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.**	**CAPITAL CASE** Case No. S075726

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

SUPPLEMENTAL RESPONDENT'S BRIEF

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ARGUMENT

I. APPELLANT FAILS TO SHOW THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY WITH CALJIC NO. 2.15

Appellant contends in his supplemental opening brief that CALJIC No. 2.15 permitted the jury to make an irrational presumption of murder based on recent possession of stolen property and "slight" corroboration; that it lessens the prosecution's burden of proof; and that the error was reversible error. (SAOB 10-25.) These claims are forfeited and, in any event, they are meritless. Moreover, any error was harmless.

A. Appellant's Claim Is Forfeited; In Any Event, His Claim Is Meritless, And Any Error Was Harmless

Here, the trial court instructed the jury with CALJIC No. 2.15, as follows:

> If you find that the defendant was in conscious possession of recently stolen property, the fact of such possession is not by itself sufficient to permit an inference that the defendant is guilty of the crimes charged. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight and need not by itself be sufficient to warrant an inference of guilt.
>
> As corroboration, you may consider the attributes of possession, time, place, and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, and any other evidence which tends to connect the defendant with the crimes charged.

(6RT 1618-1619; 8CT 2038.)

Respondent respectfully acknowledges that in *People v. Smithey* (1999) 20 Cal.4th 936, 976, footnote 7, this Court stated that although the defendant did not object in the trial court to the jury instruction challenged on appeal, his claim was not forfeited because his claim was that the instruction was not "correct in law," and that it violated his right to due

process of law. Nevertheless, respondent respectfully submits that appellant's claim is forfeited because he did not object to CALJIC No. 2.15 despite numerous opportunities to do so, nor did he request a modification of this standard instruction. (See 4RT 1092; 5RT 1322-1323; 6RT 1576-1580, 1604, 1643-44.) "Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language this standard instruction." (*People v. Catlin* (2001) 26 Cal.4th 81, 149, internal quotation marks omitted; *People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Andrews* (1989) 49 Cal. 3d 200, 218.) While section 1259 provides, in relevant part, that an appellate court "may . . . review any instruction given, refused or modified even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby," this Court has previously held that as general rule, the trial court is not obligated to revise or improve standard instructions in the absence of a request from counsel. (*People v. Wolcott* (1983) 34 Cal.3d 92, 108-109.) Appellant has failed to establish the challenged instruction amounted to a structural error affecting his substantial rights. (See *People v. Flood* (1998) 18 Cal.4th 470, 499-500.) Indeed, he cannot do so because CALJIC No. 2.15 is correct in law, and therefore appellant's substantial rights are not affected.

Even assuming, arguendo, his claims are not forfeited, they must be rejected as meritless. Respondent acknowledges that in *People v. Prieto* (2003) 30 Cal.4th 226, 248–249, this Court concluded that the trial court erred by instructing the jury, pursuant to CALJIC No. 2.15, that: "If you find that a defendant was in conscious possession of recently stolen property, the fact of such possession is not by itself sufficient to permit an

inference that the defendant ALFREDO PRIETO is guilty of the *crimes charged*." (*Id.* at p. 248, original emphasis.)[1] In so holding, this Court found persuasive the reasoning in *People v. Barker* (2001) 91 Cal.App.4th 1166, 1176 (*Barker*), that the trial court's application of CALJIC No. 2.15 to nontheft offenses like rape or murder was improper.

Respondent respectfully disagrees. As *Barker* observed, the use of CALJIC No. 2.15 has been approved where the theft-related crime set out in the instruction constitutes the basis of a murder conviction on a felony murder theory. (*People v. Mendoza* (2000) 24 Cal.4th 130, 176-177; *People v. Smithey, supra,* 20 Cal.4th at pp. 975-978; *People v. Johnson* (1993) 6 Cal.4th 1, 36-38; *People v. Lang* (1989) 49 Cal.3d 991, 1024; *People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1400.) If CALJIC No. 2.15 properly may be given with respect to a robbery or a burglary that forms the basis of a felony murder prosecution, it is also arguably appropriate as to the crime of murder where, as here, the facts indicate the alleged murder was perpetrated in the commission of the theft offense. Where, as here, theft-based felony murder is the sole theory for the charged murder, the effect of

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[1] The full instruction at issue in *Prieto* stated:

> If you find that a defendant was in conscious possession of recently stolen property, the fact of such possession is not by itself sufficient to permit an inference that the defendant ALFREDO PRIETO is guilty of the crimes charged. Before guilt may be inferred, there must be corroborating evidence tending to prove defendant's guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt. [¶] As corroboration, you may consider the attributes of possession-time, place and manner, that the defendant had an opportunity to commit the crime charged, the defendant's conduct, any other evidence which tends to connect the defendant with the crime charged.

(*Id.* at p. 248, fn. 5.)

the instruction is no different than for any other theft-related offense. For example, the instruction has been held not to invite an irrational inference that conviction of the underlying offense was proper without finding all required elements as mandated by other instructions. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 188-189 [instruction proper as to robbery offense and rejecting claim that it allowed conviction without finding force or fear as required by other instructions].) In the context of a theft-based felony murder, CALJIC No. 2.15 similarly instructs the jury regarding evidence of the underlying felony, without diluting the burden of proof or dispensing with other requirements for finding felony murder.

In any event, for the reasons explained below, even assuming it was error to give this instruction without limitation to theft-related offenses, the error was harmless. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 101 [although the trial court erred in instructing the jury, according to CALJIC No. 2.15, that the jury could infer from defendants' conscious possession of stolen property their guilt of the "crimes alleged," the error was harmless]; *People v. Prieto*, *supra*, 30 Cal.4th at pp. 248–249; *People v. Barker*, *supra*, 91 Cal.App.4th at p. 1176 [concluding that CALJIC No. 2.15 as applied to murder was harmless in view of instructions as a whole].)

In view of the record as a whole, it is not reasonably probable that the jury would have reached a result more favorable to appellant had the inference described in CALJIC No. 2.15 been limited to burglary and robbery. (1CT 5-7; 5CT 1353-1356.) As previously noted, in *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at page 101, this Court concluded the trial court erred by instructing the jury, according to CALJIC No. 2.15, that the jury could infer from defendants' conscious possession of stolen property their guilt of the "crimes alleged," without limitation to theft-related offenses. Nevertheless, this Court concluded the error was harmless, reasoning as follows:

> In view of the overwhelming evidence of defendants' guilt, however, and the panoply of other instructions that guided the jury's consideration of the evidence (e.g., CALJIC Nos. 2.90 [presumption of innocence and reasonable doubt standard of proof], 2.00 [defining direct and circumstantial evidence], 2.02 [sufficiency of circumstantial evidence to prove specific intent], 3.31 [requirement of union of act and specific intent], 1.01 [duty to consider instructions as a whole]), we see no reasonable likelihood of a more favorable outcome for either Marlow or Coffman had the instruction not been given.

(*Ibid.*)

Recently, in *People v. Gamache* (2010) 48 Cal.4th 347, this Court similarly rejected the defendant's claim that the trial court committed reversible error by instructing the jury, pursuant to CALJIC 2.15, that "If you find that a defendant was in conscious possession of recently stolen property, the fact of such possession is not by itself sufficient to permit an inference that the defendants are guilty of the crime of *murder*, robbery, burglary, and kidnapping for robbery." (*Id.* at p. 374, fn. 12, emphasis added.) Applying the reasonable probability standard under *People v. Watson* (1956) 46 Cal.2d 818, 836, this Court concluded that extending CALJIC No. 2.15 to the murder charge was clearly harmless, reasoning as follows:

> Under [the *Watson*] test—whether it is reasonably probable Gamache would have obtained a more favorable result had the instruction not been given—the error here in extending CALJIC No. 2.15 to the murder charge was clearly harmless. Copious evidence, aside from Gamache's being caught with the Williamses' property hours after Lee Williams's death, established he had intentionally shot and killed Lee Williams. Most prominently, Peggy Williams testified Gamache had done so, and codefendant Andre Ramnanan introduced Gamache's admission that he had shot Lee Williams. Indeed, counsel during closing argument conceded that Gamache was guilty of murder.

(*Id.* at p. 376.)

