.4th at p. 454.) There was overwhelming evidence of Hartsch's guilt. Hartsch had an impartial jury which represented a fair cross section of the community. The jury was made fully aware of the defense theory of the case that Castaneda was the killer and that his testimony was to be viewed with caution. The trial court's rulings

were fair. The defense had ample opportunity to impeach Castaneda's credibility in the eyes of the jury. Any errors, therefore, had little if any significance. Consequently, "[w]hether considered individually or for their 'cumulative' effect, they could not have affected the process or result to [Hartsch's] detriment." (*People v. Sanders* (1995) 11 Cal.4th 475, 565; see also *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236 [given strong prosecution case, cumulative effect of errors did not prejudice defendant].)

VII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT HARTSCH SHAVED "1-8-7" INTO HIS HAIR WHEN INCARCERATED WHILE AWAITING TRIAL ON THE CURRENT CHARGES

Hartsch contends the trial court abused its discretion in admitting the evidence that he shaved "1-8-7" in his hair. (AOB 135-144.) Hartsch was not unduly prejudiced by the evidence; there was no abuse of discretion.

Hartsch objected on the grounds of relevance and undue prejudice under Evidence Code section 352 to the testimony of a Riverside County Sheriff's Office corrections deputy that in October of 1995 while jailed and awaiting trial on the current offenses, Hartsch was observed to have the number "1-8-7," the Penal Code section for murder, shaved into his hair. (19 RT 2786-2788.) The prosecution argued that Hartsch's conduct represented an implicit admission. (19 RT 2789.) The trial court found the incident relevant and, since Hartsch was charged with three counts of Penal Code section 187, the evidence was not excludable on the ground of prejudice. (19 RT 2789.) The jury heard the testimony that on October 2, 1995, when Hartsch stepped out of his jail cell at 6:00 a.m. for the breakfast line up, he had the numbers "1-8-7," the Penal Code section for murder, shaved in his hair. The corrections deputy testified

that he was busy and before he had an opportunity to photograph Hartsch, Hartsch had shaved his head completely bald. (19 RT 2790-2791.) The defense did not cross-exam the corrections deputy regarding the incident.

Evidence Code section 352 permits a trial court to exercise its discretion to determine if the probative value of the proffered evidence substantially outweighs the probability its admission will unduly consume time or "creates substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Trial court decisions to admit or exclude evidence are reviewed for abuse of discretion, and will only be disturbed except to avert a miscarriage of justice. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Cain* (1995) 10 Cal.4th 1, 33.)

The trial court's decision under Evidence Code section 352 that the probative value of the corrections deputy's testimony outweighed the prejudicial effect was correct and the decision allowing his testimony was not an abuse of discretion. The prejudice referred to in Evidence Code section 352 applies to evidence that uniquely tends to evoke an emotional bias against one party as an individual and has very little effect on the issues. (*People v. Wright* (1985) 39 Cal.3d 576, 585.) Evidence Code section 352 is designed to avoid "undue" prejudice, which differs from the prejudice or damage created by relevant, probative evidence. Evidence should be excluded as unduly prejudicial when it inflames the jury's emotions and thereby motivates jurors to use the evidence, not to logically evaluate the point upon which it is relevant, but instead to reward or punish one side because of the jurors' emotional reaction. "Unduly prejudicial" evidence should be excluded when a substantial likelihood exists that the jury will use it for an illegitimate purpose. (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

In the present case, Hartsch's conduct of shaving "1-8-7" into his hair was relevant and probative on the issue of his guilt. Hartsch denied that he

murdered Gorman, Creque, and Angelica, and his theory at trial was that Castaneda was the killer. Since Hartsch was on trial for three murders, as the trial court pointed out, there was nothing overly prejudicial about the numbers representing murder shaved into his hair in relation to the charges. In this regard, the jury could not have been inflamed by Hartsch's conduct and use the evidence to punish Hartsch or for some other illegitimate purpose. Additionally, the corrections deputy's testimony was brief and to the point. There was no undue consumption of time or confusion of the issues in relation to the incident.

In *People v. Ochoa, supra,* 26 Cal.4th 398, this Court determined that the trial court's ruling admitting evidence of the defendant's "1-8-7" tattoo, which was indelibly marked on his forehead after the murders had occurred, was not an abuse of discretion. (*Id.* at p. 438.) This Court stated:

> The trial court properly found the tattoo represented an admission of defendant's conduct and a manifestation of his consciousness of guilt. The court reasonably considered the tattoo highly probative, as it would be unlikely that an innocent person would so advertise his connection to murder.

(*Id.* at p. 438.)

Hartsch, as did the defendant in *Ochoa*, argues that the "1-8-7" evidence is speculative and ambiguous regarding guilt. However, Hartsch's argument "concerns only the weight of this evidence, not its admissibility, which does not require complete unambiguity." (*People v. Ochoa, supra,* 26 Cal.4th at p. 438.) Further, Hartsch fails in his attempt to distinguish the defendant's conduct in *Ochoa* as somehow more significant and meaningful since it was a tattoo, i.e., permanent, rather than a hairstyle and merely a show of bravado. (AOB 140-141.) In the context of the cases, *both* acts would appear to be based upon bravado. Moreover, the relative permanence of a tattoo and a hairstyle is a distinction without a difference. Hartsch, like the defendant in *Ochoa*,

purposefully displayed the Penal Code section number for murder on his body. Whether Hartsch displayed "1-8-7" to advertise that he had committed murder or to pretend that he had goes to the weight of the evidence, not its admissibility. Additionally, as discussed above, since Hartsch was actually charged with murder, it could not have inflamed the passions the jury and cause them to use the evidence for an illegitimate purpose to have heard the evidence that Hartsch displayed "1-8-7" in his hair.

Hartsch's claim that he was deprived of a fair trial at the penalty phase based on the evidence should also be rejected. (AOB 142.) Hartsch cites to the prosecutor's use of the "1-8-7" evidence in argument during the penalty phase where the prosecutor likens Hartsch's shaved head with the numbers "1-8-7" to a "badge of honor" worn by a "cocky, arrogant son of a bitch." (30 RT 4584; AOB 139.)

> A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness" [citation], and he may "use appropriate epithets warranted by the evidence." [Citations.]

(*People v. Wharton* (1991) 53 Cal.3d 522, 567-568; *People v. Hill* (1998) 17 Cal.4th 800, 819 [quoting *Wharton*]; see *People v. Hines* (1997) 15 Cal.4th 997, 1007, 1062 [where the prosecutor labeled defendant "arrogant, cold, and malicious," "a predator," "a thief," and "a perjurer and a liar"]; *People v. Sully, supra,* 53 Cal.3d at pp. 1249-1250 [no misconduct was found where prosecutor referred to the defendant as a "creep," a "predator," and "society's worst nightmare"].)

In the present case, the prosecutor's descriptive terms of "cocky" and "arrogant" were warranted by the evidence. While the prosecutor's use of the phrase "son of a bitch" exceeded proper argument, the brief comment did not prejudice Hartsch. Moreover, the evidence demonstrated that Hartsch *was* cocky and arrogant, in the way that he killed his victims, attempted to cover his tracks, and in the way he acted towards those around him. In addition to the

evidence of the "1-8-7" Hartsch shaved into his hair and sported during a breakfast lineup and service while incarcerated, the jury heard other evidence that demonstrated his character for being "cocky" and "arrogant." Hartsch coordinated the disappearance of physical evidence against him, his shoes and his gun, through his mother and his brother and then told Castaneda that the police had no evidence tying him to the murders. (17 RT 2436, 2438; 22 RT 3243, 3246; 15 CT 4147- 4148, 4151.) He showed off Angelica's jewelry to Castaneda within 90 minutes of her last being seen alive. (16 RT 2401-2402.) He wrote a letter to his girlfriend, to whom he had given Angelica's jewelry, after the murders stating, "I shocked everyone. No one can believe what I did." (22 RT 3187-3188, 3197.) He told a fellow prisoner about the murders he committed, including the way he gunned down 20-year-old Michael Wheeler. (28 RT 4291-4292.) While on a cycling/camping trip sponsored by a court ordered program for juvenile offenders, Hartsch forced another juvenile to orally copulate him purportedly because that juvenile had not shared a piece of bread with one of Hartsch's other tent mates. (28 RT 4179-4182, 4214-4215.) In light of this and all of the other evidence of Hartsch's conduct, the prosecutor's descriptive terms of cocky and arrogant were warranted. While the prosecutor's use of the phrase "son of a bitch" overstepped the proper bounds of rhetoric in closing argument, Hartsch was not deprived of a fair penalty phase determination by the prosecutor's use of descriptive language.

Furthermore, considering that the evidence of the "1-8-7" shaved in Hartsch's hair is not viewed in a vacuum, and the overwhelming evidence of Hartsch's guilt, any error in admitting the evidence was harmless. (*People v. Ochoa, supra*, 26 Cal.4th at p. 439.) Thus error, if any, does not require reversal because it is not reasonably probable Hartsch would have received a more favorable outcome if the evidence had not been admitted. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

VIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON CONSCIOUSNESS OF GUILT PURSUANT TO CALJIC NOS. 2.03 AND 2.06

Hartsch contends the trial court erred in instructing the jury on consciousness of guilt pursuant to CALJIC No. 2.03 [Willfully False Or Misleading Statements] and CALJIC No. 2.06 [Attempt To Suppress Evidence]. Hartsch claims these instructions were duplicative, impermissibly argumentative, and allowed the jury to make irrational inferences, and that they violated his rights to due process, a fair trial, a jury trial, equal protection, and reliable determinations on guilt, special circumstances and penalty. Hartsch asserts the instructions were particularly prejudicial because the trial court refused instructions requested by the defense that would have permitted similar inferences of Castaneda's consciousness of guilt based on Castaneda's conduct and/or false statements. (AOB 144-157.) These contentions are meritless.

Over defense objection, the prosecutor requested that the jury be instructed pursuant to CALJIC No. 2.03 that if it found that Hartsch made a willfully false or deliberately misleading statement about the crimes, this evidence could be considered as tending to show a consciousness of guilt. (25 RT 3601; see 20 CT 5411.) Hartsch asserted the evidence was insufficient to support the giving of the instruction. The prosecutor argued that the instruction applied to statements Hartsch made to Riverside County Sheriff's Investigators John Schultz and Allen Paine when interviewed on June 23, 1995, at the packaging plant where he worked that the last time he saw Angelica was at the Orange Show in May of 1995. (25 RT 3601; see 14 RT 2083-2086, 2089-2090.) Hartsch denied contact with Angelica prior to her murder, despite the fact that his semen was present when her body was discovered in mid-June. (25 RT 3601; see 21 RT 3041-3042.) In light of the DNA evidence, the trial court concluded that the instruction was appropriate and instructed the jury pursuant

to CALJIC No. 2.03 as follows:

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

(26 RT 3849; 20 CT 5411.)

The prosecutor also requested, over defense objection, that the trial court instruct the jury pursuant to CALJIC No. 2.06 on efforts to suppress evidence. The trial court, concluding the instruction was appropriate, overruled the objection without argument by the parties. (25 RT 3602.) The trial court instructed the jury pursuant to CALJIC No. 2.06 as follows:

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

(26 RT 3849; 20 CT 5412.)

Hartsch does not contend the evidence was insufficient to support the giving of CALJIC Nos. 2.03 and 2.06. Rather, he claims the instructions were unnecessary. He concludes that since the jury was provided instruction on circumstantial evidence in CALJIC Nos. 2.00 [Direct And Circumstantial Evidence– Inferences], 2.01 [Sufficiency Of Circumstantial Evidence--Generally], and 2.02 [Sufficiency Of Circumstantial Evidence To Prove Specific Intent Or Mental State], the consciousness of guilt instructions were duplicative and benefitted the prosecution in violation of his due process and equal protection rights. (AOB 145-146.) Even though Hartsch did not raise the issue below, the consciousness of guilt instructions were not duplicative of other circumstantial evidence instructions. (See 20 CT 5408-5410.) For

example, CALJIC No. 2.03, unlike the other circumstantial evidence instructions, specifically referred to the pretrial making of "a willfully false or deliberately misleading statement concerning the crimes for which [the defendant] is now being tried." (26 RT 3849; 20 CT 5411.) Likewise, CALJIC No. 2.06 made specific reference to the defendant's destruction or concealment of evidence. (26 RT 3849; 20 CT 5412.) Thus, the consciousness of guilt instructions were not duplicative of the other instructions - no doubt explaining why defense counsel did not object on this ground below.

And, assuming, without conceding, the consciousness of guilt instructions were duplicative of other instructions, any conceivable error must be deemed harmless since, the logical extension of Hartsch's argument would be that the jury was already instructed on the principles contained in CALJIC Nos. 2.03 and 2.06 in CALJIC Nos. 2.00, 2.01, and 2.02. Thus, following Hartsch's argument, CALJIC Nos. 2.03 and 2.06 did not tell the jurors anything they did not already know from the other instructions. (See *People v. Watson, supra,* 46 Cal.2d at p. 836; *Chapman v. California, supra,* 386 U.S. at p. 24.) This claim should be rejected.

