IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHARLES EDWARD MOORE,

Defendant and Appellant.

S075726

CAPITAL CASE

Los Angeles County Superior Court No. A018568-02
The Honorable James B. Pierce, Judge

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES (continued)

Other Authorities

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STATEMENT OF THE CASE

In an information filed on July 22, 1983, by the District Attorney of Los Angeles County, appellant was charged in Counts I and II, under the 1977 Death Penalty Law, with the offense of murder, violations of Penal Code section 187.[1/] In both counts, it was alleged that in the commission of the murders, appellant personally used a deadly and dangerous weapon, to wit, a knife, within the meaning of section 12022, subdivision (b). As to both Counts I and II, the information further alleged three special circumstance allegations: (1) robbery-murder, within the meaning of former section 190.2, subdivision (c)(3)(i); (2) burglary-murder, within the meaning of former section 190.2, subdivision (c)(3)(v); and (3) multiple-murder, within the meaning of former section 190.2, subdivision (c)(5). (1CT 1-4; 5CT 1350-1353, 1356.)

In Count III, appellant was charged with the offense of burglary, a violation of section 459, and in Counts IV and V, appellant was charged with robbery, violations of section 211. As to Counts III, IV and V, it was alleged that: (1) appellant personally used a deadly and dangerous weapon, to wit, a

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

knife, within the meaning of section 12022, subdivision (b); (2) appellant personally used a firearm, to wit, a handgun, within the meaning of section 12022.5; and (3) appellant intentionally inflicted great bodily injury upon Hettie Marie Crumb and Robert L. Crumb, within the meaning of section 12022.7. (1CT 5-7; 5CT 1353-1356.) Appellant pleaded not guilty and denied all the special allegations. (1CT 110.)

On April 5, 1984, a jury found appellant guilty of all the charges and found all of the special allegations to be true. (1CT 226-232, 238-241.) On April 11, 1984, following the penalty phase, the jury fixed the penalty at death in both Counts I and II. (1CT 251, 267-268.)

On November 3, 1988, this Court affirmed the judgment and denied appellant's related habeas corpus petitions. (*People v. Moore* (1988) 47 Cal.3d 63; 2CT 337-415.)

Appellant's federal petition for writ of habeas corpus was granted. (*Calderon v. Moore* (9th Cir. 1997) 108 F.3d 261, cert. denied June 23, 1997, 521 U.S. 1111; 3CT 782.)

Appellant's case was returned to superior court for retrial. (3CT 784.) Appellant's motion to dismiss for lack of speedy trial was denied. (3CT 811; 4CT 819-830.) Appellant's motion to dismiss for lack of jurisdiction, and his motions to dismiss for excess of jurisdiction, were denied. (4CT 1002; 5CT 1293-1299, 1302, 1317-1345, 1346, 1357.) Appellant's section 1538.5 motion to suppress evidence was denied. (5CT 1360-1364; 6CT 1365-1399, 1431, 1457-1508, 1521-1525.)

The guilt phase of appellant's second jury trial began on September 21, 1998. (8CT 1988.) Appellant's motion to dismiss under section 1118.1 was denied. (8CT 1999.) The jury found appellant guilty as charged in Counts II, III, IV and V, and further found as to those counts that all the special allegations were true. As to Count I, the jury found appellant guilty of first degree murder

and also found the special allegations to be true, with the exception of the personal use of a deadly and dangerous weapon allegation (§ 12022, subd. (b)), which the jury found to be not true. (8CT 2013-2020.)

Following the penalty phase, the jury selected the punishment of death for the first degree murders of Hettie Marie Crumb and Robert L. Crumb. (8CT 2109-2112.) Appellant's motions for a new trial, to strike the special circumstances and to modify his sentence to life without the possibility of parole were denied. (8CT 2141-2143, 2149-2175, 2177-2180.)

On December 7, 1998, appellant was sentenced to death in Counts I and II for each of the special circumstance murders. (8CT 2144-2146, 2194-2195.) As to Counts III, IV and V, appellant was sentenced to a total determinate state prison term of 8 years, which the court ordered stayed during the pendency of the appeal on Counts I and II, with the stay to become permanent when the sentence on Counts I and II is completed. Appellant was granted custody credits for a total of 15 years, 5 months and 15 days. (8CT 2143, 2146-2147.)

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

STATEMENT OF FACTS

A. The Guilt-Phase Trial

1. Introduction

In December 1977, Robert and Marie Crumb lived in apartment 401 at the Chateau Marmont on Broadway in Long Beach, where they had been the apartment managers for the past two or three years. The Crumbs also sold costume jewelry from their apartment, that they made using turquoise, coral and mother-of-pearl; they kept large jewelry display cases in their bedroom. Around 4:00 p.m. on December 1, the owner of the apartment building, Walter James Watson, stopped by the Crumbs' apartment and picked up the rent

checks and cash that the Crumbs had collected that day. Both Marie and Robert were at home.

Later that evening, appellant, Lee Harris and 19-year-old Terry Avery entered the locked front door at Chateau Marmont by following a tenant, James Jones, through the door. The three intruders proceeded to apartment 401, and Terry knocked at the Crumbs' door. When Marie opened the door, she saw a young woman and two men holding guns, one of whom, appellant, was wearing a stocking mask. Appellant pushed into the apartment, forcing Marie into a chair, and Harris and Terry followed him inside, where Robert was seated on the couch.

Appellant grabbed Robert, struck him with the butt of a gun, and demanded to know where the money was. Marie screamed not to hurt him, and she repeatedly told them that there was no money because it had been taken to the bank earlier that day. Terry was told to look for jewelry, or anything else of value, in the bedroom. After she found the large jewelry display cases under the bed, appellant joined her and broke the cases open. Appellant left the room, and Terry used rags to pick up the jewelry and place it inside a pillowcase.

Meanwhile, in the living room, Marie lay face down on the floor, gagged and with her arms bound behind her back with white tape. Harris tried to choke her by using a rag he wrapped around her mouth and neck. Appellant was next to Robert, whose arms were bound behind his back with white tape, and who was leaning face down, half on the couch and half on the floor. Harris went into the kitchen, pulled a large butcher knife out of a drawer and returned to the living room.

When Walter Watson was unable to reach the Crumbs by telephone on December 2, he and his wife went to the Crumbs' apartment, where they found the front door closed, but unlocked. Inside the apartment Mr. Watson saw two hooded bodies on or near the couch, and the Crumbs' little dog, which was

alive.

Marie and Robert Crumb were beaten, choked and stabbed. Marie suffered six stab wounds, two of which punctured her right lung and were fatal. Robert Crumb suffered ten stab wounds, four of which were to his heart and were immediately fatal.

Appellant, who represented himself for the defense portion of the guilt phase and for the entire penalty phase, relied on a statement James Jones made to Detective Collette in February 1978, that he recognized appellant as someone who had lived at the apartments, but he had not seen appellant in several months. Based on that statement, appellant argued that he was not present at the Crumbs the night they were killed, and that the crimes were committed by Lee Harris and Terry, without appellant's knowledge.

2. Prosecution Case

a. The Crimes At Chateau Marmont In Long Beach

In late November 1977, Terry Avery, who was 19 years old and living with her parents in Denver, Colorado, had some trouble with her mother and ran away from home. Terry came into contact with appellant, who was a "friend of a friend," and someone Terry had known off and on for a couple of years. It was then that she met Lee Harris (photo; Peo. Exh. 12) for the first time. Even though Terry had no money, clothes or possessions with her, she agreed to accompany appellant and Harris to Lawrence, Kansas. It took one and one-half days to drive to their destination, and during the couple of days they stayed in Lawrence, appellant bought Terry clothes, a purse and shoes. When the shoes were given to her, they were wrapped in a yellow and white bag (Peo. Exh. 9) from Arensberg's in Lawrence, Kansas; Terry kept the bag. (5RT 1149; 6RT 1325-1330, 1370, 1443.)

When the three of them left Lawrence, they drove to the bus depot in

Kansas City, Kansas. The drive took a couple hours, and during that time, appellant mentioned that he used to live in some apartments in California, where he rented from a couple who had money and jewelry. Appellant explained that they were going to California so that they could pay his former apartment managers a visit because he wanted to rob them. Appellant paid for the bus tickets to Los Angeles. Appellant and Harris had two or three suitcases, but Terry had only her purse and the yellow and white shoe bag (Peo. Exh. 9). (6RT 1328-1333.)

After appellant, Harris and Terry arrived in Los Angeles, they stayed there overnight. The next day, which was December 1, they took a city bus to the Long Beach bus depot, where appellant and Harris left Terry alone with their suitcases for 30 to 40 minutes. When appellant and Harris returned, they took a taxi cab to the Kona Hotel (photo; Peo. Exh. 4) at Ocean and Alamitos, where they got adjoining rooms, numbers 208 and 209. Appellant registered himself and Terry as Mr. and Mrs. Charles Moore (Peo. Exh. 5-C), although he told Terry he registered them as "Mr. and Mrs. Charles Brown." Harris registered as Sam Harris (Peo. Exh. 5-D). Terry stayed in one of the rooms with appellant, but there was no "relationship" between them. (5RT 1134-1135; 6RT 1332-1336, 1443.)

Appellant, Harris and Terry took a short walk of about two and one-half blocks to an apartment building at 921 E. Broadway (photo; Peo. Exh. 13), on the corner of Broadway and Alamitos, where appellant said he used to live. The building was named the Chateau Marmont, and it was a four story, brick building. On the bottom floor was a liquor store, and there were apartments on floors two through four. The glass front door of the building self-locked and required a key for entry. They returned to the Kona Hotel and later went out for dinner. (5RT 1134, 1152, 1206-1207, 1210; 6RT 1336-1338, 1443.)

After they returned to their hotel rooms after dinner, appellant and Harris

left Terry alone and went out. Appellant was carrying a bag from a drugstore when they got back. Inside the bag was surgical tape that was white, thick and made of cloth. The men also had three guns between them, two revolvers and a "silver pistol." Terry had seen the same guns in Kansas. The plan was to return to the apartment building after dark. Harris told appellant that appellant needed to cover his face so he would not be identified. Appellant took a pair of Terry's stockings and made himself a mask, but when he put it on, Terry could still recognize him. Appellant placed the stocking mask in his pocket. When they left the motel to go to the apartment building, the men had the tape and the two revolvers with them. Terry carried only her purse. She believed that her only choice was to accompany appellant and Harris because she had no money and no way of getting home. Terry also did not want the men to hurt her; moreover, she thought they were only going to rob the apartment managers. (6RT 1337-1342.)

In 1977, Walter James Watson owned property in Long Beach, including the building at 921 E. Broadway (Chateau Marmont), and another apartment building at 1044 Appleton, which was within walking distance of the Chateau Marmont. For the past two to three years, Robert and Marie Crumb (photos; Peo. Exhs. 17 and 16) lived in apartment number 401 in the Broadway building and managed both buildings for Watson. The Crumbs kept the ledgers, collected the rent monies and turned the monies over to Watson and his wife, who would stop by the Crumbs' apartment to pick up the rent checks and cash. Around 4:00 p.m., on December 1, Watson went to the Crumbs' apartment and collected the rent monies from Robert and Marie. (5RT1205-1211.)

Earlier in the day on December 1, James Jones, who lived in apartment number 301 at the Chateau Marmont and was personal friends with the Crumbs, had spent the day with Marie, which was his regular routine. During November/December 1977, Jones was helping the Crumbs with their

housekeeping, laundry and marketing because Robert worked and Marie was ill. Jones and Marie did not do much that day except collect rent from the tenants whose rent was due on the first of the month. The last time Jones saw the Crumbs on December 1, was after Robert got home from work, which was usually around 4:30 or 5:00 p.m. When Jones left the Crumbs' apartment, nothing was broken, or strewn about the floor, including the many knickknacks the couple had. That evening Jones dressed in women's clothes, because every now and then he would be "in drag," and went to a neighborhood bar, where he became intoxicated before returning home alone. (5RT 1232-1241.)

When appellant, Harris and Terry reached the Chateau Marmont, the front door was locked; so Harris and Terry waited while appellant went around to the rear of the building. By the time appellant returned to the front, there was a man present, who was dressed like a woman, and who knew appellant. Appellant and the man talked, and when the man entered the building, appellant grabbed the door and let them all inside. Appellant was not wearing the mask when they entered through the front door. They climbed up a couple of flights of stairs and stopped at a door that had a "Manager" sign on it (photo; Peo. Exh. 1A). Terry did not yet see any guns. (5RT 1124-1125; 6RT 1342-1343, 1379, 1443.)

Terry knocked on the door, and Marie asked who was there. By the time Marie opened the door, appellant and Harris had their guns drawn, and appellant was wearing the mask. Appellant and Harris entered the apartment and Terry followed. Marie looked at appellant as if she knew him, and Terry saw Harris and appellant look at each other, with an expression that indicated they knew Marie recognized appellant. Appellant pushed Marie, who was five feet three inches tall and weighed 86 pounds, into a chair. Inside the apartment, Terry saw Robert, who was five feet seven inches tall and weighed 159 pounds, seated on the couch, and he appeared to have some type of tubes attached to

him, such as for oxygen. At first, Harris grabbed Robert, while appellant was demanding to know where their money was. Next, appellant let go of Marie and grabbed Robert, who was still seated on the couch. Appellant struck Robert in the head with the butt of his gun, and Marie became very upset and screamed at them not to hit Robert because he was sick. Terry believed the man was sick because he did not react when he was struck. Every time appellant or Harris demanded their money, Marie responded that they did not have any money because it had been taken to the bank earlier that day. (5RT 1267-1268, 1278; 6RT 1343-1346, 1363.)

Harris grabbed Marie and threw her onto the floor. Marie was lying face down, with Harris on top of her when Harris instructed Terry to get a cloth from a hamper that had towels and clothes in it. She found a curtain and gave it to Harris, who then told her to turn up the volume on the TV. After Terry turned the volume up to medium, she was told to go into the bedroom and look for "jewelry, anything." Appellant was still next to Robert, who was leaning face down, half way on the couch and half way on the floor. In the bedroom, Terry opened drawers and looked on tables before she discovered quite a few display cases under the bed. The cases looked like large jewelry boxes with glass tops. Terry saw they were filled with a lot of turquoise rings, necklaces and watches. (6RT 1346-1349.)

Appellant entered the bedroom and together they lifted the cases onto the bed. Appellant managed to break open the cases without breaking the glass tops, and he told her to put the jewelry into a bag; Terry used a pillowcase from the bed. She had been instructed to use rags to pick up things so that she did not leave fingerprints, and she placed only jewelry (Peo. Exhs. 7A-B, 7E, 7G-N) into the pillowcase. (5RT 1144-1146; 6RT 1349-1351, 1443.)

Terry returned to the living room and saw that both victims were in their same locations. However, she noticed that Marie, who was still face down on

the floor, had the white rag that Terry had given to Harris wrapped around her neck and mouth and was not making any noise. Marie's arms and hands were taped behind her back with the white surgical tape, and Harris was near her. Appellant was near Robert, whose arms were taped behind his back with the white surgical tape, and Robert was not moving or making any noise. Harris twisted the rag that was wrapped around Marie's neck and mouth to choke her, and he told Terry to find a butcher knife in the kitchen. (6RT 1351-1353.)

Terry looked through the cabinets and drawers in the kitchen (photo; Peo. Exh. 22) and took her time. She found some knives but did not take any of them. Terry told Harris she knew what he was going to do. Harris got up, entered the kitchen, opened the drawer, and pulled out a large butcher knife (Peo. Exh. 10). He looked at Terry and went back into the living room. Terry did not remove anything from the kitchen, and she returned to the bedroom. When she next looked into the living room from the door of the bedroom, she saw appellant stab Robert in the back with the butcher knife. Terry did not hear Robert making any noise, but he started to kick the coffee table; so Harris went over and held his ankles. Terry saw blood coming out of Robert's back, and she went back into the bedroom, where she stayed until Harris called to her to come out. (5RT 1150; 6RT 1353-1356, 135, 1435, 1443.)

When Terry re-entered the living room, Harris was on his knees straddling Marie's back. Although he ordered Terry to get the little pocket knife (Peo. Exh. 11) from the coffee table and to stab Marie, Harris actually picked up the knife, opened it and handed it to her. Harris pointed at Marie's back where he wanted Terry to stab her, and she did so, but did not push the knife all the way in. Terry stabbed Marie in the right side of her back directly below her underarm. Harris became angry and told her to do it again because she had not stabbed Marie hard enough. Appellant, who was still beside Robert's bloodied body, just watched her. Harris told Terry to move, and she

returned to the bedroom. However, Harris called to her to come back out and angrily pointed to the place where she had touched the coffee table when she stood up. He told her to clean it; so she got a towel and wiped it off. (6RT 1354-1362.)

Again, Terry returned to the bedroom where she had left the pillowcase with the jewelry in it on the bed. She paced the floor and tried "to hold herself together." Terry placed the pillowcase with the jewelry into her purse and left the apartment. She went downstairs and waited for appellant and Harris in the open area. After maybe 10 minutes, the men came down and they returned to the Kona Hotel. (6RT 1362-1364.)

Once they were back in their rooms, appellant poured the jewelry onto the bed, and he and Harris started to go through it. They asked her to point out the more expensive things, and told her to get a ring, or something, out of the pile. Terry selected a small, blue turquoise ring and a bracelet with turquoise on the band. She noticed some items there that she had not collected, such as watches and rings, and these items were not made with turquoise, but with diamonds. In fact, Terry recalled seeing Marie wearing the woman's ring, and Robert wearing the watch and the man's ring. Appellant took a turquoise buckle (Peo. Exh. 7E), but he also kept the two rings (Peo. Exh. 7D) and the watch (Peo. Exh. 7F) that the Crumbs had been wearing. Harris kept a diamond watch and a man's ring (Peo. Exh. 7C). After they finished looking through the jewelry and making their selections, the jewelry was placed into the yellow and white shoe bag (Peo. Exh. 9). Harris broke up the two black revolvers, placed the parts into a cloth bag and gave it to appellant. Afterwards, the three of them went down to the bar. (6RT 1365-1368, 1374-1378.)

While they were in the bar, appellant asked Terry to walk with him to the beach because he had to get rid of something. Even though appellant had the bag with the revolver-parts in it, Terry became frightened it was she that

appellant needed to get rid of, but she went with him anyway. During their walk, Terry lied to appellant in an attempt to convince him that she was all right, that she was not scared, and that nothing they had done bothered her. When they reached the beach, appellant threw the bag containing the parts of the two revolvers into the ocean. Appellant told Terry that "it wasn't him," and that "it was Harris's idea," because that was not how he operates. He further said he "didn't want to do it or something." At some point, Terry believed she had convinced appellant that she was all right, and they returned to the hotel room. (6RT 1367-1369.)

The next day Terry told appellant she did not feel good. She said she "had a doctor's appointment way before [she] left Denver," that her stomach was becoming upset again, and that she needed to go home. Appellant took her to the bus station and bought her a ticket. Neither appellant nor Harris traveled to Denver with her. Terry took only her own clothes, the clothes they had bought her, and the two pieces of jewelry she had selected, back with her. Once she arrived in Denver, she contacted her parents, but did not stay with them; she stayed with a friend. And, Terry did not tell anyone about what had happened in Long Beach. (6RT 1369-1370.)

Sometime later, Terry received a telephone call from a friend who told her to take a taxi to a specific apartment, and not to worry about the expense; so she did. Once she got to the apartment, she saw that both appellant and Harris were there. Terry was placed in one room and her friend into another. First, appellant questioned Terry about whether she had told anyone, including her friend, about what had happened. Then, appellant left the room and Harris came in and questioned her. Finally, Terry convinced them she was telling them the truth, which she was. Appellant and Harris asked Terry if she could find a girlfriend so that they could travel somewhere else. Terry replied that she had a friend that she would go visit and would ask her if she wanted to go.

(6RT 1370-1372.)

When appellant and Harris allowed Terry to leave, she called her mother and went home. Both her parents were at home when she got there, and Terry told them about Long Beach. Her father said she needed to call the police, and he called the police for her. Police officers arrived at Terry's home, and she left with them, knowing that she was in serious trouble. That evening she spoke to the police about appellant and Harris and told the officers where they could find the two men. Terry did not tell the police that she had been inside the Crumbs' apartment and present during the killings. (6RT 1372-1373.)

b. The Investigation

On December 2, 1977, Walter Watson tried to telephone the Crumbs, but no one answered. That was very unusual because either one of the Crumbs answered the phone, or their answering machine would engage. Therefore, that afternoon Watson and his wife went to the Crumbs' apartment. There was no answer when he knocked on their door; so he tried the knob and the door opened. It was also very unusual for the Crumbs' door to be unlocked because they always kept at least the deadbolt locked. Watson looked inside into the Crumbs' living room and saw two hooded bodies on or near the couch. He also saw their little dog, which was alive. Watson closed the door, went downstairs, called the police and waited for them to arrive. (5RT 1211-1213.)

On December 2, 1977, Detective William Collette, employed by the Long Beach Police Department, was assigned to the department's Homicide Division, and that afternoon he and his partner, Ron Nelson, were sent to 921 E. Broadway, Apartment 401, in Long Beach. Other officers were already there when they arrived at 4:00 p.m., and they went inside. In the living room, which was in a state of disarray with papers and things strewn all over the floor, Detective Collette saw the bodies of Robert and Marie Crumb. (5RT 1118-

1120.)

Robert Crumb's body was leaning against a partially blood-soaked sofa just inside the front door, with his buttocks on the floor and his legs extended under the coffee table (photo; Peo. Exh. 1C). There was a pillowcase over his head, and his hands were bound behind his back with white tape (photos; Peo. Exhs. 1C-1F). On the sofa next to Robert's body, Detective Collette saw a wallet and, lying on a pair of pink capris pants, a butcher knife (Peo. Exh. 10), with a reddish substance on the blade (photos; Peo. Exhs. 1B, 1D, 1F). Even though Robert's body was clothed in a white t-shirt and plaid, checkered pants, Detective Collette could see multiple stab wounds. The detective looked through the wallet and saw that it contained Robert's driver's license, but no money. (5RT 1120-112; 6RT 1443.)

Marie Crumb's body was lying face down on the other side of the living room, about five feet south of Robert's body (photo; Peo. Exh. 1B). A blue blanket partially covered Marie's back, including her hands, and her face was partially covered by a yellow curtain that was twisted tightly and wound through her mouth and around the back of her head. Detective Collette could see three stab wounds to Marie's back, and he noticed a small, folding pocket knife (Peo. Exh. 11) with a reddish substance on the blade, lying just to the right of her hip. (Photos; Peo. Exhs. 1B, 1G-1H). He also noticed that the papers strewn about were contracts and rental agreements. (5RT 1121-1122, 1126-1127; 6RT 1443.)

Detective Collette looked through the rest of the Crumbs' apartment, which consisted of a bathroom, a small kitchen and a bedroom. The bathroom was in order, and in the kitchen he saw a partially-eaten order of fish and chips, and noticed that a drawer containing silverware and knives was open about eight inches, with a butcher knife sticking out over the edge of the drawer (photo; Peo. Exh. 1J). It was the same type of butcher knife that he had seen

on the living room sofa. (5RT 1122-1123, 1127; 6RT 1443.)

