IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TIMOTHY RUSSELL,

Defendant and Appellant.

S075875

CAPITAL CASE

County Superior Court No. RIF72974
The Honorable Patrick F. Magers , Judge

RESPONDENT'S BRIEF

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INTRODUCTION

After repeatedly telling others of his disdain of police and those in authority, and remarking that it "wouldn't bother him a bit to shoot a police officer,"on January 5, 1997, Russell premeditatedly and deliberately and while lying in wait, murdered Riverside County Sheriff's Deputies Michael Haugen and James Lehmann as they responded late at night to a domestic disturbance call at Russell's home. Russell had routinely abused his wife; this time kicking her in the groin and pulled her hair before he threatened to kill her, her sister and police. When in the dark early morning hours the deputies approached Russell's home with their guns still holstered, Russell took aim and shot and killed both of them. Neither deputy had time to unholster his weapon.

A jury convicted Russell of the murders of both deputies and found the gun use and special circumstance allegations of intentionally killing each deputy while the deputy was performing his duty. The same jury could not reach a verdict in the penalty phase, and the court declared a mistrial. On retrial of the penalty phase, a second jury found the death penalty to be the appropriate punishment.

On appeal, Russell raises numerous issues, including challenges to CALJIC No. 2.03, the trial court's handling of a jury misconduct issue, the

lying in wait instruction, and the admission of victim impact evidence. He also raises numerous challenges to California's death penalty law which have been repeatedly rejected by this Court. None of Russell's claims have merit.

STATEMENT OF THE CASE

On February 13, 1997, the Riverside County Grand Jury indicted Russell in Counts I and II with first degree murder (Pen. Code, § 187[1]), in Count III with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1), and in Count IV with inflicting corporal injury to his spouse – a misdemeanor (Pen. Code, § 273.5, subd. (a)). (1 CT 5-8.) Counts I and II further alleged Russell used a rifle during the commission of the murders (Pen. Code, §§ 12022.5, subd. (a), 1192.7, subd. (c)(8)), that he intentionally killed Riverside County Sheriff's Deputies Michael Haugen and Jim Lehmann during the performance of their duties as peace officers (Pen. Code, § 1290.2, subd. (a)(7)), that he intentionally killed the deputies while lying in wait (Pen. Code, § 190.2, subd. (a)(15)), and that he intentionally murdered multiple victims (Pen. Code, § 190.2, subd. (a)(3)). (1 CT 508.)

On February 13, 1997, Russell pled not guilty to the charges and denied the special allegations. (1 CT 9.)

Prior to closing argument, the trial court granted the prosecution's motion to dismiss the misdemeanor count. (12 CT 3384; 11 RT 1298.) On, September 4, 1998, the jury found Russell guilty as charged and further found all special circumstance and gun use enhancements true. (13 CT 3483-3492.)

The penalty phase trial commenced on September 8, 1998. (13 CT 3499.) On September 18, 1998, the court declared a mistrial after the jury reported it could not reach a verdict as to penalty. (13 CT 3581.)

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1. All section references are to the Penal Code unless otherwise stated.

A second penalty phase commenced on November 16, 1998. On December 3, 1998, this second jury found death to be the appropriate punishment. (21 CT 5851, 5853.)

On January 8, 1999, the court denied Russell's motion for new trial and/for modification of the verdict and imposed a judgment of death as to counts one and two and further imposed concurrent four year gun use enhancements on each count. (21 CT 5857-5870, 5883-5890-5892.)

This appeal is automatic. (Cal. Rules of Ct., rule 8.600(b).)

STATEMENT OF FACTS

Russell's History Of Assaulting His Wife, Elaine Russell

As of 1997, Russell and Elaine Russell had been married for eight years. (8 RT 956.) They lived with their ten-year-old son, Douglas, and eight-year-old daughter, in a home in Whitewater. A week before Christmas 1997 Elaine's sister, Beverly Brown, moved in with them. (6 RT 650; 8 RT 956-957.) Russell and Elaine had been having problems in their marriage for quite some time. (6 RT 646; 8 RT 977 [Elaine Russell had called police on prior occasions and they had taken Russell to jail].)

In October 1989, Russell and Elaine Russell argued about his being drunk and coming home late. Russell threw furniture. Elaine told him he was acting like a child. (8 RT 973.) Russell choked Elaine causing her to be unable to exhale a cigarette she has just inhaled. When Russell let go, Elaine phoned 9-1-1 and reported that her husband had just choked her. While she was on the phone, Russell ripped it out of the wall. (8 RT 973.)

Russell grabbed a .22 caliber handgun and pointed it at Elaine's head. Her last thought was of who would take care of Douglas. (8 RT 974.) Russell threatened Elaine that if she called police he would kill her and the police. (8 RT 976.) As Russell screamed and yelled, Elaine took Douglas and hid in a

nearby field. Eventually she heard her garage phone ringing. She answered the phone and told the 9-1-1 operator that her husband had torn the phone from the wall. As the dispatcher told her not to move, Russell approached and Elaine dropped the phone. Russell "whipped" a bunch of tools, making "such a shatter, [it] sounded like gunshots." (8 RT 975-976.) When he ripped the phone from the wall, Elaine ran to an adjoining field. Russell left and the police arrived. (8 RT 976.)

Russell's Proficiency With Guns

Russell "always had different weapons. . . he knew his guns." (5 RT 594.) For instance, he owned a .22 caliber Uzi and a small handgun. (5 RT 594, 599.) In October 1993, Russell purchased a used M-1, .30 caliber rifle. (5 RT 573-574, 576, 580.) Russell used the gun in target practice. He practiced by shooting at what appeared to be human form "silhouettes" about two feet tall with shoulders and heads made of quarter gauge steel in the hills of the Coachella Valley in Whitewater. (5 RT 581 586, 599, 601.) Russell was described as a "very good shot.". . . he was "[v]ery accurate" and "astute with weapons."[2/] (5 RT 582, 593.) Russell "took great care in his shooting: he took a good stance and aimed carefully before he shot." (5 RT 608; but see 5 RT 607 [friend David Harrison testifies Russell was not that accurate of a shooter].) The M-1 rifle was his baby. (5 RT 959.)

Russell's Conduct Immediately Before Shooting Deputies Michael Haugen And Jim Lehmann

On January 3, 1997, two days before Russell shot and killed two Riverside County sheriff's deputies, Russell visited his friend, Jeffery Alleva. (5 RT 613.) Russell first met Alleva when each was smoking pot. (5 RT 622.)

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2. Friend, David Harrison, testified Russell had a fair, but not extensive, knowledge of weapons. (5 RT 601-602.)

Alleva was an alcoholic but had been sober for 19 years. (5 RT 621.) He had not seen Russell for about three years prior to that day. (5 RT 613-614.) Russell visited Alleva for a good portion of the day. Russell told Alleva he had left home the previous evening and was going to live in the shop where he worked. He stated he needed to get his life in order. Russell consumed no alcohol at Alleva's house. He told Alleva he had not used drugs for three to three and one-half months. He appeared sad, concerned, and resigned that he needed to make changes. (5 RT 614-616, 25.) Russell left saying he was going to the shop. (5 RT 617.)

Russell returned to Alleva's the next day. His demeanor was the same and he displayed no unusual behavior. He only appeared sad about his family situation. (5 RT 617-620.) He left around 8:30-10:00 p.m. (4 RT 617-620.)

Later that same evening, Russell went to the Red Barn Bar in Palm Desert. He drank three or more Coronas between 10:30 and 11:00 p.m. He was never loud or boisterous and never had problems with other customers. (5 RT 633-636, 638.) Russell left the bar between 12:50 and 1:00 a.m. (5 RT 637.)

Russell's Continued Violence Towards Elaine

The violence toward Elaine continued. Eventually, on Friday, January 3, 1997, Russell moved out of the house when Elaine confronted him about her suspicions that he was using drugs. (6 RT 649; 8 RT 957, 960.) Both Russell and Elaine previously had used methamphetamine. (8 RT 979.) For the next two nights, Elaine and Beverly slept together in the Russell home. (6 RT 651.) That Friday, however, before Russell left the house he told his wife he "just [couldn't] forgive the past." Elaine replied, "F-off," and slammed the door. (9 RT 960.) Because she suspected him of still using drugs, Elaine wanted Russell out of the house. (9 RT 960.) Russell did not come home on Saturday night. (9 RT 961.) The women were awakened at 2:30 Sunday morning by Russell;

he had returned and turned on a light. (6 RT 651; 8 RT 962.) Russell asked Beverly if he could talk to her; she agreed. (6 RT 651.) Beverly got up and went into the front room. Russell was drinking a large bottle of beer. (6 RT 652; 8 RT 962.) Elaine told Beverly she did not think Russell would kill them. (8 RT 963.) Russell told Beverly that his marriage was over. Beverly wanted Russell to know he could talk to her. (6 RT 653.) He appeared angry or disturbed, but not in a way that concerned Beverly. (6 RT 654.) All the while, Russell did not raise his voice and his mannerisms were not out of control. (6 RT 654.)

During the next 10 minutes Russell's demeanor began to change; he got louder, his gestures got bigger, and he became agitated. (6 RT 654-655; 8 RT 963.) Eventually, Elaine came out of the bedroom and asked Russell to leave. Russell agreed and Elaine went to the bathroom. When she came out, she sat on the couch and again asked Russell to leave. (6 RT 656; 8 RT 964-965.)

When Elaine stood up, Russell kicked her in the groin, ripped out chunks of her hair, and knocked her to the ground. Elaine feared he was going to kill her. (6 RT 657; 8 RT 965.) When she finally was able to sit on the couch, Russell yelled not to "fuck with his job, his life and not to call the cops" or he would kill her. (6 RT 658; 8 RT 966, 977.) Prior to this, Russell repeatedly had expressed his dislike of police and those in authority. (5 RT 582-583, 592-593), saying it "wouldn't bother him a bit to shoot a police officer" (5 RT 583). Beverly and Elaine said they would not do anything; they wanted Russell to calm down and leave. (6 RT 658; 8 RT 966.)

Russell did not leave. As Elaine tried to call 9-1-1, Russell yanked the phone from the wall, leaving the women without a phone. (6 RT 659; 8 RT 965, 967.) Russell finally left in his truck. (8 RT 967.) When Russell left, Beverly went to console Douglas who was crying and shaken after seeing his father kick his mother. (6 RT 660-661.)

Meanwhile, Elaine quickly ran to the home of her neighbors, John and Twilla Gideon, to call police. (6 RT 661; 8 RT 967.) While Elaine was at the Gideons' house, Russell returned with his M-1 rifle. (6 RT 662-663; 8 RT 968.) Russell asked Beverly if she knew where the bullets were. She did, but first told Russell she did not know. (6 RT 663-664.) Russell then stuck the rifle in Beverly's face and threatened to kill her if she lied. (6 RT 664.) After pointing the gun at Beverly, Russell turned the rifle as if he was going to smash her face with it. (6 RT 664.) Beverly then told Russell where to find the bullets. (6 RT 665.)

Russell loaded the gun and threatened to hold Beverly hostage because he knew Elaine was calling the police. (6 RT 666-667.) When she asked him if he was going to kill her in front of his kids, and he responded that he would kill her and her boyfriend if necessary. (6 RT 667, 717.) Russell went outside and Beverly heard four or five gunshots. Russell then came back to the house and told Beverly to get out because he was first going to kill Elaine, then he was "going to kill the cops, they are on their way." He told her to run, or he was going to "take them down." (6 RT 668, 715-718, 720, 722.)

As Beverly ran with the children to the Gideons' house (8 RT 971; see also 6 RT 706 [lights on in Gideon home]), from approximately 38 feet she could see a police car approaching slowing on Chaparral. (6 RT 706.) Russell fired several shots in the air (6 RT 671-672; 8 RT 970, 983-984). Once at the Gideon home, the Gideons, Beverly, Elaine and the children laid low to the ground. Meanwhile, Mr. Gideon called 9-1-1. (9 RT 1127-1139; Exh. 124. [9-1-1- audiotape].) In the tape of the call, the shots fired by Russell can be heard as can the screaming of those in the Gideon home. Those in the home can be heard to say they see deputies arrive. Mrs. Gideon testified that once Beverly came to the house, she did not hear any shots for a few (or couple) of minutes. (6 RT 743.) Mr. Gideon also stated he believed he saw someone smoking a

cigarette near Russell's truck. From the Gideons' kitchen window, Mr. and Mrs. Gideon and Beverly saw two bodies on the ground. (6 RT 672-673.) Initially, Twilla Gideon could only see shadows as a security/vapor light was on. (6 RT 737, 745-746.) Within a couple of moments her eyes adjusted to the light, and she realized the shadows were two uniformed officers. (6 RT 737.) Meanwhile the 911 dispatcher tried to contact the deputies but received no response. (10 RT 1130, 1139; CT 3478; Exhs.122-123 [911 tape and transcript] 124-125 [dispatch tape and transcript].)

The Deaths Of Deputies Michael Haugen And Jim Lehmann

The two deputies who were the initial responders to the scene were James Lehmann and Michael Haugen.

Deputy Lehmann stood 73 inches tall and weighed 189 pounds. (9 RT 1167.) Deputy James Lehmann died from damage to his brain from a through and through gunshot wound to his head. (9 RT 1146, 1154, 1157.) The entrance wound was on the left side of his front left ear. (9 RT 1148, 1151.) The exit wound was on the right wide of his head. (9 RT 1150.) Deputy Lehmann probably lost consciousness when shot. The shot would literally have dropped him to the ground. He died within a few minutes of being shot. (9 RT 1154-1157.) The entrance wound was not consistent with having come from a ricocheted bullet. (9 RT 1156.)

Deputy Haugen stood 74 inches tall and weighed 174 pounds. (9 RT 1166.) Deputy Haugen was shot in the chest where a bullet was still lodged. He also was shot through the bottom of his toe. (9 RT 1120-1121, 1157-1159.) The pathologist opined that the chest wound was caused by a bullet passing through Deputy Lehmann's bullet proof vest prior to entering his chest. Such high velocity projectiles that can pierce a bullet proof vest are only seen with higher powered rifles like assault rifles. They are not usually associated with handguns. (9 RT 1170.) The trajectory of the bullet was from left to right, from

front to back and upward about 10 degrees. (9 RT 1163.) Deputy Haugen died from the gunshot wound through his chest. The bullet perforated his lungs and severed his aorta. It was a fatal wound causing death within minutes and incapacitation "rather immediately." (9 RT 1165.)

When their bodies were found both Deputy Haugen and Deputy Lehmann still had their sidearms snapped, closed and holstered. (7 RT 873-874, 877.)

The Arrest Of Russell

Deputies had searched for but were unable to find the killer. The next morning, however, Deputy Lundgren saw a person matching the description of the suspect emerge from the desert brush to the west of him; that person was Russell. (7 RT 823, 825.) Russell looked from side to side and walked directly across the street to the house. (7 RT 825.)

Lundgren and two other deputies, all of whom were armed with 12-gauge shotguns, approached Russell. (7 RT 826.) Russell, who was holding his hood over his head (7 RT 829-830), stopped and looked towards his house (the area where the deputies had been shot). (7 RT 827.) He remained there for about a minute. He glanced directly at the deputies who were now jogging towards him. (7 RT 827.) Russell then disappeared through the oleander bushes into the backyard. (7 RT 828.) The deputies took Russell into custody between 7 and 7:30 on that morning. (8 RT 1016; see also 7 RT 821, 828-829.)

Forensic Evidence

Russell had no methamphetamine, cocaine, opiates (morphine or codeine), alcohol or lithium in his blood. (8 RT 1027-1031.) He did have blood on the right side of his face. (9 RT 1081-1082.)

Testing of the M-1 Carbine rifle showed it operated with no problems. (8 RT 1051-1052.) Department of Justice Senior Criminalist James Hall compared the 12 expended casings found at the end of Sagebrush and the five rounds found in front of Russell's home with five live rounds. (8 RT 1053-1054.) He concluded that all casings probably were fired by that M-1 Carbine, but he could not be certain because of the poor reproducibility in the markings on the tests casings and the evidence casings. (8 RT 1054-1055.)

Hall also tested the gun for ejection patterns to determine where the expended casings would land relative to the position of the shooter. (8 RT 1055.) Hall fired the gun 40 times: 10 shots while holding the gun in a sitting position; 10 from a prone position with his stomach and elbows on the ground holding the rifle a little over a foot off the ground; and 10 from a prone position with the rifle diverted about 10 degrees to the left. (8 RT 1056.) Each time the casings ejected to the right and rear of the shooter. (8 RT 1059-1062.) The closer the gun was to the ground, the closer the expended casings were at their final resting place. The higher the gun was from the ground, the further the casings would travel and the more dispersed they would be. (8 RT 1059.) From a standing position the gun was five feet, two inches from the ground. From a sitting position the gun was two feet, three inches from the ground. From a prone position or lying down, the gun was one foot, two inches from the ground. (8 RT 1058-1060.) The closer the shots were fired from the ground, i.e., in a prone position, the closer the ejection pattern of the casings were on the ground. (8 RT 1061-1062.)

Steven Dowell, a Criminalist for the Los Angeles County Coroner's Office and an expert who had testified on gunshot residue over 600 times (8 RT 1088, 1107), testified to the unique and consistent particles of gunshot residue found on Russell's hands and the right side of his face. (9 RT 1098-1100.) He compared those particles to those from expended cartridges (Exhibits 24 & 25),

and found "very similar chemical composition to samples found on Russell's hand and face." Dowell opined that the gunshot residue particles found on the cartridges could have been the source of the particles found on what were Russell's hand and face. (9 RT 1100.) Hall testified it was reasonable to conclude that the shooter had a heavy amount of gunshot residue on his face to start. (9 RT 1110.) If the reside was on the person's face it would mean the gun was held close to his face. That could account for residue left on the shooter's hands and from touching his face. (9 RT 1110-1111.)

Interviews Of Russell

Initially Russell declined to be interviewed. Later, however, he said he wanted to talk. He waived his *Miranda*[3] rights and a taped interview occurred. During the interview on several occasions Investigator Spidle asked Russell if he was using speed (methamphetamine). (7 RT 833; Exh. Nos. 30 & 31 [videotapes of initial interview].) During the interview Russell was able to draw the location of his house in relations to the Gideons', and where Deputies Haugen and Lehmann were when he shot them. (7 RT 834.) Russell drew a diagram of where he saw patrol cars prior to the shooting. He was able to distinguish between the car's driving and parking lights. (7 RT 835.) In the interview Russell drew a diagram of the path he took from his home to where he fired shots killing the deputies. (7 T 836.)

Deputies returned to the scene with Russell. Russell instructed the deputies as to where he was when he shot the deputies Haugen and Lehmann by showing them his location at that time. (7 RT 838, 840.) Russell demonstrated how he was standing when he fired the gun. (7 RT 841; Exhibit Numbers 36 & 37 [photos of Russell's re-enactment of position when he shot

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3. (1966) *Miranda v. Arizona*, 384 U.S. 436.

and killed the officers].) Although during the interview Russell told the deputies he had knelt down when he shot, during a video reenactment, Russell crouched down. (7 RT 840, 842.) Expended shell casings were found in that same area. (7 RT 840.) When showing deputies how he moved toward the officers as he fired the shotgun, Russell was not satisfied they were in the correct location and he told the deputies to "'[m]ove up.'" Russell calculated the distance and position and the officers moved up to where Deputies Haugen and Lehmann had been shot. (7 RT 843-844, 857.) Russell claimed he fired in front of the deputies. (7 RT 845.) He stated, "'I started shooting in front of the deputies. The rounds hit the ground, causing sparks. I saw the deputies go down. I didn't see them anymore.'" (7 RT 858, 864.)

Afterward, Russell was taken to the Indio Jail. (7 RT 849.) Just prior to booking him, Investigator Spidle spoke to Russell in a tape recorded conversation. (7 RT 849; Exh. 90.) The next morning, January 6, 1997, Investigator Spidle videotaped another interview of Russell. (8 RT 995, 998; 1 CT 100-146; Exh. 33.) In the interview, Russell admitted seeing the patrol cars approach, when he saw the silhouettes of the deputies, he stated he shot down in their direction to back them off, but did not shoot at them.

During the interview Russell agreed to show deputies where he had hidden the gun. He took them into the desert where the deputies found the rifle near a tree stump; there was one live round and three magazines under the rifle. (7 RT 852-855.) Additionally, investigators found 12 .30 caliber shell casings at the west end of Sagebrush, five near Russell's home. No other type of casings were found. (7 RT 878-780.)

When processing the scene, investigators found two groupings of shell casings which signified four rounds were discharged at one target and eight rounds at the second target. (7 RT 924-925.) Expended .30 caliber casings, stamped LC-52, were found in the back of Russell's truck. (7 RT 927.) Those

casings matched the LC-52 rounds found with Russell's M-1 Carbine that had been hidden in the desert. (7 RT 904-905.)

Defense

Riverside County Sheriff's Sergeant David Wilson testified that he heard Russell tell a California Highway Patrol Officer that he had been running southbound on a dirt path. He stated that when the deputies walked into the intersection, Russell said they were crouched down and quickly approaching his residence. (10 RT 1214-1215.) Russell told the CHP officer that the deputies had been crouched down and quickly approaching his residence. (10 RT 1214-1215.) Russell told the CHP Officer that as the deputies approached he crouched down and shot toward the deputies and "pointed his gun at the ground" and started shooting. After firing he did not see the deputies any longer. (10 RT 1214-1217.) Instead he ran toward the mountains. (10 RT 1216.)

Charles Darnell, Jr., who retired after 12 years in the Special Forces Group, West Coast Advisor of the United States Army and who trained with the Los Angeles SWAT team (10 RT 1240), testified as to his familiarity with the M-1 carbine rifle. He stated the M-1 kicks to the right when shot by a right handed shooter. (10 RT 1231.)

Darnell reviewed a portion of Russell's Army records. Russell enlisted in August 1977 and went through basic training. (10 RT 1224.) Because Russell wanted to become a medic, he was taught only the fundamentals of shooting. (10 RT 1226-1226.) One of those fundamentals was how to use a steady squeeze when firing a weapon. (10 RT 1232.) Russell qualified as a marksman. Darnell testified a person does not have to be very good to obtain marksmenship but with Russell's score, but he qualified as a sharpshooter. He did not receive any advanced weapon training as a sniper. (10 RT 1232-1233, 1237.) Army records show Russell worked as a litter bearer and later an

ambulance driver. (10 RT 1235.) Darnell testified that the M-1 Carbine was not regarded as a sniper weapon as it does not have the control and accuracy needed for sniping. (10 RT 1238.) He believed that the more rapid a shot is fired after the first shot, the less control the shooter has over the M-1. (10 RT 1239.) On cross-examination, Darnell conceded that if shooting the M-1 50 yards from a target, the shooter probably would not have to consider wind as when shooting from 300 yards. (10 RT 1246-1247.) He stated he would shoot kneeling if he could. (10 RT 1244.)