In Hartsch's main argument against the consciousness of guilt instructions, he contends the instructions were impermissibly argumentative and that they allowed the jury to make irrational inferences. (AOB 146-156.) This contention lacks merit.

This Court has repeatedly rejected the instant challenges to CALJIC Nos. 2.03 and 2.06. (See *People v. Stitely, supra,* 35 Cal.4th at p. 555 [CALJIC No. 2.03 is not improperly argumentative and does not generate irrational inference of consciousness of guilt]; *People v. Benavides* (2005) 35 Cal.4th 69, 100 [same]; *People v. Holloway* (2004) 33 Cal.4th 96, 142 [rejecting claim that CALJIC Nos. 2.03 and 2.06 are argumentative and fundamentally unfair]; *People v. Nakahara* (2003) 30 Cal.4th 705, 713 [rejecting claim that CALJIC

No. 2.03 is impermissibly argumentative and allowed irrational inferences]; *People v. Cash, supra,* 28 Cal.4th at p. 740 [rejecting argument that CALJIC No. 2.06 is improperly argumentative].)

As this Court has explained, the cautionary language of CALJIC Nos. 2.03 and 2.06 helps a defendant by admonishing the jury to use circumspection with respect to evidence that might otherwise be considered decisively inculpatory. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224; accord *People v. Holloway, supra,* 33 Cal.4th at p. 142.) Moreover, as this Court has previously stated,

> The inference of consciousness of guilt from willful falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction.

(*People v. Holloway, supra*, 33 Cal.4th at p. 142.)

Hartsch asks this Court to reconsider its previous rulings on the matter but has provided no compelling reason why his case calls for a different result. (AOB 154.) Here, it would not have been irrational for the jury to infer Hartsch's consciousness of guilt from his false and misleading statements to the police that he had not been in contact with Angelica for several weeks before her death. Likewise, it would not have been irrational for the jury to infer consciousness of guilt based on his statements to Castaneda in the jail cell indicating the police had no evidence against him because his mother had disposed of his shoes or his instructions to Rushing to get "Little Mikey" to dispose of the gun. Accordingly, Hartsch's claim should be rejected.

Hartsch contends the trial court committed reversible error because, in providing the consciousness of guilt instructions as to him and rejecting equivalent instructions concerning Castaneda's conduct, it unfairly directed the jury to focus upon specified acts of Hartsch and hindered the defense. (AOB 156-157.) Even assuming, arguendo, there was any error in providing the

consciousness of guilt instructions as they related to Hartsch, it was harmless. The jury was fully aware of the defense theory of the case that Castaneda was the killer and his version of events was not to be trusted. (See 26 RT 3764, 3771, 3773, 3779, 3787.) The jury was thoroughly instructed on evaluating the credibility of witnesses. (See 26 RT 3851-3853; 20 CT 5418-5419-5421, 5423; CALJIC Nos. 2.20 [Believability Of Witness], 2.21.1 [Discrepancies in Testimony], 2.21.2 [Witness Willfully False], 2.23 [Believability Of Witness–Conviction Of A Felony].)

Had the consciousness of guilt instructions not been given, the jury still would have rejected the defense theory of the case and convicted Hartsch. Even without the permissible inferences of consciousness of guilt raised by Hartsch's false and misleading statements to police and his efforts to destroy evidence, the evidence against him was overwhelming and established his guilt. The evidence established that (1) Hartsch owned a .22 caliber gun and ammunition, (2) after Hartsch got out of Castaneda's car and approached Gorman's truck parked in the citrus grove, he shot Gorman multiple times at close range through the driver's side window, (3) Hartsch reloaded his gun and shot Creque multiple times at close range through the passenger side window, (4) Hartsch was last seen with Angelica, Castaneda was with Martinez and at his mother's house when Angelica disappeared, (5) the same .22 caliber gun was used in Gorman-Creque and Angelica Delgado murders, (6) the shoe prints at both murder scenes were consistent with Hartsch's shoe size of 9 ½, not Castaneda's size of 12, (7) the murders occurred in relatively close proximity in the citrus grove near Hartsch's residence, (8) Hartsch's semen was present in Angelica's body when it was discovered in the citrus grove several days after she was reported missing, (9) Hartsch had Angelica's jewelry and gave it to his girlfriend around the time of Angelica's murder, and, (10) Hartsch made incriminating statements in a letter to his girlfriend while incarcerated on the

current counts. There is no reasonable possibility that a result more favorable to Hartsch would have been reached in absence of the alleged error. (*People v. Valdez, supra,* 32 Cal.4th at pp.138-139 [*Watson* standard of harmless error applied to erroneous instruction of the jury with CALJIC No. 2.06].) Indeed, the alleged error is harmless under any standard. (*People v. Crew* (2003) 31 Cal.4th 822, 849; see *Chapman v. California, supra,* 386 U.S. at p. 24.)

The instructions simply provide that if the jury finds Hartsch made false statements or attempted to suppress evidence, it may consider those circumstances as tending to show consciousness of guilt. The instructions do not compel findings that Hartsch made false statements or suppressed evidence, nor do they compel an adverse inference if the jury finds he had done so. Further, any possible prejudice is mitigated by the admonition contained in CALJIC Nos. 2.03 and 2.06 that such "conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration." (*People v. Valdez, supra*, 32 Cal.4th at pp. 138-139.) Moreover, as outlined above, evidence of Hartsch's guilt was overwhelming. Therefore, any error in giving the instruction was harmless.

IX.

NONE OF THE STANDARD JURY INSTRUCTIONS GIVEN WITHOUT OBJECTION IN THIS CASE DILUTED THE REASONABLE DOUBT REQUIREMENT

In Argument XIII of his opening brief, Hartsch contends that the trial court's instruction on reasonable doubt (CALJIC No. 2.90 [Presumption Of Innocence-- Reasonable Doubt-- Burden Of Proof]), when combined with the circumstantial evidence instructions (CALJIC Nos. 2.01 [Sufficiency Of Circumstantial Evidence-- Generally] and 2.02 [Sufficiency Of Circumstantial Evidence To Prove Specific Intent Or Mental State]), undermined the prosecution's burden of proof, and that other standard instructions (CALJIC

Nos. 2.21.2 [Witness Willfully False], 2.22 [Weighing Conflicting Testimony], 2.27 [Sufficiency Of Testimony Of One Witness], and 8.20 [Deliberate And Premeditated Murder]) also "vitiated" the reasonable doubt standard. (AOB 158-170.) At the guilt phase trial, the defense did not object to CALJIC Nos. 2.01, 2.02, 2.21.2, 2.22, 2.27, or 8.20. (26 RT 3848-3849, 3852-3854, 3863-3864.) At the penalty phase, the defense did not object to the pertinent instructions. (29 RT 4369, 4372.) Because these instructions are correct in law, Hartsch's substantial rights are not affected and he has forfeited any claim that these instructions either standing alone or in combination, were erroneous. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial."]; see Pen. Code, § 1259; *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Noble* (2002) 100 Cal.App.4th 184, 189 ["Because the claimed error affects defendant's substantial rights, it was not waived by the failure to object to the instruction."].) Even ignoring Hartsch's forfeiture, his claim should be rejected as this Court has rejected identical contentions in a number of other cases. Hartsch provides no reason for this Court to overrule these other cases.

Without objection, the trial court instructed the jury on sufficiency of circumstantial evidence with the standard CALJIC instructions. CALJIC No. 2.01 concerned the sufficiency of circumstantial evidence to prove guilt in general:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime, but, two, cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference

necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

If, on the one hand, one interpretation of the evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(26 RT 3848; 30 RT 4623-4624; 20 CT 5409; 21 CT 5704.)

The trial court also instructed the jury with CALJIC Nos. 2.02, which instructed on the sufficiency of circumstantial evidence to prove specific intent or mental state. (26 RT 3848-3849; 30 RT 4624; 20 CT 5410; 21 CT 5705.) This instruction was substantively identical to CALJIC No. 2.01.

Hartsch contends that the last paragraph of the circumstantial evidence instructions undermined the requirement of proof beyond a reasonable doubt and violated his constitutional rights to due process, trial by jury, and a reliable trial by operating as impermissible mandatory rebuttable presumptions which compelled the jury to find Hartsch guilty on all counts. (AOB 160-164.) Not so.

This Court has repeatedly rejected arguments that these instructions impermissibly dilute the reasonable doubt standard. Because the standard reasonable doubt instruction, by itself, correctly defines reasonable doubt, this Court has rejected the claim that this instruction, when considered together with other complained-of instructions, e.g., CALJIC Nos. 2.01, 8.83, and 8.83.1, plus, CALJIC Nos. 2.21.2 [Witness Willfully False], 2.22 [Weighing Conflicting Testimony], was improper. (*People v. Maury* (2003) 30 Cal.4th 342, 428-429.) When the circumstantial evidence instructions are read in conjunction with other instructions, they do not dilute the prosecution's burden of proof beyond a reasonable doubt. (*Ibid*; *People v. Hughes* (2002) 27 Cal.4th 287, 346-347; *People v. Osband, supra,* 13 Cal.4th at pp. 678-679; *People v.*

Ray (1996) 13 Cal.4th 313, 347-348.) When read in context, it is clear that the jury was required only to reject unreasonable interpretations of the evidence and to accept a reasonable interpretation that was consistent with the evidence. (*People v. Hughes, supra,* 27 Cal.4th at pp. 346-347; *People v. Crittenden, supra,* 9 Cal.4th at p. 144.) Hartsch has presented no compelling reason for this Court to overrule the long line of cases upholding the propriety of these instructions. Accordingly, his claim should be rejected.

Without objection, the trial court provided the jury with four other standard instructions concerning the jury's evaluation of the evidence: CALJIC No. 2.21.2, regarding willfully false witnesses (26 RT 3852-3853; 30 RT 4626; 20 CT 5421; 21 CT 5708); CALJIC No. 2.22, regarding weighing conflicting testimony (26 RT 3853; 30 RT 4626; 20 CT 5422; 21 CT 5709); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (26 RT 3853-3854; 30 RT 4626-4627; 20 CT 5424; 21 CT 5711); and CALJIC No. 8.20, regarding deliberate and premeditated murder (26 RT 3863-3864; 20 CT 5451-5452). Hartsch claims that, by urging the jury to decide material issues by determining which side had presented relatively stronger evidence, the instructions implicitly replaced the reasonable doubt standard with the preponderance of the evidence test. (AOB 164-167.)

For instance, Hartsch faults CALJIC No. 2.22 and 2.21.2[19/] because

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19. The jury was instructed in the language of CALJIC No. 2.22 as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim, or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses

those instructions allegedly "directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing[.]" (AOB 166.) This Court has previously rejected this contention and should do so again. (*People v. Maury, supra*, 30 Cal.4th at p. 429; *People v. Nakahara, supra,* 30 Cal.4th at p. 714.) When considered with CALJIC Nos. 1.01 [Instructions To Be Considered As A Whole] and 2.90, which were each given here (26 RT 3846, 3857; 30 RT 4622; 20 CT 5406, 5434; 21 CT 5702, 5701), it is apparent that the jury was instructed to weigh the relative convincing force of the evidence only as part of the process of determining whether the prosecution had met its fundamental burden of proving Hartsch's guilt beyond a reasonable doubt. (*People v. Maury, supra*, 30 Cal.4th at p. 429; *People v. Nakahara, supra*, 30 Cal.4th at p. 714..) In light of this Court's holdings in *Nakahara* and *Maury*, Hartsch's "convincing force" arguments on appeal should be rejected.

Hartsch argues that CALJIC No. 2.27[20/] improperly suggests to the jurors

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> who have testified on opposing sides. The final test is not in the number of witnesses, but in the convincing force of the evidence.

(26 RT 3853; 30 RT 4626; 20 CT 5422; 21 CT 5709.)

The jury was instructed under CALJIC 2.21.2 as follows:

> A witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.

(26 RT 3852-3853; 30 RT 4626; 20 CT 5421; 21 CT 5708.)

20. The jury was instructed under CALJIC No. 2.27 that:

> You should give the uncorroborated testimony of a single

that the defense had the burden of proving facts. (AOB 166.) However, as with the previously discussed instructions, this instruction simply stated the proper point that the jury may consider the testimony of one witness concerning a fact to be sufficient for the proof of that fact. Like the other instructions discussed herein, this instruction properly directed the jury to make findings using reasonable factual interpretations over those that require unreasonable interpretations. (See *People v. Noguera* (1992) 4 Cal.4th 599, 633-634.) Also, in the context of all the instructions, CALJIC No. 2.27 did not dilute the standard of proof. CALJIC No. 2.27 simply advises the jury on how to evaluate a fact proved solely by one witness's testimony. (*People v. Gammage* (1992) 2 Cal.4th 693, 700.) Although the instruction does not refer to the prosecution's burden of proving each element beyond a reasonable doubt, the instruction, when read in context with the other instructions, in no way lessens the prosecution's burden of proof. (*People v. Montiel* (1993) 5 Cal.4th 877, 941.) Because this Court has previously rejected arguments identical to the one advanced by Hartsch, and Hartsch provides no compelling reasoning for revisiting this settled issue, this Court should summarily reject his claim.