Detective Collette saw that the bedroom was extensively ransacked. He observed large jewelry display cases, where the hasps/locks were pried off. He also noticed there were a couple of strong boxes pried open, and approximately 12 small drawers had been taken out of a jewelry box on the dresser and thrown onto the bed. On the bed was a pillow with a pillowcase on it that matched the pillowcase he saw covering Robert's head; there was also a pillow without a case on it. (Photos; Peo. Exhs. 1K-1L.) (5RT 1123-1124, 1127; 6RT 1443.) The only fingerprints found belonged to the Crumbs and their associates. (5RT 1128.)

Two days later, Detective Collette attended the autopsies of the Crumbs' bodies, which were performed by Deputy Medical Examiner Peter Dykstra.[2/] The autopsy of Robert Crumb, number 77 -14545 (Peo. Exh. 19), was of a well-developed, well-nourished Caucasian male, five feet seven inches in length, weighing 159 pounds. Robert's body still had his hands secured behind his back and the pillowcase over his head. When the pillowcase was removed, Detective Collette saw a black sock protruding from his mouth and noticed the sock had white adhesive tape on it, and there was also white adhesive residue from the tape on Robert's cheek, next to his mouth (photo; Peo. Exh. 2B). He also observed that another pillowcase had been wrapped around Robert's neck and twisted. (5RT 1128-1130, 1277; 6RT 1443.)

The autopsy revealed that Robert Crumb died from multiple, penetrating stab wounds to the front of his chest, which injured his heart and left lung. There were 10 stab wounds to Robert's body, all of which were to his chest

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2. On October 6, 1998, at appellant's second trial, Los Angeles County Chief Medical Examiner-Coroner Lakshmanan Sathyavagiswaran, after reviewing the autopsy reports, testified concerning the autopsies of Marie and Robert Crumb because Dr. Dykstra was no longer with the coroner's office. (5RT 1261, 1266-1267.)

(photos; Peo. Exh. 2E-F). The deepest stab wound was eight inches, while two of the wounds were only two and one-half inches deep. There were four stab wounds to Robert's heart, all of which, in Dr. Sathyavagiswaran's opinion, would have been immediately fatal because the loss of blood would have sent Robert into shock, he would have lost blood pressure within a minute and probably died within a few minutes. However, Robert could have remained conscious until he lost his blood pressure. The blade of the large butcher knife (Peo. Exh. 10), which was approximately nine inches long and one inch wide, was consistent with all of the stab wounds on Robert's body. (5RT 1131, 1267-1272, 1274-1275.)

There were also two lacerations on the back of Robert's head (photo; Peo. Exh. 2D). Lacerations are usually caused by blunt force, and the lacerations Robert sustained were consistent with being struck on the head with an object, such as a pistol. Robert's body also had indentation marks around his wrists from the tape used to bind his hands behind his back, and marks around his neck consistent with something having been tightly wrapped around it. (5RT 1129-1131, 1272-1274.)

The autopsy of Marie Crumb, number 77-14546 (Peo. Exh. 21), was of a female weighing 86 pounds and five feet three inches tall, who had been bound with adhesive tape, gagged, beaten in the head and stabbed. Detective Collette observed bruises to Marie's left eye and forehead (photo; Peo. Exh. 3B), bruises on her right arm (photo; Peo. Exh. 3G), and three abrasion contusions on her chest (photos; Peo. Exh. 3E-F). He also saw that Marie had been stabbed six times. Three of the stab wounds were to the front of her chest (photos; Peo. Exh. 3E-F), and three stab wounds were to her back (photo; Peo. Exh. 3D). Two of the six stab wounds were fatal, penetrating her right lung, and were ones made to Marie's right, upper back. (5RT 1132-1133, 1277-1279, 1285; 6RT 1443.)

Dr. Sathyavagiswaran explained that one of the three stab wounds to Marie's back was small, only one-eighth of an inch deep, and it was the other two, which measured six and one-half inches and seven inches in depth, that fatally penetrated her right lung, causing her to bleed to death, as well as causing her lung to collapse, thereby affecting her respiration. Marie would have died within minutes, but her death would have taken longer than Robert's because a lung injury bleeds out slower than a heart injury. One of the three stab wounds to her chest was two inches deep; the second was three and three-fourths inches deep, and the third wound was 7/16 of an inch deep. In Dr. Sathyavagiswaran's opinion, the two fatal stab wounds to Marie's back and one of the three stab wounds to her chest (the one that was three and three-fourths inches deep) were consistent with having been made by the large butcher knife (Peo. Exh. 10); the smaller pocket knife (Peo. Exh. 11) could not have made those wounds. (5RT 1280-1283.)

The bruises on Marie's right upper arm were consistent with her having been grabbed forcefully in that area. The bruises to Marie's left eye region and her forehead were consistent with blunt force injury, such as being hit with a smooth, round object. Her body also had markings on her wrists from the adhesive tape restraints, and gag marks on her neck and face from the cloth that was placed around her mouth and neck. (5RT 1285-1286.)

Although both Robert's and Marie's eyes had some hemorrhages, so there could have been asphyxia, their noses were not covered, and they could still breathe. Thus, Dr. Sathyavagiswaran concluded that the asphyxia did not play a major role in their deaths, and the purpose of the gagging was mainly to prevent Robert and Marie from yelling or screaming during the attack. He further opined that it was a good possibility that both Robert and Marie were restrained and conscious at the time the stab wounds were inflicted. (5RT 1286-1287, 1290.)

On December 20-21, 1977, Detective Pete Diaz of the Denver Police Department was assigned to the crimes against persons division of the homicide unit. He worked the midnight to 8:00 a.m. shift, and during his shift, he came into contact with Terry Avery and spoke with her about appellant and Lee Harris. Based on information given to him by Terry, he and other officers went to 750 W. Bellview in Littleton, Colorado, which was a suburb of Denver. (5RT 1170-1172.)

At the 750 W. Bellview address, Detective Diaz found a two-story apartment complex and he went to apartment number 102. Other officers went to the back of the building. At the front door, someone knocked, but there was no response. Detective Diaz heard, although not immediately, movements from inside the apartment. He also heard a transmission from another officer; so while he tried to unlock the door with a key, another officer was kicking at it. Just as Detective Diaz managed to unlock the door, it was kicked open and officers entered the apartment. Detective Diaz turned right and went directly to the rear of the apartment, where he found Lee Harris (photo; Peo. Exh. 12) in the bedroom. Harris was dressed only in jeans, and he was placed against the wall, searched, handcuffed and taken into custody. (5RT 1151, 1173-1175, 1180; 6RT 1443.)

Immediately to the left of Harris was a shoulder-high chest of drawers on top of which Detective Diaz saw a yellow plastic bag, like a small shopping bag. One side of the bag was folded down, and when the detective looked inside it, he saw numerous items of jewelry. Detective Diaz noticed there were some "gold chain type stuff" and pieces of jewelry with both turquoise and coral in the setting (photo; Peo. Exh. 8), including a belt buckle (Peo. Exh. 7E). He took custody of the bag (Peo. Exh. 9), and his partner took custody of Harris. Detective Diaz left the bedroom and looked into the bathroom, where he saw the screen from the window lying in the bathtub. He climbed into the

tub, looked out the window and saw that officers had appellant in custody. (5RT 1148-1149,1175-1180; 6RT 1443.)

Denver Police Detective Donald M. Danhour was standing outside the apartment window on December 21, 1977, when he saw appellant emerge from that window. He advised appellant that he was a police officer, and he placed appellant under arrest and handcuffed him. Within one to two feet of appellant, Detective Danhour found a revolver. The revolver had not been there prior to appellant's emergence from the window. Later at the police station in Denver, Detective Danhour removed two gold rings (Peo. Exhs. 7C-D and photo; Peo. Exh. 8) from appellant's fingers. From Harris's fingers, the detective removed two silver rings (Peo. Exhs. 7A-B and photo; Peo. Exh. 8). (5RT 1222, 1224-1229.)

In late December 1977, Detective Collette was contacted by both the Denver, Colorado, and the Lawrence, Kansas, police departments. Based on the information he received from those departments, he went to the Kona Hotel in Long Beach (photo; Peo. Exh. 4). From the hotel, Detective Collette obtained registration cards (Peo. Exh. 5A-D). During his investigation, he also spoke with Walter Watson, the owner of the Chateau Marmont building, and received a rental agreement signed by Marie Crumb (Peo. Exh. 6) from Mr. Watson. (5RT 1133-1137, 1213-1214.)

On January 10, 1978, Detective Collette traveled to Denver, where he saw appellant (photo; Peo. Exh. 15), who was six feet tall and weighed 185 pounds. He also saw Lee Edward Harris (photo; Peo. Exh. 12), who was five feet ten inches tall and weighed 165 pounds. Detective Diaz turned over custody of the yellow Arensberg shoe bag from Lawrence, Kansas (Peo. Exh. 9), and the jewelry (Peo. Exhs. 7A-V) contained in it. Included with the yellow bag, were two matchbooks (Peo. Exh. 7W), money orders (Peo. Exh. 7X), and hair combs (Peo. Exhs. 7Y-Z). (5RT 1137, 1143-1149, 1169; 6RT 1443.)

Detective Collette left Denver and traveled to Lawrence, Kansas, where he spoke with Terry Avery, and obtained a tape-recorded statement about the Long Beach homicides. Also present at the interview were Long Beach Police Detective Ron Nelson, Steven Hearst from the Kansas Bureau of Investigation, Darrell Crossfield from the Lawrence Police Department and Terry Avery's attorney. Terry did not ask them for anything; however, her attorney asked Collette and Nelson to promise that California would not prosecute her if she spoke with them. Detective Collette explained they could not do that, but he suggested that they interview her without first giving her the *Miranda* advisements. Terry's attorney agreed and explained to her that without the advisements, her statements could not be used against her in court. Detectives Collette and Nelson made no promises to Terry. (5RT 1149-1150; 6RT 1436-1438.)

When the interview began, Terry appeared to be traumatically affected by the events; she continually cried, sobbed and broke down. For five hours, Terry insisted that she had not been inside the Crumbs' apartment and had not been present during the killings. Detective Crossfield, who had engaged in previous conversations with Terry, then confronted her and told her that he thought she had been present. At that point, Terry broke down, admitted that she was present in the apartment when the Crumbs were killed, and became so hysterical that they stopped the interview for an hour. Even after the one hour break, during the remainder of the interview, Terry continued to cry and sob, and she told them that she saw appellant stab Marie Crumb in the back with the large butcher knife. (6RT 1438-1440.)

Russell Bradford, a document examiner for over 37 years, qualified as an expert witness. In the late 1970's or early 1980's, Bradford examined documents in connection with appellant's case. He concluded that the same

person filled out a Kona Hotel registration in the name of "Sam Harris" (Peo. Exh. 5D) and a handwriting exemplar (Peo. Exh. 14) that Detective Collette had obtained from Lee Edward Harris. Bradford compared a second Kona Hotel registration (Peo. Exh. 5C) with the rental agreement (Peo. Exh. 6) that Walter Watson gave to Detective Collette. Bradford concluded that the person who filled in the first four lines of People's Exhibit 5C was the same person who had signed People's Exhibit 6 as "'Charles Moore and Wife.'" (5RT 1135-1137,1152-1153, 1185-1189.)

3. Defense

Appellant did not testify in his own behalf.

Appellant called Detective Collette as a witness. Detective Collette had been an investigator for 24 years. He denied that he interviewed Jim Jones in February 1978. Detective Collette recalled that he had a conversation with Jones, but he believed another investigator conducted the formal interview. After viewing a written report handed to him by appellant, Detective Collette testified that appellant was correct, and that he had interviewed Jones and written a report about the interview. Jones told Detective Collette that he knew appellant as a person who used to live at the apartments on Appleton, but he had not seen appellant in several months. (6RT 1507-1509.)

During the Jim Jones interview, Jones examined the jewelry that Detective Collette had received from Detective Diaz. Jones identified a watch, which he recognized by the turquoise-type design, as one that Robert Crumb wore to work. Jones said some of the rings were kept in the display cases and that the necklaces were kept on display boards. (6RT 1510-1511.)

When Detective Collette interviewed Terry Avery in Kansas, she told him that there were four or five jewelry cases in the Crumbs' apartment. When the police had examined the apartment, they found eight variously-sized display

cases, a tin box that contained some jewelry, five small jewelry boxes, 12 drawers that had been removed from a jewelry box that was on top of a bedroom dresser, and three large wooden display cases with glass covers. Terry had told Detective Collette that there were necklaces in the jewelry cases. (6RT 1511-1513.)

During the interview, Terry said it was when she came out of the bedroom that Harris asked her to hand him the yellow piece of cloth that she thought was a curtain. She stated it was at that time that Harris placed the cloth around Marie's neck and started to choke her with it, but Harris also then told Terry to go get a knife. (6RT 1514.)

On cross-examination, Detective Collette explained that when Terry had said there were four or five jewelry cases, she had described them as being the large display cases. The police did find three or four large cases, and therefore, what the police found was consistent with what Terry had told him. (6RT 1515.)

On redirect examination, Detective Collette acknowledged he testified at trial that at the Crumbs' apartment he saw one butcher knife and one pocket knife, which appeared to have blood on them and appeared to have been used as weapons, but that the transcript of appellant's preliminary hearing evidenced he testified there were two large butcher knives and a pocket knife with what appeared to be blood on the blades. Detective Collette could not explain the inconsistency because he had always known that there were only two knives with blood on the blades. The other two butcher knives he saw, one of which was on the stove and the other in the drawer, appeared to be clean. He did sit at the prosecution table during portions of the preliminary hearing. However, the first time Detective Collette heard Terry testify was at this trial; therefore, he could not have previously testified the same way Terry did in order to corroborate her testimony. (6RT 1516-1518.)

Detective Collette, on recross-examination, explained that Terry had been to Long Beach to testify five or six times during the past 20 years, and that the reason he had never heard her testimony until the present trial was because he had always been busy doing other things connected to the case, such as transporting witnesses to and from the airport. (6RT 1518-1519.)

The parties agreed to have a portion of Terry Avery's testimony at a 1538.5 hearing from appellant's 1984 trial read into the record, beginning on page A-50, line 18 and concluding on page A-51 through line 9, as follows:

> "'Q All right. Between the time you were present at the robbery and killing of a manager of a "[deleted]" between then and the time you got on the bus from Los Angeles, was there a discussion that you heard and participated in about going to Los Angeles and why you were going there?
>
> "' Yes.
>
> "' Tell us about that.
>
> "' Charles Moore was telling Lee Harris about this apartment complex where he used to live, and the – about the manager of the apartment complex having – collecting rent and usually having money and jewelry there in their house.
>
> "'Q Was there a discussion regarding going to Los Angeles for any particular reason?
>
> "'A I think that was the reason.
>
> "'Q All right. What was to be done in Los Angeles?
>
> "'A To go to this apartment complex.
>
> "'Q And do what if anything?
>
> "'A To rob it.'"

(6RT 1535-1536.) A second portion of Terry Avery's testimony from the same hearing, beginning on page A-81 and concluding on page A-82 through line 7,

was read into the record as follows:

> "'Did you expect that they were going to do some more robberies?
>
> "'A No, not really. No.
>
> "' You didn't think they were going to do any more robberies when you came to Los Angeles?
>
> "'A No.
>
> "'Q Did they tell you they were going to do any more robberies?
>
> "'A No."

(6RT 1536-1537.)

B. The Penalty Phase

1. Prosecution

a. The 1977 Robberies

Appellant was convicted in Colorado in 1978 of two counts of aggravated robbery, which were with the use of a gun. (Peo. Exh. 23.) These robberies occurred on November 22, 1977, at a jewelry store, Argenzio Brothers, that was located in a shopping mall. (7RT 1770-1771, 1774, 1866.)

b. The July 20, 1979, Escape And Aggravated Robbery

In July 1979, Joseph Reliham was a court transport deputy for Arapahoe, Colorado, and it was his job to take people to the various courts for their court appearances. On July 20, 1979, his supervisor instructed him to take appellant to Judge Lee's court in Aurora, which was in Arapahoe County. During the transport, appellant's hands were handcuffed behind his back and his ankles were in leg irons. (7RT 1761-1763.)

Deputy Reliham took appellant to the holding area at the Aurora

courthouse. Because Judge Lee would not allow anyone to be handcuffed in his courtroom, Deputy Reliham began to remove appellant's restraints. When the deputy had removed the handcuffs and one leg iron, he felt a strong blow to his chest. He was stunned by the blow, but did not lose consciousness. (7RT 1763.)

When Deputy Reliham became aware of his surroundings again, he saw appellant had his gun and was pointing it at his upper torso. Deputy Reliham began hollering, and appellant told him to "shut up;" so he did. Appellant left the courthouse through the back way and ran across the parking lot with the leg iron bouncing to the side. Deputy Reliham did not see appellant again that day, but he subsequently testified in a proceeding involving appellant. (7RT 1764.)

After appellant escaped from the Aurora courthouse with Deputy Reliham's gun, he pointed it at two girls in a car, forced them out of their car, took their keys and drove away. He was caught within a number of hours. (7RT 1769.)

In 1998, James Peters was the elected District Attorney of Arapahoe, Douglas, Elber and Lincoln Counties in Colorado, all of which surround Denver. However, in January 1980, as a deputy district attorney in the office, he prosecuted appellant for several crimes, which included escape and aggravated robbery, and as a habitual criminal. As to the escape charge, Deputy Joe Reliham was the victim. The aggravated robbery was committed with a gun. (7RT 1767-1769.)

On the day he escaped, appellant was to appear before Judge Lee on a motion to reduce his sentence. Appellant had been sentenced in January 1979, on two counts of aggravated robbery and two counts of grand theft, involving the Argenzio Brothers jewelry store. District Attorney Peters previously secured certified copies of the court records in appellant's aggravated robbery case, case number C6609 (Peo. Exh. 23) and in his escape and aggravated

robbery case, case number 80CR55 (Peo. Exh. 24), and transported the documents to California. (7RT 1770-1772, 1774, 1866.)

c. The October 29, 1991, Fight

On October 29, 1991, James M. Williams was employed by the Department of Corrections and assigned to San Quentin, where he was working as a gun rail security officer for the east block condemned unit. At 11:00 a.m. he was working at the exercise yard when a situation attracted his attention, and Officer Williams saw appellant involved in a "pretty serious altercation" with another inmate. The inmates were wrestling and throwing punches, and appellant had the other inmate in a head lock, that was like a choke hold. Both inmates were on the ground, with appellant on top of the other inmate, who was struggling. Officer Williams sounded an alarm, another officer "drew weapons" on appellant and the other inmate, and the fight ceased. (7RT 1776-1778.)

d. The February 1, 1993, Fight

Adam Javaras was a correctional officer at San Quentin on February 1, 1993. At 9:00 a.m. on that day, he was running the exercise yard in the adjustment center (AC). When Officer Javaras released inmate Washington into the yard, appellant approached Washington and struck him in the mouth. Washington defended himself, and both he and appellant were swinging at each other. When Officer Javaras blew his whistle and yelled for them to get down, Washington started to back away, but appellant continued to advance on Washington swinging. Appellant struck Washington more than once, hitting his face and upper body area with closed fists. Officer Javaras repeated the order to get down four times before appellant stopped pursuing Washington, all the while striking, or attempting to strike, Washington. When Washington was

taken off the yard, Officer Javaras noticed he had a cut upper lip that was bleeding and other bruises. Washington's bruises were medically cleared by the medical staff. (7RT 1781-1784.)

e. The April 8, 1993, Breakfast Incident

Correctional Officer Janet Lawson was assigned to the Adjustment Center at San Quentin on April 8, 1993. She was taking breakfast to a tier at 6:30 a.m. when she came into contact with appellant. Officer Lawson approached appellant's cell with his breakfast. Inmates are not supposed to put their hands through the food port so that their hands are outside the cell. However, appellant did put his hands outside the food port. Officer Lawson ordered appellant several times to pull his hands inside, but appellant did not comply. Eventually, appellant did pull his hands back a little so the officer could hand him the tray. Appellant took the food tray and threw it at Officer Lawson; the food splattered all over her. Officer Lawson closed the food port on appellant's cell and exited the tier. (7RT 1787-1789.)

f. The December 24, 1993, Altercation

On December 24, 1993, Correctional Officer Rogers L. Larry was assigned to the yard gun in the AC. At 10:20 a.m. an altercation between two inmates, one of whom was appellant, attracted his attention. The inmates had been playing a physical game of basketball, when a heated discussion ensued and resulted in the altercation between appellant and Fairbanks. Appellant seemed to be the aggressor; he charged Fairbanks. Officer Larry gave two verbal commands to break it up, and they did. Officer Larry froze the yard and called for staff to escort appellant and Fairbanks off the yard. The officer did not see any injuries to either inmate from the fistfight. (7RT 1790-1792.)

g. The August 1, 1996, Central Jail Incident

Los Angeles County Deputy Sheriff Dean Parker was assigned to Module 35 and 3700 at the Men's Central Jail on August 1, 1996. At 6:30 a.m. that morning, he was working as a law library officer and had contact with K-10 pro per inmates. Deputy Parker was scheduled to escort appellant into the law library for his time, but immediately prior to escorting him, the deputy was searching a cell on appellant's row, clearing out all the contraband, which he moved out to the inmate walkway (called a freeway) located between both sides of cells. Deputy Parker then walked to appellant's cell, handcuffed him, and walked off the row to open appellant's gate. Appellant exited his cell, but he stopped in front of the contraband and began to kick it into a cell. Using the public address system, Deputy Parker ordered appellant to stop it, but appellant continued. (7RT 1805-1807.)

Deputy Parker walked down the row to stop appellant and escort him to the law library. However, first Deputy Parker searched appellant and found a bag of yellow liquid that smelled like urine. The deputy had seen similar bags before and knew they were called a "piss bomb." The inmates tossed them to explode on other inmates and staff. Deputy Parker escorted appellant to the law library, and as he was removing appellant's handcuffs, appellant said, "'You idiot. Are you fucking stupid?'" Appellant's tone of voice was hostile; so Deputy Parker put the handcuffs back on him. (7RT 1807-1809.)

h. The May 19, 1998, Shank Incident

Los Angeles County Deputy Sheriff James R. Wolfhope was working custody at the Men's Central Jail on May 19, 1998. At 3:20 p.m. that day while he was working as a prowler for module 1750, he received an attorney room pass for appellant. Deputy Wolfhope broadcast appellant's name over the public address system and told appellant to get ready to go to the attorney room.

Appellant was in cell number nine, and the deputy opened appellant's cell gate to allow appellant to go onto the row. Appellant was acting as his own attorney. He lifted his accordion-style folders from the bars on his cell, exited the cell and walked along the freeway. When appellant reached another gate, he placed his folders on the bars, and turned around and waited to be handcuffed. (7RT 1811-1814.)

