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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ROGER HOAN BRADY,** Defendant and Appellant.	S078404 **CAPITAL CASE**

Los Angeles County Superior Court No. YA020910
The Honorable Stephen E. O'Neil, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ROGER HOAN BRADY,** Defendant and Appellant.	S078404 **CAPITAL CASE**

STATEMENT OF THE CASE

On April 29, 1997, the Los Angeles County District Attorney filed an information charging appellant with the murder of Martin Lane Ganz (Pen. Code, § 187; count I). The information alleged that appellant committed the murder intentionally and with knowledge that Martin Ganz was a peace officer engaged in the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)), that the murder was committed for the purpose of avoiding and preventing a lawful arrest (Pen. Code, § 190.2, subd. (a)(5)), and that appellant had suffered a prior conviction for first degree murder (Pen. Code, § 190.2, subd. (a)(2)). The information further alleged that appellant personally used a firearm during the commission of the offense (Pen. Code, § 12022.5, subd. (a)). (2CT 330-332.) Appellant was arraigned, pled not guilty, and denied all allegations. (2CT 333-334.)

Trial was by jury. The trial court bifurcated the trial on the prior-murder special-circumstance allegation from the trial on the substantive offense and the remaining special circumstance allegations. The guilt phase of appellant's trial began on October 26, 1998. On November 12, 1998, the jury found appellant guilty of first degree murder, found true the firearm enhancement allegation, and found true the special circumstance allegations pursuant to Penal Code section 190.2, subdivisions (a)(5) and (a)(7) . (32CT 9070-9072, 9076-9078.)

Following a trial on the prior-murder special-circumstance allegation, the jury found the allegation to be true. (32CT 9168A-9171.)

On November 16, 1998, the penalty phase commenced. The jury began deliberating on December 14, 1998. (33CT 9407-9408.) The next day, the jury reach its verdict fixing the penalty at death. (33CT 9424A-9424B, 9477-9482.)

On March 11, 1999, appellant filed a motion for a new trial pursuant to Penal Code section 1181. (34CT 9534-9537.) On March 16, 1999, the trial court heard and denied appellant's new trial motion, denied his automatic application for modification of the verdict, pursuant to Penal Code section 190.4, subdivision (e), and sentenced appellant to death. (34CT 9544-9577.)

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

STATEMENT OF FACTS

A. Introduction

On December 27, 1993, appellant, shot and killed Manhattan Beach Police Officer Martin Ganz during a traffic stop in Manhattan Beach, because he feared being apprehended for a series of grocery store robberies he had committed in and around the greater Los Angeles area while on supervised release following his convictions in federal court for bank robbery. Officer Ganz's 12-year-old nephew, Don Ganz, was in the patrol car on a ride along at the time of the murder. Appellant subsequently left California for the State of Washington, and he continued his string of armed robberies in Oregon and Washington. Appellant eventually shot and killed Catalina Correa during the robbery of a grocery store, and attempted to kill witness Andrew Dickson.

B. Guilt Phase Evidence

1. The People's Case-in-chief

On December 27, 1993, Manhattan Beach Police Officer Martin Ganz was scheduled to work a patrol shift beginning at 3:00 p.m. One day earlier, Officer Ganz had asked his 12-year-old nephew, Don, to come along on his shift as a civilian ride along.[1] (6RT 1452-1453, 1515-1516.) Don, who lived in Florida, was in the area visiting family for the Christmas holiday, and he agreed to join his uncle on the ride along. (6RT 1452-1453.) At approximately 2:00 p.m., Officer Ganz picked up Don from a relative's residence and drove him to the station house of the Manhattan Beach Police Department. (6RT 1454-1455, 1515-1516.)

When they arrived at the police station, Officer Ganz changed into his patrol uniform, a dark blue or black uniform with a badge attached, and introduced Don to his coworkers. Don attended a shift briefing with Officer Ganz, and then they got into a marked patrol vehicle to begin the shift. (6RT 1455-1456.) Officer Ganz drove the patrol car and Don sat in the front passenger seat. During the shift, Officer Ganz stopped numerous motorists for "routine traffic stops for speeding and running red lights and stop signs." (6RT 1457.) Officer Ganz cited some motorists and let others go with a warning. (6RT 1457.) Officer Ganz showed Don how to use the emergency radio in the patrol car, and told him that "if anything was ever to go wrong" he should call in the closest license plate or address so that the dispatcher would know where they were located. (6RT 1458-1459.)

After a few hours on patrol, Officer Ganz drove to the Manhattan Beach pier where he asked a passerby to take a photograph of himself with his nephew

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1. Don Ganz was 17 years old at the time of appellant's trial. (6RT 1452.)

at sunset. (6RT 1457-1458.) Later that evening, Officer Ganz and Don stopped for dinner. (6RT 1459.) After dinner, Officer Ganz continued his patrol shift, along with Don, and Officer Ganz stopped numerous motorists for traffic violations over the course of the evening. (6RT 1459.) After sunset, Officer Ganz would approach motorists with a flashlight in his left hand, and his right hand on his utility belt near his firearm. (6RT 1459-1460; 7RT 1853-1854.)

At approximately 11:00 p.m., Officer Ganz was traveling eastbound on 33rd Street, when he stopped at a traffic light at the intersection of 33rd Street and Sepulveda Boulevard. (6RT 1375-1376, 1460, 1466-1467.) Appellant, driving a small, gray, foreign made, two-door, hatchback car, was traveling southbound on Sepulveda Boulevard in a left turn lane, and was waiting to turn left onto 33rd Street, which led into the Manhattan Beach Village Mall parking lot. Appellant was stopped, waiting for the left turn arrow to turn green, but his car was out past the stop-limit line, and was blocking traffic coming westbound out of the mall. (6RT 1375-1377, 1381-1383, 1460-1462, 1466-1467, 1518; 7RT 1797.) Officer Ganz got on the intercom of his patrol car and told appellant to back his vehicle up behind the stop-limit line. Appellant looked over at Officer Ganz, then backed his vehicle up a short distance, but he was still out past the stop-limit line. (6RT 1377-1379, 1383-1384, 1462, 1519) Officer Ganz activated the spotlight on his patrol car, shined it on appellant, and told him in a loud and authoritative tone to "move back."[2] (6RT 1377-1379, 1384-1385, 1462, 1519.) Appellant backed up a little bit more, but still did not move all the way back behind the stop limit line. (6RT 1379.)

Once appellant had the green light on the left turn arrow, he turned left

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2. Gerald White, a bus driver who was stopped in the northbound lanes of Sepulveda Boulevard, saw appellant turn his head and grimace when Officer Ganz shined the spotlight from his patrol car on him. (6RT 1373, 1380.)

into the mall parking lot. (6RT 1463.) Officer Ganz told Don that he was going to stop appellant's vehicle. Officer Ganz drove through his own red light, got behind appellant's vehicle, and turned on his red and blue police lights. Appellant made a right turn inside the shopping mall and stopped his vehicle in front of the Bank of America. (6RT 1464-1465, 1468-1470, 1533-1535.) Appellant's passenger side window was halfway down and his driver's side window was down. (6RT 1471.)

Officer Ganz stopped his patrol car approximately three to four feet behind appellant's vehicle. (6RT 1471, 1533-1535, 1581; 7RT 1612-1614.) Officer Ganz told Don, "I'll be right back. I'm going to go see what's going on." (6RT 1472.) Officer Ganz got out of the patrol car without making any radio broadcast concerning the traffic stop or inputting any information into the mobile computer terminal in his patrol car. (6RT 1472, 1517, 1521.) Officer Ganz got out of his patrol car and left his driver's side door open. Don had the front passenger side window of the patrol car rolled down. (6RT 1475.) The red and blue police lights on Officer Ganz's vehicle continued to flash. (6RT 1533-1535, 1665.) Officer Ganz approached appellant's vehicle with his flashlight in his left hand and his right hand resting near his holstered firearm. (6RT 1472, 1537, 1581-1583; 7RT 1691, 1176-1777, 1838-1839.) Officer Ganz went to the driver's side window of appellant's vehicle and spoke with appellant for a minute or so. (6RT 1473-1474.) Don could not hear anything that was said. (6RT 1521.) Appellant leaned over towards the glove box or passenger side of his vehicle. (6RT 1474; 7RT 1782, 1809-1810.) When appellant leaned over, Officer Ganz placed his hand closer towards his own firearm. (6RT 1475-1476.)

Moments later, appellant shot Officer Ganz from inside of his vehicle. Officer Ganz spun away from appellant's car and reacted as if he had been

struck in his upper body, then began retreating back towards his patrol car.[3] (6RT 1476, 1479, 1522, 1537-1541, 1551, 1554, 1583; 7RT 1617-1627, 1646-1647, 1661-1662, 1783-1809.) Appellant got out of his vehicle and chased after Officer Ganz, shooting at Officer Ganz twice with both arms extended in front of him while he was at a place equal to the front of Officer Ganz's patrol car and Officer Ganz was standing near the rear of his patrol car, approximately seven to eight feet from appellant. (6RT 1480-1481, 1523, 1537-1541, 1551, 1554, 1584-1586, 1589; 7RT 1617-1627, 1647, 1663-1665, 1666, 1671, 1699-1700, 1744-1749, 1760-1761, 1823-1829, 1832-1834.) Officer Ganz dove over the trunk of the patrol car and attempted to shelter himself from appellant. Appellant walked to the driver's side of the patrol car, next to the rear tire, and fired again at Officer Ganz down over the trunk of the patrol car, using both hands to steady his weapon as he shot. (6RT 1541-1542, 1545-1546, 1587, 1589-1592; 7RT 1647-1648, 1666-1668, 1670, 1673-1675, 1762, 1785-1787, 1811-1813, 1823-1829, 1832-1834.)

Meanwhile, after Don saw Officer Ganz struck by appellant's first shot, he ducked down to the floor of the patrol car, crouching in a ball underneath the dashboard. (6RT 1476-1478, 1522.) Don heard loud, running footsteps on the driver's side of the patrol car coming from the front of the vehicle.[4] (6RT 1479.) Don looked up over the dashboard and saw appellant standing at the back of his vehicle shooting at Officer Ganz, who was standing on the driver's side of the patrol car. Appellant was holding his firearm with both hands out straight ahead of him. (6RT 1480-1481, 1523.) Don went back down to the

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3. Officer Ganz was wearing a bullet proof vest at the time of the shooting. (9RT 2193.)

4. Don testified that the footsteps sounded as if the person making them was wearing boots. Officer Ganz was wearing boots at the time of the shooting. (6RT 1479.) Appellant was wearing tennis shoes. (6RT 1495.)

floor of the patrol car. (6RT 1481, 1524.) Don heard more footsteps, followed by another shot, and then heard the sound of Officer Ganz's flashlight hitting the ground. Officer Ganz made a gasping sound after he fell. (6RT 1482, 1488, 1524.)

After about 20 seconds, Don believed that appellant had left because he did not hear any more gunshots. Don looked up over the dashboard again and saw appellant standing at the front of the patrol car, pointing his gun towards the driver's side of the patrol car. Appellant was standing with his legs slightly apart, his knees bent, and the weapon in both of his hands. Appellant saw Don and pointed the firearm at him through the windshield of the patrol car. Don ducked back down to the floor of the patrol car. Appellant walked calmly back to his vehicle and drove away. (6RT 1489-1491, 1525, 1548-1549, 1590; 7RT 1668, 1701, 1749, 1751-1752, 1788-1790, 1810-1811.)

Don got on the emergency radio in the patrol car and "was screaming for help."[5] (6RT 1491, 1525.) After placing the radio call, Don ran to the back of the patrol car, where Officer Ganz was "laying there in a pool of blood." (6RT 1493.) Officer Ganz tried to sit up, but was unable to do so and fell back to the ground. (6RT 1494.) Numerous mall patrons and employees arrived on the scene in an attempt to assist Officer Ganz, who was laying face down with his right arm underneath his body. Officer Ganz was making gurgling sounds, and he was struggling to breath and move. (6RT 1549-1550, 1592-1595; 7RT 1683-1686, 1691, 1695, 1753-1754.) Someone told Officer Ganz to remain calm. He attempted to respond but was unable to do so. Blood was pouring from Officer Ganz's mouth, and a pool of his blood was collecting near his face. (7RT 1686, 1694, 1753-1755.) Officer Ganz's firearm was out of his holster, leaning against the left side of his body and his hand was on the butt

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5. The jury heard an audiotape of Don's emergency radio call. (6RT 1493; Peo. Exh. No. 7A.)

and trigger of the weapon. (6RT 1595-1597; 7RT 1691, 1694-1695, 1847.)

Jamie Timmons, a mall employee, attempted to comfort Don, who was screaming and crying for someone to help. Ms. Timmons used the emergency radio in Officer Ganz's patrol car to call for help.[6] (6RT 1549-1550, 1593; 7RT 1753-1755, 1790-1793.) David Thomas, a retired Los Angeles County Sheriff's Deputy who was in the area because he had planned on using the ATM at the bank where the shooting had occurred, also got on the emergency radio in Officer Ganz's patrol car to report the incident and request help.[7] (6RT 1549-1550; 7RT 1680-1687.)

Robert Doyle, a mall employee who came to the aid of Officer Ganz, tried to turn Officer Ganz over because he has choking, but was unable to do so. (6RT 1594-1595, 1597.) Officer Ganz was having difficultly breathing because there was so much blood on the ground that he was "sucking [it] in." (7RT 1756, 1847.) Ms. Timmons lifted up Officer Ganz's head and placed it into her lap. Ms. Timmons attempted to comfort Officer Ganz by telling him that Don was okay and that help was on the way. Officer Ganz was conscious but unable to respond. (6RT 1494-1495; 7RT 1691, 1756-1757; 8RT 1868.)

Manhattan Beach Police Officer Timothy Zins was on patrol, two blocks away from the mall, when he heard Don's emergency radio broadcast from Officer Ganz's patrol car. Officer Zins had difficulty understanding what Don was saying during the broadcast, but after Ms. Timmons placed the second emergency broadcast, Officer Zins responded to the scene. (7RT 1843-1844, 1847.) Officer Ganz was lying on the ground bleeding profusely from the head, which was resting in Ms. Timmons's lap. (7RT 1845; 8RT 1868.)

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6. The jury heard an audiotape of Ms. Timmons emergency radio call. (7RT 1756; Peo. Exh. No. 7B.)

7. The Jury heard an audiotape Mr. Thomas's emergency radio call. (7RT 1690; Peo. Exh. No. 7C.)

Manhattan Beach Police Officer Hodgen Crossett arrived seconds later, within three minutes of Don's emergency broadcast. (7RT 1850; 8RT 1863-1866.) Officer Crossett got a description of appellant and his vehicle from witnesses and had another officer put out a radio broadcast detailing the description. Police officers secured the crime scene with yellow tape within five minutes of their arrival. (6RT 1495; 8RT 1851-1852, 1868.) Shortly thereafter, paramedics arrived and placed Officer Ganz into an ambulance. (7RT 1757-1758; 8RT 1874-1875.) Officer Ganz was transported to UCLA Harbor Medical Center, where he was pronounced dead at 11:45 p.m. (See RT 3975.)

On December 28, 1993, at approximately 1:00 a.m., Los Angeles County Deputy Sheriff Joseph Raffa, a detective in the homicide unit, arrived at the crime scene with his partner, Sergeant Ortiz. (8RT 1878-1879.) There were many Manhattan Beach Police Department patrol cars parked in the area, and there was a large blood stain on ground behind Officer Ganz's patrol car. (8RT 1879, 1899.) Detective Raffa recovered Officer Ganz's flashlight from the ground near the driver's side door of the patrol car. (8RT 1881.) Detective Raffa recovered three shell casings from the area around Officer Ganz's patrol car: two were located eight feet in front of the patrol car on the driver's side, and the other was located on the driver's side of the patrol car, close to the driver's side door.[8] (8RT 1883-1885, 1892, 1931-1932.)

Detective Raffa noticed a camera mounted outside of the Bank of

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8. Detective Raffa took possession of the shell casings and transported them to the sheriff's department crime laboratory for analysis, along with Officer Ganz's service weapon, which he obtained from Manhattan Beach Police Officers already on the scene. (6RT 1595-1597; 8RT 1887, 1889, 1901.) Los Angeles County Sheriff's Detective Doris Perales transported Officer Ganz's bullet proof vest to the crime laboratory. (9RT 2193.) A bullet from was lodged in back of Officer Ganz's vest, under a layer of Kevlar. (9RT 2100-2101, 2111.)

America, which was located just next to where Officer Ganz had stopped appellant's vehicle. Detective Raffa contacted the manager of the bank, and obtained a videotape from the bank's security camera system. The camera, which was focused on Officer Ganz's vehicle during the traffic stop, took a still photograph every 14 seconds.[9] (8RT 1893-1896, 1903-1904, 1929.) Detective Raffa also recovered a videotape made from security cameras maintained by First Interstate Bank, which was located near the crime scene. (8RT 1894.)

Immediately following the shooting, numerous witnesses were taken to the Manhattan Beach Police Department to be interviewed concerning their observations. Los Angeles County Deputy Sheriffs Delores Perales and Clemente Bonilla were assigned to investigate the murder of Officer Ganz, and they conducted the interviews along with Manhattan Beach Police Sergeant Randy Leaf. (6RT 1366-1367; 9RT 2127.) Detective Perales explained that the main goal in conducting the witness interviews that morning was to get a description of the suspect and his vehicle in order to identity him. (9RT 2176-2177.) Detective Perales arrived at the police station at approximately 2:00 a.m., after visiting the crime scene. (9RT 2173.) The witnesses had been placed inside of a conference room and instructed that they were not to discuss their observations. Someone from the Manhattan Beach Police Department remained in the conference room with the witnesses to ensure that they did not discuss the case. (9RT 2174.)

Don Ganz, who had been waiting in a separate portion of the police station, was interviewed from 3:08 to 3:35 a.m. (6RT 1495; 9RT 2175.) David

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9. The jury viewed a videotape of still photographs taken from the camera during trial. (8RT 1906, 1909; Peo. Exh. No. 46.) Detective Raffa also described the content of the photographs to the jury. (8RT 1910-1928.)

Thomas was interviewed from 4:00 to 4:15 a.m. David Sattler[10] was interviewed from 4:40 to 4:50 a.m. Brandi Willis was interviewed from 4:53 to 5:10 a.m. Jamie Timmons[11] was interviewed from 5:20 to 5:40 a.m. David

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10. During the People's case-in-chief, David Sattler testified that he had been loading grocery bags into his Ford Bronco in the mall parking lot when he heard gunshots. Mr. Sattler looked up and saw Officer Ganz's patrol car. Mr. Sattler went behind the opposite side of his vehicle and looked back through his windows, which were tinted, towards Officer Ganz's patrol car. Mr. Sattler saw appellant standing near the trunk of the patrol car, in a "military style position," with his feet apart, his hands together, and his arms extended out in front of him pointing down towards the ground. (7RT 1696-1699, 1703-1706.) Mr. Sattler heard at least two gunshots while appellant stood in that position. (7RT 1700, 1706-1707.) Appellant then walked to the driver's side door of the patrol car and appeared to reach inside of the patrol car. (7RT 1700, 1707-1708.) Appellant stood up from the patrol car and walked calmly back to his vehicle. (7RT 1701.)

Following the shooting, Mr. Sattler was taken to the Manhattan Beach Police Department, where he was interviewed at 4:40 a.m., after being kept up all night. During the interview, Mr. Sattler did not tell officers that he had observed appellant through the windows of his vehicle after hearing the first shot and going around to the opposite side of his vehicle. (7RT 1709, 1713-1716.) Mr. Sattler explained that the interview was very brief, and the officers questions were primarily related to making an identification of the suspect and his vehicle, and that he was recovering from back surgery, was very tired and just wanted to leave the police station. (7RT 1716, 1724-1725.) Mr. Sattler did not follow any press coverage regarding the murder. (7RT 1724.) On November 7, 1995, Mr. Sattler testified against appellant in a related court proceeding, and he testified to his observations of appellant through the windows of his vehicle consistently with his testimony in the guilt phase of this case. (7RT 1717.)

11. During the People's case-in-chief, Jamie Timmons testified that she was sitting in her car in the mall parking lot when she heard a gunshot. Ms. Timmons looked towards Officer Ganz's patrol car and saw appellant standing in front of Officer Ganz, approximately seven feet away. (7RT 1744-1748, 1760-1761.) Ms. Timmons heard a second gunshot and saw Officer Ganz go to the back of his patrol car. Appellant followed. (7RT 1748-1749, 1761-1762.) Ms. Timmons got out of her vehicle and saw appellant walk slowly back towards the front of the patrol car. Appellant stopped, looked around, then walked to his car and drove away. (7RT 1749, 1751-1752.)

Brumley[12] was interviewed from 6:15 to 6:30 a.m. Diane La Croix[13] was

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12. During the People's case-in-chief, David Brumley testified that he was driving into a parking lot across from the mall when he saw what appeared to be a "routine traffic stop" taking place. (6RT 1532-1538, 1550, 1553.) Mr. Brumley saw Officer Ganz approach appellant's vehicle, then he turned his attention away. Moments later, Mr. Brumley heard a gunshot. (6RT 1536-1537.) Mr. Brumley stopped his vehicle, looked towards the traffic stop, and saw Officer Ganz running back towards his patrol car. Appellant got out of his vehicle and chased after Officer Ganz. When appellant reached a place equal to the front of Officer Ganz's patrol car, appellant shot at Officer Ganz with both of his arms extended in front of him. (6RT 1537-1541, 1550-1551, 1554.) Officer Ganz went down behind the trunk of his patrol car. Appellant went to the rear tire area of the patrol car and fired his weapon again, down over the trunk of the vehicle. (6RT 1541-1546.) Appellant then went to the driver's side door of the patrol car, dropped out of sight, then walked to his car and departed. (6RT 1548-1549.)

Following the shooting, Mr. Brumley was taken to the Manhattan Beach Police Department, where he was interviewed at 6:15 a.m., after being kept up all night waiting to be interviewed. Mr. Brumely was exhausted at the time of the interview. (6RT 1552, 1572-1574.) During the interview, Mr. Brumley did not mention that he had seen appellant exit his vehicle and chase Officer Ganz to the back of the patrol car or that he had seen appellant shoot Officer Ganz during the offense. (6RT 1567-1568.) Mr. Brumley did tell the officers that he had seen Officer Ganz go to the ground at the rear of his patrol car. (6RT 1571.) In November of 1995, Mr. Brumley testified in a related proceeding that he saw appellant chase Officer Ganz to the rear of the patrol car, and that Officer Ganz had gone to the ground behind the rear of the patrol car before appellant shot him a final time. (6RT 1575.)

13. During the People's case-in-chief, Dianne La Croix testified that she was getting into her car in the mall parking lot when she heard a gunshot. (7RT 1661-1662.) Ms. La Croix turned toward the sound of the shot and saw Officer Ganz running back towards his patrol car. Appellant got out of his vehicle, a small hatchback, and chased after Officer Ganz. (7RT 1663-1665, 1669.) When appellant reached the front of the patrol car, he fired at Officer Ganz. (7RT 1666, 1671, 1673.) Officer Ganz went down behind the back of his patrol car and "crouched down as [if] to protect himself." (7RT 1666-1667, 1670.) Appellant went to the rear of the patrol car, leaned over the trunk, and used both of his hands to shoot down at Officer Ganz two to three more times. (7RT 1667-1668, 1673-1675.) Appellant then returned to his own vehicle and drove out of the parking lot. (7RT 1668.)

interviewed from 6:40 to 6:46 a.m. Nancy Gross was interviewed from 6:50 to 6:57 a.m. Robert Doyle[14/] was interviewed from 7:00 to 7:20 a.m. John Nims

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Following the shooting, Ms. La Croix was interviewed at the Manhattan Beach Police Department at 6:40 a.m. Ms. La Croix told officers that she had been sitting in her car when she heard three gunshots. Ms. La Croix got out of her vehicle and saw appellant run to the back of the patrol car where he stood for a few seconds before he turned and left. (7RT 1677-1678.) Ms. La Croix explained that she had not told officers that she had seen appellant shoot Officer Ganz during the interview, but she meant only that she was too far away to actually see a firearm in appellant's hands. However, from the respective positions of Officer Ganz and appellant, and the sound of the gunshots, Ms. La Croix understood what was occurring. (7RT 1676-1679.) Following the instant offense, Ms. La Croix did not discuss the case with friends or follow media reports about the crime. (7RT 1672.)

14. During the People's case-in-chief, mall employee Robert Doyle testified that he was pushing shopping carts in the parking lot when he saw Officer Ganz stop appellant's vehicle, which he described as a small, silver hatchback. Mr. Doyle watched Officer Ganz get out of his patrol car and approach appellant's vehicle, then he turned his attention away from the traffic stop. (6RT 1580-1583, 1597; 7RT 1646-1647, 1655.) Moments later, Mr. Doyle heard a gunshot emanate from the direction of appellant's vehicle, and he turned his attention back to Officer Ganz. (6RT 1583; 7RT 1646-1647.) Officer Ganz was running back towards his patrol car and appellant was chasing him, approximately 12 feet behind, holding a firearm. (6RT 1584-1585.) When appellant was near the driver's side door of the patrol car, he fired a shot at Officer Ganz. (6RT 1585-1587, 1589; 7RT 1647.) Officer Ganz crouched down behind his patrol car, and appellant shot at Officer Ganz again from over the back of the patrol car. (6RT 1587, 1589-1592; 7RT 1647-1648.) Appellant then turned and ran back to his vehicle. (6RT 1590.)

Following the shooting, Mr. Doyle was taken to the Manhattan Beach Police Department, where he was interviewed at 7:20 a.m.. (7RT 1656-1657.) During the interview, Mr. Doyle told officers that he had heard three gunshots, but had not seen the shooting, because he had turned his attention away from the traffic stop. Mr. Doyle told the officers that he looked back at Officer Ganz's patrol car after the last shot, and saw appellant standing at the rear of the patrol car looking over the truck with a gun in his hands as if he were checking to see whether he had hit Officer Ganz. (7RT 1648-1650, 1655-1658.) Mr. Doyle testified that he recalled telling the officers during the interview that he had seen the shooting, but that in the event he told the officers during the

was interviewed from 7:34 to 7:44 a.m. Bruce Lee[15] was interviewed from 8:35 to 8:45 a.m. Jennifer La Fond was interviewed from 8:50 to 9:10 a.m. Officer Timothy Zins was interviewed from 10:25 to 10:45 a.m. (9RT 2175-2176; 2194, 2228.)[16]

During the interview following the shooting, Don described appellant's vehicle as a gray, two-door hatchback, with California license plates. (6RT 1495, 1525-1526.) Don described appellant as an Asian male with a full, round face, clean shaven with a part in his hair, wearing a jacket, white tennis shoes and white T-shirt. (6RT 1495.) Don identified appellant at trial as the man

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interview that he did not see appellant shoot Officer Ganz three times, he was mistaken based on the excitement of the situation, because he remembers the incident as he testified to at trial. (7RT 1650, 1655.) Mr. Doyle followed the investigation in the local papers for approximately six months after the incident. (7RT 1646.)

15. During the People's case-in-chief, Mr. Lee testified that he was getting into his car in the mall parking lot when he saw Officer Ganz's patrol car with its police lights on. There was a small hatchback parked in front of Officer Ganz's patrol car. Mr. Lee started to drive out of the parking lot towards Officer Ganz's vehicle when he heard two gunshots. Mr. Lee looked over towards Officer Ganz's patrol car and saw Officer Ganz retreating toward his patrol car in a crouched position. (7RT 1611-1617, 1623.) Appellant exited his car and chased after Officer Ganz. Appellant was about seven feet behind Officer Ganz. (7RT 1617, 1621, 1626-1628.) Mr. Lee saw appellant point a firearm at Officer Ganz. (7RT 1618.) Mr. Lee drove away from the area for his own safety and found a telephone where he called 911. The jury heard an audiotape of Mr. Lee's 911 call. (7RT 1621, 1623; Peo. Exh. No. 14.)

16. Witness Linda Gomez also testified during the People's case-in-chief. Ms. Gomez testified that she was in the mall parking lot when she saw appellant and Officer Ganz standing outside the doors of their respective cars facing one another. Appellant raised one or both of his arms and shot Officer Ganz a "few" times. Officer Ganz disappeared from Ms. Gomez's view. (7RT 1823-1829, 1832-1834.)

who shot Officer Ganz during the traffic stop.[17] (6RT 1499-1500.)

Mall employee Jennifer La Fond was stopped in her vehicle at the stop sign next to appellant's vehicle during the traffic stop for approximately five to eight seconds, just prior to the moment when Officer Ganz approached appellant's window. (7RT 1768-1771, 1807.) Ms. La Fond looked at appellant for three to four seconds, and he looked back at Ms. La Fond.[18] (7RT 1778-

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17. In May of 1994, Don failed to identify appellant from a book of photographs that contained a photograph of appellant. (6RT 1526-1527; 9RT 2205.) Don explained that he was afraid to identify appellant, because he knew that appellant had seen his face and he feared that appellant "was coming to look for me." (6RT 1498.) In August of 1994, Don attended a live lineup in which appellant was present and first selected someone other than appellant as the person he recognized from the night of the shooting, but subsequently told Detective Perales that appellant also looked like the man who had shot Officer Ganz. (6RT 1498-1499, 1527-1529; 9RT 2219, 2224.) Don subsequently identified appellant during related courtroom proceedings in the State of Oregon as the individual who had shot Officer Ganz. (6RT 1499-1500.)

18. During the People's case-in-chief, Ms. La Fond testified that as she started to drive away from the stop sign after looking at appellant, she looked in her rearview mirror and saw appellant leaning to the right as if he were retrieving his license or some other object. (7RT 1782, 1809-1810.) Moments later, as Ms. La Fond turned left into the parking lot, she heard a gunshot. Ms. La Fond parked her car and heard a second gunshot. She looked back toward the traffic stop and saw Officer Ganz hunched over, running to the back of his patrol car. Officer Ganz dove behind his patrol car as if he were taking shelter. (7RT 1783-1787, 1809-1813; 9RT 2180.) Ms. La Fond became frightened, and she hid down below her steering wheel. She heard another gunshot, followed by the sound of a car door slam. Ms. La Fond looked up and saw appellant's vehicle driving away. (7RT 1787-1790, 1810-1813.)

Following the shooting, Ms. La Fond told Detective Perales that she saw Officer Ganz running behind his car as if to take cover, and that as he was running, she heard two gunshots. (9RT 2180.) Ms. La Fond also told Detective Perales that she had gotten out of her car and hid behind it, but at trial, Ms. La Fond explained that she had misunderstood the detective's question, and that she had ducked down inside of her car after seeing Officer Ganz take shelter behind his own vehicle. (7RT 1811.)

Ms. La Fond testified that she had used methamphetamine at 8:00 a.m.

1779, 1808.) Immediately following the shooting, Ms. La Fond described appellant to police as a man of Asian descent, with a round face, and dark hair, wearing a Members Only jacket. Ms. La Fond described appellant's vehicle as a sliver or gray two-door hatchback. (7RT 1795-1797.)

Ms. La Fond identified appellant in court as the individual she had seen on the night of the shooting. (7RT 1790, 1795, 1821-1822.) Ms. La Fond had previously identified appellant as the man she had seen during the traffic stop during a live lineup. (7RT 1798-1799; 9RT 2189.) However, Ms. La Fond had failed to identify appellant's photograph as that of the individual she had seen during the traffic stop when shown a photobook containing his picture prior to her live identifications. (9RT 2185-2187.) Ms. Timmons, who did not make an identification of appellant, believed that the shooter was an Asian male, with dark hair and a normal build. (7RT 1759.)

Dr. Solomon Riley, a deputy medical examiner employed by the Los Angeles County Department of Coroner, performed an autopsy on the body of Officer Ganz one day after the murder. (8RT 2040-2041.) Officer Ganz sustained two gunshot wounds to the body. (8RT 2041.) One bullet entered the right front side of Officer Ganz's upper chest, adjacent to his shoulder, passed through the skin and tissue of the chest wall without entering the chest cavity, fractured the right humerus, and exited on the lateral surface of his right arm. (8RT 2041-2045.) The trajectory of the through-and-through wound to Officer Ganz's chest and arm was left to right, front to back, and downward. (8RT 2049, 2062.) Dr. Riley opined that such a wound would "impair the use of the right upper extremity," but would not have impaired Officer Ganz's

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on the morning of the shooting and that the effect of the drug, which she equated to multiple cups of coffee, lasted approximately two and a half hours. (7RT 1820.) Ms. La Fond was not under the influence of methamphetamine at the time she saw appellant during the traffic stop, some 15 hours later. (7RT 1821.)

ability to walk or run. (8RT 2046.)

A second bullet entered the left side of Officer Ganz's face, at his outer cheek, slightly below his left eye.[19] (8RT 2048.) The bullet fractured Officer Ganz's orbital bone, grazed the front, left portion of his brain, crossed to the right side of the cerebrum, grazing the middle portion of the base of the cerebrum, and lodged somewhere beneath the scalp behind the right ear.[20] (8RT 2048, 2051-2052.) The bullet did not pass through Officer Ganz's brain stem, and there was no direct injury to his brain's motor cortex. (8RT 2068-2069.) The trajectory of the bullet was front to back, and left to right, with no significant upward or downward direction. (8RT 2049.) There was no stippling surrounding Officer Ganz's head wound, indicating that it was not a contact wound. (8RT 2064.)

Officer Ganz died as a result of the gunshot wound to the head. (8RT 2053.) Dr. Riley explained that Officer Ganz would not have been able to run, even a distance of 10 to 15 feet, following the head wound, and that he would have been rendered unconscious in a matter of five to ten seconds. Dr. Riley explained that although Officer Ganz could have been awake following the shooting, he would not have been aware of his surroundings. (8RT 2054, 2073.)

Officer Ganz had a contusion on his back consistent with the blunt force of a bullet hitting his bullet proof vest. (8RT 2046-2048.) Officer Ganz had several abrasions on his skin, including a large cluster of abrasions on the right side of his forehead, and several small abrasions to the back of the left hand. Officer Ganz also suffered a bruise on the back of his torso. Dr. Riley opined

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19. Dr. Riley could not determine the order in which Officer Ganz suffered his wounds. (8RT 2066-2067.)