Hartsch also claims that the trial court's instruction on willful, premeditated, and deliberate murder under CALJIC No. 8.20 "misled the jury regarding the prosecution's burden of proof" because the instruction used the word "precluding," which Hartsch asserts "could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. [Citation.]" (AOB 167, citing *People v. Williams*

> witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact, whose testimony about that fact does not require corroboration, is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends.

(26 RT 3853-3854; 30 RT 4626-4627; 20 CT 5424; 21 CT 5711.)

(1969) 71 Cal.2d 614, 631-632.) This Court recently rejected a similar challenge. (*People v. Crew, supra,* 31 Cal.4th at p. 848.)

In *Crew*, the defendant claimed that CALJIC No. 8.20, among other instructions, lessened the prosecution's burden of proof. (*People v. Crew, supra*, 31 Cal.4th at p. 848.) This Court rejected the argument, explaining:

> [CALJIC No. 8.20] requires the jury to find the killing was preceded by a clear and deliberate intent to kill that must have been formed upon preexisting reflection and not precluded by conditions that negate deliberation. There is no reasonable likelihood that any jury would misconstrue this instruction as lessening the prosecution's burden of proof in any respect.

(*Ibid.*) In light of this Court's holding in *Crew*, Hartsch's claim must be rejected.

Hartsch contends any error amounted to a federal constitutional deprivation requiring reversal. (AOB 167-169.) However, as acknowledged by Hartsch, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed herein. (See *People v. Maury, supra,* 30 Cal.4th at pp. 428-429 [CALJIC Nos. 2.21.2 and 2.22 and circumstantial evidence instructions]; *People v. Noguera, supra*, 4 Cal.4th at pp. 633-634 [CALJIC Nos. 2.01, 2.02, 2.21, and 2.27]; *People v. Wilson* (1992) 3 Cal.4th 926, 942-943 [circumstantial evidence instructions]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [same].) Because none of Hartsch's claims here implicate his constitutional rights, even assuming error, it would be harmless as there is no reasonable probability that Hartsch would have received a different outcome had the instructions not been given.

The jury was repeatedly and expressly instructed to find Hartsch guilty only if each element was proved beyond a reasonable doubt. Thus, even if Hartsch had not waived all of his claims of instructional error, and even assuming, arguendo, the claims had any merit, any error regarding the challenged instructions was harmless.

X.

THE AGGRAVATING EVIDENCE OF THE 1992 INCIDENT AT THE HIGHGROVE APARTMENT COMPLEX WAS PROPERLY ADMITTED BY THE COURT AND ANY INSTRUCTIONAL ERROR RELATED TO THE INCIDENT WAS HARMLESS BEYOND A REASONABLE DOUBT

Hartsch contends reversal of his death sentence is required because the trial court prejudicially erred in admitting the evidence in aggravation of an incident that occurred in 1992 at an apartment complex in Highgrove. (AOB 171-187.) Further, he contends that in relation to that incident, the jury was not properly instructed on the "actual knowledge" requirement for assault with a deadly weapon in violation of state law and his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 187-191.) The trial court did not abuse its discretion when it determined the evidence proffered by the prosecution regarding the incident would allow the jury to make a determination beyond a reasonable doubt as to the criminal activity and ruled it admissible. Furthermore, any error in the instruction provided to the jury regarding assault with a deadly weapon was largely technical and harmless beyond a reasonable doubt.

In the penalty phase of a capital trial, evidence of prior violent conduct is admitted "to enable the jury to make an individualized assessment of the character and history of the defendant to determine the nature of the punishment to be imposed." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1146 quoting *People v. Davis* (1995) 10 Cal.4th 463, 544.) Thus, under Penal Code section 190.3, factor (b), the trier of fact shall 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."

When such evidence is offered in aggravation, the trial court may accept "evidence that would allow a rational trier of fact to make a determination

beyond a reasonable doubt as to [such] criminal activity." (*People v. Ochoa, supra,* 19 Cal.4th at p. 449 quoting *People v. Clair* (1992) 2 Cal.4th 629, 676.) The trial court's decision to admit evidence of prior criminal activity is reviewable for abuse of discretion. (*People v. Smithey* (1999) 20 Cal.4th 936, 991.)

During in limine penalty phase proceedings, the defense objected and moved to exclude the evidence in aggravation of an incident involving Hartsch that occurred at a Highgrove apartment complex in January of 1992. (27 RT 3957; 2 CT 340-341; 20 CT 5561-5581.) The prosecution proffered that on January 11, 1992, Hartsch's father drove Hartsch and Rushing to an apartment complex in Highgrove. At the apartment complex, Hartsch, Sr. drove past one of the apartments several times. The occupants of the apartment, Mary Palacio and her grandson Shawn Maley, heard gang slogans being yelled out and "shoot, shoot, shoot." They heard several gunshots. Hartsch, Sr. had driven his vehicle on to the lawn in front of the apartment and was driving around on the grass. When the police showed up Hartsch, his father, and Rushing were gone. While the police interviewed Palacio and Maley, Hartsch, Sr. drove past the apartment and his vehicle was identified. During a traffic stop, a .22 caliber gun was located under the passenger seat that had one bullet in its chamber. Hartsch had three fully loaded .22 caliber clips in his jacket pocket that matched the gun under the passenger seat. Hartsch, Sr. told the police that he was looking for "Tommy Lopez" at the apartment complex. When the police contacted the resident of the apartment where Hartsch, Sr. said Lopez lived, the resident indicated there was no one by that name who lived there. (27 RT 3958-3959, 3963-3964.)

The trial court concluded that the relationship with the occupants, the purported victims, had not been sufficiently established and that it was unclear whether any of the acts were directed at them. Additionally, the trial court

concluded that intimidating acts such as driving on the lawn or shooting a gun into the ground did not qualify under Penal Code section 190.3, factor (b), as crimes or attempted crimes of violence. (27 RT 3960-3961.) The trial court tentatively ruled that the incident was excluded until there was a showing that it was an act of violence or attempted act of violence. The trial court indicated it was going to further research the matter. (27 RT 3963-3965.)

After a break in proceedings, the parties returned and the trial court indicated it had "read the law" and determined under Penal Code section 190.3, factor (b), the incident at the apartment complex involved the threat of violence and qualified as evidence in aggravation. The trial court acknowledged that earlier it had only considered violence or attempted violence and that section 190.3, factor (b), indeed permitted the threat of violence to be admissible for the jury's consideration. (27 RT 3990.) The trial court stated that here, "The threat of violence was without question meant to intimidate someone at the apartment complex[.]" (27 RT 3991.)

The trial court did not abuse its discretion in ruling that the incident at the apartment complex in Highgrove was admissible. The prosecution's offer of proof was sufficient to establish that evidence of the incident was admissible in aggravation as other criminal activity involving the threat of force or violence. As the trial court determined, in the context of Penal Code section 190.3, factor (b), the facts offered by the prosecution, where Hartsch was a passenger in his father's truck which was driven onto the lawn of an apartment building, and the occupants of the apartment heard gang slogans shouted from the vehicle and gun shots, clearly demonstrated the threat of violence. Furthermore, shortly after the incident during a traffic stop, a .22 caliber gun was located under the passenger seat of the vehicle Hartsch, Sr. was driving during the incident and Hartsch had three .22 caliber clips in his jacket pocket. The prosecution produced sufficient evidence to permit a rational jury to find

Hartsch had engaged in prior violent criminal activity and aided and abetted his father and/or brother in the incident at the apartment complex. (*People v. Ochoa, supra*, 19 Cal.4th at p. 449.) Any rational juror could make a determination of criminal activity beyond a reasonable doubt based on the prosecution's proffer. Accordingly, the trial court properly admitted the evidence.

At the penalty phase trial, the evidence was presented to the jury that on January 11, 1992, Hartsch, his father, Joseph Hartsch, Sr., and Rushing, went to an apartment complex in Highgrove at about 11:30 p.m. Armed with a .22 caliber gun, Hartsch, Sr. had driven there with his sons with the intention of confronting an individual known as "Halfman" who, along with his associates, had shot at Hartsch and one of his friends about a week earlier. The truck had a bench seat; Rushing was seated between Hartsch, Sr. and Hartsch. (27 RT 4059-4060, 4062, 4067-4069.) Hartsch, Sr. drove the truck onto a grassy area of the apartment complex and yelled for Halfman to come out of his apartment. (27 RT 4061-4062, 4070-4071.) Mary Palacio, a complex resident, testified that she was home with her three grandchildren, all under the age of twelve. She heard the commotion outside her apartment and opened her apartment door. Hartsch, Sr. had pulled the truck alongside her door by two or three feet so that the passenger's side was facing her door. Palacio testified that the individual seated in the passenger seat was pointing a gun at her. Palacio closed the door and called police. (27 RT 4072, 4077-4079.) Palacio then heard gunshots fired. (27 RT 4080-4081, 4089.) The police contacted Hartsch, Sr., Rushing and Hartsch in an alley near the complex. Hartsch, Sr. lied and told police that they were in the area to visit Tommy Gomez. (27 RT 4065, 4084, 4086-4087.) The men were detained and the truck was searched. A .22 caliber semiautomatic gun was found under the passenger seat with one bullet in the chamber. When Hartsch was searched police found three magazines of .22

caliber ammunition in his left front jacket pocket. One of the magazines was missing a round of ammunition. Hartsch, Sr. and Rushing did not have any ammunition. (27 RT 4092, 4096-4097.)

Hartsch argues that although the trial court made the finding that the prior criminal activity involved the threat of violence, it did not determine that the proffer presented substantial evidence of every element of the crime in question, here, assault with a deadly weapon. (AOB 179-185.) Despite Hartsch's urging, such a determination was not required. (*People v. Clair, supra,* 2 Cal.4th at p. 678; see *People v. Tahl* (1967) 65 Cal.2d 719, 738 ["There is no requirement that the jury determine at the penalty trial what technical crimes have been committed in order to consider such evidence."].)

Hartsch contends the trial court's ruling requires reversal of his death sentence. Even assuming the trial court's in limine ruling was in error under California law or the United States Constitution or both, it was not prejudicial.

> "State-law error . . . bearing . . . on penalty in a capital case . . . is reviewed under the 'reasonable possibility' standard of *People v. Brown* (1988) 46 Cal.3d 432, 446-448. Error of federal constitutional dimension, by contrast, is scrutinized under the 'reasonable doubt' standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. The two tests are the same in substance and effect."

(*People v. Clair, supra*, 2 Cal.4th at p. 678, fn 11, quoting *People v. Ashmus* (1991) 54 Cal.3d 932, 965, citation omitted.)

Under either standard there was no harm in allowing the evidence to be presented. The proper focus of the penalty phase was Hartsch and his capital crime. The evidence of the incident was marginally significant in light of the whole "picture presented of the murder[s] and the murderer." (*People v. Clair, supra*, 2 Cal.4th at p. 678, fn 11.)

Hartsch further argues that the trial court erred in instructing the jury on the elements of assault with a deadly weapon. (AOB 187-191.) Specifically,

Hartsch complains the jury was never instructed on the "actual knowledge" element of assault. (AOB 187-191.)

Pursuant to the prosecution's request in relation to the apartment complex incident, the jury was instructed in the language of CALJIC No. 9.00 (1998 Revision) [Assault – Defined] as follows:

> In order to prove an assault, each of the following elements must be proved:
>
> 1. A person willfully committed an act which by its nature would probably and directly result in the application of physical force on another person.
>
> 2. At the time the act was committed, the person intended to use physical force upon another person or to do an act that was substantially certain to result in the application of physical force upon another person, and
>
> 3. At the time the act was committed, the person had the present ability to apply physical force to another– to the person of another.
>
> "Willfully" means that the person committing the act did so intentionally.
>
> To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted, it may be considered in connection with any other evidence in determining whether an assault was committed, and if so, the nature of the assault.

(30 RT 4632-4633; 21 CT 5727.)[21/]

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21. The jury was also instructed pursuant to CALJIC No. 9.02 [Assault With A Deadly Weapon Or By Means Of Force Likely To Produce Great Bodily Injury Or With A Firearm] as follows:

> Every person who commits an assault upon the person of another with a deadly weapon or instrument is guilty of a violation of Section 245(a)(1), or with a firearm is guilty of a violation of Section 245(a)(2) of the Penal Code, a crime.
>
> A "deadly weapon" is any object, instrument, or weapon which is used in such a manner as to be capable of producing or likely to produce death or great bodily injury.
>
> A "firearm" includes a handgun.
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person was assaulted, and the assault was–

Hartsch relies upon *People v. Williams* (2001) 26 Cal.4th 779, where this Court clarified the mental state for assault and held:

> assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in physical force against another.

(*Id* at p. 784.)