Here, as demonstrated by the summary of evidence included in respondent's brief, there was overwhelming evidence of appellant's guilt. (See RB 3-21 [Statement of Facts].) Furthermore, as in *People v. Coffman and Marlow*, the jury was instructed with CALJIC Nos. 2.90 (presumption of innocence and reasonable doubt standard of proof), 2.00 (defining direct and circumstantial evidence), 2.01 (sufficiency of circumstantial evidence generally), 3.31 (requirement of union of act and specific intent), and 1.01 (duty to consider instructions as a whole) (8CT 2029, 2032-2033, 2051, 2059; 6RT 1614, 1615-1617, 1623-1624, 1626-1627). The jury was also instructed on the specific elements of felony murder during the commission of a robbery and burglary, the underlying crimes of robbery and burglary, the robbery-murder and burglary-murder special-circumstance allegations, and that the prosecution had the burden of proving each of these elements beyond a reasonable doubt. (8CT 2063-2068, 2072, 2076-2080; 6RT 1628-1631, 1632-1633, 1635-1637.) Given these instructions, it is not reasonably probable that CALJIC No. 2.15, as given, confused the jury. Indeed, if this Court found harmless error in *Gamache* where the trial court expressly extended CALJIC No. 2.15 to "murder," then a fortiori, the trial court's extension of that instruction merely to "the crimes charged" must also be harmless error.

Nor did CALJIC No. 2.15, as given, lessen the prosecution's burden of proof. (*People v. Prieto, supra*, 30 Cal.4th at p. 248 [finding "no possibility" that CALJIC No. 2.15 lowered the prosecution's burden of proof].) CALJIC No. 2.15 did not discuss the prosecution's burden of proof and, as indicated, the jury was specifically instructed that the prosecution had the burden of proving the elements of the felony-murder charges and the special circumstance allegations beyond a reasonable doubt. Nothing in CALJIC No. 2.15 absolved the prosecution of its burden of proof. The jury was properly instructed on its duty to weigh the

evidence, how to weigh the evidence, and what evidence it could consider. Given these instructions, and the instruction to consider all of the instructions "together," it is not reasonably possible that CALJIC No. 2.15 confused the jury concerning the prosecution's burden of proof, or lessened that burden.

Appellant, relying substantially on *Schwendeman v. Wallenstein* (9th Cir. 1992) *(Schwendeman)* 971 F.2d 313, argues that CALJIC No. 2.15 is constitutionally deficient because it effectively told the jury that it could infer every element of a first degree murder charge from the predicate facts of possession of recently stolen property with slight corroboration. (SAOB 17-19.) In *People v. Parson* (2008) 44 Cal.4th 332, this Court considered, and rejected, a similar claim, as follows:

> [*Schwendeman v. Wallenstein, supra*, 971 F.2d at page 313] does not support defendant's constitutional claim. There, the defendant challenged an instruction that permitted the jury to infer that he drove recklessly, solely from evidence that he drove in excess of the speed limit. (*Id.* at p. 316.) *Schwendeman* found the challenged instruction constitutionally deficient because it told the jury, "in effect, that it could ignore all the other evidence, consider only the evidence of Schwendeman's speed, and if it found Schwendeman was exceeding the speed limit, that was enough to convict him — not of speeding, but of reckless driving." (971 F.2d at p. 316.) In stark contrast, the instruction here expressly told the jury that conscious possession of recently stolen property "is not by itself sufficient to permit an inference that the Defendant is guilty" of the charged crimes and that there must be corroborating evidence, albeit only slight, tending to prove his guilt. Accordingly, CALJIC No. 2.15 does not appear constitutionally deficient under *Schwendeman*'s analysis.

(*Id.* at p. 356, footnote omitted.) Here, appellant's reliance on *Schwendeman* is misplaced for the same reasons. As such, the trial court did not commit reversible error by instructing the jury pursuant to CALJIC No. 2.15, and appellant's claim to the contrary fails for these reasons alone.

B. Alternatively, Any Error Was Harmless Because It Can Be Determined On This Record That The Jury's Verdict Rested On At Least One Correct Theory

The trial court's error was harmless for alternative, but equally valid reason: a legally erroneous jury instruction does not require reversal where it can be determined from the record that the jury relied upon a correct theory of guilt. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.)

In *People v. Kelly* (1992) 1 Cal.4th 495, 531, the defendant argued that one of his first degree murder convictions must be reversed because the trial court erred by instructing on robbery-felony-murder as well as rape-felony-murder and premeditated murder. This Court rejected that claim, reasoning as follows:

> The general rule is that when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand. [Citations.] Here, we can determine that the verdict rested on at least one correct theory. The jury found true the rape-murder special circumstance. Since the jury thus necessarily found the killing was committed in the course of a rape or attempted rape, the robbery instructions were of no consequence to the murder charge. [Citations.]

(*Id.* at p. 531; accord, *People v. Richardson* (2008) 43 Cal.4th 959, 1018-1019 [instructional error harmless in light of the jury's finding that the murder was committed in the commission of burglary, rape, and lewd acts]; *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at pp. 97–98 [erroneous instruction on sodomy felony-murder theory harmless because the jury's verdict on the robbery and burglary charges and related special circumstance allegations reflect that the first degree murder conviction was grounded upon other valid legal theories of felony murder]; *People v. Hughes* (2002) 27 Cal.4th 287, 368; see also *People v. Marshall* (1997) 15

Cal.4th 1, 38 [erroneous instruction on robbery felony-murder theory harmless where "the jury unanimously found defendant guilty of first degree murder on the valid theory that the killing occurred during the attempted commission of a rape"].)

Here, as in *Kelly*, it can be determined from the record that the jury's verdict rested on at least one correct theory. They found true both the burglary-murder and the robbery-murder special circumstances. (8CT 2013, 2015-2016.) Since the jury necessarily found the murders were committed in the course of a burglary and robbery, any error in instructing the jury with CALJIC No. 2.15 was harmless.

II. APPELLANT FAILS TO SHOW THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY WITH CALJIC NO. 2.11.5

Appellant next contends the trial court committed reversible error by instructing the jury with CALJIC No. 2.11.5 as it related to the testimony of Terry Avery. Appellant argues that the instruction undermined his defense because it allegedly prevented the jury from fully assessing Avery's credibility. Appellant asserts that the instruction was particularly harmful in this case because the evidence provided by Avery was critical to the prosecution's case and her credibility was a major issue in the trial. Appellant claims this error violated his Fifth, Sixth and Eighth Amendment due process rights and right to a fair trial. (SAOB 26-34.) These claims are forfeited and, in any event, they are meritless. Moreover, any error was harmless.

A. Appellant's Claim Is Forfeited; In Any Event, His Claim Is Meritless, And Any Error Was Harmless

Here, the trial court instructed the jury with version[2] of CALJIC No. 2.11.5, as follows:

> There's been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial.
>
> There may be reasons why that person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether Lee Harris has been or will be prosecuted. Your sole duty is to decide whether the People have proved the guilt of the defendant on trial.

(6RT 1617-1618; 8CT 2035.)

Appellant's claim is forfeited because he did not object to CALJIC No. 2.11.5 despite numerous opportunities to do so, nor did he request a modification of this standard instruction. (See 4RT 1092; 5RT 1322-1323; 6RT 1576-1580, 1604, 1643-44: *People v. Williams* (2010) 49 Cal.4th 405, 457 [failure to request modification of 2.11.5 where it properly applied to another witness rendered claim forfeited on appeal]; see also *People v. Catlin*, *supra*, 26 Cal.4th at 149; *People v. Guiuan*, *supra*, 18 Cal.4th at p. 570; *People v. Andrews*, *supra*, 49 Cal. 3d at p. 218) Appellant has failed to establish the challenged instruction amounted to a structural error

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[2] A potential problem with the pre-2004 version of CALJIC No. 2.11.5 used in this case was that, in certain circumstances, it impliedly invited the jury to not discuss or consider otherwise appropriate instructions on the credibility of an unjoined perpetrator who testified at trial. (See *People v. Cox* (1991) 53 Cal.3d 618, 668.) After the Court of Appeal in *People v. Fonseca* (2003) 105 Cal.App.4th 543, 550, suggested a revision to CALJIC No. 2.11.5 – namely, one that would simply and straightforwardly instruct the jury not to guess or speculate about whether or not other persons were being prosecuted – the CALJIC Committee revised the instruction accordingly.

affecting his substantial rights. (See *People v. Flood, supra,* 18 Cal.4th at pp. 499-500.) Indeed, he cannot do so because CALJIC No. 2.11.5 is correct in law, and therefore appellant's substantial rights are not affected.