Detective Spidle testified to the results of a videotaped demonstration performed on March 20, 1997, with the M-1 Carbine. (10 RT 1247-1248; Def. Exh. D.) The results showed that when 12 rounds were fired as fast as possible, they were fired in 4.85 seconds. When the test was repeated a second time they were fired in 2.6 seconds. When the M-1 was deliberately fired at a less rapid rate it took 10 seconds. (10 RT 1249-1250.) The test, however, did not measure accuracy, only timing. (10 RT 1251.)

Rebuttal

Adrian Ruiz, a civilian in charge of the Riverside County Sheriff's Department's Training Center for the past 12 years, was a member of the Military Special Forces Reserve and shot with the Army Pistol/Rifle Team for four years. Ruiz testified that the M-1 Carbine in this case worked properly and shot accurately when test fired from a kneeling position. (10 RT 1258-1260.) Ruiz had not fired an M-1 since 1986 or 1987, but performed rapid fire testing from 74 yards while kneeling from 215 feet. (10 RT 1261-1263.) He also testified that only a high wind of 50 to 60 miles per hour would affect the bullets shot out of an M-1 from a distance of 132 feet. (10 RT 1275.)

Penalty Phase Retrial

Circumstances of the Crime

The original jury that found appellant guilty of first degree murder and the special circumstances true at the first trial, hung in the penalty phase and a mistrial was declared. A new jury heard the evidence in the penalty phase retrial. Consequently, the parties devoted significant time presenting evidence of the circumstances of the crime to the second jury. That evidence was in large measure the same evidence as that heard in the original guilt phase. Thus, with few exceptions which respondent notes in this brief, respondent does not reiterate those facts.

Victim Impact Evidence

The Lehmann Family

At the time Russell murdered Deputy Lehmann, Deputy Lehmann and his wife, Valerie, had been married for 19-1/2 years (27 RT 2738), their son, Christopher, was ten and their daughter, Ashley, was six. (27 RT 2741.) Jim Lehmann had wanted to be in law enforcement since he had met Valerie; he dreamed of being a police officer. (27 RT 2745, 2753.

On the day of the shooting, when a San Bernardino County Sheriff's sergeant arrived to inform Valerie of Jim's death Valerie became hysterical. She called her family, told them Jim was dead, and asked them to come over right away. (27 RT 2753-2754.) After running to a friend's house to tell her, Valerie found both of her children crying, screaming and hysterical: someone else had told them their father had died. (27 RT 2755-2756.)

Deputy Lehmann had been very involved in the lives of his children. Jim participated in karate with Christopher. (27 RT 2757.) Christopher attained his black belt 13 days after his father was murdered. (27 RT 2757.)

Because Jim was no longer there to be with him, Christopher then lost interest in karate as well as other sports altogether. (27 RT 2757-2758.)

When Jim Lehmann was killed, Christopher was in the 8th grade. After his father's death, Christopher's grades dropped to Ds and Fs. He barely graduated from the 8th grade. (27 RT 2759-2760.)

Christopher became very emotional and extremely angry. He took it out on his mother, yelling and screaming at her, using profanity and telling her she was not keeping the house clean. (27 RT 2760.) Once Christopher became so angry he grabbed his mother until she finally pried him off her. (27 RT 2760-2761.) Christopher had never put his hands on his mother before. (27 RT 2761.)

Christopher's health deteriorated, too. He had suffered a grand mal seizure, and at the time of trial he suffered seizures requiring medication. (27 RT 2759-2760-2561.)

Christopher was a "[r]eal easy going" kid prior to his father's death. After, he was very emotional and lost. (27 RT 2769.) Shortly after his father's death, Christopher put his anger into words, writing that he wanted to kill himself. He wrote that he had nothing live for, his dad was gone, he had no friends, and he had given up on life. (27 RT 2771.)

At first, after her father was murdered Ashley retreated into her own world. (27 RT 2762.) She cried and wanted to run from everything. She would not even mention her father's name. (27 RT 2764.)

Valerie attended the funerals of her husband and of Deputy Mike Haugen. Christopher and Ashley attended their father's funeral and still visit his grave. (27 RT 2756.) Near the time of trial, Valerie, Christopher and Ashley attended a service in Washington, D.C., for all officers who were killed in 1997. (27 RT 2762-2763.) Jim's name is inscribed in an officers' memorial in Washington. (13 RT 1525-1527.)

On the one-year anniversary of the killing, Valerie took Christopher to the scene of the shooting (Ashley would not go). (27 RT 2766.) The experience was emotional for mother and son. Valerie was emotionally upset, but Christopher wanted to know the details of what had happened the night his father was killed. Crosses mark the spot where Jim Lehmann and Mike Haugen were murdered. (27 RT 2766.)

The Haugen Family

Deputy Michael Haugen's wife of 14 years, Elizabeth Haugen, testified that she and Michael had two children, 10-year-old Stephen, and soon to be three-year-old Katherine, who was 18-months-old when Michael died. (27 RT 2784-2785, 2792.) Elizabeth Haugen met Michael in 1982. They remained together until his death. (27 RT 2785.)

Michael put himself through the police academy. He graduated in 1989 and began working at the Hermosa Beach Police Department as a police services officer. (27 RT 2788.) Michael worked as a Riverside County Sheriff's Deputy almost a year to the day when he was murdered. (27 RT 27941462.)

Michael wrote a letter to his 15-year-old niece in England thanking her for a birthday gift. (27 RT 2811.) In the letter he spoke of how he was applying to the police department. He wrote, "'It can be rough and a little dangerous at times, but the benefits outweigh the risks. Aren't you glad you live in a civilized country?'" (27 RT 2811-2812.)

On Saturday, January 4, Michael prepared to work his last 10-hour shift before his three days off. (27 RT 2796.) While finishing his shave, Michael did something he had never done: he put aftershave on Katy and told her she would "'smell like daddy for the rest of the night.'" (27 RT 2796-2797.) As he left, Michael called out "good-bye, Boss," to Stephen and said good bye to Katy and Elizabeth. (27 RT 2798.) A few minutes later he returned saying,

"'Honey I'm home.'" The last words Elizabeth heard Michael say were, "'I am really going this time'" as he left for work. (27 RT 2798.)

At 5:30 a.m., Elizabeth's next door neighbor, Sherry, called and told Elizabeth to meet her downstairs. Sherry's husband also worked at the Sheriff's Department. (27 RT 2800.) Sherry and her husband, Omar, explained to Elizabeth that there had been a shooting and that Michael was involved. When Elizabeth asked if Michael was dead, Omar nodded yes. (27 RT 2801.) Omar went to take care of Katy who was crying, while Elizabeth and Sherry started cleaning the house. Although the Haugens' never smoked in the house, Elizabeth lit up a cigarette at the kitchen table. (27 RT 2802.)

Stephen did not talk about his father for some time. He went to his aunt's home in England for two weeks. Two to three days after arriving he said he was ready to go and to talk to his father in heaven; he said he was ready to be with him. (27 RT 2813.) Startled, his aunt told him he did not have to go to heaven to talk to his daddy, but that his daddy was everywhere with him, listening and watching him, and that he could talk to him any time. Stephen, however, did not want to talk to his father at that time. (27 RT 2813-2814.) During his stay, Stephen began talking more about his father. (27 RT 2814.) He also demonstrated with his hands his knowledge of shooting a gun. (27 RT 2814-2814.)

As with Christopher Lehmann, Stephen's grades began to plummet, and his behavior at school was appalling. (27 RT 2804, 2818.) When threatened with being sent to boarding school, Stephen thought it would be fun; he did not want to live with his mother, and he could get away from everything and everyone coming to their house. (27 RT 2819.) Eventually Stephen began seeing a psychologist. A doctor prescribed medication for depression both of which Stephen was taking at the time of trial. (27 RT 2804.) By the time of the penalty phase retrial, Stephen was doing much better and was a "nice, polite

young man. . . [l]ike how he used to be." (27 RT 2806.) At the time of trial, Stephen liked living at his boarding school and saw his mother only on the weekends. (27 RT 2819-2820.)

In response to Katy's question of where her daddy was, Elizabeth told her daddy was in heaven. (27 RT 2806.) Katy was 18 months old when her father was killed, so she does not have a real sense of who her father was. (27 RT 2806.)

On the Haugen's wedding anniversary the family placed flowers on the crosses where the deputies were shot. After arriving home, Katy told Elizabeth that she did not even get to see daddy and that they didn't get to bring him home. (27 RT 2807.) When Katy sees anyone in a sheriff's uniform, she runs up to the deputy, puts her arms around him and calls him daddy. (27 RT 2808.)

Elizabeth Haugen attended the funerals of her husband and Jim Lehmann. She also attended memorial services in Sacramento and in Washington, D.C. (27 RT 2808.) When asked about "closure" and those who commented that if this ever happened to them they hoped to be as strong as she was, Elizabeth stated, "But they don't live at my house. I have two young children I have to be strong, for, but at night, when I go in my bedroom, they're not there with me. They don't sit with me when I cry. They don't live my life." (27 RT 2808 2812.)

Ballistics Testing

Russell's M-1 carbine was test fired in March 1997 to see how fast the gun could be fired. (27 RT 2821-2822.) It took about 4.85 seconds to fire 12 rounds. (27 RT 2823.) The second test took 2.9 seconds. (27 RT 2823; see Exh. D [videotape of testing] (27 RT 2822). 12 rounds were used in the test because 12 expended casings were recovered at the end of Sagebrush. (27 RT 2822.)

Defense

Edward Verde, M.D., a physician at the Veterans Administration Medical Center (VA) in Loma Linda completed his residency in late 1992. At the time of the penalty phase retrial he was a "psychiatrist in training," working in the chemical dependency/addiction treatment unit (ATU). (28 RT 2845.)

Dr. Verde had no independent recollection of Russell; his testimony was based on Russell's medical records. (28 RT 2846.) Russell was first evaluated in an emergency room at the VA and diagnosed with suffering from drug and alcohol dependence. (28 RT 2847.) He was treated at the VA between February 8 and June 18, 1984, for drug and alcohol dependence. (28 RT 2846-2847.) At that time, Russell expressed homicidal thoughts and impulses, and had legal problems. (28 RT 2868, 2870.) Russell did not complete one entire ATU program during that time. During that time an in-patients program consisted of a month to six weeks in-patient treatment, then the patient would be discharged to a halfway house to continue aftercare. (28 RT 2848.) Russell went into a six month in-patient program three or four times, but the longest he stayed in a program was about four and one-half months. (28 RT 2847.) He completed the in-patient portion of the program but not the outpatient. (28 RT 2848.)

Russell returned in August 1984. Most patients are refused entry into the program because of their unwillingness and lack of motivation. (28 RT 2848-2849.) Russell's records did not indicate why he was not admitted. (28 RT 2849.)

From November 1986 to January 1987, Russell again attempted to complete the program, but failed to attend group meetings. (28 RT 2849.) In essence, "he walked." (28 RT 2850.) The records did not indicate whether Russell was admitted as an in-patient for the latest treatment. (28 RT 2850.)

Russell was next seen at the VA addiction clinic in March 1996. His memory, insight and judgment were intact, but he still was diagnosed as being amphetamine dependant in early full remission. (28 RT 2851, 2879.) His liver, however, was functioning normal. (28 RT 2872.) Russell returned in April for a follow-up appointment at which time he was diagnosed with being amphetamine, alcohol and marijuana dependent. (28 RT 2852-2853.) At that time, Russell reported "'feeling agitated,'" and having mood swings. (28 RT 2853.) He canceled a scheduled appointment in May, rescheduled it, but failed to show up. (28 RT 2859.)

At an April 12 appointment, Russell's records indicate he had homicidal ideations towards people who had betrayed him, but he displayed no definite places. He also displayed impulsivity – a lack of planning. (28 RT 2881.) To stabilize Russell's mood swings Dr. Verde prescribed a "very low dose" of lithium to Russell. (28 RT 2855, 2862, 2857.) The dose was below the therapeutic blood level. (28 RT 2858, 2862-2863.) When Russell returned to see Dr. Verde on April 26th he reported that he had been taking the lithium and that his overall feelings had improved; he was less irritable and less angry. (28 RT 2858.) Dr. Verde then increased Russell's lithium dosage from 300 mg twice a day to 300 mg three times a day. (28 RT 2858-2859.) Russell was to have returned in May but failed to do so. Dr. Verde had no further contact with Russell. (28 RT 2859.) If Russell had stopped taking the lithium he would not have experienced any adverse effects because the dosage was low and he had taken it far too short a time. (28 RT 2863, 2883.) Dr. Verde had treated thousands of patients, but none had been convicted of two counts of murder. (28 RT 2885.)

Jeffrey Alleva

Russell's friend, Jeffrey Alleva, saw Russell off and on for 20 years. From 1986 to 1996 their meetings were "real periodic." (28 RT 2896.) By the

time of trial, Alleva had been a recovering alcoholic for 19 years. (28 RT 2889-2890.) When he met Russell he believed Russell was an alcoholic. (28 RT 2890.) Russell went through a program and Alcoholics Anonymous to treat his alcohol problem, but was in and out of recovery. (28 RT 2890.)

On Friday and Saturday immediately prior to the murders, Alleva and Russell spent the days together. (28 RT 2890-2891.) On neither day did Russell seem hostile or angry; he wanted to make changes. (28 RT 2897.) On Friday, Russell spoke of wanting to resume his recovery. (28 RT 2892.) Russell told Alleva he had not used drugs "for a period of time," but had been using alcohol. (28 RT 2892.) Russell related that he was having marital difficulties, he could not take it anymore and had left, and he needed to get his life in order and get sober. (28 RT 2892, 2896-2897.) Russell left and spent the night at his place of work. (28 RT 2893.)

The next day Russell returned; Alleva did not see him drink any alcohol. (28 RT 2893.) Russell told Alleva he had not used methamphetamine for several months. (28 RT 2898.) Russell left between 8 and 10:30 p.m. (28 RT 2893, 2898.) Clothes and a rifle were in Russell's truck. Russell asked Alleva if he could store them at his house, but Alleva said no. (28 RT 2894.) When Russell left, Alleva thought Russell was returning to the shop. (28 RT 2894.)

David Wakefield

David Wakefield, a dental technician at a small laboratory in Palm Desert, hired Russell in the spring of 1996. (28 RT 2913.) Russell worked for one year. (28 RT 2899-2900, 2902-2903.) Wakefield described Russell as hard working, trustworthy and levelheaded. He never complained and performed "pretty well." (28 RT 2900.) Russell got along with the other employees and never became angry at them. (28 RT 2915.) Russell was punctual; "[j]ust typical employee." Shortly before Russell quit, Elaine Russell came to the lab and addressed the two employees in the lab about problems she and Russell

had. In essence she "dressed down" Russell. Russell was subdued and made no comment. (28 RT 2901, 2914.) After that he called one day and said he would not be coming to work anymore. (28 RT 2900, 2903.)

Melvin Wachs

Russell's employer of seven months, Melvin Wachs, hired Russell to work in his sign company. (28 RT 2905-2906.) Russell was an excellent worker; he was very meticulous and never had any problems. (28 RT 2906-2907.) Russell was hard working and fairly trustworthy. (28 RT 2918, 2927.) However, he could follow directions, was levelheaded and did not lose his temper. (28 RT 2931.) Russell never raised his voice or showed any sign of temper or having a problem with stress; he was "quiet." (28 RT 2907, 2927.)

In conversations with Wachs and fellow employees immediately prior to January 5, 1997, Russell discussed problems he had with his wife, the arrival of his sister-in-law at the house, and concerns about his children. He was very tense, under a lot of pressure and seemed indecisive about what to do. (28 RT 2908, 2922, 2928-2929.) On Friday, as Russell was drinking coffee, he said that he had the feeling his wife may have been putting speed in his coffee (not referring to this specific occasion). (28 RT 2911, 2922.)

Given his working hours, Russell had a key to the shop. (28 RT 2909.) On Friday before the murders Wachs refused Russell's request to stay at the shop. At one time Russell brought a rifle to work. (28 RT 2910.) Wachs would not allow Russell to keep the gun at work. (28 RT 2911.)

In the week prior to the shootings Russell became frustrated, upset, and mildly depressed. (28 RT 2912; 2919 [employee testifies Russell more edgy and uptight, and spoke of leaving home in the weeks prior to the murders].) Russell, however, was no different than other employees with personal concerns. (28 RT 2916.) After being arrested Russell called Wachs and asked that his last paycheck be sent to his wife. (28 RT 2916.)

Lucille Williams

Russell's mother, Lucille Williams, testified that Russell's father died when Russell was ten-years-old. (30 RT 3085.) Russell's father was a "sporadic" alcoholic. (30 RT 3086.) His drinking, however, never interfered with his relationship with her or Russell; he was "a very kind and loving husband and father." (30 RT 3092-3093.)

Williams remarried, but her second husband did not have a close relationship with Russell. (30 RT 3086.) When Russell was 13, his step-father caught him sniffing glue and beat him with a two-by-four, rendering him unconsciousness. (30 RT 3087, 3093, 3098.) Russell ran away from home when he was 14. He did not want his step-father in the house. (30 RT 3087.)

Russell did not finish high school but did get his GED. (30 RT 3088, 3094.) He moved in with his brother when he was 15. He attended continuation school because he had been ditching class. (30 RT 3094.) He ran away to a friend's house in Oklahoma or Kansas. (30 RT 3095.) He was 17 years old when he joined the Army. After his four years in the Army, Russell returned home where he held a steady job. (30 RT 3088.) He was neither drinking nor using drugs. (30 RT 3096.) In 1981, Russell was mugged; the assailants struck him on the head with a baseball bat, threw him into a dumpster and took his wallet. Russell was in a coma for four days. (30 RT 3089.) Before lapsing into a coma, Russell was easily frustrated. After, he became introverted and had mood swings. (30 RT 3090.)

Gordon Young

Gordon Ernest Young, was a pastor at the First Assembly of God Church in Redlands where the Russells attended church. (28 RT 2935-2937.) Over the years he had known Russell, Pastor Young had counseled him numerous times regarding the Russells' marriage. (28 RT 2937.) Russell's recurring problems centered on substance abuse and arguments with his wife.

(28 RT 2938.) Often Russell would show remorse and then weeks or months later be "back at it again." (28 RT 2950.) Pastor Young learned that Russell had beaten Elaine. (28 RT 2938.)

Throughout the years, Pastor Young felt that Russell was paranoid. (28 RT 2941.) Still, Russell volunteered for the counseling, sometimes with his wife, sometimes alone. (28 RT 2942.) About four months prior to Russell's arrest, Pastor Young concluded spiritual help alone would not solve Russell's problems. (28 RT 2952.)

Once, Russell brought an army rifle to Pastor Young for safekeeping. (28 RT 2946.) He gave the gun to Pastor Young because he wanted to remove it from his house so he could work on his relationship with Elaine. Sometimes Elaine told Pastor Young that Russell was threatening her, that he hurt her or that she was fearful of a gun. (28 RT 2946.) Elaine Russell appeared to sincerely want Russell to be a better man and husband, but she was afraid of what was happening. (28 RT 2947.) Pastor Young believed Russell partly "fudged" the truth to make himself look good in the counseling sessions. (28 RT 2849.)

Russell's Cooperation With Authorities

After handcuffing Russell, and placing him in a California Highway Patrol car, Detective Spidle *Mirandized* Russell. (29 RT 2968-2969.) Russell said he would show Spidle where the gun was but otherwise wanted to talk to a lawyer. (29 RT 2969.)

Russell directed and walked with deputies into a spot in the desert one mile north and then another mile on foot from Cottonwood. Russell then pointed to a log; the gun, additional magazines and a live bullet were on the ground. (29 RT 2970. 2988-2989.)

Prior to being taken to Riverside, Russell asked what had happened to the deputies; Spidle told him they were dead. Russell tilted his head back,

closed his eyes, and became a little teary eyed. (29 RT 2971.) Detective Spidle testified Russell was cooperative and though he used the word "remorseful" in his report to explain Russell's demeanor, the term "remorseful" was not semantically correct. (29 RT 2983.) Rather, Russell appeared regretful; he displayed disappointment or distress over his actions as opposed to moral anguish or compassion – the dictionary definition of remorseful. (29 RT 2984.)

After arriving at the Riverside station on January 5 at 11:32 a.m., Russell stated he wanted to talk to Spidle. Spidle *Mirandized* him again and then interviewed Russell for about two hours. At the end of the interview, Russell went with officers back to the scene. (29 RT 2972.) Once there Russell showed the deputies "some of the relevant locations with respect to the situation that occurred where the two deputies were killed." (29 RT 2973.) When they returned to the Indio Jail at 6:00 p.m., Russell and Detective Spidle conversed briefly. (29 RT 2973.) Russell had not slept and was booked into jail. (29 RT 2974.)

The next day Detective Spidle interviewed Russell for an hour or more. (29 RT 2974.) Russell answered every question, but never said he was sorry. (29 RT 2984-2985.)

Forensic Evidence

Forensic scientist Richard Whalley test fired Russell's M-1 rifle to determine ejection patterns. (29 RT 3006.) From 32 inches and it rotated on it's the test fired six or eight casings fell in an approximately 20 inch circle. (29 RT 3007-3008.) In a second test firing Whalley held the weapon at his hip (42 inches from the ground) and fired the rounds. Eleven of those rounds fell in an area, 19 by 17 inches. (29 RT 3008.)

Whalley also conducted an accuracy test and found the gun shot five inches high and to the left. (29 RT 2011-2012.) Whalley testified that if the gun was not brought down after each shot, the recoil would cause an

incremental change and the position of the barrel would continue to elevate upward, increasing the angle with each shot. (29 RT 2013.)

ARGUMENT
I.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON LYING-IN-WAIT AS A THEORY OF MURDER.

Russell contends the trial court erroneously instructed the jury on first degree murder by lying in wait, one of two theories advanced by the prosecution (the other being premeditation and deliberation). He suggests that because of the erroneous instructions and because it cannot be determined upon which theory the jury relied in convicting Russell of first degree murder, Russell's rights to due process and a fair trial under the state and federal constitutions were violated and require reversal of his convictions. (AOB 44 citing U.S. Const., Amends. 5 & 14; Cal. Const., art. I, §§5, 15 & 16.) Not only was the jury properly instructed on lying in wait as a theory of murder, but even if there was any defect in the lying in wait instruction, Russell was not prejudiced because the instructions on premeditated and deliberate murder were correct and substantial evidence supports the murder convictions under that theory.

Penal Code section 189 provides, in pertinent part, that a first degree murder conviction can be proved by proof beyond a reasonable doubt that the defendant committed the murder immediately after lying in wait, or by premeditating, deliberating and intentionally murdering the victim.

In *People v. Ceja* (1993) 4 Cal.4th 1134, 1140, this Court approved the standard instruction on murder by lying in wait, CALJIC No. 8.25 (1989 rev.). This Court concluded CALJIC No. 8.25 defines the crime as:

> . . . waiting and watching for an opportune time to act, together with [a] concealment by ambush or other secret design to take the other person

by surprise, even though the victim is aware of the murderer's presence. [¶] The lying in wait need not continue for any period of time provided its duration is such to show a state of mind equivalent to premeditation or deliberation.[4]

(*People v. Ceja, supra,* 4 Cal.4th at p. 1139.)