The Court indicated that the jury in *Williams* had been instructed under Former CALJIC No. 9.00 (1994 rev.) (5th ed. 1995 supp.) that assault required proof that

> 1. A person willfully and unlawfully committed an act that by its nature would probably and directly result in the application of physical force on another person; and [¶] 2. At the time the act was committed, such person had the present ability to apply physical force to the person of another.

(*Id* at p. 783.)

The Court determined the instruction provided was ambiguous and could conceivably permit a jury to find a defendant guilty of assault "even if he did not actually know the facts sufficient to establish that his act by its nature would probably and directly result in a battery." (*People v. Williams, supra,* 26 Cal.4th at p. 790.) However, the Court recognized that the error in the instruction was largely technical since "a defendant's knowledge of the relevant factual circumstances is rarely in dispute." (*Ibid.*) Accordingly, any instructional error was unlikely to affect the outcome in most assault cases and in *Williams*, the "minor ambiguity" was harmless beyond a reasonable doubt. (*Ibid.*)

> 2. The assault was committed with a deadly weapon or instrument or with a firearm.

(30 RT 4633; 21 CT 5729.)

As Hartsch points out, when the jury is instructed on the elements of other crimes introduced in aggravation, they should be accurate and complete. (*People v. Prieto* (2003) 30 Cal.4th 226, 268; *People v. Montiel, supra,* 5 Cal.4th at p. 942.)

Here, even if the trial court, which did not have the benefit of *Williams*, failed to instruct Hartsch's jury as to actual knowledge, the error was harmless. Based on the evidence presented of the incident, it would be irrational to conclude that Hartsch did not have actual knowledge of "the facts sufficient to establish that his act by its nature would probably and directly result in a battery." (*People v. Williams, supra,* 26 Cal.4th at p. 790.) Palacio testified that when she opened her door, the Hartsch truck was idling alongside her door by two or three feet and positioned so that the passenger's side was facing her door. Palacio saw the individual seated in the passenger seat pointing a gun at her and she closed her door. Thereafter, shots were fired. It was Hartsch who was seated in the truck on the passenger side, Rushing sat between Hartsch and Hartsch Sr., the driver. When the truck was searched a .22 caliber weapon was located under the passenger seat. When Hartsch was searched three magazines of .22 caliber ammunition were located in his jacket pocket. When Hartsch, Sr. and Rushing were searched, no ammunition was found. There is no evidence that Hartsch did not know of the gun and its nature as a deadly weapon. Moreover, the incident was in retaliation of an incident that had occurred a week earlier when a resident of the complex fired a gun at Hartsch. Any error in failing to instruct on the *Williams* actual knowledge requirement for the unadjudicated offense of assault with a deadly weapon was clearly harmless beyond a reasonable doubt. (*People v. Williams, supra,* 26 Cal.4th at p. 790; *People v. Prieto, supra,* 30 Cal.4th at p. 269 [Failure to instruct on knowledge requirement for an unadjudicated offense of possessing deadly weapons while in jail in the penalty phase of a capital murder prosecution harmless; the shanks

were six to seven inches long, had sharpened ends and cloth handles, and were hidden under defendant's cell bunk, and defendant admitted that he possessed the shanks for protection and presented no evidence that he did not know of the shanks and their nature as deadly weapons].) Accordingly, Hartsch's argument should be rejected and Hartsch's death sentence affirmed.

XI.

THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE

Hartsch contends the trial court erred in admitting victim impact evidence under Penal Code section 190.3, factor (a) [circumstances of the crime], (hereinafter "factor (a)") in violation of his right to a fair and reliable penalty determination, due process and his rights under the Eighth and Fourteenth Amendments and the state constitution. (AOB 192-201.) There was no error, constitutional or otherwise. The trial court properly admitted under factor (a) the testimony of Gorman's brother and sister, Creque's brother and daughter, and Angelica's mother and sister describing each victims' unique characteristics and the impact of their loss to these individual family members. Even assuming error, it was necessarily harmless given the overall brevity of the victim impact evidence and the other, overwhelming evidence in aggravation.

In *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720] (*Payne*), the United States Supreme Court overruled its prior holdings in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] (*Booth*) and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876], which had held it violated the Eighth Amendment to admit victim impact evidence during the penalty phase of a capital trial. Victim impact testimony is admissible in the penalty phase of a capital trial. (*Payne, supra,* 501 U.S. at p. 829.) Injury inflicted by the

defendant, including the impact of the crime on the family of the victim, is a circumstance of the crime and is admissible under factor (a). (*People v. Johnson* (1992) 3 Cal.4th 1183, 1245.) Allowing the admission of victim impact evidence encompasses evidence that logically shows the harm caused by the defendant. (*People v. Edwards, supra,* 54 Cal.3d at p. 835.) The admission of victim impact evidence, however, is not without limits. "Irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Payne, supra,* 501 U.S. at p. 836.)

Hartsch complains specifically that the limitations in *Payne* were not met here. He argues that under *Payne*, (1) allowing two victims impact witnesses for each victim, as opposed to a single witness per victim, constituted an unnecessarily extensive presentation of victim impact testimony; (2) since none of the victim impact witnesses were present during the murders, they could not testify as to the effect of the murders on a family member present at the scene during or immediately after the crimes; and, (3) the victim impact witnesses testified about things Hartsch could not possibly have known regarding the victims' personal histories and responses family members would have to their deaths. (AOB 195-199.) Hartsch's arguments should be rejected. Victim impact evidence is not limited to a single witness, to those who were physically present at the time of the murders, or to the facts known to the murderer at the time.

While other states have restricted victim impact testimony to a single witness, as Hartsch points out (see AOB 196), this Court has approved of cases where multiple witnesses testified to victim impact evidence, finding such evidence was not unduly prejudicial. (See, e.g., *People v. Boyette* (2002) 29 Cal.4th 381, 440-441 & 443-444; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172; see Blume, Ten Years of Payne, *supra*, 88 Cornell L.Rev. at p. 270

[most states allowing victim impact evidence place no limit on the number of witnesses].) As long as the victim impact evidence is not unduly prejudicial under Evidence Code section 352, the trial court should have discretion to admit any number of witnesses. (See *People v. Box, supra*, 23 Cal.4th at pp. 1200-1201 [Evidence Code section 352 applies at penalty phase].) Arbitrarily limiting the number of witnesses in every case is neither necessary nor warranted.

Hartsch's argument that the victim impact evidence limitations in *Payne* were not met because the victim impact witnesses were not physically present at the respective crime scenes and the evidence therefore did not constitute "circumstances of the offense[s]" should be rejected. (AOB 197-198.) Victim impact evidence properly includes the impact of the loss of the victims. This does not require the victim's family to have been present at the murder. (*Payne, supra*, 501 U.S. at pp. 826-827 ["a state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's determination as to whether or not the death penalty should be imposed"]; *People v. Boyette, supra*, 29 Cal.4th at pp. 440-441, 443-444; *People v. Taylor, supra*, 26 Cal.4th at pp. 1171-1172; *People v. Edwards, supra*, 54 Cal.3d at pp. 835-836 ["the injury inflicted is generally a circumstance of the crime"; factor (a), "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim"].) The harm caused by the defendant's crime occurs regardless of whether the witness was present at the murder or a family member. Thus, presence at the scene by a family member is not required.

As to Hartsch's argument that he could not have known about the victims' personal histories and admission of such evidence under factor (a) renders the death penalty statute unconstitutionally vague, this argument has been repeatedly and consistently rejected by this Court. Hartsch presents no

compelling reason to revisit the issue. (*People v. Lewis, et al.* (2006) 39 Cal.4th 970, 1057; *People v. Cook* (2006) 39 Cal.4th 566, 608-609; *People v. Roldan* (2005) 35 Cal.4th 646, 732.) That is because, as the High Court held in *Payne*:

> [A] State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." [Citation.]

(*Payne, supra,* 501 U.S. at p. 825.)

Additionally, the nature of murder is such that the tragic consequences should always be "known" or foreseeable to the defendant:

> The fact that the defendant may not know the details of a victim's life and characteristics, or the exact identities and needs of those who may survive, should not in any way obscure the further facts that death is always to a "unique" individual, and harm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable.

(*Payne, supra,* 501 U.S. at p. 838 (conc. opn. of Souter, J .).) Thus, victim impact evidence is not limited to facts known to the defendant at the time of the offense.

California law is consistent with these principles.

> Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant as a circumstance of the crime under section 190.3, factor (a).

(*People v. Lewis, et al., supra,* 39 Cal.4th at pp. 1056-1057.) Accordingly, contrary to Hartsch's contention, the trial court properly admitted victim impact evidence of Gorman's, Creque's and Angelica's murders under factor (a) regardless of whether this impact was actually known by before he committed

the murders. Furthermore, Hartsch can hardly claim that he could not have known how Angelica's death would affect her family. Although Gorman and Creque were perfect strangers to Hartsch, Angelica was someone with whom Hartsch was intimately involved. Angelica had a history not only with Hartsch but with his brother Joe. Additionally, Angelica was friends with Hartsch's sisters, Ileene and Susie, with whom she last visited before Hartsch picked her up, had sex with and killed her.

Permissible victim impact evidence "only encompasses evidence that logically shows the harm caused by the defendant" and is not "so unduly prejudicial that it renders the trial fundamentally unfair" in violation of a defendant's constitutional right to due process under the Fourteenth Amendment. (*People v. Brown* (2004) 33 Cal.4th 382, 396, quoting *People v. Edwards, supra,* 54 Cal.3d at p. 835 and *Payne, supra*, 501 U.S. at p. 825, respectively.) In admitting the victim impact evidence in this case, the trial court expressly acknowledged and abided by these principles.

There was extensive and thorough litigation, both written and oral, of what was appropriate victim impact evidence. (27 RT 3930-3939; 2 CT 340-342; 20 CT 5587-5612.) The defense sought to exclude victim impact evidence on the grounds of inadequate notice, irrelevance, and extreme prejudice. Alternatively, the defense requested that it be permitted to present evidence of the victims' bad character in rebuttal to any "good character" evidence. The trial court denied the defense motion in its entirety. The trial court observed that victim impact evidence is permissible in California. (27 RT 3932.) As for its limitations, the trial court explained:

> As I understand victim impact [evidence] and my experience with victim impact [evidence], it's just the impact that the shortening of that person's life has had on those persons, those loved ones, not that the son or mother or father or brother, who get up on the witness stand who say what the appropriate remedy for this is, just what impact that person's loss has. And that the person was a Nobel Prize laureate or was

> homeless has nothing to do with victim impact, just because– to contributilize, you can't contributilize one person's life as to another, you just don't. Someone who has been murdered is a human being, and that person's life was important. So their character as far as background, Nobel Prize laureate from Berkeley, and the other was a person who was homeless who the most they ever accomplished was the fourth grade, is not going to come out.

(27 RT 3934-3935.)

The trial court ultimately allowed Gorman's sister and brother, Creque's brother and oldest daughter, and Angelica's mother and sister to testify about who the victims were, what they meant to these family members, and how these family members were affected by their loss. (See Statement of Facts, Penalty Phase, Prosecution's Case (victim impact evidence), *supra*.) For the majority of the testimony the witnesses recounted basic facts about the victims such as Gorman's nonviolent nature and courage as a teenager to testify against a foster father who had molested him over a nine-year period (28 RT 4331, 4337), Creque's kindness and generosity toward homeless people and her ability to write poetry (28 RT 4349, 4351), and Angelica's fun-loving, comical nature (28 RT 4353-4356). In connection with their testimony, over defense objection the trial court allowed one photograph per victim impact witness depicting how each victim had lived life. (28 RT 4317-4320, 4332, 4337, 4345, 4354, 4357; see People's Exhibits 323, 324, 326, 328, 329.) The photograph exhibited during Creque's daughter's testimony was of Creque's children and grandson on the day of Creque's funeral. (28 RT 4350; see People's Exhibit 327.)

There was some emotional testimony in terms of how the victim impact witnesses felt upon learning of their loved ones' deaths and how the manner in which they lost their lives affected various family members. Creque's daughter testified that she cried nonstop for two to three days, Gorman's sister felt that Gorman, who was like her own child, "never really had a chance at his life," Gorman's brother became depressed, suicidal and stopped attending school,

Creque's brother resumed drinking after nine years of sobriety and lost his business, and Angelica's mother and sister missed her smile and laughter. (See Statement of Facts, Penalty Phase, Prosecution's Case (victim impact evidence), *supra*.) Such evidence of the immediate and lasting impact of Hartsch's brutal murders of Gorman, Creque, and Angelica all fell well within the ambit of appropriate victim impact evidence. (*People v. Wilson* (2005) 36 Cal.4th 309, 357 ["Contrary to defendant's suggestion, her statements permissibly concerned the "immediate effects of the murder," i.e., her "understandable human reactions" on hearing someone had killed her brother for money."]; *People v. Brown, supra,* 33 Cal.4th at pp. 397-398 [recognizing the propriety of a victim's testimony about the immediate effects of the murder such as circumstances of the night of the killing when the victim was informed of the death of her husband or the residual and lasting impact victims continue to experience-such as a brother's feelings when passing the grave of his murdered brother].)