20. Dr. Riley recovered the bullet lodged in Officer Ganz's head during the autopsy. (8RT 2059.)

that the abrasions on Officer Ganz's body were consistent with having fallen to the ground. (8RT 2042, 2054, 2057-2058.)

On December 27, 1993, detectives brought the security videotapes obtained from Bank of America and First Interstate Bank to Bob Pentz, the Director of the Aerospace Corporation. The Aerospace Corporation operates the western region of the National Law Enforcement and Corrections Technology Center for the National Institute of Justice, and it is a non-profit company that provides technology to the military, to the national space program, and to law enforcement agencies around the world.[21] (8RT 1936-1937.) Mr. Pentz copied the videotapes and loaded the images onto a computer system in order to perform stop action analysis of the individual frames. The images taken from Bank of America's security cameras depicted the front and back end of appellant's vehicle. The images taken from First Interstate Bank's security cameras depicted the front right side of appellant's vehicle. (8RT 1939-1940.) Analysts at the Aerospace Corporation compared the images to the front and back ends of a variety of different vehicle makes and models, photographing numerous cars in the location appellant's car had been in at the time of the shooting, and comparing the photographs to those taken from the security tapes. (8RT 1939-1942, 1951-1953, 1956-1958.) As a result of the video analysis, Aerospace Corporation determined that the vehicle depicted in the security videotape was a Daihatsu Charade, model EFI. (8RT 1946-1947, 1998-1999.)

Analysts also compared the vehicle in the videotape to standard model Daihatsu Charades in order to determine if there was anything unique about the vehicle used by the suspect. The suspect's vehicle had sustained damage to its

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21. The Areospace Corporation participated in the investigation into the explosion of the space shuttle Challenger, and conducted video image enhancement to help determine the cause of the accident. (8RT 1938.)

passenger side, had no passenger side mirror or a dark passenger side mirror, and had different wheel covers than a standard model Charade. Analysts also determined that the right side of the suspect's front bumper was black. (8RT 1947-1949, 1954-1955, 1973-1974, 1998-1999.) Analysts concluded that the suspect's vehicle was not black, white, or red, but could have been any other color. (8RT 1949-1950, 2009-2010.)

On January 1, 1994, Don assisted detectives in creating an re-enactment video of the murder, which was shown to the jury at trial. (6RT 1506-1507, 1513-1514; Peo. Exh. No. 10.) The re-enactment begins at the intersection of 33rd Street and Sepulveda Boulevard, corresponding to the moment when appellant had backed up his vehicle behind the stop-limit line. (6RT 1507-1508.) Don explained that the video accurately depicts the approximate speed of appellant's vehicle and Officer Ganz's patrol car prior to the shooting, and accurately depicts the relative positions of the two vehicles during the traffic stop. (6RT 1508.) The officer depicted in the video accurately demonstrates where Officer Ganz stood prior to the shooting, and how he held his flashlight during the traffic stop. (6RT 1509.) The re-enactment slightly underestimates the length of time that Officer Ganz was standing at appellant's window, and it does not depict the moment when Don looked up from the patrol car to see appellant shooting at Officer Ganz. (6RT 1510.) The re-enactment does depict appellant standing in front of the patrol car, but that signifies the moment just prior to appellant's departure, when he pointed his weapon at Don through the windshield. (6RT 1511-1512.)

Shortly after the murder of Officer Ganz, the Los Angeles County Sheriff's Department set up a "clue" system to track tips and information received from the public concerning the murder. The sheriff's department had released a composite sketch of the suspect and a description of his vehicle to the media, and the department received a significant number of tips as a result of

the information. Whenever a member of the public contacted the department with potential information concerning the case, a deputy would record the specific information on a "clue sheet," with the clues numbered sequentially. (8RT 1979; 9RT 2078-2080, 2087.) The individual clues were then assigned to deputies for investigation, based upon their apparent priority. (9RT 2079-2080.) The sheriff's department recorded 2067 clues in the instant case, and 20 to 30 deputies worked as clue investigators. (8RT 1979; 9RT 2081, 2090.)

On January 20, 1994, the sheriff's department received a tip regarding appellant and assigned the matter as clue number 1270 to Deputy Sheriff Timothy Miley and Detective Steven Weireter. (82RT 1980, 1985; 9RT 2080.) Deputy Miley ran appellant's rap sheet and determined that appellant was on federal probation. (8RT 1980, 1985.) Deputy Miley contacted appellant's probation officer, James Bouchard, and requested that Mr. Bouchard ask appellant to report to the probation office for a urine test. Deputy Miley intended to attempt to interview appellant about the instant offense when he reported to his probation officer. (8RT 1985-1986.)

Mr. Bouchard contacted appellant and instructed him to report to the probation office on January 22, 1994, at 11:00 a.m. (8RT 1985-1986.) In the meantime, Deputy Miley learned that appellant drove a Daihatsu Charade registered to his father, and that he worked at a McDonald's restaurant in Woodland Hills. On the morning of January 22, 1994, Deputy Miley and Detective Weireter went to the McDonald's where appellant was employed, but appellant was not present. (8RT 1986, 1999.) Deputy Miley and Detective Weireter went to the office of appellant's probation officer at 11 a.m., but appellant had arrived early for his appointment, at 9:00 a.m. Mr. Bouchard obtained a urine sample from appellant, took his photograph, and allowed him to leave for work, where he was expected later in the day. (8RT 1987-1988.)

Officer Miley and Detective Weireter returned to the McDonald's

restaurant to wait for appellant, but he did not show up for work. (8RT 1987-1988.) Deputy Miley and Detective Weireter went to appellant's residence, a condominium located at 23901 Civic Center Way in Malibu, where appellant lived with his parents. (8RT 1988, 1993-1994, 2002.) Deputy Miley and Detective Weireter did not attempt to contact appellant, but they did look at his vehicle, which was parked outside of his residence. (8RT 1990, 2002-2003.) Appellant's vehicle was consistent with the information that the Aerospace Corporation had given police officers concerning the suspect vehicle, as it was Daihatsu Charade, model EFI, and had damage to its front right side. (8RT 2009-2010.) Deputy Miley and Detective Weireter waited outside of appellant's residence until late in the afternoon, when they were replaced by a surveillance team that they had requested to follow appellant.[22] (8RT 1990-1991, 2004.)

The next day, January 23, 1994, Deputy Miley obtained a search warrant for appellant's residence, and was preparing to have a SWAT team execute the warrant. However, prior to the execution of the warrant, Deputy Miley learned that another company that had performed analysis on the security videotape taken from the Bank of America security camera, Cognitech, had opined that the Daihatsu Charade parked outside of appellant's residence had features not depicted in the videotape. Based on this information, Deputy Miley believed that his search warrant had been invalidated. (8RT 1991-1992.) According to Cognitech, the Daihatsu Charade parked outside of appellant's residence had different wheels and side molding from the vehicle depicted on the videotape. (8RT 2005.)

On January 25, 1994, Deputy Miley and Detective Weireter, along with

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22. Deputies called off the surveillance of appellant later that night after learning that appellant's manager at McDonald's had called appellant and informed him that police officers had been looking for him and waiting for him at the restaurant. (8RT 1992.)

two Malibu police officers, went to appellant's residence. Appellant consented to a search of his bedroom and his Daihatsu Charade. (8RT 1993.) The officers did not search the bedroom of appellant's parents. (8RT 1993-1994, 2002, 2007.) The officers did not discover anything of evidentiary value during their search of appellant's bedroom or his vehicle. (8RT 1994.)

Following the search, appellant's clue was deemed inactive, and Deputy Miley and Detective Weireter moved on to investigating hundreds of other clues. (RT 1994.) When a clue was deemed inactive, it did not signify that a suspect had been eliminated as the perpetrator of the offense, but rather, that there was insufficient evidence to pursue a criminal prosecution. (8RT 1994; 9RT 2081.) Deputies would return to inactive clues on an individual basis, once they had worked through the new, active clues. (9RT 2081.)

In late July or early August, 1994, Deputy Miley was finishing up work on the other clues assigned to him, and his superiors told him to go back to any clue that he believed had the "strong possibility" of solving the case. (8RT 1994-1995, 2082.) Appellant's clue was one of two clues that Deputy Miley felt warranted additional investigation, and one of 10 to 15 clues reactivated within the department.[23] (8RT 1994-1995; 9RT 2084.) In the meantime, appellant had moved to the state of Washington, near the Oregon border, with his parents. (See 19RT 4340-4341.)

On August 4, 1994, Washington County Deputy Sheriff John Landon participated in the execution of a search warrant at the residence appellant shared with his parents, located at located at 4701 Northeast 72nd Avenue, in Vancouver, Washington. (8RT 2013-2014, 2017, 2024.) During the search, Deputy Landon discovered a closed, locked, fire-proof safe in a cupboard

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23. All of the clues received by the sheriff's department were investigated before the clue system was shut down, and the investigation of the clues continued after appellant was identified as the shooter in the instant case. (9RT 2089, 2093.)

underneath a sink in the bathroom off of a bedroom used by appellant's parents. (8RT 2017-2020, 2025.) Deputy Landon asked appellant's parents for a key to the safe, but they were unable to provide him with a key. (8RT 2020-2021.) Deputy Landon seized the safe and booked it into evidence. (8RT 2020.) Deputy Landon also searched appellant's Daihatsu Charade, which was parked in the parking lot of the condominium complex. (8RT 2021.) Appellant's vehicle had body damage to its right front corner.[24] (8RT 2022.)

The parties stipulated that had appellant's mother, Diep Brady, been called as a witness in this case, she would have testified as follows:

> On August 4, 1994, Deputies Kuni and Landon of the Washington County Sheriff's Department searched the apartment where I lived with my husband, Phillip Brady, and our son, Roger Brady. We lived in apartment X278 of the Brentwood Apartments at 4701 Northeast 72nd Avenue in Vancouver, Washington. [¶] The Sentry security box which was found under the sink in the master bedroom did not belong to me or my husband. My husband told the police that the box belonged to Roger. I had never seen the box before. My husband and I were not aware that the box was under the sink. Neither my husband nor I had a key to open the Sentry security box. We had been living at this address since April 4th, 1994.

(8RT 2028.)

On August 9, 1994, Washington County Deputy Sheriff Larry McKinney obtained a warrant to search the safe taken from appellant's residence. (8RT 2030.) Deputy McKinney called a locksmith to open the safe,

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24. The next day, Detective Perales participated in a second search of appellant's residence and found a Member's Only style jacket in appellant's closet. (9RT 2190-2192.) At trial, Ms. La Fond identified the jacket from a photograph as the jacket that she had seen appellant wearing on the night of the shooting. (7RT 1802.)

and the locksmith opened the safe in Deputy McKinney's presence. The safe contained a semiautomatic .380-caliber handgun, Winchester .380 ammunition, two magazines, an envelope, a pair of gloves, and a knit ski mask. (8RT 2031, 2034; 9RT 2112, 2116-2117, 2122.)

On August 10, 1994, Los Angeles County Deputy Sheriff Dwight Van Horn, a firearms examiner in the firearms identification section of the department's crime laboratory, traveled to the State of Washington and accompanied Deputy McKinney as he transported the safe, weapon and other items recovered from appellant's residence to the Oregon State Crime Laboratory. (8RT 2033-2035; 9RT 2095, 2113-2114.) Oregon State Trooper Tom Jenkins and Deputy Van Horn performed ballistic tests on the firearm recovered from appellant's safe in order to determine whether it was used to kill Officer Ganz. (8RT 2035; 9RT 2114-2115.) Trooper Jenkins fired seven shots from appellant's gun into a water tank, and gave two of the expended bullets to Deputy Van Horn. (9RT 2114-2115.)

Deputy Van Horn compared the expended bullets to the bullet recovered from Officer Ganz's body during the autopsy, and to a bullet recovered from Officer Ganz's bullet proof vest, and determined that all of the bullets had been fired from the same weapon. (9RT 2100-2105, 2109-2111, 2115, 2118-2119, 2133.) Deputy Van Horn compared all of the expended bullets under a microscope and determined that all of the bullets had the same striation marks: six lands, six grooves, and a twist to the left. (9RT 2106-2107.) Prior to the discovery of appellant's firearm, Deputy Van Horn had compared more than 600 firearms to the expended bullets recovered from Officer Ganz's body and bullet proof vest, but he had been unable to match the bullets to any of those weapons. (9RT 2113.)

Deputy Van Horn examined the three .380 caliber shell casings recovered from the murder scene, and concluded that based on the markings on

the shell casings, one of the shell casings had definitely been ejected from the weapon recovered from appellant's safe, and that the other two were consistent with having been ejected from appellant's weapon. (9RT 2103-2105, 2109-2110, 2119-2121, 2133-2134.) The ammunition recovered from appellant's safe was Winchester brand .380 caliber ammunition, which matched the brand and caliber of the shell casings found at scene in the instant offense. (9RT 2122.)

Deputy Van Horn determined that appellant's weapon ejects shell casings to the right and to the rear when fired. Deputy Van Horn opined that with the type of ammunition used during the instant offense, appellant's weapon would eject a shell casing six to eight feet away from the location where the shooter was standing. (9RT 2123, 2135-2136.) Deputy Van Horn also examined Officer Ganz's service weapon and determined that it had not been fired since the last time it had been cleaned. (9RT 2126-2127.)

In January of 1995, Aerospace Corporation recreated its image enhancement tests based on the security videotape taken from the banks in the vicinity of the shooting, and used appellant's vehicle, which had been seized during the course of the investigation. (8RT 1953-1954.) Analysts compared the images taken from the security cameras to appellant's vehicle and determined that the two vehicles were identical, including the damage to the front right side of the car. (8RT 1954-1955, 1973.)

On October 2, 1992, United States Probation Officer James Bouchard began supervising appellant under a supervised release program, one day after appellant had been released from federal custody. (9RT 2158-2160.) Mr. Bouchard explained to appellant that as a requirement of his release, he was not allowed to possess a firearm.[25] (9RT 2160.) Appellant stated that he

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25. Appellant was also advised by the trial court on the date that his federal judgment was entered against him, February 1, 1990, that the judgment would prohibit him from possessing a firearm. (9RT 2161-2164.)

understood and agreed with the terms of his release, and he signed a document entitled "Conditions of Probation and Supervised Release," which stated, "I understand that revocation of supervision is mandatory for possession of or actual possession of a firearm." (9RT 2163.) Appellant was on supervised release on the date of Officer Ganz's murder. (9RT 2163-2164.)

2. The Defense Case

Dr. John Gruen, the director of neurological trauma at Los Angeles County USC Medical Center, has treated more than 100 patients who have suffered gunshot wounds to the head. (9RT 2234-2234.) Dr. Gruen explained that some patients with gunshot wounds to the head are conscious, while others are not, and that some retain the ability to speak or walk, while others do not. (9RT 2235.) As long as a patient's motor cortex or brain stem has not been damaged, that individual could start the neurological process of movement. (9RT 2240.)

Dr. Gruen reviewed the coroner's report pertaining to the autopsy of Officer Ganz, along with photographs and x-rays of Officer Ganz's body taken during the autopsy. (9RT 2237.) Dr. Gruen also reviewed the medical records from UCLA Medical Center, where Officer Ganz was treated prior to his death. (9RT 2237.) Dr. Gruen opined that based on the head wound suffered by Officer Ganz, it would have been possible for him to have moved to the back of his vehicle had he suffered that head would earlier during the traffic stop. (9RT 2241.) Dr. Gruen would have expected that Officer Ganz could have remained conscious for a few minutes following the head wound. (9RT 2241-2242.)

Dr. Gruen opined that the gunshot wound to Officer Ganz's head would have resulted in a significant amount of blood loss soon after the bullet entered his head. (9RT 2242-2245.) In the event that Officer Ganz had been shot in the head on the side of his patrol car, Dr. Gruen would have expected to see

blood on the ground in that location. (9RT 2245.) Dr. Gruen looked at the photographs taken from the Bank of America security cameras showing the pool of blood behind Officer Ganz's patrol car, and opined that the amount of blood was consistent with what he would expect to see as a result of the wound. (9RT 2247.)

Appellant called Detective Perales to testify to various discrepancies between what numerous witnesses for the People had testified to during the People's case-in-chief, and what they had told officers during interviews on the morning following the instant offense. Detective Perales explained that the main focus of the brief interviews was to get information in order to identify the suspect. (9RT 2270.)

During Detective Perales's interview with Mr. Brumley on the morning following the incident, Mr. Brumley stated that he had heard two gunshots, followed by two more gunshots, as he drove his vehicle into a parking lot across the street from a mall. Mr. Brumley looked towards the sound of the gunshots and saw Officer Ganz fall behind his vehicle. (9RT 2253.) Mr. Brumley then saw appellant standing at the door of the patrol car. (9RT 2253-2254.) Mr. Brumley did not tell Detective Perales that he had seen appellant shoot Officer Ganz. (9RT 2254.)

During Detective Perales's interview with Mr. Doyle on the morning after the shooting, Mr. Doyle stated that he heard three gunshots, then turned to see appellant standing at the rear of the patrol car, "bobbing" up over the trunk of the car as if to see whether he had hit Officer Ganz, and that appellant had an object in his hands. Appellant then went back to his own vehicle. (9RT 2255-2258, 2269-2270.) Approximately one month prior to appellant's trial, Mr. Doyle told Detective Perales that he had seen Officer Ganz exit his patrol car and approach appellant's vehicle, and that he had seen appellant shooting at Officer Ganz during the offense. (9RT 2256-2258.)

During Detective Perales's interview with Ms. La Croix on the morning following the shooting, Ms. La Croix stated that she had been seated inside of her car when she heard three gunshots. Ms. La Croix got out of her vehicle and saw appellant run to the back of the patrol car, where he stopped for two to three seconds before running back to his own vehicle. (9RT 2259, 2268-2269.) Ms. La Croix did not tell Detective Perales that she had seen Officer Ganz running to his patrol car, or that she had seen appellant shooting at Officer Ganz at the back of the patrol car. (9RT 2259-2260.)

During Detective Perales's interview with Mr. Sattler on the morning following the shooting, Mr. Sattler stated that he heard two gunshots, then turned to see appellant walking from his car to the middle of the patrol car. Mr. Sattler did not tell Detective Perales that he had seen appellant shooting at Officer Ganz or that appellant leaned into the patrol car following the shooting. (9RT 2260-2262, 2266.)

During Detective Perales's interview with Ms. Timmons on the morning following the shooting, Ms. Timmons stated that she heard two gunshots and looked up to see appellant at the rear of Officer Ganz's patrol car. While appellant was standing there, Ms. Timmons heard another gunshot. Appellant then walked back to his own vehicle. (9RT 2262, 2264-2266.) Ms. Timmons did not tell Detective Perales that she had seen Officer Ganz and appellant move from appellant's car to the rear of the patrol car. (9RT 2263-2264.)

3. The People's Rebuttal Case

On November 7, 1995, Mr. Brumley testified in an Oregon proceeding that he observed appellant walk back towards his vehicle from the rear of the patrol car, and that appellant went out of sight at the driver's side door of the patrol car for a moment before running back to his own vehicle. (9RT 2281.) During that same proceeding, Mr. Sattler testified that he saw appellant fire two shots while standing at the back of the patrol car. Appellant then went to the

driver's side door of the patrol car and leaned in, before returning to his own vehicle.[26] (9RT 2281-2282.)

C. Penalty Phase Evidence

1. The People's Case

a. The 1989 Bank Robberies Resulting In Appellant's Prior Federal Bank Robbery Convictions

On August 14, 1989, at approximately 2:30 p.m., appellant entered the Brentwood branch of American Savings Bank in Los Angeles wearing a baseball hat and dark sunglasses and stood in the teller line. Shawn Sadler, Nilda Gary, and Aida Bitar were working as tellers when appellant entered the bank. (12RT 2652-2656, 2667-2669, 2682-2684.) Appellant approached Mr.

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26. The trial court bifurcated the trial on the multiple-murder special-circumstance allegation from the trial on the substantive offense and the remaining special circumstance allegations. During the trial on the multiple-murder special-circumstance allegation, the trial court took judicial notice of the fact that aggravated murder in Oregon is the same offense as first degree murder in California, and the trial court instructed the jury accordingly. (11RT 2571-2572.) Max Wheatley, a paralegal employed by the Los Angeles County District Attorney's office, described a document entitled "Judgment Upon Trial and Conviction," a certified document demonstrating that appellant was convicted of aggravated murder in Oregon on November 2, 1995. (11RT 2567-2568; Ct. Exh. No. 6.) Mr. Wheatley described a certified copy of appellant's booking photograph and fingerprint card from the State of Oregon bearing the name Roger Hoan Brady, and showing appellant's date of birth, social security number, booking number, and FBI number. (11RT 2565-2566; Peo. Exh. No. 93.) Mr. Wheatley also described a certified document from the State of Oregon containing appellant's FBI record, State of Oregon control and identification numbers relating to appellant, a photograph of appellant, and a fingerprint card. (11RT 2568-2570; Peo. Exh. No. 94.) Peter Kergil, a forensic identification specialist employed by the Los Angeles County Sheriff's Department, fingerprinted appellant and compared the fingerprints to those contained on his fingerprint cards from the Oregon case. Mr. Kergil determined that they were made by the same individual. (11RT 2557-2662.)

Sadler's teller window and said, "Give me all your cash." (12RT 2656, 2670-2671, 2684-2685.) Appellant repeated his demand as he opened his jacket and displayed the handle of a semi-automatic handgun sticking out of his waistband. (12RT 2685-2686.) Mr. Sadler gave appellant most of the money in his teller drawer. (12RT 2687-2688, 2696.) Appellant took the money and walked out the bank. (12RT 2659.) Mr. Sadler, Ms. Gary, and Ms. Bitar each identified appellant's photograph from a photographic array as the individual who had committed the robbery, and Ms. Bitar identified appellant in court as the man who had robbed the bank. (12RT 2660-2661, 2675-2677, 2690.)

On September 5, 1989, at approximately 12:00 p.m., appellant entered Westwood Savings and Loan in Los Angeles. (12RT 2697-2699.) Appellant, wearing sunglasses, approached the teller station where Lory Kelley was working and demanded "all your hundreds." Appellant pulled up his jacket and displayed a firearm tucked into his waistband. Bank manager Conrad Hernandez gave appellant approximately $1500. (12RT 2699-2701, 2704; 13RT 2851-2855.) Appellant took the money and walked out of the bank. (12RT 2701-2702; 13RT 2855.) Ms. Kelly subsequently identified appellant's photograph from a photographic array as that of the man who had robbed the bank. (12RT 2704.)

On September 12, 1989, at approximately 2:20 p.m., appellant entered Great Western Savings Bank in Calabasas and approached the teller window of Allen Minassian wearing sunglasses. Appellant stated, "Let me have some cash." (12RT 2724-2726, 2740.) Mr. Minassian thought that appellant wanted to make a withdrawal from an existing account, so he started to hand appellant a withdrawal slip. Appellant stated, "No," and displayed a handgun tucked into his waistband. (12RT 2725-2727.) Mr. Minassian asked appellant what denominations he wanted, and appellant replied, "hundreds." (12RT 2727.) Mr. Minassian reached into his teller drawer and appellant stated, "No."

Appellant directed Mr. Minassian to a "reserve drawer," which contained significantly more cash than his own "active" teller drawer. (12RT 2727-2728.) Mr. Minassian gave appellant $2000 in hundred dollar bills from the reserve drawer, and appellant walked out of the bank. (12RT 2729.) Mr. Minassian and fellow bank employee Kimberly Corely each subsequently identified appellant from a photographic array, and in court, as the individual who had committed the robbery. (12RT 2731-2731, 2742-2743.)

On or about September 12, 1989, appellant entered the Security Pacific National Bank in Woodland Hills and approached the teller window of Nir Ravid. Appellant asked Mr. Ravid for $1000 in hundred dollar bills. (12RT 2749-2750, 2758.) Mr. Ravid asked appellant if he had an account with the bank. Appellant responded, "No." (12RT 2750.) Mr. Ravid, acting out of "panic," instructed appellant to return to the bank two weeks later and that someone else would "be able to assist" appellant at the merchant teller window. (12RT 2750, 2757-2759.) Appellant responded, "Oh, okay," and left the bank. (12RT 2757.) Mr. Ravid subsequently identified appellant from a photographic array, and in court, as the individual who had attempted to rob the bank. (12RT 2753-2754, 2768.)

On September 26, 1989, appellant returned to the Security Pacific National Bank in Woodland Hills, approached the merchant teller window, and demanded money from teller Annette Winter. Ms. Winter gave appellant $1000 in one-hundred dollar bills. (12RT 2762-2770.) Bank employee Julie Casillas subsequently identified appellant from a photographic array as the man who had attempted to rob the bank on September 12, 1989, and who returned to rob the bank on September 26, 1989. (12RT 2768.)

On October 5, 1989, at approximately 2:20 p.m., appellant entered Great Western Savings Bank in Venice, waited in line, and approached the teller window of Aldo Fontela. (12RT 2777-2779, 2784.) Appellant told Mr.

Fontela to give him "all the money" in the teller drawer, and displayed a firearm stuck into his waistband. Mr. Fontela ran into the bank's vault, yelling that a robbery was in progress. Appellant left the bank. (12RT 2780, 2785.) Mr. Fontela subsequently identified appellant from a photographic array as the individual who had attempted to rob the bank. (12RT 2783.)

Later that day, at approximately 3:45 p.m., appellant entered Hawthorne Savings in Tarzana. Appellant approach the teller window of Mark Pearson and pushed a customer who had been transacting business at the window out of his way. Appellant told Mr. Pearson, "Give me all of your money." (12RT 2791-2793, 2804.) Appellant removed a firearm from his waistband, pointed it at Mr. Pearson, and repeated his demand. (12RT 2805.) Mr. Pearson gave appellant approximately $1300. Appellant took the money and left the bank. (12RT 2794-2796, 2800, 2806-2809.) Mr. Pearson subsequently identified appellant from a photographic array, and in court, as the man who had robbed the bank. (12RT 2810.)

On October 12, 1989, at approximately 2:25 p.m., appellant entered the Home Federal Savings bank in Agoura Hills. (13RT 2859-2860.) Appellant approached the teller window of Jeannie Murray, removed a firearm from his waistband, and pointed the weapon at her face. (13RT 2861, 2874-2875.) Appellant calmly demanded hundred dollar bills. (13RT 2874-2875, 2881.) Ms. Murray gave appellant approximately $2000 in prerecorded, marked bait money from her drawer. (13RT 2862-2864, 2876-2877.) Appellant took the money and left the bank. (13RT 2863-2864.) Bank employee Jane Rieder subsequently identified appellant from a photographic array, and in court, as the man who had robbed the bank. Ms. Murray subsequently identified appellant from a photographic array as the man who had committed the robbery. (13RT 2866, 2879.)

On October 12, 1989, Los Angeles County Deputy Sheriff Christopher

Germann was on patrol in a marked police vehicle when he received a radio broadcast regarding the Agora Hills bank robbery. The broadcast described the suspect as an Asian male, driving a yellow or light-colored Volkswagen Bug. (13RT 2885-2886.) Within five to ten minutes of hearing the radio broadcast, Deputy Germann saw appellant driving a yellow Volkswagen Bug in the vicinity of the bank. Deputy Germann followed appellant's vehicle on the 101 Freeway, and appellant exited the freeway at Topanga Canyon Boulevard. (13RT 2887-2891, 2934.) Deputy Germann activated his overhead lights and siren in an attempt to pull over appellant's vehicle. Appellant did not pull over, and instead, increased his speed and drove into oncoming traffic. Appellant continued to drive at a high rate of speed through the winding canyon road for miles. (13RT 2893-2894.) Los Angeles County Deputy Sheriff Berg joined the pursuit in a another marked unit, and a Los Angeles Police Department helicopter followed overhead. (13RT 2893-2895.)

After driving eight to ten miles on Topanga Canyon Boulevard, appellant turned onto a residential street, and eventually drove up the long, dead-end driveway of his own residence. (13RT 2897, 2915, 2936.) Appellant got out of his car and ran into the undeveloped hillside, which was covered in brush and other growth. (13RT 2897.) Deputies Germann and Berg pursued appellant on foot for approximately 15 minutes, while the police helicopter followed appellant's movements from overhead. (13RT 2915-2919.) The deputies eventually located appellant, and as Deputy Germann held appellant at gunpoint, Deputy Berg handcuffed appellant as he struggled. (13RT 2920.) Deputy Germann recovered a jacket containing $2053 inside of it, approximately six feet away from where the deputies located appellant on the hillside. (13RT 2922.) Numerous bills in appellant's possession had serial numbers which matched the pre-recorded bills that were given to appellant during the Agora Hills bank robbery. (13RT 2828-2829.) Deputy Germann

searched appellant's car and found a Black Crossman BB or pellet gun on the floorboard of the driver's seat. (13RT 2923.) Deputy Germann opined, based on his training and experience, that appellant was not under the influence of cocaine or any controlled substance at the time of his arrest. (13RT 2929.)

Deputy Germann transported appellant to a local emergency room because he had suffered a cut to his right eye during the arrest. (13RT 2924, 2937.) Deputy German escorted appellant into an examination room where appellant responded belligerently and used profanity in response to questions from a nurse. (13RT 2925-2926.) Deputy Germann told appellant, "You need to calm down." Appellant looked at Deputy Germann, paused, and said, "I should have gone for it. I should have shot it out with you guys." (13RT 2927.) Deputy Germann told appellant, "You had a BB gun." Appellant replied, "Next time it's not going to be just a BB gun." (13RT 2927.)

Appellant subsequently pled guilty to two counts of bank robbery in United States District Court, after being charged with a total of six counts of bank robbery. (13RT 2943-2946, 3065-3070.) United States Probation Officer Mikal Klumpp was assigned to prepare a pre-sentencing report on appellant. (13RT 2943-2946, 3065-3070.) In preparation for his pre-sentencing report, Mr. Klumpp interviewed appellant on November 30, 1989. Appellant admitted that he had robbed all six of the banks that he had been charged with robbing. (13RT 2949-2954.) Appellant told Mr. Klumpp that he had been robbing banks because he was addicted to crack cocaine and needed the money for drugs, his rent, and his car payment. (13RT 2951.) Appellant was sentenced to federal prison on February 5, 1990. (13RT 2947.)

b. The 1993 Grocery Store Robberies Preceding The Murder Of Officer Ganz

On October 3, 1993, at approximately 6:45 a.m., appellant entered the Ralphs grocery store located at 6350 West Third Street in Los Angeles. (13RT

3004.) Ralphs company policy is for a store manager and a bookkeeper to collect cash together from the cashier boxes in the morning, around 7:00 a.m. (15RT 3414.) As store manager Ann Heng and bookkeeper Delsa Thompson began to collect the cashier boxes from the individual registers, appellant approached Ms. Thompson and pointed a firearm at her head. Ms. Thompson gave appellant two cashier boxes containing a total of $600. Appellant took the boxes and walked out of the store. (13RT 3004-3013; 14RT 3101-3102, 3105-3109.) Ms. Thompson identified appellant at a physical lineup and in court as the individual who had robbed the store. (13RT 3015-3016, 3023-3024.) Store manager Ricardo Gutierrez also identified appellant in court as the individual who had robbed the store. (14RT 3110-3114, 3120-3127.)

On October 30, 1993, at approximately 8:00 a.m., appellant entered the Ralphs grocery store in Bellflower. Store manager Robert Beauchamp, accompanied by a store bookkeeper, was transporting cash inside of a paper bag when appellant approached him, pointed a .38 caliber firearm at his face, and demanded the bag. (13RT 2973-2982.) Mr. Beauchamp gave appellant the bag, which contained approximately $9600. (13RT 2980.) Appellant took the bag and left the store. (13RT 2983.) Appellant was wearing a multi-colored Afro-style clown wig during the robbery. (13RT 2985, 2993.) Mr. Beauchamp subsequently identified appellant from a photographic array, during a live lineup, and in court as the individual who had committed the robbery. (13RT 2987-2989.)

On September 24, 1993, at approximately 5:30 a.m., appellant entered the Ralphs grocery store located at 3410 West Third Street in Los Angeles. (14RT 3128-3130.) Due to a high number of robberies that the company had recently suffered in the Los Angles area, Ralphs new store policy required a security guard to lock the doors before an employee transferred the cashier boxes to the counting room. Appellant entered the store moments before the

security guard had locked the doors. Store manager Lana Lee and bookkeeper Pamela Hernandez began to move the cash boxes to the counting room. Appellant, who had been standing four to five registers away when Ms. Lee began to collect the boxes, approached Ms. Lee and pointed a gun at her. Appellant was wearing a wig. (14RT 3128-3132, 3136-3137.) Appellant took two cash boxes from Ms. Lee and walked towards the exit. Appellant pointed his weapon at the security guard as he approached the exit, and the guard raised his hands in the air and stepped back. Appellant shot out the glass of the locked door and fled. (14RT 3132, 3136-3139, 3142-3143.) Ms. Lee identified appellant in court as the individual who robbed the store. (14RT 3144-3148, 3154-3159.)

On November 28, 1993, at approximately 6:40 a.m., appellant entered the Ralphs grocery store located at 4033 Laurel Canyon Road in Studio City. Store manager Patty Foster was carrying a bag of cash containing approximately $2000 to the bookkeepers office. (14RT 3198-3200.) Appellant, wearing a black wig, approached Ms. Foster, displayed a firearm, and demanded the bag of cash. Ms. Foster gave appellant the bag and appellant left the store. (14RT 3202-3204, 3209, 3266-3267.) Ms. Foster and cashier Suzanne McGarvey subsequently identified appellant from a video recording of a live lineup as the man who robbed the store. (14RT 3204-3205.) Ms. McGarvey also identified appellant in court as the man who robbed the store. (14RT 3269-3270.)

On December 4, 1993, at approximately 7:00 a.m., appellant entered the Ralphs grocery store in Redondo Beach wearing a black wig. As store manger William Johnson was transporting cash inside of the store, appellant confronted him at gunpoint and demanded the money from the cash register boxes. (15RT 3402-3405.) Mr. Johnson handed appellant two cash boxes containing a total of $2100. Appellant took the boxes and left the store. (15RT 3406-3407.) Mr.

Johnson identified appellant in court as the man who robbed the store. (15RT 3410-3412.)