This Court has crystallized the elements of lying in wait murder as follows:

". . . (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. . . ." (*People v. Morales* (1989) 48 Cal.3d 527, 557. . . .

(*People v. Hardy* (1992) 2 Cal.4th 86, 163.)[5]

The element of concealment of purpose is satisfied when a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he literally be concealed from view before he attacks the victim. (*People v. Sims* (1993) 5 Cal.4th 405, 432- 433.)

No specific time must elapse to constitute a "substantial period of watching and waiting for an opportune time to act." (*People v. Morales* (1989) 48 Cal.3d 527, 554-555.) "The purpose of the watching and waiting element is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. (*People v. Stevens* (2007) 41 Cal.4th 182,

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4. At the same time, lying in wait "present[s] 'a factual matrix distinct from "ordinary" premeditated murder.' [Citation.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 795-796 [ellipses deleted].)

5. Notwithstanding a notation to the contrary in *Hardy, supra,* at p. 163, lying in wait murder does not require intent to kill, whereas the lying in wait special circumstance does require such intent. (*Ceja, supra,* at p. 1140, fn. 2.) The special circumstance also differs from lying in wait murder in that it requires the victim to have been killed *while* the defendant was lying in wait, whereas lying in wait murder may be committed when the killing is merely "immediately preceded" by the period of lying in wait. (*People v. Webster* (1991) 54 Cal.3d 411, 449.)

202.) """The element of concealment is satisfied by a showing """that a defendant's true intent and purpose were concealed by his actions or conduct. . . . The factors of concealing murderous intent, and striking from a position of advantage and surprise "'are the hallmarks of murder by lying in wait."'" (*Id.* at p. 202.)

Relying on *People v. Edwards* (1991) 54 Cal.3d 787, a case Russell acknowledges was decided before this Court's decision in *Morales,* Russell faults the trial court for instructing the jury with CALJIC No. 8.25. (AOB 52-55.) He argues the instruction does not correctly inform the jury that lying in wait murder requires that the jury find a substantial period of watching and waiting. Thus, he argues the jury could have convicted Russell on an erroneous theory of murder. (AOB 52.) CALJIC No. 8.25 as worded, however, has stood the test of time.

When the parties discussed the lying in wait instructions, Russell requested the jury be instructed:

> Murder by lying-in-wait requires that the perpetrator exhibit a state of mind equivalent to, but not identical to, premeditation and deliberation. This state of mind simply is the intent to watch and wait for the purpose of gaining advantage and taking the victim unawares in order to facilitate the act which constitutes murder.
>
> To establish murder by lying-in-wait the prosecution must prove the elements or concealment of purpose together with "a substantial period of watching and waiting for an opportune time to act, and . . . immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage."

(13 CT 3472.)

Without objection the court incorporated the first paragraph into its own special instruction. The court denied Russell's request to instruct the jury with the second special instruction finding it was not a proper statement of the law. (13 CT 3472: 11 RT 1292.) Even if the preferred instruction was a proper statement of the law, the instructions as given simply made the second

paragraph in Russell's requested special instruction repetitive of the elements of lying in wait as set forth in CALJIC 8.25. The trial court is not required to give repetitive instructions. (*People v. Manriquez* (2005) 37 Cal.4th 547, 580.)

CALJIC No. 8.25 combined with the court's own specially crafted instruction to which Russell did not object (11 RT 1293), stated:

> In order to establish First Degree Murder based upon lying in wait, the perpetrator must exhibit a state of mind equivalent to, but not identical to, premeditation and deliberation.
>
> This state of mind is the intent to watch and wait for the purpose of gaining an advantage in taking the victim unawares in order to facilitate the act which constitutes murder.
>
> The concealment which is required is that which puts the defendant in a position of advantage from which one can infer that the principal act of lying in wait was part of the defendant's plan to take the victims by surprise.
>
> It does not include the intent to kill or injury the victim.
>
> In order to establish Lying in Wait Murder, the prosecution must prove the crime involved the unlawful killing of a human being with malice aforethought. Malice may be express or implied.

(11 RT 1292-1293.)

While Russell has found no cases where a few seconds have been found "substantial" to support a first degree murder conviction based on a lying in wait theory (AOB 51), this Court's opinion in *People v. Hillhouse* (2002) 27 Cal. 4th 469, does just that. In *Hillhouse,* the defendant and the victim were traveling in a truck when the victim asked the defendant to stop so he could urinate. The defendant stopped the truck and as the victim was urinating-- "and hence particularly vulnerable"–the defendant attacked from his position of advantage. The victim had no opportunity to resist or defend himself from the stabbing the defendant inflicted. (*Id.* at p. 500-501.) Thus in the momentary amount of time it took the victim to get out of the truck and begin to urinate to the defendant stabbing the victim to death, a substantial period of time of

watching and waiting supported a lying in wait theory of first degree murder and the lying in wait special circumstance finding.

This Court recently concluded that even a short period of watching and waiting can negate an inference that a defendant acted out of rash impulse. (*People v. Stevens*, *supra*, 41 Cal.4th at p. 203 [when intended victims slowed down, the time to act became opportune].) The facts in this case dispel any inference that Russell acted on rash impulse when he murdered Deputies Haugen and Lehmann. The jury could reasonably have concluded that Russell was not attempting to scare the deputies so he could escape into the desert, but rather because he assumed a position to take Deputies Haugen and Lehmann unawares and to kill them. Russell took the time to force Beverly Brown to tell him where the bullets were. He took the time to load his M-1. He may have even taken the time to smoke a cigarette. He took the time to determine he should stealthily leave out the back door of his home where he could not be seen by the deputies or by all those at the Gideon house. He took the time to position himself so he could see the deputies but they could not see him, they had not even unholstered their weapons. Russell waited "to maximize his position of advantage before taking his victim[s] by surprise." (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1140; *People v. Hillhouse, supra,* 27 Cal.4th at p. 501.) Taking Russell's statements to Detective Spidle as true, Russell spent more than enough time waiting and watching before he shot Deputies Haugen and Lehmann for any reasonable jury to find him guilty of murder by lying in wait.

Moreover, the evidence was more than sufficient to support Russell's first degree murder convictions on either theory. Over time Russell repeatedly expressed his malevolence toward police and that night stated he would "take them down." (5 RT 582-583. 592-593; 8 RT 976.) Russell said it would not bother him to kill a "cop" and if need be, he would "take out a cop" that night. (See e.g., *People v. Cummings* (1993) 4 Cal.4th 1233, 1288-1289 [evidence

that defendant possessed a handgun and threatened to kill any police officer who got in his way supported elements of intent, premeditation and deliberation from which jury could infer intent to kill]; *People v. Rodriquez* (1986) 42 Cal.3d 730, 756 [contempt and hatred for police and generic threat repeated over time to kill any officer who attempted to arrest defendant admissible to show homicidal intent; repeated threats over several months preceding murders tended to show a design or intent to kill members of a class of persons under certain circumstances].)

Additionally testimony of the pathologist show the wounds inflicted on the deputies did not result from bullets ricocheting off the ground. (9 RT 1120-1121, 1156-1159.) Thus, Russell's claim that he aimed 25 feet in front of the deputies is devoid of any evidentiary support. He was a "[v]ery accurate and a very good shot." He practiced on targets that took a human form. (5 RT 581, 599, 601.) The murder weapon, Russell's M-1 Carbine, was his "baby" and he was extremely proficient with it. (5 RT 959.)

As if this evidence were not enough, Russell's fate was sealed when the jury heard evidence and saw the videotape of Russell taking the deputies into the desert where he hid the M-1. Russell did not surrender to authorities and provide them the gun until after he learned he had killed the two deputies.

Based on these reasons, the instructions on lying in wait murder were correct. Assuming there were any errors, based on the evidence and the elements necessary for premeditation and deliberation as a theory for murder there was more than enough evidence to sustain Russell's convictions and special circumstance findings. Accordingly, any error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705].)

II.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING RUSSELL'S GUILT AND PENALTY PHASE MOTIONS TO HAVE THE JURY VIEW THE SCENE OF THE SHOOTING.

Russell contends the trial court abused its discretion in denying both his guilt and penalty phase motions to have the jury view the scene of the shooting. (AOB 61-62, 66.) Russell tries to convince this Court that the lighting and weather conditions at the murder scene could be replicated. He maintains the trial court abused its discretion and violated his constitutional rights to a fair trial, present a defense and due process by not permitting the jurors to view the scene. (AOB 64.) The trial court properly exercised its discretion at the guilt phase in finding they could not because: (1) the lighting could not be replicated to show the deputies' visibility the night he killed them; (2) there was sufficient evidence at the time Russell ambushed the officers that it was "extremely black, extremely dark"; and (3) the real issue was whether Russell intentionally aimed at the deputies when he shot them, or whether he aimed in front of them and hit them when the shots ricocheted from the ground. (AOB 64-65). Thus, having the jury view the scene would have added nothing to the evidence already presented. Accordingly, the trial court properly denied Russell's request for the same viewing in the penalty phase for the same reasons. Thus none of Russell's state or federal constitutional rights were violated.

Penal Code section 1119 states:

> When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom, it may order the jury to be conducted in a body, in the custody of the sheriff, marshal or constable, as the case may be, to the place, or to such property, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor to

do so himself, or any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time.

The trial court's decision to permit such a viewing outside of the courtroom will not be disturbed on appeal in the absence of a clear abuse of discretion. (*People v. Pompa* (1923) 192 Cal. 412, 421.)

Prior to the guilt phase of trial, Russell filed a motion for the jury to view the crime scene. (2 CT 447-449.) Russell argued the viewing was necessary for the jurors to see what lighting existed at the time of the shooting as it related to the issue of intent. (2 CT 449.) When defense counsel raised the issue, he said it would be appropriate for the jury to view the scene at 8:00 p.m. because there would be issues as to "lighting, back-lighting, silhouetting, whether or not you could see people, whether or not other persons saw them." Counsel attempted to buttress his request with the fact that defense expert, Richard Whalley, had conducted tests with Russell's M-1 Carbine rifle at 7:55 p.m. (4 RT 543.) Counsel had been to the scene numerous times with co-counsel and a defense investigator. He proffered that it was "almost pitch black." (4 RT 544.) Counsel indicated one of the central issues would be what Russell actually saw when he fired the rifle and the distance from where he fired it. (4 RT 544.)

The court disagreed, commenting that, "there was an issue as to duplicating the conditions that existed on January 5, 1997, because of a variety of factors: overcast, clouds, stars, moon, exactly which neighbors had their lights on." (4 RT 544.) Defense counsel noted the investigation reports included "a very complete listing of what lighting was out there, because most of the law enforcement individuals who came out took some efforts to shoot out certain lights. . . there is a very clear picture of which lights were out, which lights were on out there." He again noted that even with the stars and a full or half moon it was "extremely dark" there. (4 RT 545.)

Russell's statements to the officers, however, revealed he had no problem seeing Deputies Haugen and Lehmann. The prosecutor reminded the court that in Russell's statements to Detective Spidle, Russell said he saw the deputies. "He saw them well enough, [Russell] said, he was aiming 25 to 30 feet in front of them. He described their relative sizes." (4 RT 545.) The prosecutor suggested defense counsel was creating an issue where none existed, because Russell already had admitted that after he fired the gun "he saw them drop from his sight." (4 RT 545.) The court reserved ruling until after the prosecution's case was presented. (4 RT 545-546.)

At the close of the prosecution's case, the parties revisited the issue. Counsel pointed out that the defense had conducted cross-examination to elicit information from any witness who actually participated in the events that night. (10 RT 1201.) The prosecutor pointed out: (1) in Russell's statement he said that while outside his house, he saw the officer and the police cars pull into the street; (2) he saw that one car did not have its lights on, the other may have had its parking lots on; (3) Russell could discern that they were police cars from 537 feet down the street; (4) Russell could see Deputy Mike Haugen lying on his back; (5) he could see Haugen's thick mustache (see also 6 RT 673 [Beverly Brown saw bodies and thought one was Russell because of the dark hair and mustache]; and (6) Russell even noticed the differences in the weights and heights of the deputies. As the prosecutor stated, the entire defense was that Russell made a conscious decision to fire the gun in front of the officers. (10 RT 1203.) The defense did not depend on proving Russell could not see his victims. To the contrary, an inability to see his victims was inconsistent with his defense of deliberately aiming a substantial distance in front of the deputies.

In denying the request for a jury view of the scene, the court found it would be impossible to duplicate the lighting conditions as they existed on January 5, 1997, and that there was sufficient testimony that it was "pitch black

out there, difficult to see, but the defendant in his statement stated several times that he did see the silhouettes of the officers." (10 RT 1204.) Finally, the court noted that the issue was whether Russell was aiming at the officers or whether he was randomly firing. (10 RT 1204.) Having the jury view the crime scene would not have added to the evidence already admitted on this point. During the hearing the prosecutor even stated that Russell's defense was not that he heard somebody coming and fired wildly in that direction. Rather, Russell told Investigator Spidle, "I saw them, and I fired 25 feet in front of them." There was no evidence that Russell could not see the officers.

There was nothing arbitrary or capricious about the trial court denying Russell's request to have the jury view the murder scene. In addition to the lack of any need for the defense to have the jury view the scene to show intent, Russell made clear in his videotaped statements to Detective Spidle, which were played for the guilt phase jury that he saw the officers, could size them up, and took aim in front of them. (7 RT 833 *et seq.*) He recalled seeing enough to draw a detailed diagram showing where he was when he saw the patrol cars, and where he was when he shot at the deputies. (7 RT 834.) It was light enough for him to be able to distinguish between the car's parking and driving lights. (7 RT 834.)

Moreover, on cross-examination the defense elicited plenty of testimony to give the jury a sense of the lighting conditions. Beverly Brown could see the police car with its headlights on as she ran across the street–she saw the cars "all the way down the street." (6 RT 705.) While Beverly was the certain lights in rooms in the house were off, she stated, the kitchen and hall lights were on "if she remembered right." (6 RT 702.) Beverly testified the lights were on in the Gideons' front room. (6 RT 707.) She further testified that while in the Gideon home "there was the reflection from the street lamp" from which she could see a lit cigarette from inside the front of the car; like Russell might have

been in front of it, but she could not be certain. (6 RT 713.) She now realized there was a light in her car, but the battery was dead that night. (7 RT 714.) She previously had told deputies it was a lit cigarette. Both Beverly Brown and Twilla Gideon testified they saw two bodies on the ground, Beverly could even see one of the bodies had dark hair and mustache, and she thought it was Russell. (6 RT 673.)

As Beverly ran with the children to the Gideons' house (8 RT 971; see also 6 RT 706 [lights on in Gideon home]), from approximately 38 feet she could see a police car approaching slowing on Chaparral. (6 RT 706.) Russell fired several shots in the air (6 RT 671-672; 8 RT 970, 983-984). Once at the Gideon home, the Gideons, Beverly, Elaine and the children laid low to the ground. Meanwhile, Mr. Gideon called 9-1-1. (9 RT 1127-1139; Exh. 124. [9-1-1- audiotape].) In the tape of the call, the shots fired by Russell can be heard as can the screaming of those in the Gideon home. Those in the home can be heard to say they saw the deputies arrive. Mrs. Gideon testified that once Beverly came to the house, she did not hear any shots for a few (or couple) of minutes. (6 RT 743.) Mr. Gideon also stated he believed he saw someone smoking a cigarette near Russell's truck. From the Gideons' kitchen window, Mr. and Mrs. Gideon and Beverly Brown saw two bodies on the ground. (6 RT 672-673.) Initially, Twilla Gideon could only see shadows as a security/vapor light was on. (6 RT 737, 745-746.) Within a couple of moments her eyes adjusted to the light, and she realized the shadows were those of two uniformed officers. (6 RT 737.) Testing the witness' descriptions of the lighting by cross-examination and by having an impartial observer view the scene at the appropriate time and then testify about his observations, would substantially permit the defense to address the conditions of the lighting that night. (*People v. Price* (1991) 1 Cal.4th 324, 422.) There was plenty of evidence from the

testimony of percipient witnesses, as well as from diagrams and photos, concerning the conditions at the scene.

Russell sought to have the jury view the scene at 8:00 p.m., rather than around 1:00 a.m. when he killed the officers. Russell's arguments to the contrary, conditions could not be replicated to show the lighting on January 5, 1997 at 1:00 a.m., with a jury viewing at 8:00 p.m. during trial in August 1998. (See *People v. Robinson* (1970) 5 Cal.App.3d 43, 48 [denial of motion for jury to view scene where crime occurred at 4:00 a.m. and the scene could not have unfolded; duplication was impossible.].)

Finally, the trial court may consider the practical difficulties in conducting a jury view. (*People v. Lawley* (2002) 27 Cal.4th 102, 158.) Considering the jury would have to view the scene at Russell's suggested time of 8:00 p.m. at Whitewater, a considerable distance from the Riverside courthouse, there would have been substantial inconvenience to the jury to take them to view the scene at the requested hour; an hour that did not even coincide with the time the murders were committed. (*People v. Price, supra,* 1 Cal.4th at p. 422.)

The court did not abuse its discretion in denying Russell's request to have the jury view the scene at the guilt or penalty phases. Through the testimony of the witnesses and the photos admitted, Russell was able to present his defense and argue that it was too dark for him to have seen that the shadows were the deputies. Thus, none of Russell's constitutional rights under the California Constitution, article 1, section 28, subdivision (d), or the Fifth, Sixth or Fourteenth Amendment rights were violated.

Even if the trial court's exercise of discretion was arbitrary or capricious, because of the reasons stated above, whether measured by the state harmless error standard applicable to state law violations (*People v. Watson* (1956) 46 Cal.2d 818), or the federal harmless error standard applicable to violations of

federal constitutional law, any error was harmless (*Chapman v. California, supra,* 386 U.S. at p. 24) due to the overwhelming evidence of Russell's guilt.

Penalty Phase (retrial)

Russell also contends the trial court violated his rights under state law and the Eighth and Fourteenth Amendment rights to the United States Constitution when it denied Russell's same request at the penalty phase. Russell argues a view of the crime scene would have affected his ability to rebut the aggravating circumstances and to establish lingering doubt. (AOB 66-67.) Russell's claim "fails at the threshold." A capital defendant has no federal constitutional right to have the jury consider lingering doubt in choosing the appropriate penalty. "'Such lingering doubts are not over any aspect of [a defendant's] "character," "record," or a "circumstance of the offense."'" (*People v. Stitely* (2005) 35 Cal.4th 514, 516 citing *Franklin v. Lynaugh* (1988) 487 U.S. 164, 174 [108 S. Ct. 2320, 101 L. Ed. 2d 155], quoting Eddings v. *Oklahoma* (1982) 455 U.S. 104, 110 [102 S. Ct. 869, 71 L. Ed. 2d 1,]; accord, *People v. Cox* (1991) 53 Cal.3d 618, 676.) In any event, nothing the United States Supreme Court has said about the constitutional significance of mitigation makes such evidence more relevant, competent, and admissible at the penalty phase than at the guilt phase. "Evidence that is inadmissible to raise reasonable doubt at the guilt phase is inadmissible to raise lingering doubt at the penalty phase." (See *McKoy v. North Carolina* (1990) 494 U.S. 433, 440 [110 S.Ct. 1227, 108 L.Ed.2d 369]) [same test of relevance applies to mitigation at penalty phase as in any other context].) For the reasons given above, the jury could draw reasonable inferences presented to demonstrate the circumstances of the crimes admitted at the penalty phase. The jury could have reviewed the photos and diagram admitted into evidence. Additionally, Russell had other available means to demonstrate the lighting conditions that late at night; he was free to have an investigator testify to how he found the lighting conditions on

a night like that when Russell killed the officers. (*People v. Lawley, supra*, 27 Cal.4th at p. 159.) Just as the trial court properly denied a view during the guilt phase, it was also well within its discretion in denying the view during the penalty phase of trial. (31 RT 3165, 3174-3175.)

There was no basis for the jury to find any lingering doubt that Russell cold-bloodily laid in wait and/or premeditated and deliberated the cold-blooded murders of Deputies Michael Haugen and Jim Lehmann. The absence of a view did not impact the evidence presented at the penalty phase to establish the lighting conditions when Russell killed Deputies Haugen and Lehmann. Accordingly, there is no reasonable possibility Russell was prejudiced. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Moreover, given the overwhelming evidence of Russell's guilt any error under the federal constitution is harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

III.

AFTER RECEIVING A NOTE THAT A JUROR WAS NOT FOLLOWING THE TRIAL COURT'S INSTRUCTIONS, WITH THE CONSENT OF BOTH PARTIES, THE TRIAL COURT PROPERLY QUESTIONED BOTH THE FOREPERSON AND THE JUROR.

During deliberations, the court received a note from the jury indicating that two jurors felt Juror No. 8 was not fulfilling her duties as a juror. The note indicated the juror was injecting personal bias into her deliberative process and felt sympathy for Russell even though the jurors were instructed not to do so. With the agreement of the parties the court spoke with the foreperson. (12 RT 1416.) Defense counsel then suggested the court speak with Juror No. 8 and then had no objection when the court did as he asked, reinstructed her and sent her back to resume deliberations. (12 RT 1421-1424.)

Without addressing the effect of Russell's acquiescence in the trial court talking with Juror No. 8, Russell contends the court committed misconduct by

questioning the juror without a substantial basis for doing so. By questioning Juror No. 8 he claims the court violated his rights to due process, a fair trial and a unanimous verdict under Article I , sections 15 and 16 of the California Constitution and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. (AOB 68.) Far from violating Russell's state and federal constitutional rights, by its actions, the trial court was making certain Russell was afforded those rights.

A trial court has a duty to conduct reasonable inquiry into allegations of juror misconduct or incapacity--always keeping in mind that the decision whether (and how) to investigate rests within the sound discretion of the court. (See *People v. Engleman* (2002) 28 Cal.4th 436, 442; § 1120; see also § 1089; *People v. Cleveland* (1993) 25 Cal.4th 405, 476.)

Under Penal Code section 1089, the trial court may discharge a juror who "becomes ill, or upon other good cause shown to the court is found to be unable to perform his [or her] duty." Once put on notice that good cause to discharge a juror may exist, the court has a duty to make whatever inquiry reasonably is necessary to determine whether the juror should be discharged. (*People v. Espinoza* (1992) 3 Cal.4th 806, 821.) As this Court observed in *People v. Gates* (1987) 43 Cal.3d 1168, 1199, to establish juror misconduct, the facts must establish "'an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality.'"