In short, Hartsch killed three human beings, Kenneth Gorman, Ellen Creque, and Angelica Delgado. This Court has not seen fit to limit victim impact testimony in the three ways Hartsch now suggests, such limitations are not constitutionally required, and there is no reason for the Court to adopt such limitations now. Hartsch's claim that his rights to a fair and reliable penalty determination and due process were violated must be rejected.

Even assuming arguendo the trial court had erred in admitting the victim impact evidence for the reasons Hartsch complains, reversal is not required. Any erroneous admission of victim impact evidence is subject to harmless error analysis. (*People v. Johnson, supra*, 3 Cal.4th at p. 1246 [any error in admitting victim's family member's opinion was not likely to have affected verdict in light of callousness of crime].) Here, there is no reasonable possibility that the jury would have returned a different sentence but for the erroneous admission of any victim impact evidence. (*People v. Jones* (2003) 29 Cal.4th 1229, 1264,

fn. 11.) For the same reasons, any federal constitutional error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U. S. at pp. 24-26.)

In arguing reversal is required, Hartsch asserts that the "emotionally-charged" victim impact evidence on which the trial court failed to instruct the jury (see Argument XII, *infra*) and the prosecutor's arguments based upon that evidence so overwhelmed the jury that they were unable to give the mitigating evidence presented by the defense "the consideration it deserved." (AOB 200-201.) This Court has said the trial court "should allow evidence and argument on *emotional* though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction." (*People v. Edwards, supra*, 54 Cal.3d at p. 836 [emphasis added].) Testimony by family members about the various ways their lives were affected by the victim's death is proper. (*People v. Taylor, supra,* 26 Cal.4th at pp. 1171-1172 [no error to allow family members to explain various ways their lives were adversely affected by victim's death]; see *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017 [prosecution argument on family's likely suffering from victim's death was proper].) While such testimony is obviously emotional, it is not surprising or shocking. (*People v. Sanders, supra,* 11 Cal.4th at p. 550 [that families were aggrieved was an "obvious truism" and an "obvious and predictable consequence[]"].)

Here, the evidence was emotional at times, but the harm caused by Hartsch was great. "Courts have always taken into consideration the harm done by the defendant in imposing sentence," and "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question." (*Payne, supra*, 501 U.S. at p. 825.)

Hartsch's crimes deeply affected the lives of the victim impact witnesses.

The witnesses testified about their close relationships with their loved ones, the victims' importance to their lives, and the impact the deaths had on them personally. The victim impact evidence was limited to the three victims' immediate family members: Gorman's bother and sister, Creque's brother and daughter, and Angelica's mother and sister. The testimony gave context to the stark facts of the senseless murders. Thus, the evidence gave the jury a "quick glimpse" (*Payne, supra*, 501 U.S. at p. 830 (O'Connor, J., concurring)) of the three lives that Hartsch chose to extinguish. The entire presentation, concerning three victims, spanned only 30 pages of the roughly 400 pages of Reporter's Transcript of evidence in the penalty phase. Hartsch's mitigating evidence constituted about 122 pages. The victim impact evidence was appropriate and it was not particularly voluminous in light of the totality of the evidence presented in the penalty phase. Even if the testimony aroused emotions and evoked sympathy, "it was not so inflammatory as to have diverted the jury's attention from its proper role or invited an irrational response." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1063.) Additionally, the trial court's instructions told the jury not to be swayed by prejudice against Hartsch (30 RT 4619; 21 CT 5696 [CALJIC No. 8.84.1]), and that they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider" (30 RT 4636; 21 CT 5736 [CALJIC No. 8.88]). The jury is presumed to have followed these instructions. (*People v. Rich* (1988) 45 Cal.3d 1036.)

Moreover, the bulk of the prosecution's evidence in aggravation related to Hartsch's prior criminal activity involving the use or attempted use of force or violence or the express or implied threat to use force or violence. (See Statement of Facts, Penalty Phase, Prosecution's Case (prior criminal activity), *supra*.) Hartsch was convicted of three vicious and particularly senseless murders. Less than a year before those murders, Hartsch admitted that he

threatened, beat, and forced Shane A. to orally copulate him. Two years before the current murders, Hartsch beat and shot to death Michael Wheeler in an elementary school yard. In 1991, Hartsch participated in a drive-by shooting in which he pointed a gun at Mary Palacio from a two to three foot distance when she opened the door to her residence. This and other evidence of Hartsch's prior criminal activity was more lengthy and compounded in terms of the jury weighing the aggravating and mitigating circumstances than the brief testimony about the impact of his murders on his victims' families.

In light of the limited number of victim impact witnesses (two per victim), the brevity of the testimony (30 pages), and the relatively subdued nature of the victim impact testimony, when compared to Hartsch's argument against the jury being overly swayed by the evidence, the court's instruction, and the abundance of other aggravating factors which overwhelmingly supported death as the appropriate penalty - especially that Hartsch committed a heinous and brutal crime against three defenseless individuals - any error in allowing the victim impact witnesses to testify was harmless. As this Court has observed, "among the most significant considerations [in the jury's assessment of punishment] are the circumstances of the underlying crime." (*People v. Mitcham, supra*, 1 Cal.4th at p. 1062.) The admission of the challenged testimony "did not undermine the fundamental fairness of the penalty-determination process." (*Id.* at p. 1063.) Also, the admission of the witnesses' testimony did not violate Hartsch's federal or state rights to due process, a fair trial, or a reliable penalty determination.

In sum, even if the victim impact evidence had been excluded, the outcome would have remained the same. Any alleged error was harmless.

XII.

THE TRIAL COURT PROPERLY REFUSED THE DEFENSE REQUESTED VICTIM IMPACT INSTRUCTION AND THE JURY WAS ADEQUATELY INSTRUCTED UNDER CALJIC NOS. 8.84.1 AND 8.85

Hartsch contends the trial court erred in failing to instruct the jury with the defense proposed victim impact instruction.[22/] (AOB 202-205.) The trial court properly refused the defense proposed instruction as it had no duty to give such an instruction, especially in light of the other instructions. Even assuming error, it was harmless.

A trial court's duty to instruct at the penalty phase is guided by the following principles:

> [T]he standard CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." [Citation.] Moreover, the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. [Citation.] Instructions should also be refused if they might confuse the jury. [Citation.]

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22. The proposed Defendant's Special Instruction No. F, Aggravation – Victim Impact, refused by the trial court states as follows:

> Evidence has been presented for the purpose of showing the specific harm caused by the defendant's crimes, as it directly relates to the circumstances of the capital offense. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether the defendant should live or die. You must make this decision soberly and rationally, and you may not impose the ultimate punishment of death as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional, though relevant subjects, may provide legitimate reasons to sway you to show mercy towards the defendant.

(21 CT 5764.)

(*People v. Gurule, supra*, 28 Cal.4th at p. 659.)

The trial court properly refused the proposed Defense Special Instruction No. F. It was duplicative of another instruction given at the penalty phase, CALJIC No. 8.84.1, which instructed the jury that it "must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings." (30 RT 4619; 21 CT 5696.) Hartsch's proposed instruction "would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1, and the trial court properly refused to read special instruction No. [F]." (*People v. Ochoa, supra*, 19 Cal.4th at p. 455 [addressing an instruction identical to that proposed here].) Morever, as this Court has stated regarding the identical instruction proposed by Hartsch:

> The court properly rejected the defense-proffered instruction as confusing; the instruction was unclear as to whose emotional reaction it directed the jurors to consider with caution--that of the victim's family or the jurors' own. Further, the instructions given as a whole did not give the jurors the mistaken impression that they could consider emotion over reason, nor did the instructions improperly suggest what weight the jurors should give to any mitigating or aggravating factor.

(*People v. Harris* (2005) 37 Cal.4th 310, 359.)

Furthermore, the proposed instruction was confusing because it seemed to imply that victim impact evidence could not be considered. The jury was correctly instructed with CALJIC No. 8.85, which stated that it was to take into account 11 factors, including "the circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true," in determining which penalty to impose. (30 RT 4619; 21 CT 5697-5698.) Victim impact evidence is relevant to section 190.3, factor (a) and, therefore, a proper consideration in determining which penalty is appropriate. (See *People v. Brown, supra,* 31 Cal.4th at p. 573; *People v. Edwards, supra*, 54 Cal.3d at p. 837.)

In sum, no further instruction was required, as CALJIC No. 8.84.1

sufficed. Hartsch's constitutional rights were not violated. Even if the trial court erred in refusing the proposed defense instruction, there is no indication that the jury misapplied CALJIC No. 8.84.1, which covered the information that was in Hartsch's requested instruction, in deciding the penalty. Thus, there was no reasonable possibility that the trial court's alleged instructional error regarding victim impact evidence affected the verdict. (See *People v. Ochoa, supra,* 19 Cal.4th at p. 479.) The judgement and sentence of death should be upheld.

XIII.

HARTSCH'S CONSTITUTIONAL RIGHTS WERE NOT INFRINGED UPON BY THE ADMISSION OF PENAL CODE SECTION 190.3, FACTOR (B) EVIDENCE

Hartsch contends the Penal Code section 190.3, factor (b) ("factor (b)") evidence of seven incidents of prior criminal activity admitted during the penalty phase of his capital trial violated his constitutional rights. He further argues that because some of the incidents fell outside the applicable statutes of limitations they were improperly introduced as evidence in aggravation. He also asserts that evidence of his juvenile misconduct was inadmissible. (AOB 206-218.) Hartsch's constitutional rights were not violated. This Court has previously considered and rejected the claims now raised by Hartsch. He presents no compelling reasons for the Court to revisit its prior holdings. Accordingly, his arguments must be rejected.

Factor (b), allows the trier of fact, in determining penalty, to take into account:

> The presence or absence of criminal activity by the defendant, other than the crimes 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.

(See 21CT 5697 [CALJIC No. 8.85].)

Hartsch's claim that consideration of seven incidents of unadjudicated criminal activity at the penalty phase (see Statement of Facts, Penalty Phase, Prosecution's Case (prior criminal activity), *supra*) violated his due process rights and rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, thereby rendering the death sentence unreliable must be rejected because factor (b), has been held by this Court to be constitutional. It is well-settled that the introduction of unadjudicated evidence under factor (b) does not offend the state or federal Constitutions. (*People v. Boyer* (2006) 38 Cal.4th 412, 483; *People v. Chatman* (2006) 38 Cal.4th 344, 410; *People v. Guerra, supra*, 37 Cal.4th at p. 1165; *People v. Hinton* (2006) 37 Cal.4th 839, 913; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Kipp* (2001) 26 Cal.4th 1100, 1138; *People v. Cunningham* (2001) 25 Cal.4th 926, 1042.)

This Court has "long held that a jury may consider such evidence in aggravation if it finds beyond a reasonable doubt that the defendant did in fact commit such criminal acts." (*People v. Samayoa* (1997) 15 Cal.4th 795, 863.) Factor (b) is also not impermissibly vague. Both the United States Supreme Court and this Court have rejected this contention. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976 [114 S.Ct. 2630, 129 L.Ed.2d 750] ; *People v. Lewis, supra,* 25 Cal.4th at p. 677.) The Supreme Court stated:

> Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact.

(*Tuilaepa v. California, supra*, 512 U.S. at p. 976.) The Court concluded: "Factor (b) is not vague." (*Ibid.*)

Hartsch also complains that the jury was not impartial; since it was the same jury that had convicted him of capital murder, according to Hartsch, it is "self-evident" that the same jury could not fairly evaluate the evidence and

make a reliable penalty determination. (AOB 210-212.) It is well-established that the statutory preference for a unitary jury in Penal Code section 190.4, subdivision (c), in a capital case is consistent with constitutional principles. (*People v. Cornwell, supra,* 37 Cal.4th at p. 106; *People v. Osband, supra,* 13 Cal.4th at p. 668; *People v. Horton* (1995) 11 Cal.4th 1068, 1094.) Hartsch was not entitled to separate guilt and penalty phase juries. Moreover, despite Hartsch's related complaint that he was deprived of an adequate voir dire since he did not want to question potential jurors about the factor (b) crimes and taint the impartiality of the jury that was empaneled (AOB 212), the desire to voir dire jurors in a different way does not constitute good cause for separate juries. (*People v. Catlin, supra,* 26 Cal.4th at pp. 113-114; *People v. Rowland* (1992) 4 Cal.4th 238, 267-269.) Additionally, contrary to Hartsch's assertion (AOB 212-213), there is no requirement that the jury unanimously agree on the aggravating circumstances that support the death penalty, since the aggravating circumstances are not elements of an offense. (*People v. Medina* (1995) 11 Cal.4th 694, 782.) Nor is it necessary to instruct the jury that it must unanimously agree beyond a reasonable doubt that the defendant committed each unadjudicated offense. (*People v. Sims* (1993) 5 Cal.4th 405, 462; *People v. Anderson* (2001) 25 Cal.4th 543, 590.) Accordingly, Hartsch's jury-related claims must be rejected.