In 1993, Los Angeles Police Detective Jack Giroud was assigned to investigate the rash of morning robberies occurring at various Ralphs grocery stores in the Los Angeles area. (15RT 3428-3429.) Detective Giroud explained that no further robberies occurred at Ralphs grocery stores following the murder of Officer Ganz. (15RT 3430.)[27/]

c. The 1994 Grocery Store Robberies Following The Murder Of Officer Ganz

On April 10, 1994, at approximately 10:45 p.m., appellant, wearing a ski mask, entered a Safeway supermarket in Vancouver, Washington, and approached the cash register of checker Gary Wall. Appellant pointed a semi-automatic firearm at Mr. Wall and demanded the money in the cash register. Mr. Wall opened the register and gave appellant approximately $150. Appellant took the money and walked out of the store. (15RT 3483-3488, 3498-3502, 3509.) Customer Cindy Ettestad identified appellant from a photographic array, and in court, as the man who robbed the store. (15RT 3518-3522.)

On May 26, 1994, at approximately 4:00 p.m., appellant entered the Medicine Shoppe, a pharmacy in Vancouver, Washington. Appellant asked pharmacist Richard Kim about having a prescription filled, then appellant displayed a handgun and stated, "This is a robbery." (14RT 3282-3285, 3298-

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27. In addition to the evidence of robberies preceding appellant's murder of Officer Ganz, the People presented evidence that on October 15, 1993, appellant threatened to stab Phillip Brown, who was working as a security guard at appellant's condominium complex, after Mr. Brown cited a moving truck that appellant had been using. (15RT 3371-3378.) Mr. Brown did not take appellant seriously because appellant was small and "kind of nerdish." (15RT 3381-3382.)

3299.) Kay Heinzman was working in the back of the pharmacy. Appellant forced her to the front of the store at gunpoint. (14RT 3301-3302.) Appellant demanded specific drugs, principally "narcotic drugs," tranquilizers, and pain killers. (14RT 3287, 3304.) Mr. Kim and Ms. Heinzman retrieved the drugs for appellant. Appellant took the drugs and demanded cash. Mr. Kim and Ms. Heinzman opened the cash register and appellant removed cash from it. (14RT 3288-3290, 3306, 3309-3310.) During the offense, appellant inadvertently dropped bullets onto the floor of the pharmacy.[28] (14RT 3313-3314.) Appellant ordered Mr. Kim and Ms. Heinzman into a back room, then departed. (14RT 3290, 3311.) Ms. Heinzman subsequently identified appellant from a photographic array, and in court proceedings in Oregon, as the man who robbed the pharmacy.[29] (14RT 3315-3319, 3329-3331, 3345-3346.)

On June 1, 1994, at approximately 11:00 p.m., appellant entered a Safeway supermarket in Vancouver, Washington. Appellant, wearing a ski mask, approached a cashier with a firearm in his hand. Appellant told the cashier, "give me the money." (16RT 3636-3638.) The cashier gave appellant money from the cash register. (16RT 3638.) Appellant took the money and

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28. FBI David Agent Moriguchi recovered a single Winchester .380 caliber cartridge from the floor of the pharmacy following the robbery. (14RT 3327, 3331, 3333.) The bullets found in the pharmacy were subsequently analyzed at an FBI laboratory and compared to those recovered from appellant's safe following his arrest. All of the bullets were made by the same manufacturer, were the same caliber, and had the exact same lead content. (14RT 3338-3339, 3349-3350.)

29. Prior to the penalty phase in the instant case, Ms. Heinzman signed a letter saying she could not positively identify appellant as the man who had robbed the pharmacy because she did not want to have to testify in the proceedings. (14RT 3324-3325.) Although Mr. Kim had never identified appellant as the robber of the pharmacy, and had stated the robber had been white, he signed the letter as well. (14RT 3292-3293, 3296-3297, 3324-3325, 3343.)

walked out of the store. (15RT 3460-3462.) Customer Wendy Strand identified appellant in court as the man who robbed the store. (16RT 3643-3644.)

On June 15, 1994, at approximately 9:30 p.m., appellant entered a Safeway supermarket in Vancouver, Washington, wearing a ski mask. Appellant approached cashier Vince Kelly and demanded the money in his register. (15RT 3532-3535, 3545-3546.) Mr. Kelley responded, "You're kidding." Appellant displayed a semi-automatic firearm and repeated his demand. Mr. Kelly gave appellant all of the money in the cash register, approximately $300 to $400. (15RT 3535-3536, 3545-3548.) Appellant took the money and left the store. (15RT 3537, 3548.) Customer Doris Sybouts subsequently identified appellant from a photographic array, and in court, as the man who robbed the store. (15RT 3538-3540.)

On July 16, 1994, at approximately 11:00 p.m., appellant entered a Safeway grocery store in Beaverton, Oregon wearing a ski mask. Appellant approached the check stand of checker Tara Thompson, displayed a firearm, and demanded the cash in the register. (14RT 3163-3169, 3212-3215.) Ms. Thompson opened her register and gave appellant approximately $700 in cash. Appellant took the money and left the store. Appellant got into a light gray hatchback and drove away. (14RT 3171-3172, 3216.) A few weeks later, checker Jolynn Ames saw appellant's photograph in the newspaper and recognized his eyes as those of the man who had robbed the store. (14RT 3172-3175.) Both Ms. Thompson and Ms. Ames identified appellant in court as the man who had robbed the store. (14RT 3177, 3222.)

On July 26, 1994, at approximately 11:00 p.m., appellant entered a Safeway supermarket in Beaverton, Oregon, wearing a ski mask. Appellant approached cashier Jennifer Asher, pointed a firearm at her, and demanded the money in her register. Ms. Asher gave appellant all of the money in her

register. (15RT 3460-3463, 3469, 3556-3557, 3559.) Appellant took the money and walked to the check stand of cashier Julie Cates. (15RT 3465-3466, 3556-3557.) Appellant demanded the money in Ms. Cates's register. (15RT 3575-3577.) Ms. Cates complied with appellant's demand. (15RT 3578-3579.) Appellant left the store. (15RT 3558-3565, 3583, 3590.) Ms. Asher and Ms. Cates identified appellant in court as the man who had committed the robbery. (15RT 3470-3471, 3476, 3479, 3585-3586, 3588.)

d. The Murder Of Catalina Correa And Attempted Murder Of Andrew Dickson

On August 3, 1994, at approximately 10:25 p.m., appellant entered the Cedar Mills Safeway supermarket in Beaverton, Oregon. (16RT 3670.) Appellant wore a black ski-mask, and as he walked in, he past customers Catalina Correa and Stephen O'Neil, who were on their way out of the store after completing their respective transactions. (16RT 3670-3672, 3691; 17RT 3752.) Mr. O'Neil and Ms. Correa exchanged a worried look and Ms. Correa stated, "I think he's got something in his pocket and I don't want to stick around and find out what it is." (16RT 3672-3673.) Ms. Correa left the store while Mr. O'Neil remained inside the store, watching appellant. (16RT 3673.)

Appellant approached the check stand of cashier Arden Schoenborg and demanded that Mr. Schoenborg open his register. (16RT 3674-3675; 17RT 3751-3755, 3779-3780.) Mr. Schoenborg stood still and did not respond to appellant. (17RT 3757.) Appellant removed a .380 caliber semi-automatic firearm from his pocket, pointed the weapon at Mr. Schoenborg, and said, "Open up the fucking till." (17RT 3758-3760.) Mr. Schoenborg opened the register. (17RT 3760.) Appellant took money out of the register with one hand while he kept his firearm pointed at Mr. Schoenborg's head with the other

hand.[30] (17RT 3760-3765.) Appellant instructed Mr. Schoenborg and the customers in the check-out line that they should not move until he had left the store. Appellant walked out of the store past Mr. O'Neil.[31] (17RT 3768-3681.)

Appellant rounded the corner of the building when he encountered Ms. Correa in the parking lot. Appellant shot Ms. Correa three times from a distance of three to five feet.[32] (18RT 4014-4015, 4018.) Appellant casually entered his vehicle, which had been backed into a parking space, and drove away. (16RT 3709; 18RT 4016-4020.)[33]

Andrew Dickson was driving into the Safeway parking lot when he saw appellant shoot Ms. Correa. Appellant got into his car and drove away. (16RT 3704-3706, 3708, 3733.) Mr. Dickson followed appellant's vehicle out of the parking lot, and memorized appellant's license plate number. (16RT 3713, 3715-3716.) Mr. Dickson followed appellant's vehicle into a residential neighborhood, where appellant stopped his car, got out, and shot at Mr. Dickson three times. Appellant shot through the windshield, dashboard, and grill of Mr. Dickson's vehicle. (16RT 3717-3719, 3726; 17RT 3829-3830 .) Mr. Dickson stopped his vehicle, ducked down to the center console, and placed his vehicle into reverse. (16RT 3718.) Appellant got back into his car

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30. Mr. Schoenborg identified appellant in court as the man who had robbed the supermarket. (17RT 3775.)

31. Approximately one minute later, Mr. O'Neil heard gunshots from outside of the grocery store. (16RT 3680-3687.)

32. Ms. Correa died as a result of her gunshot wounds within minutes of being shot. Ms. Correa suffered one gunshot wound to the middle of her back and another to her right chest. (18RT 4045-4052, 4061.)

33. Brett Ferguson witnessed appellant's shooting of Ms. Correa and testified against him during the Oregon proceedings. Due to the unavailability of Mr. Ferguson during the instant case, his prior testimony was read into the record. (18RT 4010-4011.)

and fled. (16RT 3720.) Mr. Dickson got out of his van and ran to a residence, where the occupants allowed him to call 911.[34] (16RT 3726.)

Washington County Deputy Sheriff James George responded to Mr. Dickson's 911 call, and put out a radio broadcast regarding appellant's vehicle and license plate number. (17RT 3793-3797, 3817.) Detective George recovered three .762 caliber rifle shell casings from the street where appellant shot at Mr. Dickson. (17RT 3813-3815, 3825-3827.) Later that day, Washington County Sheriff's Corporal Rolland Kane recovered two .380 caliber shell casings from the Safeway parking lot. (17RT 3821-3823, 3819-3820.)

Police officers in Vancouver, Washington, received a radio broadcast concerning Ms. Correa's homicide and learned that the license plate number provided by Mr. Dickson was registered to appellant's address. (17RT 3834-3835, 3846-3850.) Vancouver Police Officer Jim Rogers met his fellow officers outside of appellant's condominium complex and identified appellant's vehicle in the parking lot. (17RT 3836-3842.) Shortly thereafter, Officer Rodgers watched as appellant exited and threw plastic garbage bags into a dumpster.[35] (17RT 3839-3840, 3844.) Police officers subsequently evacuated appellant's building and called in a SWAT team. Appellant surrendered the next morning at 7:00 a.m. (17RT 3841, 3917-3918.)

Police officers subsequently recovered an assault rifle from appellant's residence, along with a .380 handgun and ammunition, 7.62 caliber ammunition, and ski masks in a safe located in his parents bathroom. (17RT

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34. The jury heard an audiotape of Mr. Dickson's 911 call at trial. (RT 3730; Peo. Exh. No. 139.)

35. Washington County Sheriff's Department Detective Larry McKinney searched the dumpster outside of appellant's apartment following his arrest and found appellant's clothing inside of the bags. (RT 3901-3902, 3912.)

3846-3851, 3881-3882, 3906-3911.) Officers also recovered two wigs from a bathroom located off of appellant's bedroom. (17RT 3913.)

Oregon State Police Criminalist Thomas Jenkins compared the .380 semi-automatic pistol found in the safe in appellant's residence with the shell casings recovered from the Safeway parking lot where Ms. Correa was shot, and determined that the weapon discharged one of the shells, and was consistent with having discharged the other. (17RT 3883-3884.) Mr. Jenkins examined the assault rifle found in appellant's residence and determined that it had discharged one of the casings found at the location where appellant had shot at Mr. Dickson, and that it was consistent with having discharged the other two shell casings recovered from the location. (17RT 3885-3887, 3890.)

e. The Victim Impact Evidence Regarding Officer Ganz

Martin Ganz was the sixth of eight children born to his parents, and the only boy. (18RT 4099-4102.) As a child, Officer Ganz was good to his sisters and looked out for their well being. (18RT 4103; 19RT 4197.) Officer Ganz first expressed his desire to become a police officer at age 12. (18RT 4103.) Officer Ganz joined the Police Explorers when he was in junior high school, and he got to know various members of the Garden Grove Police Department. (19RT 4151-4152.) Officer Ganz also met Manhattan Beach Police Officer Karl Nilsson through the Police Explorers program. Officer Ganz would discuss his aspiration to become a police officer with Officer Nilsson, and he would accompany Officer Nilsson on ride alongs. (18RT 4082-4084; 19RT 4224.) Officer Ganz's "life goal" was to become a police officer. (19RT 4161.)

When Officer Ganz graduated from high school, he joined the United States Marine Corps so that he could become a military police officer. (19RT 4162.) Officer Ganz was stationed at Camp Pendleton, near Oceanside, California. On one occasion in 1984, an accident occurred on Interstate 5,

which runs adjacent to Camp Pendleton. Officer Ganz ran out to the location of the accident and pulled a man from a burning truck. Officer Ganz was subsequently awarded a commendation from the Marine Corps for saving the man's life. (19RT 4208.) Officer Ganz was very humble, and would always downplay any commendations that he received. (19RT 4217.)

In May of 1988, the Manhattan Beach Police Department hired Officer Ganz in a civilian position, after obtaining a grant to educate the community regarding seat belt safety. Officer Ganz developed a coloring book for children regarding seat belts and vehicle safety. (18RT 4094; 19RT 4127, 4224.) One year later, Officer Ganz became a Manhattan Beach Police Department recruit and he attended the sheriff's academy. (19RT 4127.)

Officer Ganz became a sworn police officer in September of 1989. (19RT 4129.) As a police officer, Officer Ganz regularly volunteered for assignments and acted as if he "lived and breathed the job." (18RT 4085; 19RT 4226.) He volunteered as a DARE officer in the school system, where he often helped children work through personal issues. Officer Ganz received numerous letters of commendation from members of the community and was a well respected, and well liked, officer. (18RT 4085, 4094-4095; 19RT 4131-4132, 4140, 4146, 4226-4227.)

As an adult, Officer Ganz remained very close with his sisters, and often provided them with emotional and financial support. (18RT 4103; 19RT 4168.) Rachel Ganz-Williams, one of Officer Ganz's sisters, was a single mother and Officer Ganz played a large role in raising her two children, Don and Lorine. (19RT 4167-4618.) Officer Ganz cared greatly for his family and loved children. (18RT 4104-4105; 19RT 4174, 4197-4198.)

Officer Ganz was engaged to marry Pamela Magdaleno, who was working as a judicial assistant in the Los Angeles Municipal Court when they met. (19RT 4178.) Officer Ganz got to know Ms. Magdaleno during his court

appearances, and one day he asked her to lunch. A romantic relationship ensued. Officer Ganz and Ms. Magdaleno were "completely inseparable." (19RT 4180-4181.) Officer Ganz had purchased a home and he was in the process of remodeling the residence in preparation for his life with Ms. Magdaleno. (19RT 4185.)

On December 25, 1993, Officer Ganz arrived at his sister Mary Pfaff's residence at 4:00 a.m., having volunteered to work a shift on Christmas Eve so that other officers could be with their families. Officer Ganz spent that Christmas morning with his sisters, Mary and Rachel, and their respective families.[36] (19RT 4201-4203.)

On December 27, 1993, Ms. Magdaleno asked Officer Ganz to take the night off of work and spend it with her and his family. Officer Ganz refused, telling Ms. Magdaleno that it was his last opportunity to take his nephew Don on a ride along before Don was scheduled to return home to Florida. (19RT 4185-4186.) Officer Ganz called Ms. Magdaleno during his shift that evening, sometime between 6:00 and 7:00 p.m., to tell her that he loved her. (19RT 4186.)

Officer Nilsson was on duty when he heard the radio report concerning the shooting of Officer Ganz and he responded to the crime scene. There was so much blood around Officer Ganz's head that people had to keep his head elevated so that he would not choke on his own blood. Officer Ganz's right leg was jerking badly. (18RT 4088.) Officer Nilsson held Officer Ganz "as he was losing his life," and told him, "[l]et go, Martin. Go ahead and go. It's okay." (18RT 4090.) However, Officer Ganz kept fighting to stay alive. (18RT 4090.)

Manhattan Beach Police Officer Neal O'Gilvy rode to the hospital in the

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36. Jurors watched a portion of a videotape depicting Officer Ganz celebrating that Christmas morning with his family. (19RT 4203; Peo. Exh. 165.)

ambulance with Officer Ganz. (19RT 4225, 4231-4236.) Officer O'Gilvy held Officer Ganz's hand, and Officer Ganz's grip grew weaker as they proceeded to the hospital. Officer O'Gilvy repeatedly encouraged Officer Ganz to "hold on." At the hospital, Officer O'Gilvy remained at Officer Ganz's side to encourage him as doctors and nurses pumped blood into his body. Officer Ganz looked up at Officer O'Gilvy and stated, "I'm sorry." Officer O'Gilvy felt Officer Ganz's hand go limp. (19RT 4231-4236.)

Dr. Stanley Klein, the director of the trauma center at Harbor UCLA Medical Center, was treating Officer Ganz within minutes of his arrival at the hospital. (18RT 3963-3966.) Officer Ganz was "gravely, clinically, neurologically impaired" upon his arrival at the hospital. (18RT 3970.) He had suffered a "profuse hemorrhage" through the nose and mouth due to gunshot wound to face, and brain tissue was coming out of his mouth and nose. (18RT 3970-3971.) Officer Ganz had a pulse and was breathing rapidly when he arrived at the hospital. However, he was not responsive and his eyes were not opening, though he had some reflexes left. (18RT 3973.) Dr. Klein explained that Officer Ganz rapidly deteriorated and suffered a heart attack within a few minutes of his arrival at the hospital. Officer Ganz was pronounced dead at 11:45 p.m. (18RT 3974-3975.)

Shortly after the shooting, Officer Nilsson directed the other officers in the department to call their family members and let them know that they were okay, in case family members had heard something about the shooting in the media. (RT 4089.) Following the shooting, various law enforcement agencies from around the area handled police calls in Manhattan Beach while the department dealt with the crime against Officer Ganz. (RT 4134.) The department contacted a psychologist specializing in police issues to help its officers cope with Officer Ganz's death. (RT 4135-4136.) Officer Nilsson lost sleep, drank too much, had a romantic relationship fail, and was demoted from

his position as a sergeant because of his mood changes resulting from Officer Ganz's death. (RT 4090.) Officer O'Gilvy sought counseling and would often cry in his patrol car as a result of the shooting. (RT 4238, 4240.)

Officer Ganz's family suffered greatly as a result of his murder. (18RT 4108; 19RT 4152, 4172, 4175.) After learning of her fiancé's death, Ms. Magdaleno "felt like someone had stuck their hand into my chest and ripped my heart out." (19RT 4182.) Ms. Magdaleno ended up marrying "another member of the Manhattan [Beach] Police Department" who had "suffered the loss alongside of me," but she still loves Officer Ganz. (19RT 4186, 4189, 4194.) Ms. Magdaleno explained that Officer Ganz would have wanted everyone to go on with their lives, but not to forget him. (19RT 4194.)

Officer Ganz's funeral was held at the American Martyrs Catholic Church in Manhattan Beach, and was attended by over 4,000 mourners.[37] (18RT 4093; 19RT 4212-4214.) The funeral was followed by a processional to Inglewood Cemetery. The processional was over seven miles long, and some cars were still in Manhattan Beach when the first vehicles arrived at the cemetery. (18RT 4093.) Officer Ganz's mother was too emotional to get out of the car, and she did not attend his funeral or burial. (19RT 4212-4214.) Officer Ganz's mother died six months following his murder. She had been suffering from emphysema and she "basically stopped eating, [and] taking care of herself." (19RT 4160-4161.)

2. The Defense Case

Appellant's mother, Diep Brady, was born in 1942, in Saigon, Vietnam. Mrs. Brady's father died when she was 12 years old, and her mother worked on a vegetable farm to support Mrs. Brady and the other seven children in the

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37. The jury watched a videotape depicting a portion of the funeral during trial. (19RT 4214; Peo. Exh. 167.)

family. After finishing high school, Mrs. Brady worked as a clerk in various stores in Saigon. (19RT 4281-4283.)

Appellant's father, Phillip Brady, was serving in the United States Marine Corps in the early 1960s and came to Vietnam to advise the South Vietnamese military. Mrs. Brady had two brothers serving in the South Vietnamese military, and they introduced her to Mr. Brady. (19RT 4283-4284.) Mr. Brady did not speak Vietnamese, so he communicated with Mrs. Brady in English and French. (19RT 4284.) Mr. Brady and Mrs. Brady's brother were away for two months fighting in one particular battle, and Mrs. Brady's brother was killed in combat. Mr. Brady contacted Mrs. Brady so that she could retrieve her brother's personal effects. (19RT 4285.) Mr. Brady grew ill with hepatitis and malaria. Mrs. Brady comforted him during his illness, and he, in turn, comforted her over her grief stemming from the death of her brother. Mrs. Brady conceived appellant during this time. (19RT 4285.)

Mr. Brady was subsequently sent to a military base on Okinawa, Japan, and then back to the United States, due to his illness. Meanwhile, Ms. Brady endured a difficult pregnancy alone in Saigon, where she grew depressed due to the stigma of being a single mother in her country. (19RT 4285.) Mrs. Brady became the "black sheep" of her family due to her pregnancy. (19RT 4288.) Mrs. Brady gave birth to appellant and lived with her mother. Mr. Brady wrote numerous letters to Mrs. Brady from the Untied States, and he returned to Saigon to be with her when appellant was eight months old.[38/] (19RT 4286-4287.)[39/]

Mr. Brady had been discharged from the military and he was working for the United States Central Intelligence Agency. Mr. and Mrs. Brady lived

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38. Unbeknownst to Mrs. Brady, Mr. Brady had been married with two children at the time appellant was conceived. (19RT 4288.)

39. Appellant was born on October 31, 1965. (34CT 9555.)

briefly in Saigon, then moved into Bien Hoa, a military compound in the countryside. (19RT 4288-4289.) Mr. and Mrs. Brady lived in the compound, with appellant, for two to three years. Mr. Brady would often leave the compound and Ms. Brady did not know where he was going or what he was doing. Appellant was the only child in the compound, which was topped with barbed wire and guarded by soldiers. The compound was often attacked by North Vietnamese soldiers, who threw hand grenades into the compound. Ms. Brady would often have to take appellant and hide inside of the compound during an attack. (19RT 4291-4292, 4300.) Appellant learned to speak Vietnamese and he would communicate with his mother and with the soldiers in the compound. By the time appellant was two and a half years old, he was pointing out North Vietnamese soldiers and identifying them as "VC" or Viet Cong. (19RT 4291-4294.)

Mrs. and Ms. Brady moved to another military compound near the Cambodian boarder. The new compound was more secure than Bien Hoa, but there were no children other than appellant. Mrs. Brady and appellant were isolated, as Mr. Brady would leave the compound for days at a time, but they would remain inside of the compound. Ms. Brady regularly heard the sound of bombs dropped from B-52 airplanes. (19RT 4296-4297.) Appellant often saw soldiers shooting at one another, and he witnessed soldiers being killed. (19RT 4299.) On one occasion, when appellant was three and a half years old, appellant and Mrs. Brady were evacuated from the compound on a helicopter. As the helicopter took off, appellant was sitting between two men operating machine guns and appellant was pointing out enemy soldiers on the ground to them. (19RT 4298.)

During Mr. Brady's time in Vietnam, he got to know writer David Halberstam and would provide him with information about the war. Mr. Halberstam encouraged Mr. Brady to pursue a career in reporting. In 1969, Mr.

Brady accepted a job with NBC news, and the Bradys moved to New York with appellant. (19RT 4299-4301.) Mr. and Mrs. Brady lived with Mr. Brady's brother and his wife. Mrs. Brady stayed home to care for appellant, who was four years old, while Mr. Brady spent long hours at work. Mrs. Brady knew nothing about the United States, and she was very lonely after moving to New York. (19RT 4303-4304.) Mrs. Brady believed that her sister-in-law looked down upon her, and no one spoke Vietnamese. (19RT 4304.) Mrs. Brady was so unhappy in New York that she returned to Vietnam with appellant and moved in with her mother. (19RT 4305.)

Mr. Brady returned to Vietnam a few months later in his capacity as an NBC war correspondent, and the Bradys rented a home near Mrs. Brady's mother in Saigon. (19RT 4305-4307.) Mr. Brady began drinking heavily and using marijuana. He also suffered flashbacks relating to his combat experience during the war. (19RT 4307, 4361-4362.) After about a year and a half, the Vietnamese government required Mr. Brady to leave the country due to a news report that he did concerning the government. Mr. Brady moved his family to Hong Kong. (19RT 4307-4308, 4363-4365.)

After arriving in Hong Kong, Mr. Brady left his family to work on assignment for NBC in Cambodia. Ms. Brady found it difficult to live in Hong Kong because she did not know anyone. Appellant enrolled in school and began to learn English. The Bradys lived in Hong Kong for two to three years, but Mr. Brady was often working and after his assignment in Cambodia, he went to cover a story in Afghanistan for months on end. While the Bradys lived in Hong Kong, Mrs. Brady became pregnant, and she gave birth to appellant's sister, Linda, in December of 1972. (19RT 4308-4310.)

Mr. Brady subsequently moved his family back to the United States. The Bradys moved to New Jersey, and appellant enrolled in a school where he began to do well academically. Mr. Brady then quit his job with NBC and

moved his family to Venice, California. Although appellant complained that the public school he attended in California was covering material that he had already learned in New Jersey, Mr. Brady did not want to send appellant to private school. Mr. Brady was unemployed, and he would spend a lot of time at home drinking, smoking marijuana, and listening to loud music. (19RT 4310-4311.) Mr. and Mrs. Brady would often argue about his drinking and drug use. Mr. Brady would become verbally abusive and Mrs. Brady became frightened of him. (19RT 4311-4313.) Ms. Brady took appellant and Linda, and went to stay with her mother, who had relocated to the area from Vietnam in 1975. (19RT 4311-4314.) Mr. and Mrs. Brady began divorce proceedings, and Mr. Brady took an apartment one block away from the family residence that Mrs. Brady continued to live in with appellant and Linda. Appellant was involved in the Cub Scouts, but he was doing poorly in school during this time in his life. (19RT 4313-4314, 4320.)

After about six months, Mr. Brady stopped drinking and reconciled with his wife. (19RT 4315.) Mr. Brady took a job with ABC, and in 1977, the Bradys purchased a home located at 20158 Observation Drive in Topanga Canyon. The residence was located in a remote area. Mr. Brady began to grow marijuana behind the house and told appellant to water it for him. (19RT 4316-4318, 4351.) On one occasion, Mr. Brady was arrested for growing marijuana. (19RT 4319.)

Appellant was isolated from other children when the Bradys lived in Topanga Canyon due to the remote area where they lived. The Bradys would have to drive for 30 minutes just to get to a store, and appellant did not have any friends who lived in the area. Appellant was not used to being around other children and he was shy and withdrawn. (19RT 4321-4322, 4343-4346; 20RT 4436-4440.) Mr. Brady worked long hours and Mrs. Brady enrolled at Santa Monica College, so appellant was often home alone. (19RT 4317, 4321-4322.)

Appellant idolized his father, but Mr. Brady was "never there" for appellant. (19RT 4323.) Mr. Brady was "very hard" on appellant, had high expectations for his education, and expected him to do a lot of work around the house. (19RT 4323, 4384; 20 RT 4460-4461.) Mr. Brady treated appellant's sister like a princess "who could do no wrong," but he treated appellant like a "ne'er do well son." (20RT 4441-4443, 4454, 4462.) Appellant never stood up to his father and kept his feelings to himself. (19RT 4352-4352; 20RT 4461.)

When Mr. Brady was home, he would drink heavily and use marijuana and cocaine in the presence of appellant and his sister, and he kept the drugs around the house. (19RT 4384-4350; 20RT 4450-4451, 4461.) Mr. Brady was a "very overwhelming presence just in general" and he would become "more extreme and irrational" when he was under the influence of drugs and alcohol. Mr. Brady could be "very happy and laughing or extremely abusive or very emotional." Mr. Brady's emotional extremes could be very frightening. (19RT 4350; 20RT 4451.) Appellant begin using marijuana when he was 12 or 13.[40] (19RT 4350.)

Appellant told his parents that he wanted to join the military after high school, but Mr. and Mrs. Brady opposed the idea because of their own experiences with warfare. Mr. Brady told appellant that he was too "weak" to be in the military. (19RT 4324.) Following high school, appellant attended a community college for two years. (19RT 4324-4325.)

On one occasion, Mr. Brady began to get physically abusive with his wife. Mrs. Brady called out for appellant to help her because he was only one room away, but appellant did not come. When Ms. Brady asked appellant why

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40. Although appellant's sister testified that appellant began using marijuana at age 12 or 13, Mrs. Brady never saw appellant using the drug. (19RT 4319, 4350.)

he had not come to her aid, he told her that he would not have been able to do anything to stop Mr. Brady, and that Mr. Brady often abused him physically as well. (19RT 4325-4326.)

Following appellant's conviction for bank robbery, Mr. Brady visited appellant in federal prison every other week. Mr. Brady was optimistic and believed that appellant would learn from his mistakes and straighten out his life when he got out of custody. (19RT 4334-4336.) Following appellant's release, he went into a drug rehabilitation facility in Pasadena, then returned to live with his parents in Topanga Canyon. (19RT 4336.) Mr. and Mrs. Brady were fighting a lot during this time, and appellant repeatedly told his mother that he would rather be back in prison. (19RT 4339.)

Mr. Brady, over the objections of his family, sold the Topanga Canyon residence in order to live off of the proceeds of the sale. The Bradys moved into a condominium complex in Malibu. Mr. and Mrs. Brady subsequently moved to the State of Washington, and appellant moved along with them because he had no friends in California and no reason to stay behind. (19RT 4340-4341.)

United States Probation Officer James Bouchard was assigned to supervise appellant in October of 1992. Appellant was required to report to Mr. Bouchard once a month, and he always reported promptly and was very cooperative. (19RT 4370-4371.) Appellant appeared to be a timid, frightened, and anxious. (19RT 4372.)

On March 16, 1993, appellant called Mr. Bouchard on the telephone and told him that he was upset with his father and wanted to go back to prison. Appellant told Mr. Bouchard that his father was belittling him because he did not have a job. Appellant stated that he no longer wanted to live in his father's residence. (19RT 4373-4374.) The next day, Mr. Bouchard met with appellant at his drug rehabilitation program. Appellant told Mr. Bouchard that he had

overreacted on the telephone the day before because he was upset, but that he now believed that everything would be alright at home. (19RT 4374.)

One week later, appellant failed to appear for mandatory drug testing. Appellant subsequently explained to Mr. Bouchard that he had been involved in an argument with his father. (19RT 4374.) Appellant completed his formal drug testing regimen on November 30, 1993. Appellant was tested for the use of narcotics more than 50 times between October 1, 1992, and November 30, 1993, and he never tested positive for the use of any drug. (19RT 4376-4379.) Appellant's drug test on January 20, 1994, was negative for the presence of drugs, and appellant never tested positive for drugs when he lived in the State of Washington. (19RT 4379-4380.)

Appellant's mother testified that she had tried to raise appellant as a good person, "but somehow bad thing happen. I just come here to apologize." (19RT 4341.) Appellant's sister, Brigitte Linda Brady-Harris, testified that she does not want appellant to die "because I love him very much, and I think he is a good human being and has made some unfortunate turns in his life." (19RT 4354-4355.) Appellant's cousin, Tommy Huynh, testified that he loves appellant very much and does not want appellant to die. (20RT 4464.)

Dr. Lorie Humphrey, a neuropsychologist, testified that neuropsychology is the study of the brain and how it impacts people's behavior. (20RT 4489-4490.) Dr. Humphrey opined that a great deal of human brain development occurs during adolescence and early adulthood, and the brain has trouble developing under stressful situations. (20RT 4489-4490, 4496, 4530.) In July and September of 1998, over the course of four days, Dr. Humphrey conducted a neuropsychological assessment of appellant at the county jail by asking appellant about his life history and providing him with 29 standardized tests.[41]

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41. Dr. Humphrey also reviewed information provided by appellant's family members, including his mother, concerning his life history, and reviewed

(20RT 4497-4506.) The standardized tests Dr. Humphrey administered to appellant related to "several domains of functioning," including: language skills, auditory and visual memory, personality, ability to pay attention, problem solving ability, I.Q., and motor skills. Dr. Humphrey also administered tests relating to how appellant "sees the world and how he integrates what he sees with his hands." (20RT 4507.) Dr. Humphrey then scored the tests in order to determine how appellant compared to other individuals his own age. (20RT 4507.)

Dr. Humphrey determined, based on the tests she administered, that appellant's neuro-cognitive strengths included his ability to reason and solve problems with language, that appellant had good verbal memory, a good vocabulary, and could express himself well. (20RT 4508-4510.) Appellant's neuro-cognitive weakness included his inability to name common items, which, according to Dr. Humphrey, is a common marker for brain damage. (20RT 4511-4512.) Dr. Humphrey opined that appellant had poor verbal fluency, in that appellant had trouble coming up with words starting with a particular letter within 60 seconds during a test on this skill. (20RT 4513.) Dr. Humphrey also believed that appellant had problems paying attention, problems with fine motor tasks, had difficulty integrating visual information, did poorly on puzzle placement tests, and worked very slowly. (20RT 4514-4517.)

Dr. Humphrey opined that appellant's test results suggested possible right-side brain damage and that this may have affected appellant's perception of society, his socialization, and his ability to form relationships with people. (20RT 4519-4520, 4524-4527, 4573-4574.) Dr. Humphrey noted that appellant

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appellant's school records. (20RT 4570.) Dr. Humphrey did not consider the offenses resulting in the charges against appellant in the instant case during the course of her evaluation of appellant. According to Dr. Humphrey, appellant's offenses were not significant to his neuropsychological assessment. (20RT 4536-4537, 4588.)

had not suffered any significant head injury in his life, that his test results were inconsistent with cocaine abuse, and she concluded that appellant's test results suggested "the presence of actual neuropsychological deficits based on brain pathology." (20RT 4541-4544, 4573-4574.)