"The decision whether to investigate the possibility of juror bias, incompetence, or misconduct, as well as the ultimate decision whether to retain or discharge a juror, rests within the sound discretion of the trial court." (*People v. Osband* (1996) 13 Cal. 4th 622, 675-676.) If any substantial evidence exists to support the trial court's exercise of that discretion, the court's action will be upheld on appeal. (See *People v. Price, supra,* 1 Cal. 4th at p. 400.) An informal in camera hearing may be adequate for this purpose. Due process

requires only that all parties be represented, and that the investigation be reasonably calculated to resolve the doubts raised about the juror's impartiality. (*See Smith v. Phillips* (1982) 455 U.S. 209, 217 [102 S.Ct. 940, 71 L.Ed.2d 78]; *Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 526; *United States v. Boylan* (1st Cir. 1990) 898 F.2d 230, 258.) The governing precedent of the United States Supreme Court provides a "flexible rule," which may be satisfied by an inquiry short of a full evidentiary hearing. (*Tracey v. Palmateer* (9th Cir. 2003) 341 F.3d 1037, 1043-1044.) The trial court must be "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips, supra,* 455 U.S. at p. 946.)

Prior to the court reading the note from the foreperson to the parties, defense counsel stated that he and the prosecutor were requesting the court question Juror No. 8 about whether or not she was able to continue deliberating. Defense counsel insisted, "the Court make the inquiry, not counsel." (12 RT 1415.) The court agreed to do so. When the court stated the note was from the foreperson, not Juror No. 8, both the prosecutor and defense counsel agreed that the court should inquire about the note. (12 RT 1416.) The court observed that the comments on the note might not be shared by other jurors. "And I tread very lightly on these issues and I don't want to intrude on the deliberations." (12 RT 1416.)

The court then had the foreperson (Juror No. 12), come into the courtroom. The court told the foreperson it had received a letter from another juror. (12 RT 1416.) Without disclosing the author of the letter or the letter itself, the court remarked that the juror was critical of another juror and alleged that juror was having trouble setting aside his or her sympathy for Russell and objectively deliberating. Responding to the court's inquiry as to whether the foreperson thought there were problems with any juror mentioning sympathy or putting aside sympathy and failing to deliberate, the foreperson thought there

was. He identified the juror by first name and the court noted it was Juror No. 8. The court carefully asked the foreperson not to reveal how the jury was voting or how may people were discussing issues of guilt or innocence, but only on whether they were deliberating or refusing to deliberate. (12 RT 1417.) The foreperson responded:

> I don't think she would describe herself as not being willing to deliberate in that she is certainly engaging in discussion back and forth and, you know, offering opinions and asking questions.
>
> But when she asks a question and any of the rest of us try to satisfy that question, she ignores that answer and comes immediately back to, "I feel this happened because of this." And it's just a circular kind of thing. She seems to perseverate [*sic*] on that perception, which has in my mind an emotional basis. . .

(12 RT 1417-1418.)

The court then inquired whether the juror said anything about sympathy for Russell. The foreperson reported that the juror said she felt "'pity'" for him and was sorry for him. The foreperson related that the juror had stated, "'Well, I wouldn't do that.'" "I have felt like that, so therefore, I wouldn't do that.'" (12 RT 1418.) According to the foreperson, the jury tried to explain to the juror that the instructions were very clear on this issue, but that the juror was describing an emotional state that she shared with Russell and used that as a basis for her decision. (12 RT 1418.) Juror No. 8 had not indicated directly that her sympathy for Russell made it more difficult for her to evaluate the evidence, but she was ready to quit early the day before, saying she was "'tired of this,'" and that she was not going to talk that day. The foreperson believed Juror No. 8 seemed more emotionally involved than the other jurors even considering that "emotions do run high" during deliberations. (12 RT 19.)

The court allowed both parties to question the foreperson; both defense counsel and the prosecutor declined. (12 RT 1419.) After both counsel

set forth their concerns to the court (12 RT 1419-1420), as previously requested by defense counsel and without objection, the court questioned Juror No. 8. (12 RT 1415, 1421.) As with the foreperson, the trial court told Juror No. 8 that it would not inquire about how people were voting or how she was voting. (12 RT 1421.) The court told Juror No. 8 it would "make a difference to [the court] . . . if jurors are using pity or sympathy for a defendant in any way in this case." (12 RT 1422.)

The court then reminded Juror No. 8 that she had been instructed and the jurors had the instructions that a juror must not allow pity or sympathy for a defendant to interfere with the deliberation process or influence his or vote in the jury process. "That is extremely important, because it just can't be allowed." (12 RT 1422.) The court:

> urged [Juror No. 8] to be as honest as [she] can, because obviously, this is a serious and important case to everybody concerned – do you feel that your feelings of sympathy towards the defendant is influencing your deliberation process?

(12 RT 1422.)

Juror No. 8 responded that she did not think so. When asked if she had mentioned that she felt pity and sympathy for Russell, Juror No. 8 admitted she had said so, "In general," but that she had not said it had anything to do with her thinking processes. (12 RT 1422.) Juror No. 8 stated she understood it could not, and that to do so would be a violation of her oath as a juror and a violation of law. (12 RT 1422.) The court reminded Juror No. 8 not to leave common sense behind as it and common experiences were important in evaluating evidence and coming to a conclusion. He told her not to focus on a particular person even in life and allow that to interfere with her objectivity and that to do so would also violate her oath as a juror. Juror No. 8 stated she understood, did not think she had done so and remarked the jury had "gone

over and over it." (12 RT 1423.) The court then directed Juror No. 8 to resume deliberations. (12 RT 1423.)

After Juror No. 8 left, the court, showed its sensitivity to the import of a jury's freedom to deliberate. The court told the parties that if there were further problems it would bring in other jurors, but would not do so at that point. (12 RT 1423.) The court hoped the admonition to Juror No. 8 would be sufficient. If there were further problems, the court would question each individually, but did not want to "intrude to that degree" unless it was necessary. (14 RT 1424.)

A. Russell Has Invited Any Error By Asking The Trial Court To Question The Foreperson And Juror No. 8

As articulated in *People v. Wickersham* (1982) 32 Cal.3d 307, 330, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201: "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the Russell cannot be heard to complain on appeal. ... [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake." In cases involving an action affirmatively taken by defense counsel, this Court has found a clearly implied tactical purpose to be sufficient to invoke the invited error rule. (See *People v. Catlin* (2001) 26 Cal.4th 81, 150; *People v. Wader* (1993) 5 Cal.4th 610, 657-658.)

Here, defense counsel did not merely acquiesce, but represented to the trial court that he and the prosecutor thought the court should question the foreperson and Juror No. 8. (12 RT 1415-1416.) The reason is simple: prior to questioning the foreperson defense counsel had no knowledge of how deliberations were going. After questioning the foreperson it became clear that Juror No. 8 might be allowing pity or sympathy to affect her deliberative

process. Unfortunately for Russell, once the court questioned the foreperson there was a substantial basis to question Juror No. 8 (as counsel had originally suggested). Thus, tactically counsel invited the court to question both jurors as a means to obtain information on how deliberations were progressing After obtaining preliminary information from the foreperson, the trial court did exactly as counsel requested. Thus, Russell cannot be heard to complain that the court erred by questioning the foreperson and/or Juror No. 8, or that the court's comments coerced Juror No. 8 into finding him guilty.

Even if the error was not invited, it is forfeited by Russell's failure to object at the time. (*People v. Stanley* (2006) 39 Cal.4th 913, 950.) Russell got the type of informal hearing he requested. Moreover, because he chose not to question Juror No. 8 at the hearing does not mean the trial court erred in the type of hearing it held. (*People v. Siripongs* (1988) 45 Cal.3d 548, 571 [no misconduct where trial counsel given opportunity to question jury but declined seeking instead an in camera hearing between the court and the juror].)

B. The Trial Court's Inquires Of The Foreperson Revealed A Substantial Basis From Which The Court Should Question Juror No 8; The Court's Questions To Juror No. 8 Were Proper

"Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience." (*People v. Marshall* (1990) 50 Cal.3d 907, 950.) This experience may stem from education or employment, but sometimes it comes from other personal experiences. This Court previously has explained that illicit drugs and their effects have become a matter of common knowledge or experience, and that '[j]urors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room." (*People v. Fauber* (1992) 2 Cal.4th 792, 839.) Rather, "jurors are expected to bring their individual backgrounds and

experiences to bear on the deliberative process." (*People v. Pride* (1992) 3 Cal.4th 195, 268.)

In *People v. Keenan* (1998) 46 Cal.3d 478, during the penalty phase deliberations of a capital case the jury foreperson provided the court with a note stating that one of the jurors did not recall that during jury selection he said he could vote for the death penalty. (*Id.* at p. 528.) Rather than "'investigate'" the juror about possible misrepresentations, at defense counsel's behest, the court reinstructed the jury on its sentencing powers and duties. (*Ibid.*)

Later that same day, the foreperson delivered another note indicating there was a juror who could not morally vote for the death penalty. The court denied defense counsel's motion for mistrial. In the court's view it was "'duty bound to investigate,'" whether a juror had misled them during voir dire. (*Id.* at p. 529.) After speaking to the foreperson the court ruled it need not investigate further and recalled the jury to the courtroom. The court reiterated the instructions on the obligation of jurors to follow the law, discuss issues frankly, respect and consider the views of other jurors, and reach a verdict if possible without violating the conscience or individual judgment. (*Id.* at p. 532.) Within an hour of recommencing deliberations, the jury returned a death verdict. (*Id.* at p. 531.)

In *Keenan*, this Court found that the trial court had a duty to investigate a problem during deliberations which, if unattended, "might require the granting of a mistrial or new trial motion. [T] he court may and should intervene promptly to nip the problem in the bud." (*Id.* at p. 532.) Once a juror's inability to perform his or her duty is called into question, a hearing to determine the facts is contemplated. (*Ibid.*) "Grounds for investigation or discharge of a juror may be established by his statements or conduct, including event which occur during jury deliberations and are reported by fellow panelists." (*Id.* at p. 532; *People v. Burdened* (1986) 31 Cal.4th 505, 517.)

Based on the foreperson's report, this Court found the trial court in *Keenan* had "ample cause to pursue the matter further." (*People v. Keenan, supra,* 46 Cal. 3d at p. 533.) The court conducted a discreet and properly limited investigation which proved any inference or misunderstanding unfounded. (*Ibid.*)

Here, as in *Keenan*, the trial court asked the most discreet of questions to the foreperson and Juror No. 8 to learn whether Juror No. 8 was violating her oath as a juror. The court told the foreperson and later Juror No. 8 that it would not inquire about how people were voting or how she was voting. (12 RT 1421.) The court "tread very lightly" on these issues and was careful to remind both the foreperson and Juror No. 8 not to divulge their deliberative process or the numerical division, if any, of the jury. (21 RT 1415.) When Juror No. 8 admitted that she had talked in the jury room of pity and sympathy "in general" the court reminded her of the instructions that she could not consider pity or sympathy in rendering her verdict. (21 RT 1423.)

Nothing the trial court did violated Russell's constitutional rights in speaking to the foreperson and Juror No. 8, particularly given the court did so at the behest of the prosecutor *and* defense counsel. Far from violating Russell's rights, the court took great care to safeguard Russell's right to a fair and unbiased jury and to comport with the due process requirements of the Fifth, Sixth and Fourteenth Amendments and the article I, § 16 of the California Constitution.

IV.

RUSSELL'S VIDEOTAPED STATEMENTS PROVIDED THE BASIS FOR THE TRIAL COURT TO INSTRUCT THE JURY ON CONSCIOUSNESS OF GUILT (CALJIC NO 2.03).

Russell next contends the trial court violated his rights to due process, trial by jury and a fair trial under the Sixth and Fourteenth

Amendments of the United States Constitution and sections 7, 15, and 16 of article I of the California Constitution by instructing the jury with CALJIC No. 2.03 on consciousness of guilt. (AOB 84-93.) In his three pronged argument, Russell claims (1) there was no evidence to support giving the instruction (AOB 83-91), (2) the instruction permitted an improper inference to be drawn from the evidence (AOB 88-91), and (3) the instruction was argumentative (AOB 91-94). Russell minimalizes the evidence which supported giving CALJIC No. 2.03. Substantial evidence supported the instruction. The instruction did not create an unreasonable inference and was not argumentative.

CALJIC No. 2.03, as given, provides:

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

(11 RT 1373.)

This Court has repeatedly upheld the use of CALJIC No. 2.03 for false or misleading pretrial statements. (*People v. Bonilla* (2007) 41 Cal.4th 313, 329-330; People *v. Jurado* (2006) 38 Cal.4th 72, 125-126; *People v. Benavides* (2005) 35 Cal.4th 69, 100.) The gravamen of the instruction is that juries may infer a consciousness of guilt whenever a defendant fabricates stories "which, like devious alibis, are apparently motivated by fear of detection . . . ." (*People* v. *Albertson* (1944) 23 Cal.2d 550, 582 (conc. opn. of Traynor, J.).) The instruction should be given where it can be inferred "that the defendant made the false statement for the purpose of deflecting suspicion from himself . . . ." (*People* v. *Rankin* (1992) 9 Cal.App.4th 430, 436.) The plain language of the instruction allows a jury to find a consciousness of guilt when the defendant makes a willfully false or deliberately misleading statement

"concerning the crimes for which [he] is now being tried . . . ." (*People* v. *Albertson, supra,* 23 Cal.2d at p. 582 (conc. opn. of Traynor, J.).)

A. Substantial Evidence Supported Instructing The Jury With CALJIC 2.03, Thus Russell's Federal And State Constitutional Rights Were Not Violated

In claiming the evidence did not support giving CALJIC 2.03, Russell focuses exclusively on a specific portion of his interchange with Beverly Brown on the night of the shooting and contrasts that with his videotaped statement to Investigator Spidle after being arrested. He suggests that Brown's testimony that Russell fired the gun into the air and his statement to Spidle that the police were coming "and he was going to kill them" (6 RT 668), was impeached by her testimony on cross-examination where she was confronted with her grand jury testimony in which she testified Russell had said, "just that they were coming. That the police were coming and that he was going down." (6 RT 716-717; 1 CT 130-131 [grand jury testimony].) Russell then relegates to a footnote that when further questioned by the prosecutor before the grand jury as to whether Russell said he would shoot the officers, Brown testified that was the "'gist'" of what Russell said. (AOB 84, fn. 17.)

Russell then juxtaposes Beverly Brown's testimony with Russell's taped statements to Investigator Spidle. During the first of the interviews Russell emphatically stated he had never told Brown that he was going to shoot the cops. (4 SCT 111.) The next day when the interview progressed, Investigator Spidle stated:

ES: An, uh, you said something like you know, "I don't give a shit, I'll take them out too." And I, I want you to think about that because uh we have that information from her and if you could have said that in your anger I want you to think if that's possible.

TR: That is possible, yes.

ES: That is possible that you said that?

TR: This is possible, yes sir.

ES: Okay, that you said words to the effect of "I don't care if the cops are comin', I'll take them out too."

TR: Yes, at them time, I told her that, you know, I'd kill and Elaine.

. . . . . .

ES: Us huh, Do you remember, us saying the statement of "'The cops are coming,' I don't care, I'll take them out too?"

TR: I don't remember saying that but it's very possible that I did, yes."

(4 SCT 111.)

CALJIC No. 2.03 properly allowed the jury to consider Russell's later statements to Investigator Spidle showed Russell first emphatically stated he did not tell Brown he was going to shoot the police, but then his changed his statement to say he could not remember telling Brown he was going to "take out" the police but it was "very possible that [he] did, yes" as evidence of consciousness of guilt. (4 SCT 111.) By then Russell had time to consider the consequences of telling Brown that he was going to "take out" the cops.

Russell had a day to consider his initial statements in which he clearly rejected any notion that he had told Brown that he said, in any form, that he was going to kill, take out, or shoot the police. Not until the following day after he had time to think about the affect of Brown's statements, did he attempt to lessen the certainty of his actions by statements downplaying his threats. From this evidence the jury could logically infer that during the second interview Russell attempted to deflect suspicion that he planned on killing the deputies by qualifying his answers, saying it was possible he had stated that the

cops were "comin, that he did not care and that he would "take them out too." (4 SCT 85.)

"Deliberately false statements to the police about matters that are within an arrestees's knowledge and materially related to his or her guilt or innocence have long been considered cogent evidence of a consciousness of guilt, for they suggest there is no honest explanation for incriminating circumstances. [Citation.]" (*People v. Williams* (2000) 79 Cal.App.4th 1157, 1167-1168.) The statements need not be inconsistent with other statements made by the defendant. The giving of CALJIC No. 2.03 is justified when there exists evidence that the defendant prefabricated a story to explain his conduct. (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103.) "'[A] prior false statement, although exculpating in form, may prove highly incriminating at the trial because, upon a showing of its falsity, it can constitute evidence of consciousness of guilt'." (*People v. Benavides*, *supra*, 35 Cal.4th at p.100, quoting *People v. Underwood* (1964) 61 Cal.2d 113, 121.) Thus, once confronted with the fact Brown had told Spidle that Russell told her, "I don't give a shit. I'll take them out too" (4 SCT 111), the jury could infer that Russell made his deliberately misleading statement to deceive Spidle into believing his statements were similar, not contradictory, to those the originally made to Brown. (See 11 RT 1306 [prosecutor's closing argument: in " [a] very subtle way, Mr. Russell, is trying to make himself look better. He's trying to dig himself out of the ultimate hole"].) The instruction also permitted the jury to infer that, faced with the special circumstance murder of two sheriff's deputies, Russell was attempting to lessen the enormity of his conduct.

The jury also could employ CALJIC No. 2.03 to find consciousness of guilt if it found Russell lied to Spidle, that he had something to hide, by running away after shooting Deputies Haugen and Lehmann. even if he did not

run under the freeway as he stated, but instead ran in the opposite direction. (11 RT 1310.)

In addition, the jury could infer consciousness of guilt from Russell's statements to Brown that he was going to "take out" the officers, and his later statements to Spidle that he only meant to shoot in front of the officers. (see 11 RT 1305 [prosecutor's argument that Russell drew a diagram for Investigator Spidle and explained he intended on shooting in front of the officers so, "they [would] run back the other way"].)

The jury had more than ample evidence to infer Russell was attempting to deflect suspicion from having committed the two cold-blooded, intentional murders of Deputies Mike Haugen and Jim Lehmann. The jury could find these and other statements were deliberately misleading and could, but were not required, to infer a consciousness of guilt from that evidence.

B. CALJIC No. 2.03 Does Not Embody An Improper Permissive Inference Of Guilt

Recognizing this Court has repeatedly rejected the claim that CALJIC No. 2.03 on consciousness of guilt creates an improper permissive inference in violation of Russell's constitutional rights (AOB 89, citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1224; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579), Russell attempts to distinguish his case by pointing out that cases such as *Jackson* and *Nicolaus* relied on *People v. Crandell* (1988) 46 Cal.3d 833, 871. (AOB 90.) In *Crandell*, this Court concluded reasonable jurors would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged." Conspicuously absent from Russell's argument, however, is this Court's discussion of how a jury would view "consciousness of guilt." In *Crandell*, this Court noted CALJIC No. 2.03 is not the equivalent of a confession, establishing all elements of a murder charge, including

premeditation and deliberation, though defendant might be conscious only of having committed some form of unlawful homicide. This Court concluded:

> Defendant's fear that the jury might have confused the psychological and legal meanings of "guilt" is unwarranted. A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged" The instructions advise the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense. The instructions do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto.

(*People v. Crandell, supra,* 46 Cal.3d at pp. 870-871.)

While Russell claims he acknowledged wrongdoing by admitting to Investigator Spidle that he fired the shots that killed Deputies Haugen and Lehmann, he maintains the prosecutor had "no reasons to try to indirectly prove Russell had committed a crime by showing consciousness of guilt when Russell had expressly and candidly acknowledged wrongdoing." Contrary to the decisions of this Court, Russell erroneously suggests that evidence and the instruction on consciousness of guilt could not be used for a jury to determine whether Russell intentionally killed the deputies because it "was the central issue in this case." (AOB 90-91.)

Crandell and cases since then have consistently held that CALJIC 2.03 does not address the defendant's mental state at the time of the offense and does not direct or compel the drawing of impermissible inferences in regard thereto. (*People v. Crandell, supra,* 46 Cal.3d at pp. 870-871.) A jury must still determine whether the defendant committed the murder, and the degree of that murder. (*People v. Breaux* (1991) 1 Cal.4th 281, 304.) Even when a defendant admits committing a homicide and the sole issue is his state of mind

"*at the time the crime was committed,*" CALJIC No. 2.03 does not direct or compel the drawing of impermissible inferences in that regard, because it does not address a defendant's mental state at the time of the offense. (*People v. Nicolaus*, *supra*, 54 Cal.3d at p. 579,) emphasis added.

For example, in *People v. Arias* (1996) 13 Cal.4th 92, in argument the prosecutor contrasted statements the defendant made to his mother downplaying his culpability in a murder with statements of an eyewitness who saw the defendant put his hand on the victim's shoulder and pull the victim toward him before stabbing him. (*Id.* at p. 141.) On appeal, this Court rejected the defendant's argument that there was no evidence his statements to his mother were fabrications. "[I]n light of the contrast between eyewitness accounts which suggested a deliberate action, and defendant's claim or mere reflex, a jury could reasonably infer that the statements made were self-serving falsehoods intended to cast his conduct in the least culpable light. (*Id.* at pp. 41; see *People v. Green* (1980) 27 Cal.3d 1, 40-41 [instruction proper where only evidence of statement's falsehood it its inconsistency with prosecution case at trial].)

Here, the prosecutor did just that: he requested CALJIC No. 2.03 based on Russell's attempts during his interviews with Investigator Spidle to lessen his culpability, and thus try to lessen the degree of any homicide conviction. As in *Arias*, Russell's statements to Spidle were attempts to lessen his culpability or deny that he intended to kill Deputies Haugen and Lehmann. If the jury found Russell's statements to Spidle were lies, "they would logically suggest that [Russell] did intend to kill, and that he harbored a consciousness of that fact." (*People v. Arias, supra,* 13 Cal.4th at p. 142.)

The trial court properly instructed the jury with CALJIC No. 2.03 permitting, but not requiring, the jury to draw reasonable inferences regarding Russell's level of culpability from his statements to Investigator Spidle and

Beverly Brown and others. Nothing in CALJIC No. 2.03 compels the jury to draw impermissible inferences. (*People v. Schmeck* (2005) 37 Cal.4th 240, 291.)

C. CALJIC 2.03 Is Not Argumentative

Russell also contends CALJIC No. 2.03 is impermissibly argumentative. He argues that the language, "'If you find certain facts,' then 'you may' consider that evidence for a specific purpose" is argumentative and that the instruction is argumentative in a way which benefits the prosecution by lowering its burden of proof. (AOB 92-93.) Russell acknowledges this Court has repeatedly rejected his arguments. (see e.g., *People v. Bonillas* (2007) 2007 Cal. LEXIS 6394, at pp. * 21-22; *People v. Benavides*, *supra*, 37 Cal.4th at p. 240, 303; *People v. Nakahara* (2003) 30 Cal.4th 705, 713.) He raises the claim to preserve the federal constitutional issues and to permit this Court to reconsider its previous decisions. (AOB 92.) This Court should not reconsider its previous decisions which reject Russell's arguments as appellant advances no new grounds that would justify this Court reconsidering its opinion.