Hartsch also contends that the use of unadjudicated factor (b) evidence violates his right to equal protection because the same evidence is not allowed in non-capital trials. (AOB 212.) This Court has held many times that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Hinton , supra,* 37 Cal.4th at p. 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Morrison* (2004) 34 Cal.4th 698, 371; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Boyette, supra,* 29 Cal.4th at pp. 465-467; *People v. Allen*

(1986) 42 Cal.3d 1222, 1286-1288.) Thus, Hartsch's equal protection claim is without merit.

Hartsch further argues that his constitutional rights were violated by the evidence of the his prior criminal activity since some of the conduct was outside of the applicable statute of limitations. (AOB 213-215.) Hartsch's argument should be rejected. In *People v. Williams* (1997)16 Cal.4th 153, 233, this Court explained:

> [W]e consistently have rejected the contention that a defendant's statutory or constitutional rights are violated by the consideration, as a factor in aggravation of penalty, of evidence of unadjudicated criminal activity for which prosecution would be time-barred. [Citations.]
>
> We have long recognized that, as [section 190.3, factor] (b) imposes *no* time limitation on the introduction of "violent" crimes; the jury presumably may consider criminal violence which has occurred at any time in the defendant's life. [Citations and internal quotes omitted. Emphasis in original.]

Finally, Hartsch's argument that his juvenile criminal conduct was improperly admitted as evidence in aggravation must be rejected. (AOB 216-218.) Evidence of prior juvenile criminal conduct may properly be considered as an aggravating factor. (*People v. Lewis* (2001) 26 Cal.4th 334, 378-379.) Such evidence does not violate the Eighth Amendment. (*People v. Raley* (1992) 2 Cal.4th 870, 909.)

In sum, the evidence of Hartsch's prior criminal activity was properly admitted under Penal Code section 190.3, factor (b). Hartsch's arguments that the factor (b) evidence violated his constitutional rights are unavailing and have been previously rejected by this Court. Hartsch provides no reason for this Court to revisit its prior decisions rejecting his contentions.

XIV.

HARTSCH WAIVED HIS RIGHT TO CHALLENGE ANY ERRORS IN DENYING HIS MOTION TO MODIFY THE DEATH VERDICT

Hartsch contends his death verdict must be vacated and the case remanded for a new hearing on his motion to modify the verdict for two reasons. First, he contends the record does not establish whether the trial court understood and discharged its duties to re-weigh the evidence of aggravating and mitigating circumstances and independently decide if the weight of the evidence supported the jury's verdict. Second, he argues the trial court failed to state its reasons for denying Hartsch's application on the record. (AOB 229-239.) Hartsch waived these claims by failing to object when the trial court summarily denied his modification motion. In any event, a remand for reconsideration is unnecessary in light of trial counsel's statement at the hearing on the motion and the aggravating and mitigating circumstances.

Hartsch's automatic application for modification of the jury's verdict of death under Penal Code section 190.4, subdivision (e), was heard at the sentencing hearing on November 13, 1998.[23/] At that hearing, the defense

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23. In pertinent part, Penal Code section 190.4, subdivision (e) states as follows:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding[. . . .] In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings. [¶] The judge shall set forth the reasons for his ruling on the application and direct

requested that the trial court impose the lesser punishment of life without parole based upon the arguments previously heard during the course of trial and the "proportionality in this situation." The defense conceded that the trial court did not have discretion to modify the jury's death verdict on this basis. Nevertheless, the defense contended that the punishment was disproportionate because Casteneda had never been charged with a crime in the matter and Hartsch, who was 18-years-old at the time of the murders, was facing the death penalty. (30 RT 4656-4657.) The prosecutor argued that proportionality was irrelevant to a determination on the matter. (30 RT 4657.) After imposing a determinate sentence of twelve years, the trial court imposed a sentence of death and indicated Hartsch's motion for modification of the verdict had been heard and was denied. (30 RT 4657-4661.) The trial court stated:

> This is truly something that didn't have to happen for everyone. It's ugly for everyone. People don't take responsibility with what they do anymore. It's (*sic*, It) permeates every level of society. You just don't get any help at home, friends, neighbors– it's sad. It's sad for all of us.

(30 RT 4662.)

In ruling on a motion to modify a death verdict, the trial court independently reweighs the evidence of aggravating and mitigating factors presented at the penalty trial and determines whether, "in its independent judgment, the evidence supports the death verdict." The trial court "must state the reasons for its ruling on the record." (*People v. Steele* (2002) 27 Cal.4th 1230, 1267; Pen. Code, §190.4, subd. (e).) This Court has repeatedly declared that the trial court's function in ruling on a motion for modification of the jury's penalty verdict "is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's

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that they be entered on the Clerk's minutes.

independent judgment, *the weight of the evidence supports the jury verdict.*" (*People v. Cooper* (1991) 53 Cal.3d 771, 848, internal quotation marks and citations omitted.) An "independent" review is one the court undertakes in accordance with the weight it believes the evidence deserves. (*People v. Marshall* (1990) 50 Cal.3d 907, 942.)

While it is clear that no judge should deny the motion merely because the jury's penalty verdict is supported by "substantial evidence" (*People v. Bonillas* (1989) 48 Cal.3d 757, 800-801), it is just as clear that no judge may disregard the verdict or decide what result he or she would have reached if the case had been tried without a jury. (*People v. Risenhoover* (1968) 70 Cal.2d 39, 58, quoting *People v. Robarge* (1953) 41 Cal.2d 628, 633.) Indeed, that a trial judge's authority to reduce a jury's penalty verdict is more circumscribed than the jury's discretion to select appropriate penalty in the first instance follows ineluctably from the fact that the sentencing authority under California law *is the jury* (unless waived by both parties), not the judge. (Pen. Code, § 190.4, subd. (e); *People v. Jennings* (1988) 46 Cal.3d 963, 995.)

> This Court subjects the trial court's verdict-modification ruling to independent review: the decision resolves a mixed question of law and fact; a determination of this kind is generally examined de novo. . . . Of course, when we conduct such scrutiny, we simply review the trial court's determination after independently considering the record. We do not ourselves decide the verdict-modification application.

(*People v. Holt* (1997) 15 Cal.4th 619, 710; accord, *People v. Memro* (1995) 11 Cal.4th 786, 884; *People v. Berryman* (1993) 6 Cal.4th 1048, 1106.)

As a threshold matter, because Hartsch did not object when the trial court summarily denied his motion to modify the verdict, and because the hearing on the motion was held on November 13, 1998 (30 RT 4655), after this Court's decision in *People v. Hill* (1992) 3 Cal.4th 959, 1013, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, Hartsch's

claim is not cognizable on appeal. (*People v. Horning* (2004) 34 Cal.4th 871; *People v. Martinez* (2003) 31 Cal.4th 673, 701 [claim that court considered irrelevant and inadmissible evidence waived by failure to make contemporaneous objection]; *People v. Riel* (2000) 22 Cal.4th 1153, 1220 [objection rule only applies to post-*Hill* cases].)

Even if Hartsch's claims were cognizable, a remand for reconsideration is unnecessary. A trial court is presumed to have properly followed established law. (*People v. Crew, supra,* 31 Cal.4th at p. 859.) Although the trial court here did not fulfill the statutory requirement of stating its reasons for denying the motion, there is no indication on the record that the trial court was unaware of or failed to discharge its duty to independently determine if the weight of the evidence supported the jury's death verdict. (Compare *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-793 [finding error where trial court expressly stated its view that it did not have the right to make independent determination].) Given the absence of such evidence, the trial court should be presumed to have been aware of and applied the appropriate standard of review in denying the modification motion.

As for the failure to state reasons for denying the motion, this Court has applied harmless error review when a trial judge fails to state reasons for denying a modification application, but dies before the case is subject to remand (see e.g, *People v. Mincey, supra,* 2 Cal.4th at p. 478; *People v. Allison* (1989) 48 Cal.3d 879, 912; *People v. Heishman* (1988) 45 Cal.3d 147, 201-202), when the statement of reasons are inadequate (see e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 373-374), and when a trial court erroneously reads the probation report before reviewing the application (see e.g., *People v. Fudge* (1994) 7 Cal.4th 1075, 1128; *People v. Livaditis* (1992) 2 Cal.4th 759, 787 ["absent a contrary indication in the record, we assume that the court was not influenced by the report in ruling on the motion"].) While in past cases this Court has

remanded a case for a new hearing when, as here, the trial judge who failed to state reasons is still living (see e.g., *People v. Sheldon* (1989) 48 Cal.3d 935, 962), a remand is unnecessary in this case because the evidence that the aggravating circumstances outweighed the mitigating circumstances was so overwhelming there is no reasonable possibility a statement of reasons would have altered the trial court's conclusion or revealed reversible error.

Compelling aggravating factors were present here: the circumstances of the murders and the special circumstances in the instant case (Pen. Code, § 190.3, factor (a)) and Hartsch's prior criminal activity, including a fourth murder, and the use, attempted use, or express or implied threat to use force or violence (Pen. Code, § 190.3, factor (b)).

With respect to the first aggravating factor, Hartsch killed his victims viciously and senselessly. Gorman and Creque were asleep in Gorman's truck parked in the citrus grove when Hartsch approached, shot out the driver's side window and fired multiple rounds into the driver's side of the truck. (16 RT 2363-2364; 17 RT 2511-2512.) Hartsch shot Gorman seven times in his head and upper torso. Gorman died within two or three minutes of the gunshot wounds he suffered to his head and neck. (18 RT 2645-2647, 2650-2652, 2654-2658.) After shooting Gorman, Hartsch stepped over to Castaneda, who was waiting for Hartsch in the stolen get-away car, and told him that "they won't die." Hartsch reloaded his gun and again approached the truck as all the while Creque was screaming for her life. (16 RT 2365-2366; 17 RT 2518, 2520-2521.) Hartsch shattered the passenger side window when he fired multiple rounds into the passenger side of the truck. As Creque was dying Hartsch reached into the truck, pulled down the strap of her shirt and grabbed her breast. Hartsch shot Creque 13 times from a one to twelve-inch distance in her head and torso. She died within two minutes. (18 RT 2659, 2661-2668, 2671.) After the killings, Hartsch told Castaneda that no one would find out

about the killings because Gorman and Creque were not "important" and "nobody cared about them." (12 RT 2375; 16 RT 2375.)

Two days after committing double murder, Hartsch killed Angelica. The last time Angelica was seen alive, Hartsch told Castaneda and Martinez he was going to the citrus grove with her to have sex. (11 RT 1645, 1706; 16 RT 2395-2397; 17 RT 2614-2617.) Hartsch had sex with 14-year-old Angelica and then, at a remote spot in the citrus grove, shot her five times in the head-- in the center of her face at the bridge of her nose and four times in the top of her head. (10 RT 1542, 1547; 18 RT 2710-2714, 2723, 2731-2732, 2735; 19 RT 2782, 2784; 21 RT 3041-3042, 3044.) Hartsch took Angelica's jewelry and gave it to his girlfriend. (15 RT 2207; 22 RT 3187.)

The next factor, Hartsch's violent criminal history, also weighed in favor of a death sentence. In the weeks before the murders Hartsch had been violent toward his ex-girlfriend Armanda Ramirez who was Angelica's best friend. During arguments, he pulled her hair and drew his gun on her. (28 RT 4127-4131.) In 1991, Hartsch and his cohorts were caught breaking into a truck and while making their get-away, at least one of them brandished a knife. (27 RT 4015-4019, 4021, 4025-4027, 4030, 4035.) In January of 1992, Hartsch, Rushing, and Hartsch, Sr., drove to an apartment complex where they believed a man lived who had previously shot at Hartsch and his friends. Hartsch, Sr. drove onto the lawn of the apartment building and in front of an apartment unit. The occupant opened her door and Hartsch pointed a gun at her. After she shut the door she heard gunshots fired. When Hartsch was later arrested he was carrying ammunition for the gun. (27 RT 4059-4060, 4062, 4067-4069, 4072, 4077-4079, 4092, 4096-4097.) In May of 1993, Hartsch murdered Michael Wheeler. Hartsch attempted to rob Wheeler, who was severely developmentally disabled, of his wallet. When Wheeler told Hartsch he did not have any money, Hartsch beat and shot him. Hartsch stole Wheeler's ring and jacket. (28 RT

4270-4271, 4290-4293, 4323.) Four months later, in September of 1993, Hartsch and his cohorts robbed two young transients of their jackets. One of the transients was beaten and stabbed. (27 RT 4104-4111, 4114.) In October of 1994, Hartsch repeatedly threatened another youth at a court-ordered juvenile program and forced him to orally copulate Hartsch. (28 RT 4181-4182.)