Even assuming, arguendo, his claims are not forfeited, they must be rejected as meritless. The purpose of CALJIC No. 2.11.5 is to "discourage the jury from irrelevant speculation about the prosecution's reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses, and also to discourage speculation about the eventual fates of unknown perpetrators." (*People v. Price* (1991) 1 Cal.4th 324, 446.) Generally, the instruction should not be given if the "other person" who may have been involved testifies at trial because there is the possibility that CALJIC No. 2.11.5 could prevent a jury from considering the coparticipant's incentive to lie. (*People v. Hardy* (1992) 2 Cal.4th 86, 189-190; *People v. Cox* (1991) 53 Cal.3d 618, 667.) Accordingly, where a coparticipant testifies and another does not, CALJIC No. 2.11.5 either should not be given or should be limited to preclude its application to the testifying coparticipant. (*People v. Cain* (1995) 10 Cal.4th 1, 34-35, fn. 9; *People v. Sully* (1991) 53 Cal.3d 1195, 1218.)

Here, CALJIC No. 2.11.5 was clearly appropriate because Lee Harris, a participant in the brutal murders of the Crumbs, was repeatedly mentioned during trial. Thus, CALJIC No. 2.11.5 correctly named him in its admonishment to the jury not to consider whether he had been or would be prosecuted. Furthermore, the instruction, reasonably construed, was limited to preclude its application to Avery since, unlike Harris, she was not named in the instruction. The instruction expressly instructed not to "discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether *Lee Harris* has been or will be prosecuted." (6RT 1617-1618, emphasis added.)

Appellant, anticipating respondent's argument, acknowledges that the instruction did expressly mention Harris, but argues that this reference was insufficient to exclude Avery. Appellant asserts that because the sentence which mentions his name is separated into two clauses by the disjunctive word "or," respondent's argument would impermissibly render one of the two clauses as surplus. (SAOB 29.) Respondent disagrees. The propriety of the jury instructions is reviewed in context and as a whole. (*People v. Barajas* (2004) 120 Cal.App.4th 787, 791; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) An instruction is not erroneous if no reasonable juror would have misinterpreted the instruction as the appellant suggests. (See *People v. Fonseca, supra*, 105 Cal.App.4th at p. 549.) When CALJIC 2.11.5 is read as a whole, there is no reasonable likelihood the jury would parse this instruction so finely in the manner appellant suggests.

In any event, instructing the jury with CALJIC No. 2.11.5 is not considered error when it is given with other instructions regarding witness credibility and burden of proof. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1114; see also *People v. Brown* (2003) 31 Cal.4th 518, 560.) In *Jones*, this Court stated, "[W]e have often said that trial courts should not give CALJIC No. 2.11.5 in an unmodified form when, as here, a person who might have been prosecuted for the crime has testified at trial. [Citations.]" (*Jones, supra*, at p. 1113.) However, the court also stated that although it is a "mistake" to give CALJIC No. 2.11.5 where an unjoined coparticipant has testified, the "mistake" is not "error when, as here, 'the instruction is given with the full panoply of witness credibility and accomplice instructions.'" (*Jones, supra*, at p. 1114, quoting *People v. Lawley* (2002) 27 Cal.4th 102, 162.)

Here, the trial court instructed the jury with CALJIC Nos. 2.13 [prior consistent or inconsistent statements as evidence], 2.20 [believability of a

witness], 2.21.1 [discrepancies in testimony], 2.21.2 [witness willfully false], 2.22 [weighing conflicting testimony], 2.27 [sufficiency of testimony of one witness], 3.10 [definition of accomplice], 3.11 [testimony of accomplice must be corroborated], 3.12 [sufficiency of evidence to corroborate an accomplice], 3.16 [witness accomplice as matter of law], and 3.18 [testimony of accomplice to be viewed with care and caution] (8CT 2037, 2039-2043, 2054-2058; 6RT 1618-1621, 1625-1626). Significantly, CALJIC No. 3.16 instructed the jury that: "If the crimes charged were committed by anyone, *the witness Terry Avery was an accomplice as a matter of law and her testimony is subject to the rule requiring corroboration.*" (6RT 1626, emphasis added; 8CT 2057.) The court also instructed the jury to consider the instructions as a whole and to not single out one instruction to the exclusion of another. (CALJIC No. 1.01; see, e.g., *People v. Sully, supra*, 53 Cal.3d at pp. 1218-1219; *People v. Cox, supra*, 53 Cal.3d at p. 667.) As the instructions as a whole correctly instructed the jurors regarding Avery's credibility, the court did not err in giving CALJIC No. 2.11.5 without a limiting instruction. (*Jones, supra*, 30 Cal.4th at p. 1114.)

For the same reasons, there is no reasonable probability that had the jury been told in a clearer manner that CALJIC No. 2.11.5 did not apply to Avery, appellant would have reached a more favorable verdict. In short, appellant's arguments are without merit, as is the claim that the giving of the instruction constituted federal constitutional error by excluding relevant evidence of bias. (*People v. Ayala* (2000) 23 Cal .4th 225, 253 ["There was no violation of state law, and because defendant's constitutional claims are predicated on his assertion that state law was violated, they too must fail."].)

III. APPELLANT FAILS TO SHOW THAT THE COURT'S INSTRUCTIONS ON DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE WERE UNCONSTITUTIONAL

Appellant next argues the trial court's instructions on direct and circumstantial evidence violated his right to due process and right to a jury determination of the facts under the federal and state constitutions. (SAOB 35-40.) Specifically, appellant appears to complain that the instructions on direct evidence (e.g., CALJIC No. 2.00) were deficient because they omitted certain language found in the instructions on circumstantial evidence (e.g., CALJIC Nos. 2.01, 8.83, and 8.83.1). Appellant argues:

> In short, the state relied on both direct and circumstantial evidence to support its case. When the court instructed the jury, it specifically identified the *second* of these categories (circumstantial evidence) and told the jury that as to this category of evidence, two important limitations applied: (1) the evidence had to be proved beyond a reasonable doubt and (2) if there were two reasonable constructions of the evidence, the jury had to adopt the construction favoring Mr. Moore. (6RT 1616-1617.) . . . . [I]n a case like this – where the state relied on both direct and circumstantial evidence, and the defense contended there was an alternate explanation for the direct evidence – it was fundamentally improper to limit these cautionary principles to the jury's evaluation of circumstantial evidence. Reversal is required.

(SAOB 35-36.)

Appellant's claim is forfeited because he did not object to the instructions on direct and circumstantial evidence despite numerous opportunities to do so, nor did he request a modification of these standard instructions. (See 4RT 1092; 5RT 1322-1323; 6RT 1576-1580, 1604, 1643-44; *People v. Catlin*, *supra*, 26 Cal.4th at 149; *People v. Guiuan*, *supra*, 18 Cal.4th at p. 570; *People v. Andrews*, *supra*, 49 Cal. 3d at p. 218.) Appellant has failed to establish the challenged instructions amounted to a structural error affecting his substantial rights. (See *People v. Flood, supra,*

18 Cal.4th at pp. 499-500.) Indeed, he cannot do so because the standard instructions on direct and circumstantial are correct in law, and therefore appellant's substantial rights are not affected.

In any event, appellant's claim must be rejected as meritless. In *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1186, the California Court of Appeal considered and rejected a similar argument. There, the defendant claimed that CALCRIM No. 224[3] addressed only circumstantial evidence and criticized the "intentional omission" of direct evidence from its scope. (*People v. Ibarra, supra*, 156 Cal.App.4th at p. 1186.) The *Ibarra* Court observed that CALCRIM No. 224 states as follows:

> "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.
>
> Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

(*Id.* at p. 1186-1187.)

The *Ibarra* Court properly rejected the defendant's claim, reasoning:

> Implicit in Ibarra's argument is the assumption that circumstantial evidence and direct evidence are similarly situated, but that is not so. Circumstantial evidence involves a two-step process – first, the parties present evidence and, second, the jury decides which reasonable inference or inferences, if any, to draw from the evidence – but direct

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[3] CALCRIM No. 224 is former CALJIC No. 2.01.

> evidence stands on its own. So as to direct evidence no need ever arises to decide if an opposing inference suggests innocence. [*People v. Anderson* (2007) 152 Cal.App.4th 919, 931.]

(*Id.* at p. 1187; see also *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152 [explaining the difference between direct and circumstantial evidence]; *People v. Lim Foon* (1915) 29 Cal.App. 270, 274 [same].)