D. Any Error In Instructing The Jury With CALJIC No. 2.03 Is Harmless

As previously stated, CALJIC No. 2.03 specifically informs the jury that conduct by a witness "is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide." (11 RT 1373.) A jury is presumed to understand and follow the court's instructions. (*People v. Jablonski* (2006) 37 Cal.4th 774, 834; *People v. Stitely* (2005) 35 Cal.4th at p. 559.)

Additionally, even had the instruction not been given the jury was free to infer that Russell was attempting to cover his tracks after a night to think things over. Forensic evidence made clear that the shotgun shells were found

in an area such that the shooter could have knelt down and took aim at his targets and did not fire until they were in a position of vulnerability. Russell repeatedly told people that he would not mind shooting a police officer. He repeated his threat minutes before he carried it out. He even told Investigator Spidle that he saw the deputies that night, and that he "aimed the gun and fired." Russell hid in the desert and had his gun under a fallen tree; not the actions of a man who simply shot to scare versus to premeditatedly and deliberately kill.

Given the wealth of other evidence supporting Russell's two first degree murder convictions, any conceivable error in instructing the jury with CALJIC No. 2.03 is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

V.

THE TRIAL COURT WAS NOT REQUIRED TO INSTRUCT THE JURY THAT IT MUST AGREE WHETHER RUSSELL COMMITTED PREMEDITATED MURDER OR LYING-IN-WAIT MURDER.

Russell next argues that the trial court should have instructed the jury that it must agree on the theory of murder – murder with premeditation or murder by lying-in-wait – to convict Russell of first degree murder. By failing to do so, Russell contends his federal and state constitutional rights to have the prosecution prove the crimes beyond a reasonable doubt, to due process and to a reliable determination on allegations that he committed a capital offense. (AOB 95-101 citing U.S. Const., Amends 5, 6, 8 & 14; Cal. Const., art. I, §§ 1, 15, 16 & 17) were violated. Russell recognizes this Court has repeatedly rejected his claim. (AOB 95 citing *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride, supra,* 3 Cal.4th at pp. 249-250; *People v. McPeters* (1992) 2 Cal.4th 1148, 1185.) Relying on the dissenting opinion in *Schad v.*

Arizona (1991) 501 U.S. 624, 653-661 (Opn. of J. White) [111 S.Ct. 2491, 115 L.Ed.2d 555], Russell attempts to persuade this Court that the trial court erred by failing to require the jury to agree unanimously on a theory of first degree murder -- lying-in-wait or premeditated and deliberate -- before returning a guilty verdict on that charge. Russell notes that the lead opinion in *Schad* did not command a majority. If this is a suggestion that the plurality's opinion does not control here, it is incorrect because a fifth justice, Justice Scalia, concurred in the plurality's conclusion that the federal Constitution did not entitle the defendant to a unanimity instruction on different theories of first degree murder. (*Id.* at pp.627, 645 [plur. opn. of Souter, J.); *id.* at pp. 648-652 [conc. opn. of Scalia, J.])

As Justice Scalia noted in his concurring opinion n *Schad v. Arizona*, *supra*, 501 U.S. at p. 649 (Conc. Opn of A. Scalia) it has long been the general rule "that when a single crime can be committed in various ways the jury need not agree on the mode of its commission. Thus in *Schad,* the Court held that if two mental states are supposed to be equivalent means to satisfy the *mens rea* element of a single offense, they must reasonably reflect notions of equivalent blameworthiness or culpability, whereas a difference in their perceived degrees of culpability would be a reason to conclude that they identified different offenses altogether. (*Id.* at p. 643.) In the ten years since *Schad*, neither the United States Supreme Court nor this Court has shown any inclination to change the rule in *Schad*, must less to adopt the dissent's view. This Court has repeatedly cited *Schad* in support of the principle that a defendant is not entitled to a unanimity instruction when the jury could convict him of murder based on different theories. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1025 [no entitlement to unanimity instruction where evidence shows defendant could have been the perpetrator or an aider and abettor]; *People v. Millwee* (1998) 18 Cal.4th 96, 160 [no entitlement to unanimity instruction on theories of first

degree murder].) The Ninth Circuit has found *Schad* dispositive as well. (*Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664, 668.)

Russell's attempt to distinguish California's murder statute from that of Arizona must fail. In *Sullivan v. Borg* (9th Cir. 1993) 1 F.3d 926, the defendant was prosecuted in California for first degree murder on theories of felony murder and premeditated murder. The jury was instructed it was "not necessary that all twelve jurors agree on which theory of murder of the first degree was committed." All twelve did not need to unanimously agree on which of the two theories occurred, they only needed to agree that one of the two theories of murder in the first degree occurred. (*Id.* at p. 927.) After exhausting his state remedies and having his petition for writ of habeas corpus denied by a federal district court, petitioner appealed to the Ninth Circuit. (*Ibid.*) Petitioner argued precisely what Russell argues here: that unlike Arizona's statutory scheme, California's scheme codifies premeditated and felony murder in two separate statutes (Pen. Code, §§ 187, 189). The court rejected petitioner's argument that because California placed the two theories of murder in separate statutes, there must be jury unanimity as to which theory underlies a first degree murder conviction. (*Sullivan v. Borg, supra,* 1 F.3d at p. 928.) Further, the court found California's statutory scheme to be "almost identical to Arizona's statute in encompassing felony murder and premeditated murder." (*Ibid.*) California Penal Code section 189 sets forth degrees of murder and provides:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration of [certain enumerated felonies] . . . is murder of the first degree.

As with California's statutory scheme Arizona's scheme provides:

> A murder which is perpetrated by means of poison or lying in wait, torture or by another other kind of wilful, deliberate or premeditated killing, or is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of or attempt to perpetrate [certain enumerated] felonies is murder of the first degree.

(Ariz. Rev. Stat. Ann. § 13-452 (Supp. 1973).

While decisions of lower federal courts are not binding on this Court (*People v. Gray* (2005) 37 Cal.4th 168, 226), as *Sullivan v. Borg*, demonstrates, California has not "followed a different course than Arizona." (AOB 97.) This Court has repeatedly held that:

> [In] a prosecution for first degree murder it is not necessary that all jurors agree on one or more of several theories proposed by the prosecution; it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of first degree murder as that offense is defined by statute.

(*People v. Milan* (1973) 8 Cal.3d 185, 194-195; accord *People v. Chavez* (1951) 37 Cal.2d 656, 671-672.)

Nothing suggests a lying-in-wait theory of murder should be exempt from this Court's application of this principle to murders committed during the course of a felony (see e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712), and those committed as an aider and abettor (*People v. Beardslee* (1991) 53 Cal.3d 68, 92-93), and those wilfully committed with premeditation and deliberation. "'Where the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury's understanding of the case.'" (*Beardslee, supra,* at p. 68.)

Still, Russell argues that the elements of lying-in-wait are different than those underling wilful, premeditated and deliberate murder. (AOB 98-99.) He suggests a conviction of murder on the theory of lying in wait only requires

the defendant be shown to have exhibited a state of mind which is "'equivalent to,'and not identical to, premeditation *or* deliberation. (*People v. Ruiz* (1988) 44 Cal.3d 589, 615, emphasis added.)" (AOB 98-99.) Yet Russell has not taken stock of this Court's decision in *People v. Hardy*, *supra*, 2 Cal.4th at pp. 161-162.

In *Hardy*, the jury was presented with two theories of first degree murder: murder by lying in wait, and premeditated and deliberate murder. The defendants complained that CALJIC 8.25 was deficient because it did not require the jury to find the defendants premeditated and deliberated the killing. Accordingly, they claimed the instruction denied them due process to have the jury decide every element of the crime. (*Id.* at p. 162.) The defendants claimed that the instruction, embodied in Penal Code section 189, proof that the killing was committed by lying in wait, does not relieve the prosecution from independently proving premeditation and deliberation. (*Ibid.*) In upholding the conviction and death penalty, this Court reiterated it view that lying in wait is the functional equivalent of premeditation, deliberation and intent to kill. (*Ibid.*)

> Thus, a showing of lying in wait obviates the necessity of separately proving premeditation and deliberation, and "imposition of a requirement of independent proof of premeditation, deliberation or intent to kill would be a matter for legislative consideration."

This Court went on to note that although

> technically 'the Legislature' . . . directed a defendant need only have a mental state that is equivalent (and not identical) to premeditation and deliberation, courts have consistently interpreted section 189 in this manner. (see *Ruiz, supra,*44 Cal.3d at p. 614, and cases cited and the Legislature has not amended the statute to reflect its disagreement in the interim despite other recent amendments to section 189. Under these circumstances, we concluded the Legislature has acquiesced in the above interpretation.

(*People v. Hardy, supra*, 2 Cal.4th at p. 163.) Thus, proof of lying in wait is basically identical to premeditation and deliberation: they are not different elements for different crimes. Thus, Russell's constitutional rights were not violated when the trial court denied his request to instruct the jury it must be unanimous upon which theory supported its first degree murder verdicts.

Moreover, even had the jury been so instructed any error was harmless beyond a reasonable doubt. The jury's verdicts and enhancement findings necessarily found Russell fired several shots killing Deputies Haugen and Lehmann. The site of the shelling casings was consistent with someone having knelt on one knee, taken aim and fired at the deputies, as was the gun residue sample from Russell's face. (9 RT 1119-1111.) Even if Russell's self-serving attempts to lessen his culpability when speaking with Investigator Spidle were believed, Russell still was not prejudiced. In his own statements he said he had "taken aim" at the deputies. Russell fired at the deputies after having repeatedly displayed his bravado and proclaimed he would have no problem killing police officers and that he was going to "take out" police officers that night.

Under either theory, Russell did not shoot the deputies by accident. He did not do so in the heat of passion. He did so wilfully, deliberately and with premeditation and or immediately after lying in wait for them. Accordingly, any error would not effect the verdict.

VI.

THE TRIAL COURT PROPERLY EXCLUDED TAPED STATEMENTS RUSSELL MADE TO DEPUTIES IN WHICH HE ADMITTED KILLING DEPUTIES HAUGEN AND LEHMANN

Russell contends that in the penalty phase retrial the trial court violated his rights to due process, a fair and a reliable penalty determination under the federal constitution (U.S. Const., 8th & 14 Amends), and state statute

and constitution (§ 190.3; Cal. Const., art. I, §§ 15, 16, & 17), by excluding statements Russell made to officers after his arrest. (AOB 103.) Russell contends the trial court should have admitted the statements because they were admitted in the prosecution's case to support Russell's guilt phase convictions and special circumstance allegations and thus were admissible in the penalty retrial when requested by Russell. He argues the statements were either admissible (1) under *Green v. Georgia* (1979) 442 U.S. 95 [99 S.Ct. 2150, 60 L.Ed.2d 738]; or (2) as character evidence in the form of hearsay but admissible as an exception to the hearsay rule or as non-hearsay. (AOB 104.) He maintains all were relevant under Penal Code section 190.3, subdivision (a) as a circumstance of the crime, or under Penal Code section 190.3, subdivision (k), as a factor which could extenuate the gravity of the crime. Russell's failure to request the statements be admitted for a non-hearsay purpose precludes him from arguing admissibility on these grounds now. In any event, the trial court properly exercised its discretion in excluding the statements as they were unreliable and Russell was not subject to cross-examination.

A. Hearing On Admissibility Of Statements

Prior to the start of the penalty phase retrial, Russell moved to have the taped statements he made to Investigator Spidle after his arrest admitted as circumstances of the offense under Penal Code section 190.3, subdivision (a), or in the alternative as non-hearsay under Penal Code section 190.3, subdivision (k) to extenuate the gravity of Russell's crime. (21 RT 1853-1854) Russell argued the statements were reliable because they occurred shortly after the shooting, they provided depth and detail to the penalty phase jury above and beyond simply informing them that Russell had been convicted of first degree murder, and they would permit this jury to consider whether Russell premeditated the killing or not, and demonstrated Russell's character. (21 RT

1854.) The defense stated that under factor (k) it was asking this jury to *reconsider some of the circumstances of the crime.* (21 RT 1854.)

In support of admitting the statements, the defense also wanted the jury to have a "very clear picture" of Russell "in living color" on the same day he committed the shootings. The defense argued that the jury should be privy to as much evidence surrounding the case as possible. Counsel noted he was not asking for admission of any evidence the prosecution had not introduced in the first trial. (21 RT 1855.)

The prosecutor, however, rightly pointed out that the court had discretion not only to admit the hearsay statements, but also determine whether everything Russell said to the officers was relevant. The next issue was whether the statements were reliable versus self-serving hearsay. (21 RT 1856.) The prosecutor reminded the court that (1) Russell was interviewed 11 hours after the shooting – four hours and one-half hours-after his arrest;(2) initially Russell did not want to give a statement, but did so only after leading deputies on a trek across the desert for approximately an hour to show them where had hidden the gun he had used to kill Deputies Haugen and Lehmann; and (3) the statement was drastically inconsistent with the physical evidence of how the crime occurred. (21 RT 1857-1858.) The prosecutor also pointed out that Russell had an opportunity at the penalty phase to testify and could do so consistent with his statements. The prosecution then could be assured its rights under federal and state law. (21 RT 1859.) The prosecutor concluded that if the entire statement were admitted, there would be a couple of counts of second-degree murder. Just because he admits to some form of criminal culpability does not make it reliable.

> He was attempting in a self-serving unreliable way to mitigate his involvement in the deaths of the two sheriff's deputies. He was trying to dance around an intentional killing. . . .

(21 RT 1861-1962.) As the prosecutor stated, because Russell had already been convicted of the intentional murders of the deputies, his statements to Investigator Spidle, that he did not mean to kill the deputies, should not be admitted without the prosecutor being afforded the opportunity to cross-examine Russell about the statements. (21 RT 1962.)

The court found the evidence was relevant on the issue of lingering doubt and Russell's mental state on the issue of remorse. (21 RT 1862.) The court, however, found the statements unreliable for several reasons: (1) Russell did not initially speak to the officers, he invoked his *Miranda* rights; thus there was no spontaneous "outpouring of emotion" when Russell later provided his version of the events; (2) a substantial period of time elapsed between the time Russell was arrested and when he spoke to Investigator Spidle; (3) Russell spoke to Spidle only after he led the deputies to where he hid the gun; and (4) Russell spoke only after being told the deputies had been killed. (21 RT 1863.)

The court found no evidence to corroborate Russell's statements. Russell attempted to mitigate or negate the element of intent that he planned and premeditated the killing and that he intended to kill the officers. (21 RT 1865.)

Far from precluding the defense from presenting evidence of Russell's remorse Russell had choices: he could testify and be subject to cross-examination and/or present testimony from Investigator Spidle concerning Russell's statements of remorse during the interview when Russell was informed of the deputies' deaths. (21 RT 1865-1866.) The issue of whether Russell was truthful with Investigator Spidle was different than whether he showed remorse. (21 RT 1867.)

B. Because Russell Failed To Request The Evidence Of His Conduct During The Interview Be Admitted As Non-Assertive Conduct And Thus Not Hearsay, Russell Has Forfeited This Issue

During the hearing to determine the admissibility of the video tapes of Russell's interview with Investigator Spidle and as demonstrated in his motion to admit the tapes (14 CT 3637-3641), Russell never sought admission of the tapes to show non-assertive conduct by him which could be deemed non-hearsay. Russell sought admission of the taped statements based solely on the ground that they although they contained hearsay, they should be admitted under *Green v. Georgia* and that they were sufficiently reliable. This basis for admission was insufficient to preserve the specific claim raised now on appeal. He has forfeited consideration of this issue. (*People v. Hardy, supra,* 41 Cal.4th at p. 1000; *People v. Sims*, *supra*, pp. 459-460.)

C. Because Russell's Statements To Investigator Spidle Lacked Sufficient Reliability For The Purpose Russell Sought To Have Them Admitted, Were Self-serving And The Prosecution Had No Opportunity To Cross-examine Russell, The Trial Court Properly Denied Russell's Motion To Admit The Taped Statements

In the event this Court entertains Russell's contention that the videotapes of Russell's interviews by Investigator Spidle were sufficiently reliable to be admitted by the court at the penalty phase, it is clear they were not reliable.

"As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall* (1986) 41 Cal. 3d 826, 834.) Exclusion of hearsay testimony at a penalty phase may violate a defendant's due process rights if the excluded testimony is highly relevant to an issue critical to punishment *and* substantial reasons exist

to assume the evidence is reliable. (*People v. Kaurish* (1990) 52 Cal. 3d 648, 704.)

This Court has acknowledged that California appellate courts have the authority to recognize a non-statutory exception to the hearsay rule. This Court, however, has warned they should do so "cautiously in light of the venerable policy against admitting declarations by witnesses who cannot be cross-examined." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 27.) Russell asks this Court to make an "'exception for 'critical reliable evidence'" which this Court indicated in *Demetrulias* might deserve recognition in capital cases. (*Id.* at p. 27; AOB 110.) Yet, like *Demetrulias*, this case does not present that situation. Not only were Russell's statements unreliable because they were self-serving and meant to try and reduce his own culpability, they were also properly excluded because Russell did not testify thus the prosecution was precluded from cross-examining Russell about the statements. Thus admission of the statements would have violated the *prosecution's* Sixth and Fourteenth Amendment rights to cross-examination and due process; not Russell's rights to a fair trial, due process and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Evidence Code section 225 provides that a "statement" is any "(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." In the penalty phase of the capital trial in *People v. Jurado*, *supra*, 38 Cal.4th pp. 128-130, the defendant sought to introduce a secretly recorded videotape of his interrogation by detectives. (*Id.* at p. 128.) During the interview the defendant expressed concern that he would be perceived in prison as a snitch and killed or that he would have to spend the rest of his life in prison. (*Ibid.*) At this juncture in the interview the defendant "displayed considerable emotion, sobbing and at one point grasping an officer's hand." The defense sought admission of the

defendant's responses to show his remorse for the killing. (*Id.* at p. 129.) As in this case, in *Jurado* the prosecution objected that the videotape was inadmissible hearsay because the defendant's displays were assertive conduct, and that under Evidence Code section 352, the probative value of the evidence was substantially outweighed by its risk of undue prejudice and confusion. Ultimately the trial court sustained the prosecution's objection.

In affirming the trial court's ruling, this Court stated that by themselves the defendant's "emotional displays were nonassertive conduct, and thus not within the hearsay rule." (*Ibid.*) The defense, however, sought to introduce more than evidence of the defendant's emotional displays; it sought to introduce the entirety of the interrogation. (*Id.* at p. 129.) The defendant's statements, including his assertion and descriptions of his own feelings were hearsay. (*Ibid.*) As the trial court correctly determined, the circumstance that defendant made his statements during a post arrest police interrogation, when he had a compelling motive to minimize his culpability for the murder and to play on the sympathies of his interrogators, indicated a lack of trustworthiness. (*Id.* at p. 130.)

In rejecting the defense argument, this Court concluded:

> We have also rejected the argument that exclusion of this sort of hearsay evidence violates a capital defendant's right to a *fair trial and a reliable penalty determination* under the federal Constitution. As we have explained, a capital defendant has no federal constitutional right to the admission of evidence lacking trustworthiness, particularly when the defendant seeks to put his own self-serving statements before the jury without subjecting himself to cross-examination.

(*Id.* at p. 130, emphasis in original.) The defense never offered to redact the videotape to show only the nonassertive conduct. Even had it done so, any error was harmless. (*Ibid.*)

Similarly, in *People v. Edwards, supra*, 54 Cal.3d at p. 787, the trial court rejected the defendant's attempt to introduce under the state of mind

exception to the hearsay rule (Evid. Code, § 1250), a notebook and tape of the defendant's post-arrest interview made nine days after a shooting where the defendant knew he had killed a 12-year-old girl. (*Id.* at p. 819.) In its ruling, the trial court found the statements were "'really . . . an attempt to put on a whole defense without ever putting the defendant on the stand subject to cross-examination.'" The defendant was not unavailable and exercised his right not to testify even though the choice was his. The defendant court have testified if he had elected. (*Ibid.*)

As in *Jurado*, this Court found the trial court did not abuse its discretion in denying the defendant's request to admit the notebook and tape. (*Ibid.*) The court agreed with the trial court that a defendant may not avoid testifying in order to avoid being cross-examined. To be admissible under Evidence Code section 1252, the statements """must be made in a natural manner, and not under circumstances of suspicion, so that they carry the probability of trustworthiness. Such declarations are admissible only when they are 'made at a time when there was no motive to deceive.'"" (*Id.* at p. 819.) The defendant "had a compelling motive to deceive and seek to exonerate himself from, or at least to minimize his responsibility for, the shootings. There was 'ample ground to suspect defendant's motives and sincerity' when he made the statements." (*Ibid.*)

There is nothing in this case to distinguish it from *Edwards*, and *Jurado*. The prosecution's rights to cross-examination and due process would have been violated had the videotapes been admitted. (See *People v. Livaditis* (1992) 2 Cal.4th 759, 777-780 [state has compelling interest in cross-examining defendant about statements to family members to show remorse].)

Russell attempts to distinguish these cases by arguing that he should have been allowed to introduce the statements at the penalty phase just as the prosecution introduced them in its case during the guilt phase. (AOB 104.)

Russell fails to appreciate the differences in the prosecution's purpose of introducing them in the first guilt phase and Russell's purpose in offering the statements in the second penalty phase. In the guilt phase the prosecution introduced the videotapes as admissions by a party opponent (Evid. Code, § 1220), to show that much of Russell's story was unreliable and made with a motive to deceive as it was inconsistent with the physical evidence found at the scene and statements of others at the scene. Additionally, the tapes were admitted at the guilt phase to show Russell was motivated to deceive investigators to minimize his culpability in what he knew were the killings of Deputies Haugen and Lehmann. Thus, the court admitted the videotapes at the guilt phase not to show Russell was remorseful as an admission by a party opponent, but to show he was unreliable and had a motive to deceive. Under the admissions by a party opponent exception to the hearsay rule, the admission of the evidence during the guilt phase was entirely proper. It did not require the court to also admit the statements at the penalty phase for Russell's wholly different purpose.

Moreover, Russell's reliance on *Green* v. *Georgia, supra,* 442 U.S. 95, does not aid his claim. *Green* v. *Georgia* established a narrow exception for admission of hearsay testimony at the penalty phase of a capital trial. There the petitioner and Carzell Moore were jointly indicted for the rape and murder of Teresa Allen. Moore was tried separately, convicted of both crimes and sentenced to death. The evidence showed Moore and the petitioner abducted Allen and, acting either in concert or separately, raped and murdered her. At the penalty phase of petitioner's trial he attempted to introduce the testimony of an individual who had testified at Moore's trial that Moore had confided in him that he (Moore) had shot Allen after ordering petitioner to run an errand. The evidence was excluded as hearsay because Georgia did not recognize a hearsay

exception for declarations against penal interest. (*Green* v. *Georgia*, *supra*, 442 U.S. at pp. 95-96.)