Dr. Humphrey also administered the MMPI (Minnesota Multiphasic Personality Inventory) test to appellant which measures personality function by asking the respondent to answer 567 questions by indicating whether a statement is true or false. (20RT 4562, 4582-4583.) Dr. Humphrey then sent appellant's answers to a service which generated a report. (20RT 4582.) As a result of administering this test and viewing appellant's results, Dr. Humphrey concluded:

> [Appellant] has endorsed a number of items reflecting a high degree of anger. He appears to have a high potential for explosive behavior at times . . . He views the world as a threatening place, sees himself as having been unjustly blamed for others problems and feels he is getting a raw deal out of life.

(20RT 4564.) Dr. Humphrey also found that appellant's test results showed that he "may physically or verbally attack others when he is angry." (20RT 4565.) Dr. Humphrey found that appellant's test results showed that:

> Any efforts to initiate new behaviors may be colored by his negativism. He may find relationships with others as threatening and harmful. He feels intensely angry, hostile, and resentful of others, and he would like to get back at them.

(20RT 4565.)

Dr. Humphrey explained that the McGarvey System is a scale for classifying a criminal offenders results on the MMPI test. (20RT 4566.) The results of appellant's test matched "type C" on the scale, which provides:

> Individuals matching this profile type are among the most difficult

> criminal offenders. They are often viewed as distrustful, cold, irresponsible and unstable. [¶] They tend to have antisocial aggressive and hostile attitudes towards others. [¶] They engage in violent crimes against other people . . . Their interpersonal relationships are quite disruptive. Their suspicious attitudes and deep seeded hostility toward others make them a difficult case for rehabilitation. [¶] Research supports the view that type C inmates typically have problems adjusting to prison life. [¶] It may be necessary to segregate them from weaker for more vulnerable inmates during incarceration.

(20RT 4567.) Appellant's MMPI test results provided that appellant appeared to have a "low potential for change." (20RT 4568.)

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED EVIDENCE CONCERNING THIRD PARTY CULPABILITY

Appellant contends that the trial court abused its discretion when it excluded evidence concerning four "clues" which implicated suspects other than appellant in the shooting of Officer Ganz, and he further contends that the alleged error violated his state and federal constitutional rights. (AOB 36-51.) Respondent disagrees. The trial court did not abuse its discretion when it excluded evidence of third party culpability as the evidence did not tend to establish a reasonable doubt as to appellant's guilt. Furthermore, appellant has not established a violation of his state or federal constitutional rights, and assuming error, he has failed to demonstrate prejudice stemming from the trial court's ruling.

A. The Relevant Proceedings In The Trial Court

Shortly after the murder of Officer Ganz, the Los Angeles County Sheriff's Department set up a "clue" system to track tips and information received from the public concerning the murder. The sheriff's department had released a composite sketch of the suspect and a description of his vehicle to the media, and the department received a significant number of tips as a result of the information. Whenever a member of the public contacted the department with potential information concerning the case, a deputy would record the specific information on a "clue sheet," with the clues numbered sequentially. (8RT 1979; 9RT 2078-2080, 2087.) The individual clues were then assigned to deputies for investigation, based upon their apparent priority. (9RT 2079-2080.) The sheriff's department recorded 2067 clues in the instant case, and 20 to 30 deputies worked as clue investigators. (8RT 1979; 9RT 2081, 2090.) All

of the clues received by the sheriff's department were investigated before the clue system was shut down, and the investigation of the clues continued after appellant was identified as the shooter in the instant case. (9RT 2089, 2093.)

On September 17, 1998, appellant filed a Motion to Present Evidence Concerning Five "Clues" pursuant to Evidence Code section 402. (10CT 2542-2548.) Appellant sought the admission of five "clues," which he identified as follows:

1. The facts and circumstances of the defendant's own "Clue", as described, ante. [Clue #1270.]

2. A man placed a telephone call to a 911 operator on December 29, 1993, two days after the death of Officer Ganz, and confessed to the murder of the officer. This individual was later identified as Jose Castaneda. Mr. Castaneda, when interviewed by investigators on May 17, 1994, admitted he had placed the call in question but denied having killed Officer Ganz. [Clue #1796.]

3. Two members of the Palos Verdes Estates Police Department, Captain Michael W. Tracey and Sergeant Vernon Thomas Vanderpool, were killed on February 14, 1994, in a Torrance hotel meeting room by a male Asian, David J. Fukuto, who was himself killed while being arrested. Mr. Fukuto was later found to possess a number of firearms and was suspected of having committed at least one armed robbery prior to the incident in which the Palos Verdes Estates officers were killed. [Clue #1506.]

4. A letter was sent to the Manhattan Beach Police Department in which the author claimed responsibility for the death of Officer Ganz and stated an intention to leave the country until such time as the search for Officer Ganz'[s] killer had abated. Said letter was processed for the presence of any latent fingerprints. Those latent fingerprints which were

> found did not match the defendant. [Unknown Clue number.]
>
> 5. The task force caused two composite drawings prepared by witnesses to the shooting of Officer Ganz to be published. One of these witnesses was Jennifer LaFond. Numerous individuals reported that a person known as "Miko", Michael Herbert, resembled the published composite drawing. Mr. Herbert has proven to be associated with Ms. LaFond. Ms. LaFond has identified the defendant as Officer Ganz'[s] assailant and has denied that Mr. Herbert was involved. [Clue #192].

(10CT 2545-2546.)

Appellant's motion sought to have the trial court admit the aforementioned evidence in the guilt phase of his trial in order to "underscore the weaknesses inherent to the prosecution's case," and "to establish in the minds of jurors reasonable doubts as to the convincing force of the prosecution's evidence." (10CT 2547.) Appellant also asked the trial court to admit the evidence in the penalty phase to serve to "mitigate the potentially aggravating nature of the evidence the prosecution intends to present." (10CT 2543.) The People did not file a written response to appellant's motion. (2RT 501.)

On October 2, 1998, the trial court held a hearing on appellant's motion. (2RT 501-508.) The trial court indicated that it had read appellant's motion and asked the prosecutor to respond. The prosecutor told the trial court that while the People had no objection to the introduction of evidence concerning the facts surrounding clue number 1270 (denominated as number one in appellant's motion), the People opposed the introduction of evidence of the remaining clues set forth in appellant's motion. (2RT 502.) The prosecutor told the trial court:

> With respect to the other four [defense counsel] has, however, I think that's hearsay, and I don't think there's clue exception. If she can bring

in those people to testify they had identified someone else as to the person who killed Officer Ganz and maybe, in fact, that person had been submitted as one of the over two thousand clues, perhaps she could do it that way. But I think its hearsay for [defense counsel] to bring in, and I don't know how she would do it. If she would ask the investigating officer in this case, well, didn't in fact you receive a clue no. 1796 and didn't it consist of this and that, that's hearsay, and I don't think it's admissible.

(2RT 502.)

The trial court stated:

Let's talk about [Clue No.] 1796 first, the phone call where someone identified as Jose Casteneda appears to have confessed to the murder of Officer Ganz and then withdrawn his confession. How would that even be relevant? Before we even get to hearsay which it clearly is, how would that be in any way relevant?

(2RT 503.) Defense counsel told the trial court that the evidence would be admissible under the statement against penal interest exception to the hearsay rule, and that it was relevant to establish that Casteneda was the actual perpetrator of the offense. Defense counsel also suggested that the evidence was relevant to "a bias on the part of the investigators" because "[t]hey went out and interviewed this individual and concluded in May of '94 that this individual was not, in fact, the person they were looking for and released him." (2RT 503.) The prosecutor responded:

As counsel indicated in her papers, there were over two thousand clues so I think what you're doing - - I mean, inevitably her argument would be, then, you're allowed to bring in every clue because every clue is based on someone telephoning the Manhattan Beach Police Department where they had the clue line, this person did it, this person confessed to

> doing it, or this person looks like the composite. The bottom line is the indicia of reliability, and it's not there. And I think that's what has to be overcome. [¶] Again, clearly, I think if perhaps the witness were to be subpoenaed in and brought in, he could be asked about it, ["]didn't you, in fact, confess[,"] if she found that to be relevant or helpful to her case. But I think there's a lot of obstacles that have to be overcome prior to that, and short of that, I don't see it as admissible evidence.

(2RT 503-504.)

The trial court stated:

> Well, we would have to have Mr. Casteneda come in and do some kind of 402 and lay some kind of foundation as to whether, in fact, he did it or not, that kind of thing. At this point I don't see how that could possibly be relevant to the proceedings so clue 1796 would not be - - the Court will rule at this time that it is not admissible evidence. [¶] [Clue No.] 1506 is even more attenuated in the Court's view in the sense we all know or all of us who live in this community know about the sad situation involving Mr. Fukuto and the two police officers of Palos Verdes Estates that were killed at the then Holiday Inn. Again, I just don't see how that relates in any respect to this case whatsoever.

(2RT 504.) Defense counsel argued that at the time of the murders of the Palos Verde Estates police officers, February of 1994, investigators in the instant case had released information that they were looking for a male Asian, and the suspect involved in the Palos Verde Estates shooting was a male Asian. (2RT 505.) The trial court responded:

> Well, okay. The only possible connection would be male Asian, the crimes are not similar. Yes, there were police officers killed by a male Asian, but it's completely different community, completely different set of facts and circumstances. There are not related in any way that I can

see. If some relationship were shown other than police officers killed in the South Bay, if you will, by [a] male Asian, I just - - again, I just don't feel that's appropriate and not reliable and certainly not relevant. So [Clue No.] 1506 will not admitted. [¶] The letter, again, I think that's unknown clue number, No. 4 on the motion. Again, that's the same really as No. 2 [in appellant's motion], [Clue No.] 1796, that's some unknown persons confessing to killing Officer Ganz. If there can be some more indicia of reliability shown, perhaps, but not at this stage and certainly not based on a letter, basically, anonymous letter, to the police department that they were the ones who did it. I don't see where that would have any probative value whatsoever.

(2RT 505-506.)

The trial court asked defense counsel to address the relevance of "No. 5, the composite drawings, that's Mr. Herbert, I believe it is, clue 192." (2RT 506.) Defense counsel told the trial court:

The interest to me was that there were individuals, I seem to recall more than one person, telephoning in to this task force once this composite was published in which these individuals were saying, gee, this composite looks like this fellow we know as Miko, —I-K-O, or Michael Herbert. And it turns out there was a connection between Herbert and one of the prosecution's leading witnesses, Ms. La Fond. It turns out they had some type of a drug connection at minimum. I gather Mr. Herbert is also involved in the selling of drugs and Ms. La Fond was known to be associated with him or at least purchased drugs from him or been friendly with him. So that was the connection that was of interest there.

(2RT 506.) The trial court responded:

It's oh so attenuated. Again, if there was some[thing], that would be

> brought to the court's attention at the time with respect to maybe even cross-examination of Ms. La Fond. But it's so attenuated at this point I really don't think it's relevant at all.

(2RT 506.)

Defense counsel asked the trial court for clarification as to whether she would be able to cross-examine Ms. La Fonda concerning her relationship, if any, with Mr. Herbert. (2RT 506-507.) The trial court told defense counsel:

> If something were to come up, I'm going to have to rule on it at the time, clearly. That's all I'm saying. In other words, I'm just saying as a clue the Court is deeming it inadmissible. For example, if Ms. La Fond gets up on the stand and somehow it comes out during her testimony on direct that Miko did X, Y, or Z, and that's somehow relevant to our case, you know, that might open up the door to some cross-examination.

(2RT 507.) Defense counsel stated, "just to be absolutely clear, the relevance then would also be Ms. La Fond is identifying [appellant] as having been the perpetrator." (2RT 507.) The trial court told defense counsel that it understood that there may be a potential issue as to Ms. La Fond's bias or prejudice, but that the issue would be subject to another Evidence Code section 402 motion prior to defense counsel's cross-examination of the witness. (2RT 507.) The hearing concluded with the trial court noting that only evidence concerning the clue relating to appellant would be admissible during trial, absent further rulings of the Court. (2RT 507-508.)

B. The Trial Court Did Not Abuse Its Discretion When It Excluded Appellant's Third-Party Culpability Evidence

Evidence tending to show that someone other than the appellant committed the charged offense is admissible if it could raise a reasonable doubt about the appellant's guilt. (*People v. Avila* (2006) 38 Cal.4th 491, 577-578; *People v. Lewis* (2001) 26 Cal.4th 334, 372; *People v. Edelbacher* (1989) 47

Cal.3d 983, 1017; *People v. Hall* (1986) 41 Cal.3d 826, 829-833.) However, evidence that a third person merely had a motive or opportunity to commit the crime is insufficient to raise such doubt, and as such, inadmissible. (*People v. Avila*, *supra*, 38 Cal.4th at pp. 577-578; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1017.) In order for third-party culpability evidence to be admissible, there must be "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall*, *supra*, 41 Cal.3d at p. 833; see also *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1017.)

This Court has held that trial courts should treat evidence of third-party culpability "like any other evidence, if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion. ([Evid. Code,] § 352)." (*People v. Lewis*, *supra*, 26 Cal.4th at p. 372.) A trial court's decision to exclude evidence of third-party culpability is reviewed for an abuse of discretion. (*Id.* at pp. 372-373.) A trial court abuses its discretion when it exercises such discretion in an "arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Appellant contends that the trial court abused its discretion when it excluded evidence concerning the clue providing that Jose Castaneda called a 911 operator on December 29, 1993, confessed to the murder of the officer, and subsequently retracted his confession when questioned by investigators. The trial court properly excluded this evidence as irrelevant. (2RT 504.) Appellant's offer of proof was insufficient to demonstrate that this evidence could have raised a reasonable doubt as to his guilt. Appellant made no showing that Casteneda had provided any actual information concerning the case, or that his initial statement evinced any personal knowledge of the crime whatsoever. Given that various media outlets had broadcast and published the request of the sheriff's department for the public's help with tips concerning the

offense, it is unremarkable that an imbalanced individual would call in to claim responsibility for the offense, and in no way does this act create a reasonable doubt in appellant's guilt. This Court has required a defendant to show, via direct or circumstantial evidence, a link between the third party and "the *actual* perpetration of the crime," not merely an abstract claim to have perpetrated the crime. (*People v. Hall*, *supra*, 41 Cal.3d at p. 833; see *People v. Bradford* (1997) 15 Cal.4th 1229, 1325; compare *People v. Cudjo* (1993) 6 Cal.4th 585, 609 [error to exclude third party culpability evidence of a confession where statement given "under circumstances providing substantial assurances that the confession was trustworthy."].) Moreover, witnesses to the shooting had described the shooter as an Asian man, not a man of Hispanic heritage as the surname Casteneda would seem to suggest. Evidence concerning this "clue" also constituted hearsay and appellant did not explain how he planned on introducing the evidence concerning Casteneda's statement by way of this clue. Finally, the trial court properly excluded this evidence as it would have necessitated an undue consumption of time on a collateral issue, necessitating a mini-trial on Casteneda's involvement based on a telephone call that failed provide any information about the actual offense. (See *People v. Gutierrez* (2002) 38 Cal.4th 1083, 1136.)

Appellant also contends that the trial court abused its discretion when it excluded evidence that someone had anonymously sent a letter to the Manhattan Beach Police Department claiming responsibility for the death of Officer Ganz. Once again, the trial court properly excluded this evidence as irrelevant as there was no "indicia of reliability" surrounding the letter. (2RT 505-506.) Appellant's offer of proof was insufficient to demonstrate that this evidence could have raised a reasonable doubt as to his guilt. Appellant made no showing that the author of the letter had provided any actual information concerning the case, or that the letter contained any information which evinced

a personal knowledge of the circumstances of the crime. (See *People v. Cudjo*, *supra*, 6 Cal.4th at 609.) Given the media attention that the case received, an anonymous letter claiming responsibility for the offense did not create a reasonable doubt as to appellant's guilt. Moreover, the letter was written anonymously and appellant does not identify any possible suspect, so there was no "third party" upon which appellant could have attributed guilt to. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 176-177; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1325; *People Edelbacher*, *supra*, 47 Cal.3d at pp. 1017-1018.) Finally, evidence of this clue constituted hearsay and appellant does not explain how it would have been admissible at trial.

Appellant contends that the trial court abused its discretion when it excluded evidence concerning a clue that David Fukuto, a man of Asian decent who killed two members of a neighboring police department in a hotel meeting room two months after the instant offense, may have been responsible for the murder of Officer Ganz. Appellant offers no substantive evidence "linking" Fukuto "to the actual perpetration of the crime." (*People v. Hall*, *supra*, 41 Cal.3d at p. 833; see *People v. Harris* (2005) 37 Cal.4th 310, 340; *People v. Cunningham* (2001) 25 Cal.4th 926, 995; *People v. Alaca* (1992) 4 Cal.4th 742, 793). Instead, appellant merely asserts that this evidence was "at least enough to suggest that there was a reasonable doubt as to whether [appellant] had been correctly identified." (AOB 45.) Appellant's rank speculation regarding what "might have" occurred is insufficient to warrant admission of third-party culpability evidence. (*People v. Staten* (2000) 24 Cal.4th 434, 456; see also *People v. Panah* (2005) 35 Cal.4th 395, 481; *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1137.) The trial court properly excluded evidence concerning this clue as irrelevant.

Appellant contends the trial court abused its discretion when it excluded evidence concerning clue number 192, in which individuals reported that a man

named Michael Herbert resembled the published composite drawing released by the media, and that Ms. La Fond was acquainted with Mr. Herbert. (10CT 2545-2546.) Mere evidence that someone "resembles" a composite drawing does not constitute "direct or circumstantial evidence linking the third person to the actual perpetration of the crime," lest every individual resembling a suspect's composite be brought into court by a defendant asserting a third-party culpability defense. (*People v. Hall*, *supra*, 41 Cal.3d at p. 833.)

Appellant's assertion that the trial court "refused" to allow him to admit evidence that Ms. La Fond knew Mr. Herbert is belied by the record. (AOB 36, fn. 7; see also AOB 50, fn. 11.) The trial court ruled only that "as a clue the Court is deeming it inadmissible." (2RT 507.) The trial did not rule on whether appellant would be allowed to cross-examine Ms. La Fond concerning her relationship, if any, with Mr. Herbert and its effect on Ms. La Fond's identification of appellant. (2RT 507.) Instead, the trial court told defense counsel that it would revisit the issue prior to Ms. La Fond's testimony if appellant requested a separate Evidence Code section 402 hearing prior to his cross-examination of Ms. La Fond. (2RT 507-508.) Appellant never renewed his request to cross-examine Ms. La Fond concerning her relationship with Mr. Herbert, and during appellant's cross-examination of Ms. La Fond, he did not attempt to question Ms. La Fond about her relationship, if any, with Mr. Herbert. (7RT 1803-1821.) Appellant should not be heard to complain about something that he never asked the trial court to rule on. (*People v. Robinson* (2005) 37 Cal.4th 592, 628-629 [when a defendant fails to offer evidence at trial, he may not claim on appeal that it was improperly excluded].)

Appellant also contends, in passing, that the penalty phase verdict should be reversed because the jury may have imposed a life sentence upon him had it heard the third-party culpability evidence as such evidence may have created a "lingering doubt" concerning his guilt in the minds of the jurors. (AOB 36-

38, 51.) However, evidence that is excluded as irrelevant to a defendant's guilt or innocence during the guilt phase may be similarly excluded in the penalty phase if offered to show a lingering doubt as to the defendant's guilt. (*People v. Blair* (2005) 36 Cal.4th 686, 750; *People v. Stitely* (2005) 35 Cal.4th 514, 566-567.) Given that the trial court did not abuse its discretion when it excluded appellant's third-party culpability evidence during the guilt phase, appellant had no right to introduce this same evidence during the penalty phase.

C. Appellant Has Failed To Demonstrate That He Suffered Any Prejudice As A Result Of The Trial Court's Ruling Excluding The Third-Party Culpability Evidence

Assuming arguendo the trial court abused its discretion when it excluded appellant's third-party culpability evidence, appellant suffered no prejudice as there is no reasonable probability that appellant would have received a more favorable result at trial had such evidence been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Bradford*, *supra*, 15 Cal.4th at p. 1325 [exclusion of third-party culpability evidence evaluated under *Watson*]; *People v. Hall*, *supra*, 41 Cal.3d at p. 834.)[42/]

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42. Appellant errs in suggesting that his constitutional rights were violated by the trial court's act of excluding third-party culpability evidence as the "ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall*, *supra*, 41 Cal.3d at p. 8.34; see also *People v. Bradford*, *supra*, 15 Cal.4th at p. 1325.) Appellant's asserts that he had a federal constitutional right to present third-party evidence, "irrespective of how attenuated or implausible" that evidence appears. (AOB 46.) This Court has plainly stated that the rules governing third-party evidence do "not require that any evidence, however remote" must be admitted to show a third party's possible culpability." (*People v. Hall*, *supra*, 41 Cal.3d at p. 833.) Moreover, appellant's reliance upon *Thomas v. Hubbard* (9th Cir. 2002) 273 F.3d 1164, in support of his claim that he had a federal constitutional right to present, essentially, anything that he wished to suggesting the culpability of a third party, is misplaced. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn.3 [this Court is not bound by the decisions of "the lower federal courts, even on federal questions."].) Moreover, the court in *Thomas v. Hubbard* recognized

The evidence demonstrating appellant's identity as the individual who shot and killed Officer Ganz was truly overwhelming. Appellant was identified by Don Ganz and Jennifer La Fond in court as the individual who shot Officer Ganz. (6RT 1499-1500; 7RT 1790, 1795, 1821-1822.) Appellant was found to possess the very firearm used to kill Officer Ganz in a safe in his Washington residence. (8RT 2013-2020, 2024-2025, 2028, 2031, 2034; 9RT 2100-2119, 2122, 2133-2134.) Moreover, appellant's vehicle, a Daihatsu Charade Model EFI, was identified as the precise make and model of the shooter's vehicle depicted in the security footage taken from bank cameras on the night of the shooting, and appellant's particular vehicle was identified, based in part on damage to its front end, by Aerospace Corporation technicians as the exact same vehicle depicted on the videotape. (8RT 1936-1958, 1973-1974, 1986, 1990, 1998-1999,2002-2003, 2009-2010, 2022.) Ms. La Fond also identified a jacket recovered from appellant's closet as the jacket worn by the shooter on the night of the murder. (7RT 1802; 9RT 2190-2192.)

Appellant offered no alibi evidence at trial and he provided no independent evidence challenging the issue of identity. Instead, the defense challenged only the witnesses' identifications of appellant, through cross-examination, based on their prior inconsistent statements and their inability to

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that "[f]undamental standards of relevancy" apply to a trial court's decision to admit such evidence. (*Thomas v. Hubbard*, *supra*, 273 F.3d at p. 1177, citing *United States v. Crosby*, 75 F.3d 1343, 1347 (9th Cir. 1996).) The United States Supreme Court recently held that a trial court may exclude evidence of third party culpability which is "only marginally relevant." (*Holmes v. South Carolina* (2006) 547 U.S. 319, ___ [126 S.Ct. 1727, 1733, 164 L.Ed.2d 503].) In articulating its holding in *Holmes*, the Supreme Court noted that this Court's holding in *Hall* articulates the "widely accepted" view on the admissibility of third party evidence. (*Ibid.*) Given that no error occurred in the instant case, appellant's challenges under the Fifth, Sixth, Eighth, and Fourteenth Amendments fail. (*People v. Panah*, *supra*, 35 Cal.4th at p. 482, fn. 31; *People v. Staten*, *supra*, 24 Cal.4th 456, fn. 4.)

identify him in a book of photographs prior to trial. (6RT 1526-1527; 9RT 2185-2187.) Defense counsel posed no serious challenge to the issue of identity during closing argument, and instead, devoted the majority of her argument to arguing issues relating to appellant's mental state during the offense. (11RT 2481-2510.)

The third-party culpability evidence that appellant sought to offer was extremely unavailing. Evidence that Castaneda had placed a telephone call to 911 and confessed to killing Officer Ganz, then subsequently retracted the confession, would have been of no assistance to appellant at trial. The shooter was described as an Asian male, not one of Hispanic descent. Moreover, had evidence concerning this clue been admitted, the People would have simply called as witnesses the officers who subsequently interviewed Castaneda, and even Casteneda himself, to demonstrate that Casteneda had no actual involvement in the crime.[43] Similarly, evidence that an unidentified individual had mailed an anonymous letter claiming responsibility for the murder, without providing any details about the shooting whatsoever, would have been unconvincing. Considering the totality of the evidence adduced at trial, the fact that two individuals had responded to media requests for tips concerning the

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43. Appellant engages in pure speculation in arguing that "[b]ased on the clues, defense cross-examination of the task force investigators would have revealed that police did not vigorously pursue leads concerning four alternate suspects. Defense counsel could have created a reasonable doubt as to [appellant's] guilt by demonstrating weaknesses, bias and/or negligence in the investigation." (AOB 48; see also AOB 49-50.) Nothing in the record suggests that sheriff's deputies did not "vigorously pursue" each of these clues. In fact, deputies testified that all of the clues received by the sheriff's department were investigated before the clue system was shut down, and the investigation of the clues continued after appellant was identified as the shooter in the instant case. (9RT 2089, 2093.) Appellant's speculation cannot establish his claim of prejudice. (See *People v. Williams* (1988) 44 Cal.3d. 883, 937 [a defendant's speculation is insufficient to meet his burden of establishing prejudice on appeal].)

instant offense by alleging personal responsibility for the offense, without providing any details concerning the offense itself, would not been of any possible benefit to appellant at trial.

The evidence concerning Fukuto's involvement in an unrelated shooting two months after the murder of Officer Ganz, under wholly different circumstances and involving an entirely different police department than the one which employed Officer Ganz, would have done nothing to alter the outcome of appellant's trial. In fact, appellant's reliance of the mere fact that both Fukuto and appellant are Asian may have alienated some jurors, and others would have simply disregarded this facile argument. Finally, evidence that certain individuals believed that Mr. Miko appeared similar to the artist's rendition of the suspect would not have benefitted appellant, as the People would have simply called Mr. Miko as a witness and established that he was not the individual responsible for the offense. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1325; *People v. Hall*, *supra*, 41 Cal.3d at p. 834.)

Considering the overwhelming evidence establishing appellant's identity in the instant case, together with the negligible value of the proffered third-party culpability evidence, appellant has failed to establish a reasonable probability that the outcome of his trial would have been more favorable to him had the evidence been admitted. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; see *People v. Bradford*, *supra*, 15 Cal.4th at p. 1325; *People v. Hall*, *supra*, 41 Cal.3d at p. 834.) For these same reasons, it is not reasonably possible that the outcome of appellant's sentencing phase would have been any different had this evidence been admitted.[44] (See *People v. Roldan* (2005) 35 Cal.4th 646, 723

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44. Any error in excluding appellant's third-party culpability evidence was especially harmless as to the penalty phase of appellant's trial, given that the People introduced additional evidence demonstrating appellant's premeditation and deliberation in killing Officer Ganz during the penalty phase. During the penalty phase, the jury learned that police officers were

[employing reasonably possibility standard as to penalty phase claims].) This claim fails.

II.

SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTION FOR FIRST DEGREE MURDER

Appellant contends that the evidence presented during the guilt phase of his trial is insufficient to support his conviction for the first degree murder of Officer Ganz. Specifically, appellant asserts that the evidence adduced at trial regarding premeditation and deliberation was insufficient to support the jury's verdict as to the substantive murder count, and he requests that this Court modify his judgment to reflect a conviction for second degree murder. (AOB 52-71.) This claim is without merit. Substantial evidence supports appellant's conviction for the first degree murder of Officer Ganz.

A. Standard Of Review

The rules governing appellate review of sufficiency of the evidence are well established.

> [T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid

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investigating a string of grocery store robberies that appellant had committed just prior to Officer Ganz's murder. (15 RT 3428-3430.) Moreover, jurors learned that following appellant's arrest for federal bank robbery he told Deputy Germann that he should have "shot it out" with deputies to avoid arrest. When Deputy Germann responded that appellant only had a BB gun in his possession, appellant stated, "[n]ext time it's not going to be just a BB gun." (13 RT 2927.) Thus, the totality of the evidence presented during the penalty phase was even stronger as to appellant's culpability in the murder of Officer Ganz than in the guilt phase alone, and there is no reasonable possibility that the outcome of the penalty phase would have been any different had evidence concerning third-party culpability been admitted at trial.

value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

(*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *People v. Ledesma* (2006) 39 Cal.4th 641, 722-723; *People v. Jurado* (2006) 38 Cal.4th 72, 118; *People v. Marshall* (1997) 15 Cal.4th 1, 31.)

A reviewing court must "presume in support of the judgment the existence of every fact the jury could reasonably infer from the evidence." (*People v. Bloyd* (1987) 43 Cal.3d 333, 346-347 [citations omitted]; see also *People v. Rayford* (1994) 9 Cal.4th 1, 23; *People v. Johnson*, *supra*, 26 Cal.3d at p. 576.) The question is, after drawing all inferences in favor of the judgment, could *any* rational trier of fact have found appellant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) Before a judgment of conviction can be set aside for insufficiency of the evidence to support the trier of fact's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it. (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Redmond* (1969) 71 Cal.2d 745, 755; *People v. Caplan* (1987) 193 Cal.App.3d 543, 559.) This is an "enormous burden" for a defendant to overcome on appeal. (*People v. Vasco* (2005) 131 Cal.App.4th 137, 161.)

In a case where findings of the trial court are based upon circumstantial evidence, the reviewing court "must decide whether the circumstances reasonably justify the findings of the trier of fact. . . ." (*People v. Proctor* (1992) 4 Cal.4th 499, 528-529.) If the reviewing court finds "that the circumstances also might reasonably be reconciled with a contrary finding [it] would not warrant reversal of the judgment." (*Id.* at p. 529; accord, *People v. Cain* (1995) 10 Cal.4th 1, 39; see *People v. Ceja* (1993) 4 Cal.4th 1134, 1138 [a review of circumstantial evidence uses the same standard as sufficiency of the evidence].)

It is not the function of a reviewing court to reweigh the evidence, reappraise the credibility of witnesses or redetermine factual conflicts, those functions being committed to the trier of fact. (*People v. Culver* (1973) 10 Cal.3d 542, 548; *In re Frederick G.* (1979) 96 Cal.App.3d 353, 367.)

B. Substantial Evidence Supports Appellant's Conviction For The First Degree Murder Of Officer Ganz

A murder that is premeditated and deliberate is murder in the first degree. (Pen. Code, § 189.) This Court has explained that:

> "premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."

(*People v. Mayfield* (1997) 14 Cal.4th 668, 767, quoting CALJIC No. 8.20 (5th ed. 1988); see also *People v. Jurado*, *supra*, 38 Cal.4th at pp. 118-119.) An intentional killing is premeditated and deliberate "if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely*, *supra*, 35 Cal.4th at p. 543.) This Court has explained that:

> The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity, and cold, calculated judgment may be arrived at quickly."

(*People v. Mayfield*, *supra*, 14 Cal.4th at p. 767, quoting *People v. Thomas* (1945) 25 Cal.2d 880, 900 .)

A reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported: preexisting motive, planning activity, and manner of killing. (*People v. Stitely, supra*, 35 Cal.4th at p. 543.) However, these factors "are not

exclusive, nor are they invariably determinative" (*People v. Combs* (2005) 34 Cal.4th 821, 850), and they "need not be present in any particular combination to find substantial evidence of premeditation and deliberation." (*People v. Stitely*, *supra*, 35 Cal.4th at p. 543; *People v. Silva* (2001) 25 Cal.4th 345, 368.) The aforementioned three factors serve to "guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse." (*People v. Bolin* (1998) 18 Cal.4th 297, 331-332.) In fact, "the method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.) In conducting this analysis, a reviewing court draws all reasonable inferences necessary to support the judgment. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 543.)

In the instant case, ample evidence supports appellant's conviction for the first degree murder of Officer Ganz, and appellant's challenges to the sufficiency of the evidence supporting premeditation and deliberation are wholly without merit. Officer Ganz activated his police lights and stopped appellant's vehicle after repeatedly ordering appellant to move his car behind the stop limit line at the intersection of Sepulveda Boulevard and 33rd Street. After appellant stopped his vehicle, Officer Ganz got out of his patrol car and approached the driver's side window of appellant's car. Officer Ganz spoke with appellant for a few moments, then appellant leaned towards the passenger side of his vehicle, retrieved a firearm, and shot Officer Ganz as he stood at appellant's driver's side window. (6RT 1474; 7RT 1782, 1809-1810.) Officer Ganz spun away from appellant's window as if he had been struck in his upper body and retreated towards his patrol car.[45] (6RT 1476, 1479, 1522, 1537-

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45. Appellant's first shot struck Officer Ganz in the upper right side of his chest, adjacent to his shoulder. The bullet fractured Officer Ganz's right

1541, 1551, 1554, 1583; 7RT 1617-1627, 1646-1647, 1661-1662, 1783-1809; 8RT 2041-2045.) Appellant got out of his own vehicle and followed Officer Ganz at a distance of seven to eight feet. Appellant shot twice more at Officer Ganz with both hands extended directly out in front of him holding his weapon, and one bullet struck Officer Ganz in the back of his bullet proof vest. (6RT 1480-1481, 1523, 1537-1541, 1551-1554, 1584-1586, 1589; 7RT 1617-1627, 1647, 1663-1665, 1666, 1671, 1699-1700, 1744-1749, 1760-1761, 1823-1829, 1832-1834; 8RT 2046-2048.) Officer Ganz took shelter behind his vehicle and appellant walked to the trunk of the patrol car, steadied his weapon with two hands, and shot Officer Ganz in the head as he crouched behind the rear bumper of his vehicle. (6RT 1541-1546, 1587-1592; 7RT 1647-1648, 1666-1675, 1762, 1785-1787, 1811-1813, 1823-1829, 1832-1834.)[46] Following the shooting, appellant walked calmly back to his vehicle and drove away. (6RT 1489-1491, 1525, 1548-1549, 1590; 7RT 1668, 1701, 1749-1752, 1788-1790, 1810-1811.)

All three factors identified by this Court as an aid to determining premeditation and deliberation: preexisting motive, planning activity, and the manner of killing, support appellant's conviction for first degree murder in the

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arm and impaired his ability to draw his service weapon to return fire. (6RT 1459-1460; 7RT 1853-1854; 8RT 2041-2046.)