Similarly, in *People v. Anderson*, *supra*, 152 Cal.App.4th at page 931, the California Court of Appeal rejected the defendant's claim that because CALCRIM No. 224 "is limited to circumstantial evidence and sets forth basic reasonable doubt and burden of proof principles, it gives the false impression these principles apply only to circumstantial evidence, not direct evidence." The *Anderson* Court also characterized the defendant's additional claim that CALCRIM No. 224 applied to both direct and circumstantial evidence as "mix[ing] apples with oranges." (*Id.*)

Similarly, in *People v. Golde* (2008) 163 Cal.App.4th 101, 118-119, the California Court of Appeal rejected the defendant's argument that CALCRIM No. 225 impermissibly set forth limitations of reasonable doubt and burden of proof principles as to circumstantial evidence only, thus improperly implying such limitations did not apply to direct evidence.

Here, too, appellant's claim is premised on his assumption that circumstantial evidence and direct evidence are similarly situated, and it fails for the same reasons explained in *Ibarra, Anderson, Goldstein, Lim Foon*, and *Golde.* Appellant has not advanced any persuasive arguments requiring this Court to reject these holdings.

Even assuming, arguendo, that CALJIC No. 2.00 improperly omitted the principles found in the instructions on circumstantial evidence, there is no reasonable likelihood that the jury misunderstood and misapplied the instruction in the manner appellant suggests. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4; *People v. Smithey*, *supra*, 20 Cal.4th at p.

963; *People v. Avena* (1996) 13 Cal. 4th 394, 417.) As stated above, the jury was instructed, pursuant to CALJIC No. 1.01, not to "single out any particular sentence or any individual point or instruction and ignore the others" and to "[c]onsider the instructions as a whole and each in light of all others." (6RT 1614; 8CT 2029.) The jury was instructed with CALJIC 2.90, which explained the presumption of innocence, the People's burden of proving appellant's guilt beyond reasonable doubt, and defined reasonable doubt. (6RT 1623; 8CT 2051.) For these reasons, appellant's claim fails.

IV. APPELLANT FAILS TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S REQUEST FOR APPOINTMENT OF CO-COUNSEL

Appellant next reiterates the claim, raised in his opening brief, that that trial court's denial of his request for co-counsel was improper and violated both state and federal law. (SAOB 41-42; AOB 31-87.) This claim fails for the same reasons stated in respondent's brief. (RB 46-67.)

V. APPELLANT FAILS TO SHOW THAT THE PROSECUTOR VIOLATED HIS DUE PROCESS RIGHTS BY ALLEGEDLY PRESENTING INCONSISTENT THEORIES AT HIS TRIAL AND THE TRIAL OF HARRIS

Appellant next argues that a new penalty phase is required because the trial prosecutor allegedly violated his right to due process and the Eighth Amendment by taking "fundamentally inconsistent positions in the penalty phases of [separately tried codefendant] Harris" and appellant. (SAOB 43-53.) This claim is meritless and must be rejected.

Appellant's claim fails because any issue regarding the "position" the prosecutor took during Harris's trials cannot be adequately addressed on

appeal because those transcripts are not part of the appellate record.[4] (See SAOB 43, fn. 2.) 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; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 633 [denying the defendant's request to take judicial notice of the appellate record in the trial of his crime partner to support his argument that the prosecutor argued inconsistent factual theories in the two trials]; *People v. Waidla* (2000) 22 Cal.4th 690,

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[4] On December 3, 2010, appellant filed a request for this Court to take judicial notice of certain pages from the reporter's transcript of Harris's two trials. On December 20, 2010, respondent filed its opposition to appellant's request for judicial notice. As of the date of the filing of respondent's supplemental brief, this Court has not ruled on that request. Respondent's counsel has not reviewed the transcript of Harris's trials to evaluate the claim of inconsistent theories. Respondent notes, however, that Avery, the only living witness to the events surrounding the murders, told her version of what actually transpired (including that Harris was the "brains" behind it, according appellant's supplemental opening brief [SAOB 54]), so the jury had a clear understanding of the relative culpability of Harris and appellant, and not just a theory of the prosecution as to their relative culpability. Furthermore, even based on the sparse transcript pages attached to appellant's request for judicial notice – which appear extremely selective and self-serving – it appears the prosecutor did not present factually and legally inconsistent theories at appellant's trial and the trial of Harris. Variations in emphasis where the underlying theory of the case was consistent at both trials does not amount to inconsistent and irreconcilable theories. (*In re Sakarias, supra*, 35 Cal.4th at p. 161, fn. 3; *People v. Richardson* (2008) 43 Cal.4th 959, 1017 [the prosecutor did not present inconsistent theories where the prosecutor in both cases proceeded on the theory that defendant was the killer and his separately tried co-defendant aided and abetted him].) Should this Court grant appellant's request for judicial notice, respondent respectfully requests leave and sufficient time to review the transcripts of Harris's trial and to prepare an appropriate response to appellant's claim of inconsistent theories.

703, fn. 1; *People v. Sanchez* (1995) 12 Cal.4th 1, 59, fn. 5.) Accordingly, his claim fails.

VI. APPELLANT FAILS TO SHOW THAT THE TRIAL COURT ERRED BY DENYING HIS REQUEST TO INSTRUCT THE JURY AS TO THE SENTENCE RECEIVED BY HARRIS

Appellant next reiterates the claim, raised in his opening brief, that a new penalty phase is required because the trial court allegedly erred by denying his request to instruct the jury as to the sentence received by Harris. (SAOB 54-68; AOB 150-155.) This claim fails again for the same reasons stated in respondent's brief. (RB 102-104.) Moreover, for the additional reasons explained below, this claim is meritless and must be rejected.

A. The Trial Court Properly Denied Appellant's Request To Instruct The Jury As To The Sentence Received By Harris

1. Relevant Facts

Respondent incorporates herein the relevant facts as summarized in respondent's brief.

2. Evidence of Harris' Sentence Was Irrelevant To Appellant's Penalty Phase

Appellant, relying substantially on the United States Supreme Court's decision in *Parker v. Dugger* (1991) 498 U.S. 308 [111 S. Ct. 731, 112 L. Ed. 2d 812] (*Parker*), argues he was deprived of any mitigating inferences that could be drawn from such information in violation of his federal constitutional rights to due process, equal protection, and a reliable penalty determination, and in violation of analogous state constitutional guarantees. This claim is meritless.

In *People v. Brown, supra,* 31 Cal.4th at p. 518, this Court rejected the defendant's claim that the trial court erred by denying his request to

take judicial notice of the sentences received by other perpetrators to the crime, as follows:

> [Brown] admits we have rejected this legal claim several times in the past (see, e.g., *People v. Hines* (1997) 15 Cal.4th 997, 1068 [64 Cal. Rptr. 2d 594, 938 P.2d 388]), but urges us to reconsider, relying on *Parker v. Dugger* (1991) 498 U.S. 308 [112 L. Ed. 2d 812, 111 S. Ct. 731].
>
> "We have consistently held that evidence of an accomplice's sentence is irrelevant at the penalty phase because 'it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition.'" (*People v. McDermott* (2002) 28 Cal.4th 946, 1004–1005 [123 Cal. Rptr. 2d 654, 51 P.3d 874], quoting [*People v. Cain* (1995) 10 Cal.4th 1, 63].) Defendant presents no persuasive reason to reconsider that conclusion. *Parker v. Dugger, supra*, 498 U.S. 308, on which he relies, does not direct a different result. "*Parker* did not hold evidence of an accomplice's sentence must be introduced in mitigation at the penalty phase, or that a comparison between sentences given codefendants is required. [Citation.] The *Parker* court merely concluded a Florida trial judge, in sentencing the defendant to death, had in fact considered the nonstatutory mitigating evidence of the accomplice's sentence, as under Florida law he was entitled to do. [Citation.] *Parker* does not state or imply the Florida rule is constitutionally required, and California law is to the contrary; we have held such evidence irrelevant because it does not shed any light on the circumstances of the offense or the defendant's character, background, history or mental condition." (*Cain, supra*, at p. 63.) We conclude the trial court did not err in refusing to grant the request for judicial notice.

(*Brown, supra*, 31 Cal.4th at pp. 562-563.) Since appellant provides no persuasive reason to reconsider this Court's repeated rejection of claims similar to the one he is raising here, his contention should be rejected.