Deputy Wolfhope did a brief, cursory inspection of appellant's folders. He saw some pencils at the bottom, but a piece of metal caught his eye. When he retrieved the metal object, he saw that it was 13 inches long, with one end sharpened to a point (Peo. Exh. 26), and it was absolutely useable as a weapon. Appellant had his own personal typewriter that he had previously taken into the law library. Deputy Wolfhope went to the library and looked at appellant's typewriter. He observed that one of the rods was missing, and that the piece of metal he removed from appellant's folders fit perfectly, except for the side that was sharpened. (7RT 1815-1816, 1866.)

Deputy Wolfhope attended a hearing at the county jail concerning the shank (Peo. Exh. 26) he recovered. Appellant explained that the shank (Peo. Exh. 26) was for his own protection. However, he also argued that because there was no handle, or anything wrapped around it, the shank (Peo. Exh. 26) was not useable as a weapon. Deputy Wolfhope definitely believed that the sharpened typewriter rod (Peo. Exh. 26) could be used as a weapon. (7RT 1816-1817, 1866.)

i. The June 28, 1998, Shank Incident

At 6:00 p.m. on June 28, 1998, Los Angeles County Deputy Sheriff William Campbell, assigned to the "3,000 movement" at the Men's Central Jail, was conducting cell searches in "Charlie Row, 1750." The cells on that row are single man cells, and Deputy Campbell personally searched appellant's cell,

which was number nine, and in which he found a jailhouse shank (Peo. Exh. 25). A shank is a tool used for stabbing; it is similar to a knife. The shank (Peo. Exh. 25) recovered from appellant's cell was a round metal bar, eight inches long, sharpened to a point, and had a handle made from a Bic pen, from which the ink pen portion had been removed; it was useable as a weapon. Deputy Campbell found the shank (Peo. Exh. 25) running along a conduit at the top of the cell. This was an area that only the inmate in cell number nine could access; there was no way another inmate, walking by or in another cell, could access that particular spot. For someone outside the cell to have placed the shank (Peo. Exh. 25) along the conduit, that person would have had to climb up on the bars of the cell, or use a chair, and the cells are monitored by cameras 24 hours a day. The shank was visible from inside the cell, but not from the outside. (7RT 1796-1802, 1866.)

j. The 1977 Murder In Lawrence, Kansas

Terry Avery met appellant in Denver, Colorado, and spent a night with him at his father's house. Terry and appellant were then joined by Lee Harris, and the three of them traveled together to Lawrence, Kansas, and subsequently to Long Beach, California. In Lawrence, they stayed at a motel, and they went shopping and ate at Woolworth's. Appellant told them that he used to work at the Woolworth's, and he knew the girl who took their food order. (7RT 1833-1836.)

After they returned to the motel, appellant again mentioned that he used to work at the Woolworth's and that they could rob it. Appellant and Harris continued to talk about committing a robbery at Woolworth's; Terry did not participate in the discussion. (7RT 1836-1837.)

Appellant, Harris and Terry returned to the Woolworth's that night. The two men had guns, but Terry did not. They were traveling in a rental car. It

was 9:00 or 10:00 p.m. when they arrived at the store and it was still open. They parked the car in a rear lot, which was "a little ways" from the store. Terry was asked to look inside the store and see who was there. She saw that a few people who worked there were still inside. When she reported back to the car, Harris was no longer there, but appellant was still in the back seat. Terry climbed into the front passenger's seat, and when she turned around, she saw Harris walking towards the car with the manager, Sam Norwood (photo; Peo. Exh. 28). She knew he was the manager because he had been pointed out and identified to her earlier that day. Harris had Norwood by the arm and a gun against his back. (7RT 1829,1837-1840, 1846-1847, 1866.)

When Harris and Norwood reached the car, they stopped at the passenger side door behind Terry, and she saw appellant and Harris push Norwood onto the floor of the backseat. Norwood asked them not to hurt him, and he was told to "shut up." Appellant repeatedly asked Norwood about money and the safe in the store. Norwood said the money had been taken to the bank earlier that day. Appellant hit Norwood in the head with a gun. Appellant took Norwood's wallet and a polaroid camera he had, which Terry saw later in Long Beach. Norwood kept saying there was no money, and all he wanted to do was go home–that his little boy was having a birthday party. Appellant responded by asking if he wanted them to go get his little boy. Harris, who was seated in the driver's seat, asked appellant if he remembered what they had discussed, and appellant said "Yeah." Harris started the car. Terry just sat there and spoke to no one. (7RT 1840-1843.)

Following appellant's directions, Harris drove for 10 minutes to a dark area, by the railroad tracks. Norwood said nothing. Harris stopped the car, and appellant pulled Norwood out of the car through the passenger door on the driver's side. Once Norwood was outside, Terry could only see his legs. Harris also got out of the car, and next, Terry heard gunshots from two different guns.

She thought there were two guns because some gunshots were louder than the others. When appellant and Harris returned to the car, Harris asked appellant why he had to shoot Norwood so many times. Appellant answered, to "'make sure he was dead,'" and then, appellant laughed. (7RT 1843-1845.)

Harris was driving, and after about 25 or 30 minutes, appellant and Harris discussed going to Long Beach. They went to the bus terminal in Kansas City. (7RT 1846.) Later, Terry testified in Kansas about what she had seen; she believed she had immunity from prosecution there. (7RT 1846.)

Terry accompanied appellant and Harris to Kansas, after appellant said he was going there for a couple of days to pick up some money. Once they were in Kansas, Terry heard them talking about a robbery; so she rode along. Terry "surely didn't think there was going to be anyone get killed." There was no talk about killing someone; however, Harris always said that if not going back to prison meant not having witnesses, then there would not be any. To remind appellant about that, Harris always said to him, "'Remember what we talked about,'" and appellant agreed with him. After Norwood was killed, Terry believed she had seen too much, could not leave them, and that sooner or later, they would kill her. (7RT 1848-1850, 1854-1855.)

At the Kona Hotel, appellant and Harris talked about robbing the Crumbs of their jewelry and the rent money. There was nothing said about killing them. Terry was to knock on the door because Marie Crumb would open it if she saw a woman standing there. (7RT 1854-1855.)

Michael J. Malone, at the time of trial, was a judge in Lawrence, Kansas, but in 1977-1979, he was the District Attorney of Douglas County, which includes the City of Lawrence. As District Attorney, Malone prosecuted appellant in 1977-1979 for the kidnaping, aggravated robbery and first degree murder of Sam Norwood. Malone knew Norwood, and when his body was discovered by an early morning jogger, he went to the crime scene. It was

either right before, or right after, Thanksgiving 1977. (7RT 1824-1826.)

When Malone reached the location of Norwood's body, he saw it was in some trees in a remote area near the railroad station. He noticed that Norwood's body was lying face down, with his hands bound behind his body using an athletic-type of white, adhesive tape (photos; Peo. Exhs. 28 and 29). Malone also saw what appeared to be four bullet entry wounds to the back of Norwood's head, and once the body was removed to the morgue, it was possible to see four exit wounds to the front or side of Norwood's head. Underneath Norwood's head, bullet fragments were found in the sand. There were two different types of casings. Malone believed the gun used was a .32 or .38 caliber, and both types of casings could have come from the same gun. (7RT 1826-1827, 1829, 1832, 1866.)

In December 1979, appellant was tried for the kidnaping, aggravated robbery and first degree murder of Sam Norwood; Malone was the prosecutor who tried the case. Terry Avery testified for the prosecution. At some point based on a request from her attorney, Terry was granted immunity, even though Kansas authorities had never planned on prosecuting her. After a five-day trial, appellant was convicted on all the charges (Peo. Exh. 27). (7RT 1828-1829, 1866.)

2. Defense

a. Appellant's Childhood And Family Background

Robert Lee Moore is appellant's youngest brother, and he loves appellant. Their lives when they were children were very difficult because they were one-half White and one-half Black; they did not get along with anyone. It seemed as if the Whites, Blacks and Hispanics were all against them. There were some good times at home, such as going camping in the mountains and to drive-ins or movies, and when they were young, they went to church. (7RT

1876-1877.)

However, there were problems at home. Their father gambled, drank and played around with women. Because of his gambling and drinking, there was not much money; therefore, the kids used to haul trash on weekends and after school, and they did not like that. Their father was rough on all of them. He would tell appellant to go steal things out of yards. Their father would "whoop" them, using a belt or an extension cord, and when they got older, he would use his fists. (7RT 1877-1878, 1881.)

When their parents split up, it affected all of them. That was when Robert started using drugs. Robert went to California with their mother for six months; then, he returned to Denver for six months or a year. He next went to live in Kansas with some of his father's relatives, but was only there for six months. When he returned, Robert lived with Etta Moore, but he committed burglaries to get things he needed, such as shoes and clothes, and was sent to Lookout Mountain School for Boys, which was a juvenile home, for two years. After he got out of Lookout Mountain School, he was 16 years old and went to the job corps. After the job corps, Robert got married and got his life together until his wife left with their daughter. (7RT 1878-1882.)

At the time of trial, Robert was 41 years old, and he figured that made appellant 44 or 45 years old. Robert explained that whenever he had been in a situation where he felt someone cared about him, he would get his life together. Every time he felt no one cared about him, he regressed and got into trouble. When Robert went into rehabilitation, he was told he used drugs because of his past life with his mother, father and when his wife left him. (7RT 1880, 1882.)

Robert believes the problems from their childhood could have impacted appellant too because different people handle situations differently. Robert never knew appellant to shoot or stab people. When they were little, they all

used to fight a lot, but he never heard appellant talk about going out to kill. (7RT 1883.)

On cross-examination, however, Robert admitted that he did not know appellant was convicted in Kansas of killing a man by shooting him in the back of the head. Robert knew appellant had been convicted previously in California of stabbing two people to death, but he did not think it had been proved beyond a reasonable doubt. Robert had not seen appellant since the last time they were in court. (7RT 1884.)

Appellant's brother, Steven Allen Moore, is one year younger than appellant. He described their family as "dysfunctional," and explained that "we grew up like weeds," because when their parents separated, their father worked and the children did what they wanted to do. Although there had been some good times, such as going to the mountains, and they did go to church on Sundays, their father gambled all the time, and drank himself to death. Steven felt degraded when their father made him work on the truck, instead of being in school, and he would have to ask at his friends' homes if he could take their trash away. His father even gave him marijuana. (7RT 1886-1889, 1892.)

Before he was 17 or 18 years old, Steven had been in juvenile hall 30 or 40 times. Whenever his father's girlfriends would come over, his father would make Steven leave for a week or so. Therefore, he used to do things so he would get sent to juvenile hall where he could get a good meal and have a place to sleep. Steven stayed with Etta Moore, and she would feed him; but there were no rules or curfew. In fact, when he stayed with Etta, Steven was with her daughter all the time and would steal a car so he could take Etta's daughter out. (7RT 1889-1891.)

Steven was embarrassed by his lack of education. Sometimes his father kept him out of school, and other times because people would call them "yellow niggers," he did not want to go to school. Their father treated appellant the

same as he treated all of his children. Steven believed their father was self-centered, selfish and drank. Their father used to say that he paid the rent, and he was going to do what he was going to do. (7RT 1891-1893.)

Steven knew in his heart that it was wrong to steal, and he never really got his life together, which he believed was because he never had a role model. Therefore, even though he wanted to work, and to be a good husband and a good father to his children, he did not know how. Because Steven did not want to be a bad influence on his children, he decided "I rather not even be around them so they could see some of the things that I did." Steven thanked God that he did not end up in prison. In fact, other than for a traffic ticket, Steven had not been to jail as an adult. A few months before trial, Steven was in an accident and lost his eyesight. He believed the accident actually freed him, because at the time of the trial, he was going to school and learning to read and write. (7RT 1891-1892, 1894.)

Linda Charlene Moore, appellant's older sister, loves appellant. Appellant's being locked up had affected her; she had been seeing a mental health counselor and was going through a lot of changes. As children, life was terrible for them–very rough. Linda did not remember any good times. She remembered getting "whoopings;" sometimes she deserved them, and sometimes she did not. (7RT 1895-1897.)

Linda described their life after their parents split up as "pitiful." Linda left home at nne years of age because her mother had left and because her father was "having sex with her." Linda moved in with some friends, whose parents watched their children. Linda had children beginning when she was 16 years old and went on welfare. Linda believed their parents did not take care of them as they should have, and she also believed that her life had been "messed up" because of her upbringing. She explained that they were all abused too much. (7RT 1898-1899.)

Linda did not think appellant was a violent person and did not think he would stab and shoot people. She knew that appellant liked money, wanted it, and would go out and take it, but she never heard that he killed to get it. Linda did not understand how appellant was "charged with all this," and did not think her brother was guilty of the crimes of which he was convicted. (7RT 1899-1900.)

Milton Moore was 46 years old at the time of trial. He explained that he had five siblings, and that both of his parents had two jobs and worked all the time. His father had bad habits, such as gambling and alcohol. On weekends, Milton and his siblings hauled trash and did other things to earn money to make up for their father's gambling losses. Although their father pretty much provided for them, sometimes because of the gambling, they went without. (7RT 1915-1916.)

Milton believed that his father's problems caused problems with the marriage and were partially responsible for the break-up. Milton recalled that his father and mother argued and fought. His mother did not like his father beating up the children, and they argued over that. Their father put everyone else before his family, and Milton believed that was partially the cause of their mother's nervous breakdown and her decision to leave. (7RT 1916-1917.)

Milton explained that after his parents split up, the things children need–love, stability and the knowledge that someone is there for them–were taken away from their family. After his mother left, Milton stayed at home for awhile, but then went to live with his married, older sister. However, his siblings stayed with their father in the projects, and he thought the abuse continued because his siblings were "hooking up" with the wrong kind of people, starting to act out and to get themselves in trouble. (7RT 1917-1918.)

Milton's life at his older sister's home was very different from that of his siblings. He went to school, while his siblings' lives with their father lacked

stability. Milton was angry for a long time after his parents separated, but he eventually put it behind him and became "pretty functional." Milton believed that he was too scared to get into trouble. He thought that there were times when appellant tried to get his life together, but that to a certain extent, appellant, because of his upbringing, rebelled and got into trouble. His brothers Steven and Robert still blame their mother for everything that happened; so they still will not accept any responsibility. Milton's younger brothers were 10 to 12 years old at the time their parents separated. (7RT 1918-1920.)

Milton did not believe their parents knew how to be parents; they thought they were doing a good job by putting food on the table. All they really knew how to do was to work. Milton remembered when their father left the children with Etta for what, Milton believed, was their father's convenience so that he did not have to take responsibility. Even though their father got a two-bedroom apartment over by Etta's house, Milton never thought his father planned on having the children stay with him. In essence, their father just left the children "out there on their own," because Milton did not see Etta as a particularly good "surrogate" parent. (7RT 1920-1922.)

Milton also believed that when his father left the children on their own, he was getting back at their mother through the children. Whenever the children thought they wanted a father figure, their father would pick them up, take them to the movies, feed them and then drop them off again; it was convenient for him to be able to drop off the children at Etta's. After the separation, their parents engaged in "a tug of war," and were never thinking about their children, only about themselves. Milton's father never came to see him at Kay's house; so Milton rarely saw his father. Milton thought that their father treated appellant worse than the other children because appellant was "Charles Moore, Jr." and should have lived up to his father's expectations. Milton believed his siblings went out trying to find love, or to get some

recognition from their father that he approved of them. In other words, Milton thought his siblings rebelled against their father's mixed messages. He further believed that coming from a mixed marriage also created problems for the children of that marriage "because basically everybody hated us. . . ." (7RT 1921-1924, 1926.)

On cross-examination, Milton admitted that he had once been in trouble with the criminal justice system as an adult, and that was for drugs. He explained that it was not that one experience that caused him to be too scared to get into trouble again–it was that he just was never that type of person. "I was just too scared to steal." (7RT 1924-1925.)

Karen Kay Vaden, appellant's older sister, was 51 years old at the time of trial. Their father, Charles Edward Moore, Sr., died in April 1979. At the time of trial, their mother, Maxine Moore, was 69 years old. Karen had five siblings, who at the time of trial, were the following ages: Milton, 46 years old; Linda, 45 years old; appellant, 43 years old; Steven, 42 years old; and Robert, 41 years old. Karen's parents married when she was three years old, and Milton, who was nicknamed "Bubba," was born when Karen was five years old. Karen recalled that her parents worked a lot and were not home a lot; therefore, she cared for Milton, and later, she cared for all five of her siblings. When she was 18 years old, Karen got married and left home. (7RT 1927-1928.)

The day after Karen got married, her mother left her father and went to Karen's house, but then returned home. A short time after that her parents separated, and subsequently, they divorced. During the time they were getting the divorce, her parents had a lot of conflict and they fought a lot. The children had a lot of emotional conflict at the time because their father would pick them up and take them to a movie, and their mother was left with trying to maintain discipline. (7RT 1929.)

When Karen was in either the fifth or sixth grade, their parents bought a brick house in a nice area; however, their parents were rarely there because they were working. Karen recalled that their father had a lot of bad habits. He liked young girls, he drank, he gambled a lot, he liked to show off, and he was very abusive to the family, especially to appellant, which Karen did not understand. In Karen's opinion, their parents had no business being parents. They loved each other, but they did not know how to show love as a parent; therefore, there were no hugs. The children became a family within a family. (7RT 1929-1930.)

It was their father's gambling and womanizing that broke up the marriage; and, when Karen left, their parents did not seem to want the responsibility of parenting. Karen did not think their mother had any backbone and believed their mother was afraid of their father, who was overbearing. The younger siblings were all in grade school, and still small, when their parents separated. Karen remembered that their father wanted money; so either he would steal, or he would have his children skip school and steal for him. If the children did not like that, he would beat them; therefore, the children really had no choice. On the weekends, their father had the children polishing cars and emptying trash. (7RT 1930-1931.)

After Karen and Milton moved away from home, Karen felt bad that she could not take all of her siblings with her. Karen tried to check on her siblings to see if everything was all right with them, but their father would hide things from her so that she would not get upset and "raise hell." Karen and her husband could not afford financially to take care of her siblings, whose lives were doomed as a result of having to stay with their father, while she and Milton "got out." The fact that appellant was on death row caused Karen to feel like she failed him because she did not get to save him. (7RT 1932-1933.)

b. Additional Mitigating Evidence

As of the time of trial, Ruth Tiger had known appellant for 18 years. She met appellant through an organization of prison fellowship, a Christian organization, that among other things matches prisoners with pen pals. When she met appellant, Ruth and her husband lived in Denver, and appellant was in the Canyon City jail. Ruth started writing to appellant, and she and her husband visited him in jail or in prison at least three times, including taking their newborn son with them to visit appellant. (7RT 1945-1946.)

Appellant was sent to California, and Ruth, her husband and children visited him at the Los Angeles County jail and also at San Quentin. They exchanged dozens of letters, and phone calls. Appellant called her every month and they discussed spiritual matters. While he was in the Denver County jail, appellant had a Christian conversion, and he spent a lot of time studying the Bible, praying, fellowshiping with other Christians, and participating in prison Bible studies. Their correspondence was primarily of a spiritual nature. (7RT 1946-1947.)

Many times appellant told Ruth that he regretted his past; appellant had a lot of remorse over it. Appellant repented that lifestyle, and as a Christian, made a lot of effort to change his life. Ruth explained that she cared very much about appellant, and that she had come to love him as a Christian brother. Ruth had very much enjoyed her contacts with appellant and believed that he impacted her and her family's lives. For example, appellant gave her and her husband a lot of encouragement when her husband was out of work. Appellant was very supportive when Ruth was struggling with her faith, and appellant had also corresponded with Ruth's mother, who sent him some books. (7RT 1947-1948.)

When Ruth and her husband were talking about moving to the woods, appellant designed an A-frame house for them, where he drew up plans and

made suggestions. Appellant wrote many chapters of a book he hoped to have published, and he sent the chapters to her. Ruth edited and typed the chapters and returned them to him. Appellant also wrote articles that he also hoped to get published; Ruth sent him the addresses of publishers. Appellant connected with a victims' group, and he wrote an article hoping it would help people who had been victims of crimes. (7RT 1948-1949.)

Ruth did not know appellant before he committed the crimes. However, she could not even imagine him as someone who would commit crimes because every interaction she had with appellant over the years had been positive, loving and supportive. Therefore, Ruth assumed appellant has changed over the years. (7RT 1949.)

On cross-examination, Ruth admitted that she had not heard from appellant in the past three or four years. She explained that there had been a couple of times when appellant was going through difficult times in prison and he stopped writing. Ruth had also written to two other inmates. (7RT 1949-1950.)

Appellant had never asked Ruth for anything except the typing, and Ruth felt that she and appellant were friends. Her testimony at trial was based on the 14 years they wrote back and forth. (7RT 1951.)

c. Psychiatric Evaluation By Marshall Cherkas, M.D.

Dr. Cherkas, who is a medical doctor, a psychiatrist, and a psychoanalyst, described the education and training that qualified him as an expert witness. Dr. Cherkas evaluated appellant's family and background with regard to the penalty phase of the trial, and he determined that there were mitigating factors about appellant that should be known to those who would make the penalty decision. To reach his determination, Dr. Cherkas met with appellant four times, spoke with both Kay and Milton, and reviewed a number

of investigative reports, in which all of the family members were included. (7RT 1934-1935.)

In making his evaluation, Dr. Cherkas looked at three things: (1) what the crime was, (2) what appellant was, and (3) what appellant is presently. With regard to the first factor, the crimes were heinous–the killing of three people. Dr. Cherkas explained he did not know the extent of appellant's participation in the killings, but he "just wanted to provoke the issue that there may be some doubt in terms of how much of this crime was committed" by appellant, what appellant's role was, and how much of appellant's intent was to brutally kill people. (7RT 1935-1936.)

With regard to the second factor, Dr. Cherkas noted that at the time of the crimes, appellant was 22 years old. He explained that appellant was abandoned as a boy and had a lack of appropriate modeling, from neither parents nor teachers, because it is not what is said to children but what they see that models and helps children to become what they are. Not everyone in appellant's family became the same–in other words, not everyone murdered people. However, there were marked effects of abandonment within the family. Appellant's mother had some conflicts with the racial issue. The mixed marriage that she freely entered caused her some embarrassment. (7RT 1936-1937.)

Dr. Cherkas observed that when appellant's mother left the family, she left the children in the care of their father, who was not a very competent father. Here was a father who would bring young girls into the home, and the boys had some sexual involvement with those girls. Appellant's father would eat steak, while the other members of the family were barely fed. Appellant's father not only drank and gambled, but he physically abused his children and sexually abused the women in the home. Appellant's father taught his sons how to steal and that became appellant's manner of survival–to be a thief. Apparently,

appellant became a fairly good thief and helped his father acquire things illegally, and that became appellant's way of getting what he could not get otherwise, which was the love he needed as a young boy. (7RT 1937.)