The United States Supreme Court held that regardless of Georgia's hearsay rule, exclusion of the evidence violated the Due Process Clause of the Fourteenth Amendment. It found (1) the excluded testimony was highly relevant to a critical issue in the penalty phase of the trial, and (2) substantial reasons existed to assume its reliability. The high court believed the statement was reliable because (a) Moore made the statement spontaneously to a close friend; (b) there was ample corroborating evidence of the confession; (c) the statement was against Moore's interest and there was no reason to believe Moore had any ulterior motive in making the statement; and (d) Georgia used the statement against Moore in his trial to obtain a capital conviction. (*Id.* at p. 97.)

Unlike in *Green*, here there was nothing spontaneous about Russell's statements: having learned the deputies were dead, he had plenty of time to ponder what he would say to Detective Spidle; there was no evidence to corroborate Russell's statements, the evidence actually showed the contrary; and there was every reason to believe Russell's motive was to try and lesson his culpability. Thus the videotaped statements do not meet the narrow exception set forth in *Green*.

Additionally, even assuming error it was harmless. As Russell recognizes in his opening brief, the trial court permitted Investigator Spidle to testify about Russell's conduct and display of remorse during the interrogation, and provide his opinion as to whether Russell was remorseful as he had written in a report. (29 RT 2976-2982.) Spidle testified that when he first came into contact with Russell on January 5th, Russell said he would show Investigator Spidle where the gun was, but otherwise he wanted to speak with a lawyer. (29 RT 2969.) Russell then directed deputies a mile by car and then a mile on foot

to where he had hidden the gun. (29 RT 2970.) After stopping at a paved area, Russell asked what had happed to the two deputies. When Investigator Spidle told him they were dead, Russell "tilted his head back. Closed his eyes, because a little teary eyed." "[F]rom that perspective" he became visibly emotional. (29 RT 2971.)

Counsel elicited from Spidle that Russell appeared cooperative. (29 RT 2983.) Counsel was permitted to question Investigator Spidle about his subsequent questioning of Russell at the sheriff's station and then returning to the scene where Russell showed them "some of the relevant locations with respect to the situation that occurred where the two deputies were killed." (29 T 2973.) Investigator Spidle testified that he had used the word "remorsely" in his report to describe what he perceived to be Russell's frame of mind, the term was not semantically correct. (29 RT 2983.) He then explained that he had consulted the dictionary and actually believed Russell had expressed regret for his actions rather than remorse, this was simply the product of cross-examination by the prosecution. (29 RT 2983-2094.) Investigator Spidle testified that Russell did express disappointment or distress over his actions as opposed to some type of moral anguish or compassion. (29 RT 2984.) His retraction, however, went to the weight of the evidence.

In closing argument defense counsel still took advantage of Investigator Spidle's original statements, remarking that when told the deputies were dead, Russell, "closed his eyes, got teary eyed, and an emotional reaction. ¶ Is that the reaction of a cold-blood killer? A remorseless killer? Is that the reaction of someone who couldn't care less? ¶ It's a reaction. It's a human reaction. It's a reaction of a person who has been informed that his acts, his ragings, his behavior, has resulted in the death of somebody. And it's a reaction of remorse. It's a reaction where a person is sorry." (31 RT 3177-3178.)

Counsel then proceeded in this way to explain that whether Investigator Spidle used the term "remorseful" or "regret, "from the time Mr. Russell surrenders, to the time that he shows them the gun and his reaction upon learning of the deaths of the deputies, as well as his going back out to the scene and doing a walk-thru with the deputies, shows a cooperation and I would suggest a remorse in his heart for his reactions." (31 RT 3178.) Counsel then analogized Russell's acknowledgment of wrongdoing with that of a child when he must admit he is wrong. And, that in a "certain ironic sense, Russell's acknowledgment of wrongdoing and cooperation may be" the greatest measure that this man will ever be." (31 RT 3178-3179; see also 3179 [counsel tells jury there is "remorse, regret, a conscious"].)

Considering Russell was not prevented from presenting evidence of his "remorse" (see Evid. Code, § 1250), during the penalty phase and that counsel was permitted to argue that Russell was remorseful, even if the videotapes should have been admitted any error is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

VII.

RUSSELL IS PRECLUDED FROM CHALLENGING THE TRIAL COURT'S EXCUSAL OF SEVEN PROSPECTIVE JURORS BASED ON THEIR STRONG ANTI- OR PRO-DEATH PENALTY VIEWS AS HE WORKED WITH THE TRIAL COURT AND THE PROSECUTOR IN EXCUSING THE JURORS; THUS, RUSSELL INVITED ANY ERROR.

Russell next contends the trial court violated his constitutional rights to a fair trial, due process and a reliable penalty determination (U.S. Const. 6 & 14) when it excused seven prospective jurors during the qualification selection process for the penalty phase retrial. (AOB 114.) In advancing his argument, Russell relegates to a footnote the import of his agreement with the

trial court to have each of these jurors dismissed. (AOB 115-116 22). Russell's express agreement to dismissing these potential jurors has invited any error. Accordingly, Russell's argument may not be heard for the first time on appeal.

Potential jurors "must be excused if their views on capital punishment would prevent or substantially impair the performance of their duties in accordance with the instructions and their oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140.) The court's determination resolves "what is essentially a question of fact or, perhaps more accurately, a mixed question that is essentially factual." (*People v. Gordon* (1990) 50 Cal. 3d 1223, 1262.) Accordingly, this Court's review is deferential: it determines whether substantial evidence supports the trial court's rulings. (*Ibid.*)

A. Russell has Invited Any Error in Excusing the Jurors By His Agreement to Excuse Them at Trial

A trial court may excuse a potential juror in a capital case for cause based solely on the juror's answers in a written questionnaire, "if it is clear from the answers that he or she is unwilling to temporarily set aside his or her own beliefs and follow the law." If, however, a party stipulates to the removal of a juror, that party may not raise the issue for the first time on appeal. Russell cites *People v. Cox*, *supra*, 53 Cal.3d at p. 648 fn. 4, and *People v. Velasquez* (1980) 26 Cal.3d 425, 443, to try and circumvent this rule by noting that this Court has never required an objection from the defense in order to claim on appeal that the trial court improperly excused an anti-death penalty jury under *Witherspoon* and *Witt.* (AOB 115-116 fn. 22.) Here, however, Russell took much more affirmative action then a mere failure to object does.

Unlike a "mere" failure to object this Court has held a defendant forfeits consideration of the issue if he stipulated to the removal of the juror. In *People v. Coogler* (1969) 71 Cal.2d 153, 175, a juror stated that under no

circumstances could she impose death. She later expressed equivocation, stating she did not like "the [p]sychiatrist]." The defendant's entire defense depended upon a psychiatrist. At that point both parties acquiesced in the court's suggestion to excuse the juror (*Id.* at p. 175.) This Court found the defendant's agreement to dismiss the juror forfeited his right to challenge the trial court's ruling on appeal.

> If defense counsel had entertained any brief [*sic*] that [the juror] would qualify as a juror on the issue of the death penalty, he could have objected to the court's excusal of [the juror]. As he did not formulate or press that issue, the record itself does not pose it. We are, therefore, not here involved in a case in which a venireman was improperly excused because of her attitude on the death penalty.

(*People v. Coogler, supra,* 71 Cal.2d at p.175; *People v. Mitcham* (1992) Cal.4th 1027, 1060-1061 [because parties stipulated that two prospective jurors be excused for cause, this Court would not review a challenge to the excusal of the jurors].)

The doctrine of invited error also applies. "If defense counsel intentionally caused the trial court to err, the [Russell] cannot be heard to complain on appeal." (*People v. Wickersham, supra,* 32 Cal.3d at p. 330, disapproved on other grounds in *People v. Barton, supra,* 12 Cal.4th at p. 201.) The doctrine of invited error applies if the record reflects that counsel made a conscious tactical choice. (*People v. Cooper* (1991) 53 Cal.3d 771, 831.)

Here, whether through stipulations or invited error, Russell is precluded from challenging the excusal of the complained of seven prospective jurors. The jurors in the penalty phase retrial completed juror questionnaires prior to individual voir dire. The court first dismissed jurors based on time or hardship problems. It then reviewed the questionnaires with the parties and stated it had reached a tentative ruling on about 25 or 26 of them. (23 RT 2032.) The court told the parties it wanted to "go through that tentative ruling right now and solicit any opposition from counsel that – give you an opportunity to be heard."

(23 RT 2032.) In light of the trial court's offer, a pattern immediately emerged demonstrating that if either counsel had any objection to a juror being excused because of a strong opinion, anti- or pro-death penalty, counsel was offered the opportunity to give reasons for the objection and it was ruled on by the court. Among the jurors that defense counsel agreed could be excused are the very ones he challenges now: 35, 42, 48. 52, 76, 89, and 90.

Juror No. 35 was a prospective juror who would not vote for the death penalty: both parties had no objection to the juror being excused. (27 RT 2035.) As to Juror No. 42, a prospective juror who always voted for life, neither counsel objected to the court excusing her. (27 RT 2036.) As to Juror No. 48, who stated he was a volunteer minister at the Correction Rehabilitation Center in the Banning Jail and responded that he would always vote for life, both parties again agreed to his excusal. (27 RT 2036-2037.) Both parties had no objection to the court dismissing Juror No. 52, who did not believe in capital punishment and always voted for life. (27 RT 2037.) Juror No. 89 indicated he "could not vote for death. Strong opinion. Life in prison." The prosecutor had no objection to excusing the juror, and defense counsel submitted. (27 RT 2042.) Lastly, as to Juror No. 96, who would always vote for life, defense counsel again submitted and the prosecutor had no objection. (27 RT 2042.)

Each time the parties agreed to have the trial court excuse one of these jurors or had no objection to one of the jurors being excused, or simply submitted on having the juror excused, the trial court was invited to believe it could dismiss the juror without the need to hear further argument from counsel or from having to voir dire the juror further regarding his or her views. The court told the parties it was "primarily going through this and excusing people who are very, very obvious to this Court." (27 RT 2034.) Defense counsel knew he could inquire further if desired. For instance, when, in the questionnaire one of the prospective jurors stated that no matter what the

evidence he would vote for life,"'I shall not kill," his response could be labeled nothing other than strong. Yet because counsel asked to further inquire, the court retained the juror for further questioning. (27 RT 2036, 2042 [court grants defense counsel's request to further inquire of another juror].)

By defense counsel's actions, he invited the trial court to dismiss particular jurors because of their strong opinions. Accordingly, Russell may not now complain of the trial court's ruling.

Even if this Court finds that counsel's actions were not tantamount to stipulations to excusal of the seven complained of jurors, from the juror's strong opinions about the death penalty there was substantial evidence to support the trial court's decision to exclude each as his/her views might prevent or substantially impair the performance of his/her duties as a juror. (*Wainwright v. Witt, supra,* 469 U.S. at p. 424; *People v. Crittenden* (1994) 9 Cal.4th 83, 122.) Each potential juror strongly expressed his/her opinion that he/she was "pro life," and would not vote for the death penalty. (22 RT 2035-2037, 2042.)

B. Russell's Agreement To The Contents Of The Juror Questionnaire Precludes Him From Using This Court To Challenge The Trial Court's Use Of The Questionnaire

The parties reviewed the proposed juror questionnaire with the court prior to the first guilt phase trial and prior to the penalty phase retrial. Each party had an opportunity to provide input on the contents of the questionnaire and to object to any part of the questionnaire. (1 RT 30-35, 38; 21 RT 1875-1979; 22 RT 1880-1888.) Prior to the guilt phase of the first trial, the prosecutor told defense counsel he was not going to put questions 17, 18, and 19 on the questionnaire "unless the defense specifically wanted" them. (1 RT 30.) Defense counsel requested they be included because he expected there would testimony about drug use by Russell and others. (1 RT 30.) Defense

counsel stated he had reviewed the questionnaire and "agree[d] to all the contents of it," but wanted to add to question no. 20, regarding the jurors' knowledge of the case. (21 RT 1875.) In that area, the questionnaire had asked the prospective jurors:

> 34. This case involves the shooting death of Riverside Sheriff's Deputies James Lehmann and Michael Haugen on January 4, 1997, in the Banning Whitewater area of Riverside County. The defendant was arrested the same day and charged with the murder of the two deputy sheriffs.
>
> a. Have you heard of this case?
> _____Yes ____ No
>
> If yes, please state from which source and what you recall:
> _____

(See e.g., 19 CT 5215.)

At defense counsel's request the instruction then added:

> b. If you have heard of this case, have you formed a strong opinion regarding the appropriate punishment?
>
> _____ Yes _____ No
>
> If your answer is yes, what is your opinion?
> _____
>
> c. Can you set aside your strong opinion and give each side a fair hearing regarding punishment?
>
> _____ Yes ___ No

(19 CT 5215.)

Both parties and the trial court discussed language for that part of the questionnaire. (21 RT 1876-1877.) The next day the parties agreed upon the language of the questionnaires. (22 RT 1886-1887.) The questionnaires posed the precise questions the parties requested. (21 CT 5730-5745.) If counsel had any qualms about the questions being asked or wanted the questions worded

differently, he could have discussed his concerns further with the court and counsel. He did not. Rather, he concurred in the wording of the final questionnaire. The questionnaire adequately identified information from potential jurors to discern their views on capital punishment and ultimately whether they could serve as jurors for the penalty phase retrial. Counsel invited any error, or at least, failed to object to the wording of the questionnaire. As a result, none of Russell's constitutional rights were violated.

VIII.

THE TRIAL COURT PROPERLY ADMITTED VICTIM IMPACT EVIDENCE.

In a series of related arguments, Russell attacks the trial court's admission of victim impact evidence: from testimony of the widows of Jim Lehmann and Michael Haugen regarding life with their husbands, life on the day the deputies were killed, and how life after the murders affected them and their children; from Ashley Lehmann and ten-year-old Stephen Haugen about life without their fathers, from Elizabeth and Valerie's parents who witnessed the effects of the murders on their daughters, and to other friends and family members. Russell contends the evidence was irrelevant, excessive, cumulative, and highly prejudicial (particularly that of the children) under Evidence Code section 352, and elicited improper testimony concerning the character of Russell. He claims the testimony violated his right to due process and to a reliable penalty determination under the Eighth Amendment, and Penal Code section 190.3, subdivision (a), which permits the prosecution to present circumstances of the crime as a factor for the jury to consider in rendering a penalty of death or life without the possibility of parole. Neither United States Supreme Court law nor the laws of California support Russell's position.

In *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S. Ct. 2597, 115 L.Ed.2d 720], the United States Supreme Court in large part overruled *Booth*

v. Maryland (1987) 482 U.S. 496 [109 S.Ct. 2207, 104 L.Ed.2d 876], which had foreclosed all evidence and argument regarding victim impact. The Court did not erect any state law bar to admission of victim impact evidence and prosecutorial argument on that evidence. The Court remarked, "[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." (*Payne,* at p. 825.)

"In California, the admissibility of victim impact evidence is governed by judicial construction of the state's death penalty law, not by statute." (*People v. Brown* (2004) 33 Cal.4th 382, 394 citing *People v. Edwards*, *supra*, 54 Cal.3d at pp. 833-834.) In *Edwards*, this Court held the word "circumstances" as used in section 190.3, subdivision (a), "does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to '[t]hat which surrounds materially, morally, or logically' the crime (3 Oxford English Dict. (2 ed. 1989) p. 240, 'circumstance,' first definition.) The specific harm caused by the defendant does surround the crime 'materially, morally, or logically." (*Edwards, supra,* at p. 833.)

In *People v. Sanders*, *supr*a, 11 Cal.4th at p. 475, this Court recognized that *Payne* only encompasses evidence that logically showed the harm caused by the defendant and does not mean there are no limits on emotional evidence and argument. (*Id.* at p. 549.) On the one hand, evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy, or to impose the ultimate sanction are permissible. (*Ibid.*) Irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational and purely subjective response, however, must be curtailed. (*Id.* at pp. 549-550.)

A. The Testimony Of The Widows, Children, Parents And Friends Of The Deputies Along With Photos Depicting Their Lives, Were Neither Irrelevant Nor Excessive

In his first sub-claim, Russell contends the amount of evidence depicting the lives of Deputies Haugen and Lehmann was irrelevant and excessive. (AOB 145.) The evidence was neither irrelevant nor excessive.

This Court has held that emotional testimony on the injurious impact a capital murder defendant inflicts on surviving members of the victim's family is admissible at the penalty phase of a capital trial. In *Brown, supra,* 33 Cal.4th 382, 397-398, the defendant murdered a police officer during the performance of the officer's duties. During the penalty phase of the trial, the trial court allowed the prosecution to introduce the testimony of the officer's wife regarding her description of the events on the night of the killing when she was informed of her husband's death. (*Id.* at pp. 397-398.) She also testified to past incidents or activities she shared with her husband prior to his murder. This Court held both were properly admitted:

> [T]heir testimony simply served to explain why they continued to be affected by his loss and to show the "victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be. (*Payne v. Tennessee, supra,* 501 U.S. at p. 823.) In this regard the United States Supreme Court in *Payne* acknowledged that just as the defendant is entitled to be humanized, so too is the victim: "'[J]ustice, though due too the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.'"

(*Brown I, supra,* 33 Cal.4th at p. 398.)

The same holds true for the testimony in *Brown* of the officer's brother who testified to his custom of saluting his brother's grave each time he drove by the cemetery and that their father had not gone fishing since his son's death. (*Id.* at p. 398.) In words particularly apropos to this case, this Court found these were "simply manifestations of the psychological impact experienced by the

victims." This evidence was not inconsistent with the Court's prior decisions within the "fundamentally fair" meaning of *Payne, supra,* 501 U.S. at p. 25. The Court concluded that "these responses are understandable human reactions, particularly [the officer's brother] given the circumstances of the crime–a police officer deliberately killed in the line of duty." (*Brown I, supra,* 33 Cal.4th at p. 398.)

Similarly, in *People v. Panah* (2005) 35 Cal.4th 395, 494-495, this Court upheld the admission of testimony by the victim's family that the victim's brother had begun doing poorly in school and begun using drugs and alcohol after his brother's death. In rejecting the defendant's constitutional arguments, this Court held, "There is no requirement that family members confine their testimony about the impact of the victim's death to themselves, omitting mention of other family members." (*Id.* at p. 495.) Additionally, the "'residual and lasting impact'" the victim's brother "'continued to experience as a result of [his sister's] murder" was properly admitted. (*Id.* at pp. 494-495.) "It is common sense that surviving families would suffer repercussions from a young [person's] senseless and seemingly random murder long after the crime is over." (See also *People v. Brown* (2003) 31 Cal.4th 518, 572-573 (*Brown II*) [surviving family members testified that they were still scared to go outside at night, more than three years after the robbery and murder].)

In yet another example, in *People v. Taylor* (2001) 26 Cal.4th 1155, 1170, this Court found the trial court properly admitted evidence from the victim's wife and son about the "various ways they were adversely affected by their loss of [the victim's] care and companionship." This Court found that evidence of this kind, directed towards showing "the impact of the defendant's acts on the family of his victims is admissible at the penalty phase of a capital trial." (See also *People v. Boyette* (2002) 29 Cal.4th 381, 442 [testimony of

family members describing their love of the victims and how they missed the victims in their lives properly admitted under § 190.3, subd. (a)].)

Likewise, in *People v. Marks* (2003) 31 Cal.4th 197, 235, this Court found the trial court properly admitted the testimony of a nonrelative of the murder victim and permitted him to testify that the victim treated him like a son, provided financial assistance because of the witness's seizure disability, and treated him like a human being where others had not. The witness also properly testified that his physical condition had deteriorated since the victim's death, and that the victim had extended credit to many elderly people. This Court recalled the United States Supreme Court's pronouncements in *Payne* concerning the broad scope of admissible victim impact evidence to show the victim's death "'represents a unique loss to society and in particular to his family.'" (*Id.* at p. 235.)

> "The jury may know 'the full extent of the harm caused by the crime, including its impact on the victim's family and *community*.'" (*Payne v. Tennessee, supra,* 501 U.S. 808, 830 (conc. opn. of O'Conner, J.), italics added.) Murderers know their victims "probably ha[ve] close associates, 'survivors,' who will suffer harms and deprivations from the victim's death . . . . [T]hey know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents." (*Payne v. Tennessee, supra,* 501 U.S. 808, 838 (conc. opn. of Souter, J.).)

(*People v. Marks, supra,* 31 Cal.4th at pp. 235-236, italics omitted.)

Russell believes the victim impact evidence in this case, however, reaches the limits of what is admissible. In addition to the testimony of the surviving spouses, children and others, he claims the photos showing the life of each deputy with his family, coupled with testimony by the deputies' wife, two of the children and others were irrelevant and excessive. (E.g., AOB 145.) In *People v. Prince* (2007) 40 Cal.4th 1179, 1289-1291, in addition to testimony by several members of the victim's family which included testimony by the victim's father who broke down to tears while testifying, the prosecution

presented a 25 minute videotape of the victim being interviewed about her musical and other talents. This Court found the trial court properly exercised its discretion in admitting the videotape; the tape was not set to stirring music. and the record showed it did not evoke an emotional response from the jury.

Similarly, the photos in this case were nothing more than visual glimpses of the lives of the deputies: their families, their activities, the fulfillment of their dreams of becoming law enforcement officers. The photos were relevant as they depicted what Russell describes as "biographies" of each deputy. Those "biographies" helped to humanize the deputies just as did other testimony. The photos, combined with the evidence properly imparted to the jury each deputy's unique loss his family, friends, and community. The photos simply provided a visual representation of that testimony.

B. The Testimony Of Ashley Lehmann And Stephen Haugen Was Neither Cumulative Nor Unduly Prejudicial

Russell next claims that because Valerie Lehmann testified to the affect of Jim Lehmann's death on his daughter Ashley, and Elizabeth Haugen testified to the adverse affect of her husband's murder on their son, Stephen, the children themselves should not have been allowed to testify. (AOB 148-151.) He contends the testimony of the two children was cumulative and unduly prejudicial. (AOB 148.) Nothing precluded the children from also testifying to their personal reactions to the murder of their father. (*People v. Mitcham*, *supra*, 1 Cal.4th at p. 1062 [trial court properly permitted witness to testify to length of extensive hospitalization for psychiatric problems, two nervous breakdowns, suicide attempts, phobias of entering small stores and continuing inability to work.].) The jury was entitled to hear of their suffering not only from their mother's perspective, but from theirs.