46. The location of the three shell casings found outside of Officer Ganz's patrol car supports the witnesses's testimony concerning the shooting. Two shell casings were located eight feet in front of Officer Ganz's patrol car on the driver's side, and one was located close to the driver's side door. (8RT 1833-1855, 1892, 1931-1932.) Deputy Van Horn examined appellant's firearm and concluded that it ejected shell casings six to eight feet to the right and to the rear when fired. (9RT 2123, 2135-2136.) Moreover, Deputy Medical Examiner Dr. Solomon Riley testified that Officer Ganz could not have suffered the head wound prior to the time he was behind the patrol car, as he would not have been able to run, even a short distance, after having suffered the wound. (8RT 2054, 2073.)

instant case. (*People v. Stitely, supra*, 35 Cal.4th at p. 543.) Appellant's act of executing Officer Ganz by shooting him in the head over the back of the patrol car, while Officer Ganz took shelter and crouched, wounded, behind his vehicle is itself sufficient to support the jury's verdict. (*People v. Memro, supra*, 11 Cal.4th at pp. 863-864; see *People v. Koontz* (2002) 27 Cal.4th 1041, 1082 [defendant's act of "firing a shot at a vital area of the body at close range" supports finding of premeditation and deliberation]; *People v. Welch* (1999) 20 Cal.4th 701, 759 [defendant's act of shooting victim, crouching over her, and shooting her again sufficient to support finding of premeditation and deliberation]; *People v. Bolin, supra*, 18 Cal.4th at pp. 331-332 [defendant's act of shooting victim at close range as wounded victim fled supported finding of premeditation and deliberation]; *People v. Mayfield, supra*, 14 Cal.4th at p. 768 [defendant's act of shooting victim in the face "is a manner of killing that was entirely consistent with a preconceived design to take his victim's life"]; *People v. Hawkins* (1995) 10 Cal.4th 920, 956-957[defendant's act of shooting victim in the head from close range was itself sufficient to establish premeditation and deliberation despite absence of evidence establishing planning or motive], overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101; *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1428 [defendant's act of shooting victim through the heart at close range supports finding of premeditation and deliberation]; *People v. Vorise* (1999) 72 Cal.App.4th 312 [defendant's act of shooting victim repeatedly after wounding victim with initial shots supports finding of premeditation and deliberation]; *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192 [defendant's act of shooting at victim repeatedly from a distance of five to six feet supports finding of premeditation and deliberation]. Moreover, the "'calm,' 'cool,' and 'focused' manner of [the] shooting also supports the finding of premeditation and deliberation." (*People v. Marks* (2003) 31 Cal.4th 197, 232.)

The People also presented ample evidence that appellant planned to kill Officer Ganz. A number of minutes elapsed between the time that Officer Ganz first ordered appellant to move his vehicle back behind the stop-limit line at the intersection, and the moment when appellant first shot Officer Ganz during the traffic stop. After Officer Ganz activated his police lights, appellant continued driving for a short distance prior to stopping his vehicle outside of the Bank of America. Officer Ganz approached appellant's driver's side window, and he spoke with appellant for more than a minute. (6RT 1474). Appellant then leaned towards his vehicle's glove box and shot Officer Ganz seconds later. (6RT 1474-1476; 7RT 1782, 1809-1810.) When appellant's first shot failed to achieve his purpose, appellant got out of his vehicle, following Officer Ganz, and shot him from close range as he took shelter, wounded, behind his vehicle. Thus, ample evidence demonstrates that appellant contemplated killing Officer Ganz during the traffic stop and that he reached for his firearm during the stop to carry out his plan. This evidence supports an inference that the killing occurred "as the result of preexisting reflection rather than unconsidered or rash impulse." (*People v. Bolin*, *supra*, 18 Cal.4th at pp. 331-332.)

Moreover, appellant's act of driving with a loaded firearm in his vehicle makes it "reasonable to infer that he considered the possibility of homicide from the outset." (*People v. Alcala* (1984) 36 Cal.3d 604, 626; see also *People v. Marks*, *supra*, 31 Cal.4th at p. 232 [defendant's act of bringing a loaded firearm into a place of business reasonably suggests that defendant considered the possibility of murder in advance]; *People v. Koontz*, *supra*, 27 Cal.4th at pp. 1081-1082 [a defendant's act of arming himself with a loaded firearm constitutes evidence of planning for the purpose of determining premeditation and deliberation]; *People v. Steele* (2002) 27 Cal.4th 1230, 1250 [defendant's act of carrying knife to victim's residence demonstrates planning]; *People v. Welch*, *supra*, 20 Cal.4th 701, 758 [defendant's act of obtaining a weapon

demonstrates planning]; *People v. Edwards* (1991) 54 Cal.3d 787, 814 [defendant's act of carrying loaded firearm in his vehicle constituted strong evidence of planning to commit murder]; *People v. Miranda* (1987) 44 Cal.3d 57, 87 [the fact that "defendant brought his loaded gun (with him) and . . . . thereafter used it to kill" his victim demonstrates premeditation and deliberation]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224 [fact that "defendant was carrying a loaded gun with him at the time of the incident" demonstrates planning activity]; *People v. Williams* (1995) 40 Cal.App.4th 446, 456 [defendant's act of bringing a firearm with him to scene of the offense demonstrates planning].)

Finally, appellant had a motive to shoot Officer Ganz as he was on supervised release following his federal conviction for bank robbery, and he was aware that revocation of his supervised release was mandatory in the event that he possessed a firearm. (9RT 2158-2164; see *People v. Hughes* (2002) 27 Cal.4th 287, 334 [a defendant's parole status is relevant to his act of killing a peace officer to establish a motive to avoid revocation of his parole]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1300-1301; *People v. Superior Court* (*Wells*) (1980) 27 Cal.3d 670, 672; *People v. Durham* (1969) 70 Cal.2d 171, 189; *People v. Robillard* (1960) 55 Cal.2d 88, 100; *People v. Powell* (1974) 40 Cal.App.3d 107, 154-155; *People v. Meyes* (1961) 198 Cal.App.2d 484, 495-496.) Contrary to appellant's suggestion, the People had no duty to prove, for the purposes of establishing guilt of the substantive offense of murder, circumstances leading "an objective observer to believe that an arrest was highly likely." (AOB 61.) Although this standard does apply to the jury's finding on the special circumstance of committing a murder to avoid a lawful arrest (Pen. Code, § 190.5, subd. (a)(5)), challenged elsewhere in appellant's Opening Brief (AOB 278-282), the People need not meet this standard to demonstrate motive for the substantive count, as any substantial evidence

showing appellant's motive to kill Officer Ganz may support, but is not necessary for, the jury's finding of premeditation and deliberation. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 543; *People v. Edwards*, *supra*, 54 Cal.3d at p. 814.) Despite this fact, the evidence present at trial was sufficient to support a reasonable inference that appellant killed Officer Ganz to avoid a lawful arrest on a parole violation based on the presence of the firearm in his vehicle, and to forestall any possible search of his vehicle.

Appellant devotes a significant portion of his argument to setting forth the prosecutor's theories at trial by way of the language that the prosecutor employed during closing argument. Appellant then attempts to refute the prosecutor's arguments in turn. (AOB 52, 54-58, 63-64, 66-68, 70-71.) However, in reviewing a sufficiency claim, a court does not focus on the arguments set forth by the prosecutor below, but on the totality of the evidence in the record and the reasonable inferences to be drawn therefrom. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125-1126.)

More egregiously, appellant relies on an improper standard of review in setting forth his claim, asserting repeatedly that the People's evidence did not "compel" a particular inference or conclusion (AOB 52, 61, 63), and arguing that the evidence was "consistent with a sudden, random explosion of violence." (AOB 69.) This is not the proper standard of review and it is irrelevant that evidence presented at trial was possibly consistent with a different interpretation that the one found by the jury. (*People v. Proctor*, *supra*, 4 Cal.4th at p. 529.) Instead, a reviewing court presumes the existence of every fact in support of the judgment that the jury "could reasonably infer from the evidence." (*People v. Bloyd*, *supra*, 43 Cal.3d at pp. 346-347.) After having drawn all inferences in favor of the judgment, the reviewing court then determines whether "*any* rational trier of fact" could have found the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at pp.

318-319.)

Appellant also errs in asserting that "there were strong reasons to question the reliability of the eyewitness testimony describing the way in which the shooting took place," and in setting forth various discrepancies between the witnesses' pretrial statements and their trial testimony. (AOB 60, 67-68.) This Court has explained that in reviewing a claim regarding the sufficiency of the evidence, a reviewing court does not reappraise the credibility of witnesses or redetermine factual conflicts, as those functions are left solely to the trier of fact. (*People v. Culver*, *supra*, 10 Cal.3d at p. 548.) Considering the totality of the evidence, and presuming the existence of every fact in support of the judgment that the jury could reasonably infer from the evidence, substantial evidence of appellant's premeditation and deliberation existed, and his claim must be rejected.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED EVIDENCE THAT PROSECUTION WITNESS ROBERT DOYLE WAS ON SUMMARY PROBATION STEMMING FROM A MISDEMEANOR OFFENSE AT THE TIME OF APPELLANT'S TRIAL

Appellant contends that the trial court abused its discretion when it excluded evidence that Mr. Doyle was on summary probation stemming from a misdemeanor conviction at the time of his testimony in appellant's trial, and that the trial court's exclusion of this evidence violated appellant's federal constitutional rights. (AOB 72-94.) This claim is without merit. The trial court did not abuse its discretion in excluding evidence that Mr. Doyle was on summary probation as a result of a misdemeanor offense at the time of appellant's trial, and its ruling did not violate appellant's constitutional rights. Furthermore, appellant has failed to demonstrate that he suffered prejudice as

a result of the trial court's ruling.

A. The Relevant Proceedings Below

Robert Doyle began his testimony during the People's case-in-chief in the penalty phase on the afternoon of October 27, 1998. (6RT 1579-1598.) The next day, prior to the resumption of Mr. Doyle's testimony, defense counsel told the trial court:

> There has been some confusion as to this witness's name. The discovery up until the point I received the witness list from the prosecution, on October 14th it listed him as Robert, I believe, Daniel F-E-R-R-E-R. Yesterday when he testified, he identified himself as Robert Daniel Doyle. . . . Your Honor, it is my understanding, and I just came to learn this last night that under the name of Doyle, this individual may be on summary probation for a violation of Penal Code section 243 subsection (e) subsection (1) which I believe is spousal abuse or battery against a former spouse or fiancé - - pardon me. [¶] I believe he is on summary probation. It is a misdemeanor. I understand that the fact that he has been convicted of a misdemeanor may not be something I may use to impeach; however, I would be requesting to elicit evidence from this gentlemen that he is in fact on summary probation under *Davis* [*v.*] *Alaska,*[[47]] and in the sense that his status as a probationer may very well influence his testimony here before this jury particularly in terms of shading his testimony in such a way as he thinks will be most favorable to the prosecution.

(7RT 1636.)

The prosecutor explained that "Doyle" is the witnesses's given legal

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47. See *Davis v. Alaska* (1974) 415 U.S. 308 [94 S.Ct. 1105, 39 L.Ed.2d 347].

surname, but that when Mr. Doyle was eight months's old, his mother married a man named Ferrar, and he was raised using the surname Ferrar, despite the fact that his birth certificate and social security card bear the name Doyle. Mr. Doyle only learned that Ferrar was not his legal surname in the years since appellant's offense, and he began using Doyle for employment reasons as the name was matched to his social security number. (7RT 1636-1637.) The prosecutor told the trial court that she had learned that very afternoon that Mr. Doyle had been arrested on April 14, 1997, and had pled no contest to misdemeanor battery the very next day, April 15, 1997. The prosecutor told the trial court that she provided this information to defense counsel as soon as she learned of it. (7RT 1640.)

The following exchange occurred:

THE COURT: He has testified his name is Robert Doyle. I don't have a problem with that. Now, we have a question re: possible impeachment, if any, due to the fact that he is an a summary probation status, as a misdemeanor involving - - what was it, 243(a)(1) or (e)(1)?

[DEFENSE COUNSEL]: 243(e)(1)

THE COURT: 243(e)(1) is battery against a spouse[,] person with whom the defendant is cohabitating, et cetera et cetera. [¶] And it is clearly a misdemeanor. All right?

[DEFENSE COUNSEL]: Yes.

THE COURT: Okay. [¶] So that is the issue at this point. [¶] By the way, there is a case *People* [*v.*] *Mansfield* [(1988) 200 Cal.App.3d 82], that says battery is not involving moral turpitude.

[THE PROSECUTOR]: Correct. I have that case, and so it would be the People's position it is not admissible.

THE COURT: You want to respond?

[DEFENSE COUNSEL]: Again it is not the fact of a conviction. It is

his status as a probationer which I would submit under *Davis* [*v.*] *Alaska* would be the probative fact.

THE COURT: How would it be probative to any issue in this case as to - - are you saying that because he is under - - the argument being that because he is under summary probation to a judicial officer that somehow he would taint his testimony in this case?

[DEFENSE COUNSEL]: That it would somehow - - correct, shade his testimony in such a fashion that he is going to want to testify here in a more favorable degree for the prosecution side of the case. [¶] When we get to cross-examine this witness, I think the Court will find that this witness such as we saw yesterday, has five years after the fact apparently changed his recollections with respect to the incident in question; going to be comparing what he said yesterday with what he said several hours after the incident.

THE COURT: Okay. All right. If that is the basis then, do [the People] have any further response?

[THE PROSECUTOR]: I don't think it is admissible, his probationary status.

THE COURT: I agree. [¶] The misdemeanor status of summary probation may not be used to impeach this witness at least based on what the Court has seen so far, and again the fact that as presented even under the *Davis* case, so at this point that will not be a proper basis for any impeachment.

(7RT 1638-1639.)

B. The Trial Court Did Not Abuse Its Discretion When It Excluded Evidence That Mr. Doyle Was On Summary Probation Stemming From A Misdemeanor Conviction At The Time Of Appellant's Trial

A trial court has broad discretion to determine the relevance of any

evidence, including impeachment evidence. (Evidence Code § 350; *People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) Evidence that a witness has suffered a misdemeanor conviction is inadmissible for purposes of impeachment. However, the witnesses' conduct underlying a misdemeanor conviction may be admissible for impeachment if it involves moral turpitude, subject to the court's discretion under Evidence Code section 352.[48] (*People v. Wheeler* (1992) 4 Cal.4th 284, 292, 295-296.) Because a misdemeanor is a less forceful indicator of character than a felony, courts should "consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Id.* at pp. 296-297.) Moreover, a trial court does not abuse its discretion in excluding evidence that a witness is on probation stemming from a conviction where there has been no showing made that the witness received any promises in exchange for their testimony. (*People v. Chatman* (2006) 38 Cal.4th 344, 374.) A reviewing court will reverse the trial court's determination as to the admissibility of evidence only where there has been an abuse of discretion. (*Ibid.*; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

In the instant case, the trial court did not abuse its discretion in excluding evidence that Mr. Doyle was on summary probation stemming from a misdemeanor conviction at the time of trial. Nothing in the record suggests that Mr. Doyle ever spoke with any prosecutor, or any member of law enforcement, concerning the disposition of his misdemeanor matter, and appellant's offer of proof failed to show that Mr. Doyle had, in fact, received a benefit in the form

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48. Evidence Code section 352 provides:
The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

of a lenient sentence or a threat to have his probation revoked, prior to his testimony in the instant case. (See *People v. Chatman*, *supra*, 38 Cal.4th at p. 374 [trial court did not abuse its discretion in excluding evidence that prosecution witness was on probation where defendant failed to make a showing that witness had received a promise from law enforcement]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1050-1051; *People v. Harris* (1989) 47 Cal.3d 1047, 1091; *Kennedy v. Superior Court* (2006) 145 Cal.App.3d 359, 380.) Nothing in the record suggests that Mr. Doyle received any benefit in his misdemeanor case as a result of his impending testimony in the instant case. Similarly, nothing in the record suggests that Mr. Doyle was threatened with having his summary probation revoked if he failed to testify in a particular manner. Mr. Doyle was arrested in his misdemeanor case on April 14, 2007, and he entered a no contest plea *the very next day*. (7RT 1640.) Appellant failed to suggest in his offer of proof that anyone associated with the instant case was made aware of, or intervened in, the disposition of Mr. Doyle's misdemeanor matter during this 24-hour period. In fact, the prosecutor only learned of Mr. Doyle's conviction and status on probation on the day she disclosed the information to the trial court and defense counsel. (7RT 1640.) As this Court has previously stated in affirming a trial court's decision to exclude evidence concerning the probation status of a prosecution witness:

> In the absence of any offer of proof by defendant that [the witness] had been threatened with probation violation, or other sanctions, or had been offered incentives for his testimony, the trial court did not abuse its discretion.

(*People v. Harris*, *supra*, 47 Cal.3d at p. 1091.)

Appellant's offer of proof was also insufficient as he did not establish that Mr. Doyle was on probation stemming from a Los Angeles County Superior Court judgment, and as such, appellant merely speculates that the

prosecutor, a Los Angeles County Deputy District Attorney, or any of the Los Angeles County Deputy Sheriffs investigating the instant case, could have had any influence over Mr. Doyle's probationary status in his misdemeanor case. (See *People v. Chatman*, *supra*, 38 Cal.4th at p. 374; *People v. Carpenter*, *supra*, 21 Cal.4th at pp. 1050-1051; *People v. Harris*, *supra*, 47 Cal.3d at p. 1091.) Appellant had no right to introduce evidence concerning Mr. Doyle's misdemeanor "probationary status untethered to any specific showing that it could have affected" his testimony. (*People v. Chatman*, *supra*, 38 Cal.4th at p. 374.) Moreover, appellant's assertion that this evidence was relevant because of discrepancies between Mr. Doyle's pretrial statements and his trial testimony (AOB 80-81) fails in light of his inability to demonstrate that any promise or threat was made to Mr. Doyle by anyone involved with the prosecution of the instant case. (*Ibid.* [rejecting claim that witness's "probation status was relevant because of differences between her redirect testimony and her previous statements"].)

Appellant errs in asserting that the trial court's exercise of its discretion was "not responsive to defense counsel's objection," and that the trial court mistakenly treated this an as impeachment-by-prior-conduct question." (AOB 76.) The trial court properly articulated appellant's position, in the form of a question to defense counsel, stating, "the argument being that because he is under summary probation to a judicial officer that somehow he would taint his testimony in this case?" Defense counsel responded, "[t]hat it would somehow - - correct, shade his testimony in such a fashion that he is going to want to testify here in a more favorable degree for the prosecution side of the case." (7RT 1638-1639.) Thus, defense counsel specifically affirmed that the trial court correctly understood appellant's position and the argument that appellant was advancing below. Moreover, the trial court denied appellant's request to introduce the evidence at issue stating:

> The misdemeanor status of summary probation may not be used to impeach this witness at least based on what the Court has seen so far, and again the fact that as presented even under the *Davis* case, so at this point that will not be a proper basis for any impeachment.

(7RT 1639.) The trial court's express reference to *Davis v. Alaska*, *supra*, 415 U.S. 308, demonstrates that the court understood appellant's claim to involve more than "an impeachment-by-prior-conduct question." (AOB 76.)

Appellant claims that the trial court's act of excluding evidence concerning Mr. Doyle's probationary status violated his federal constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 76-78, 81-86.) Appellant's constitutional claims fail as the trial court retained wide latitude to restrict this evidence as prejudicial, confusing, or of marginal relevance. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-680.) In *Van Arsdall*, the high Court noted that the "Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Id.* at pp. 678-679; see also *Holmes v. South Carolina*, *supra*, 126 S.Ct. at p. 1732 ["the Constitution permits judges to exclude evidence that is repetitive . . . only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues"]; *People v. Carpenter*, *supra*, 21 Cal.4th at pp. 1050-1051.) Moreover, application of the ordinary rules of evidence does not "impermissibly infringe on the accused's right to present a defense." (*People v. Hall*, *supra*, 41 Cal.3d at p. 8.34.)

C. Assuming The Trial Court Abused Its Discretion, Appellant Suffered No Prejudice

Assuming the trial court abused its discretion when it excluded evidence that Mr. Doyle was on summary probation as a result of a misdemeanor conviction during appellant's trial, appellant suffered no prejudice as it is not

reasonably probable that appellant would have received a more favorable result at trial had the evidence been admitted. (*People v. Watson*, *supra*, 46 Cal.2d at. p. 836; see *People v. Ayala* (2000) 23 Cal.4th 225, 271 [error in excluding impeach evidence evaluated under *Watson*]; *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1555.) As previously explained, the evidence concerning appellant's identity and mental state was truly overwhelming. (See Arguments I(c), and II(b), *supra*.)

More importantly, Mr. Doyle did not testify to any aspect of the shooting that was not fully corroborated by the testimony of many other witnesses at trial. Mr. Doyle testified that he was pushing shopping carts in the parking lot when he saw Officer Ganz stop appellant's vehicle, which he described as a small, silver hatchback. Mr. Doyle watched Officer Ganz get out of his patrol car and approach appellant's vehicle, then he turned his attention away from the traffic stop. (6RT 1580-1583, 1597; 7RT 1646-1647, 1655.) Moments later, Mr. Doyle heard a gunshot emanate from the direction of appellant's vehicle, and he turned his attention back to Officer Ganz. (6RT 1583; 7RT 1646-1647.) Officer Ganz was running back towards his patrol car and appellant was chasing him, approximately 12 feet behind, holding a firearm. (6RT 1584-1585.) When appellant reached the driver's side door of the patrol car, he fired a shot at Officer Ganz. (6RT 1585-1589; 7RT 1647.) Officer Ganz crouched down behind his patrol car, and appellant shot at Officer Ganz again from over the trunk of the vehicle. (6RT 1587, 1589-1592; 7RT 1647-1648.) Appellant then turned and ran back to his vehicle. (6RT 1590.)

A plethora of other witnesses testified to these exact same observations at trial. Appellant was seen chasing after Officer Ganz and shooting at him while on the side of the patrol car by Mr. Brumley (6RT 1537-1541, 1550-1554), Ms. Timmons (7RT 1744-1749, 1760-1762), Ms. La Croix (7RT 1663-1673), Mr. Lee (7RT 1611-1617, 1621-1628), and Ms. Gomez (7RT 1823-

1834). Appellant was subsequently seen shooting Officer Ganz over the trunk of the patrol car by Mr. Sattler (7RT 1696-1706), Mr. Brumley (6RT 1541-1546), and Ms. La Croix (7RT 1666-1675). Given that a host of other witnesses testified to the exact same observations testified to by Mr. Doyle, evidence that Mr. Doyle was on summary probation for a misdemeanor offense in an unidentified jurisdiction would not have benefitted appellant in any manner. (*People v. Ayala*, *supra*, 23 Cal.4th at p. 271.)

Appellant contends that in the event that jurors had learned that Mr. Doyle was on summary probation, they would have had reason to suspect that he had intentionally altered his trial testimony to favor the prosecution. However, as appellant himself points out, Mr. Doyle had already told Detective Perales on the morning of the shooting that after the last shot had been fired he had seen the shooter standing at the rear of the patrol car looking over the trunk of the vehicle with a firearm in his hands as if he were checking to see whether he had hit Officer Ganz. (7RT 1648-1649.) Furthermore, had Mr. Doyle wished to embellish his testimony in favor of the prosecution, he could have simply identified appellant as the man he saw on the night of the offense. He did not.

Appellant also errs in suggesting that Mr. Doyle's "account of events at the crime scene added a great deal of drama and emotional impact to the prosecution's case" and that if appellant had undermined Mr. Doyle's credibility "this would have also encouraged skepticism about his dramatic descriptions of the crime scene." (AOB 90; see also AOB 74.) Mr. Doyle's description of the crime scene in the aftermath of the shooting was consistent with the testimony of numerous other witnesses, including Mr. Thomas (7RT 1683-1686, 1691-1695), Ms. Timmons (7RT 1753-1755), and Officer Zins (7RT 1846-1847). Given that Mr. Doyle's testimony concerning both the manner in which appellant shot Officer Ganz and the aftermath of that shooting

was wholly consistent with the testimony of the other witnesses at trial, any attempt to suggest that Mr. Doyle was embellishing his testimony to gain favor in his misdemeanor case would have met with failure.

Appellant contends that Mr. Doyle's status on summary probation would have somehow enabled him to challenge the trial court's act of instructing the jury on flight with CALJIC No. 2.52, because Mr. Doyle was one of two witnesses who described appellant running back to his vehicle, rather than walking back to his vehicle, prior to his departure. (AOB 76, 89-91.) Mr. Doyle told Detective Perales that appellant had ran back to his vehicle on the morning following the shooting, years before he was placed on summary probation. (7RT 1649.) Moreover, the trial court's decision to instruct the jury with CALJIC No. 2.52 was not influenced by whether appellant was running or walking back to his car after the shooting, and this distinction is irrelevant to appellant's subsequent flight from the area. (See Argument V, *post.*) Appellant also fails to explain the basis of his passing claim that Mr. Doyle's name change and his late arrival to court on the second day of his testimony somehow "raise further concerns about his reliability." (AOB 74-75, fn. 21.) Neither the fact of Mr. Doyle's legal name, nor his late arrival to court had any bearing whatsoever on his credibility, and defense counsel did even bother to raise these matters in closing argument below. (11RT 2481-2510.)

Appellant's assertion that evidence concerning Mr. Doyle's status on summary probation would have created a "lingering doubt" about his guilt during the penalty phase is without merit, as is not reasonably possible that this evidence would have created a lingering doubt in the minds of the jurors. (AOB 91-94.) This is especially true given that additional evidence introduced during the penalty phase bolstered the People's guilt phase case regarding appellant's motive and plan to kill Officer Ganz in order to avoid arrest, as police officers were investigating a string of grocery store robberies that

appellant had committed just prior to Officer Ganz's murder. (15 RT 3428-3430.) Moreover, jurors learned during the penalty phase that following appellant's arrest for federal bank robbery he told Deputy Germann that he should have "shot it out" with deputies to avoid arrest. When Deputy Germann responded that appellant only had a BB gun in his possession, appellant stated, "[n]ext time it's not going to be just a BB gun." (13 RT 2927.) Thus, the totality of the evidence presented during the penalty phase was even stronger as to appellant's culpability in the murder of Officer Ganz than in the guilt phase alone, and there is no reasonable possibility that the outcome of the penalty phase would have been any different had evidence concerning Mr. Doyle's status on summary probation stemming from a misdemeanor offense been admitted at trial.

Finally, appellant errs in asserting that Mr. Doyle's status on summary probation was relevant as evidence in mitigation under Penal Code section 190.3, and in suggesting that he had a right to have the jury consider any evidence he wished to place before it irrespective of state law rules governing relevance. (*People v. Harris*, *supra*, 37 Cal.4th at pp. 353-355; *People v. Smith* (2005) 35 Cal.4th 334, 365-366.) Moreover, as the evidence had limited relevance and was there was no indicia of reliability concerning any assertion that Mr. Doyle received any benefit in his misdemeanor matter as a result of testifying in the instant case, appellant had no right to introduce this evidence during the penalty of his trial. (*People v. Morrison* (2004) 34 Cal.4th 698, 725.) This claim fails.

IV.

THE PROSECUTOR DID NOT COMMIT *GRIFFIN* ERROR DURING THE PEOPLE'S CLOSING ARGUMENT IN THE GUILT PHASE OF APPELLANT'S TRIAL

Appellant contends that the prosecutor improperly commented on his

failure to testify during the People's closing argument in the guilt phase of appellant's trial, in violation of his Fifth Amendment rights and the rule articulated in *Griffin v. California* (1965) 380 U.S. 609, 615 [85 S.Ct. 1229, 14 L.Ed. 106]. (AOB 95-108.) This claim is without merit. The prosecutor's closing argument cannot reasonably be construed as a comment, directly or indirectly, upon appellant's failure to testify on his own behalf. Assuming that the prosecutor's remarks constituted error, any such error was harmless beyond a reasonable doubt.

A. The Relevant Proceedings In The Trial Court

During the People's closing argument in the guilt phase of appellant's trial, the prosecutor told the jury: "Now, the next issue, then, as I indicated, is the issue of identity. As you realize, the defense did not appear to refute the issue of identity." (11RT 2472.) Defense counsel interjected: "I would object to that, Your Honor, and ask to approach." (11RT 2472.)

At sidebar, out of the presence of the jury, defense counsel told the trial court:

> Seems to me counsel is commenting on the fact that [appellant] did not testify. I'm not sure where else counsel is going with a comment such as that. I mean I recollect asking a number of questions on cross-examination about the circumstances surrounding the identity or the identification process, if you will, the fact that the witnesses were shown photographs and did not identify the defendant. At this juncture, I would be moving for a mistrial based on I think there's only one possible inference that the jury could draw, and that is counsel is referring to the fact that [appellant] did not testify.

(11RT 2472-2473.) The trial court asked the prosecutor to respond to defense counsel's assertion, and the prosecutor told the trial court:

> I clearly think that making reference to the issue of identity is far from

commenting on the defendant's failure to testify. And I might indicate that I understand - - I believe the case is *Morris*[[49]] and several other cases, I could make a lot more specific comments than that without going anywhere near *Griffin* error. So I think the objection is unfounded.

(11RT 2473.)

The trial court overruled appellant's objection, stating:

Okay, objection is overruled. [¶] Identity is clearly an issue in the sense that we had the identification that night and the cross-examination of those witnesses. But we had people across the street, if you'll remember, at Domino's, and we had all those kinds of issues. But it's clearly an issue. But I don't think it reaches the area of *Griffin* error by that comment. But let's just stay away from defense did not put in any witnesses or anything of that nature. What you did say, I don't think reached that level.

(11RT 2473.) The following exchange immediately occurred:

[THE PROSECUTOR]: Just to be clear on the Court's ruling, I think I am allowed to say the defense presented no witnesses - -

THE COURT: Okay.

[THE PROSECUTOR]: I thought you were saying I couldn't say that.

THE COURT: No, no.

[DEFENSE COUNSEL]: But I did.

THE COURT: I think what you should do is continue with your argument. It's overruled.

(11RT 2474.)

Back in the presence of the jury, the prosecutor resumed her closing argument, telling jurors:

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49. See *People v. Morris* (1988) 46 Cal.3d 1, 35.

> As I indicated, you heard all the evidence that's been presented in this case. And other than the questioning of witnesses that were presented, there was not any evidence presented to suggest that anyone other than [appellant] committed this crime. To go over the evidence of identification, in other words, of what evidence was presented to establish that [appellant] is the person who, upon a traffic stop, fired at Officer Ganz, got out of the car, chased him down, shot him in the back, chased him down further, shot him in the head, how do we know it was [appellant]?

(11RT 2475.) The prosecutor went on to summarize the evidence adduced at trial demonstrating that appellant was the individual responsible for the offense. The prosecutor told the jury that a Member's Only jacket, described by Ms. La Fond as an article of clothing worn by the shooter, was found in appellant's residence. The prosecutor told jurors that the Aerospace Corporation had identified the suspect's vehicle from security videotapes as a Daihatsu Charade with front end damage, that appellant's vehicle matched that description precisely and that "we have expert testimony which was not refuted[,] by Mr. Pentz that the vehicle that was recovered from [appellant] in August 1994 is, in fact, the same vehicle that was seen in those ATM pictures." (11RT 2475.)

The prosecutor discussed the evidence adduced at trial concerning the identifications of appellant made by Don Ganz and Jennifer La Fond, and told the jurors, "I'm certain that [the] defense is going to attack every witness who identified or made any descriptive testimony regarding the events that occurred . . ." (2RT 2475-2476.) The prosecutor then told the jury, "[f]inally, and again, not refuted by the defense at all, the evidence of the murder weapon." (11RT 2476.) The prosecution went on to detail Deputy Van Horn's testimony and his conclusion that the weapon recovered from a safe in appellant's residence was the weapon used to shoot the bullets recovered from Officer Ganz's body and

from his bullet proof vest, and that one of the shell casings recovered from the crime seen had been ejected from appellant's weapon. (11RT 2477.) The prosecutor told the jury:

> That is unrefuted evidence, ladies and gentlemen. There's no doubt that the defendant, Roger Brady, is the person who killed Officer Ganz and who fired all three shots that entered and/or injured Marin Ganz's body.

(11RT 2477.)

During appellant's closing argument, defense counsel told the jury:

> The defendant is entitled to what we call rest on the state of the evidence. So in other words, every time [the prosecutor], with all due respect to her this afternoon, said to you and this was uncontroverted or the defendant didn't - - the defense, rather, did not offer any evidence to the contrary, ladies and gentlemen, the burden is on the prosecution. That's what the law is.

(11RT 2488.)

Defense counsel subsequently argued to the jury that the identifications of appellant made by Don Ganz and Ms. La Fond must be evaluated in light of their failure to identify him from a book of photographs following the crime, and that a portion of the Aerospace Corporation's initial report regarding appellant's vehicle did not mention the existence of front end damage to the vehicle. (11RT 2507-2508.) Defense counsel devoted the balance of her closing argument to disputing the evidence regarding the mental state possessed by the shooter during the offense. (11RT 2481-2510.)

B. The Prosecutor Did Not Commit *Griffin* Error During Closing Argument

In *Griffin v. California*, *supra*, 380 U.S. 609, the United States Supreme Court held that the prosecution may not comment upon a defendant's failure to testify on his own behalf. This Court has explained that the rule articulated in

Griffin:

> does not, however, extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses.

(*People v. Bradford*, *supra*, 15 Cal.4th at p. 1339; see also *People v. Turner* (2004) 33 Cal.4th 406, 419-420; *People v. Frye* (1998) 18 Cal.4th 894, 977; *People v. Johnson* (1992) 3 Cal.4th 1183, 1229; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1051; *People v. Kelly* (1990) 51 Cal.3d 931, 967; *People v. Johnson* (1989) 47 Cal.3d 1194, 1236; *People v. Morris*, *supra*, 46 Cal.3d at p. 35.)

A prosecutor may commit *Griffin* error:

> if her or she argues to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand.