B. The Evidence Of Harris' Sentence Was Not Proper Rebuttal Evidence

Appellant, relying on the United States Supreme Court decisions in *Simmons v. South Carolina* (1994) 512 U.S. 154 [114 S. Ct. 2187, 129 L.

Ed. 2d 133] (*Simmons*) and *Crane v. Kentucky* (1986) 476 U.S. 683 [106 S. Ct. 2142, 90 L. Ed. 2d 636] (*Crane*), next argues that the trial court erred by refusing to allow appellant to rebut the prosecutor's arguments, made during the penalty phase, with evidence of Harris's sentence. (SAOB 69-71.) Appellant argues that "*Simmons* and *Crane* control this case." (SAOB 70.) They do not.

In *Simmons*, the petitioner claimed that because the State argued during the penalty phase of his murder trial that he posed a future danger to society, his due process right to rebut the State's argument was violated by the trial court's refusal to permit him to show that he was legally ineligible for parole, and thus would remain in prison if afforded a life sentence. (*Simmons, supra,* 512 U.S. at pp. 160-161.) The United States Supreme Court agreed, reasoning that the petitioner's proffered evidence of the alternative sentence of life without parole would have necessarily undercut the State's argument regarding the threat the defendant posed to society. (*Id.* at p. 169.) The Court explained that because truthful information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court. (*Ibid.*)

In *Crane*, the United States Supreme Court addressed the issue of whether the exclusion of testimony about the circumstances of the confession violated the petitioner's rights under the Sixth and Fourteenth Amendments to the Federal Constitution. (*Crane, supra,* 476 U.S. at p. 686.) The Supreme Court, noting that the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense," held the trial court erred by foreclosing the petitioner's efforts to introduce testimony about the environment in which the police secured his confession. (*Id.* at p. 691.)

Nothing in *Simmons* or *Crane* stands for the proposition that a trial court violates a defendant's federal or state rights by deciding not to admit irrelevant evidence, such as sentences received by other perpetrators to the crime, to rebut a prosecutor's argument during the penalty phase of a capital trial. To the contrary, as the United States Supreme Court stated in *Simmons*, "where the prosecution relies on a prediction of future dangerousness in requesting the death penalty, elemental due process principles operate to require admission of the defendant's *relevant evidence* in rebuttal." (*Simmons, supra*, 512 U.S. at p. 164, emphasis added.) As this Court has repeatedly made clear, evidence of an accomplice's sentence is *irrelevant* at the penalty phase. (See, e.g., *Brown, supra*, 31 Cal.4th at pp. 562-563.) Accordingly, appellant's claim fails.

C. The Trial Court Did Not Prevent Appellant From Presenting A Proper Theory Of Mitigation, Nor Did The Trial Court's Refusal To Permit Evidence Of Harris's Sentence Violate State Law

Appellant next argues that the trial court prevented him from presenting a proper theory of mitigation by denying his request to present evidence of Harris's sentence, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment. (SAOB 72-74.) Appellant also argues the trial court's refusal to permit evidence of Harris's sentence violated California law (SAOB 74-77), and that these errors require a new penalty phase (SAOB 77-80.) These claims are premised on the validity of his earlier arguments regarding the admissibility of the evidence of Harris's sentence, and since that evidence was properly excluded at appellant's penalty phase for the reasons previously discussed, these derivative arguments must be rejected as meritless.

D. Any Error Was Harmless

In any event, any error in refusing to instruct the jury with Harris's sentence, or excluding evidence of his sentence, was harmless under any standard. (See *People v. Cowan* (2010) 50 Cal. 4th 401, 493; *People v. Brown* (1988) 46 Cal.3d 432, 447–448.) The evidence against appellant of the charged crimes and the aggravating factors presented during the penalty phase was overwhelming. Moreover, the jury was well aware of the relative culpability of Harris in light of Avery's eyewitness testimony, and so exclusion of Harris's sentence itself, which necessarily relied on other penalty phase evidence unique to him per section 190.3, did not undermine the reliability of appellant's death sentence.

VII. APPELLANT FAILS TO SHOW THE TRIAL COURT COMMITTED ANY ERRORS DURING THE PENALTY PHASE, OR THAT THE CUMULATIVE EFFECT OF ANY ERRORS PREJUDICED HIM

Appellant next argues that the trial court allegedly made various errors during the penalty phase, and that the cumulative effect of these errors requires a new sentencing hearing. (SAOB 81-93.) Respondent disagrees.

A. The Prosecutor Properly Introduced Evidence Of Appellant's Convictions During The Penalty Phase

Appellant asserts that unlike the 1978 death penalty law, the 1977 death penalty law, which applied here, did not authorize the prosecutor to introduce evidence of appellant's prior felony criminal convictions during the penalty phase. (SAOB 82; see 7RT 1726.) He also claims, in the alternative, that the prosecutor's introduction of appellant's convictions which occurred after the crimes charged in this case was improper. (SAOB 83.) Appellant's claims are forfeited, and are meritless. In any event, any error was harmless.

During the penalty phase, the prosecutor presented evidence that appellant suffered convictions for aggravated robbery, theft, escape, kidnapping, and murder. (7RT 1770-1771, 1825, 1828-1829.) Appellant's failure to object to this evidence forfeits his claims on appeal. (See *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1052-1053 [defendant's claim that the acts presented during the penalty phase did not satisfy the "crime" and/or "violence" requirements of section 190.3, factor (b), were forfeited under both statutory and constitutional law because he failed to object to the evidence].)

Even assuming appellant's claims are not forfeited, they must be rejected as meritless. In *People v. Ray* (1996) 13 Cal.4th 313 (conc. opn. of George, C.J.) (*Ray*), the Chief Justice explained in his concurring opinion, which was also signed by four other justices, that even under the 1977 death penalty law, the prosecution may properly admit evidence of a defendant's conviction of a crime involving the use or threat of force of violence, as follows:

> In 1972, this court concluded that the then existing California death penalty statute was unconstitutional. [Citations.] In 1976, the United States Supreme Court handed down a group of decisions that provided guidance as to the requirements of a constitutionally permissible death penalty statute [citations], and, shortly thereafter, this court, relying upon these recently decided United States Supreme Court decisions, concluded that the initial successor to the death penalty statute that had been invalidated in [*People v. Anderson* (1972) 6 Cal. 3d 628] also was unconstitutional. [Citation.]
>
> The following year, the Legislature reinstated the death penalty in California through the enactment of the 1977 death penalty law. (Stats. 1977, ch. 316, § 1-26, pp. 1255-1266.) Among other features, the 1977 death penalty law set forth (in section 190.3) a list of factors that the jury (or the judge, if a jury is waived) is to consider at the penalty phase in choosing between the alternative sentences of death or life without possibility of parole. As enacted in 1977, section 190.3 included factor (b) – "[t]he

presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence" – but did not include any other factor (such as the current factor (c), subsequently added in 1978) that specifically referred to criminal "convictions" sustained by the defendant.

The language and legislative history of section 190.3 as adopted in 1977 make it clear that, in enacting section 190.3, factor (b), the Legislature intended to authorize the prosecution to introduce *not only* evidence of a defendant's *conviction* of a crime involving the use or threat of force or violence, but *also* evidence that the defendant had engaged in such criminal activity without having been convicted of a crime (provided the defendant had not been prosecuted and acquitted of the crime). (See *People v. Phillips* (1985) 41 Cal. 3d 29, 69-72 [222 Cal. Rptr. 127, 711 P.2d 423] (lead opn. by Reynoso, J.) [reviewing the legislative history of section 190.3's reference to "criminal activity," as enacted in 1977].)

In this regard, the first three paragraphs of the 1977 version of section 190.3 – which preceded the listing of the specified aggravating and mitigating factors and concerned the evidence that could be presented at the penalty phase – are particularly instructive. Those paragraphs provided in relevant part: "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to . . . the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, [and] history . . . . [¶] However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. *As used in this section, criminal activity does not require a conviction.* [¶] However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and was acquitted. The restriction on the use of this evidence is intended to apply only to proceedings conducted pursuant to this section and is not intended to affect statutory or decisional law allowing

such evidence to be used in other proceedings." (Stats. 1977, ch. 316, § 11, pp. 1258-1259, italics added.)