In Dr. Cherkas's opinion, appellant is very narcissistic. He explained that everyone is a narcissist and that is appropriate because we all have to take care of ourselves. However, when people do not get appropriate succor, help and guidance from others, they have extra narcissism. Then, those people become almost exceedingly involved with themselves and their own needs, without necessarily having any interest, caring or involvement in others' needs. In order to learn to be loving and caring, a person has to be loved. Dr. Cherkas opined that appellant became a "pseudo-independent man." Pseudo-independent meant that appellant went out to make his own way by the ways that he knew how to do. (7RT 1927-1938.)

Appellant's family's descriptions of appellant told Dr. Cherkas that appellant was a passive person, who did not speak up and did not talk about his inner feelings or reveal himself. Appellant felt that he had to take care of everything by himself, an example of which was that appellant could not trust an attorney to take over his case, so he was in pro per acting as his own attorney. Admitting that it was conjecture, Dr. Cherkas offered that maybe the boy appellant was at 22 years of age was involved in matters he could not handle and maybe got led into things that he did not want to be led into. (7RT 1938.)

As to the third factor of what appellant was presently, Dr. Cherkas observed that appellant had been on death row for 11 years, and he had not been the greatest "guy," or the most conforming, but neither has appellant been really bad. Dr. Cherkas explained that he knew what trauma does to people because he had seen literally thousands of patients who had experienced traumatic things in their lives. He had also visited the jails regularly for most

of his adult life, and he was sure that being in one of those systems had impacted appellant. Dr. Cherkas was aware of appellant's possession of a couple of shanks, his one or two fights, and his inappropriate sexual behavior, but he was also aware that appellant never hurt anyone with the shanks and that appellant felt vulnerable in jail and endangered by others. Dr. Cherkas considered all of these things in his evaluation of whether appellant was a violent person. By definition, murder, of course, made appellant a violent man. However, since the murders, Dr. Cherkas saw a man who was not significantly violent given the circumstances of where he was. (7RT 1939-1941.)

During cross-examination, Dr. Cherkas explained that he did not test appellant, but that he did review Dr. Michael Mahoney's testimony from 1984. Dr. Cherkas found appellant to be within the normal range of intelligence, and he found no symptoms of any major mental illness, or defect. He explained that a person with an antisocial personality disorder is one, who by virtue of stress or inability to handle the normal stresses of life, reacts in a way against other people. In other words, each person handles their own stresses in different ways, and each person, when he or she fragments because he or she is overwhelmed, acts differently. Some people get neuroses, such as anxiety or aggression, and some become psychotic, as did appellant on one occasion. Other people will get physical illnesses, known as a somatic daze, and some people take it out on others by committing crimes or hurting others. (7RT 1942-1943.)

Dr. Cherkas further explained that everyone is narcissistic and needs to provide for themselves. If a person cannot do that, the person cannot provide for others. Moreover, narcissism becomes a disorder when a person is so narcissistic that he or she is unable to be empathic to others, and is not caring. Again, while appellant is very narcissistic, there is no evidence of any major mental illness or defect. (7RT 1943.)

On redirect examination, Dr. Cherkas noted that if a person is taught that the way to survive is to steal, when that person is under stress, abandoned, hurt or neglected, stealing is that person's response to a difficult situation. He does not believe that people with personality disorders are static, and he explained that such people could be loyal and loving to some, but in certain areas that antisocial personality might be elicited. Dr. Cherkas also opined that maladaptive behaviors do change in life. A person who is not stressed, or who finds other ways to adapt, can become a different person; in other words, there is potential for change. (7RT 1943-1945.)

ARGUMENT

I.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST FOR APPOINTMENT OF CO-COUNSEL

Appellant contends that the trial court's denial of his request for appointment of co-counsel was not an exercise in sound judicial discretion because the denial was based (1) on the trial court's mistaken belief that the duties of an attorney assisting a pro per defendant were to be "dictated by the label attached to such counsel and as a result the court imposed impermissible restrictions on the duties of counsel" (AOB 43), as well as (2) on the arbitrary compensation provisions of the local appointment contract, and not on appellant's needs. Appellant concludes that because of the trial court's abuse of its discretion in denying his request for co-counsel and in restricting the role of his advisory counsel, appellant never received the assistance he needed to prepare his defense, and thus, the trial court's erroneous ruling violated his constitutional rights to meaningful self-representation, due process and a reliable capital trial under the Fifth, Sixth, Eighth and Fourteenth Amendments, and constituted *per se* reversible error. (AOB 31-59.) Respondent submits a review of the record evidences that there was no abuse of discretion by the trial court. Indeed, appellant's underlying reason for his request was that he wanted to control his defense strategy and tactics, but wanted to have an attorney whom he could order to do the work for him, such as the questioning of witnesses and other in-court presentations during trial. Respondent further submits that because no error resulted from either the trial court's denial of appellant's request for appointment of co-counsel, or from the restrictions placed on the scope of advisory counsel's assistance, appellant was not prejudiced, nor was he denied any rights guaranteed by the federal Constitution.

"A criminal defendant does not have a right to simultaneous self-representation and representation by counsel." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1368.) Moreover, a defendant, who elects to represent himself or herself, "'does not have a constitutional right to choreograph special appearances by counsel.'" (*People v. Bloom* (1989) 48 Cal.3d 1194, 1218, quoting *McKaskle v. Wiggins* (1984) 465 U.S. 168, 183 [104 S.Ct. 944, 79 L.Ed.2d 122].) Thus, neither "'cocounsel,'" "'advisory counsel,'" nor "'standby counsel'" is in any sense constitutionally guaranteed. (*Ibid*; *People v. Bradford, supra,* at p. 1368.) Moreover, a self-represented defendant who seeks the assistance of an attorney in an advisory or other limited capacity, but who does not wish to surrender effective control over presentation of the defense case, may obtain the assistance of an attorney only with the court's permission and upon a proper showing. (*People v. Bloom, supra,* at p. 1219.)

It is within the trial court's discretion to authorize the appointment of co-counsel for a self-represented defendant. (*People v. Frierson* (1991) 53 Cal.3d 730, 741.) This Court reiterated in *People v. Clark* that as long as there exists a reasonable or even fairly debatable justification, under the law, for the court's exercise of discretion, such action will not be set aside. (*People v. Clark* (1992) 3 Cal.4th 41, 111[court denied self-represented defendant's request for advisory counsel].)

A. The Trial Court Acted Within Its Discretion When It Placed Restrictions On The Duties Of Advisory Counsel

Appellant contends the trial court abused its discretion when it "imposed impermissible restrictions on the duties" of advisory counsel based solely on the label attached to such counsel. Appellant further asserts that the trial court held the mistaken belief that the duties of an attorney assisting a *pro per* defendant were to be determined by factors such as the label attached to such counsel and

compensation requirements and not by an evaluation of appellant's needs, thereby assuring that appellant never received the assistance he needed to prepare his defense. (AOB 46, 50-51, 57.) Respondent submits there was no abuse of the trial court's discretion because it is within the trial court's discretion to determine the extent to which advisory counsel may participate. Furthermore, in the present case, the trial court appropriately considered relevant factors in determining the scope of any hybrid representation it might allow.

This Court has held that when a defendant chooses self-representation, the defendant retains primary control over the conduct of the case, and consequently, the role of advisory counsel is limited. (*People v. Bradford, supra,* 15 Cal.4th at p. 1368; *People v. Clark, supra,* 3 Cal.4th at p. 112; see *People v. Bloom, supra,* 48 Cal.3d at pp.1218-1219, 1226.) The trial court retains authority to exercise its discretion regarding the extent to which such advisory counsel may participate. (*People v. Bradford, supra,* at p. 1368; *People v. Clark, supra,* at p. 115.)

In the present case, the trial court described the duties of advisory counsel as an attorney who would be available to answer appellant's questions and to assist appellant with legal issues, but the court stated that advisory counsel was not to assist appellant by examining witnesses or arguing motions in court. However, the trial court further explained that advisory counsel could offer advice to appellant and also tell him how to examine witnesses and how to argue his motions. (2RT 352-354.) Appellant, however, wanted an attorney to assist him with the presentation of his defense case in court, in other words, an attorney to help him question witnesses, to help him by participating in the jury selection process and who would take over presenting appellant's defense case if appellant was not "articulate in front of the jury." (2RT 384-386, 389.)

The facts in appellant's case are analogous to the facts in *Bradford*,

supra, a case in which the defendant elected to represent himself and where the trial court authorized advisory counsel to perform only a limited role at trial. When Bradford's advisory counsel sought to make objections and arguments, or sought to instruct Bradford on exactly what to say next, the trial court disallowed advisory counsel's efforts and ruled that because Bradford was representing himself, he could not simply repeat what advisory counsel told him to say next but would have to make his own objections and arguments. (*People v. Bradford, supra,* 15 Cal.4th at pp. 1367-1369.) On appeal this Court held that having granted Bradford's requests to represent himself and also for advisory counsel, the trial court "was not obliged to accede to the defense's requests both for self-representation and for whatever degree of participation in the proceedings it desired for advisory counsel." (*Id.* at p. 1369.) This Court further explained that the trial court "was well within its discretion in refusing to permit Bradford both to represent himself and to have the benefit of professional representation." (*Ibid.*)

In the case at bar, the trial court attempted to explain to appellant the problems that arise when an attorney gets involved in the presentation of a case where the defendant is representing himself. The court explained that there was a concern that the attorney would take over the case and that appellant would not be representing himself at that point. (2RT 353-354.) Thus, the trial court was aware this Court has held that "the powers and responsibilities attendant upon the representation of a person criminally accused never should be conferred jointly and equally on the accused and the attorney." (*People v. Bradford, supra,* 15 Cal.4th at p. 1368.) "'Stated otherwise, at all times the record should be clear that the accused is either self-represented or represented by counsel; the accused cannot be both at once.'" (*Ibid.*, quoting *People v. Bloom, supra,* 48 Cal.3d at p. 1219.)

Appellant wanted to be both self-represented and represented by counsel

so that he could control the strategy and tactics of the defense case but could also direct an attorney to handle whatever parts of the trial appellant did not want to do himself. (2RT 353, 384, 389, 401.) However, as noted above, appellant did not have any constitutional right "to choreograph special appearances by counsel." (*McKaskle v. Wiggins, supra,* 465 U.S. at p. 183; *People v. Bloom, supra,* 48 Cal.3d at p. 1218; see also *People v. Stewart* (2004) 33 Cal.4th 425, 518 [lower courts did not err in restricting the role of advisory counsel by precluding examination or cross-examination by advisory counsel].)

Hence, the trial court was not laboring under any mistaken belief that the duties of advisory counsel were to be dictated by the label, but was trying to provide appellant, a self-represented defendant, with appropriate legal assistance. Appellant is incorrect when he argues that the duties of an attorney assisting a self-represented defendant should be limited–in essence, dictated--by the defendant and not the court. (AOB 57.) It was within the discretion of the trial court to determine the scope of advisory counsel's participation, and in appellant's case, the trial court did not abuse its discretion.

B. The Trial Court's Denial Of Appellant's Request For Co-Counsel Was Not An Abuse Of Its Discretion

1. Appellant Failed To Show The Appointment Of Co-Counsel Would Promote Justice And Judicial Efficiency

Although appellant contends the trial court abused its discretion when it denied his motions for co-counsel, the record reveals othewise. Twice appellant filed written motions in support of his requests. (5CT 1253-1256, 1308-1315.) In his first written motion, appellant argued that he needed the assistance of a co-counsel because the law library did not have Colorado law books, and "some of the cases are missing out of the law books;" therefore, he needed co-counsel to help him research case law to fight the Colorado

convictions that would be presented by the prosecution as an aggravating factor at the penalty phase. (5CT 1256.)

In his second written motion, appellant argued that just the fact that his case was a death penalty case rendered it complicated and technical enough to have a co-counsel appointed to assist him in preparing and presenting his defense at trial. Appellant explained that he needed assistance because he was representing himself to insure that his defense strategy was presented to the jury. (5CT 1313-1314.) On one occasion in court, appellant explained he wanted appointment of a co-counsel who "would also help if I weren't articulate in front of the jury if she had to take over the case or something of that nature to just be able to take over the case . . . ." (2RT 389.) At a later time, appellant advised the court that he wanted co-counsel appointed to help him prepare and present his defense in an orderly manner, including the direct examination of himself if he decided to testify. (2RT 389, 401.) During the numerous times appellant raised his motion for co-counsel in court, he never offered any additional reasons in support of his motion. (2RT 349-351, 352-355, 356-358, 379-394, 398-403, 423-427, 450-453.)

Essentially, appellant presented the court with only three reasons as to why he required a co-counsel: (1) the law library did not have Colorado law books so he needed help researching Colorado law in order to fight admission of his Colorado convictions; (2) the case was complicated and technical just because it was a death penalty case; thus, he needed help preparing and presenting his defense; and (3) he needed help because he was representing himself. None of these three reasons was so compelling that the trial court's refusal to appoint co-counsel for appellant constituted an abuse of its discretion. First, appellant had advisory counsel available to research Colorado law and assist him in challenging his out-of-state prior convictions. Second, as the prosecutor pointed out when she opposed appellant's request, a defendant is not

entitled to co-counsel absent unusual circumstances, or where it is a particularly difficult case, and neither circumstance applied to appellant's case. (2RT 382-385.) Third, appellant had both advisory counsel and an investigator-legal runner available to help him represent himself. (2RT 428-429, 532-533.)

Whenever appellant explained in court why he wanted co-counsel, he stated that he wanted to retain control over all of the decision making, but have an attorney with whom he could discuss issues and strategy, and who would help him with the jury selection and the examination of witnesses, including the direct examination of himself if he decided to testify. (2RT 382-385, 388-394; see AOB 35-36, 45-46.) In other words, appellant was very clear in stating that his reason for wanting co-counsel was so that he could control the defense strategy and tactics, but have an attorney to help him with legal research, jury selection, cross-examination of witnesses, and the presentation of defense evidence.

Appellant was entitled as a self-represented defendant to control the case he chose to present to the jury. (*McKaskle v. Wiggins, supra,* 465 U.S. at p. 178.) However, appellant did not have a constitutional right to appointment of co-counsel. (*People v. Bradford, supra,* 15 Cal.4th at p. 1368; *People v. Bloom, supra,* 48 Cal.3d at p.1218.) Because allowing a self-represented defendant to share legal functions with an attorney is generally undesirable (see *ibid*; *People v. Frierson, supra,* 53 Cal.3d at p. 741), a court's discretion to authorize such an arrangement is "sharply limited." Appellant failed to establish that the appointment of co-counsel would promote justice and judicial efficiency in his case (see *People v. Frierson, supra,* at p. 741) such that the trial court was required to appoint co-counsel or be found to have abused its discretion. On most occasions in court, he did not even try but seemed to argue

only that he was "entitled" to co-counsel, which of course he was not.[3/]

Accordingly, even though appellant was given the opportunity to establish why the appointment of co-counsel would promote justice and judicial efficiency in his case, he failed to so, and hence, it cannot be said that the trial court abused its discretion.

2. Evidence Of The Terms Of The Local Appointment Contract Is Not Included In The Record On Appeal

Additionally, appellant asserts there were two restrictions in the local appointment contract relevant to his contention. The first restriction was that any appointment of counsel for a capital case had to be made from the capital case list. The second restriction, according to appellant, was that there was no provision in the local appointment contract for compensation to a second counsel where the defendant was representing himself. Thus, appellant alleges that the trial court was actually precluded from appointing co-counsel because "it was highly unlikely that any attorney, even one on the local capital case list, would accept appointment" as co-counsel without some assurance about compensation. (AOB 53-54.)

Next, appellant challenges the denial of his request for co-counsel by arguing that the trial court's reliance on the local appointment contract was improper, and he thereby was denied his rights to due process, effective assistance of counsel and equal protection. Specifically, appellant argues that although appointments of co-counsel were not prohibited under the local appointment contract, such appointments were discouraged by both the terms of the contract and by those who administered the contract. (AOB 52-56.) It

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3. One time, appellant simply argued that he was entitled to co-counsel because defendant Stansbury (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1035) had a court-appointed co-counsel to assist him at his death penalty trial. (5CT 1255; 2RT 353.)

is respondent's position that any issues regarding the terms of the local appointment contract from 1997 cannot be adequately addressed on appeal because the terms of that contract are not part of the appellate record.[4/] In addition, the only information regarding the contract in the record did not come directly from the coordinator of the capital case panel, but from persons who spoke to the coordinator and then tried to relay that information in court. Indeed, at one point, the court stated that there seemed to be no one with a definitive answer as to how appointed counsel would be compensated. (2RT 418-419.) Therefore, respondent submits that in the present case, any discussion regarding the terms of the contract would be speculative.

In any event, during appellant's discussions with the trial court, there were four attorneys mentioned as possibilities for appointment as co-counsel. The first attorney the court contacted at appellant's request was Mr. Halpern, who was not on the local capital case appointment panel, and the court explained to appellant that accordingly Mr. Halpern was not considered "qualified to handle a case of this type." (2RT 376.) The second attorney appellant brought to the court's attention was Ms. Morsell, who also was not on the local capital case appointment panel. Ms. Morsell stated she was on the capital case list downtown, but not in Long Beach, and at that time, the court believed being on the downtown list would be sufficient for appointment. Ms. Morsell later informed the court that she would be unable to prepare for trial in the time remaining, and in a subsequent hearing, she told the court that she was unable to accept appointment as co-counsel. (2RT 379-381, 392, 400, 417, 452; 5CT 1289.) The third attorney mentioned, Mr. Ringgold, was unwilling to accept appointment as co-counsel because he would not have been paid

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4. Appellant bears the burden of presenting a record supporting his claim of error, and any uncertainty in the record in that respect is resolved against him. (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1452; *People v. Green* (1979) 95 Cal.App.3d 991, 1001.)

enough under the contract. (2RT 404-406.) And, Mr. Yanes, the fourth attorney, would not accept appointment as co-counsel under the conditions offered to him. (2RT 452.)

Based on Mr. Ringgold's and Mr. Yanes's refusals to accept appointment as co-counsel, it appears there were provisions in the contract for compensation to appointed co-counsel, just not enough to interest either Mr. Ringgold or Mr. Yanes. Indeed, the trial court never stated, as appellant suggests (AOB 53), that an attorney from the capital case list who accepted appointment as co-counsel would not be compensated; the court related that based on the information it had received, an attorney appointed from the capital case list would be compensated at a flat rate. The court had also been advised by the coordinator of the capital case panel that under the contract with the county, there was no method to compensate the appointment of an attorney who was not on the capital case list. (2RT 404-405.)

In sum, respondent reiterates that any issue involving the 1997 local appointment contract is not properly before this Court because the contract and its terms are not part of the appellate record. Moreover, the trial court's denial of appellant's request was not an abuse of its discretion. Accordingly, there was no violation of any of appellant's constitutional rights as a result of the trial court's refusal to appoint co-counsel.

C. Assuming Arguendo The Trial Court's Refusal To Appoint Co-Counsel Was An Abuse Of Discretion, Appellant Has Failed To Demonstrate Prejudice

Appellant contends he never received the assistance he needed to prepare his defense as evidenced by his numerous disagreements with advisory counsel,

which led to the "rotating attorneys" situation.[5/] Appellant concludes that the trial court abused its discretion when it refused to appoint an attorney who was willing to work as co-counsel with appellant and thereby impermissibly interfered with his Sixth Amendment right to self-representation, which constituted *per se* reversible error. (AOB 56-59.) Respondent submits that appellant has failed to show that a result more favorable to him would have been reached had the alleged error not occurred.

As respondent discussed above, appointment of a second counsel in a capital case is not an absolute right protected by either the state or the federal constitution. (*McKaskle v. Wiggins, supra,* 465 U.S. at p. 183; *People v. Bradford, supra,* 15 Cal.4th at p. 1368; *People v. Clark* (1993) 5 Cal.4th 950, 997, fn. 22; *People v. Bloom, supra,* 48 Cal.3d at p. 1218.) Hence, any error resulting from a trial court's denial of a defense request for second counsel must be judged under the standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836. In other words, appellant must show that it is reasonably probable that a result more favorable to him would have been reached had the error not occurred. (*People v. Williams (Bob)*(2006) 40 Cal.4th 287, [52 Cal.Rptr.3d 268, 280-282]; *People v. Clark, supra,* at p. 997, fn. 22.)

Respondent submits appellant has failed to show how he was prejudiced by the trial court's refusal to appoint co-counsel. Appellant asserts that because

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5. Appellant represented himself during pre-trial proceedings until June 17, 1998, when his motion to terminate his pro per status was granted, and advisory counsel, John Schmocker, was appointed to represent appellant. (8CT 1963.) Mr. Schmocker continued to represent appellant during the trial until October 8, 1998, when the prosecution concluded its case-in-chief and rested. Appellant then renewed his motion for pro per status, and after a lengthy hearing, his motion was granted and Mr. Schmocker was designated stand-by counsel. (8CT 1998-1999.) Appellant represented himself for the remainder of the guilt trial, through the penalty trial, and through the post-conviction proceedings, including sentencing. (8CT 2002-2005, 2098-2112,2142-2147.)

he was denied co-counsel, he never received the assistance he needed to prepare his defense. (AOB 57.) However, appellant never specifies exactly what assistance he sought and never received. Instead, appellant in very general terms simply complains about Mr. Schmocker, who was appellant's advisory counsel, and after appellant's request that his pro per status be terminated was granted, was appointed as appellant's defense counsel. Appellant states only that he and Mr. Schmocker disagreed about the defense that would be presented, as evidenced by the several *Marsden*[6] hearings that were held. (AOB 57.)

Respondent again observes that appellant fails to specify the nature and the substance of the disagreement between him and Mr. Schmocker over his defense. In other words, what exactly did Mr. Schmocker fail to do that appellant wanted done? Of course, respondent has no access to the transcripts of the several *Marsden* hearings, but the record evidences that the trial court denied each of appellant's *Marsden* motions. (3RT 839; 5RT 1321; 6RT 1496.) And, following the first *Marsden* hearing, the court stated for the record that it denied appellant's motion because it was ambiguous, untimely and appellant never stated any grounds in support of it. (3RT 839.)

On appeal, just as he failed to do below, appellant still fails to explain to this Court what assistance it was that he needed to prepare his defense, but never received. The record shows that appellant actively represented himself. Following the People's case-in-chief, appellant took over his own representation and presented his defense. (6RT 1507-1519; 1535-1537.) At the penalty hearing, appellant presented testimony from seven witnesses, including expert testimony from a psychiatrist. (7RT 1876-1945.) Following the verdicts, appellant filed motions for a new trial, to strike the special circumstances and to modify his sentence to life without the possibility of

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6. *People v. Marsden* (1970) 2 Cal.3d 118.

parole. (8CT 2141-2143, 2149-2175, 2177-2180.) Nowhere in the record is there evidence that appellant was unable to present his theory of defense to the jury, nor is there evidence that appellant was unable to present his mitigating circumstances at the penalty trial.