(*People v. Bradford*, *supra*, 15 Cal.4th at p. 1339.) However, a prosecutor's comments noting the absence of evidence contradicting what was produced at trial by the prosecution, or upon the failure of the defense to introduce material evidence or alibi witnesses, "cannot fairly be interpreted as referring to [a] defendant's failure to testify." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1339; see also *People v. Frye*, *supra*, 18 Cal.4th at p. 977.) In reviewing a claim of prosecutorial misconduct based on a prosecutor's closing argument, the entirety of the prosecutor's remarks must be viewed in the context of the argument as a whole. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

No *Griffin* error occurred in the instant case. The prosecutor's remarks that "the defense did not appear to refute the issue of identity," and that "other than the questioning of witnesses that were presented, there was not any evidence presented to suggest that anyone other than [appellant] committed this

crime," were entirely proper, as they manifestly referred to the state of the evidence and appellant's failure to call any witnesses refuting key issues regarding identity, including appellant's possession of the very firearm used to kill Officer Ganz, the eyewitness identifications of appellant as the shooter, and the conclusion of the Aerospace Corporation that appellant's vehicle was the vehicle depicted on the bank surveillance taken from the scene of the offense. (11RT 2472, 2475.) Nothing in the prosecutor's remarks suggested that the People were referring to appellant's failure to testify on his own behalf, rather than his failure to introduce material evidence or call logical witnesses, and appellant was not the only witness who could have provided defense evidence on these issues. (See *People v. Stewart* (2004) 33 Cal.4th 425, 505; *People v. Brown* (2003) 31 Cal.4th 518, 554; *People v. Medina* (1995) 11 Cal.4th 694, 756; *People v. Bradford, supra*, 15 Cal.4th at p. 1339; *People v. Miller* (1990) 50 Cal.3d 954, 956; *People v. Font* (1995) 35 Cal.App.4th 50, 56; *People v. Roberts* (1975) 51 Cal.App.3d 125, 135; *People v. Gaulden* (1974) 36 Cal.App.3d 942, 954; *People v. Meleley* (1972) 29 Cal.App.3d 41, 60.)

Appellant's assertion that "[d]efense counsel did everything possible to refute the identification *short of calling [appellant] to the stand*" is mistaken. (AOB 103 [italics in original].) Defense counsel presented no alibi witnesses on behalf of appellant, no witnesses from the parking lot on the night of the shooting to testify that the shooter was someone other than appellant, no independent experts challenging the conclusions of the Aerospace Corporation that the vehicle depicted on the surveillance camera was appellant's, and most importantly, defense counsel presented no challenge whatsoever to evidence which conclusively demonstrated that appellant was in possession of the firearm used to kill Officer Ganz. Thus, appellant's conclusion, that the prosecutor's remark's "can only be understood [as referring] to the one thing that defense counsel did *not* do: have [appellant] testify," must be rejected. (AOB 103

[italics in original]; see *People v. Bradford*, *supra*, 15 Cal.4th at p. 1339.)

Appellant devotes a great deal of his argument to his assertion that the prosecutor "completely misrepresented the trial record by claiming that the defense did not refute the evidence of" identification (AOB 103), and he extensively chronicles his efforts to cross-examine the People's witnesses concerning the issue of his identity. (AOB 97-103.) However, the prosecutor's characterizations of appellant's efforts in cross-examining witnesses does not inform the only relevant question presented by this claim: whether the prosecutor commented, directly or indirectly, on appellant's failure to testify. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1339.) Here, nothing in the prosecutor's remarks referenced appellant's failure to testify on his own behalf. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 505; *People v. Brown*, *supra*, 31 Cal.4th at p. 554.)

Appellant errs in relying on *People v. Northern* (1967) 256 Cal.App.2d 28, in support of his claim that the prosecutor committed *Griffin* error. (AOB 104-105.) *Northern* is wholly inapposite. In *Northern*, which involved a hand-to-hand drug transaction between the defendant and an undercover officer, the prosecutor commented:

> Looking at this evidence, which, incidentally, has not been refuted by the Defendant, there is no controverting evidence from the other side. The case, as I see it, referring to the evidence coming from the witness stand, is overwhelmingly strong as compared to that coming from that Defendant . . . *There is no evidence offered by the Defendant to controvert what the People offered*. They certainly have that opportunity . . . I was in the process of stating that the evidence in this case is uncontroverted in that, *although the defense has an opportunity to offer evidence rebutting the evidence offered by the People, this was not done in this case*.

(*People v. Northern*, *supra*, 256 Cal.App.2d. at p. 30 [italics in original].) The Court of Appeal in *Northern* found the comment to be error because it constituted a specific reference to the defendant and his failure to testify on his own behalf. (*Id.* at pp. 30-31.)

Appellant errs in stating that the prosecutor's remarks in the instant case were "virtually identical" to those in *Northern*. (AOB 104.) The prosecutor in the instant case referred only to "the defense" and never to "the defendant." (11RT 2472-2477.) This distinction marks the difference between a reference to appellant's duty to call logical, material witnesses and his failure to testify on his own behalf. (See *People v. Vargas* (1973) 9 Cal.3d 470, 476 [comment on failure to "explain" evidence is proper, but comment on failure to "deny" evidence is improper].) Moreover, the posture of the instant case was different than in *Northern*, where only the defendant could have refuted the People's evidence. In the instant case, the prosecutor's remarks did not refer to appellant personally, and "cannot fairly be interpreted as referring to [appellant's] failure to testify." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1339; see also *People v. Frye*, *supra*, 18 Cal.4th at p. 977.)

C. Any *Griffin* Error Was Harmless Beyond A Reasonable Doubt

Assuming the prosecutor committed error in the manner alleged, appellant suffered no prejudice as the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) This Court has explained that "indirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error." (*People v. Hovey* (1988) 44 Cal.3d 543, 572 [prosecutor's argument that the defendant has "never said anything to you about why, why he did these things" constituted harmless error]; see also *People v. Turner*, *supra*, 33 Cal.4th at pp. 420-421 [prosecutor's "oblique reference" to the lack of access "to

testimony from defendants" at a prior trial, and his "brief" reference to his inability to talk with the defendant were harmless beyond a reasonable doubt]; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1340.) In the instant case, the prosecutor's brief remarks did not invite the jurors to draw an inference of guilt from appellant's failure to testify.

The evidence demonstrating appellant's identity as the individual who shot and killed Officer Ganz was truly overwhelming. (*People v. Hardy* (1992) 2 Cal.4th 86, 154 [*Griffin* error harmless beyond a reasonable doubt in light of overwhelming evidence of defendant's guilt].) Appellant was identified by Don Ganz and Jennifer La Fond in court as the individual who shot Officer Ganz. (6RT 1499-1500; 7RT 1790, 1795, 1821-1822.) Appellant was found to possess the very firearm used to kill Officer Ganz in a safe in his Washington residence.[50] (8RT 2013-2020, 2024-2025, 2028, 2031, 2034; 9RT 2100-2119, 2122, 2133-2134.) Moreover, appellant's vehicle, a Daihatsu Charade Model EFI, was identified as the precise make and model of the shooter's vehicle depicted in the security footage taken from bank cameras on the night of the shooting, and appellant's particular vehicle was identified, based in part on damage to its front end, by Aerospace Corporation technicians as the exact same vehicle depicted on the videotape. (8RT 1936-1958, 1973-1974, 1986, 1990, 1998-1999, 2002-2003, 2009-2010, 2022.) Ms. La Fond also identified a jacket recovered from appellant's closet as the jacket worn by the shooter on the night of the shooting. (7RT 1802; 9RT 2190-2192.) Given the strength of the People's case on the issue of identity, appellant suffered no prejudice.

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50. Appellant engages in sheer speculation in asserting that he "could have obtained the gun illegally after someone else used it to shoot Officer Ganz." (AOB 108.) Nothing in the record suggests that appellant obtained the weapon from someone else following the murder of Officer Ganz, and his reliance on his own failure to introduce material evidence proves respondent's very point concerning the propriety of the prosecutor's closing argument in this case.

(*People v. Hardy*, *supra*, 2 Cal.4th at p. 154.)

Appellant errs in focusing on the strength of the People's case at the time that his "clue" was initially inactivated by investigators, and by asserting that the inactivation of his clue "strongly indicated that the identification was not as credible as the prosecutor wanted the jury to believe." (AOB 107.) This argument overlooks, of course, the fact that appellant was arrested in possession of the firearm used to kill Officer Ganz, and in possession of the jacket identified by Ms. La Fond as the one worn by the shooter on the night of the offense, *following* the reactivation of his clue.

Defense counsel highlighted the specific portions of the People's case that appellant disputed during appellant's closing argument, and told jurors that the prosecutor had the burden of proof on the issue of identity. (11RT 2488, 2507-2508.) Furthermore, the trial court instructed the jury that:

> A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that the defendant does not testify. Further you must neither discuss this matter nor permit it to enter into your deliberations in any way.

(11RT 2425; CT 9122; CALJIC No. 2.60.) The trial court also instructed the jury that:

> In deciding whether or not to testify, the defendant, Mr. Brady, may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. And no lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element.

(11RT 2425-2426; 32CT 9123; CALJIC No. 2.61.) The trial court also instructed the jury that "statements made by the attorneys during trial are not evidence." (11RT 2411; 32CT 9105; CALJIC No. 1.02.) It is presumed that

jurors understood and followed the instructions of the trial court. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

Given the overwhelming evidence of appellant's guilt, the indirect nature of the prosecutor's remarks, defense counsel's remarks clarifying that appellant disputed specific portions of the People's case regarding identity, and the trial court's instructions to the jury concerning appellant's constitutional right to refrain from testifying, any *Griffin* error was harmless beyond a reasonable doubt. (*People v. Turner, supra*, 33 Cal.4th at pp. 420-421; *People v. Bradford, supra*, 15 Cal.4th at p. 1340; *People v. Hardy*, *supra*, 2 Cal.4th at p. 154; *People v. Hovey*, *supra*, 44 Cal.3d at p. 572.)

V.

THE TRIAL COURT PROPERLY INSTRUCTED IN THE JURY REGARDING FLIGHT INDICATING CONSCIOUSNESS OF GUILT WITH CALJIC NO. 2.52

Appellant contends that the trial court erred when it instructed the jury regarding flight indicating consciousness of guilt with CALJIC No. 2.52, because the instruction was not supported by substantial evidence, and because it was "unfairly partisan and argumentative," and allowed an irrational inference concerning appellant's guilt. (AOB 109-122.) Appellant's claims are without merit. The trial court properly instructed the jury with CALJIC No. 2.52 as substantial evidence supported the instruction. Moreover, this Court has repeatedly rejected appellant's general challenges to CALJIC No. 2.52 (and other similar instructions regarding consciousness of guilt), and appellant has offered no reason for this Court to reconsider its prior decisions in the instant case. Finally, assuming the trial court erred, appellant has failed to establish that he suffered prejudice as a result of the trial court's act of instructing the jury with CALJIC No. 2.52.

During a discussion of the applicable instructions in the guilt phase, the

trial court was reading through the CALJIC numbers of the instructions that it intended to give when appellant objected to CALJIC No. 2.52, regarding flight after crime demonstrating consciousness of guilt. (10RT 2363.) Defense counsel told the trial court:

> My position has always been with respect to this particular instruction that it speaks to a situations where the prosecution has particular evidence that a defendant took particular steps in order to absent himself or herself from the vicinity, and we have no evidence of that in this particular instance other than the fact that if one believes my client to be the perpetrator, he did not remain at the scene, and it seems to me that if the prosecution were to be entitled to this instruction they should have some additional evidence. And the case that always comes to mind is a case where they have evidence that the defendant has cleaned out his bank account and gone to Italy. And that's not the case here. The best evidence as I understand it is that the defendant remained in the Los Angeles Area for a number of months after this incident and only went up to the Northwest in April, I believe, of '94. [¶] So I would be object[ing] to giving this particular instruction because there is simply no evidence to support it other than the fact that - - and again, it seems to me unreasonable for the prosecution to expect that merely not remaining at the scene of a crime gives rise to an instruction such as this.

(10RT 2363-2364.)

The trial court asked the prosecutor to respond, and the prosecutor stated, "I think based on the language of the instruction, he got in his car and drove off. I think that's sufficient." (10RT 2364.) The trial court stated, "[a]ll right, 2.52 will be given." (10RT 2364.)

The trial court subsequently instructed the jury with CALJIC No. 2.52, as follows:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all the other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(11RT 2425; 32CT 9121.)

An instruction on flight is properly given if the jury could reasonably infer that a defendant's flight reflects consciousness of guilt and that flight was to avoid being arrested. (*People v. Smithey* (1999) 20 Cal.4th 936, 982; *People v. Roybal* (1998) 19 Cal.4th 481, 517; *People v. Visciotti* (1992) 2 Cal.4th 1, 60; *People v. Crandall* (1988) 46 Cal.3d 833, 869.) Where evidence of a defendant's flight is relied upon as tending to show guilt, the instruction must be given. (Pen Code, § 1127c; *People v. Mason* (1991) 52 Cal. 3d 909, 943.)

Appellant's act of getting into his vehicle and driving away from the crime scene immediately after shooting Officer Ganz, without summoning help or rendering aid for Officer Ganz, demonstrates that he fled the scene in order to avoid arrest, and justifies the trial court's act of instruction the jury with CALJIC No. 2.52. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 126; *People v. Turner* (1990) 50 Cal.3d 668; *People v. Visciotti* (1992) 2 Cal.4th 1, 60-61; *People v. Hoang* (2006) 145 Cal.App.4th 264, 276-277 [defendant's act of leaving the scene of the crime quickly and in silence is sufficient to warrant giving of CALJIC No. 2.52]; *People v. Marchialette* (1975) 45 Cal.App.3d 974, 981 [defendant's act of leaving scene of the shooting hastily and without explanation or rendering aid warrants CALJIC No. 2.52].)

Appellant devotes the majority of his argument to asserting that CALJIC No. 2.52 is argumentative and that it allows an irrational permissive inference about a defendant's guilt. (AOB 110-121.) This Court has repeatedly rejected

these precise challenges to CALJIC No. 2.52, and to other similar instructions providing for permissive inferences. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 125; *People v. Guerra* (2006) 37 Cal.4th 1067, 1137; *People v. Benavides* (2005) 35 Cal.4th 69, 100; *People v. Hughes* (2002) 27 Cal.4th 287, 348; *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439; *People v. Mendoza* (2000) 24 Cal.4th 130, 179; *People v. Arias* (1996) 13 Cal.4th 92, 142; *People v. Kelly* (1992) 1 Cal.4th 495, 531-532; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 127-128.) This court has also repeatedly rejected appellant's specific claim that consciousness of guilt instructions permit irrational permissive inferences concerning a defendant's mental state. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1137; *People v. Nakahara*, *supra*, 30 Cal.4th at p. 713; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1224; *People v. Bacigalupo*, *supra*, 1 Cal.4th at pp. 127-128; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579; *People v. Crandell*, *supra*, 46 Cal.3d at p. 871.) Appellant acknowledges that this Court has repeatedly rejected these precise claims, and he asks this Court to reconsider its prior decisions. (AOB 112-113, 119.) However, appellant has provided this Court with no reason to do so.[51] (*See People v. Jurado*, *supra*, 38 Cal.4th at p. 125.) Furthermore, given that the trial court properly instructed the jury with CALJIC No. 2.52, appellant's federal constitutional claims under the Fifth, Sixth, Eighth, and Fourteenth Amendments fail. (See *People v. Benavides*, *supra*, 35

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51. Appellant also asserts that the trial court erred in instructing the jury with CALJIC No. 2.52 because it was duplicative of other instructions on circumstantial evidence, including CALJIC Nos. 2.00, 2.01, and 2.02. (AOB 109-110.) However this argument is simply a restatement of appellant's argument concerning the allegedly argumentative nature of instructions allowing permissive inferences. (AOB 110 ["There was no need to repeat this general principle under the guise of permissive inferences of consciousness of guilt. This unnecessary benefit to the prosecution . . ."].) This argument fails for the same reasons that appellant's other arguments urging this same contention fail. (See *People v. Mendoza*, *supra*, 24 Cal.4th at p. 179.)

Cal.4th at p. 100.)

Assuming the trial court erred when it instructed the jury with CALJIC No. 2.52, any error was harmless as it is not reasonably probable that appellant would have received a more favorable outcome at trial had the trial court refrained from giving the challenged instruction. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Crandall*, *supra*, 46 Cal.3d at p. 869 [error in instructing jury with CALJIC No. 2.52 evaluated under *Watson*].) Under the challenged instruction, the existence and significance of flight were left to the jury to determine, and the instruction expressly informed jurors that flight was not sufficient to establish guilt. (11RT 2425; 32CT 9121; see *People v. Carter* (2005) 36 Cal.4th 1114, 1182-1183 *People v. Crandall*, *supra*, 46 Cal.3d at p. 870.) Moreover, had the trial court refrained from giving the instruction, the jury would have still been aware of appellant's flight following the offense and been able to give this evidence the same weight during deliberations. (*People v. Moon* (2005) 37 Cal.4th 1, 28.)

Importantly, the flight instruction "did not figure in the prosecutor's closing argument" in any manner. (*People v. Crandall*, *supra*, 46 Cal.3d at p. 870; see 11RT 2461-2481, 2510-2523.) Appellant's flight after the offense was an infinitesimal portion of the People's case, and as previously explained, the People introduced overwhelming evidence demonstrating both appellant's identity and his mental state in killing Officer Ganz. (See Arguments I(c), II(b), and IV(c), *supra*.) Had the trial court refrained from instructing the jury with CALJIC No. 2.52, the outcome of appellant's trial would have been no different. (*People v. Crandall*, *supra*, 46 Cal.3d at p. 869.)

Even assessing prejudice under the standard articulated in *Chapman* does not benefit appellant given the overwhelming nature of the evidence against him, and the prosecutor's utter lack of reliance on appellant's flight during closing argument. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Appellant suggests that he was prejudiced by "combined effect of the consciousness of guilt instruction and the [prosecutor's] *Griffin* error." (AOB 122.) However, no *Griffin* error occurred and appellant has presented nothing to cumulate. (See *People v. Williams* (2006) 40 Cal.4th 287, 339.) Appellant's claim fails.

VI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING VICTIM IMPACT EVIDENCE CONCERNING THE MURDER OF OFFICER GANZ AND THE INTRODUCTION OF THIS EVIDENCE DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS

Appellant contends that the trial court's "admission of an excessive quantity of irrelevant and inflammatory victim impact evidence" violated state law and his federal constitutional rights. Specifically, appellant objects to the introduction of evidence relating to: (1) the circumstances of Officer Ganz's death; (2) Officer Ganz's funeral service; (3) Officer Ganz's character; (4) the impact of the murder on Officer Ganz's family; and (5) the impact of the murder on Officer Ganz's friends, coworkers, and the community. According to appellant, the cumulative impact of the trial court's errors in admitting this evidence violated his federal constitutional rights. (AOB 123-215.) Appellant's claims are without merit. The majority of appellant's claims regarding the introduction of victim impact evidence have been waived by his failure to object to the introduction of evidence below. Moreover, the trial court properly admitted all of the victim impact evidence that appellant challenges in this case, and appellant's constitutional rights were not violated in any manner by the People's presentation of victim impact evidence, which comprised only approximately three hours of the People's entire penalty phase case.

A. The Relevant Pre-penalty Phase Proceedings Concerning Victim Impact Evidence

On November 13, 1998, shortly after the jury's guilt phase verdicts, defense counsel requested discovery of victim impact evidence from the prosecutor. (11RT 2583.) The prosecutor explained that the People had a variety of still photographs of Officer Ganz, and that she had just received a videotape of Officer Ganz's funeral, which she would duplicate and provide to defense counsel as she intended to introduce a short portion of the tape during the penalty phase. (11RT 2584-2585.) The prosecutor indicated that she had provided defense counsel with a list of names of the witnesses she intended to call regarding victim impact evidence, and had turned over the sole report in her possession concerning those witnesses, a statement of Officer O'Gilvy, but that she did not intend to interview the other victim impact witnesses and had no further statements to disclose. (11RT 2585.)

Defense counsel subsequently repeated her request for discovery concerning the People's victim impact evidence, noting that she had received no additional evidence from the prosecutor. (12RT 2643.) The prosecutor explained that she had offered to provide defense counsel with the entire pool of photographs from which she planned to draw selected photographs of Officer Ganz for use during the penalty phase, but that defense counsel had opted to wait until the prosecutor went through the photographs individually. The prosecutor told the trial court that she had gone through the photographs one day earlier, and that she would provide various still photographs to defense counsel later that day. (12RT 2644.) The prosecutor indicated that she had obtained video footage from Officer Ganz's funeral, and a "home movie of Officer Ganz prior to his death." (12RT 2644.) The prosecutor indicated that she would copy and provide the videotapes to defense counsel. (12RT 2644-2645.) The next day, the prosecutor indicated that she had provided all of the

still photographs of Officer Ganz that she planned to use in the penalty phase to defense counsel, and that she was still in the process of preparing copies of the videotapes of Officer Ganz's funeral and home movie, and that she would provide the tapes to defense counsel. (13RT 284-2846.)

On November 24, 1998, appellant filed a "Motion In Limine With Respect To Prosecution's "Victim Impact" Evidence," requesting that the trial court hold a hearing pursuant to Evidence Code section 402, regarding the admissibility of the People's victim impact evidence. (33CT 9226-9263.) In response, the People filed a "Penalty Trial Brief Re Victim Impact Evidence." (33CT 9290-9302.)

On December 1, 1998, the trial conducted a hearing on appellant's in limine motion regarding victim impact evidence. (15RT 3526-3529; 16RT 3593-3634, 3650-3661, 3737-3738.) The trial court began the hearing by noting that under *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed. 720], victim impact evidence is admissible unless "it is unduly prejudicial" and "renders the trial fundamentally unfair." (16RT 3594.) The trial court also quoted this Court's opinion in *People v. Edwards*, *supra*, 54 Cal.3d at p. 833, stating that it understood that "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (16RT 3594.) The trial court continued:

> So it seems to me what I have to do, because there's a not a lot of cases applying those very broad standards, is, one, consider relevance; two, consider the temporal nearness or remoteness, if you will, of the evidence; three, consider if it's duplicative evidence . . .

(16RT 3594-3595.) The trial court also noted that under this Court opinion in *People v. Monteil* (1993) 5 Cal.4th 877, 935, evidence concerning Officer Ganz's "zest for life and the effect of his death on the immediate family" was

relevant and admissible. (16RT 3600.)

The trial court asked the parties to address the admissibility of the People's videotape showing a portion of Officer Ganz's funeral. (16RT 3600.) Defense counsel objected to the admission of the tape, arguing that it was a tribute to the victim, and not evidence that would "assist a family member in illustrating to the jury his or her loss or the loss to that person." (16RT 3600-3601.) Defense counsel also asserted that the People do not "have a right to inflame the jury or have professional film makers create a lot of hoopla, it's the right to the survivors to be heard." (16RT 3601.) The prosecutor told the trial court that the videotape was relevant to demonstrate the impact of Officer Ganz's death on "friends, family, community, and so forth," and to demonstrate the impact that attending the funeral service had on the victim's family and friends. (16RT 3603.) The trial court asked the prosecutor:

> Why do we need a videotape to show a funeral? We know he died. The People - - the family can say I went to his funeral, it was an emotional experience, it just tore my heart out, et cetera. Why do we need a videotape?

(16RT 3604.) The prosecutor told the trial court that the People were entitled to present evidence which would assist the trier of fact in making a determination about the impact that Officer Ganz's death had on his loved ones, and that the jury was entitled to "see what it was these people experienced." (16RT 3604.)

The prosecutor told the trial court that she intended to play only a short portion of the videotape, that no one speaks on the tape, and that it would show:

> Officer Ganz's mother that's sitting - - there's a procession of cars, and she's in one of the police cars, she never gets out, the police chief handing the flag to one of the sisters at the ceremony, and she walks over to the police car and hands it to her mother, the nephew being

given the officer's hat at the ceremony, the fiancee, you see her in possession of a state flag and holding that. And that's basically the portions of the funeral I anticipate showing. . . . And there's also a point - - and just looking at - - there will be also a view of the funeral where you see his hat on top of the casket, and so forth.

(16RT 3605-3606.)

The trial court asked defense counsel:

What is the prejudice, the undue prejudice to [appellant] by having 60 seconds or less of a tape that shows what [the prosecutor] just put on the record? Namely, a procession of cars, a flag, a hat, a fiancee with a flag, and a hat on a casket? What is unduly prejudicial? They know that he died, they know that he had a funeral.

(16RT 3607.) Defense counsel responded that although the surviving family members could testify that "this is how I felt, and this is what I saw," "that's not what's going on when you inject a film and you let somebody else edit it, some agent of the prosecution edit it for propaganda purposes, and that's what's going on here." (16RT 3608.) The trial court stated:

I hardly think they're doing it for propaganda. What they're doing is producing it for aggravation which they're entitled to do . . . based upon - - right now based upon what [the prosecutor has] just told me, under 60 seconds, the car procession, the flag of the sister, the nephew getting the hat, the fiancee getting the flag, and the hat on the casket, that I think is appropriate under *Payne* and *Edwards*.

(16RT 3608-3609.) The trial court compared the People's videotape to footage of John F. Kennedy, Jr., as a child, saluting his father's casket during President Kennedy's funeral procession, and stated, "that's a family member and the personal emotional response of that family member," and opined that it was relevant to the impact on a family member. (16RT 3610.) The trial court held,

"I do want to see [the tape] in its edited version, but based on the offer of proof as is given now, the funeral tape under *Payne* and *Edwards* is appropriate." (16RT 3611.)

The prosecutor told the trial court that the People intended to introduce a videotape of Officer Ganz celebrating Christmas with his family, taken two days before his murder. (16RT 3613.) The trial court stated that such a videotape would appear to be admissible as evidence demonstrating the "emotional impact on the victim's family," especially given the proximity of the tape to the murder. (16RT 3613.) The prosecutor explained that she planned to introduce the short videotape, which depicted Officer Ganz handing out gifts to his family members and embracing his sister. (16RT 3614-3615.) The trial court stated:

> It sounds to me like it does qualify under *Payne* and *Edwards*. Friday morning please have it here available so we can see it. So that we can see it before we finally use it. . . . Again, it seems to me that it's clearly relevant, it clearly qualifies under *Payne* and *Edwards* as victim impact permissible evidence. It meets the temporal time, it's not duplicative, and it's not unduly prejudicial to the defendant. Sure, it's emotional, but there nothing that's prejudicial to [appellant].

(16RT 3618.)

The trial court asked the prosecutor to address the proposed testimony of five police officers from the Manhattan Beach Police Department as victim impact evidence, stating:

> The officers I have a problem with under *Payne* and *Edwards* because, again, it talks in those cases about the victim's family. And I know we can argue that the police department is his family or was his family, but that's not what those cases are talking about. So now I'm really concerned about the issue of the duplicity of the officers' testimony. I

mean he's a police officer, he's a good police officer, he's a great police officer. He was doing his duty. It's a great loss to the Manhattan Beach Police Department, we're a close-knit family. How many people do you need to say that?

(16RT 3618-3620.) The prosecutor told the trial court that she had reduced the number of police officers that she planned to call. The prosecutor planned to call Chief Mertens to testify about Officer Ganz's career, and that Officer O'Gilvy "accompanied Officer Ganz in the ambulance, was present with Officer Ganz in the operating room at the hospital, and as a circumstance of the crime is clearly allowed to testify to those facts." (16RT 3620.) The trial court responded, "[n]o question about that," but asked the prosecutor to explain the relevance of Officer O'Gilvy's victim impact testimony. (16RT 3620.) The prosecutor responded that Officer O'Gilvy would testify to "the impact on him personally from what he experienced." (16RT 3620.) Defense counsel objected to testimony concerning victim impact evidence regarding the "impact, if you will, or the result of the officer's death upon his colleagues at work and in a sense the community at large." (16RT 3621.) The trial court stated, "I don't have any problem at all as far as the Chief talking about that, that seems appropriate. And O'Gilvy doing the circumstances of the crime," or discussing its impact upon him personally. (16RT 3625.)

The prosecutor subsequently told the trial court that Officer Nilsson, and not Chief Mertens, might testify regarding Officer Ganz's career, but that in any event, the content of their testimony would remain the same. (16RT 3650.) The trial court stated, "[a]s long as it's not duplicative, call either one of those witnesses." (16RT 3650.) The prosecutor indicated that she intended to introduced evidence concerning Officer Ganz's character, including photographs of him with his nephew Don throughout Don's life, a comic book that he had drafted as a D.A.R.E. officer, and evidence that he had received

commendations from the police department for his work as an officer and from the United States Marine Corps for saving a man's life. (16RT 3651-3654.) Defense counsel objected to documentary evidence concerning Officer Ganz's character as an "appeal directly to the emotion of the jury." (16RT 3654-3655.)

The following exchange occurred:

> THE COURT: [I]sn't it true that *Payne* in the U.S. Supreme Court case says the victim's personal characteristics also can come in? And why wouldn't receiving an award for saving the life of someone be a personal characteristic that the U.S. Supreme Court has said would be relevant in the penalty phase of a capital case?
>
> [DEFENSE COUNSEL]: There's a few mysteries in this whole thing to me. I understood the reason the personal characteristics of the victim were relevant was that somehow the survivors, their loss was based on the uniqueness of the victim and the role that the victim had played in their lives.
>
> THE COURT: Well, you have the balance here. We are now in the penalty phase and the defense is entitled to present the personality and the characteristics and the personal characteristics of [appellant]. [¶] As long as it's relevant, why shouldn't the people be allowed to present the personality and the personal characteristics of the victim of this murder.
>
> [DEFENSE COUNSEL]: Because the law says you can't.
>
> THE COURT: Where does it say you can't?
>
> [DEFENSE COUNSEL]: But the circumstances of the crime, including the loss to the victims or the uniqueness of the victim.
>
> THE COURT: Right. The circumstances of the crime can include who you shot and killed right? . . . . Speaking broadly and generically, they are entitled to know who the victim was, and they are entitled to know what the personal characteristics of that victim were. And why wouldn't

> this qualify under that category? And also, it's not in a comparison, it's not comparing - - we're not talking about comparing [appellant] to Ganz. What we're talking about is this is the victim of this crime, this person cannot come in and speak about the impact on him. I hate to say it so crudely. Why can't others come in and say this was a top notch citizen, et cetera, et cetera, et cetera, whatever the characteristics are? Why should a defendant have the advantage to put his personality into play when the victim cannot?

(16RT 3656-3658.) The trial court found that documentary evidence regarding Officer Ganz's character was relevant and admissible. (16RT 3658-3661.)

The trial court subsequently noted that the People had provided the Court with a copy of edited videotapes of a portion of Officer Ganz's funeral and of Officer Ganz celebrating Christmas with his family two days prior to his murder. The trial court described the audio portions of videos as follows:

> Let me tell you, this is what's in the funeral tape. This is what I observed and compare it when you see it, [defense counsel]. This is the funeral tape, you literally hear one church bell chime then twice during the - - at the burial site you hear a Scottish piper for just a few seconds. Otherwise, it's a silent tape. That's that tape. [¶] On the Christmas tape there's no music at all, as I recall. I take that back, there is sort of a ten bars, if you will, or so, of a folk song when there's a shot of Ms. Hamm or one of the sisters. I mean it's very, very brief.

(17RT 3744-3746.)

The prosecutor subsequently told the trial court that she planned to call both Officer Nilsson and Chief Mertens to testify regarding different areas of Officer Ganz's career. (18RT 3933.) The prosecutor indicated that she would be calling four sisters of Officer Ganz, some older and some younger than Officer Ganz, to testify to their different relationships with Officer Ganz, and

the different impacts his loss has had on their lives. (18RT 3934-3935.) The trial court responded, "[a]s long as it doesn't get repetitive and cumulative, I don't have a problem with that." (RT 3935.)

Defense counsel reiterated her objections to the introduction of the videotape of Officer Ganz celebrating Christmas with his family two days before the murder on the basis that children can be heard thanking Officer Ganz on the tape in excitement and that such evidence would cause the jurors' reason to be overcome by their emotions. (18RT 3941-3943.) The trial court responded:

> it is a classic, boring - - excuse the word - - family Christmas tape of a bunch of people sitting around the living room exchanging gifts on Christmas morning. I think again to quote William, William S.[,] it's much ado about nothing. What is it is a bunch of people sitting around [sic]. [Don] Ganz gets a cop car, he runs it a minute, a few minutes. Sister gets a few presents, the sister gets excited about it and says, "[y]ou shouldn't have done it." [¶] It's clearly relevant, the Court is going to let it in. End of statement.

(18RT 3944.)

Defense counsel reiterated her objections to the introduction of the videotape of Officer Ganz's funeral, and told the trial court that "funerals are a ritual that use a lot of symbolism to engage the emotional feelings of the participants," that it constitutes an improper attempt "to appeal and engage the emotions of the jury," and that it was not personal to Officer Ganz. (18RT 3951.) The trial court disagreed with defense counsel's characterization of the evidence and responded, "[t]his Court has made its ruling and the . . . Supreme Court can tell me whether I was right or wrong." (18RT 3951; see also 18RT 3952-3960, 3994-3997.)

Defense counsel objected to the testimony of Dr. Klein, the trauma

physician who treated Officer Ganz at the hospital following the shooting, on the grounds that the evidence was cumulative of evidence offered during the guilt phase. (18RT 3961-3962.) The trial court stated:

> Let me respectfully disagree again. As I recall, and you're going to have to refresh my recollection. As I recall, basically - - and again, don't take this literally, but we left Officer Ganz lying in a pool of blood at the Bank of America, we never had any testimony in this trial other than the coroner saying what was the cause of death. We had no testimony whatsoever at this trial after the officers were there and his head was on the knee of someone, et cetera. There's been no testimony whatsoever.
> I don't see how it's repetitive of anything.

(18RT 3962.) The prosecutor told the trial court that the doctor's testimony was relevant as "a circumstance of the crime[,] not only [as to] the nature of the injuries, but his last minutes, and so forth." (18RT 3961-3962.) The trial court overruled appellant's objection. (18RT 3961-3962.)

The trial court excluded a poster board offered by the prosecutor as demonstrative evidence, denominated "In Memory," which had photographs from Officer Ganz's funeral, the funeral program, a photograph of his gravestone, a photograph of the Manhattan Beach Police station, and a photograph of the National Police Officer's Memorial in Washington DC. (18RT 4074-4076.)