By providing in section 190.3 that "[a]s used in this section, criminal activity does not require a conviction" (italics added), the Legislature made it clear that the prosecution could present evidence of criminal activity by the defendant involving the use or threat of force or violence even if that activity had not resulted in a conviction. At the same time, the Legislature implicitly confirmed that when the defendant *had* been convicted of a crime involving the use or threat of force or violence, the prosecution, *of course*, could rely upon that conviction to establish "the presence . . . of criminal activity" for purposes of section 190.3, factor (b). Particularly when this language of the 1977 version of section 190.3 is considered in light of the consistent practice under the prior death penalty law, I believe it would be absurd to interpret the 1977 statute as *precluding* the prosecution from relying upon a prior conviction of a crime involving the use or threat of force or violence to prove the presence of other violent criminal activity within the meaning of section 190.3, factor (b), and instead as *requiring* the prosecution to *try anew* every prior violent crime offered in aggravation under factor (b), even when the defendant already had been convicted of the crime.

Such an interpretation would fly in the face of past practice and would be quite impractical, compelling the prosecution to relitigate fully – through the testimony of victims and witnesses and the presentation of physical and documentary evidence – each violent crime of which the defendant already had been convicted, and, at the same time, prohibiting the prosecution from bringing to the jury's attention at the penalty phase other violent criminal activity of the defendant *that had resulted in a conviction*, whenever the physical evidence or witnesses presented in the earlier proceedings no longer were available. (As noted, section 190.3, as it read in 1977, contained no separate factor referring explicitly to the defendant's prior "convictions.") Nothing in the language or history of the 1977 legislation supports the claim that the Legislature intended to impose such limitations with regard to the proof of prior criminal activity of which the defendant had been convicted.

> In 1978, section 190.3 was amended to expand the list of aggravating and mitigating factors, adding the present factor (c), which permits the sentencer to consider "the presence or absence of any prior felony conviction." Unlike factor (b), factor (c) is limited to crimes of which the defendant has been convicted (indeed, to felony convictions sustained by the defendant prior to the commission of the capital homicide (see *People v. Balderas* (1985) 41 Cal. 3d 144, 201-203 [222 Cal. Rptr. 184, 711 P.2d 480])), but the provision at the same time encompasses *all* felony convictions, whether or not they involve the use or threat of force or violence. Significantly, nothing in the enactment of factor (c) in 1978 indicates any intent to modify the meaning or application of section 190.3, factor (b).
>
> Accordingly, I believe it is clear both from the language and history of section 190.3, factor (b), as well as the decisional law that preceded its enactment, that the prosecution may establish the presence of "criminal activity" within the meaning of that provision by the introduction of the record of a conviction that involves the use or threat of force or violence. Although the statute does not *limit* the prosecution to the introduction of a record of conviction when the defendant has been convicted of a crime involving the use or threat of force or violence, it *permits* the prosecution to introduce such a conviction to establish the presence of other violent criminal activity committed by the defendant under section 190.3, factor (b).

(*Id.* at pp. 366-368, original emphasis.) In light of the above, appellant's claim that the 1977 death penalty law did not authorize the prosecutor to introduce evidence of appellant's criminal convictions is contrary to law. (SAOB 82.) Appellant does not acknowledge, much less distinguish, the majority's concurring opinion in *Ray*. (See SAOB 81-82.) Accordingly, his claim fails.

Appellant also claims, in the alternative, that the prosecutor's introduction of appellant's convictions, all of which involved crimes of force or violence, which occurred after the crimes charged in this case was improper. (SAOB 83.) This claim is also contrary to law. In *People v. Hovey* (1988) 44 Cal. 3d 543, 577, this Court rejected as meritless the

defendant's claim that the prosecutor, during the penalty phase, improperly presented evidence that the defendant committed a forcible kidnapping which occurred *after* the murder at issue in his capital case. This Court reasoned as follows:

> Under the 1977 death penalty law applicable here, the People were permitted to present evidence "as to any matter relevant to aggravation, mitigation, and sentence, including . . . the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence . . . ." (Former § 190.3, italics added.) The same section provided that, in deciding penalty, the trier of fact shall take into account "(b) The presence or absence of [forceful or violent] criminal activity by the defendant . . ." Neither of these provisions was limited to "prior" criminal activity.
>
> The section also contained, however, two further references to the subject. One unnumbered paragraph of former section 190.3 excluded evidence of "other criminal activity" which did not involve force or violence, while another paragraph excluded evidence of "*prior* criminal activity" (italics added) for an offense of which defendant was acquitted. Neither of these latter two paragraphs is applicable here, and we find no legislative intent to limit the penalty phase evidence to forceful or violent criminal activity which preceded the charged offense. In light of the penalty jury's role, it would be anomalous to exclude from its consideration highly relevant evidence regarding the defendant's violent character and background. (See *People v. Bentley* (1962) 58 Cal.2d 458, 460 [24 Cal. Rptr. 685, 374 P.2d 645] [subsequent crime admissible at penalty phase].)
>
> *People v. Balderas* (1985) 41 Cal.3d 144, 201-204 [222 Cal. Rptr. 184, 711 P.2d 480], supports our conclusion. There, we construed the language of the 1978 death penalty law, permitting consideration of the defendant's violent or nonviolent "*prior* felony convictions" (italics added) as limited to nonviolent convictions entered before the charged offense was committed. Significantly, we observed that as to *violent* crimes, "Subdivision (b) [of § 190.3] allows in *all* evidence of *violent* criminality to show defendant's propensity for violence." (P. 202, italics in original.) We so stated despite the fact that other language in section 190.3 provided (in language identical to the

> 1977 law discussed above) that no evidence of "prior" criminal activity shall be admitted for an offense of which defendant was acquitted. *Balderas* thereby implicitly rejected the present argument that one isolated inclusion of the word "prior" in section 190.3 disclosed an intent generally to limit the admission of evidence of defendant's violent criminal activity. Nor can we think of any sound policy reason for limiting the penalty phase evidence in the manner suggested by defendant.

(*Id.* at pp. 578-579; see also *People v. Avena, supra,* 13 Cal.4th at p. 394 [rejecting, under the 1978 death penalty law, the defendant's claim that evidence of his priors violent offenses were improperly admitted as aggravating evidence at the penalty phase because both incidents occurred after the capital crimes in that case].) Appellant does not acknowledge, much less distinguish, this Court's decision in *Hovey*. Accordingly, his claim fails.

In any event, any error in admitting the evidence of appellant's challenged convictions was harmless. Specifically, in light of the weight of the aggravating circumstances in this case, including the facts and circumstances of the charged offenses, there is no reasonable possibility any error affected the penalty verdict. (See *People v. Martinez* (2003) 31 Cal.4th 673, 694-695; cf. *People v. Pinholster* (1992) 1 Cal.4th 865, 962 [admission of irrelevant aggravating evidence rarely reversible error]; *People v. Wright* (1990) 52 Cal.3d 367, 426–427 [same]; see also *People v. Medina* (1995) 11 Cal.4th 694, 768; *People v. Danielson* (1992) 3 Cal. 4th 691, 722; *People v. Pinholster, supra,* 1 Cal. 4th at p. 963; *People v. Gallego* (1990) 52 Cal. 3d 115, 196)

Here, the evidence of the challenged convictions was of minor importance compared with the properly admitted evidence in aggravation, including the facts of the charged crime. The jury that heard the penalty phase evidence was the same jury that heard testimony during the guilt phase regarding the robbery and murder of the Crumbs, a frail and elderly

couple who were tied up, gagged, brutally stabbed, and left to die inside their own home. During the prosecutor's closing argument of the penalty phase, she reminded the jury of the details of the murders of the Crumbs, and their true findings on the burglary-murder and the robbery-murder special circumstances. (8RT 1957-1958.) As the prosecutor argued:

> The first [of the aggravating factors] is the circumstance of the crime of which [appellant] was convicted in the present proceeding and the existence of any special circumstances found true. Two people killed. Two people, invaded in their home, beaten, their property stripped from their bodies, unable to defend themselves or even cry out. You have seen the evidence. You have heard the evidence. You have seen the photographs. You know that these two people were killed in cold blood for absolutely no reason, posing no threat to [appellant]. This factors points in one direction, toward death. [Appellant] showed no mercy, and he deserves none.

(8RT 1957-1958.)

In light of all this evidence demonstrating that appellant was extremely violent and capable of extreme acts of cruelty and aggression, it was not reasonably possible that the jurors could have drawn any more damaging inferences from the relatively brief testimony pertaining to appellant's challenged convictions. (See *People v. Wright, supra,* 52 Cal.3d at pp. 428-429; *People v. Brown, supra,* 46 Cal.3d at p. 449.) The evidence showing the brutality of the crimes committed against the Crumbs so completely overshadowed the challenged evidence that the latter could not possibly have enhanced the jurors' perception of him as a violent man.