Consequently, appellant has failed to show that it is reasonably probable a result more favorable to him would have been reached had the trial court granted appellant's request for co-counsel. (*People v. Clark, supra,* 5 Cal.4th at p. 997, fn. 22.) In addition, as this Court has previously held, when a self-represented defendant has a lawyer acting as advisory counsel, his or her rights are adequately protected. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1040.) Appellant had both advisory counsel and an investigator/legal runner acting in his behalf. (2RT 423, 427-429; 3RT 746, 748, 752, 755, 758.) Accordingly, appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were protected.

II.

THE ABSENCE OF APPOINTED *KEENAN* COUNSEL DID NOT RESULT IN A VIOLATION OF APPELLANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Appellant's second contention is that the provisions of the local appointment contract, which foreclosed any payment to a second attorney appointed to assist a *pro per* capital defendant, resulted in a bar to the appointment of *Keenan* counsel for appellant, and thus, impermissibly interfered with appellant's ability to effectively represent himself. Appellant concludes that his constitutional right to effective assistance of counsel, as well as his rights to due process and a reliable guilt and penalty determination, were violated as a result of the trial court's failure to appoint *Keenan* counsel. (AOB 60-74.) Respondent submits that, even given the sketchy description of the terms of the local appointment contract available in the appellate record, it is

evident that the contract did not foreclose payment to a second attorney appointed to assist a *pro per* capital defendant. Moreover, this Court need not reach the issue of whether the trial court's refusal to appoint second counsel impermissibly interfered with appellant's ability to represent himself because the record reveals appellant never made the showing of genuine need required to trigger the presumption that a second attorney was necessary to his defense against the capital charges.

In *Keenan v. Superior Court* (1982) 31 Cal.3d 424, this Court recognized the importance of a capital defendant's right to a complete and full defense and concluded that "under a showing of genuine need ... a presumption arises that a second attorney is required." (*Id.* at p. 434.) However, the burden is on the capital defendant to present a specific factual showing to the trial court as to why the appointment of a second attorney is necessary to his defense against the capital charges. (*People v. Lucky* (1988) 45 Cal.3d 259, 279; *People v. Burgener* (1986) 41 Cal.3d 505, 524.) The decision whether to appoint a second counsel remains within the trial court's discretion, and where the record reveals that the defendant failed to meet the burden of showing a genuine need, the trial court's refusal to appoint second counsel is not an abuse of its discretion. (*Ibid.*) Where a defendant elects self-representation, relief under *Keenan* "is not available for the simple reason that petitioner is not an attorney. (*Scott v. Superior Court* (1989) 212 Cal.App.3d 505, 511.)

Initially, respondent respectfully directs this Court's attention to respondent's Argument I-B-2, *ante*, wherein respondent discusses the lack of evidence in the appellate record regarding the provisions of the local appointment contract. As respondent discussed in the prior argument, it appears that the local appointment contract did have provisions to compensate appointed co-counsel, but perhaps not sufficient compensation for the amount of trial work appellant wanted his co-counsel to do. The real problem was that

appellant wanted both to represent himself and also to be represented by counsel. That was evident when appellant explained the extent to which he wanted an attorney to assist him with the preparation and presentation of his defense to the jury. Appellant wanted an attorney to help him question witnesses, to help him select a jury, and an attorney who would take over presenting his defense case if appellant was not "articulate in front of the jury." (2RT 384-386, 389.)

This Court has consistently held that a "... defendant is not entitled to have his case presented in court both by himself and by counsel acting at the same time or alternating at defendant's pleasure. ..." (*People v. Hill* (1969) 70 Cal.2d 678, 692; see also *People v. Moore* (1988) 47 Cal.3d 63, 77-78; *People v. Miranda* (1987) 44 Cal.3d 57, 75, overruled on another ground *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) In *Scott v. Superior Court, supra,* 212 Cal.App.3d at p. 511, the Court of Appeal held that *Keenan* does not apply to a defendant who elects self-representation.

In any event, respondent again submits that any issue involving the local appointment contract is not properly before this Court because evidence of the contract and its terms are not part of the appellate record. Moreover, appellant has failed to pinpoint in the record evidence that shows the provisions of the local appointment contract foreclosed payment to a second attorney, thereby resulting in a bar to the appointment of *Keenan* counsel for appellant and impermissibly interfering with his ability to effectively represent himself.

Furthermore, as respondent emphasized in Argument I-B-1, *ante*, appellant presented the trial court with only three reasons to support his request for second counsel: (1) the law library did not have Colorado law books so he needed help researching Colorado law in order to fight admission of his Colorado convictions; (2) his case was complicated and technical just because it was a death penalty case; thus, he needed help preparing and presenting his

defense; and (3) he needed help because he was representing himself. (5CT 1256, 1313-1314; 2RT 389, 401.) Appellant never offered any additional reasons during the numerous renewals of his motion in court. (2RT 349-351, 352-355, 356-358, 379-394, 398-403, 423-427, 450-453.)

The above-stated reasons do not, either singularly or taken together, establish a genuine need for appointment of second counsel. Appellant had both advisory counsel and an investigator/legal runner available to help him represent himself, and it was up to appellant to utilize both to meet his needs. Certainly, advisory counsel would have been able to research Colorado law and assist appellant with challenging his out-of-state convictions, but only if appellant asked advisory counsel to do so. Accordingly, based on the reasons provided by appellant, the trial court did not abuse its discretion when it denied appellant's requests for second counsel. (See *Scott v. Superior Court, supra,* 212 Cal.App.3d at p. 512 [finding that the tasks the *pro per* petitioner pointed to in seeking *Keenan* counsel could have been accomplished by advisory counsel and investigators that were already provided].)

Additionally, appellant never advised the trial court what specific duties would be assigned to second counsel. On appeal, in his attempt to show he did not receive effective assistance of counsel because of the lack of second counsel, appellant suggests that often in a capital case second counsel "effectively prepares for the penalty phase of the trial." Appellant asserts that a second counsel who would have been more adept at questioning an expert witness would have been better suited to examine appellant's defense psychiatrist at the penalty phase. (AOB 71.) The difficulty appellant is unable to overcome in the present case is that he never advised the trial court that he needed a second attorney to prepare and present the defense evidence at the penalty phase, or even that he needed the assistance of co-counsel to examine the defense expert. Appellant cannot rely on appeal on arguments not presented

to the trial court. (*People v. Roldan* (2005) 35 Cal.4th 646, 688, fn. 13.)

Also, appellant points out that he advised the trial court that he wanted co-counsel to examine him when he testified to avoid narrative testimony, and then argues that "this was critical to appellant's request and therefore we can only speculate on whether the trial court's decision not to appoint co-counsel impacted appellant's decision not to testify at either phase of the trial." (AOB 71; 2RT 389.) Respondent agrees with appellant that it is pure speculation, and not based on the appellate record, that the absence of a co-counsel impacted appellant's decision whether to testify.

Finally, appellant has failed to show that it is reasonably probable a result more favorable to him would have been reached had the trial court appointed *Keenan* counsel. (*People v. Williams(Bob), supra,* 52 Cal.Rptr.3d at pp. 279-282 ; *People v. Clark, supra,* 5 Cal.4th at p. 997, fn. 22.) During the guilt phase of the trial, appellant was represented by Mr. Schmocker; therefore, he had assistance of appointed counsel during that portion of the trial. Appellant was again granted *pro per* status just after the prosecution rested its case and continued to represent himself through the defense case, argument, the penalty phase of the trial and in all post-conviction proceedings. (See fn. 4, *ante*.)

With the single exception of suggesting that co-counsel would have been more adept at questioning appellant's expert witness during the penalty phase, appellant fails to explain how an appointed co-counsel would have made a difference at his trial. Indeed, while appellant might not consider himself as having been adept at questioning his expert witness, respondent submits that appellant's expert psychiatrist was very adept at testifying and thoroughly explained his opinions and the bases for them. (7RT 1934-1945.) In addition, during the penalty trial, appellant presented testimony from another six witnesses, who described appellant's family background, childhood and how

he had changed his life since he was imprisoned. (7RT 1876-1933, 1945-1951.) During the post-conviction proceedings, appellant filed a motion for new trial (8CT 2149-2175) and a motion to strike the special circumstance finding (8CT 2177-2180), and appellant argued both motions before the trial court (8RT 1995-1998, 1000-2001).

In sum, appellant's claim that the local appointment contract foreclosed any payment to a second attorney appointed to assist a *pro per* defendant is not supported by the record. Moreover, the trial court did not err in denying *Keenan* counsel since appellant had elected to represent himself. (*Scott v. Superior Court, supra,* 212 Cal.App.3d at p. 512.) Further, appellant failed to make a showing of genuine need required to trigger the presumption that a second attorney was necessary to his defense against the capital charges, and therefore, the trial court did not abuse its discretion when it denied appellant's request for appointed second counsel. Finally, because the appointment of a second counsel in a capital case is not an absolute right protected by either the state or the federal Constitution, any error must be judged under the standard enunciated in *People v. Watson, supra,* 46 Cal.2d at page 836, and appellant has failed to show that it is reasonably probable a result more favorable to him would have been reached had the trial court appointed *Keenan* counsel. Hence, appellant's second contention lacks merit.

III.

THE DENIAL OF APPELLANT'S REQUEST FOR CO-COUNSEL WAS NOT A VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION

Appellant contends that the local appointment contract "disapproved of" second counsel appointments for *pro per* capital defendants, and thereby denied him the same access to the authorized ancillary services as a represented capital

defendant; therefore, the denial of his request for co-counsel violated his state and federal constitutional rights to equal protection. (AOB 75-87.) Respondent submits that appellant has failed to show that California has adopted a classification that affected two or more similarly situated groups in an unequal manner, and thus, he has failed to show that he was denied equal protection of the laws when the trial court refused his request for co-counsel.

The Equal Protection Clause in the Fourteenth Amendment to the United States Constitution and in article I, section 7 of the California Constitution mandate that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. (*Scott v. Superior Court, supra*, 212 Cal.App.3d 505, 511.) To establish a meritorious claim under the Equal Protection Clause of the federal and state constitutions, the first prerequisite is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*In re Eric J.* (1979) 25 Cal.3d 522, 530; *People v. Leung* (1992) 5 Cal.App.4th 482, 494.)

Appellant asserts that the similarly situated groups in this case are capital defendants with appointed counsel and capital defendants who represent themselves. He points out that section 987, subdivision (d), specifically discusses the appointment of co-counsel in a capital case based on the request of the first attorney appointed and that section 987.9 is a common avenue for capital defendants, through their counsel, to obtain ancillary services, including *Keenan* counsel. Appellant argues that neither section provides that the "attorney" or the "counsel" who is authorized to request co-counsel or *Keenan* counsel "means only a state bar certified attorney," and therefore, the *pro per* capital defendant, who is his own attorney for all purposes, should not be treated differently. Appellant contends that in his case, he was treated differently because of the local appointment contract's disapproval of co-counsel for *pro per* defendants. (AOB 77-81.)

There are several reasons why appellant's present contention fails. First, as discussed in respondent's arguments I and II, *ante*, the local appointment contract, which appellant characterizes as disapproving of second counsel appointments for *pro per* capital defendants, is not part of the appellate record. Therefore, any issue based on that contract is not properly before this Court.

Second, as also discussed in respondent's prior arguments, the problem that appellant had below was that he both wanted to represent himself and also to have the services of an appointed attorney. However, appellant waived his constitutional right to have an attorney, and no capital defendant, whether represented or not, has the absolute right to appointment of a second counsel. (*People v. Bradford, supra,* 15 Cal.4th at p. 1368; *People v. Lucky, supra,* 45 Cal.3d at p. 279 [decision whether to appoint a second counsel remains within the trial court's discretion]; *People v. Burgener, supra,* 41 Cal.3d at p. 524.) Accordingly, it was not that appellant was treated differently than represented capital defendants because of the local appointment contract, or some other state provision that prevented appellant from obtaining the services of co-counsel, it was that appellant, after waiving his right to representation, asked for appointed co-counsel who would be able to act as trial attorney for the defense at appellant's whimsy. "A criminal defendant does not have a right to simultaneous self-representation and representation by counsel." (*People v. Bradford, supra,* at p. 1368.)

Third, appellant is not similarly situated to a capital defendant who has exercised his right to counsel because appellant abandoned his constitutional right to counsel in favor of representing himself. (*Scott v. Superior Court, supra,* 212 Cal.App.3d at p. 511.) To ask whether the groups are similarly situated is the same as asking whether the distinction between them can be justified under the appropriate test of equal protection. (*People v. Leung, supra,* 5 Cal.App.4th at p. 494.) "Where the right affected by the classification is not

constitutionally protected, the classification need only be rationally related to a legitimate state purpose in order to withstand equal protection scrutiny." (*Ibid.*)

As discussed above, the appointment of a second counsel is not an absolute right protected by either the state or federal Constitution, but in California, section 987, subdivision (d)[7] allows the trial court, in its discretion, in a capital case to appoint an additional attorney if so requested by the first appointed attorney. Therefore, the relevant standard of scrutiny to analyze appellant's equal protection claim is rational basis. (*People v. Leung, supra,* 5 Cal.App.4th at p. 494.)

It is a legitimate state interest to provide first appointed counsel in a capital case with the assistance of co-counsel when needed. (§987, subd. (d).) Appellant waived his right to be represented by counsel. The state, rationally and constitutionally, is not compelled to provide for the appointment of co-counsel– i.e., an attorney--where a defendant has advised the court that he or she does not want to be represented by an attorney. Any distinction between represented capital defendants and *pro per* capital defendants in the availability of appointed co-counsel plainly has a rational basis, and thus, appellant was not similarly situated with other capital defendants who chose representation by appointed counsel. (*Scott v. Superior, supra,* 212 Cal.App.3d at p. 511.) Accordingly, appellant was not denied his right to equal protection . (*Ibid.*; *cf.*

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7. Section 987, subdivision (d) provides: "In a capital case, the court may appoint an additional attorney as a cocounsel upon a written request of the first attorney appointed. The request shall be supported by an affidavit of the first attorney setting forth the reasons why a second attorney should be appointed. Any affidavit filed with the court shall be confidential and privileged. The court shall appoint a second attorney when it is convinced by the reasons stated in the affidavit that the appointment is necessary to provide the defendant with effective representation. If the request is denied, the court shall state on the record its reasons for denial of the request."

People v. Leung, supra, 5 Cal.App.4th at pp. 494-496.)

The fourth reason why appellant's contention fails is that under California case law, it is within the discretion of a trial court to authorize appointment of co-counsel for a self-represented defendant. (*People v. Frierson, supra,* 53 Cal.3d at p. 741.)

At his trial, appellant chose to act as his own attorney. That was his constitutional right. But appellant had no right under any constitutional provision, including the Equal Protection Clause, to have a second counsel appointed so that appellant could choreograph special appearances by counsel. (*McKaskle v. Wiggins, supra,* 465 U.S. at p. 183; *People v. Bloom, supra,* 48 Cal.3d at p. 1218.) In sum, it was not an equal protection violation to deny appellant an appointed co-counsel, and appellant's contention that he was denied equal protection of the laws should be rejected by this Court.

IV.

THE TRIAL COURT'S DENIALS OF APPELLANT'S REQUESTS TO REINSTATE HIS PRO PER LAW LIBRARY PRIVILEGES DID NOT DEPRIVE APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO DEFEND HIMSELF AND TO DUE PROCESS

Appellant contends that the trial court erred when it refused to reinstate some of his *pro per* law library and telephone privileges because he was denied access to the necessary tools required to have a meaningful opportunity to represent himself, and accordingly, his rights under the Fifth, Sixth and Fourteenth Amendments were violated. (AOB 88-91.) Respondent submits that appellant's constitutional rights were protected by the trial court's appointment of advisory counsel and an investigator, who was also appointed as a legal runner, to assist appellant in the preparation of his defense. Respondent further submits that the trial court's refusal to allow appellant to

dictate what means would be available to him to prepare his defense was neither erroneous nor a violation of appellant's constitutional rights.

A. Factual Background

On June 30, 1995, the trial court granted appellant's request to proceed in propria persona. (1RT A-32, A-50.) During that pretrial hearing, the court warned appellant that if he was disruptive in the jail setting, the sheriff had the authority on his own to revoke appellant's pro per privileges within the jail, and the court wanted to make sure that appellant understood that. (1RT A-47-A-49.) By September 19, 1995, it appears that attorney Clive S. Martin had been appointed as advisory counsel for appellant. (1RT 100.)

On July 28, 1997, appellant was in pro per and reiterated to the court that he wanted to represent himself. (2RT 348-351.) On September 17, 1997, John Schmocker was appointed as advisory counsel. (2RT 423, 427-429.) On January 1, 1998, the record shows appellant had access to the law library and filed a notice of motion to suppress evidence pursuant to Penal Code section 1538.5, and was instructed by the court to file additional points and authorities. (2RT 473-479.)

On April 1, 1998, appellant was to appear in court, but he refused to leave his cell and became combative with the deputies. (2RT 552.) On April 6, 1998, appellant's section 1538.5 hearing proceeded, and appellant represented himself, with the assistance of advisory counsel. (2RT 558.) On April 15, 1998, the trial court denied appellant's motion to suppress evidence and trial was set for June 10, 1998. On May 18, 1998, appellant was in court and explained his complaints about advisory counsel and about his investigator to the court. The trial date was set at June 17, 1998. (3RT 694-711.)

On May 26, 1998, the matter was on calendar for a pretrial conference, and the court advised appellant that it had received a notice of the results of an

administrative hearing to revoke the defendant's in-custody pro per privileges for cause that was filed on May 21, by the sheriff's department. The court observed that it appeared appellant's pro per privileges had been revoked. Appellant advised the court that he wanted to continue representing himself and wanted access to some law books and the phone. (3RT 712.) The court set May 28 for a hearing regarding appellant's in-custody pro per privileges, but declared that the trial remained set for June 17. (3RT 722.)

On May 28, 1998, Deputy Sheriff James Wolfhope testified that on May 19, he received a call that appellant had a visitor waiting in the attorney room, and Deputy Wolfhope was to expedite getting appellant there. Appellant was called out of his cell. When appellant's cell opened, the deputy could see appellant dressing and grabbing his materials. Appellant stopped at the gate, put his materials up on the gate and turned around to be handcuffed. (3RT 725-727.)

Deputy Wolfhope handcuffed appellant and unlocked the gate. As he opened the gate, he noticed that appellant's materials, which were in a brown, accordion-type file, were about to fall; so he grabbed the file. Because appellant's status was a K-10 inmate, "which is a keep-away from all other inmates" status, and because appellant was to be searched "prior to and upon returning to his housing location," Deputy Wolfhope decided to search appellant's file. (3RT 727-728.)

When Deputy Wolfhope went through the papers in appellant's file, he found a metal rod, which was sharpened at one end. The metal rod looked like a metal scale that is etched on one flat side, such as would be on a typewriter. Appellant was returned to his cell. (3RT 728-729.)

Deputy Wolfhope checked with the deputy who worked in the law library and learned that appellant had access to a typewriter. Deputy Wolfhope checked the typewriter appellant had access to and saw that a rod was missing

from it. He also observed that the rod he recovered from appellant's file appeared to be a match for the one missing from appellant's typewriter. There were no other similar rods in the typewriter–the one recovered from appellant was the top rod that would hold a piece of paper against the main roller. (3RT 729-730.)

Deputy Sheriff Donald Jeanson testified that he arranged for and conducted the administrative hearing before a hearing officer on May 21, at which Deputy Wolfhope and appellant testified. Deputy Jeanson explained that an inmate's possession of a weapon is a violation of jailhouse rules and the Penal Code, and it is a serious detriment to the security and safety of the jail. The metal rod possessed by appellant was a weapon because it was a long, thin, sharpened piece of metal suitable to be used as a stabbing device. When appellant testified at the hearing, he admitted possession of the metal rod for use as a weapon for his self-protection. (3RT 733-735, 738.)

Based on the weapon confiscated from appellant, the sheriff's department determined appellant was a security risk to inmates and to staff, and it revoked appellant's pro per privileges. Basically, the revocation meant that appellant could not visit the jail's law library. However, appellant could have access to legal materials if a legal runner brought them to appellant during normal visiting hours. And, appellant could still receive supplies once a week, and he still had tier time which gave him access to a telephone, but not as much access as pro per inmates have to the phones in the law library, which they can use for two hours every day. (3RT 739-740, 743.)

Appellant asked that the court order he be allowed to receive library books twice a day to review in his cell and that he be allowed telephone privileges in the morning to call advisory counsel or his investigator. Deputy Jeanson explained that the sheriff's department did not allow library books to be taken out of the law library because it did not want to risk damage to the

books and so that the books remained available for pro per inmates who had law library privileges. (3RT 739-740.) Appellant argued that if he did not possess a knife or a shank, he would not be a security risk in the law library and should be allowed to use it. Deputy Jeanson explained that appellant had previously been involved in an altercation, and thus, even with just his hands and fists, appellant would still be a security risk. (3RT 741-744.) The trial court determined it would not order appellant's pro per privileges reinstated, but it would appoint a legal runner who could bring legal materials to appellant. Mr. Schmocker remained appointed as appellant's advisory counsel. (3RT 746.)

On June 9, 1998, appellant again objected to the loss of law library privileges stating that he still had no access to legal materials, law books and the telephone. He asked the court to allow him to use the law library between "10:00 and 11:00 o'clock because no one is in the law library." The court denied appellant's request and pointed out that Mr. Schmocker, appellant's advisory counsel, and Mr. Mackee, appellant's investigator and legal runner, were available to confer with appellant and to assist him with legal materials, and that both Schmocker and Mackee had already spent a considerable amount of time on appellant's behalf reviewing his files, including the jury instructions from the first trial, and were ready to consult with appellant concerning the instructions. The court found that given the fact appellant possessed a shank at a time he was scheduled to meet with Mr. Schmocker and to visit the law library, the sheriff's department's restrictions were reasonable. (3RT 755-758.)

B. Appellant Had The Necessary Tools To Have A Meaningful Opportunity To Represent Himself

Appellant argues the right to self-representation under *Faretta* necessarily includes the right to prepare a defense, including access to research

materials, and the trial court's refusal to grant him limited access to the law library denied him that right. Appellant relies on three Ninth Circuit Court of Appeal cases to support his contention. (AOB 88-91.) Respondent submits all three of the Ninth Circuit cases are factually distinguishable from the facts in appellant's case. Respondent further submits that appellant was provided with the necessary tools to represent himself.