C. Relevant Evidence Of Impact Of The Testimony Of Deputy Lehmann's Mother And Daughter

Russell takes issue with the testimony of Ethel Lehmann, Deputy Lehmann's mother, regarding testimony that she suffered a heart attack two weeks after her son's death as there was no causal connection between the murders and her heart attack. Likewise he contends evidence that the Haugen's infant daughter, Katie, who awoke at the time of the shooting and started screaming and crying uncontrollably, was irrelevant. (AOB 152.) Even assuming error, evidence of the heart attack and Katie's early morning stirring, was harmless beyond a reasonable doubt. (*People v. Kelly* (1990) 51 Cal.3d 931, 964 [*Chapman* standard applied to arguably improper victim impact evidence under *Booth*.) The evidence in aggravation was overwhelming

D. The Prosecutor Did Not Elicit Improper Defendant Character Evidence From Ashley Lehmann When She Testified Her Father Had Told Her There Were "Bad People" In His Work

In yet another attempt to find error in the trial court's admission of victim impact evidence, Russell contends the trial court erroneously allowed 11-year-old Ashley Lehmann to testify that her father told her there were "'Bad people'" in his work and that since her father was killed she now thinks there are lots of "'bad people out there.' (30 RT 3077.)" (AOB 153.) Russell suggests that because this testimony was inadmissible under *Booth*, so too it is inadmissible under *Payne*. He urges that the testimony constituted improper evidence regarding Russell's character. (*Ibid.*) Russell's failure to specifically object on constitutional grounds to Ashley's testimony precludes him from raising the issue on appeal.

A timely objection is required to preserve a claim of the erroneous admission of evidence. (Evid. Code, § 353.) "Failure to comply with this statutory requirement may not be excused on the ground that a timely objection

would be inconvenient or because of concerns about how jurors might perceive the objection." *(People v. Pollock* (2004) 32 Cal.4th 1153, 1181.) Russell objected to Ashley testifying in general. He did not object to this portion of Ashley's testimony or the specific portion he now complains of on appeal. Thus he has forfeited consideration of this issue. (*People v. Huggins* (2006) 38 Cal.4th 175, 326 [failure to object to victim impact evidence forfeits issue on appeal].)

In any event, Ashley's testimony was admissible. While Russell characterizes Ashley's testimony as equating Russell of being a "bad" person, nothing in the record supports this characterization. More likely, Ashley was expressing the grief of a young girl having had her innocence of childhood taken away by the murder of her father.

Even if this Court were to construe Ashley's testimony as characterizing Russell as a "bad" person," any error was harmless beyond a reasonable doubt. By this time in the trial, the jury knew Russell had intentionally murdered Deputies Lehmann and Haugen in the performance of their duties. They knew Russell had been convicted of first degree murder and the special circumstance allegations had been found true. They knew Russell had previously expressed his desire to "take out" a police officer. Thus, Ashley's thoughts were no more than another way of a young girl articulating what the jury already knew: that Russell was a "bad" person for having gunned down the unsuspecting deputies. (*People v. Samayoa* (1997) 15 Cal.4th 795, 842-843 [even if prosecutor's guilt phase argument could be characterized as improper character reference of defendant, no harm as the prosecutor in part simply articulated circumstances known or reasonably inferrable from the evidence].) They knew Russell had loaded three clips into his gun as the deputies approached, that he took aim, waited for the opportune moment, and shot them. They knew from the testimony of Robert Joseph, Omar Rodriquez and Valerie Lehmann of the

special qualities and activities they would no longer share with Deputy Lehmann because Russell had murdered them. From this it would come as no surprise to any juror that the child of one of the slain officers would consider Russell to be a "bad" person.

Additionally, the prosecutor did not mention this portion of Ashley's testimony (nor any of the victim impact evidence) in his penalty phase closing argument. (31 RT 3131-3157 [entirety of prosecutor's argument].) For these reasons, even had Russell lodged a timely and specific objection to Ashley's testimony, any error was harmless beyond a reasonable doubt. (*People v. Frank* (1990) 51 Cal.3d 718, 735.)

IX.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE USE OF VICTIM IMPACT EVIDENCE.

Russell argues that the trial court failed to provide any instructions on victim impact evidence. This involved the trial court's to refusal to give a defense requested special instruction regarding the use of "the extensive victim impact evidence presented by the prosecution" or any instructions at all on victim impact evidence which Russell contends violated his due process rights to a fair trial and reliable penalty determination. (AOB 155 citing U.S. Const., Amends., 6, 8, 14.; Cal. Const., articles I, §§ 7, 15, 16 & 17.)

At the penalty retrial, Russell requested the court instruct the jury with special instruction number 3, which read:

> Cautionary & Limiting: Victim Impact
>
> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional

> evidence and argument. On the other had, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(21 CT 5844.) The court refused to give the same special instruction at the first penalty phase trial. (14 RT 1598.) In written points and authorities at that time, Russell argued that the court should give the instruction because CALJIC Nos. 8.86 and 8.87 prevented the jury from considering non-criminal aggravating evidence. (13 CT 3527.) He claimed the failure to give the instruction violated his federal constitutional rights to equal protection and to be free from cruel and unusual punishment and to due process (U.S. Const., Amends. 8 & 14) (13 CT 3528.) At the penalty retrial, Russell submitted the same instruction indicting that in light of the court's "inclination" not to give it, he was not presenting any further reasons to justify giving the instructions. (29 RT 3057.)

Neither in his argument at the first penalty phase nor in the retrial did Russell object to the court's refusal to give the instruction on state constitutional grounds. Thus, he has forfeited consideration of any claim based on a violation of state constitutional grounds in this appeal. (*People v. Geier* (2007) 41 Cal.4th 555, 590.)

Even if not foreclosed from raising this issue, the court still properly refused to give the instruction. Acknowledging that in *People v. Harris (Maurice)* (2005) 37 Cal.4th 310, and *People v. Ochoa* (2001) 26 Cal. 398, this Court rejected Russell's argument regarding instructions on victim impact evidence, Russell attempts to distinguish *Harris* and *Ochoa*, arguing (1) the instruction was needed so the jury would know how to consider the "extensive victim impact evidence" presented by the prosecutor (AOB 155), (2) that unlike CALJIC 8.84.1 (describing the general duties of the jury) given in *Ochoa*, there was no instruction at all concerning victim impact evidence (AOB 156-157), and (3) California should give an impact instruction as do other states (AOB

159). None of these attempts alter the conclusion that the trial court was not required to give the instruction.

CALJIC 8.84.1 instructs the jury:

> You will now be instructed as to all of the law that applies to the penalty phase of this trial.
>
> You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.
>
> You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.
>
> The court instructed the jury that to determine whether to impose death or life without the possibility of parole the jury must be guided by the applicable factors of aggravation and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignments of weights to any of them. You are free to assign or the moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.
>
> In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without possibility of parole.

(31 RT 3204-32055; 21 CT 5809 [CALJIC No. 8.88].)

The court also instructed the jury with CALJIC 8.84.1:

You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you.

You must neither be influenced by bias or prejudiced against the defendant, or swayed by public opinion or public feeling. Both the People and the Defendant have a right to expect that you will consider all of the evidence and follow the law and exercise your decision consciously [*sic*], and reach a just verdict.

(31 RT 3191; 21 CT 5782 [CALJIC No. 8.84.1].)

Recently in *People v. Carey* (2007) 41 Cal.4th 1009, 134, this Court again upheld the rejection of an instruction identical to that requested by Russell. In so doing, the Court reiterated its holding in *Ochoa* and *Harris*. The jury is presumed to read and follow the court's instructions. (*People v. Jablonski, supra*, 37 Cal.4th at p. 834.) Nothing in the instructions left the jury with the impression that they could consider emotion over reason. Nor did the instructions improperly suggest what weight the jurors should give to any mitigating or aggravating factors. (*People v. Harris, supra,* 37 Cal.4th at p. 358.) While CALJIC No. 8.85 did not expressly state the jury must consider the instructions as a whole, it imparted that principle to the jury. As in *Carey*, the trial court properly rejected the proffered defense instruction as being confusing: the instruction was unclear as to whose emotional reaction it directed the jurors to consider with caution -- that of the victim's family or the juror's own. (*Harris, supra,* at p. 359.) There is no reason to consider once more this Court's continuous rejection of this issue.

X.

THE TRIAL COURT HAD NO OBLIGATION TO SUA SPONTE INSTRUCT THE JURY THAT IT COULD CONSIDER EVIDENCE OF THE UNCHARGED ACTS AS AN AGGRAVATING FACTOR ONLY IF THEY FOUND THEM TRUE BEYOND A REASONABLE DOUBT.

Russell contends the trial court failed to sua sponte instruct the jury that it could not consider the presence of uncharged acts Russell committed which involved the use of force or attempted use force, or the express or implied threat to use force or violence. (Pen. Code, § 190.3, subd. (b)), until the prosecution proved those prior acts beyond a reasonable doubt. Russell claims the failure to give this "*Robertson*[6] instruction violated his rights to due process, a fair penalty trial and a reliable penalty proceeding under the 5th, 6th, and 14th Amendments, and the equivalent provisions of the California Constitution (Cal. Const., art. I, § 16). (AOB 161-165.) Russell's characterization of the instruction and the court's duty to give it is incorrect. Because the evidence Russell complains of was not admitted under § 190.3, subd. (b), the trial court was not required to give the instruction sua sponte.

The trial court instructed the jury in pertinent part, pursuant to section 190.3, subd. (a):

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of this trial. You shall consider, take into account, and be guided by the following factors, if applicable.
>
> . . .
>
> A, the circumstances of the crime of which the defendant was convicted in the proceeding and the existence of any special circumstances found to be true.

---

6. *People v. Robertson* (1982) 33 Cal.3d 21, 53-56.

> B, the presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence.

(31 RT 3202; 21 CT 5804.)

The trial court did not instruct the jury that before it found the jury could consider any prior offenses it must find the prosecution proved those offenses beyond a reasonable doubt. (*People v. Robertson, supra,* 33 Cal.3d at p. 54.) Such an instruction must be given, "'only when evidence of other crimes is introduced or referred to as an aggravating factor pursuant to former Penal Code section 190.3, [factor] (b). When such evidence is introduced and used for other purposes, a defendant is not entitled to a reasonable doubt instruction, but may be entitled to an instruction limiting the use of that evidence to the purpose for which it was admitted.'" (*People v. Rich* (1988) 45 Cal.3d 1036, 1121 quoting *People v. Robertson, supra,* 33 Cal.3d at p. 60.) In this case, the trial court was not required to give this instruction because: a) no evidence of criminal activity was admitted during the penalty phase, only a lack of such activity; and b) testimony concerning Russell's prior domestic violence and threats was not admitted under Penal Code section 190.3, subdivision (b) - it was admitted and argued as circumstances of the crime under Penal Code section 190.3, subdivision (a), and as a factor challenging the testimony of Dr. Verde. Russell cannot complain of its admission on this latter basis as he did not object to it on this ground at trial. In fact, Russell tried to use Dr. Verde's testimony to persuade the jury that because of Russell's troubled past they should impose life without the possibility of parole.

During the penalty phase of trial, Elaine Russell's brother-in-law, David Brugett, testified to Russell's drinking and drug use. (25 RT 230.) Brugett stated he was on good terms with Russell until Russell began mistreating Elaine. (25 RT 2392.) In 1983, Russell expressed hostility towards authority

figures. In a "quite striking" conversation, Russell stated he did not approve of police in certain counties where he had experienced run-ins with them. (25 RT 2393-2394.) Russell stated it would not bother him to shoot a police officer. (25 RT 2393, 2403.) Over the years Brugett spent time with Russell. Russell's views towards authority remained the same. (25 RT 2393.) Brugett's testimony was not admitted as "other crimes" evidence under section 190.3, subdivision (b); it was admitted to show Russell's specific intent to kill the deputies rather than shoot in front of them. (Evid. Code, § 1101, subd. (b).)

The fact that Russell fired several shots into the air before murdering the deputies was not evidence of another crime under subdivision (b), but was a circumstance of the crime under subdivision (a). (25 RT 2425, 2452.)

Similarly, the prosecutor elicited testimony on cross-examination from Dr. Verde and Pastor Young concerning reported domestic violence committed by Russell. He did so not to support an aggravating factor under section 190.2, subdivision (b), but to show that despite counseling and repeated opportunities to turn his life around, Russell had not changed his life and, like the problems with Elaine, would continue to carry through with actions and threats he had made. (See 31 RT 3148 [no factors other than A and K apply to this case].) Russell and Pastor Young discussed Russell's recurring problems concerning substance abuse and arguments with his wife. (28 RT 2938.) Often Russell would show remorse and then weeks or months later be "back at it again." (28 RT 2950.) Pastor Young learned that Russell had beaten Elaine. (28 RT 2938.) Russell volunteered for the counseling, sometimes with Elaine, sometimes alone. (28 RT 2942.)

Similarly, the defense called Dr. Verde, who unsuccessfully attempted to treat Russell for chemical dependency. Russell's medical record chronicled his treatment, pending legal problems, history of violence, including abusing his girlfriend prior to admission into a treatment program, unemployment, and

emotion disturbances -- all consistent with alcohol and drug abuse. (28 RT 2874.) Dr. Verde opined that Russell's behavior also fit the criteria for an antisocial personality disorder. (28 RT 2874.)

Prior to 1996, there was no indication in Russell's records that he had any kind of mental illness or mental disorder, only that he had some personality problems. (28 RT 2884.) His record did indicate he had childhood or adolescent antisocial behavior. (28 RT 2885.) On cross-examination the prosecutor questioned Dr. Verde's diagnosis by asking Dr. Verde about facts fundamental to his diagnosis including Russell's polysubstance abuse. By doing so the trier of fact could consider the weight to assign to Dr. Verde's testimony and possibly the applicability of Penal Code section 190.3, subdivision (d) -- whether or not Russell committed the offense while under the influence of extreme mental or emotional disturbance, or section 190.3, subdivision (k)-extenuating the gravity of the crime – a mitigating defense pursued by Russell.

Because this jury was not the original jury that found Russell guilty in the guilt phase, some of this evidence was presented as circumstances of the crime under Penal Code section 190.3, subdivision (a). Thus, no *Robertson* instruction was required. (*People v. Lang* (1989) 49 Cal.3d 991, 1040 [because prosecutor did not offer evidence as "other crimes evidence," instruction unnecessary].) Morever almost all of the "other crimes" evidence was admitted during the guilt phase of Russell's trial to show Russell's intent to murder the deputies. (*People v. Rich, supra,* 45 Cal.3d at p. 1121.) The fact that during closing argument at the penalty phase the prosecutor never asked the jury to consider the alleged "other crimes" evidence to determine Russell's sentence further supports this position. (*Ibid.*; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1030 [testimony that defendant told witness he had shot and killed a man during a robbery and had carried the body in his car for three days did not

constitute "other crimes" evidence, but was simply a "thinly disguised reference to the instant crime].)

Even if this Court finds the jury should have been instructed according to *Robertson*, any error in failing to do so is harmless. Testimony concerning Russell's acts of domestic violence on Elaine Russell, as noted, were part and parcel of the defense and went both in the guilt phase and in the penalty phase, uncontradicted and unimpeached. (*People v. Coleman* (1988) 46 Cal.3d 749; *People v. Morales*, *supra*, 48 Cal.3d at p. 566.)

The state law harmless error test applies. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 446-447. In *Brown*, the Court held that in the absence of controlling evidence to the contrary, the failure to give the *Robertson* instruction as a condition of a jury's consideration of other-crimes evidence as an aggravating circumstances is judged by California's state harmless error standard which is more exacting than *Watson*. Thus, harmless error determinations call for a finding of whether it is reasonably possible such an error affected a verdict, here the decision to impose the death penalty. (*Brown,* at pp. 447-448.) In *Brown*, this Court found it was not reasonably possible that the jury would have returned a verdict less than death had it not heard evidence of other violent acts committed by the defendant. In *Brown*, as in this case, there was overwhelming evidence by direct and cross examinations that defense counsel did not dispute in closing argument. (*Id.* at p. 448.)

Furthermore, the foundation for the mitigating circumstances offered by Russell, i.e., Dr. Verde's opinion and testimony regarding Russell's attempt to obtain help for his alcohol and drug use, and Pastor Young's testimony concerning Russell's troubled relationship with Elaine, including beating her, both depended in great measure on the introduction of Russell's domestic violence against Elaine. If the prosecution had not been allowed to cross-examine the entirety of Dr. Verde's and Mr. Young's testimony, including these

acts, Russell stood the very real possibility of having the trial court exclude their testimony in total. Russell chose not to do so, thus putting forth his defense, rather than risk undercutting it by having the witnesses' testimony excluded.

XI.

THE TRIAL COURT PROPERLY AND FULLY INSTRUCTED THE JURY ON THE PRESENCE OR ABSENCE OF PRIOR FELONY CONVICTIONS.

Russell next challenges the court's refusal to give Russell's proposed instruction to the effect that, "The absence of any felony convictions prior to the crime[s] for which the defendant has been tried in the present proceedings is a mitigating factor." (AOB 168 citing 21 CT 5838.) Russell claims the proposed instruction undercut a significant portion of his defense, thus violating Russell's state statutory rights (section 1093, subd. (f)), and his right to due process and a reliable penalty determination in violation of the state and federal constitution (U.S. Const. Amends. 5, 6, 8 & 14; Cal. Const., art. I, §§ 7, 15, 16 & 17). In *People v. Farnam* (2002) 28 Cal.4th 107, 191-192, this Court rejected Russell's underlying argument, i.e., that the court must instruct the jury on which factors are aggravating and which are mitigating. This Court has adequately addressed the underlying reasoning presented by Russell and there is no reason for the Court to reconsider its decision in *Farnam*. (AOB 237-241.)

CALJIC No. 8.85, the implementing instruction for the aggravating and mitigating factors set forth in Penal Code section 190.3, as given in this case, reads in relevant part:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of this trial. You shall consider, take into account, and be guided by the following factors if applicable:
>
> A, the circumstances of the crime of which defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.

B, the presence or absence of any criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the express or implied threat to use force or violence.

C, the presence or absence of any prior felony conviction other than the crimes for which the defendant has been tried in the present proceedings.

(31 RT 3202-3203; 21 CT 5804.)

The trial court concluded by instructing the jury with subdivision K: Any other circumstance which extenuates the gravity of the crime, even though it's not a legal excuse for the crime, and any sympathetic or other aspects of the defendant's character or record, that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

(31 RT 3293; 21 CT 5805.)

This Court has repeatedly held that the failure to identify which factors are aggravating and which are mitigating is not error; "the aggravating and mitigating nature of the factors is self-evident within the context of each case." (*People v. Dickey* (2005) 35 Cal.4th 884, 928; see also *People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Farnam, supra,* 28 Cal.4th at p. 191; *People v. Hillhouse, supra*, 27 Cal.4th at p. 509.) Despite Russell's argument from the first penalty phase request for the instruction (Special Instruction #8) which was incorporated into his request for the instruction at the penalty retrial (29 RT 3056; see 13 CT 3529-3530; 14 RT 1599.) Russell has provided no reason for this Court to depart from its decisions. None of his constitutional rights were violated.

XII.

THE INSTRUCTIONS DID NOT ALLOW THE JURY TO DOUBLE COUNT WHICH WERE SPECIAL CIRCUMSTANCES AS AGGRAVATING FACTORS.

Russell next contends the trial court's refusal to give his Special Instruction #7 which informed the jury it "should not double count aggravating

factors which are special circumstances," violated Russell's constitutional rights under the Eighth and Fourteenth Amendments to due process and a reliable penalty determination. (AOB 178-184.)

> You must not consider as an aggravating factor the existence of any special circumstances if you have already considered the facts of the special circumstance as a circumstance of the crime for which the defendant has been convicted. [¶] In other words, do not consider the same facts more than once in determining the presence of aggravating factors.

The trial court refused to give this instruction stating the standard jury instructions advised the jury as to the use of aggravating factors. (see 29 RT 3056-3057.)

Russell contends that without clarification of the proposed instruction, he was left "vulnerable to double counting" as the jury might have improperly double counted the same facts in determining the presence of aggravating factors.[7] While a clarifying instruction *may* have assisted the jury, the absence of a clarifying instruction is usually harmless, as is the case here, in light of properly given instructions and the fact the prosecutor did not mislead the jury or suggest that evidence could be counted more than one time. (See *People v. Mayfield, supra*, 14 Cal.4th at pp. 804-805; *People v. Medina* (1995) 11 Cal.4th 694, 779; *People v. Proctor* (1992) 4 Cal.4th 499, 549-550.)

In the instant case, the jury was instructed with CALJIC No. 8.85 which does not imply the jury may "double count"evidence under these factors. (*People v. Mayfield, supra*, 14 Cal.4th at p. 805 [discussing CALJIC No. 8.84.1

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7. Section 190.3 lists the factors a penalty phase jury may consider. Among those are factor (a), which requires the jury to consider the circumstances of the offense, factor (b), which requires the jury to consider the presence of violent criminal activity, and factor (c), which requires the jury to consider prior felony convictions. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 804; *People v. Sanchez* (1995) 12 Cal.4th 1, 78.)

now 8.85]; 31 RT 3202; 21 CT 5804.) Moreover, the jury was not apt to give undue weight to the facts underlying the present offenses merely because those facts also gave rise to a special circumstance. (*People v. Medina*, *supra*, 11 Cal.4th at p. 779.) In addition, the prosecutor did not urge the jury to double count aggravating factors or special circumstances and Russell does not argue to the contrary. (*People v. Medina*, *supra*, 11 Cal.4th at p. 779.)

As no instruction implied the jury could improperly double count aggravating factors or special circumstances, and because the prosecutor's argument was not misleading to the jury, any alleged error was not prejudicial as there was no reasonable possibility the lack of a clarifying instruction could have affected the outcome of the penalty phase. (*People v. Medina*, *supra*, 11 Cal.4th at p. 779; *People v. Proctor*, *supra*, 4 Cal.4th at p. 550; see also *People v. Welch* (1999) 20 Cal.4th 701, 769.)

XIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON CIRCUMSTANCES OF THE CRIME AS A FACTOR FOR THEM TO CONSIDER.

Russell next contends the trial court improperly allowed the jury to consider circumstances of the crimes as evidence of uncharged violent crimes under section 190.3, subdivision (b). More specifically, Russell claims the jury was improperly allowed to consider the two charges that were dismissed prior to the beginning of the penalty retrial, the misdemeanor spousal abuse charge (§ 273.5 , subd. (a)), and assault with a deadly weapon charge against Beverly Brown (§ 245, subd. (a)(1)), both stemming from the events in the minutes before the murders to Deputies Haugen and Lehmann, as uncharged violent crimes under section 190.3, subdivision (b). (AOB 185.) Russell alleges this error violated his right to due process, a fair trial and a reliable penalty under the state and federal constitutions (U.S. Const., Amends., 5, 6, 8, & 14; Cal. Const.,

art. I, §§ 7, 15, 16, & 17). (AOB 185-189.) First, Russell has forfeited consideration of this issue by his failure to raise it below. Second, it was not the charges but the acts Russell committed which were an integral part of the circumstances of the crimes. Thus, no further instruction was necessary.