The only mitigating evidence offered was that Hartsch, who was 18 years old at the time he committed the offenses, was a product of his environment. Hartsch, Sr. was imprisoned when Hartsch was three-years-old. Hartsch's mother became involved with another man that Hartsch did not like and who hit Hartsch. When Hartsch was about 10-years-old, his mother and father reunited. But not long after, his older brother, Joe with whom he was close was sent to the California Youth Authority and his father returned to prison. Hartsch was a gang member from the age of 12 or 13. His mother did not force him to go to school and he was allowed to drink alcohol at home. During this time, from 1989 through 1993, Hartsch was in and out of the juvenile justice system at least every six months. (29 RT 4450-4451.) When Hartsch was 16 years old, he moved into the converted garage and covered the walls with gang graffiti and slogans. (29 RT 4480-4501.) Hartsch's former manager at the food packing plant, his probation officer, and his case manager at the court ordered juvenile program all essentially testified that Hartsch was generally cooperative and responded well to structure. Despite these traits however, Hartsch maintained a gang-like mentality and his potential for future criminal behavior caused his probation officer great concern. (29 RT 4438-4439, 4442-4445, 4450-4451, 4509, 4513, 4515, 4520, 4522, 4524.)

No other mitigating circumstances were present. There was no evidence that Hartsch was under the influence of extreme mental or emotional disturbance, that he believed there was a moral justification or extenuation for

his conduct, that he acted under extreme duress or the substantial domination of another person, or that he was impaired as a result of a mental disease or defect, or intoxication at the time of the crime. (Pen. Code, § 190.3, factors (d), (f), (g), (h).) Additionally, none of Hartsch's victims participated in or consented to Hartsch's homicidal acts (Pen. Code, § 190.3, factor (e)), and the evidence indicated Hartsch was the sole participant in the crimes (Pen. Code, § 190.3, factor (j)).

Thus, although Hartsch was largely unsupervised as an adolescent and even encouraged to participate in criminal activity by his father, and relatively young when he committed the murders, to the extent these were mitigating factors, they clearly did not offset the overwhelming factors in aggravation. Although

> a more detailed statement of reasons would have been helpful to understand more fully the trial court's independent determination that death was warranted . . . the record here not only establishes that the court acted on a proper understanding of its statutory duties, it amply justifies the court's conclusion as well.

(*People v. Farnam*, *supra*, 28 Cal.4th at p. 195, and cases there cited.) The trial court's statement during a record correction proceeding on June 24, 2004, upon which Hartsch relies in support of his argument (AOB 234), that it had "a script" from which it read during the sentencing hearing prior to denying the motion to modify the verdict does not negate the trial court's understanding of its duties. Indeed, the trial court's comments at the sentencing hearing concerning the absence of personal responsibility for one's actions, the need for but lack of help at home from "friends, neighbors," and that the case was "ugly for everyone," and "sad for all of us," after imposing death certainly were not scripted and indicate the trial court undertook the statutorily required independent determination that the death penalty was warranted. (30 RT 4662.)

In any case, "The trial judge's reasons for concluding that the jury's

verdict of death was not contrary to law or the evidence in the case are self-evident from the record." (*People v. Allison, supra*, 48 Cal.3d at p. 912.) Consequently, Hartsch was not prejudiced by the trial court's failure to state reasons for denying his application for modification of the death verdict. (*People v. Heishman, supra,* 45 Cal.3d at pp. 201-203 [assuming *Chapman* applies and finding failure to state reasons harmless under that standard where evidence in mitigation did not offset, to a significant extent, overwhelming aggravating circumstances].) Accordingly, Hartsch's argument should be rejected and a remand is not required.

XV.

THIS COURT HAS PREVIOUSLY REJECTED HARTSCH'S NUMEROUS CHALLENGES TO CALIFORNIA'S DEATH PENALTY SCHEME

In an apparent effort to preserve his claims for federal review (see AOB 243, fn 85), Hartsch mounts a series of separate attacks on California's death penalty law and death sentencing process. (AOB 219-228, 240-277.) This Court has repeatedly rejected each of these claims. Hartsch provides no persuasive reason for this Court to reconsider its previous decisions. Thus, each of Hartsch's claims should be rejected.

A. The Trial Court Properly Rejected The Defense-Requested Special Instruction On Lingering Doubt

In Argument XIV, Hartsch contends the trial court prejudicially erred in refusing to instruct the jury that it could consider lingering doubt as to Hartsch's guilt in determining his penalty.[24/] (AOB 219-228.) Hartsch was not entitled

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24. Hartsch's proposed Special Instruction No. M, refused by the trial court, reads as follows:

to a special instruction on lingering doubt. The CALJIC instructions provided were adequate.

In closing argument to the jury, trial counsel did not focus on the third-party culpability theory it presented at trial but rather urged the jury to consider the value of human life and vote for life imprisonment. (30 RT 4606-4607, 4617.) Trial counsel asked the jury to focus on Penal Code section 190.3, factor (k), and argued that Hartsch was "a product of his environment," "the killer, the thief," who was never taught to act properly and was not deserving of the death penalty for this reason. (30 RT 4608-4617.) The jury was instructed it could consider the circumstances of the crime (Pen. Code, § 190.3, factor (a)), any other circumstances that extenuated its gravity (Pen. Code, § 190.3, factor (k)), and any sympathetic or other aspect of Hartsch's character or record that suggested a sentence other than death (CALJIC No. 8.85 [Penalty Trial-- Factors For Consideration]). (30 RT 4619-4621; 21 CT 5697.) Additionally, CALJIC No. 8.88 [Penalty Trial-- Concluding Instruction] instructed the jury that it had to consider mitigating factors, which it defined broadly as "any fact, condition or event which does not constitute a justification

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> Although you have found the defendant guilty of murder in the first degree beyond a reasonable doubt, you may demand a greater degree of certainty for the imposition of the death penalty. The finding of guilt is not infallible and any lingering or residual doubts which you may entertain on the question of his guilt, even though it does not rise to the level of reasonable doubt, may be considered by you in determining the appropriate penalty to be imposed.
>
> Lingering or residual doubt is defined as the state of mind between "beyond a reasonable doubt" and "beyond all possible doubt." Thus, if you have any lingering or residual doubt concerning the defendant's guilt, you may consider that as a factor in mitigation, upon which to base a sentence of life imprisonment without the possibility of parole.

(21 CT 5774-5775; 29 RT 4400-4401.)

or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (21 CT 5736.)

This Court has explained,

> [T]he standard CALJIC penalty phase instructions "are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards." [Citation.]

(*People v. Gurule, supra,* 28 Cal.4th at p. 659.) A capital defendant has no federal or state constitutional right to have the penalty phase jury instructed to consider residual lingering doubt about his or her guilt. (See e.g., *People v. Panah* (2005) 35 Cal.4th 395, 497; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1218, citing *People v. Staten* (2000) 24 Cal.4th 434, 464; *People v. Cox, supra,* 53 Cal.3d at p. 677; *Oregon v. Guzek* (2006) 546 U.S. 517 [126 S.Ct. 1226, 1231-1232, 163 L.Ed.2d 1112] [noting that the Court has never held that such a right exists].) CALJIC No. 8.85, as noted in *People v. Sanchez* (1995) 12 Cal.4th 1, 77-78, is sufficiently broad to encompass any residual doubt any jurors might have entertained.

Here, the instructions provided under CALJIC Nos. 8.85 and 8.88 affirmatively required the jury to consider any mitigating circumstances. The trial court did not prejudicially err in refusing to instruct the jury under the defense proposed Special Instruction No. M. Thus, Hartsch's claim of error should be rejected. (See *People v. Hughes, supra*, 27 Cal.4th at p. 405.)

B. Intercase Proportionality Review Is Not Required By The Federal Or State Constitutions

In Argument XVI, Hartsch contends the failure of California's death penalty statute to require intercase proportionality review violates his Eighth and Fourteenth Amendment rights. (AOB 240-242.) Hartsch's argument is not well taken, as this Court has repeatedly rejected identical contentions based on

United States Supreme Court precedent.

Intercase proportionality review is not constitutionally required in California (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Wright* (1990) 52 Cal.3d 367), and this Court has consistently declined to undertake it. (*People v. Harrison* (2005) 35 Cal.4th 208, 261; *People v. Morrison,* 34 Cal.4th at p. 730; *People v. Welch* (1999) 20 Cal.4th 701, 772; *People v. Majors* (1998) 18 Cal.4th 385, 432; *People v. Millwee* (1998) 18 Cal.4th 96, 168; *People v. Mayfield* (1997) 14 Cal.4th 668, 812; *People v. Marshall* (1996) 13 Cal.4th 799, 865-866; *People v. Ray, supra,* 13 Cal.4th at p. 360; *People v. Champion* (1995) 9 Cal.4th 879, 950-951.)

C. The Trial Court Was Not Required To Instruct The Jury On The Burden Of Proof During The Penalty Phase

Unlike the determination of guilt, the sentencing function is inherently moral and normative, not functional, and thus not susceptible to any burden-of-proof qualification. (*People v. Burgener* (2003) 29 Cal.4th 833, 884-885; *People v. Anderson, supra,* 25 Cal.4th at p. 601; *People v. Welch , supra,* 20 Cal.4th at p. 767; *see People v. Daniels* (1991) 52 Cal.3d 815, 890; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418.) Hartsch contends in Argument XVII that under this rationale, fundamental reasoning applicable to other parts of the law has been omitted from the process of determining whether death is an appropriate punishment in violation of a defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 243-257.) This Court has repeatedly rejected claims identical to Hartsch's regarding a burden of proof at the penalty phase. (*People v. Welch, supra,* 20 Cal.4th at pp. 767-768; *People v. Ochoa, supra,* 19 Cal.4th at p. 479; *People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Box , supra,*23 Cal.4th at p. 1216; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People*

v. Holt, supra, 15 Cal.4th at pp. 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) Hartsch does not offer any valid reason to vary from this Court's past decisions.

Insofar as Hartsch 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, 147 L.Ed.2d 435], compel a different conclusion (see AOB 244-247), Hartsch is mistaken. These cases have been found to have no application to the penalty phase procedures of this state. (*People v. Gray, supra,* 37 Cal.4th at p. 237; *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Morrison, supra,* 34 Cal.4th at p. 730; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Smith* (2003) 30 Cal.4th 581, 642; *People v. Prieto, supra,* 30 Cal.4th at pp. 262-264, 271-272, 275.) Nor does the United States Supreme Court's recent decision in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] alter this conclusion. (*People v. Ward* (2005) 36 Cal.4th 186, 221.)

D. CALJIC No. 8.88 Is Constitutional

Hartsch contends in Argument XVIII that the instruction under CALJIC No. 8.88 [Penalty Trial -- Concluding Instruction][25] was constitutionally

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25. The trial court instructed the jury in the language of CALJIC No. 8.88 as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the State prison for life without the possibility of parole, shall be imposed on the defendant.
>
> After hearing all of the evidence and after hearing and -- heard and considered the arguments of counsel, you shall consider and take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. An aggravating factor is any fact,

defective in defining the scope of the jury's discretion and the nature of the deliberative process and violated his constitutional rights to due process, trial by jury and a reliable penalty determination under the Sixth, Eighth, and Fourteenth Amendments. Specifically, he argues the instruction: (1) did not provide adequate guidance because the "so substantial" standard it articulated

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> condition or event attending the commission of a crime which increases– which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> In weighing– the weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you may deem appropriate to each and all the various factors you are permitted to consider. In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgement of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> You shall now retire and select – excuse me. You shall now retire and deliberate on the penalty. The foreperson previously selected may preside over your deliberations, or you may chose a new foreperson. In order to make a determination as to penalty, all 12 jurors must agree. Any verdict that you reach must be dated and signed by your foreperson on the form that will be provided and then you shall return into this courtroom.

(30 RT 4636-4637; 21 CT 5737-5738.)

was vague and ambiguous; (2) by use of the term "warrants," the instruction failed to inform the jurors that they were to determine whether the death penalty was actually appropriate; and, (3) did not include mandatory language that the jurors were required to return a finding of life without the possibility of parole if they determined the mitigating factors outweighed the aggravating factors. (AOB 258-265.) This Court has repeatedly rejected each of the above claims. (See *People v. Boyer, supra,* 38 Cal.4th at pp. 485-486; *People v. Chatman, supra,* 38 Cal.4th at pp. 409-410; *People v. Perry* (2006) 38 Cal.4th 302, 320; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Lenart* (2004) 32 Cal.4th 1107, 1134-1135; *People v. Cleveland, supra,* 32 Cal.4th at p. 765; *People v. Crew, supra,* 31 Cal.4th at p. 858; *People v. Boyette, supra,* 29 Cal.4th at pp. 464-466; *People v. Farnam, supra,* 28 Cal.4th at p. 192; *People v. Hughes, supra,* 27 Cal.4th at p. 405; *People v. Hawkins, supra,* 10 Cal.4th at p. 965; *People v. Marshall, supra,* 50 Cal.3d at pp. 936-937.)

The issues raised by Hartsch were rejected by this Court in *People v. Boyette, supra,* 29 Cal.4th at pages 464-465, when this Court stated:

> Defendant next claims CALJIC No. 8.88 is unconstitutional for a variety of reasons. He admits we have rejected all these claims in prior cases and asserts he is raising them in this court to exhaust his state remedies to permit him to renew these claims in federal court. [Citation.] We agree none of the claims has merit and that no reason appears to reconsider our past decisions. We list defendant's claims here to ensure a future court will consider them fully exhausted:
>
> - [. . .] .
> - The instruction's use of the phrase "so substantial" is vague and violates the Eighth Amendment to the United States Constitution. [Citations.]
> - The instruction's use of the term "warrants" is so overbroad it misleads the jury to believe it may impose the death penalty even when it concludes it is not the appropriate penalty. [Citation.]
> - The instruction fails to specify that the prosecution has the burden of persuasion. [Citation.]
> - The instruction fails to require the jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating ones and that

death is the appropriate penalty. [Citation.]