The first federal case cited by appellant is *Taylor v. List* (9th Cir. 1989) 880 F.2d 1040, and it involved the plaintiff in a civil rights action who argued his right to self-representation was violated when the defendants denied him access to prison law clerks and witnesses and actively prevented a witness from testifying on his behalf. (*Id.* at p. 1047.) The Ninth Circuit concluded that if the evidence offered by the plaintiff was "sufficient to raise a genuine issue of material fact as to whether the defendants prevented the plaintiff's access to law books and witnesses, entry of summary judgment on Taylor's Sixth Amendment claim was improper." (*Ibid.*)

Appellant also cites *Milton v. Marks* (9th Cir. 1985) 767 F.2d 1443, wherein after the defendant decided to represent himself, prison officials hampered his efforts to contact expert witnesses and gave him no access to current law books or witnesses. (*Id.* at p. 1445.) The federal appellate court held that the Sixth Amendment right to self-representation recognized in *Faretta* includes a right of access to law books, witnesses and other tools necessary to prepare a defense. (*Id.* at 1446.) However, the federal court also acknowledged that certain factors, such as security concerns or "avoidance of abuse by opportunistic or vacillating defendants," would justify limitations on the defendant's access to law books and witnesses. (*Ibid.)*

The *Taylor* and *Milton* cases involved situations where prison officials denied the defendants access to law books and witnesses. In the case at bar, appellant was denied access to the law library, but he had an advisory counsel

and an investigator/runner who could bring legal materials to him. Appellant had access to a telephone during tier time, and also, his investigator/runner was able to contact his witnesses and arrange for their appearances in court. Thus, appellant was not deprived of access to the legal materials and witnesses needed to prepare his defense, and appellant's case is not analogous to either *Taylor* or *Milton*

Finally, appellant cites *Bribiesca v. Galaza* (9th Cir. 2000) 215 F.3d 1015. In *Bribiesca* the federal court found that the state trial court violated the defendant's Sixth Amendment right to self-representation when it denied him the right to represent himself. This federal case is not analogous to appellant's case because appellant was not denied his right to represent himself.

In *People v. Jenkins*, this Court reviewed *Milton v. Morris, supra,* and observed that even in the circumstances in which defendant Milton had found himself–no counsel and no access to a law library, to a legal assistant, to an investigator, or to a runner and extremely limited access even to the telephone–defendant Milton "had no right to dictate what means would be made available to him to prepare his defense" because the institutional and security concerns of pretrial detention facilities may be considered in determining what means will be accorded to a defendant to prepare his defense. (*People v. Jenkins*, *supra*, 22 Cal.4th 900, 1000-1001.) Moreover, "[a]ffording a defendant a lawyer to act as advisory counsel adequately protects the right identified in the *Milton* case." (*Id.* at 1001.)

Here, appellant had advisory counsel, as well as an investigator who was also designated a runner so that he could bring legal materials to appellant. Therefore, appellant's right to prepare his defense was not violated by the restrictions placed on his pro per privileges. Appellant is a good example of a defendant who tried to dictate what means would be available to him to prepare his defense. Appellant tried to bargain for law books to be brought to his jail

cell. (3RT 745.) He also tried to bargain for time in the law library when he believed no one else was in there. (3RT 755-757.) Appellant was warned, as early as June 1995, three years before his law library privileges were revoked, that if he was disruptive in the jail setting, the sheriff could revoke his pro per privileges; yet appellant chose to fashion a shank out of a typewriter rod from a typewriter that was available to him in the law library and attempt to carry it with him to visit the law library and to a meeting with his advisory counsel.

In sum, appellant was provided with access to legal materials and to a telephone, just not under the terms he wanted to dictate. Hence, appellant received access to the necessary tools to have a meaningful opportunity to represent himself, and his constitutional rights to prepare a defense and to due process were in no way violated.

V.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS THE YELLOW BAG AND THE JEWELRY SEIZED AT THE ARRESTS OF LEE HARRIS AND APPELLANT

Appellant contends the trial court's denial of his motion to suppress evidence was erroneous because the seizure of the yellow bag containing the jewelry was the result of an unlawful arrest and seizure in violation of his Fourth Amendment rights. Appellant asserts the police officers arrested him without first securing an arrest warrant, and the trial court's ruling to the contrary is not supported by the evidence presented at the hearing below. (AOB 92-102.) Respondent submits that the police officers arrested both appellant and Harris based on existent arrest warrants, and therefore, the trial court properly denied appellant's motion to suppress evidence.

In *People v. Panah*, this Court reiterated that,

> When reviewing a ruling on an unsuccessful motion to exclude evidence, we defer to the trial court's factual findings, upholding them if they are supported by substantial evidence, but we then independently review the court's determination that the search did not violate the Fourth Amendment.

(*People v. Panah* (2005) 35 Cal.4th 395, 465, quoting *People v. Memro* (1995) 11 Cal.4th 786, 846.)

A. Evidence Presented At The Suppression Hearing[8]

Sometime between 7:00 p.m. and midnight on December 20, 1977, Brian Deasy of the Denver Police Department interviewed Terry Avery. Deasy was working a special assignment with the Special Crime Attack Team and was the acting sergeant that night. Terry was not in custody during her interview with Deasy, which was conducted in the hallway at the police station. The second interview of Terry that night was conducted by the Homicide Detail and was tape recorded. Detective Pete Diaz, of the Homicide Unit, spoke with her afterwards. (2RT 562-563, 565-567; 3RT 614-616.)

Terry Avery told the Denver police officers that appellant and Harris robbed and killed the manager of a Woolworth's in Lawrence, Kansas. She did not tell them about the Long Beach crimes. Terry also told the officers about the apartment on Bellview where appellant and Harris were staying. She further told them that when she was last at the apartment, she saw two western-style revolvers and a sawed-off shotgun that was located by the door. (2RT 563, 565, 568-569; 3RT 611.)

Deasy further learned that night that appellant and Harris were wanted for aggravated robberies in two other Colorado counties, and that one of those

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8. The parties stipulated that the transcript of the hearing from appellant's motion to suppress evidence at his first trial could also be considered by the trial court. (2RT 558.)

robberies was committed at a jewelry store. Deasy spoke on the phone with Detective Charlie Flos, who was off that night, and who told him appellant was "wanted," and Flos believed that Lee Harris was also "wanted". Deasy would have verified the information about the existence of arrest warrants in two counties for appellant and Harris either by telephone, or by radio; although if he had an actual police bulletin in his hand, verification might not have been necessary. (2RT 571-574; 3RT 584-589, 599, 611.)

Detective Diaz knew from Deasy and the other officers that they were going to the apartment on Bellview to make arrests pursuant to arrest warrants (Peo. Exhs. 1 and 15/23). He knew there were two counties outside of Denver where appellant was wanted for robberies, and he knew that one of the robberies involved a jewelry store. There was no possibility that there was not an arrest warrant for appellant in existence that night because "we double check and triple check, but the information could come from a special police bulletin, from other officer information at the time that a warrant does exist. So I wouldn't physically have to see a warrant to believe that a warrant is active." There was no search warrant that night for the apartment on Bellview. (3RT 616-623, 638, 652, 655.)

Sergeant Deasy, Detective Diaz and several other officers went to apartment 102 at 750 W. Bellview to arrest appellant and Harris. Diaz got the key to apartment 102, and he, Deasy, Detective Bill Martinez and William Fugate went to the front door, while other officers positioned themselves at the rear of the building. They knocked on the door and announced themselves as police officers. They heard noise inside the apartment indicating someone was inside. They also heard over the police radio, "'They're coming out the back.'" Diaz tried to open the door with the key, but could not; so the other officers started kicking the door. About the time Diaz was able to get the key to work, Detective Martinez kicked the door wide-open. All the officers entered the

apartment. (3RT 601-602, 604, 624.)

After the officers were inside the apartment, there was further communication over the radio about someone exiting through the bathroom window. Detectives Diaz and Martinez found Harris in the bedroom. Martinez forced Harris up against the bedroom wall, while Diaz did a quick pat down and placed handcuffs on Harris. Diaz was standing to the left of Harris and situated on Harris's left was a small chest of drawers. While Diaz was putting the handcuffs on Harris, he noticed a yellow, plastic bag on the chest of drawers. The bag had sagged open and Diaz could see numerous pieces of jewelry inside. He also noticed that there was a business name printed on the yellow bag, as well as the names of two cities, Lawrence and Atkinson, Kansas. Based on the information he had, Diaz decided he should recover the bag. There were also .22 caliber bullets in that area, which Detective John Wyckoff recovered. (3RT 625.)

Detective Diaz left Harris in Detective Martinez's custody and went down the hallway to the left where there was a bathroom. In the bathroom, against the north wall, Diaz saw a window from which a screen had been removed; the screen was in the bathtub. Diaz could hear some commotion in the back of the building. When Diaz stood on the bathtub and looked out the window, he saw a person in handcuffs and heard some talk about a weapon that was recovered at that person's feet. Appellant had exited the apartment through the bathroom window and dropped 15 feet to the ground into the bushes. He was taken into custody there by Detectives Gordy Baker, Darryl Wagner and Officers Don Danhour and John Wycoff. Appellant was arrested based on the warrant (Peo. Exh. 1) that was out for him and also based on the information given to the police by Terry about the homicide in Kansas. (2RT 570; 3RT 601, 608, 625-626.)

Detective Diaz kept the yellow bag with the jewelry in his possession

until he completed the inventory sheet that night. He then placed it in the police property bureau under the supervision of the police custodian. It was two or three weeks later that Diaz met Detective Collette, who was in Denver to investigate homicides that occurred in Long Beach, California. Diaz had no knowledge about the Long Beach homicides before he met Collette. Diaz authorized Collette to take custody of the jewelry and remove it; no court order was needed for Diaz to release the jewelry to Collette. (3RT 630, 635-636.)

B. Appellant's Arrest Was Lawfully Based On An Arrest Warrant And The "In Plain View" Seizure Of The Yellow Bag Was Valid

Following the presentation of evidence and argument at appellant's motion to suppress evidence, the trial court found there were arrest warrants for both appellant and Harris that had been issued on December 6, 1977, well before the night they were arrested, and that on the night of their arrests, the Denver police officers knew of the existence of the arrest warrants. The court also found the Denver officers knew that one of the crimes for which appellant and Harris were wanted involved a robbery at a jewelry store. In addition, the trial court found the officers had information that appellant and Harris were involved in a homicide in Lawrence, Kansas, and that they had weapons in the apartment. (3RT 668-670, 672-673.)

The trial court ruled appellant's arrest was lawfully based on an arrest warrant. It further ruled the yellow bag and its contents was lawfully seized without a search warrant because it was in plain view at the time Harris was arrested, and Detective Diaz would have been derelict in his duty if he had not seized the bag at that time. Accordingly, the trial court denied appellant's motion to suppress the yellow bag and the jewelry it contained. (6CT 1523-1525; 3RT 673.)

On appeal, appellant contends his arrest by the Denver police officers

was unlawful because they arrested him without an arrest warrant. He argues that the trial court's ruling to the contrary is not supported by the evidence presented at the hearing on his suppression motion because the evidence proved that there was only an arrest warrant for Harris, but not one for appellant. (AOB 95-99.) Appellant further contends that the evidence failed to show there were any exigent circumstances that would have allowed the warrantless entry into the apartment because the officers had no reason to believe appellant and Harris would flee before they could obtain a valid warrant. (AOB 99-101.) Appellant concludes that without valid arrest and search warrants, or exigent circumstances, his arrest was unlawful, the seizure of the yellow bag was unlawful, and accordingly, it was prejudicial error when evidence of the yellow bag and its contents was not suppressed. (AOB 101-102.)

Respondent submits that appellant is mistaken when he argues the evidence failed to prove there was a warrant out for his arrest the night he was arrested. A copy of the arrest warrant for appellant from Adams County, Colorado, issued on December 6, 1977, was identified and received at the suppression hearing as People's Exhibit 1. (3RT 652, lines 11-20, 655, lines 6-9.) Deasy and Diaz both testified they knew from verified information that there were outstanding arrest warrants for appellant and Harris, that Terry had advised them of appellant's location at the apartment on Bellview, and that the arrests were based on those existent warrants. (3RT 569, 599, 602, 608, 625-626.)

> In *Payton v. New York*, the United States Supreme Court held, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

(*Payton v. New York* (1979) 445 U.S. 573, 603 [100 S.Ct. 1371, 63 L.Ed.2d 639].)

Here, substantial evidence supported the trial court's factual findings, and its

ruling that the Denver officers lawfully arrested appellant pursuant to an arrest warrant was proper.

Moreover, Detective Diaz's "in plain view" seizure of the yellow bag and the jewelry it contained was lawful. Under the Fourth Amendment, officers may seize items specifically named in a valid warrant, as well as other items in plain view. However, the officers must be lawfully in the place from which they view the items, and the incriminating character of the items as contraband or evidence of a crime must be immediately apparent. (*Horton v. California* (1990) 496 U.S. 128, 136 [110 S.Ct. 2301, 110 L.Ed.2d 112]; *People v. Lenart* (2004) 32 Cal.4th 1107, 1118-1119.)

The evidence showed that Harris was arrested by Detective Diaz, pursuant to an arrest warrant (Peo. Exh. 15/23), in the bedroom of the apartment. While Diaz was handcuffing Harris, he noticed a chest of drawers to Harris's left, and on top of the chest, Diaz saw a yellow, plastic bag with the names of two cities, Lawrence and Atkinson, Kansas, printed on it. The top of the bag had sagged open, and Diaz could see jewelry inside. Diaz seized the bag because he knew that one of the robberies for which Harris and appellant were wanted involved a jewelry store, and also, because of the information from Terry Avery concerning the robbery/murder in Lawrence, Kansas. (3RT 625.)

Hence, the evidence at the suppression hearing established that Diaz was lawfully at the location from which he viewed the yellow bag, and that he immediately recognized the incriminating character of the yellow bag and its contents as possibly contraband or evidence of a crime. Accordingly, the trial court's ruling that the warrantless recovery of the yellow bag was a lawful seizure (3RT 673) should be upheld by this Court.

VI.

APPELLANT WAS PROPERLY CONVICTED OF THE FIRST-DEGREE MURDERS OF MR. AND MRS. CRUMB (COUNTS 1 AND 2) ON A FELONY-MURDER THEORY EVEN THOUGH THE INFORMATION CHARGED APPELLANT WITH "MALICE MURDER" UNDER SECTION 187

Appellant contends his first-degree murder convictions of Mr. and Mrs. Crumb (counts I and II) must be reversed because the prosecution proceeded on a felony-murder theory when the information only charged appellant with "malice murder" in violation of section 187. Relying on this Court's decision in *People v. Dillon* (1983) 34 Cal.3d 441, appellant argues that felony murder is a separate offense under section 189 and that "a charge of murder with malice (a violation of Pen. Code, § 187) plainly does not charge the offense of felony-murder in the language of the statute defining it." Thus, appellant reasons that because the information charged him only with "malice murder" in violation of section 187 and made no allegation that he committed felony murder under section 189, he received constitutionally inadequate notice of the charges and was "convicted of two counts of offenses other than with which he was charged . . . in excess of the jurisdiction of the trial court." (AOB 103-121.) Appellant's contention has been expressly rejected in *People v. Hughes* (2002) 27 Cal.4th 287, 368-370.

Appellant's entire argument is predicated on the erroneous premise that this Court's holding and rationale in *People v. Witt* (1915) 170 Cal. 104 was undermined and implicitly overruled by this Court in *People v. Dillon* (1983) 34 Cal.3d 441, a case which held, according to appellant, that felony murder "is not the same as malice murder . . . ." Thus, the argument is that felony murder and premeditated murder are separate crimes and that *Dillon* effectively overruled *Witt*'s holding that a defendant can be convicted of felony murder even though he is only charged with malice murder in the information. (AOB

106-115.) Unfortunately for appellant, this Court rejected the identical argument in *Hughes*:

> As the People observe, numerous appellate court decisions have rejected defendant's jurisdictional argument. [Citations.] We have rejected defendant's argument that felony murder and murder with malice are separate offenses [*People v.*] *Carpenter* [1997] 15 Cal.4th 312, 394-395 [it is unnecessary for jurors to agree unanimously on a theory of first degree murder]; [citation], and, subsequent to *Dillon, supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt, supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely. Thus, we implicitly have rejected the argument that felony murder and murder with malice are separate crimes that must be pleaded separately. [Citations.]

(*People v. Hughes, supra*, 27 Cal.4th at p. 369.)

After rejecting the underlying premise that felony murder and malice murder are separate offenses, the *Hughes* court also rejected "defendant's various claims that because the information charged him only with murder on a malice theory, and the trial court instructed the jury pursuant to both malice and a felony-murder theory, the general verdict convicting him of first degree murder must be reversed." (*People v. Hughes, supra*, 27 Cal.4th at p. 370.) Thus, appellant's claim must fail.

Furthermore, it must be noted that appellant's claim of lack of notice is likewise factually meritless. Again, as this Court noted in *Hughes*:

> As we observed in [*People v.*] *Diaz, supra,* [1992] 3 Cal.4th 495, "generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or at the indictment proceedings." (*Id.*, at p. 557.) In the present case, defendant received adequate notice: (i) the preliminary hearing testimony made clear the prosecution's intent to establish that defendant killed during the commission of a burglary and a robbery; (ii) the information charged defendant with robbery, burglary, and sodomy, and (iii) the evidence at trial alerted defendant to the felony-murder theory. Even now, defendant does not explain in what manner he might have been prejudiced by the absence of a separate felony-murder charge. We conclude that defendant received constitutionally adequate notice of the

prosecution's felony-murder theory. (*Diaz, supra*, 3 Cal.4th 495, 557; [*People v.*] *Gallego* [1990] 52 Cal.3d 115, 188-189.)

(*People v. Hughes, supra*, 27 Cal.4th at pp. 369-370.)

The same is true in the instant case. Appellant received adequate notice from the following: (1) the preliminary hearing testimony made it clear that the murders were committed during the commission of a burglary and robbery (1CT 75-89, 91, 105-106); (2) the information charged appellant with robbery and burglary, as well as robbery and burglary special circumstances (1CT 1-7); (3) the evidence at trial made appellant aware of the felony- murder theory (5RT 1120-1121; 6RT 1331, 1338, 1341, 1344-1346, 1348, 1350-1351, 1354-1355, 1364); and (4) perhaps most significantly, the instant trial was a retrial where the prosecution relied on a felony-murder theory, as well as a "malice murder" theory, at the first trial (1CT 174-180). Thus, appellant received constitutionally adequate notice of the prosecution's felony-murder theory. (See *People v. Hughes, supra*, 27 Cal.4th at pp. 369-370.)

Appellant's claim must be rejected.

VII.

NO ERRORS WERE COMMITTED BY THE TRIAL COURT DURING THE ADMISSION OF, AND THE INSTRUCTION ON, SECTION 190.3, FACTOR (B) EVIDENCE OF APPELLANT'S PRIOR VIOLENT CONDUCT

Appellant contends that the jury's reliance on several instances of the unadjudicated criminal activity introduced at his penalty trial was inappropriate because the evidence presented was insufficient to establish acts of violence under section 190.3, factor (b), and also because the jury instruction given, CALJIC No. 8.87,was incomplete and misleading. Appellant concludes that these errors were not harmless, and thus, violated his federal and state constitutional rights to due process, a fair trial and a reliable penalty verdict as

guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and by article I, sections 15, 16, and 17 of the California Constitution. (AOB 122-138.) Respondent submits appellant fails to establish that any errors occurred during the presentation of, and instruction on, the evidence of unadjudicated criminal activity, and assuming arguendo there were errors, appellant fails to establish a reasonable possibility that the penalty verdict would have been different absent the errors.

A. Appellant Waived This Claim By Failing To Object Below

Appellant did not object below to the admission of the evidence presented by the People to prove the seven instances of unadjudicated criminal activity which he now challenges on appeal, nor did he ask for clarifying language to CALJIC No. 8.87, which was given to the penalty jury, and which appellant now characterizes as incomplete and misleading. (7RT 1733-1736.)[9/] Accordingly, appellant's challenges to the admission of seven of the twelve instances of unadjudicated criminal activity and to CALJIC No. 8.87 are forfeited because he failed to object at trial on the same grounds he now raises on appeal. (*People v. Catlin* (2001) 26 Cal.4th 81, 172; *People v. Rodrigues* (1994) 8 Ca.4th 1060, 1140, 1191-1192; *People v. McPeters* (1993) 2 Cal.4th 1148, 1188.)

B. The Factor (b) Acts Of Unadjudicated Criminal Activity Were Established By Sufficient Evidence

Appellant contends that seven of the twelve acts of prior violent conduct

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9. Appellant did object, unsuccessfully, to the prosecution presenting evidence of the details underlying the Kansas murder, kidnaping and robbery, and he asked that the Kansas crimes be proved by a stipulation that he had been convicted of those offenses. (7RT 1738-1739.)

introduced by the prosecution under section 190.3, subdivision (b), should have been excluded because the evidence presented was insufficient to prove criminal activity beyond a reasonable doubt. (AOB 123-129.) Respondent submits the trial court did not abuse its discretion when it admitted evidence of the seven instances of unadjudicated criminal activity now challenged by appellant because each of the incidents contained the elements of a crime.

Evidence of unadjudicated criminal activity presented at the penalty phase pursuant to section 190.3, subdivision (b) is limited to evidence of conduct that demonstrates the commission of a crime, specifically, the violation of a penal statute. (*People v. Phillips* (1985) 41 Cal.3d 29, 72; *People v. Boyd* (1985) 38 Cal.3d 762, 778.) That crime must include a requisite degree of force or violence. (*People v. Boyd, supra,* at pp. 776-777.) The prosecution must prove each element of the factor (b) offense beyond a reasonable doubt. (*People v. Boyd, supra,* at p. 778.) It is the responsibility of the trial court to determine that the factor (b) evidence meets this high standard of proof. (*Ibid.*) A trial court's determination to admit factor (b) evidence is reviewable for abuse of discretion. (*People v. Smithey* (1999) 20 Cal.4th 936, 991.)

1. 1991 Fight With Inmate (Choke-Hold)

Appellant claims this incident is "best described as horse-play between two individuals," and the evidence presented was insufficient to establish the elements of a battery as required by section 242.[10/] (AOB 123, 126.)

On cross-examination, the correctional officer, James M. Williams, who testified about this incident agreed with appellant that the incident could have been horse-play initially, but that it "definitely turned into a pretty serious altercation." (7RT 1779.) The officer described the incident as both appellant

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10. Penal Code section 242 defines battery as "any willful and unlawful use of force or violence upon the person of another."

and the other inmate wrestling and throwing punches, but that at some point, appellant had a choke-hold on the other inmate, who was pinned to the ground with appellant on top of him. Officer Williams could see that the other inmate was struggling; so he sounded an alarm. (7RT 1778.)

In sum, respondent submits that appellant's actions of imposing a choke-hold on the other inmate and pinning the other inmate to the ground by being on top of him, went beyond being "playful" and engaging in "horse play." Officer Williams sounded an alarm because the other inmate was struggling, not because appellant and the other inmate were playfully slapping one another. And, the fight only ceased when another officer "drew weapons" on appellant and the other inmate. Thus, the evidence presented was sufficient to prove appellant used force and violence upon another inmate, and in doing so, committed a battery. (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 860, fn. 2 [only a slight unprivileged touching is needed to satisfy the force requirement of a criminal battery], disapproved on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224, 1228.)

2. 1993 Battery On Inmate

Appellant argues that his act of approaching another inmate and striking him in the mouth was insufficient to prove a battery because the correctional guard who saw the incident did not know who or what started the altercation, and thus, there was no evidence the fight was unprovoked. (AOB 123, 126.) Respondent submits that the evidence introduced was sufficient to establish battery.