B. The Relevant Legal Principles Governing Victim Impact Evidence

The United States Supreme Court has specifically authorized the use of victim impact evidence during the penalty phase of a capital trial. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 823-827.) The *Payne* court held individual states are free to conclude that "evidence about the victim and about the impact of the murder on the victim's family" is "relevant to the jury's decision as to

whether or not the death penalty should be imposed." (*Id.* at p. 827.) In reaching its conclusion in *Payne*, the Court overruled its prior decisions in *Booth v. Maryland* (1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440], and *South Carolina v. Gathers* (1989) 490 U.S. 805 [109 S.Ct. 2207, 104 L.Ed.2d 876]. In *Booth*, the Court had held that victim impact evidence was inadmissible per se, except to the extent that it "relate[d] directly to the circumstances of the crime." (*Booth v. Maryland*, *supra*, 482 U.S. at 507, fn. 10.) In *Gathers*, the Court extended the rule articulated in *Booth* to prohibit a prosecutor from arguing the personal qualities of the victim to the jury during the penalty phase of a capital trial. (*South Carolina v. Gathers*, *supra*, 490 U.S. at pp. 810-812.) In *Payne*, the Court abrogated its prior rulings, and concluded that victim impact evidence,

> is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.

(*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) The Court noted that, "[t]here is no reason to treat such evidence differently than other relevant evidence is treated." (*Id.* at p. 827.)

More importantly, the Court recognized that its decisions in *Booth* and *Gathers* had resulted in an inequity, as a defendant could present any relevant mitigating evidence, irrespective of whether it directly related to the circumstances of his offense, while the State was prevented from "demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822.) The *Payne* court explained that:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase

> evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

(*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825, quoting *Booth v. Maryland*, *supra*, 482 U.S. at 517 (White, J., dissenting).)

In articulating its ruling, the *Payne* Court noted:

> Payne echoes the concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment that those whose victims are perceived to be less worthy. [Citation.] As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind - for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to instead *each* 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.)

The Supreme Court did not place any limitations on the type or amount of victim impact evidence that could be admitted during a penalty phase, but explained that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.)

Shortly after the Supreme Court's decision in *Payne*, this Court held that

victim impact evidence was admissible as a circumstance of the crime under Penal Code section 190.3, subdivision (a). (*People v. Edwards*, *supra*, 54 Cal.3d at p. 833.) This Court found that victim impact evidence was admissible, "including the impact on the family of the victim. This holding only encompasses evidence that logically shows the harm caused by the defendant." (*Id.* at 835.) Evidence and argument on emotional but relevant subjects that could provide legitimate reasons for the jury to show mercy or to impose the death penalty should be allowed, but "'irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.'" (*Id.* at 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864; see also *People v. Pollack* (2004) 32 Cal.4th 1153, 1180 [evidence admissible if it "is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case"].)[52]

C. The Trial Court Did Not Abuse Its Discretion In Admitting Victim Impact Evidence Concerning The Murder Of Officer Ganz

By reproducing numerous excerpts of transcript over the course of nearly 100 pages of his Opening Brief, appellant implies that the People's presentation of victim impact evidence concerning Officer Ganz consumed an undue about of the jury's attention during the penalty phase, and he asserts that jurors were overwhelmed by the presentation of the People's victim impact evidence. (AOB 123-215.) In fact, the entirety of the People's victim impact evidence as

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52. Appellant requests that this Court reconsider its prior rulings rejecting the notion that victim impact evidence must be limited to matters which a defendant knew or observed, and he asks this Court to adopt a more narrow construction of "circumstances" for the purposes of interpreting Penal Code section 190.3. (AOB 134-135.) This Court has repeatedly rejected such requests and should do so again. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 565; *People v. Pollack*, *supra*, 32 Cal.4th at p. 1183.)

to the murder of Officer Ganz was presented to the jury over the course of just a few hours. The People's victim impact evidence concerning the murder of Officer Ganz began shortly after 3:45 p.m., on Monday, December 7, 2007.[53] (18RT 4080-4081.) The People called two witnesses who testified briefly that afternoon before the trial court recessed the proceedings for the day. (18RT 4081-4114.) The next day, the proceedings resumed at 10:30 a.m. The trial court recessed the proceedings from 12:00 to 1:40 p.m., for lunch. (19RT 4176-4177.) Later that afternoon, well before the end of the court day, the People concluded their presentation of victim impact evidence. (19RT 4242.) Thus, the entirety of the presentation of the People's victim impact evidence as to the murder of Officer Ganz occurred over the course of just a few hours, and not "nearly two days" as appellant repeatedly describes it. (AOB 126, 194.) Moreover, the victim impact evidence was only a small portion of the People's lengthy penalty phase case, which focused primarily on appellant's numerous violent offenses other than the murder of Officer Ganz, including appellant's murder of Ms. Correa, his attempted murder of Mr. Dickson, and the plethora of armed robberies appellant committed in three states. The fact that the entirety of the People's presentation regarding victim impact evidence occurred in the space of a few hours must be considered in evaluating appellant's claim that the "sheer quantity of evidence was sufficient to violate due process." (AOB 125.)

More important than the amount of time this evidence consumed, however, was its relevance to the issues presented at trial. The evidence presented regarding the impact of Officer Ganz death on his family and friends was not, as appellant contends, "an extended memorial service for the victim,"

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53. Earlier that morning, the People had presented the brief testimony of Dr. Klein, the doctor who treated Officer Ganz in the moments before his death. (18RT 3964-3978.)

and the jurors hardly "learned about every aspect of [Officer] Ganz's life," nor were they exposed to "a cradle to grave life history of the victim" during the three hours of victim impact testimony. (AOB 123, 131.) All of the victim impact evidence presented was properly introduced as a circumstance of appellant's offense, to show Officer Ganz's character and uniqueness as a human being, and to demonstrate the impact that Officer Ganz's death had on his family, friends, and the community. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825; *People v. Edwards*, *supra*, 54 Cal.3d at p. 833.)

1. Testimony Concerning The Manner Of Officer Ganz's Death Was Properly Admitted As A Circumstance Of The Offense

Appellant contends that the trial court abused its discretion when it allowed Sergeant Nilsson and Officer O'Gilvy to testify to their observations of Officer Ganz at the crime scene, and when it allowed Officer O'Gilvy to testify concerning his observations of Officer Ganz in the ambulance and at the hospital prior to his death. (AOB 137-149.) Appellant asserts that this testimony was irrelevant, unduly inflammatory, and cumulative to guilt phase evidence regarding the offense. (AOB 138, 146-149.) Appellant did not pose any objection to the testimony of Sergeant Nilsson or Officer O'Gilvy's describing Officer Ganz on the night of his death, and appellant never sought to have this evidence excluded during any pre-penalty phase proceeding. (18RT 4082-19RT 4223-4244.) As such, appellant has forfeited this claim on appeal. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Roldan*, *supra*, 35 Cal.4th at p. 732; *People v. Mickle* (1991) 54 Cal.3d 140, 187.)

In any event, the testimony of Sergeant Nilsson and Officer O'Gilvy concerning the manner of Officer Ganz's death was not cumulative to evidence presented during the penalty phase, and this testimony was relevant as a circumstance of appellant's offense in murdering Officer Ganz. During the guilt phase of appellant's trial, there was no evidence whatsoever describing

Officer Ganz struggle to survive in the ambulance on the way to the hospital or at the hospital itself. No witnesses presented during the guilt phase testified to the circumstances of Officer Ganz's actual death. Officer Ganz's pain and suffering in his final moments of life, cause by appellant's callus act of shooting Officer Ganz in the head as he sought refuge, wounded, behind his patrol car, were circumstances of appellant's offense and were relevant to the jury's penalty phase determination. (Pen. Code, § 190.3, subd. (a).) The very injury inflicted by a defendant is unquestionably admissible as a circumstance of the crime during a penalty phase of a capital trial, and the trial court did not abuse its discretion in allowing testimony concerning the manner of Officer Ganz's death. (*People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352; *People v. Roldan*, *supra*, 35 Cal.4th at p. 732; *People v. Gurule* (2002) 28 Cal.4th 557, 658.)

Appellant relies on *People v. Love* (1960) 53 Cal.2d 843, in support of his contention that the testimony concerning Officer Ganz's death should have been excluded. (AOB 147-149.) *Love* is of no assistance to appellant. In *Love*, the defendant shot his wife and was convicted of murder and sentenced to death. During the penalty phase, the prosecutor introduced an audiotape recording of the victim's last moments in the hospital, replete with her repeated groans as she lay dying. (*People v. Love*, *supra*, 53 Cal.2d at pp. 848-856.) This Court found that the introduction of such evidence, in combination with other unrelated errors, required reversal because "proof of such pain is of questionable importance to the selection of penalty unless it was intentionally inflicted." (*Id.* at p. 856.) *Love* predates the Legislature's 1978 enaction of Penal Code section 190.3, which specifically provides that the "circumstances of the crime of which the defendant was convicted" may be considered by a trier of fact in imposing penalty in a capital case. Moreover, appellant unquestionably inflicted suffering upon Officer Ganz *intentionally* in the instant case, shooting Officer Ganz in the head after disabling him with a bullet to his

right shoulder and arm. Most importantly, unlike the prosecutor in *Love*, the People in the instant case introduced no recorded evidence of Officer Ganz's death, allowing jurors to experience the actual groans of the victim, and as such, *Love* is inapposite.

This Court has repeatedly held that "the immediate injurious impact of a capital murder is a 'circumstance of the crime' (§§ 190.3, factor (a)) which may be introduced and argued in aggravation under state law." (*People v. Montiel*, *supra*, 5 Cal.4th at p. 935; see also *People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352; *People v. Roldan*, *supra*, 35 Cal.4th at p. 732; *People v. Gurule*, *supra*, 28 Cal.4th at p. 658.) This trial court did not abuse its discretion in admitting just such evidence in the form of testimony concerning the death of Officer Ganz.

Assuming the trial court erred in admitting testimony concerning Officer Ganz's death during the penalty phase, appellant suffered no prejudice. The jury was aware that Officer Ganz had been murdered and had already heard compelling testimony regarding his suffering during the guilt phase of appellant's trial, as well as testimony from the deputy medical examiner who performed the autopsy regarding the cause and manner of death. The evidence concerning Officer Ganz's subsequent death "was not significant in light of the emphasis placed in the penalty phase on the effect of the crime itself on the victim's family, the brutality of the murders, and the paucity of significant mitigating circumstances." (*People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.)

2. Evidence Concerning Officer Ganz's Funeral Was Properly Admitted To Demonstrate The Effect That Appellant's Act Of Murdering Officer Ganz Had On The Victim's Family And Friends

Appellant contends that the trial court erred in admitted evidence concerning Officer Ganz's memorial service, including a videotape of a portion

of that service. (AOB 149-158.) Although appellant objected repeatedly to the introduction of evidence in the form of a videotape of the funeral, he never posed any objection to the testimony of witnesses concerning their attendance at, and observations of, Officer Ganz's funeral. Appellant's specific challenges to the portions of the testimony of Ms. Magdaleno, Ms. Pfaff, Sgt. Nilsson, Officer O'Gilvy, and Chief Mertens, regarding Officer Ganz's funeral have accordingly been forfeited.[54/] (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Mickle*, *supra*, 54 Cal.3d at p. 187.)

In any event, appellant's challenges to the evidence regarding Officer Ganz's funeral service are without merit. This Court has held that evidence relating to a funeral and the viewing of the victim's body by his family members during the funeral, is relevant and properly admitted during the penalty phase of a capital trial as a circumstance of the crime. (*People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.) This Court has also specifically approved of photographs of a victim's gravesite as "evidence relating to her death and the effect upon her family," and has stated that such evidence is "properly admitted as a circumstance of the murders." (*Ibid.*) This Court has

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54. Appellant misstates the record in asserting that "[d]efense counsel objected to both the testimony and the videotape on state and federal constitutional grounds, and also lack of relevance and undue prejudice according to state law. (See 16RT 3608-3613; 3654-3658.)" In fact, the specific portions of the Reporter's Transcript cited by appellant demonstrate that he objected only to the introduction of the videotape of the funeral and not to any witnesses' testimony concerning the funeral. Defense counsel specifically told the trial court, "it's one thing for People to come in and say I felt very sad, and I remember" the funeral proceedings, but "[w]hen you show the video of the funeral to the jury . . . what you're doing is you're taking these same symbols and you're evoking an emotional response from the jurors." (16RT 3657.) The record demonstrates that appellant posed no objections to the testimony of the People's witnesses concerning their attendance at, or their observations of, Officer Ganz's funeral. (18RT 4082-4093; 19RT 4125-4139, 4178-4194, 4211-4215; 4223-4244.)

also approved of a family member's testimony stating that she would visit the victim's grave and "cry, sobbing, cry and cry, throw [her]self on the grave." (*People v. Jurado*, *supra*, 38 Cal.4th at p. 133.) Evidence regarding the emotional and financial impact on a family member of having to plan a victim's funeral is also properly admitted at the penalty phase of a capital trial as victim impact evidence. (*Ibid*; see also *People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.) Moreover, evidence that a community has honored a victim, even in death, comports with traditionally accepted victim impact evidence. (*People v. Huggins* (2006) 38 Cal.4th 175, 236-238.)

Appellant's assertion that the People "effectively recreated the experience of attending a full ceremonial burial service for an officer killed in the line of duty" is a overstatement of the People's penalty phase evidence on the subject. (AOB 149-150.) The brief testimony of the People's witnesses concerning their attendance at, and observations of, Officer Ganz's funeral was relevant to demonstrate the effect that the services had on Officer Ganz's family and friends. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 133; *People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.) Similarly, the trial court did not abuse its discretion in admitting the videotape of brief segments of Officer Ganz's funeral service, as the videotape demonstrated the impact that Officer Ganz's death had upon his family and friends. Brief images of Officer Ganz's family and friends crying quietly during his funeral eloquently conveyed the loss they had suffered as a result of appellant's act of murdering their loved one. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 133; *People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.)

Appellant misstates the content and quality of the videotape, which although recorded by a private news organization, was not professionally edited. (See Peo. Exh. No. 167.) The tape cuts abruptly between scenes, there is little audio, and the large grain and overexposed footage during particular

shots belie appellant's suggestion that the tape was slickly produced or engineered to evoke emotion. (See 17RT 3744-3746 [trial court notes that the videotape is "very jumpy."].) Moreover, the video was most certainly not, as appellant alleges, "a tribute" to Officer Ganz. The focus of the videotape is Officer Ganz's family, and there are numerous shots of Officer Ganz's family members in mourning, including his fiancee, his nephew, his sisters, and his mother. Rather than serving as a "tribute" to Officer Ganz, this video demonstrated that pain and suffering that appellant, by his murderous act, had visited upon various members of Officer Ganz's family.[55] (Peo. Exh. No. 167.)

This Court recently discussed how the introduction of a videotape presenting victim impact evidence might improperly impact the penalty phase of a defendant's trial. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652.) In *Robinson*, this Court stated:

> One extreme example of such a due process infirmity is *Salazar v. State* (Tex.Crim.App.2002) 90 S.W.3d 330. In that murder trial, the court admitted a 17-minute "video montage" tribute to the murder victim - approximately 140 photographs set to emotional music, including "My Heart Will Go On," sung by Celine Dion and featured prominently in the film Titanic. (*Id.* at pp. 333-334.) Reversing a lower appellate court decision finding the presentation admissible, the Texas Court of Criminal Appeals remanded for an assessment of prejudice. In so ruling, the state high court observed, among other things, that "the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial."

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55. Moreover, the videotape does not depict "4,000 to 5,000 mourners most of whom were police officers in full dress uniform." (AOB 150.)

(*Ibid.*)

In contrast to the videotape discussed by this Court in *Robinson*, the brief videotape depicting various portions of Officer Ganz funeral was largely silent, and primarily depicted the family members of Officer Ganz suffering silently in grief, rather than focusing on Officer Ganz himself. The videotape was not produced to include moving music or any other external factor not a product of the funeral itself. The videotape did not celebrate the life of Officer Ganz, but poignantly conveyed the quiet suffering of his family members during his funeral, and as such, was wholly relevant to the instant case. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 133; *People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.)

Appellant's argument that the trial court abused its discretion in admitting evidence concerning Officer Ganz's funeral fails because such evidence was not offered, and it did not serve, as a "tribute" or "memorial" to Officer Ganz. In fact, the trial court excluded evidence offered by the prosecutor in the form of a poster board headed by the words "In Memory," which included a copy of the funeral program. (18RT 4074-4076.) This ruling demonstrates that the trial court properly exercised its discretion to admit evidence which bore on the surviving family members' grief and loss, and not evidence standing in abstract tribute to Officer Ganz. The testimony of Officer Ganz's family and friends concerning their experiences at his funeral, and the videotape itself, demonstrated the injurious impact that appellant's act of killing Officer Ganz had on his surviving loved ones, and the trial court did not abuse its discretion in admitting this evidence during the penalty phase. (See *People v. Jurado*, *supra*, 38 Cal.4th at p. 133; *People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.)

Moreover, assuming the trial court erred in admitting the videotape of Officer Ganz's funeral, or the testimony relating thereto, appellant suffered no

prejudice. The jury was aware that Officer Ganz had been murdered and could presume that he had been honored during a funeral or memorial service. The evidence concerning the funeral "was not significant in light of the emphasis placed in the penalty phase on the effect of the crime itself on the victim's family, the brutality of the murders, and the paucity of significant mitigating circumstances." (*People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.)

3. Evidence Regarding Officer Ganz's Character Was Properly Admitted As A Circumstance Of The Offense

Appellant contends that the trial court abused its discretion in admitting character evidence concerning Officer Ganz. (AOB 159-194.) While appellant objected to discrete portions of documentary and photographic evidence relating to Officer Ganz's character and personage during the pre-penalty phase discussions concerning victim impact evidence and thereafter (16RT 3654-3655; 18RT 4062-4080;19RT 4148, 4209-4211), he failed to object to any portion of the testimony to which his claim on appeal is directed. (See 18RT 4082-4097, 4099-4111; 19RT 4126-4146, 4149-4163, 4166-4175, 4178-4195 4196-4219.) Specifically, appellant lodged no objection to the testimony concerning Officer Ganz's background and character offered by his sisters (Ms. Ganz-Williams, Ms. Pfaff, Ms. Chase, and Ms. Pobuda), his fiancee (Ms. Magdaleno),[56] or his friends and colleagues (Sgt. Nilsson, Chief Mertens, and Officer O'Gilvy). (See 18RT 4082-4097, 4099-4111; 19RT 4126-4146, 4149-4163, 4166-4175, 4178-4195 4196-4219.) Given appellant's failure to object to the testimony concerning Officer Ganz's background and character at trial, he has forfeited the instant claim on appeal. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Mickle*, *supra*, 54 Cal.3d at p. 187.)

Assuming this Court wishes to address the merits of appellant's

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56. Appellant refers to Ms. Magdaleno by her maiden name,"Ms. Hamm," throughout his Opening Brief.

contention, it fails nonetheless. It is well established that evidence of a victim's character is admissible during the penalty phase of a capital trial as a circumstance of a defendant's offense. (Pen. Code, § 190.3, subd. (a); see *People v. Robinson*, *supra*, 37 Cal.4th at p. 650; *People v. Roldan*, *supra*, 35 Cal.4th at pp. 730-732; *People v. Panah*, *supra*, 35 Cal.4th at pp. 494-495; *People v. Boyette*, *supra*, 29 Cal.4th at p. 445; *People v. Hardy*, *supra*, 2 Cal.4th at p. 201.) This Court has explained that evidence concerning a victim's "zest for life" and the effect of his death on his family and friends is, "well within the boundaries" of permissible victim impact evidence under *Payne* and *Edwards*. (*People v. Montiel*, *supra*, 5 Cal.4th at p. 935.) It is proper for family members or friends to testify about the personal traits of a victim, including, but not limited to a victim's "compassion, loyalty, and extroversion." (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238.) This Court has approved of evidence concerning a victim's charitable contributions and activities, as well as the victim's involvement with their church or religious group. (*Ibid*; *People v. Lewis* (2006) 39 Cal.4th 970, 1057; *People v. Pollack*, *supra*, 32 Cal.4th at pp. 1180-1181 [evidence that victim taught Bible school properly admitted].) Witnesses describing the character of a victim may also testify to the "the psychological effects of [a victim's] death on other individuals and the community." (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238.) It is proper for prosecutor to urge jurors to remember the victim and the life that the victim would have lived, as a defendant's "rights are not infringed by evidence or argument showing that the victim was a unique and valuable human being." (*People v. Clark* (1993) 5 Cal.4th 950, 1033-1034.)

Appellant errs in claiming that the trial court abused its discretion when it admitted evidence concerning Officer Ganz's character and background. (AOB 181-194.) Testimony concerning a victim's life history, employment, penchant for hard work, and community activism does not offend a defendant's

right to due process. (*People v. Roldan*, *supra*, at pp. 722, 730-732.) Similarly, specific examples or stories concerning a victim's life are wholly permissible as relevant victim impact evidence. (*Ibid.*) The fact that multiple family members testified to Officer Ganz's character and the effect of his loss had on their lives does not demonstrate a constitutional violation. (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238 [no due process violation where seven to eight witnesses testify as to victim impact]; *People v. Panah*, *supra*, 35 Cal.4th at pp. 416, 494-495 [no due process violation where five members of victim's family testified regarding the victim and their loss].) The testimony in the instant case concerning Officer Ganz character, his devotion to family, his work ethic, his future plans, and his status as a "unique and valuable human being" was standard victim impact testimony and did not violate appellant's right to due process. (See *People v. Clark*, *supra*, 5 Cal.4th at pp. 1033-1034; *People v. Lewis*, *supra*, 39 Cal.4th at p. 1057; *People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238; *People v. Robinson*, *supra*, 37 Cal.4th at p. 650; *People v. Roldan*, *supra*, 35 Cal.4th at pp. 730-732; *People v. Panah*, *supra*, 35 Cal.4th at pp. 494-495; *People v. Pollack*, *supra*, 32 Cal.4th at pp. 1180-1181; *People v. Boyette*, *supra*, 29 Cal.4th at p. 445; *People v. Hardy*, *supra*, 2 Cal.4th at p. 201.) None of the evidence concerning Officer Ganz's character, considered individually or cumulatively, would have diverted "the jury's attention from its proper role" or invited "an irrational, purely subjective response" on the penalty phase verdict (*People v. Edwards*, *supra*, 54 Cal.3d at p. 836), "untethered to the facts of the case." (*People v. Pollack*, *supra*, 32 Cal.4th at p. 1180.)

Appellant contends that the trial court abused its discretion when it failed to exclude evidence that Officer Ganz had received commendations from the community and an award from the Marine Corps for saving a man's life. However, evidence that a community has honored a victim, even in death, comports with traditionally accepted victim impact evidence. (*People v.*

Huggins, *supra*, 38 Cal.4th at pp. 236-238.) In *Huggins*, the defendant challenged the admission of victim impact evidence demonstrating that the community had "mourned [the victim's] death by placing a bronze statue of her at the Pleasanton public library." (*Ibid.*) This Court found the evidence to be "traditional victim-impact evidence, 'permissible under California law as relevant to the circumstances of the crime, a statutory capital sentencing factor.'" (*Id.* at p. 239, quoting *People v. Cole* (2004) 33 Cal.4th 1158, 1233.)

Similarly, the introduction of photographs of a victim have been repeatedly upheld as a relevant circumstance of the offense, and appellant has failed to demonstrate that any particular photograph of Officer Ganz, or combination of photographs, was somehow prejudicial. (*People v. Stitely*, *supra*, 35 Cal.4th at pp. 564-565; *People v. Boyette*, *supra*, 29 Cal.4th at p. 444.) Moreover, the short videotape of Officer Ganz celebrating Christmas with his family conveyed the family's loss without presenting any conceivable prejudice to appellant. (Peo. Exh. No. 165; *People v. Stitely*, *supra*, 35 Cal.4th at p. 564; *People v. Boyette*, *supra*, 29 Cal.4th at p. 444.) The videotape of Officer Ganz celebrating Christmas with his family was especially relevant to demonstrate his family's loss given that it was taken only two days before appellant ended Officer Ganz's life.

The jury in the instant case heard an abundance of testimony concerning appellant's upbringing in war torn Vietnam, including numerous moving stories concerning his life in protected military encampments where he was exposed to mortal combat on a regular basis and learned to identify North Vietnamese soldiers as "Viet Cong" before he could communicate with his own father. (19RT 4288-4300.) The jury learned about all of the numerous moves that appellant endured as a child, the different schools he attended, his limited friendships with other children, and his trying relationship with his demanding father who often used drugs. (19RT 4300-4346; 20RT 4436-4462.) Given that

jurors learned about appellant's life history, character, and prospects, the fact that the jury also learned about the life history, character, and prospects of appellant's victim did not offend appellant's right to due process. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) As the Untied States Supreme Court noted in approving victim impact evidence in *Payne*: "[J]ustice, though due to 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." (*Ibid*; see also *People v. Clark*, *supra*, 5 Cal.4th at pp. 1033-1034.) The People's victim impact evidence regarding Officer Ganz showed nothing more than his "uniqueness as an individual human being," and the trial court's admission of such evidence did not constitute an abuse of discretion, nor did it violate appellant's federal constitutional right to due process. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 823.)

4. Evidence Concerning The Impact Of Officer Ganz's Murder On His Family And Friends Was Properly Admitted

It is well established that evidence regarding how a murder has impacted a victim's family is relevant during the penalty phase of a capital trial. (*People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238; *People v. Panah*, *supra*, 35 Cal.4th at pp. 494-495; *People v. Benavides*, *supra*, 35 Cal.4th at p. 107; *People v. Stitely*, *supra*, 35 Cal.4th at p. 564; *People v. Pollack*, *supra*, 32 Cal.4th at pp. 1182-1183; *People v. Boyette*, *supra*, 29 Cal.4th at p. 444; *People v. Taylor* (2001) 26 Cal.4th 1155, 1171; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1017.) Moreover, victim impact evidence need not come from blood relatives of a victim, but may come from the victim's personal friends and neighbors as well. (*People v. Williams* (2006) 40 Cal.4th 287, 306, fn. 4; *People v. Huggins*, *supra*, 38 Cal.4th at p. 236-238; *People v. Pollack*, *supra*, 32 Cal.4th at p. 1183; *People v. Benavides*, *supra*, 35 Cal.4th at p. 107; *People v. Brown*, *supra*, 31 Cal.4th at p. 573; *People v. Marks*, *supra*, 31 Cal.4th at pp. 236-237.)

Appellant asserts that the People presented evidence that appellant's act of murdering Officer Ganz, also "killed [his] mother." (AOB 195-197.) According to appellant, "two of Officer Ganz's sisters told jurors that the crime also killed their mother." (AOB 195.) The record belies appellant's contention. Contrary to appellant's assertion, Ms. Pfaff did not testify regarding her mother's death at trial. (19RT 4196-4219.) The only testimony concerning the death of Officer Ganz's mother came from Ms. Chase. During Ms. Chase's testimony, the prosecutor asked her, "other than Martin's death up until that point in time had there been any other deaths in your immediate family?" (19RT 4156.) Defense counsel objected, and at sidebar, the prosecutor explained that two of Ms. Chase's sisters had died prior to Officer Ganz, and that she wanted to elicit comparisons in Ms. Chase's feelings about the deaths as neither of her deceased sisters had been murdered. (19RT 4156.) The trial court sustained defense counsel's objection and told the prosecutor that she could ask Ms. Chase about how Officer Ganz's death had impacted her, but not to make comparisons regarding prior losses she had suffered in her life. (19RT 4157-4158.)

The prosecutor asked Ms. Chase about the impact that Officer Ganz's death had upon her, and in the course of her answer, Ms. Chase stated:

> during this time period then my mother she kind of gave up life, and she died, and I was there in the end. I spent the last three days with her, and she basically told me and my sister - -

(19RT 4157-4158.) Defense counsel objected, stating that the response was "hearsay and beyond the scope. And it's a narrative at this juncture." (19RT 4160.) The trial court sustained the objection on the basis that the response was a narrative, but invited the prosecutor to "come back to it." (19RT 4160.) The following exchange occurred:

> [THE PROSECUTOR]: Mrs. Chase, you made reference to your

mother. At the time of Martin's death, was your mother alive?

[MS. CHASE]: Yes, she was.

[THE PROSECUTOR]: Where was she living?

[MS. CHASE]: In Santa Barbara, California.

[THE PROSECUTOR]: And how much after his death did your mother die? How much time went by?

[MS. CHASE]: Six months.

[THE PROSECUTOR]: And you had made reference to being with your mother at the time of her death?

[MS. CHASE]: Yes, I was.

[THE PROSECUTOR]: And what do you attribute to being the cause of her death six months later?

[DEFENSE COUNSEL]: Objection, Your Honor.

[THE COURT]: Overruled.

[MS. CHASE]: She told me that she gave up on life because she thought she was older, she had emphysema, and she knew she was going to die. She was older and she could not believe that her son was murdered, and she basically stopped eating, taking care of herself. And I did spend the last three days of her life in the hospital with her at her side, and she said she could not cope, and she couldn't even tell us - - and that was really hard for me, but that's a different story.

(19RT 4161.)

The record does not support appellant's claim that two of Officer Ganz's sister's "told juror's that the crime also killed their mother." (AOB 195.) Ms. Pfaff said nothing on the subject, and Ms. Chase answered the prosecutor's question regarding her opinion of the cause of her mother's death by stating that her mother "gave up on life because *she thought she was older*, *she had emphysema*, and *she knew she was going to die*." (19RT 4161 [italic added].)

Although Ms. Chase also added that Officer Ganz's death contributed to her mother's lack of concern for her own health in the face of old age and a deadly disease, she stated, "that's a different story." (19RT 4161.) In any event, Ms. Chase's testimony that her mother had suffered emotionally as a result of Officer's Ganz's death is standard victim impact testimony regarding a family member who has lost a loved one. As this Court has recently explained, "[t]here 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." (*People v. Panah*, *supra*, 35 Cal.4th at p. 495.)

Appellant also contends that the trial court abused its discretion when it allowed Rachel Ganz-Williams to testified that her son, Don, could not bring himself to testify in the penalty phase, and when it allowed Ms. Ganz-Williams to spontaneously offer, in response to the prosecutor's question concerning what she would say to Officer Ganz if should had the chance, "I'd tell him I love him and that even though Don couldn't be here today he tried his hardest." (19RT 4172, 4175.) Although appellant preemptively objected to photographs of Don and testimony that he attended counseling as a result of appellant's offense (18RT 4071-4073), appellant posed no objections to these specific portions of Ms. Ganz-Williams's testimony and has forfeited his challenge on appeal. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Mickle*, *supra*, 54 Cal.3d at p. 187.) In any event, the trial court did not err in excluding Ms. Ganz-Williams's testimony that Don could not bring himself to testify during the penalty phase or her spontaneous statement that Don had tried to be in the courtroom, as this evidence bore on the impact that appellant's crime had upon his nephew. (See *People v. Panah*, *supra*, 35 Cal.4th at p. 495.)

Appellant challenges the applicability of this Court's ruling in *Panah* that 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," (*People v. Panah*, *supra*, 35 Cal.4th at p. 495), stating that he did not have the opportunity to cross-examine appellant's mother or Don Ganz during the penalty phase. (See AOB 199-200.) Nothing in this Court's opinion in *Panah* provides that this distinction has any relevance whatsoever. (*People v. Panah*, *supra*, 35 Cal.4th at p. 495; see also *People v. Cook* (1996) 39 Cal.4th 566, 609 [no error where mother testified to effect crime had on her daughters who did not testify at trial]; *People v. Jurado*, *supra*, 38 Cal.4th at p. 132-133 [no error where family members testified to effect crime had on their daughters and grandchildren who did not testify at trial]; *People v. Brown*, *supra*, 31 Cal.4th at pp. 528-529, 573 [testimony of one family member concerning effect of crime another deemed relevant and admissible].) *Payne* expressly provides that victim impact evidence is relevant to show harm to both "the victim's family," and "to society." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 822, 823.) Just as a criminal defendant cannot confront and cross-examine every member of society in order to establish whether society has suffered personal harm, the testimony of one family member regarding the effect of an offense on another family member, when based on his or her own observations, does not violate appellant's right to confrontation. (*People v. Jurado*, *supra*, 38 Cal.4th at p. 132-133; *People v. Panah*, *supra*, 35 Cal.4th at p. 495; see *People v. Brown*, *supra*, 31 Cal.4th at pp. 528-529, 573.)[57]

Appellant contends that the trial court abused its discretion when it admitted evidence concerning the effect of the crime on the lives of Ms. Magdaleno, Sergeant Nilsson, and Officer O'Gilvy. (AOB 206-215.) Specifically, appellant maintains that these witnesses testified to having suffered "severe psychological disturbances" as a result of the murder, and that the

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57. Appellant has also forfeited any Confrontation Clause challenge due to his failure to object on this ground at trial. (*See People v. Millwee* (1998) 18 Cal.4th 96, 129.)

testimony was both inflammatory and of limited relevance to appellant's offense. (AOB 206-207; 211-215.) Appellant failed to object to any of the testimony his claim relies upon, and he has forfeited the instant claim as a result. (18RT 4237-4240; 19RT 4090-4091, 4177-4195; see *People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Mickle*, *supra*, 54 Cal.3d at p. 187.)