- The instruction fails to require that the jury unanimously find which aggravating circumstances are true. [Citation.]

- The instruction fails to require a statement of reasons supporting the death verdict. [Citation.]

Likewise in *People v. Hughes, supra*, 27 Cal.4th at page 405, this Court stated:

> Defendant also asserts that CALJIC No. 8.88 given here, is constitutionally inadequate to "channel the jury's discretion and provide a non-arbitrary, non-capricious sentencing decision" by informing the jury, consistently with section 190.3, that if, in weighing the factors in aggravation and mitigation, the jury finds that the former do not outweigh the latter, the jury must return a verdict of life imprisonment. We rejected a similar challenge in *People v. Duncan* (1991) 53 Cal.3d 955, 978 [281 Cal.Rptr. 273, 810 P. 2d 131], and do so here as well.

Finally, in *People v. Taylor, supra,* 26 Cal.4th at page 1181, this Court observed:

> Defendant faults the sentencing instructions (CALJIC No. 8.88) for failing to direct the jury to impose a life imprisonment without parole sentence if it concluded the mitigating circumstances outweighed the aggravating ones. We have repeatedly rejected the claim in light of other language in this instruction, allowing a death verdict only if aggravating circumstances outweighed mitigating ones.
>
> Defendant also faults CALJIC No. 8.88 for calling on the jury to impose death if they find "substantial" aggravating factors, implicitly compelling a death verdict if aggravating circumstances outweighed mitigating ones. Defendant observes that under our case law, the jury may reject a death sentence even if mitigating circumstances do not outweigh aggravating ones. Our reading of the instruction discloses no compulsion on the jury to impose death under such circumstances. Instead, the instruction simply explains that no death verdict is appropriate unless substantial aggravating circumstances exist which outweigh the mitigating ones. This instruction was proper under our case law.
>
> Defendant also argues CALJIC No. 8.88 was deficient for failing expressly to inform the jurors they could vote against the death penalty even if they believed the aggravating circumstances outweighed the mitigating ones. We have rejected the argument in past cases.

This Court has repeatedly rejected the claims Hartsch raises, and should do so here. (See *People v. Moon*, *supra,* 37 Cal.4th at pp. 42-43; *People v. Boyette, supra*, 29 Cal.4th at p. 464 ["We agree none of the claims has merit and that no reason appears to reconsider our past decisions."]; *People v. Taylor, supra*, 26 Cal.4th at p. 1183 ["Once again, as defendant acknowledges, we have repeatedly rejected similar arguments, and we see no compelling reason to reconsider them here."].)

E. The Instructions Provided To The Jury Concerning Aggravating And Mitigating Circumstances Were Not Constitutionally Flawed

Next, Hartsch asserts in Argument XIX, that CALJIC Nos. 8.88 and 8.85, the instructions provided on the aggravating and mitigating factors related to Penal Code section 190.3, and the application of those factors, render the death penalty unconstitutional. He claims: (1) the application of Penal Code section 190.3, subdivision (a), resulted in arbitrary and capricious imposition of the death penalty; (2) the failure to delete inapplicable sentencing factors violated his rights under the Sixth, Eighth and Fourteenth Amendments; (3) the failure to instruct that the statutory mitigating factors are relevant solely as mitigators precluded a fair imposition of the death penalty; (4) the restrictive adjectives used in the list of potential mitigating factors impeded jurors consideration of mitigating evidence; (5) failure to require specific written findings with respect to the aggravating factors they found and considered in returning a death sentence violated Hartsch's rights to meaningful appellate review and equal protection; and, (6) even if these procedural safeguards are not necessary for fair and reliable capital sentencing, denying them to capital defendants violates equal protection. (AOB 266-273.)

As discussed above in Sub-Argument D, instruction under CALJIC No. 8.88 did not deprive Hartsch of any constitutional right. With respect to

CALJIC No. 8.85 [Penalty Trial -- Factors For Consideration][26], this Court has

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26. The jury was instructed in the language of CALJIC No. 8.85 as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case. 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 found to be true. [. . .]
>
> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat of the use force or violence.
>
> (c) The presence or absence of any prior felony conviction other than the crimes for which the defendant has been tried in the present proceedings.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the victim's (*sic*, defendant's) homicidal conduct or consented to the homicidal act.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.
>
> (i) The age of the defendant at the time of the crime.
>
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
>
> (k) Any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime,

consistently held that the instruction is not unconstitutionally vague and does not allow the penalty process to proceed arbitrarily or capriciously. (*People v. Perry, supra*, 38 Cal.4th at p. 319; *People v. Farnam, supra*, 28 Cal.4th at pp. 191-192; *People v. Lucero* (2000) 23 Cal.4th 692, 728; *People v. Earp, supra*, 20 Cal.4th at p. 899.) More specifically, this Court has repeatedly held that: a trial court has no obligation to modify the instruction to delete inapplicable aggravating and mitigating factors (*People v. Perry, supra*, 38 Cal.4th at p. 319; *People v. Farnam, supra*, 28 Cal.4th at pp. 191-192; *People v. Earp, supra*, 20 Cal.4th at p. 899); the instruction did not need to specifically identify the sentencing factors as either aggravating or mitigating circumstances since their natures are clear (*People v. Perry, supra*, 38 Cal.4th at p.319; *People v. Earp, supra*, 20 Cal.4th at p. 899; *People v. Frye* (1998) 18 Cal.4th 894, 1026); the aggravating factors described in CALJIC No. 8.85 are not impermissibly vague (*People v. Earp, supra*, 20 Cal.4th at p. 899; *People v. Arias* (1996) 13 Cal.4th 92, 188-189); the use of the adjectives "extreme" and "substantial" to modify two of the mitigating factors is not unconstitutionally vague and does not erroneously suggest to the jury that such evidence could not be considered if less than extreme or substantial (*People v. Perry, supra*, 38 Cal.4th at p. 319; *People v. Frye, supra*, 18 Cal.4th at p. 1029; *People v. Stanley* (1995) 10 Cal.4th 764, 862); and, the jury is not required to render a statement of reasons or to make unanimous written findings on the aggravating factors supporting

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> and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.
>
> You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(30 RT 4619-4621; 21 CT 5697-5698.)

its verdict (*People v. Farnam, supra,* 28 Cal.4th at p. 192). Hartsch offers no valid reason for revisiting these decisions and the instant claim should therefore be rejected.

To the extent that Hartsch reasserts an equal protection claim with respect to the arguments he raises in Argument XIX (AOB 272-273), the claim should be rejected. This Court has repeatedly held that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Hinton, supra,* 37 Cal.4th at p. 912; *People v. Smith, supra,* 35 Cal.4th at p. 374; *People v. Morrison, supra,* 34 Cal.4th at p. 371; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Boyette, supra,* 29 Cal.4th at pp. 465-467.)

F. California's Death Penalty Statute Does Not Violate International Law

Hartsch contends in Argument XX that California's death penalty law operates in contravention of customary international law and, to the extent the Eighth Amendment is implicated, his right to be free from cruel and unusual punishment is violated by the imposition of a death sentence. (AOB 274-277.) Hartsch is precluded from raising this issue because it has been forfeited and he lacks standing to assert a violation of international law. Additionally, this Court has previously and repeatedly rejected the notion that California's death penalty statutes somehow violate international law.

Initially, it is observed that Hartsch should be precluded from claiming violations of international customary law or treaties for the first time on appeal, since he never raised any such claims in the trial court. Convicted defendants are generally precluded from raising claims on appeal if the claim was not previously raised in the trial court. (See, e.g., *People v. Jones* (1997) 15 Cal.4th 119, 181; *People v. Collie* (1981) 30 Cal.3d 43, 64.) Moreover, Hartsch has

failed to show that he has any standing to invoke the jurisdiction of international law in this proceeding, because the principles of international law apply to disputes between sovereign governments and not between individuals. (*Hanoch Tel-Oren v. Libyan Arab Republic* (D.D.C., 1981) 517 F.Supp. 542, 545-547.)

Hartsch notes that all Western European countries have abolished the death penalty and that the Eighth Amendment should be interpreted to prohibit capital punishment based on the views of other nations. (AOB 275-277.) However, it is not the international communities' views which are relevant to Eighth Amendment analysis; "it is *American* conceptions of decency that are dispositive[.]" (*Stanford v. Kentucky* (1989) 492 U.S. 361, 369 fn. 1 [109 S.Ct. 2969, 106 L.Ed.2d 306].) Interpretation and application of the provisions of the United States Constitution to questions presented by state or federal statutory or constitutional law is ultimately an issue for the United States Supreme Court and the lower federal courts, not customary international law.

Finally, Hartsch's claim lacks merit because it has previously been specifically rejected by this Court. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511 ["International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements"]; accord *People v. Perry, supra,* 38 Cal.4th at p. 322; *People v. Brown, supra,* 33 Cal.4th at p. 404; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In *Ghent*, this Court held that international authorities do not compel elimination of the death penalty, and do not have any effect upon domestic law unless either self-executing or implemented by Congress. (*People v. Ghent, supra,* 43 Cal.3d at pp. 778-779.) As in *Ghent*, Hartsch cites no authorities suggesting the international treatises on which he relies have been held effective as domestic law.

In summary, Hartsch has forfeited this claim and further has no standing

to invoke international law as a basis for challenging his state convictions and judgment of death. Moreover, Hartsch has failed to state a cause of action under international law, for the simple reason that Hartsch's various claims of violations of the Eighth Amendment in connection with his prosecution, conviction, and sentencing in the instant case are without merit. American federal courts carry the ultimate authority and responsibility for interpreting and applying the American Constitution to constitutional issues raised by federal or state statutory or judicial law.

California's death penalty law does not violate the International Covenant of Civil and Political Rights, which prohibits the "arbitrary" deprivation of life and bars the "cruel, inhuman or degrading treatment or punishment." The covenant specifically permits the use of the death penalty "if imposed only for the most serious crimes in accordance with law in force at the time of the commission of the crime." When the United States ratified the treaty, it specifically reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under the laws permitting imposition of the death penalty. (See 138 Cong. Rec. S-4718-01, S4783 (1992); *People v. Perry*, *supra,* 38 Cal.4th at p. 322; *People v. Brown, supra,* 33 Cal.4th at pp. 403-404.) This Court's earlier rejections of similar claims have equal applicability in this case.

XVI.

THERE WAS NO CUMULATIVE ERROR

Hartsch contends the cumulative effect of the alleged errors which occurred in this case undermined the fundamental fairness of Hartsch's trial and warrants the reversal of the judgment of conviction and sentence of death. (AOB 278-281.) As previously discussed at length throughout this brief, no error occurred; therefore, there cannot be any cumulative error.

Assuming for the sake of argument that those claims of error Hartsch ascribes to the guilt and penalty phases of his trial were in fact error, each would be harmless under the applicable standard of review. (*People v. Cunningham, supra*, 25 Cal.4th at pp. 1009, 1038; see *People v. Heard* (2003) 31 Cal.4th 946, 982; *People v. McDermott* (2002) 28 Cal.4th 946, 1005 [no individual error, so rejecting claim of cumulative error]; accord *People v. Slaughter, supra,* 27 Cal.4th at p. 1223 [taken individually or cumulatively, errors harmless].) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Box, supra,* 23 Cal.4th at p. 1214.) Because the issues claimed as error by Hartsch either were all not error, have been forfeited, or were harmless, there could be no prejudice to Hartsch, and therefore no cumulative effect. (*People v. Kipp, supra,* 26 Cal.4th at p. 1141.)

Accordingly, assuming arguendo any error occurred, viewed cumulatively such errors would not have significantly influenced the fairness of Hartsch's trial or detrimentally affected the jury's determination of the appropriate penalty. (*People v. Avila, supra,* 38 Cal.4th at p. 615.) Therefore, the entire judgment must be affirmed. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1038.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment and death sentence be affirmed.

Dated: January 25, 2007.

Respectfully submitted,

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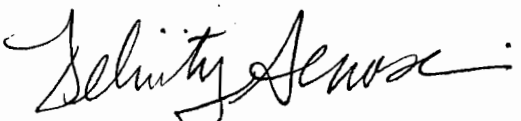

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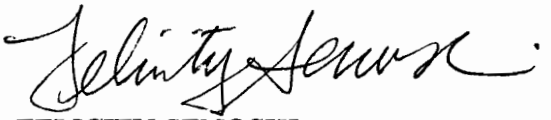
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 50833 words.

Dated: January 25, 2007.

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Cisco Hartsch**

No.: **S074804**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 25, 2007, I served the attached **Respondent's Brief,** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 25, 2007, at San Diego, California.

Lidia Hernandez
Declarant

Lidia Hernández
Signature

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