Correctional Officer Javaras testified he released inmate Washington into the exercise yard, and appellant walked up to Washington and struck him in the mouth. When Javaras blew his whistle and told them to get down, Washington started to back away, but appellant continued to advance on Washington using

his fists to strike Washington's face and upper body area. (7RT 1782-1783.)

Indeed, the case cited by appellant, *People v. Young* (AOB 126), supports respondent's position. This Court in *Young* held that evidence the defendant, unprovoked, approached another inmate in the holding cell and punched him in the face, causing the inmate to bleed from his nose and mouth, was "plainly sufficient to constitute a battery." (*People v. Young* (2005) 34 Cal.4th 1149, 1210.) Here, without any evidence of provocation, appellant approached Washington when Washington was released into the yard and struck him in the mouth, causing him to bleed.

Appellant argues there was no evidence the fight was unprovoked. However, the fact Washington had just that moment been released into the yard when appellant came up to him and struck him certainly supports an inference the fight was unprovoked. And, if there was evidence of provocation, appellant could have introduced it. In any event, respondent submits the above evidence presented through the testimony of Officer Javaras was sufficient to prove battery.

3. 1993 Battery On Correctional Officer (Throwing Food)

Appellant characterizes the food tray incident as an incident where he threw the food tray at his cell bars and some food hit the correctional officer. Appellant concludes that such act "hardly qualified as an unlawful use of force against another person." (AOB 124, 126-127.) First, respondent submits, the evidence does not support appellant's version of the incident, and furthermore, when the evidence as presented at the penalty phase is reviewed, appellant's conduct with the food tray, without question, constituted a battery.

When Officer Lawson approached appellant's cell with his breakfast tray, she noticed appellant had put his hands through the food port so that his hands were actually outside of his cell. Because this was a violation of the

rules, Officer Lawson ordered appellant several times to pull his hands inside, but appellant failed to comply. Eventually, appellant did pull his hands back a little so that the officer could hand him the tray, which she did. Appellant took the tray and threw it directly at Officer Lawson. The food from the plate splattered all over Officer Lawson. (7RT 1787-1789.)

Appellant is incorrect when he argues that he threw the breakfast tray at his cell bars and some food hit the officer. The evidence shows that appellant threw the tray directly at the officer, not at his cell bars, and supports a finding that appellant engaged in a willful and unlawful use of force or violence upon Officer Lawson. Just because Officer Lawson was either fast enough, or fortunate enough, not to be struck by the tray, or the plate, or both, does not turn this criminal act into a lawful one. Accordingly, the evidence presented was sufficient to prove appellant's conduct constituted a battery. (§ 242; see *People v. Glover* (1967) 257 Cal.App.2d 502, 505, fn. 3 [evidence that inmate slammed food tray and food into deputy's face sufficient to prove battery].)

4. 1993 Fight With Inmate (Basketball Game)

Appellant contends the incident where during a heated argument in a basketball game, he "supposedly charged" another inmate and a fight ensued, involved mutual combat between two inmates and does not constitute sufficient evidence of an aggravating factor under section 190.3, subdivision (b). (AOB 124, 126.) Respondent submits the only evidence introduced regarding the basketball game and the fight that ensued showed appellant turned a heated discussion into a battery on another inmate; thus, the trial court did not abuse its discretion when it allowed the jury to consider the evidence under factor (b).

The uncontradicted evidence showed that during a basketball game, appellant and inmate Fairbanks were in what appeared to be a heated discussion. Officer Rogers Larry was watching the two inmates and saw

appellant, who seemed to be the aggressor, charge Fairbanks and engage him in a fistfight. (7RT 1790-1792.) Appellant's conduct of charging at Fairbanks and starting a fistfight constituted a willful and unlawful use of force or violence upon the person of another, and hence, all the elements needed for a battery were present. (§ 242.) Evidence of this incident was properly presented to the jury as factor (b) evidence.

5. 1996 And 1998-Three Possession Of Weapon In Custody Incidents

Appellant next addresses the three incidents that occurred in county jail where he possessed weapons, which consisted of a bag of urine and two shanks (the pen shank and the typewriter shank). Appellant challenges the admission under factor (b) of all three incidents. He contends that the bag of urine, while possibly disgusting, was not a weapon, and thus, its possession was not a criminal offense. As to the pen shank, appellant argues there was no evidence that proved it was he who placed the shank in the conduit outside his cell. Finally, as to the typewriter shank, appellant concedes the evidence showed he "possibly possessed" this shank, but contends that his mere possession of any of the three weapons does not by itself rise to the level of an actual or implied threat of force or violence. (AOB 124-125, 127-129.) Respondent submits each of the three possession of weapon incidents was properly admitted under factor (b).

a. 1996 Possession Of Weapon In Custody (Urine)

On August 1, 1996, Deputy Dean Parker walked down the row at the Men's Central Jail to where appellant was located; his intention was to escort appellant to the law library. However, Deputy Parker first searched appellant and recovered a bag of yellow liquid that smelled like urine. He had seen

similar bags before and knew they were called a "piss bomb." The deputy explained that the inmates tossed them to explode on other inmates and staff. (7RT 1807-1809.)

Appellant claims his possession of the bag of urine was not a crime because the urine-filled bag was not a weapon. (AOB 128.) Respondent disagrees and submits that the urine-filled bag was made to be a weapon for use in committing a battery under section 242. Section 242 defines battery as "any willful and unlawful use of force or violence upon the person of another."

Here, Deputy Parker explained that the urine-filled bags were made by inmates to be like a bomb. The inmates threw them to strike and explode on other inmates and staff members. (7RT 1808.) Previously, this Court held that throwing a cup of urine in a person's face is a battery. (*People v. Pinholster* (1992) 1 Cal.4th 865, 961.) No evidence was offered below to show the bag filled with urine recovered from appellant was made for any purpose other than to commit a battery. Thus, evidence of appellant's possession of the urine-filled bag involved the implied threat to use force or violence, and thus, was properly admitted under section 190.3, subdivision (b).

b. 1998 Possession Of Weapon In Custody (Typewriter Shank)

On May 19, 1998, Deputy Wolfhope broadcast appellant's name over the public address system and told appellant to get ready to go to the attorney room. Appellant, who was acting as his own attorney, collected his accordion-style folders, exited his cell and walked along the freeway. When appellant reached a gate, he placed his folders on the bars, turned around and waited to be handcuffed. (7RT 1811-1814.)

Deputy Wolfhope briefly inspected appellant's folders, and at the bottom, a piece of metal caught his eye. The deputy extracted a metal object,

13 inches long, with one end sharpened to a point (Peo. Exh. 26) and which was "absolutely useable" as a weapon. Deputy Wolfhope inspected appellant's personal typewriter in the law library, observed that one of the rods was missing, and ascertained that the metal object (Peo. Exh. 26) fit perfectly, except for the side that was sharpened. (7RT 1815-1816.) Later at a hearing, appellant explained the shank (Peo. Exh. 26) was for his own protection, but also argued that without a handle, or something wrapped around it, the shank was not useable as a weapon. (7RT 1816-1817.)

On appeal, appellant concedes possession of the "typewriter rod" shank, but citing *People v. Cox* (2003) 30 Cal.4th 916, 973, appellant argues that mere possession does not by itself rise to the level of an actual or implied threat of force or violence. Appellant thus concludes that use of his possession of the typewriter rod shank as an aggravating factor under subdivision (b) was erroneous. (AOB 127-129.) Respondent submits appellant's reliance on *Cox* is mistaken and further submits that evidence of a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b).

In *Cox*, the prosecution did not take the position or argue that evidence of the defendant's supposed gun possession constituted evidence in aggravation. Such evidence was admitted only at the guilt phase and was not mentioned during the penalty phase. (*People v. Cox, supra,* 30 Cal.4th at p. 964.) However, during the automatic motion for modification of the death verdict, although the trial court correctly considered the circumstances of the current crime, such as the defendant's possession of guns and knives, under section 190.3, subdivision (a), it incorrectly considered these same circumstances as an aggravating factor under section 190.3, subdivision (b). Furthermore, this Court held that the trial court had also incorrectly stated that the mere possession of guns constituted a crime of violence. (*Id.* at pp. 972-

973.) It is upon this incorrect statement by the trial court that appellant mistakenly relies for his position that mere possession of a weapon does not rise to the level of an actual or implied threat of force or violence.

Evidence of the defendant's possession of guns in *Cox* was guilt phase evidence properly admitted under factor (a) of section 190.3. It was not evidence proffered by the prosecution under factor (b), nor would it have been proper to present it as a factor (b) aggravating factor because the mere possession of guns does not constitute a crime of violence. (*People v. Cox, supra,* 30 Cal.4th at p. 973.) In appellant's case, however, evidence of his possession of a shank made from a typewriter rod was properly presented as a factor (b) aggravating factor because appellant was in custody at the time he possessed the shank, while defendant Cox was not in custody during the time he possessed the guns. And, it is settled that

> a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under [section 190.3,] factor (b). Such conduct is unlawful and involves an implied threat of violence even where there is no evidence defendant used or displayed it in a provocative or threatening manner.

(*People v. Smithey, supra*, 20 Cal.4th 936, 1002, quoting *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589.) Accordingly, evidence of appellant's possession of the shank made from a typewriter rod was properly admitted under factor (b) as an aggravating factor.

c. 1998 Possession Of Weapon In Custody (Pen Shank)

On June 28, 1998, Deputy Campbell was conducting cell searches in Charlie Row 1750 at the Men's Central Jail. The cells in that row are single man cells, and Deputy Campbell personally searched appellant's cell. Inside appellant's cell, the deputy found a jailhouse shank (Peo. Exh. 25), which is a tool for stabbing, similar to a knife. This shank (Peo. Exh. 25) was made from

a round metal bar, 8 inches long, sharpened to a point, and it had a handle made from a Bic pen, from which the ink pen portion had been removed. The shank (Peo. Exh. 25) was useable as a weapon. (7RT 1796-1797.)

Appellant's cell was number nine, and Deputy Campbell found the shank (Peo. Exh. 25) running along conduit at the top of the cell. The shank (Peo. Exh. 25) was visible from inside the cell, but not from the outside. It was in an area that only the inmate in cell number nine could access. For someone outside the cell to have placed the shank (Peo. Exh. 25) along the conduit, that person would have had to climb up on the bars of the cell, or use a chair, and the cells are monitored by cameras 24 hours a day. (7RT 1797-1802.)

Appellant contends it was improper to admit evidence of this shank (Peo. Exh. 25) as criminal activity by him because there was no evidence introduced that showed he placed the shank along the conduit, or in other words, that he was in knowing possession of it. Furthermore, appellant argues that anyone could have placed that shank along the conduit outside his cell and that it was "bald speculation and conjecture" to assume that he was the possessor of the shank and was the one who placed it there. (AOB 128.) Respondent submits the prosecution presented sufficient evidence to prove appellant's knowing possession of the shank.

As noted above, it is well-settled that a defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b). (*People v. Tuilaepa, supra,* 4 Cal.4th at p. 589.) Here, the evidence presented to show appellant's knowing possession included that the shank was visible from inside appellant's single-person cell, but not from the outside. Furthermore, the shank was in an area that only a person in appellant's cell could access. For anyone to access the shank from outside appellant's cell, that person would have to climb up on the bars of the cell, or stand on a chair, and the cells are monitored by cameras 24 hours a day. (7RT 1797-1802.)

In *People v. Gutierrez*, this Court held that although the defendant was not observed using razor blades as deadly weapons, his possession of the blades and their placement throughout his cell, supported an inference that the defendant wanted easy access to the blades from anywhere in his cell, and was sufficient evidence to support a finding that the blades were being possessed for use as deadly weapons. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1152.)

Likewise, in the present case, the fact the shank was only visible from inside appellant's one-person cell and that it was in an area where only he could access it supported an inference that appellant was in knowing possession of the shank. Moreover, appellant did not produce any evidence that he did not know of the shank's presence in his cell. Thus, there was sufficient evidence presented to support a finding that appellant was in knowing possession of the shank, and accordingly, evidence of the shank (Peo. Exh. 25) found in appellant's jail cell was properly admitted under section 190.3, subdivision (b).

C. CALJIC No. 8.87 Was Properly Given To Appellant's Jury

Appellant contends his state and federal rights to due process, a jury trial, and a reliable penalty determination were violated when the trial court instructed the penalty jury with CALJIC No. 8.87 because the instruction allowed the jury to consider acts of unadjudicated criminal activity as aggravating factors without requiring the jury to determine whether the acts were, in fact, criminal activity involving force or violence. (AOB 123, 129-135.) Respondent submits CALJIC No. 8.87 is a correct statement of state law, and accordingly, none of appellant's constitutional rights were violated when the trial court gave No. 8.87 at the penalty trial.

CALJIC 8.87 was given at appellant's penalty trial as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts or activity:

1977 Roberry with a weapon (2 counts-Colorado)

1977 Murder, kidnapping, robbery (Kansas)

1979 Escape with gun, robbery with gun (Colorado)

1991 Fight with inmate (chokehold)

1993 Battery on inmate

1993 Battery on correctional officer (throwing food)

1993 Fight with inmate (basketball game)

1996 Possession of weapon in custody (urine)

1998 Possession of weapon in custody (typewriter shank)

1998 Possession of weapon in custody (pen shank)

> which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any criminal acts or activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal acts or activity. A juror may not consider any evidence of any other criminal acts or activity as an aggravating circumstance. ¶ It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(8CT 2118-2119.)

In *People v. Phillips*, a capital case tried under the 1977 statute, as was appellant's case, this Court reviewed former section 190.3, subdivision (b), and concluded that evidence of other criminal activity *introduced* in the penalty phase *must be limited* to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute. (*People v. Phillips*, *supra*, 41 Cal.3d 29, 72.) It was evident from this Court's holding that the only admissible evidence under factor (b) was evidence that demonstrated the commission of an actual crime, and it was further evident that such determination was to be made by the trial court prior to the presentation of the

criminal activity evidence to the penalty jury. (*Id.* at p. 72, fn. 25.) "Once the trial court has determined what evidence is properly admissible as other criminal activity ([Evid. Code, §§ 402, 310]), 'the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty . . . .'" (*Ibid.*) At appellant's penalty phase, the prosecution requested, and the trial court properly gave, CALJIC No. 8.87.

Appellant argues that CALJIC No. 8.87, improperly and in violation of his rights, removed the factual issue of whether his alleged acts or conduct constituted criminal activity from the jury. (AOB 133.) However, this Court has previously held that CALJIC No. 8.87 is "not invalid for failing to submit to the jury the issue whether the defendant's acts" constituted criminal activity. (*People v. Nakahara* (2003) 30 Cal.4th 705, 720; *People v. Ochoa* (2001) 26 Cal.4th 398, 453.)

> The question whether the acts occurred is certainly a factual matter for the jury, but the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court.

(*People v. Nakahara, supra*, at p. 720, emphasis in the original.)

Because CALJIC No. 8.87 is a correct statement of state law, and because there were no errors in the instruction as given to appellant's penalty jury, there is no reasonable likelihood that it confused or misled the jury. (*People v. Hawkins* (1995) 10 Cal.4th 920, 963 overruled on another ground in *People v. Lasko* (2002) 23 Cal.4th 101.) "When, as here, the jury is effectively instructed [with CALJIC No. 8.87] that evidence of unadjudicated offenses is subject to the reasonable doubt standard, no more is required." (*People v. Rodrigues, supra*, 8 Cal.4th 1060, 1191.)

D. Assuming Arguendo That Any Of The Acts Of Unadjudicated Criminal Activity Were Erroneously Admitted, Such Error Was Harmless

Appellant argues that his death sentence must be reversed because his penalty jury was allowed to consider erroneously admitted evidence of unadjudicated criminal conduct. Appellant concludes that reversal is mandated because such error denied him his rights to due process, and a jury trial and also undermined the Eighth Amendment's requirement of heightened reliability in capital sentencing. (AOB 134-135.) Respondent submits, as discussed above, that none of the acts of unadjudicated criminal activity were erroneously admitted. Moreover, assuming arguendo that error did occur, it is not reasonably possible that such error affected the penalty jury's death verdict.

State law error at the penalty phase is reviewed under a "reasonable possibility" standard. This Court examines whether there is a reasonable possibility that a sentence of life without possibility of parole would have been returned absent the error. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) California's reasonable possibility standard for assessing penalty phase error is the same in substance and effect as the beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479.)

The acts of unadjudicated criminal activity, the admission of which appellant claims was error of such magnitude that reversal of his death sentence is required, include: three batteries on fellow inmates at San Quentin, one battery on a San Quentin correctional guard where appellant threw a food tray, and three county jail incidents where appellant possessed weapons (two shanks and one bag of urine). (AOB 122-125.) Given the remaining evidence of appellant's violent criminal activity–the brutal murders of Robert and Marie Crumb, the cold-blooded murder of Sam Norwood, the many robberies where appellant used a gun, and appellant's 1979 escape from custody, where he

struck a peace officer, stole the officer's gun and used the gun to hijack a car from two young women–it is not reasonably possible that absent evidence of the four San Quentin batteries and the three weapon possession incidents in county jail, appellant would have received a life without possibility of parole sentence, rather than a sentence of death. Hence, any error in the admission of the acts of unadjudicated criminal activity was harmless.

VIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY PURSUANT TO CALJIC NOS. 8.85 AND 8.87

Appellant contends the "trial court erred in failing to ensure impartiality and parity of instructions between CALJIC Nos. 8.85 [Penalty Trial-- Factors For Consideration] and 8.87 [Penalty Trial -- Other Criminal Activity -- Proof Beyond A Reasonable Doubt] regarding jury non-unanimity thus skewing the instructions toward a death verdict and violating appellant's Eighth Amendment right to a fair and reliable penalty determination." (AOB 136.) This is so, explains appellant, because the non-unanimity language in CALJIC No. 8.87 regarding a juror's consideration of prior unadjudicated criminal activity, without similar language in CALJIC No. 8.85 regarding the factors to consider in determining the appropriate penalty, skewed the instructions in favor of a death verdict. (AOB 136-138.) As stated by appellant, "the language that 'it is not necessary for all jurors to agree' should be deleted from CALJIC No. 8.87 *sua sponte*, or alternatively, the same non-unanimity language should be added to the instructions defining the burden of proof regarding mitigation evidence (CALJIC Nos. 8.85 and 8.88) so that the instructions are symmetrical." (AOB 137-138.) This contention is meritless.

First, there was no need for the trial court to modify CALJIC Nos. 8.85 or 8.88 with non-unanimity language similar to the language in CALJIC No.

8.87. This Court has squarely held that there is no requirement that the jury be instructed that unanimity is not necessary for consideration of mitigating evidence. (*People v. Breaux* (1991) 1 Cal.4th 281, 314-315; see also *People v. Samoya* (1997) 15 Cal.4th 795, 862.) Indeed, in *Breaux*, this Court upheld the trial court's rejection of a proposed defense instruction to the effect that unanimity was not a requisite to consideration of mitigating evidence. Thus, there was no need for the trial court to modify CALJIC Nos. 8.85 or 8.88 with non-unanimity language in the manner suggested by appellant.

Second, this Court has consistently held that the jury need not unanimously find other crimes true beyond a reasonable doubt before individual jurors may consider them. (See *People v. Anderson* (2001) 25 Cal.4th 543, 590 and cases cited therein.) As this Court stated in *Anderson*, "We have consistently applied the rule that while an individual juror may consider violent 'other crimes' in aggravation only if he or she deems them established beyond a reasonable doubt, the jury need not unanimously find other crimes true beyond a reasonable doubt before individual jurors may consider them." (*People v. Anderson, supra*, 25 Cal.4th at p. 590.) Since CALJIC No. 8.87 is a correct statement of the law, there was no need for the trial court to modify the instruction by deleting the non-unanimity language in the manner suggested by appellant.

In short, the trial court gave instructions that were proper, but appellant claims the court should have modified them *sua sponte*. However, since the instructions correctly stated the law, "if the defendant wanted additional, clarifying instructions, he should have requested them;" the trial court fulfilled its duty by instructing the jury on the applicable law. (See *People v. Hart* (1999) 20 Cal.4th 546, 622.)

Thus, appellant's claims must be rejected.

IX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY PURSUANT TO CALJIC NO. 8.88

Appellant contends CALJIC No. 8.88 (Penalty Trial -- Concluding Instruction), as given, violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the federal Constitution for two reasons: (1) the instruction improperly reduced the prosecution's burden of proof below the level required by Penal Code section 190.3; and (2) the instruction improperly described the weighing process applicable to aggravating and mitigating evidence. (AOB 139-149.) Appellant is mistaken.

Appellant first argues that the language in CALJIC No. 8.88 "informs the jury merely that the death penalty may be imposed if aggravating circumstances are 'so substantial' in comparison to mitigating circumstances that the death penalty is warranted." (AOB 142.) Appellant maintains that such language fails to conform to the requirements of section 190.3 and "would plainly permit the imposition of a death penalty whenever aggravating circumstances were merely 'of substance' or 'considerable,' even if they were outweighed by mitigating circumstances." (AOB 143.) This contention was rejected by this Court in *People v. Duncan* (1990) 53 Cal.3d 955, 978:

> Defendant contends that the instruction given (CALJIC No. 8.84.2, 1986 rev.) was invalid because it did not state the following language from section 190.3: "If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole."
>
> His contention fails. In *People v. Brown, supra*, [1985] 40 Cal.3d 512, we noted that instruction in the terms of the statute had the potential to confuse jurors and thus suggested the adoption of an instruction like the one given here. (*Id.* at p. 545, fn. 19.) The instruction given informed the jurors that to return a verdict of death they must be persuaded that the "aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life

> without parole." We do not think that there is a reasonable likelihood that any of the jurors would have concluded that, even if the mitigating factors outweighed those in aggravation, the "so substantial in comparison with" language nevertheless might demand imposition of the higher punishment. (See *Boyde v. California* (1990) 494 U.S. 370, ___ [108 L.Ed.2d 316, 329, 110 S.Ct. 1190].) The instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty).

Duncan expressly rejected appellant's claim. (See also *People v. Hughes, supra,* 27 Cal.4th at p. 405, and *People v. Jackson* (1996) 13 Cal.4th 1164, 1443 [both cases citing *Duncan* and expressly rejecting the claim that CALJIC No. 8.88 is flawed because it does not inform the jury that it is required to return a verdict of life imprisonment without the possibility of parole if it finds the aggravating factors do not outweigh the mitigating factors].) Thus, appellant's first complaint regarding CALJIC No. 8.88 must be rejected.