B. CALJIC No. 8.87 Is Not Deficient

Appellant next claims that the trial court erred in instructing the jury with CALJIC No. 8.87. (SAOB 83-85.) Specifically, appellant asserts that this instruction is deficient because it allegedly failed to instruct the jury that "before it could rely on the state's section 190.3(b) evidence, it had to specifically find the offenses involved 'criminal activity by the defendant

which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence."' (SAOB 83, original capitalization omitted.) This claim is forfeited and, in any event, is meritless. Moreover, any error was harmless.

Respondent recognizes that in previous cases, this Court declined to find this issue was forfeited by the defendant's failure to object. (See, e.g., *People v. D'Arcy* (2010) 48 Cal. 4th 257, 302.) However, respondent respectfully submits that the claim here should be deemed forfeited because he did not object to CALJIC No. 8.87 despite numerous opportunities to do so, nor did he request a modification of this standard instruction. (See 4RT 1092; 5RT 1322-1323; 6RT 1576-1580, 1604, 1643-44; *People v. Catlin, supra*, 26 Cal.4th at 149; *People v. Guiuan, supra*, 18 Cal.4th at p. 570; *People v. Andrews, supra*, 49 Cal. 3d at p. 218) Appellant has failed to establish the challenged instruction amounted to a structural error affecting his substantial rights. (See *People v. Flood, supra,* 18 Cal.4th at pp. 499-500.) Indeed, he cannot do so because CALJIC No. 8.87 is correct in law, and therefore appellant's substantial rights are not affected.

Even assuming, arguendo, this claim not forfeited, it must be rejected as meritless. Here, the trial court orally instructed the jury under CALJIC No. 8.87, the standard instruction for considering other criminal activity under factor (b) of section 190.3, as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal acts or activity: 1977, robbery with a weapon, two counts, Colorado; 1977, murder, kidnapping, robbery, Kansas; 1979, escape with gun, robbery with gun, Colorado; 1991, fight with inmate, choke hold; 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 act or activity as an aggravating circumstance.

It is not necessary for all jurors to agree. If any juror's convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If is juror is not so convinced, that juror must not consider that evidence for any purpose.

(8RT 1974-1975, emphasis added; 8CT 2118-2119.)

Appellant's claim was most recently considered, and rejected, by this Court in *People v. D'Arcy, supra,* 48 Cal. 4th at p. 257. The question of whether the acts occurred is a factual matter for the jury to decide at the penalty phase, but the characterization of whether those acts involve force or violence is a legal matter for the court to decide. (*People v. Nakahara* (2003) 30 Cal.4th 705, 720-721.) Appellant presents no compelling reason to overturn these decisions.

Finally, any instructional error during the penalty phase was harmless. "[T]he evidence and argument properly focused the jury's attention on the moral assessment of defendant's actions[.] . . . [T]he instructions now suggested were not essential to the jury's consideration of this issue." (*People v. Cain, supra,* 10 Cal.4th at p. 73; *People v. Prieto, supra,* 30 Cal.4th at p. 265 [finding that no reasonable juror could have found that the defendant committed the criminal acts identified in the instruction without also finding those acts involved force or violence].) Here, as argued above, the evidence of appellant's violence and aggression

was overwhelming. Accordingly, any instructional error during the penalty phase was harmless.

C. The Trial Court Did Not Err By Not Repeating Accomplice Corroboration Instructions During The Penalty Phase

Appellant claims the trial court erred by failing to instruct the jury not to rely on Avery's penalty phase testimony about prior offenses unless those statements were corroborated, and to view her testimony with caution. Specifically, appellant takes issue with how Avery testified about the details of appellant's involvement in the brutal murder, kidnapping, and robbery, of Sam Norwood, a manager of a Woolworth's store in Kansas. Appellant therefore claims she was an accomplice and the court should have given accomplice instruction to the penalty phase jury. Accordingly, appellant maintains the penalty verdict should be reversed. (SAOB 85-91.) Respondent disagrees.

During the guilt phase, the trial court read instructed the jury with a full panoply of accomplice instructions, including CALJIC Nos. 3.10 [definition of accomplice], 3.11 [testimony of accomplice must be corroborated], 3.12 [sufficiency of evidence to corroborate an accomplice], 3.16 [witness accomplice as matter of law], and 3.18 [testimony of accomplice to be viewed with care and caution] (8CT 2054-2058; 6RT 1625-1626). Significantly, CALJIC 3.16 instructed the jury that: "If the crimes charged were committed by anyone, *the witness Terry Avery was an accomplice as a matter of law and her testimony is subject to the rule requiring corroboration.*" (6RT 1626, emphasis added; 8CT 2057.)

Appellant does not allege, nor does the record show, that he ever requested the trial court repeat any of the accomplice instructions during the penalty phase. (See SAOB 85-93.) Accordingly, his claim is forfeited because he never requested that the instructions be repeated. (See *People v.*

Ervine (2009) 47 Cal.4th 745, 804 [claim that the trial court failed to orally reinstruct the jury with applicable instructions during the penalty phase forfeited because he failed to request such instructions at trial]; *People v. Wilson* (2008) 43 Cal.4th 1, 30 [defendant's failure to request instructions at trial forfeited his claim on appeal]; *People v. Riggs* (2008) 44 Cal.4th 248, 292 [defendant's failure to request instruction at trial forfeited his claim on appeal]; *People v. Boyer* (2006) 38 Cal.4th 412, 465.)

Even assuming, arguendo, his claim is not forfeited, it is meritless. The accomplice corroboration rule applies to both the guilt and penalty phases of a death penalty case. (See *People v. McDermott* (2002) 28 Cal.4th 946, 1000; *People v. Mincey, supra,* 2 Cal.4th at p. 461; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1180; *People v. Miranda* (1987) 44 Cal.3d 57, 100.) Thus, where the prosecution introduces evidence of the defendant's unadjudicated prior criminal conduct, the jury should be instructed at the penalty phase that an accomplice's testimony must be corroborated. (*People v. McDermott, supra,* 28 Cal.4th at p. 1000; *People v. Mincey, supra,* 2 Cal.4th at p. 461; *People v. Easley* (1988) 46 Cal.3d 712, 734.)

1. Avery Was Not An Accomplice As A Matter Of Law

First, appellant's claim fails because, as a matter of law, Avery was not an accomplice to the Kansas crimes. An "accomplice" is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.)

> "Whether a person is an accomplice within the meaning of section 1111 presents a factual question for the jury 'unless the evidence presents only a single inference.' [Citation.] Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed.' [Citations.]"

(*People v. Williams* (1997) 16 Cal.4th 635, 679.)

Here, for Avery to be an accomplice to the Kansas crimes, she would have had to act with knowledge of appellant's criminal purpose and with the intent to encourage or facilitate the commission of the offenses. (See *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91.) Providing assistance without sharing appellant's purpose and intent is insufficient to establish that Avery was an accomplice. (*People v. Sully, supra,* 53 Cal.3d at p. 1227.) During the penalty phase, Avery admitted she accompanied appellant from Colorado to Lawrence, Kansas. (7RT 1835.) After they arrived at a motel in Lawrence, they ate and shopped at a Woolworth's. (7RT 1835-1836.) When they returned to their motel, appellant and Harris discussed the possibility of robbing the Woolworth's. (7RT 1837.) Avery denied participating in this discussion. (7RT 1837.) Later that evening, appellant, Harris, and Avery, drove to the Woolworth's. Appellant and Harris were armed with guns, but Avery was unarmed. (7RT 1837-1838.) At the request of either appellant or Harris, Avery looked into the Woolworth's, and she reported to them that she saw a few people inside the store. (7RT 1838.)