Russell acknowledges that "[c]riminal activity involving force or violence under subdivision (b) is limited to conduct other than the immediate circumstances for which the death penalty is being contemplated. (*People v. Melton, supra,* 44 Cal.3d at p. 763.) Penal Code section 190.3, subdivisions (b) and (c) pertain only to crimes other than the crimes for which the defendant was convicted in the present proceeding." (AOB 186.) What he fails to grasp, however, is that Russell's kicking and hitting of his wife, Elaine Russell, and his pointing his M-1 rifle at Beverly Brown and threatening to kill her were circumstances immediately preceding his shooting the deputies.

Russell would have this Court view the circumstances immediately preceding the shootings as wholly separate from the shootings. Yet, the events happened within a matter of minutes. The sole reasons Deputies Haugen and Lehmann responded to the scene were because of a domestic disturbance call at Russell's home in which Russell had hit and kicked Elaine Russell, ripped the phone from the wall, threatened to kill her, Beverly Brown, and police, point his rifle to shoot, and put the butt of the rifle at Beverly as if to bash her face and because he fired shots into the air. There is no way to divorce these facts from the "circumstances" of Russell killing the two deputies.

Furthermore, Russell argues the only evidence this second penalty phase jury had of the circumstances of the crimes was what the court told them: that Russell had been convicted of two accounts of first degree murder and the special circumstances. (31 T 3197.)" (AOB 187.) Russell, however, must concede that the jury was made aware of more than the fact of the first degree murder convictions and the true findings on the special circumstance

allegations. They were presented with a substantial amount of evidence demonstrating the circumstances of the crimes. This Court has held that section 190, subdivision (b) refers to violent criminal activity *other than* that underlying the offenses in the present proceeding. A reasonable juror could not have believed that the instruction in question allowed any reconsideration whatever. (*People v. Ashmus* (1991) 54 Cal.3d 932, 998.) Russell's constitutional claims must be rejected.

In any event, nothing in the prosecutor's argument stated or implied that the circumstances of the murder should be considered both under factor (a) and as criminal activity under factor (b). In fact the prosecutor pointed out that the jury would be guided by all the factors but the only ones that really applied in this case where (a) and (k). "Everything else in between doesn't apply to this situation." (31 RT 3148.) There was no prejudice. (*People v. Coleman* (1989) 48 Cal.3d 112, 156-157.) Accordingly, even assuming error, Russell's constitutional rights were not violated.

XIV.

CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE CONSTITUTIONAL; THE PROSECUTION IS NOT REQUIRED TO PROVE AND THE COURT IS NOT REQUIRED TO INSTRUCT THE JURY THAT THE PROSECUTION HAS THE BURDEN OF PROOF IN THE PENALTY PHASE.

Russell next raises a plethora of constitutional challenges under the Sixth, Eighth and Fourteenth Amendments to the instructions given in the penalty phase of a capital case. (AOB 190 *et seq.*) He recognizes all have been rejected by this Court, but raises them to preserve his right to later state and federal review. (AOB 190 fn. 37.)

Russell contends that his constitutional rights were violated because the jury was not instructed in the penalty phase that all aggravating factors had to

be proven by the prosecution beyond a reasonable doubt, that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt, and that death is the appropriate penalty beyond a reasonable doubt. (AOB 191-203; U.S. Const., Amends. 6, 8, & 14.) First, Russell has forfeited consideration of this issue by his failure to raise it below. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171) Second, this Court has consistently rejected similar contentions. (See *People v. Moon, supra,* 37 Cal.4th at pp. 43-44; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418 [because the penalty decision is "inherently moral and normative" rather than factual, instruction on the burden of proof is not required]; *People v. Osband, supra,* 13 Cal.4th at pp. 709-710 [rejecting claim that federal constitution required penalty phase jury to be instructed that all aggravating factors and decision to impose death penalty had to be supported by proof beyond a reasonable doubt].)

A. The United States Constitution Does Not Require The Prosecution Prove Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty

Russell contends the failure to assign a burden of proof in California's death penalty scheme should be revisited in light of the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]. (AOB 192-193, 197.) Russell acknowledges that recently, this Court did reexamine its decisions in light of *Apprendi, Ring,* and the more recent decision in *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]. (AOB 192-198.) This Court determined that those cases have not altered the Court's conclusion that no burden of proof is required in the penalty phase of a capital trial. (*People v. Arias, supra,* 13 Cal.4th at p. 171.) "[U]nder the California death penalty scheme, once a

defendant has been found guilty of first degree murder and one or more special circumstances have been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole.' [Citation]." (*People v. Ward* (2005) 36 Cal.4th 186, 221-222 quoting *People v. Prieto* (2003) 30 Cal.4th 226, 263.) Although Russell argues that these rulings are "simply no longer tenable," (AOB 197), this Court has repeatedly held otherwise. This Court need not reexamine its decisions yet again. (*People v. DePriest* (2007) 42 Cal.4th 1, 60.)

B. The Trial Court Was Not Required To Instruct The Jury That They May Impose Death Only If They Were Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweighed The Mitigating Factors And That Death Was The Appropriate Penalty

Russell contends his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated because the jury was not instructed in the penalty phase that a sentence of death could be imposed 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 204-209.) Recently this Court reaffirmed its previous rulings that instructions on burden of proof or persuasion are not required, and should not be given. (*People v. Hoyos* (2007) 41 Cal.4th 872, 926.) There is no need to reconsider those rulings.

C. The Trial Court Was Not Required To Instruct The Jury On Burden Of Persuasion

Russell also contends that a sentence of death may not withstand constitutional scrutiny under the Sixth, Eighth and Fourteenth Amendments unless the trial court instructs the jury that the prosecution bears "some burden" of persuasion at the penalty phase. (AOB 209-214.) Russell acknowledges this

Court has rejected this contention, but asks this Court to reconsider its ruling. (AOB 210 citing *People v. Hayes* (1990) 52 Cal.3d 577, 643.)

As recent as this year, this Court reaffirmed its prior rulings, holding that "[b]ecause the determination of penalty is essentially moral and normative [citation omitted] and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion." (*People v. Hayes, supra,* 52 Cal.3d at p. 643; *People v. Geier, supra*, 41 Cal.4th at p. 620; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418.) There is no reason to reexamine this Court's decisions.

D. Jury Unanimity On Aggravating Factors Is Not Constitutionally Compelled

Again recognizing that this Court has previously rejected his claim that the constitution requires a jury unanimously find aggravating circumstances (AOB 214-215 citing *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147, & *People v. Taylor, supra,* 52 Cal.3d at p. 749), Russell nevertheless asserts that the failure to require unanimity as to aggravating circumstances violates his rights under the Sixth, Eighth and Fourteenth Amendments. To preserve his claim for further review, Russell argues the United States Supreme Court's decision in *Ring* undercuts the constitutional validity of this Court's ruling in *Bacigalupo*. (AOB 214-215 & fn. 47.) This Court has already rejected Russell's argument. (*People v. Griffin* (2004) 33 Cal.4th 536, 593.)

Russell asks this Court to reconsider its reliance on *Bacigalupo* particularly because of its reliance on the United States Supreme Court's reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 [109 S.Ct. 2055, 144 L.Ed.2d 728]. (AOB 215.) This Court has considered the effect of *Hildwin*, and has rejected Russell's argument. (*People v. Prieto* (2003) 30 Cal.4th 226, 275.) In *People v. Blair, supra,* 36 Cal.4th at page 753, this Court reaffirmed

its holding after considering the ramifications of *Apprendi, Ring,* and *Blakely*. It need not do so again in this case.

E. The Trial Court Was Not Required To Instruct The Jury On Presumption Of Life Without Possibility Of Parole

Russell next contends the trial court should have been required to instruct the jury that the presumption of life rather than death violated Russell's right to due process under the Fifth and Fourteenth Amendments, his Eighth Amendment rights to a reliable penalty determination and to be free from cruel and unusual punishment, and his Fourteenth Amendment right to equal protection as well as the concurrent provisions of the California Constitution (Cal. Cons., art 1, §§ 7, 15). (AOB 220-221.) This Court has repeatedly rejected this challenge, holding a trial court is not required to instruct on a "'presumption of life.'" (*People v. Dunkle* (2005) 36 Cal.4th 861, 940 citing *People v. Combs* (2004) 34 Cal.4th 821, 868; *People v. Arias, supra,* 13 Cal.3d at p. 190.) There being no requirement for the trial court to do so, Russell's constitutional challenges must fail.

XV.

THE INSTRUCTIONS PROPERLY DEFINED THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS.

Russell also takes issue with the modified version of CALJIC No. 8.88 given to the jury. That instruction, given without objection, provided:

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

An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself.

A mitigating circumstance is any fact, condition, or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.

In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances, with the totality of the mitigating circumstances.

To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(31 RT 3204-3205; AOB 222.)

Russell claims this instruction was "flawed" in several respects, thus violating his rights to a fair trial, due process and a reliable penalty determination. (AOB 223.)

A. CALJIC No. 8.88 Is Not Unconstitutionally Vague In Instructing The Jury That It Must Be Persuaded That Aggravating Circumstances Must Be "So Substantial" In Comparison To Mitigating Factors That It Can Impose Death Instead Of Life Without The Possibility Of Parole

Russell claims that CALJIC No. 8.88 is unconstitutionally vague and violates his rights under the Eighth and Fourteenth Amendments by informing 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 the possibility of parole." (AOB 223-226.) The phrase in the instruction telling the jurors that the aggravating factors must be "so substantial" as compared to the mitigating factors that death is warranted is not impermissibly vague. Preliminarily because Russell did not request a clarifying instruction at trial, he has waived consideration of this issue. (*People v. Arias, supra,* 13 Cal.4th at p. 171; 30 RT 3123-3125; 31 RT 3128-3130 [penalty phase instructional conferences].)

In any event, this Court has previously held that the phrase "so substantial" in the last paragraph of the instruction properly instructs the jury that aggravating circumstances must outweigh mitigating ones. (*People v. Moon, supra,* 37 Cal.4th at p. 43; *People v. Young* (2005) 34 Cal.4th 1149, 1227; *People v. Arias, supra*, 13 Cal.4th at p. 171.) CALJIC No. 8.88 is not vague and adequately guides the jury's sentencing discretion. (*People v. Smith* (2005) 35 Cal.4th 334, 369; *People v. Carter* (2003) 30 Cal.4th 1166, 1226 [rejecting argument that phrase "so substantial" contained in CALJIC No. 8.88 was unconstitutionally vague, conducive to arbitrary and capricious decision making, and created an unconstitutional presumption in favor of death].)

Further, the United States Supreme Court has stated that once the jury finds the defendant is within a category of persons eligible for the death penalty, the sentencer may be given "'unbridled discretion' in determining whether the death penalty should be imposed." (*Tuilaepa v. California* (1994) 512 U.S. 967, 979-980 [114 S.Ct. 2630, 129 L.Ed.2d 750].) Indeed this Court has cited the *Tuilaepa* case in rejecting a claim that the phrase "so substantial" is too vague. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1231.) As Russell presents no persuasive reason for this Court to revisit any of its past rulings, his claims should be rejected. (See *People v. Frye* (1998) 18 Cal.4th 894, 1024; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1193.)

B. The Trial Court Was Not Required To Instruct The Jurors That The Central Determination Is Whether The Death Penalty Is The Appropriate Punishment Not Simply An Authorized Penalty For Russell

Russell next attacks CALJIC No. 8.88 for instructing the jury that to impose the death penalty, it must find the aggravating circumstances so substantial compared to those in mitigation that it "*warrants* death instead of life without parole." (AOB 226-228, emphasis added.) Russell claims the term "warrants," violates his Eighth and Fourteenth Amendment rights arguing that just because death may be warranted, or authorized, in a given case does not mean it is necessarily appropriate. (AOB 226-227.) Once again, Russell's failure to object and request a modification to the instruction precludes him from doing so on appeal. (*People v. Arias, supra,* 13 Cal.4th 92, 171; 31 RT 3123-3125 & 32 RT 3128-3130 [penalty phase instructional conferences].) In any event, in *People v. Breaux* (1991) 1 Cal.4th 281, 315-316, this Court termed this same contention "spurious." The Court held that use of the term "warrants" is not a considerably broader term than "appropriate," as the defendant argued and that the language of CALJIC No. 8.84.2 (the precursor to CALJIC No. 8.88), essentially informed the jury that "it could return a death verdict only if the aggravating circumstances predominated and death [was] the appropriate verdict." (*Breaux, supra,* at p. 316; *People v. Marlow and Coffman* (2004) 34 Cal.4th 1, 122 [relying on *Breaux* to reject identical challenge to CALJIC No. 8.88]; *People v. Crew* (2003) 31 Cal.4th 822, 858; *People v. Boyette, supra*, 29 Cal.4th at pp. 464-465.)

> "By advising that a death verdict should be returned only if aggravation is 'so substantial in comparison with' mitigation that death is 'warranted,' the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty."

(*People v. Smith, supra*, 35 Cal.4th at p. 370 citing *People v. Arias, supra*,13 Cal.4th at p. 171.)

CALJIC No. 8.88 adequately instructs the jury on how to return a life sentence. (*People v. Taylor, supra,* 26 Cal.4th at p. 1181; *People v. Kipp* (2001) 26 Cal.4th 1100, 1138; *People v. Frye, supra,* 18 Cal.4th at pp. 1023-1024.) Further, there is certainly no federal claim involved here since the United States Supreme Court has approved language providing that if the aggravating circumstances outweigh the mitigating circumstances the jury "shall impose a sentence of death." (*Boyde v. California* (1990) 494 U.S. 370, 373-377.) The jury in this case was told:

> In weighing the various circumstances you determine under the relevant evidence which penalty is justified and *appropriate* by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

(31 RT 3205; 21 CT 5808; emphasis added.)

Russell has neither acknowledged nor attempted to demonstrate why this Court should reconsider its prior decisions rejecting his contention.

C. CALJIC No. 8.88 Properly Informed The Jury Of Its Responsibility In Determining Whether To Impose Death Or A Sentence Of Life Without The Possibility Of Parole

Russell claims that CALJIC No. 8.88 did not convey to the jury that a life sentence was mandatory if aggravating factors did not outweigh mitigating factors. (AOB 244-248.) The trial court need not expressly instruct the jury that a sentence of life imprisonment without parole is mandatory if the aggravating circumstances do not outweigh those in mitigation (*People v. Kipp, supra,* 18 Cal.4th at p. 381; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) As previously noted, this Court has found CALJIC No. 8.88 gives the jury adequate instruction on how to return a life sentence (*People v. Taylor, supra,* 26 Cal.4th 1155, 1181; *People v. Kipp, supra,* 26 Cal.4th at p. 1138; *People v.*

Frye, supra, 18 Cal.4th at pp. 1023-1024; see *People v. Arias, supra*, 13 Cal.4th at pp. 170-171) and the standard instruction has been consistently upheld. (*People v. Moon, supra,* 37 Cal.4th at p. 43; *People v. Smith, supra*, 35 Cal.4th at p. 370; *People v. Medina, supra*, 11 Cal.4th at pp. 781-782; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) CALJIC No. 8.88 permits a death verdict only if aggravation is so substantial in comparison with mitigation that death is warranted; if aggravation failed even to outweigh mitigation, it could not reach this level. (*People v. Smith, supra*, at p. 370.) The instruction was proper.

XVI.

THE INSTRUCTIONS ON MITIGATING AND AGGRAVATING FACTORS UNDER SECTION 190.3 ARE CONSTITUTIONAL.

Russell contends CALJIC No. 8.85 as given in this case regarding the factors under section 190.3 that may be considered in determining whether to impose life in prison without the possibility of parole or the death penalty (31 RT 3202-3203), and CALJIC No. 8.88 as given, which is the standard instruction regarding the weighing of the aggravating and mitigating factors are unconstitutional for a host of reasons. All of Russell's complaints have been repeatedly rejected by this Court.

A. Section 190.3, Subdivision (a), And As Applied, Does Not Result In The Arbitrary And Capricious Imposition Of The Death Penalty And Thus Is Constitutional Under The Fifth, Sixth, And Fourteenth Amendments

Russell contends section 190.3, subdivision (a) as implemented in CALJIC No. 8.85 violated the Fifth, Sixth and Fourteenth Amendments to the Unites States Constitution because it uses the "circumstances of the crime" factor to determine whether to impose life without the possibility of parole or death results in the arbitrary and capricious imposition of the death penalty. (AOB 235-236.) This Court has held that CALJIC No. 8.85 "provides

guidance to a jury in sentencing." Thus it is not arbitrary and capricious. (*People v. Hoyos, supra,* 41 Cal.4th at p. 926; *People v. Prieto, supra,* 30 Cal.4th at p. 276.)

B. The Trial Court Was Not Required To Delete Inapplicable Sentencing Factors

Russell contends that because most of the factors listed in CALJIC No. 8.85 were inapplicable to this case, the trial court violated his Sixth, Eighth and Fourteenth Amendment rights in failing to delete them from its instruction to the jury. (AOB 236-238.) This Court has consistently adhered to its decisions rejecting this contention. (See, e.g., *People v. Geier, supra,* 41 Cal.4th at p. 620.) There is no reason to do otherwise here.

C. Use Of The Terms "Extreme and "Substantial" Do Not Create Barriers For The Jury To Consider Mitigating Factors

Russell also claims that use of adjectives such as "extreme" and "substantial" "acted as a barrier" for the jury in considering factors in mitigation, thus violating his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 239.) Again, this Court has rejected this claim. (See, e.g., *People v. Geier, supra,* 41 Cal.4th at p. 620.) Russell has presented no reason for this Court to depart from its prior holding.

D. The Jury Is Not Required To Issue Written Findings Regarding Aggravating Factors

Russell contends the instructions in this case (CALJIC Nos. 8.85 and 8.88) violated his rights to meaningful review under the Eighth Amendment and to equal protection and due process under the Fourteenth Amendment because they did not require the jury to issue written findings about the aggravating factors found and considered in imposing the death sentence.

(AOB 239.) No such findings are constitutionally required. (See, e.g., *People v. Geier, supra,* 41 Cal.4th at p. 620.)

E. As A Capital Defendant Russell Is Not Afforded Less Procedural Protections Than Is A Non-Capital Defendant, Thus California's Death Penalty Scheme And Its Application To Russell Has Not Been Denied Russell His Right To Equal Protection

Russell argues that even if the absence of the previously complained of procedural safeguards do not render California's death penalty scheme constitutionally inadequate to ensure reliable capital sentencing, they deny capital defendants their right to equal protection of the law under the Fourteenth Amendment. (AOB 240-244.) Like Russell's other sentencing arguments, this Court has rejected this argument as well. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1059.) The death penalty law does not deny capital defendants equal protection because it provides a different method of determining the sentence than is used in noncapital cases. (See, e.g., *People v. Smith*, *supra*, 35 Cal.4th at p. 374.) Accordingly, Russell's argument should be rejected.

XVII.

INTERCASE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED.

Russell claims that California law violates his rights under the Eighth and Fourteenth Amendment to be protected from the arbitrary and capricious imposition of capital punishment because it does not provide intercase proportionality review in capital cases. (AOB 245-248.) This Court recently reaffirmed its long-standing rejection of this contention. (*People v. Hoyos, supra,* 41 Cal.4th 927.) It need not reconsider the issue now.

XVIII.

BECAUSE RUSSELL HAS NOT DEMONSTRATED ANY ERRORS BY THE TRIAL COURT, THE PROSECUTOR, OR DEFENSE COUNSEL, THERE ARE NO ERRORS WHICH TAKEN CUMULATIVELY REQUIRE REVERSAL OF RUSSELL'S CONVICTION AND DEATH SENTENCE.

Russell alleges that even if an error does not individually require reversal of his murder conviction and special circumstance finding and/or his death sentence, when taken together the cumulative effect of such errors requires reversal. (See, e.g., AOB 249.) Here, none of Russell's claims demonstrate any error by the trial court, the prosecutor, or defense counsel. Moreover, even assuming there were such errors, taken individually or together, these errors do not require reversal of Russell's murder conviction, the special circumstance findings, or the jury's determination that death was the appropriate penalty for Russell's crimes. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1223; *People v. Koontz* (2002) 27 Cal.4th 1041, 1094 [guilt phase instructional error did not cumulatively deny defendant a fair trial and due process]; *People v. Cooper, supra,* 53 Cal.3d at p. 830 ["little error to accumulate"];.)

For the reasons stated throughout respondent's brief, based on the overwhelming evidence of Russell guilt on the murder charge and the special circumstance allegations, as well as the weight of the aggravating factors at the penalty phase, and the lack of any substantial evidence to refute the strength of the evidence presented in the guilt phase or of the aggravating factors in the penalty phase, coupled with the lack of other errors complained of by Russell, Russell's cumulative error argument must fail. Moreover, even if this Court finds there were such errors, it is not reasonably probable that but for any few errors, Russell would have received a more beneficial verdict, special circumstance findings or sentence. As to Russell's other claims of error which he cumulates in support of his argument, "any number of 'almost errors,' if not

'errors' cannot constitute error." (*Hammond v. United States* (9th Cir. 1966) 356 F.2d 931, 933.)

XIX.

RUSSELL'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW, THE EIGHTH AMENDMENT OR THE FOURTEENTH AMENDMENT

Lastly, Russell claims the use of the death penalty violates international law (AOB 252-256) and as a regular form of punishment violate the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments (AOB 256.). Because this Court has repeatedly rejected such challenges, it should reject Russell's challenges as well.

This Court has repeatedly held the use of the death penalty in California does not violate international law. (*People v. Hoyos, supra,* 41 Cal.4th at p. 927 and cases cited therein.) And that use of the death penalty as a "regular" form of punishment constitutes cruel and unusual punishment. (*Ibid.*) There is no need to reconsider these holdings.

CONCLUSION

For these reasons, respondent respectfully requests this Court affirm Russell's first degree murder conviction, the use of a deadly weapon and special circumstance findings, and his death sentence.

Dated: October 10, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached uses a 13 point Times New Roman font and contains 36,419 words.

Dated: October 10, 2007.

Respectfully submitted,

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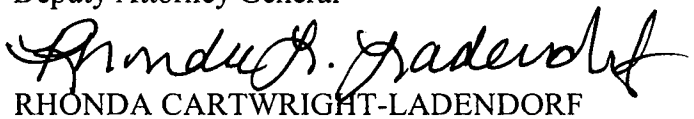

RHONDA CARTWRIGHT-LADENDORF
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **RUSSELL, TIMOTHY**

No.: **S075875**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On October 10, 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 United States Mail at San Diego, California, addressed as follows:

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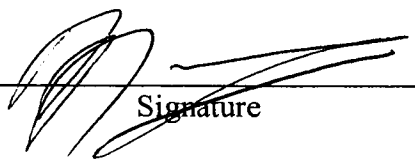
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 10, 2007, at San Diego, California.

D. Daswani
Declarant


Signature

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