Likewise, appellant's second complaint about CALJIC No. 8.88 – that it incorrectly describes the weighing process applicable to aggravating and mitigating factors (AOB 143-148) – has repeatedly been rejected by this Court. This Court has explained that the standard CALJIC penalty instructions, such as CALJIC No. 8.88, "'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Gurule* (2002) 28 Cal.4th 557, 659, quoting *People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 593; *People v. Raley* (1992) 2 Cal.4th 870, 919-920.) In this regard, CALJIC No. 8.88 properly informed the jury that "[t]o return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (8CT 2122.) This Court has also held that CALJIC No. 8.88 properly

describes the weighing process as "'merely a metaphor for the juror's personal determination that death is the appropriate penalty under all the circumstances.'" (*People v. Jackson*, *supra,* 13 Cal.4th at p. 1244, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1250; see also *People v. Gutierrez*, *supra,* 28 Cal.4th 1083, 1161.) Appellant's second complaint concerning CALJIC No. 8.88 must therefore also be rejected.

X.

THE TRIAL COURT PROPERLY REFUSED TO GIVE APPELLANT'S SPECIAL PENALTY PHASE INSTRUCTION THAT THE JURY COULD CONSIDER HIS ACCOMPLICE'S MORE LENIENT SENTENCE AS A MITIGATING FACTOR

Appellant contends the trial court violated his federal constitutional rights, as guaranteed by the Fifth, Eighth and Fourteenth Amendments, when it refused to give appellant's special penalty phase instruction that the jury could take into consideration his accomplice's more lenient sentence as a mitigating factor. Appellant argues that his proposed special instruction was a proper pinpoint instruction that would have "illuminated the legal standard for the penalty decision by providing straightforward advice that the jury could properly factor into its penalty determination the punishment given to an equally guilty accomplice," Terry Avery, who was given total immunity from prosecution in both Kansas and California, and which fact was the crux of appellant's mitigation case. (AOB 150-155.) Respondent submits that evidence of the punishment received by an accomplice is irrelevant to the decision a jury must make at the penalty phase in a capital trial, and therefore, no constitutional error resulted from the trial court's refusal to give appellant's special penalty phase instruction.

During a discussion of jury instructions for the penalty phase, appellant

requested a special instruction be given that would advise the jury it may consider the fact that appellant's accomplice received a more lenient sentence as a mitigating factor. The court replied that CALJIC No. 8.85 would be given, which would instruct the jury that "whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor" was a factor for its consideration. The judge indicated he would file stamp appellant's proposed special instruction, read the case that appellant apparently cited, and "take it up before we give the final instructions." (7RT 1737-1738.)

Subsequently, after the presentation of evidence, and prior to argument, the following discussion ensued:

> The Court: What do you want to go into in regards to what he can argue and what he can't?
>
> Ms. Seymour: I know he's brought up to some extent the penalties as to Terry Avery and to Lee Harris. I didn't bring up my list. Maybe I did. But there is case law which says, at least as to Lee Harris, that is irrelevant the fact that he ultimately did receive life without the possibility of parole.
>
> The Court: I have read cases on that as well. I don't believe the punishment in regards to codefendants is appropriate to argue in the case.
>
> Defendant Moore: As a mitigating factor?
>
> The Court: As any type of factor, mitigating or aggravating. It's not a proper relevant subject in regards to what are the two punishments they are to–to give you. So I'm not going to allow argument in regards to that.

(7RT 1907.) Although the discussion concerning argument did not directly address the propriety of appellant's proposed special instruction, the discussion

does show that the court had decided to refuse to give it.

This Court has repeatedly rejected similar contentions that "capital juries must be instructed during the penalty phase to consider the sentences imposed on a defendant's accomplices." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1188; *People v. Mincey* (1992) 2 Cal.4th 408, 479-480; *People v. Morris* (1991) 53 Cal.3d 152, 225, disapproved on other grounds in *People v. Ochoa* (1998) 19 Cal.4th 353, 463 and in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) The reason for the above holding is that in the penalty phase of a capital trial, the focus is on the character and record of the individual offender. Thus, "'the individually negotiated disposition of an accomplice is not constitutionally relevant to defendant's penalty determination.'" (*People v. Rodrigues, supra,* at p. 1188, quoting *People v. Johnson* (1989) 47 Cal.3d 1194, 1249.) Respondent submits that the present contention should again be rejected.

Appellant's characterization of his special penalty instruction as a pinpoint instruction (AOB 150-151) is of no assistance to him. It might have been appellant's personal theory of defense that because Terry Avery was culpable as an accomplice in the Kansas and California murders, her "punishment" of total immunity should be considered by the jury as a mitigating factor in determining appellant's fate, but being appellant's personal theory of defense still did not make an irrelevant fact relevant to the penalty determination. In sum, because appellant's proposed special instruction did not concern evidence relevant for consideration as a mitigating factor, the trial court's refusal to give the instruction was proper and none of appellant's constitutional rights were violated.

XI.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE PENALTY JURY THAT THERE WAS A PRESUMPTION OF LIFE WITHOUT THE POSSIBILITY OF PAROLE WHEN WEIGHING THE AGGRAVATING AND MITIGATING FACTORS

Appellant contends the trial court was required to instruct the penalty jury that there was a presumption of life without the possibility of parole over death when weighing the mitigating and aggravating factors. (AOB 156-157.) Such an instruction was not required. In *People v. Arias* (1996) 13 Cal.4th 92, 190, this Court considered and rejected the identical contention raised by appellant:

> Defendant also claims the statute is constitutionally deficient because it "fails to require a presumption that life without parole is the appropriate sentence." No authority is cited for the proposition, and it lacks merit. If a death penalty law properly limits death eligibility by requiring the finding of at least one aggravating circumstance beyond murder itself, the state may otherwise structure the penalty determination as it sees fit, so long as it satisfies the requirement of individualized sentencing by allowing the jury to consider all relevant mitigating evidence. (See *Tuilaepa v. California, supra,* 512 U.S. 967, ___ [129 L.Ed.2d 750, 759-760, 114 S.Ct. 2630, 2635]; *Boyde v. California* (1990) 494 U.S. 370, 377 [108 L.Ed.2d 316, 326-327, 110 S.Ct. 1190] [upholding 1978 law's provision that sentencer "shall" impose death if aggravation outweighs mitigation]; *Zant v. Stephens* [1983], *supra,* 462 U.S. 862, 875[[103 S.Ct. 2733,] 77 L.Ed.2d 235, 248-249] [once defendant is death eligible, statute may give jury "unbridled" discretion to apply aggravating and mitigating sentencing factors].)

Although appellant candidly acknowledges that this Court has previously rejected in *Arias* the claim he now raises, he nevertheless urges this Court to reconsider *Arias* since, he maintains, it was wrongly decided. (AOB 156-157.) Appellant, however, has not presented this Court with any persuasive or logical reason for it to reconsider *Arias* (see AOB 156-157), and thus, this Court

should not do so. And, significantly, this Court has recently reaffirmed *Arias* several times. For example, in *People v. Lenhart* (2004) 32 Cal.4th 1107, 1136-1137, this Court reiterated that neither the federal Constitution nor societal interests at stake in a capital trial require a presumption of life without the possibility of parole. Likewise, in *People v. Jones* (2003) 29 Cal.4th 1229, 1267, this Court stated the death penalty law is not unconstitutional because it does not require the penalty jury to be instructed on the presumption of life without the possibility of parole. (See also *People v. Cummings* (1993) 4 Cal.4th 1233, 1335, fn. 73, where this Court rejected the claim that "the court must instruct the jury that the law presumes that life without the possibility of parole is the appropriate punishment.")

Appellant's claim must be rejected.

XII.

APPELLANT'S CHALLENGES TO THE DEATH PENALTY SENTENCING SCHEME LACK MERIT

Appellant alleges numerous aspects of the death penalty sentencing scheme violate the federal Constitution. (AOB 158-240.) As appellant himself concedes (AOB 158), many of these claims have been raised and rejected in prior capital appeals before this Court. Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected. Moreover, it is entirely proper to reject appellant's complaints by case citation, without additional legal analysis. (E.g., *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

A. The Special Circumstances In Section 190.2 Are Not Overbroad, And They Perform The Narrowing Function

Appellant contends the failure of California's death penalty law to meaningfully distinguish those murders in which the death penalty is imposed from those in which it is not requires reversal of the death judgment. Specifically, appellant argues his death sentence is invalid because section 190.2 is impermissibly broad and fails adequately to narrow the class of persons eligible for the death penalty. (AOB 160-165.)

The Supreme Court has found that California's requirement of a special-circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by appellant that California's death penalty law contains so many special circumstances that it fails to perform the narrowing function required under the Eighth Amendment or that the statutory categories have been construed in an unduly expansive manner. (*People v. Avila* (2006) 38 Cal.4th 412, 483; *People v. Huggins* (2006) 38 Cal.4th 175, 254; *People v. Crew* (2003) 31 Cal.4th 822, 860; accord *People v. Pollack* (2004) 32 Cal.4th 1153, 1196; *People v. Prieto* (2003) 30 Cal.4th 226, 276; see also *People v. Burgener* (2003) 29 Cal.4th 833, 884 ["Section 190.2, despite the number of special circumstances it includes, adequately performs its constitutionally required narrowing function"]; *People v. Kraft* (2000) 23 Cal.4th 978, 1078 ["The scope of prosecutorial discretion whether to seek the death penalty in a given case does not render the law constitutionally invalid"].) Appellant's claim must be rejected.

B. Section 190.3, Factor (a), Is Not Impermissibly Overbroad

Appellant contends the death penalty is invalid because section 190.3,

factor (a), as applied allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.[11] (AOB 165-173.) Specifically, appellant contends factor (a) has been applied in such a "wanton and freakish" manner that almost all features of every murder have been found to be "aggravating" within the meaning of the statute. (AOB 165.) The issue is without merit.

The Supreme Court has specifically addressed the issue of whether section 190.3, factor (a), is constitutionally vague or improper. In *Tuilaepa v. California, supra,* 512 U.S. 967, the Supreme Court commented on factor (a), stating,

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976.)

This Court recently held in *People v. Guerra* (2006) 37 Cal.4th 1067, 1165, that "Section 190.3, factor (a), is neither vague nor overbroad, and does not impermissibly permit arbitrary and capricious imposition of the death penalty." Indeed, this Court has consistently rejected this claim and followed the ruling of the Supreme Court. (See, e.g., *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Brown* (2003) 33 Cal.4th 382, 401; *People v. Jenkins, supra,* 22 Cal.4th 900, 1050-1053.) There is no need for this Court to revisit

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11. Section 190.3, factor (a), states:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

the issue.

C. Application Of California's Death Penalty Statute Does Not Result In Arbitrary And Capricious Sentencing

Appellant also contends California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing, and therefore violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 175-225.) He raises 10 sub-claims in support of this claim, including challenges involving the burden of proof required at the penalty phase, the failure to require juries to make written findings or reach unanimity as to the aggravating factors, and the inability to conduct an intercase proportionality review. All of these claims are without merit.

1-5. The United States Constitution Does Not Compel The Imposition Of A Beyond-a-reasonable Doubt Standard Of Proof, Or Any Standard Of Proof, In Connection With The Penalty Phase; The Penalty Jury Does Not Need To Agree Unanimously As To Any Particular Aggravating Factor

Appellant asserts his death sentence violates the Eighth and Fourteenth Amendments for the following reasons: (1) because the death sentence was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors, appellant's constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of the death penalty was violated (AOB 175-199); (2) the penalty jurors were not instructed that they could impose a death sentence only if they were persuaded beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that death was the appropriate penalty (AOB 199-206); (3) even if proof beyond a reasonable doubt was not constitutionally required for finding (a) that an

aggravating factor exists, (b) that the aggravating factors outweigh the mitigating factors, and (c) that death is the appropriate sentence, then proof by a preponderance of the evidence is constitutionally compelled as to each such finding (AOB 206-208); (4) some burden of proof is required at the penalty phase in order to establish a tie-breaking rule and ensure even-handedness (AOB 208-209); and (5) even if a burden of proof is not constitutionally required, the trial court erred in failing to instruct the jury to that effect (AOB 209-210). Appellant's contentions are meritless because this court has rejected appellant's claims.

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, supra,* 29 Cal.4th at pp. 884-885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Welch* (1999) 20 Cal.4th 701, 767.) This Court has repeatedly rejected claims identical to appellant's regarding a burden of proof at the penalty phase (*People v. Sapp* (2003) 31 Cal.4th 240, 316-317; *People v. Welch, supra,* 20 Cal.4th at pp. 767-768; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Holt* (1997)15 Cal.4th 619, 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"]), and, because he does not offer any valid reason to vary from those past decisions, should do so again here. Moreover, California death penalty law does not violate the Sixth, Eighth, and Fourteenth Amendments by failing to require unanimous jury agreement on any particular aggravating factor. Neither the federal nor the state Constitutions require the jury to agree unanimously as to aggravating factors. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Osband* (1996) 13 Cal.4th 622, 710.)

Appellant argues, however, that this Court's decisions are invalid in light of *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d

556](*Ring*), *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435](*Apprendi*), and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403](*Blakely*). (AOB 174-185.) This Court has considered and rejected appellant's argument by finding that neither *Ring* nor *Apprendi* affect California's death penalty law. (*People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Martinez* (2003) 31 Cal.4th 673, 700; *People v. Cox, supra*, 30 Cal.4th 916, 971-972; *People v. Prieto, supra,* 30 Cal.4th at pp. 262-263, 271-272; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.) The same is true as to *Blakely*. (*People v. Monterroso, supra,* 34 Cal.4th at p. 796; *People v. Morisson* (2004) 34 Cal.4th 698.)

6. The Jury Was Not Constitutionally Required To Provide Written Findings On The Aggravating Factors It Relied Upon

Appellant maintains California law violates the Sixth, Eighth, and Fourteenth Amendments by failing to require that the jury base any death sentence on written findings regarding aggravating factors. (AOB 211-215.) This Court has held, and should continue to so hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Avila, supra,* 38 Cal.4th at p. 485; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Bolden* (2002) 29 Cal.4th 515, 566; People *v. Hughes, supra*, 27 Cal.4th at p. 405; *People v. Welch*, *supra*, 20 Cal.4th at p. 772.) The above decisions are consistent with the Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 144, 108 L.Ed.2d 725] [citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed.2d 728]].) Appellant's claim should be rejected.

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

Appellant contends the failure of California's death penalty procedures to require intercase proportionality review violates his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (AOB 215-220.) Appellant's point is not well taken.

Intercase proportionate review is not constitutionally required in California (*Pulley v. Harris, supra,* 465 U.S. at pp. 51-54; *People v. Wright* (1990) 52 Cal.3d 367), and this Court has consistently declined to undertake it (*People v. Avila, supra,* 38 Cal.4th at p. 484; *People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Lenard* (2004) 32 Cal.4th 1107, 1131).

8. Section 190.3, Factor (b), Properly Allows Consideration Of Unadjudicated Violent Criminal Activity And Is Not Impermissibly Vague

Section 190.3, factor (b), allows the trier of fact, in determining penalty, to take into account:

> (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 involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(8CT 2115 [CALJIC No. 8.85].)

Appellant's claim that consideration of unadjudicated criminal activity at the penalty phase violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, thereby rendering the death sentence unreliable (AOB 221-222), must be rejected because section 190.3, 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 ["Nor is factor (b) (defendant's other violent criminal activity) unconstitutional

insofar as it permits consideration of unadjudicated crimes"]; *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.)

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, supra*, 15 Cal.4th at p. 863.) Factor (b) is also not impermissibly vague. Both the Supreme Court and this Court have rejected this contention. (*Tuilaepa v. California, supra*, 512 U.S. at p. 976; *People v. Lewis* (2001) 25 Cal.4th 610, 677; *People v. Lucero* (2000) 23 Cal.4th 692, 727.) 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.*) And neither *Ring* nor *Apprendi* affect these holdings because *Ring* and *Apprendi* "have no application to the penalty procedures of this state." (*People v. Martinez, supra,* 31 Cal.4th at p. 700; *People v. Cox, supra,* 30 Cal.4th at pp. 971-972.) Similarly, *Blakely* has been found not to affect those procedures. (*People v. Monterroso, supra,* 34 Cal.4th at p. 796.)

Appellant's claim must therefore be rejected.

9. Adjectives Used In Conjunction With Mitigating Factors Did Not Act As Unconstitutional Barriers To Consideration Of Mitigation

Appellant contends the inclusion in potential mitigating factors of such descriptions as "substantial" in factor (g) and "extreme" in factors (d) and (g) acted as barriers to the consideration of mitigation in violation of the Fifth,

Sixth, Eighth, and Fourteenth Amendments. (AOB 222.) Appellant's contention is without merit.

This Court has previously held that the words "extreme" and "substantial" as set forth in the death penalty statute have common sense meanings which are not impermissibly vague. (*People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Jones* (1997) 15 Cal.4th 119, 190, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Arias, supra,* 13 Cal.4th at pp. 188-189.)

Significantly, the trial court instructed the jury as follows:

> (j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less that 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.

(8CT 2116.) As this Court has noted:

> the catch-all language of section 190.3, factor (k), calls the sentencer's attention to "[a]ny other circumstance which extenuates the gravity of the crime," and therefore allows consideration of any mental or emotional condition, even if it is not "extreme." Similarly, factor (k) allows consideration of duress that is less than "extreme" and domination that is less than "substantial."

(*People v. Arias, supra*, 13 Cal.4th at p. 189, citations omitted.)

Thus, appellant's claims that the jury was inhibited from considering mitigating factors should be rejected.

10. The Trial Court Did Not Err In Refusing To Label The Aggravating And Mitigating Factors

Appellant argues the trial court erred in failing to label the factors as aggravating and/or mitigating, thus precluding a fair, reliable, and evenhanded administration of the capital sanction. (AOB 222-225.) He is wrong.

Sentencing factors are not unconstitutional simply because they do not specify which are aggravating and which are mitigating. (*People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Crew, supra,* 31 Cal.4th at p. 860.) As this Court has stated, "the trial court's failure to label the statutory sentencing factors as either aggravating or mitigating [i]s not error." (*People v. Williams* (1997) 16 Cal.4th 153, 269 [citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1192].)

In addition, the Supreme Court has held that "[a] capital sentencer . . . need not be instructed how to weigh any particular fact in the capital sentencing decision." (*Tuilaepa v. California, supra,* 512 U.S. at p. 979.) Thus, the trial court is not constitutionally required to instruct the jury that certain sentencing factors are relevant only in mitigation. (*People v. Kraft, supra,* 23 Cal.4th at pp. 1078-1079.) Accordingly, "[a]lthough [labeling the factors] would be a correct statement of law [citation], a specific instruction to that effect is not required, at least not unless the court or parties make an improper contrary suggestion." (*People v. Livaditis* (1992) 2 Cal.4th 759, 784; see also *People v. Carpenter, supra,* 15 Cal.4th at p. 420 [although some factors may be only aggravating or mitigating, because it is self-evident, the trial court need not identify which is which]; *People v. Samayoa, supra,* 15 Cal.4th at p. 862 ["[t]he jury need not be instructed as to which sentencing factors are aggravating and which are mitigating," citing *People v. Davenport* (1995) 11 Cal.4th 1171, 1229, overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 556, fn. 5].) Under this well-established authority, the trial court properly instructed the jury.

D. The Death Penalty Law Does Not Violate The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants

Appellant claims that the absence of intercase proportionality review at

trial or on appeal violates his right to equal protection of the law under the Fourteenth Amendment of the United States Constitution. (AOB 225-235.) Appellant maintains it is unfair to afford non-capital inmates such review under former Penal Code section 1170, subdivision (f), of the Determinate Sentencing Law, but not to allow such review to capital defendants. Appellant acknowledges that this Court rejected this claim in *People v. Allen* (1986) 42 Cal.3d 1222, but he nevertheless urges a re-examination of the issue. (AOB 229-235.)

Unfortunately for appellant, this Court has consistently rejected the claim that equal protection requires that capital defendants be provided with the same sentence review afforded felons under the determinate sentencing law. (*People v. Cox, supra,* 30 Cal.4th at p. 970; *People v. Lewis* (2001) 26 Cal.4th 334, 395; *People v. Anderson, supra,* 25 Cal.4th at p. 602; *People v. Jenkins, supra,* 22 Cal.4th at p. 1053; *People v. Cox* (1991) 53 Cal.3d 618, 691; *People v. Allen, supra*, 42 Cal.3d at pp. 1287-1289.) As aptly noted by this Court in *People v. Cox, supra*, 53 Cal.3d at p. 691:

> . . . [I]n *People v. Allen, supra*, 42 Cal.3d 1222, we rejected "the notion that equal protection principles mandate that the 'disparate sentencing' procedure of section 1170, subdivision (f) must be extended to capital cases." (*Id.*, at pp. 1287-1288.) Section 1170, subdivision (f), is intended to promote the uniform-sentence goals of the Determinate Sentencing Act and sets forth a process for implementing that goal by which the Board of Prison Terms reviews comparable cases to determine if different punishments are being imposed for substantially similar criminal conduct. (42 Cal.3d at p. 1286.) "*[P]ersons convicted under the death penalty are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act and accordingly cannot assert a meritorious claim to the 'benefits' of the act under the equal protection clause [citations].*" (*People v. Williams, supra*, 45 Cal.3d at p. 1330, emphasis added.)

Appellant also claims he was denied equal protection of the law because he was deprived of penalty phase procedural safeguards available to non-capital defendants, such as unanimity as to sentencing allegations, burden of proof

requirements for enhancements and written findings. This argument must be rejected because capital and non-capital defendants are not similarly situated for purposes of sentencing. (See *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 123.)

Thus, appellant's equal protection claim must be rejected since he is not similarly situated to a defendant sentenced under the Determinate Sentencing Law.

E. International Law

Appellant asserts California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency, and violates the Eighth and Fourteenth Amendments. (AOB 235-240.) This claim was specifically rejected in *People v. Ghent* (1987) 43 Cal.3d 739, 778-779 (discussing the 1977 death penalty statute). Appellant does not provide sufficient reasoning to revisit the issue here, and thus, it should be rejected.

XIII.

APPELLANT RECEIVED A FAIR TRIAL AS THERE WAS NO CUMULATIVE PREJUDICE

Appellant's final contention is that the cumulative effect of the guilt phase errors requires reversal of the guilt judgment and that the cumulative effect of the guilt and penalty phase errors requires reversal of the penalty. (AOB 241-245.) Respondent disagrees.

Simply stated, there are no multiple errors to accumulate. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Guerra*, *supra*, 37 Cal.4th 1067, 1165; *People v. Hinton*, *supra*, 37 Cal.4th 839, 913; *People v. Jablonski* (2006) 37 Cal.4th 774, 837; *People v. Panah*, *supra*, 35 Cal.4th 395,

501; *People v. Burgener*, *supra*, 29 Cal.4th 833, 884.) Even a capital defendant is entitled to only a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219.) The record shows appellant received a fair trial. Nothing more is required. This Court should, therefore, reject appellant's claim of cumulative error.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of conviction and the sentence of death be affirmed.

Dated: January 30, 2007

Respectfully submitted,

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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 37462 words.

Dated: January 30, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Charles Edward Moore** No.: **S075726**

I declare:

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

On **January 30, 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 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 30, 2007, at Los Angeles, California.

Zola Salena-Hawkins
Declarant

Signature

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