When she returned to the car, she saw Harris "walking the manager" (apparently Norwood) out of the store to the car. (7RT 1839-1840.) Appellant and Harris pushed the manager to the floor of the car and asked him about the store's money. (7RT 1841.) Appellant hit the manager's head with a pistol, and either appellant or Harris took his wallet and camera. (7RT 1842-1843.) Appellant asked Harris if he remembered what they spoke about earlier, and Harris replied, "Yeah." (7RT 1843.) Avery believed they were "talking to each other in code," and, at the time, she did not know what they meant. (7RT 1843.) With the manager still inside the car, Harris drove for approximately 10 minutes to a dark area near some railroad tracks. (7RT 1843-1844.) Appellant pulled the manager out of the

car, and Harris also exited the car. (7RT 1844-1845.) Avery then heard the sound of two guns being fired. (7RT 1845.) Avery denied being involved in the robbery plan, and denied there was any conversation about killing anybody: "I just rode along. I didn't – I surely didn't think there was going to be anyone [*sic*] get killed." (7RT 1849.) Michael Malone, who testified at the penalty phase, also provided further evidence that Avery was not an accomplice.[5] Malone testified that, in 1977 through 1979, he prosecuted appellant in Kansas for the kidnapping, aggravated robbery, and first degree murder, of Norwood. (7RT 1825, 1828.) He testified that he never planned to charge Avery for those crimes. (7RT 1829.) Accordingly, since Avery was not an accomplice to the Kansas crimes, the court did not err by not instructing the jury that her testimony required corroboration or that it should be viewed with caution.

2. Appellant Was Convicted Of The Kansas Crimes To Which Avery's Penalty Phase Testimony Pertained

Even assuming, arguendo, Avery was an accomplice, appellant's claim fails because appellant was convicted of the Kansas crimes to which Avery's penalty phase testimony pertained. As explained by this Court in *People v. Hernandez* (2003) 30 Cal. 4th 835,

> when the prosecution uses accomplice testimony at the penalty phase of a capital case to show that the defendant has engaged in violent criminal acts, the trial court must give the instructions on its own initiative, *unless the defendant has been convicted of the crime to which the penalty phase testimony pertains.*

(*Id.* at p. 874 (emphasis added), citing to *People v. Williams, supra*, 16 Cal.4th at pp. 275-276 ["we have not interpreted the statutory corroboration requirement to extend to cases where 'a jury ha[s] already found defendant

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[5] At the time of the penalty phase, Malone was a judge in Lawrence, Kansas. (7RT 1824.)

guilty, beyond a reasonable doubt' of the aggravating prior crime"]; *People v. Mincey, supra*, 2 Cal.4th at p. 461; see also *People v. Tobias* (2001) 25 Cal.4th 327, 331.)

Here, during the penalty phase, the prosecutor elicited the testimony of Malone to establish appellant's convictions for the Kansas crimes. (7RT 1823-1824.) As stated, *ante*, Malone testified that, in 1977 through 1979, he prosecuted appellant in Kansas for the kidnapping, aggravated robbery, and first degree murder, of Norwood. (7RT 1825, 1828.) Malone testified that after a five-day jury trial, appellant was found guilty of all charges. (7RT 1828.) Malone brought with him official court documents which reflected appellant's convictions for those crimes, which was marked as an exhibit (People's 27) and later admitted into evidence. (7RT 1828-1829, 1866.) Accordingly, even if Avery had been an accomplice with respect to the Kansas crimes, the court was not required sua sponte to instruct the jury that her penalty phase testimony about appellant's involvement in those crimes required corroboration.

3. Any Error Was Harmless

In any event, any error was harmless. A conviction may be based on accomplice testimony where there is sufficient corroborating evidence that tends to connect the defendant with the commission of the offense. (§ 1111.) However, a conviction will not be reversed for failure to instruct on the law of accomplices if review of the entire record reveals sufficient evidence of corroboration. (*People v. Lewis* (2001) 26 Cal.4th 334, 370; *People v. Frye* (1998) 18 Cal.4th 894, 966, 959 P.2d 183.) Corroborating evidence "must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged. . . [Citation.]" (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1206, internal quotation marks omitted; *People v. Zapien* (1993) 4

Cal.4th 929, 982, 846 P.2d 704.) The corroborating evidence need only be slight, such that it would be entitled to little consideration if standing alone. (*People v. Sanders* (1995) 11 Cal.4th 475, 534-535.) It is enough that the corroborative evidence connects the defendant with the crime in a way that may reasonably satisfy a jury that the accomplice is telling the truth. (*Id.* at p. 535.)

Here, Malone corroborated Avery's testimony regarding appellant's involvement in the Kansas crimes. Malone testified during the penalty phase that Norwood was a manager of a Woolworth's store in Lawrence, Kansas. (7RT 1825.) Malone personally went to the scene where Norwood's body was discovered. (7RT 1826.) Malone, like Avery, described the area as a "remote area near the railroad station." (*Compare* 7RT 1826 *with* 7RT 1844.) Malone's testimony that Norwood's body suffered four gunshot wounds to the back of his head, and that shell casings were found near his body, was consistent with Avery's testimony that she heard multiple gunshots after Norwood was dragged out of the car. (*Compare* 7RT 1827, 1831-1832 *with* 7RT 1845.) Malone also testified Avery personally spoke to him about appellant's involvement in the crimes. (7RT 1829-1830.) For these reasons, Malone's testimony did far more than "tend[] to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the trier of fact that the witness who must be corroborated is telling the truth." (*People v. Rissman* (1957) 154 Cal.App.2d 265, 277.)

Finally, Respondent has already demonstrated in its opening brief that the evidence against appellant was overwhelming as to each and every count alleged against him. Given the strength of the evidence and the fact that the jury had already been instructed with the accomplice corroboration instructions during the guilt phase, it is not reasonably possible that he would have received a more favorable result had those instructions been

repeated during the penalty phase. Accordingly, any instructional error was harmless.

D. The Cumulative Effect Of Any Errors Did Not Prejudice Appellant

Appellant next argues that the cumulative effect of the alleged penalty phase errors require a new penalty phase. (SAOB 91-93.) Respondent submits that the cumulative effect of any errors did not prejudice appellant.

To determine whether errors are sufficiently grave to mandate reversal, it is necessary to look at the cumulative effect of the errors. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907; see also *People v. Pitts* (1990) 223 Cal.App.3d 606, 815.) Reversal is appropriate only where the appellant has demonstrated that he was prejudiced by such errors. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1382; *People v. Mayfield* (1997) 14 Cal.4th 668, 790.)

As set forth in the preceding arguments all of appellant's claims of error are unmeritorious and/or any error was harmless. "Zero plus zero" still equals zero. (*Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1358; see also *Moore v. Reynolds* (10th Cir. 1998) 153 F.3d 1086, 1113 ["Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors"]; *Mullen v. Blackburn* (5th Cir. 1987) 808 F.2d 1143, 1147 ["Twenty times zero equals zero"].) Appellant has failed to demonstrate a cumulative effect from any errors. (See, e.g., *People v. Smithey, supra,* 20 Cal.4th at p. 1017; *People v. Ochoa* (1998) 19 Cal.4th 353, 435.)

Any such errors, even when viewed collectively, were inconsequential in light of the strong evidence of appellant's guilt as to the offenses of which he was convicted and the weak nature of his defenses. (See *People v. Bradford, supra,* 15 Cal.4th at p. 1382.)

A defendant is entitled to a fair trial, not a perfect one. (*People v. Welch* (1999) 20 Cal.4th 701, 775.) Even assuming, arguendo, any error(s) existed, appellant has at most shown that his "'"trial was not perfect – few are,"' especially few of the length and complexity of this trial. There was no prejudicial error either individually or collectively." (*People v. Cooper* (1991) 53 Cal.3d 771, 839, citation omitted.) Appellant received a fair trial. His claim fails.

VIII. APPELLANT'S CONSTITUTIONAL CHALLENGES TO CALIFORNIA'S CAPITAL SENTENCING SCHEME ARE MERITLESS

Appellant next raises various challenges to California capital sentencing scheme. He acknowledges they have all been rejected by this Court in previous decisions, but includes them in his supplemental opening brief for the sole purpose of preserving them for further review. (SAOB 94-97; *People v. Schmeck* (2005) 37 Cal.3d 240.) These claims fail for the same reasons stated by the decisions of this Court cited in appellant's supplemental opening brief and the arguments included in respondent's brief. (SAOB 94-97; RB 106-117.)

CONCLUSION

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

Dated: February 28, 2011

Respectfully submitted,

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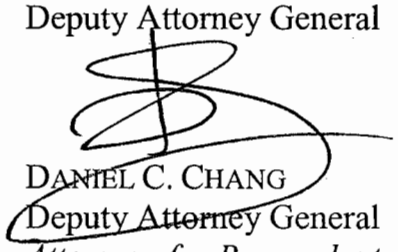

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 12,029 words.

Dated: February 28, 2011

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Sandra Fan
Declarant

Signature

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