In any event, the trial court did not abuse its discretion in admitting the testimony of Ms. Magdaleno, Sergeant Nilsson, or Officer O'Gilvy. Ms. Magdaleno was Officer Ganz's fiancee. (19RT 4178.) Officer O'Gilvy testified that he and Officer Ganz were close personal friends who spent a lot of time together off duty. (19RT 4225-4226.) Officer Nilsson testified that he was both a mentor and friend to Officer Ganz, and that they spent time together both on and off duty. (18RT 4095-4096.) As previously noted, victim impact evidence need not come from blood relatives of a victim, but may come from the victim's personal friends and neighbors as well. (*People v. Williams*, *supra*, 40 Cal.4th at p. 306, fn. 4; *People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238; *People v. Pollack*, *supra*, 32 Cal.4th at p. 1183; *People v. Benavides*, *supra*, 35 Cal.4th at p. 107; *People v. Brown*, *supra*, 31 Cal.4th at p. 573; *People v. Marks*, *supra*, 31 Cal.4th at pp. 236-237.) The testimony of Ms. Magdaleno, Sergeant Nilsson, and Officer O'Gilvy properly conveyed the impact that Officer Ganz's death had upon each of them, and fell far short of establishing any "serious psychological disturbances" unrelated to their loss. (AOB 206.) Ms. Magdaleno spoke earnestly about her grief and her feelings that Officer Ganz is still a part of her life in spirit. (19RT 4177-4195.) Officer O'Gilvy testified briefly about withdrawing from social activities, suffering depression, and crying over the loss of his friend. (19RT 4238.) Officer Nilsson testified that he lost sleep and did not eat for weeks following the offense, drank for a period to "numb the pain," suffered mood changes, and became unduly strict

and disciplined at work. (18RT 4089-4091.) The testimony of each of these witnesses was well within the boundaries of standard victim impact evidence, and appellant overstates the record in stating that the testimony reveals "severe maladjustment and psycho-pathological states," unrelated to appellant's offense. (AOB 213; see *People v. Williams, supra*, 40 Cal.4th at p. 306, fn. 4; *People v. Huggins, supra*, 38 Cal.4th at p. 236-238; *People v. Panah, supra*, 35 Cal.4th 494-495 [testimony that family member used drugs and became suicidal as a result of offense proper]; *People v. Brown* (2004) 33 Cal.4th 382, 397-398; *People v. Pollack, supra*, 32 Cal.4th at p. 1183 [testimony that family member decided to sell home where murder occurred because he could not stand the memory of the crime not improper or unduly prejudicial]; *People v. Benavides, supra*, 35 Cal.4th at p. 107; *People v. Brown, supra*, 31 Cal.4th at p. 573 [testimony that victim's loved ones still afraid to go outside of the house three years after offense not improper or unduly prejudicial]; *People v. Marks, supra*, 31 Cal.4th at pp. 236-237; *People v. Mitcham, supra*, 1 Cal.4th at p. 1063.) This claim fails.

5. Evidence Regarding Officer Ganz's Impact On The Community

In approving the use of victim impact evidence during the penalty phase of a capital trial, the United States Supreme Court specifically stated that such evidence was relevant to show the impact of a victim's death on "the victim's family," and "to society." (*Payne v. Tennessee, supra*, 501 U.S. at p. 822, 823.) This Court has approved of the introduction of victim impact evidence calculated to show the effect on society, the community, or on a particular institution in the community, as a result of a victim's loss. (*People v. Huggins, supra*, 38 Cal.4th at pp. 236-238; *People v. Pollack, supra*, 32 Cal.4th at pp. 1182-1183 [fact that victim taught Bible study class relevant to show that her death resulted in the cancellation of the class and impacted others]; *People v.*

Fierro (1991) 1 Cal.4th 173, 236 [victim impact evidence encompasses "the status of the victim and the effect of his loss on friends, loved ones and the community as a whole"].)

Appellant contends that the trial court abused its discretion when it admitted the testimony of Chief Mertens regarding the immediate effect of Officer Ganz's murder upon the department and its officers. (AOB 201-206.) Chief Mertens testified briefly concerning Officer Ganz's death, the shock and sadness felt by the officers in the department at Officer Ganz's loss on the night of the incident, the logistical support that the department received from other law enforcement agencies immediately following the offense, and the fact that officers in the department act more cautiously as a result of Officer Ganz's death. (19RT 4132-4137.) Chief Mertens brief testimony was relevant to demonstrating the effect that Officer Ganz's death had on a public institution charged with ensuring the safety of the citizens in the community. Officer Ganz's death during a traffic stop had concrete ramifications within the City of Manhattan Beach, including crucial issues relating to how its officers related to members of the public, and how the department carried out its duties, following the offense. Chief Mertens's testimony was relevant to demonstrating the effect that Officer Ganz's death had on the community, and as such, was relevant and properly admitted at trial. (See *Payne v. Tennessee*, *supra*, 501 U.S. at p. 822, 823; *People v. Huggins*, *supra*, 38 Cal.4th at pp. 236-238; *People v. Pollack*, *supra*, 32 Cal.4th at pp. 1182-1183.)

Appellant errs in relying on *Lambert v. State* (1996) 675 N.E.2d 1060, in support of his claim that the trial court abused its discretion in admitting the testimony of Chief Mertens regarding the impact of Officer Ganz's death on his fellow officers. (AOB 204-205.) In *Lambert*, the Indiana Supreme Court considered the admission of victim impact evidence under a state statute narrowly restricting penalty phase evidence to "testimony which is relevant to

a statutory aggravating or mitigating circumstance," which is similar to a special circumstance under California law. (*Id.* at p. 1064.) Following the defendant's trial in *Lambert*, the state Legislature had enacted legislation permitting victim impact evidence, but the court in *Lambert* expressly stated that "[w]e make no ruling today on the impact, if any, of the new statute." (*Id.* at 1064, fn. 1.) Because the charged aggravating circumstance in *Lambert* was that the victim was a peace officer killed in the course of duty, relevant testimony was statutorily limited to establishing only the fact that the victim was a peace officer killed in the line of duty. (*Id.* at p. 1064.) Given that California has no similar restrictions in place regarding the introduction of victim impact evidence as those at issue in *Lambert*, appellant's reliance on *Lambert* is misplaced.

Assuming the trial court erred when it allowed Chief Mertens to testify to the effect of Officer Ganz's death on the department and the community, and error was harmless given the brevity of the testimony, the overwhelming evidence in aggravation offered against appellant, and the lack of any significant mitigating evidence offered by appellant. (*People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.)

D. The Totality Of The Victim Impact Evidence Presented At Trial Did Not Violate Appellant's Right To Due Process

The thrust of appellant's claim, that his federal constitutional rights were violated by the cumulative victim impact of the evidence introduced during the penalty phase, must be rejected. The People's victim impact evidence was only a small portion of its penalty phase case in aggravation, consuming roughly three hours of court time. Moreover, none of the evidence presented in the instant case, considered individually or cumulatively, was "so unduly prejudicial that it render[ed] the trial fundamentally unfair." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) In *People v. Huggins*, this Court

rejected the contention that the testimony of "seven to eight" victim impact witnesses violated the defendant's right to due process. (*People v. Huggins*, *supra*, 38 Cal.4th at p. 237.) This Court held:

> As we have described, various witnesses painted a portrait of [the victim] as compassionate, loyal, and extroverted, and made clear that they mourned her loss. The community, too, mourned her death by placing a bronze statue of her at the Pleasanton public library. The testimony, though emotional at times, fell far short of anything that might implicate the Eighth Amendment. It was traditional victim-impact evidence, "permissible under California law as relevant to the circumstances of the crime, a statutory capital sentencing factor."

(*Id.* at pp. 238-239, citing *People v. Cole*, *supra*, 33 Cal.4th at p. 1233.) Similarly, the testimony of eight witnesses in the instant case, taking up approximately three hours of the trial court's time, did not offend appellant's federal constitutional right to due process. (*Ibid.*; *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1057-1060 [testimony of five victim impact witnesses did not violate defendant's due process rights]; *People v. Jurado*, *supra*, 38 Cal.4th at pp. 132-134; *People v. Panah*, *supra*, 35 Cal.4th at pp. 494-495 [testimony of five of the victim's family members as victim impact evidence did not violate defendant's due process rights].)

Nothing in the record supports appellant's suggestion that after hearing the victim impact testimony the jurors were so overwhelmed by emotion that they were unable to make a rational determination of penalty. Moreover, the People presented a multitude of evidence in aggravation, including evidence that appellant had killed Ms. Correa in cold blood in Oregon, that he had attempted to kill Mr. Dickson, and that he had committed a profusion of armed robberies up and down the west coast of the United States. In contrast, appellant's evidence in mitigation was unavailing. Appellant's claim that he

was somehow abused by his father is belied by the record as his father went to great lengths to support appellant, even after appellant had been sentenced to federal prison for bank robbery. Moreover, appellant's claim of having suffered brain damage enjoyed no support in the record, and Dr. Humphrey's testimony on the issue was speculative at best. Given the strength of the People's case in aggravation, including "the brutality of the murders, and the paucity of significant mitigating circumstances," it is not reasonably possible that any errors on part of the trial court affected the penalty phase verdict. (*People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.)

VII.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED EVIDENCE CONCERNING THE EFFECT APPELLANT'S PRIOR ARMED ROBBERY OFFENSES HAD UPON HIS VICTIMS PURSUANT TO PENAL CODE SECTION 190.3, SUBDIVISION (B)

Appellant contends that the trial court abused its discretion when it permitted various victims of appellant's numerous armed robbery offenses to "describe not only their immediate responses [to the crimes] but also the lasting effects of their experiences." (AOB 216.) According to appellant, this testimony constituted impermissible victim impact evidence concerning his armed robbery offenses admitted pursuant to Penal Code section 190.3, subdivision (b), and he alleges that its admission served to violate his federal constitutional rights. (AOB 216-237.) This claim is without merit. Appellant has forfeited any claim of error on this issue by his failure to object below. Moreover, the very premise of appellant's claim is mistaken as this Court has specifically approved the admission of evidence in the penalty phase of a capital trial which demonstrates that a victim of a defendant's prior criminal conduct suffered residual emotional harm from the prior offense. Assuming the trial court abused its discretion in any manner, appellant suffered no prejudice.

A. The Relevant Proceedings In The Trial Court

Prior to trial, appellant filed "Motion In Limine To Bar The Prosecution From Introducing 'Victim Impact' Evidence Pursuant To Any Other Factor Than Penal Code Section 190.3(a)." (9CT 2399-2424.) Appellant's motion specifically indicated that potential "'victim impact' evidence pertaining to the death of Ms. Correa, [] is the subject of this motion in limine." (9CT 2403.) In appellant's motion, he conceded that "the actual victims of [a defendant's] prior violent criminal acts may, in describing the conduct in question, express something of the emotional effect of these acts." (9CT 2415.) Appellant argued that evidence regarding the lasting harm stemming from a defendant's prior offense had to come directly from the victim of that offense, and not from a victim's family members, and as such, victim impact evidence regarding the murder of Ms. Correa should be excluded. (9CT 2415-2423.)

The People filed a pleading in opposition to appellant's motion in limine requesting that the trial court permit the prosecution to introduce victim impact evidence concerning appellant's act of murdering Ms. Correa. (9CT 2442-2456.) Appellant filed a responsive pleading to the People's opposition to his motion in limine, reiterating his position that the trial court should exclude victim impact evidence concerning his murder of Ms. Correa. (9CT 2459-2472.) In his reply pleading, appellant, once again, conceded that "the effect of a defendant's prior criminal acts upon the actual victims of those acts is permissible." (9CT 2468.)

The trial court subsequently held a hearing on appellant's motion to exclude victim impact evidence pertaining to appellant's murder of Ms. Correa. (2RT 251-263, 292-305.) Defense counsel reiterated that appellant's motion was limited to challenging victim impact evidence regarding the murder of Ms. Correa. (2RT 261.) The prosecutor indicated that a victim of a defendant's prior crime admitted under Penal Code section 190.3, subdivision (b), was

permitted to testify regarding the resulting emotional harm, and that to exclude victim impact evidence as to Ms. Correa would reward appellant for "eliminating a potential witness." (2RT 300, 303.) The trial court subsequently granted appellant's motion and excluded victim impact evidence from Ms. Correa's family members concerning her murder. (2RT 304-305.)

The prosecutor subsequently informed the trial court that she planned to elicit testimony from appellant's robbery victims concerning their fear and the lasting impact, if any, that appellant's crimes had upon them. The prosecutor stated:

> On the issue of - - because counsel raised it, and I concur with the Court's attitude of asking victim's of robbery about fear, that being an element of it, but I will also direct the Court to the case of *People v. Price* [(1991)] 1 Cal.4th 324[,] 479, and I'll just read it to the Court quoting from that. "At the penalty phase the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of those acts." And there are some cases cited at that point also.

(14RT 3253.)

The trial court responded:

> Right. And there are other cases besides that one . . . [t]hat clearly say when we're in the penalty phase, it's not no holds barred, but it's fairly close in the sense that as long as it's relevant, as long as it's relevant, basically there's not that 352 balance, and all that. It's not required. [¶] But more importantly, in this case it is relevant because what we're talking about by my count, I've lost track, but we've got 17, I don't know what's the total number of robberies. We're already up to about 11 or 12, I think, and the fact that, again, fear is an element, and that is appropriate with respect to presentation as evidence in this case. And

even more so, from the *Price* case and the other cases saying in the penalty phase the previous acts of the defendant of violence, et cetera, are permissible. And so accordingly, it's appropriate questioning.

(14RT 3253-3254.)[58/]

B. Appellant Has Forfeited The Instant Claim By His Failure To Object Below

At no point during appellant's trial did he object to the introduction of testimony from the victims of appellant's various armed robbery offenses, concerning their fear during the offense or the lasting impact the crimes had upon them, on the grounds that such testimony constituted victim impact evidence or was otherwise impermissible pursuant to Penal Code section 190.3, subdivision (b). In fact, appellant's in limine motion, in which he sought to exclude only victim impact evidence regarding Ms. Correa, specifically acknowledge the propriety of "the actual victims of [a defendant's] prior violent criminal acts," "describing the conduct in question, [and] express[ing] something of the emotional effect of these acts." (9CT 2415.) Similarly, in appellant's reply to the People's opposition to his motion in limine, he again

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58. Appellant mischaracterizes the trial court's ruling in which it excluded victim impact evidence pertaining to Ms. Correa, as he suggests that the ruling encompassed evidence concerning the impact of appellant's prior robbery offenses upon the victims of those crimes. (AOB 219.) The trial court's ruling on appellant's in limine motion did no such thing, and appellant expressly conceded the admissibility of this evidence in his motion. (9CT 2415, 2468.) Given that the trial court's ruling did not restrict evidence concerning the impact of appellant's prior robbery offenses on his victims, the prosecutor's opening statement was entirely proper and did not, as appellant suggests, "violate[] the trial court's ruling at the very start of the penalty phase." (AOB 219.) In any event, contrary to appellant's assertion (AOB 220; see 12RT 2640), he failed to object to the prosecutor's opening statement on the grounds of error that he alleges in the instant claim, and he may not point to this alleged error in support of his claim. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652.)

conceded that "the effect of a defendant's prior criminal acts upon the actual victims of those acts is permissible." (9CT 2468.)

Moreover, appellant posed no objections to much of the testimony he challenges from various bank tellers concerning their fear of appellant during or subsequent to the offenses. (AOB 222-223) Appellant failed to object to the testimony his instant claim relies upon from Ms. Bitar (12RT 2674), Mr. Saddler (12RT 2691), Ms. Kelly (12RT 2703), Mr. Minassian (12RT 2727), Ms. Corley (12RT 2741), Mr. Fontela (12RT 2777-2789), Mr. Pearson (12RT 2808-2809), and Ms. Murrary (13RT 2880).[59] Appellant also failed to object to much of the testimony he challenges from various grocery store clerks concerning their fear of appellant and the lasting impact the crimes had upon them. (AOB 223-225, 227.) Appellant failed to object to the testimony his instant claim relies upon from Mr. Beauchamp (13RT 2983, 3001), Ms. Thompson (13RT 3016), Mr. Gutierrez[60] (14RT 3108-3114), Ms. Lee (14RT 3128-3161), Ms. Ames (14RT 3178), Ms. Foster (14RT 3198-3210), Ms. McGarvey (14RT 3255-3281), Mr. Johnson (15RT 3401-3423), Ms. Cates (15RT 3579), Ms. Ettestad (15RT 3520-3522), and Ms. Strand (16RT 3635-3644.) Similarly, appellant failed to object to Safeway cashier Aaron Schoenborn's testimony that he felt like he was looking at "death" when he looked in appellant's eyes during the robbery of his cash register. (17RT 3763,

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59. Appellant did object to testimony concerning Ms. Reider's resulting fear and attendance of counseling on relevance grounds. (13RT 2866-2868.) Appellant also objected to a portion of Ms. Bitar's testimony that she was fearful during a bank robbery, but only on the grounds that the question had been asked and answered. (12RT 2674.)

60. Appellant challenges four statements testified to by Mr. Gutierrez, but posed only a single relevance objection during his testimony, directed to the prosecutor's question concerning Mr. Gutierrez's thoughts when he participated in a live lineup. (14RT 3113.)

3775.)[61] Appellant also failed to pose any objections to the testimony of Mr. Kim (14RT 3282-3297), or Ms. Heinzman (14RT 3298-3326), concerning their fear during appellant's robbery of the pharmacy in which they worked, or the lasting effects of the crime upon them. (See AOB 225-226).

Appellant has forfeited his challenges on appeal to all of the evidence to which he failed to object at trial. (*People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Maury* (2003) 30 Cal.4th 342, 418.)

C. The Trial Court Did Not Abuse Its Discretion In Admitting Evidence Concerning Fear Experienced By Appellant's Various Robbery Victims Or The Impact That The Crimes Had Upon Those Victims

Assuming appellant has preserved his claim on appeal, it fails nonetheless. A trial court has broad discretion to admit evidence during the penalty phase of a capital trial, and its ruling on such issues will not be disturbed absent an abuse of that discretion, i.e., where the trial court has acted in an arbitrary or capricious manner. (*People v. Lewis*, *supra*, 39 Cal.4th at pp. 1055-1056; see also *People v. Boyer* (2006) 38 Cal.4th 412, 477, fn. 51.) Moreover, a trial court has only limited discretion to exclude evidence pertaining to a defendant's prior violent crimes in the penalty phase of a capital trial. (*People v. Jablonski* (2006) 37 Cal.4th 774, 834; *People v. Karis* (1998)

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61. Appellant did object on relevance grounds when the prosecutor asked Mr. Schoenborn, "how has this effected your life since this robbery occurred back in August of '94?" (17RT 3775-3776.) The trial court overruled the objection at sidebar, but the witness never answered the question, and the prosecutor abandoned the issue when the sidebar concluded. Instead, the prosecutor asked Mr. Schoenborn, "did you continue to work for Safeway." (17RT 3776.) Mr. Schoenborn explained that he retired shortly after the incident. The prosecutor then asked Mr. Schoenborn why he had retired. Appellant posed no objection to this question and Mr. Scheonborn explained that he "couldn't handle the stress anymore of watching the doors, watching the people, whether they had a gun, they were going to hurt me again. I couldn't deal with the stress anymore." (17RT 3777.)

46 Cal.3d 612, 641-642.)

The very premise of appellant's claim, that evidence regarding the impact a defendant's prior criminal acts had upon the victims of those offenses is inadmissible during the penalty phase of a capital trial, is mistaken. (AOB 230-234.) This Court has explained that, "[a]t the penalty phase, the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of those acts." (*People v. Price* (1991) 1 Cal.4th 324, 479; see also *People v. Holloway* (2004) 33 Cal.4th 96, 143-144 [victim of prior violent assault may testify to effect of assault on her life in penalty phase of defendant's capital trial for an unrelated murder]). This Court has explained that "the circumstances of the uncharged violent criminal conduct, including its direct impact on the victim or victims of that conduct, are admissible under factor (b)," of Penal Code section 190.3. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 39-40.) Moreover, this Court has plainly stated that "the impact of a capital defendant's past crimes on the victims of those crimes is relevant to the penalty decision." (*People v. Mendoza* (2000) 24 Cal.4th 130, 186.) Nothing in the federal Constitution prohibits the introduction of evidence demonstrating the lasting effect of a defendant's prior crime on his victim during the penalty phase of a capital trial. (*People v. Garceau* (1993) 6 Cal.4th 140, 201-202.)

To the extent that the various robbery victim's testified to their fear of appellant during the offense, such testimony was entirely proper given that fear is an element of the crime of robbery. (See Pen. Code, § 211; *People v. Huggins*, *supra*, 38 Cal.4th at p. 214, *People v. Davis* (2005) 36 Cal.4th 510, 562.) Moreover, appellant's contention that various victim's improperly described their feelings about the moment they saw appellant by alternatively stating that looking into his eyes was like looking "at death," seeing an "evil look" that caused them to feel " butterflies" in their stomach, or that appellant's

eyes appeared "cold and dead like a shark," fails because such testimony was wholly relevant to explaining the witnesses' fear during the robbery offenses and to establishing the element of the offense. (AOB 230.) These comments did not, as appellant contends, constitute an opinion on appellant, his offenses, or an expression of a belief in a particular penalty. (AOB 230; see *Payne v. Tennessee*, *supra*, 501 U.S. at p. 830, fn.2.)

Similarly, appellant's assertion that the trial court should have excluded evidence that various cashiers experienced residual fear and anxiety as a result of appellant's prior crimes as "misleading, cumulative or unduly inflammatory," must be rejected. (AOB 234; see *People v. Demetrulias*, *supra*, 39 Cal.4th at 10, 39-40 [trial court properly admitted testimony of victim that following defendant's prior offense he could no longer live independently, that he lost the ability to walk or speak, and that he had to be fed by a caretaker]; *People v. Holloway*, *supra*, 33 Cal.4th 143-144 [trial court properly admitted testimony of victim that following defendant's prior offense she sought psychological counseling and purchased a firearm for her safety which she slept with because she "could not rest"].) The various robbery victims in the instant case who suffered residual fear or anxiety testified briefly regarding those feelings, and in no instance did the testimony constitute more than a single sentence or answer to one question on the part of the prosecutor. (See 12RT 2674, 2691, 2703; 13RT 2866-2868, 2880, 3001, 3016; 14RT 3108-3114, 3178, 3322-3325; 17RT 3777.) This evidence was relevant to the jury's penalty phase determination and was not unduly prejudicial. (*People v. Smith*, *supra*, 35 Cal.4th at p. 368; *People v. Mendoza*, *supra*, 24 Cal.4th at p. 186.)

Appellant's passing assertion that the evidence concerning his various prior armed robberies of banks and grocery stores was cumulative and should have been excluded does not appear to be related to his claim that the trial court abused its discretion in admitting evidence concerning the victim's lasting fear

or anxiety, and he has waived this claim by his failure to object to the evidence as cumulative in the trial court. (AOB 235; see *People v. Robinson*, *supra*, 37 Cal.4th at p. 652; *People v. Maur, supra,* 30 Cal.4th at p. 418.) In any event, appellant's claim is without merit. The People presented evidence concerning numerous discrete robberies, and as to those discrete robberies, presented only those witnesses necessary to identify appellant or establish other elements of the offenses. Every witness presented was either a victim of appellant's criminality or identified him as the individual responsible for a particular offense. There was nothing cumulative about the People's evidence concerning appellant's armed robbery offenses. Moreover, contrary to appellant's suggestion, substantial evidence supported each separate offense, as appellant was identified as the responsible party by at least one victim to each crime. (AOB 235.) The fact that some of appellant's prior crimes were unadjudicated is of no consequence. (*People v. Smith*, *supra*, 35 Cal.4th at p. 368.)

Appellant's assertion that the prosecutor's closing argument exacerbated the prejudicial effect of the evidence at issue is irrelevant to the trial court's decision to admit such evidence, as the prosecutor's closing argument had not yet occurred. (AOB 228-229, 236.) Moreover, appellant failed to object to the portions of the prosecutor's closing argument which he contends "capitalized on the testimony about the lasting impact of the factor b crimes." (AOB 236.) Given appellant's failure to object, he may not rely on the prosecutor's closing argument in making the instant claim. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 398-399.) In any event, given the propriety of the admission of evidence concerning the effect of appellant's prior crimes of armed robbery on his victim's, the prosecutor's closing argument was entirely proper. (See *People v. Mendoza*, *supra*, 24 Cal.4th at p. 186.)

Finally, appellant's contention that the trial court abused its discretion when it allowed the People to introduce enlarged maps showing the various

locations that appellant's robbery offenses had occurred is without merit. (AOB 227-228.) Appellant has forfeited his claim as his objections to the exhibits were limited to the inclusion of photographs of Officer Ganz and Ms. Correa, and not to the photographs of the various robbery victims. (15RT 3390-3396, 17RT 3876.) Defense counsel specifically told the trial court that she was "not objecting to" the photographs of the robbery victims on the board. (17RT 3879.) As such, appellant has forfeited the instant claim. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 398-399.)

In any event, the trial court did not abuse its discretion in finding that the exhibits were "helpful" to jurors given the number offenses and the different locations in which those offenses occurred. (15RT 3394; 17RT 3876.) Appellant complains that the exhibits "made it appear that [appellant] was responsible for a wave of terror that had landed on the west coast with the force of a hurricane." (AOB 235-236.) Appellant aptly describes his own conduct, and the exhibits in question did nothing more than demonstrate the locations where appellant's myriad offenses occurred, while enabling jurors to correlate appellant's offenses to the particular victims who had testified at trial. No abuse of discretion occurred. (*People v. Lewis*, *supra*, 39 Cal.4th at pp. 1055-1056.)

D. Assuming The Trial Court Erred, There Is No Reasonable Possibility That The Error Affected The Penalty Phase Verdict

Assuming the trial court abused its discretion when it allowed the victim's of appellant's armed robbery offenses to testify to the effect of those offenses upon them, there is no reasonable possibility that the jury would have reached a different verdict in the penalty phase given the gravity of appellant's offense in killing Officer Ganz, and properly admitted evidence demonstrating that he murdered Ms. Correa and attempted to kill Mr. Dickson. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1236-1237.) All of the testimony from

appellant's robbery victims regarding the lasting effects of the crimes upon them was brief and innocuous. (See 12RT 2674, 2691, 2703; 13RT 2866-2868, 2880, 3001, 3016; 14RT 3108-3114, 3162-3178, 3322-3325; 17RT 3777.) Given the gravity of the aggravating evidence presented, and the absence of any significant mitigating circumstances, there is no reasonable possibility that any error affected the verdict. (See *People v. Harris*, *supra*, 37 Cal.4th at pp. 351-352.)

VIII.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE PEOPLE'S CLOSING ARGUMENTS IN THE PENALTY PHASE

Appellant contends that the prosecutor committed assorted misconduct during the People's closing argument in the penalty phase, and he asserts that his federal constitutional rights were violated as a result. (AOB 238-269.) Appellant's claims are without merit. Appellant has forfeited many of his claims of error by his failure to object in the trial court. Moreover, the prosecutor's closing argument in the penalty phase was entirely proper, and assuming error, appellant was not prejudiced in any manner.

A. The Relevant Proceedings Below

Prior to closing arguments in the penalty phase, the prosecutor told the trial court, "I have some preliminary matters on argument I would like to address." (21RT 4689.) The prosecutor identified several areas of potential defense argument that she identified as objectionable. (21RT 4689-4690.) Defense counsel responded, "[i]f we are going to be engaging in a discussion of what is or is not permitted during the course of argument - - " (21RT 4690.) The trial court interjected:

> I hope not. I hope we'll just argue and if there's an objection - - I prefer there not be any, but if there has to be, we'll make an objection, and

> we'll make a ruling. I don't think either side needs to tell the other side how to argue so let's move on to another subject.

(21RT 4690.)

Defense counsel told the trial court that appellant wished to object to "a number of demonstrative aids that I gather [the prosecutor] wishes to utilize during the course of her presentation or argument." (21RT 4690-4691.) Defense counsel objected to a quotation by Edmond Burke which stated, "[a]bout the only thing necessary for evil to triumph is for good men to do nothing," on the basis that it "visually elevates the philosophical statement by Burke so that it is read in the same way as the law is" and because it sends a message that society demands a particular verdict in the case. (21RT 4691-4692.) The trial court overruled the objection. (21RT 4692.)

Defense counsel also objected to a chart listing factors in mitigation and aggravation. (21RT 4692.) Specifically, appellant objected to the fact that the chart provided that there had been no indication of remorse on the part of appellant, and that it listed this factor under "aggravation." The prosecutor indicated that she would change the chart so that the factor was listed as absence of mitigation. (21RT 4692-4696.) Defense counsel objected that as a factor in aggravation, the chart stated that Officer Ganz was a police officer, "one of our protectors." (21RT 4696.) The trial court told defense counsel that it planned on telling the jury that the People's chart was merely a part of her argument in the form of a demonstrative aid, and was not the instruction of the trial court. (21RT 4696-4698.)

Defense counsel then told the trial court, "I just wanted to comment on [it is] all more civilized if we can sit here and not interrupt opposing counsel." (21RT 4698.) The trial court responded, "I have a feeling we'll have a few sidebars" during closing argument, and told counsel that they should make any necessary objections during closing argument. (21RT 4698.)

The trial court instructed the jury and closing argument commenced. (21RT 4702-4735.) During the prosecutor's closing argument, she argued that appellant "grew up with two parents his entire life, two parents who did what they could for him." (21RT 4749.) Moments later, the prosecutor stated, "[e]ven when [appellant] was in prison the testimony was his father took a second mortgage on the home to be able to visit him alternate weekends." (21RT 4750.) Defense counsel objected, stating "that assumes facts not in evidence." (21RT 4749.) The trial court overruled the objection. (21RT 4750.)

The prosecutor subsequently told the jury:

> We know from one of the tests administered by Dr. Humphrey that [appellant] is a dangerous person subject to explosive behavior. And I think one of the issues to consider is how safe would he be in a prison. We know he'll kill a police officer. How safe would a prison guard be?

(21RT 4754.) Defense counsel objected, stating, "[t]hat's calling for speculation." (21RT 4755.) The trial court overruled the objection, and the prosecutor continued:

> How safe would a prison guard be with [appellant] as an inmate? He's already murdered someone who represents that line of all of use between safety and danger so what's to stop him just because he'd be locked up in prison? Is that a reason that anyone there would feel safe?

(21RT 4755.)

Later during the People's closing argument, the prosecutor told jurors:

> Police officers are our protectors, they insulate us from things that are out in our society that we're hoping we don't have to come in contact with. And if any of us are so unfortunate that we have to come in contact with those types of things as these numerous victims and witnesses went through, those series of crimes, we're grateful when that

police officer comes. If you get home and see that your home has been burglarized, what do you do? You call the police.

(21RT 4760.) Defense counsel objected, stating that the prosecutor was engaging in "improper argument." (21RT 4760.) The trial court overruled the objection. (21RT 4760.)

Immediately thereafter, the prosecutor continued her argument, telling the jury:

> The police officers arrive, they don't know you at all, but they're putting themselves in harm's way to protect you. And if there's a potential suspect in your home because you came home, saw the door open, maybe hear noise in there, when you go to your neighbor's to call the police, it's police officers who come and go into your home to protect you. Police officers are - - if you think of the human body or even think of society as a form of life, and we think of our skin as enclosing all of us and our tissue and our bones being the things that insulate us from infection inside, the police officers are like that, they're the last stop. Our immune system in our body is what protects us from the most microscopic virus, and the police officers protect us in that way also. [¶] It was only a few months ago that a local television broadcaster named Stan Chambers gave a very moving speech at a ceremony at the sheriff's department whey they erected a wall in memorial for fallen officers, and I wanted to just read a little bit of the speech he gave because I think it helps point out what police officers - - what they do for us and how important they are.

(21RT 4760-4761.) Defense counsel interjected, "[e]xcuse me, again, Your Honor. I would object." (21RT 4761.) The trial court overruled the objection. (21RT 4761.)

The prosecutor continued:

And again, this is Stan Chambers' words. [¶] "Each name is inscribed on solitary bronze blocks that records the lives of these gallant men. Together they form the symbolic wall that marks that fragile line between civilization and anarchy. In the middle ages the rugged stone walls and wide moats protected the townspeople from the marauders, they knew they were secure behind their gates. They rested at night knowing that sentr[ies] were on duty and the soldiers were inside awaiting for any call. [¶] Ours is a different time, a different society. The marauders and the enemies are inside, they strike at any time and any place, they live among us only to destroy. More than ever that wall must be manned daily. It must be enforced daily. Civilization must be protected daily. And as all of us here know, it is done at a deadly price. [¶] What a strange world we have created for ourselves, what strange people live in our world. Those who would rip it apart are out there slashing the very fabric of what made this very country great. But the wall must be manned and those who violate it must be punished. No matter what we do, the vicious, the violent, and the criminal mind is just a wall away from a ruthless, inhuman, and cruel rampage that will not stop until it is stopped. [¶] And that is what these men and women of law enforcement do daily, that's what these valiant men and women do to the very end, and the wall still stands tall because of it. It's often a lonely watch out there, many feel very much alone as they protected the castle wall. But you know and you must remember how much every one appreciates what you are all doing. You've given us the opportunity to raise our children, to go to our jobs, to live a happy live, and take advantage of the wonderful challenges that are here for everyone. You've given us the chance of life. It's ever so precious, and it is just a step away from those who would take everything we have away. [¶]

> No matter what you hear, no matter what is said, just know the people out there know what you are trying to do, and they respect you, and they appreciate what you have done to keep their lives free from fear and violence and, yes, even death. [¶] But looking at the wall, we all feel the deep emotion that stirs within, the wall is there because of the men and women who died, it is our memorial to them, we must pay homage to those who gave their all that we might be here today remembering them we own them such an infinite [debt]." [¶] Ladies and gentlemen, Martin Ganz was one of the men manning that wall.

(21RT 4761-4764.)

At the conclusion of the prosecutor's argument, defense counsel told the trial court:

> Your Honor, I know we discussed objections before and [we] didn't approach. I assume you were aware the objections were based on the 8th and 14th Amendments, specifically the statement about repeated references to police. [We] objected to counsel arguing about police coming to our assistance, and the basis of that is it's improper argument and appeals to the emotions of the jurors. [¶] There is a reference to a speech by Stan Chambers in connection with some memorial. And again, there was an objection, but the Court overruled the objection. And in connection with that part, counsel gestured to the audience and the peace officers in the audience. I don't know if the Court was aware of that.

(21RT 470-4771.) The trial court responded, "I saw her." (21RT 4771.) Defense counsel continued:

> I think that's objectionable. I would ask the Court to again admonish the jury that the presence of spectators and their reaction is not something on which the jury can base a verdict. The repeated statements

> by the prosecutor that we owe them, indicating the police, that that's objectionable, that calls for the jury to return a verdict based on a perceived debt that they have to police officers. Generally, it distracts them from their duty. [¶] There was also a request by counsel that the jury return a verdict because society needs to make sense out of terrible things. That was again asking the jury to base it on something other than the evidence and statements about society cries out. Now, I can prepare curative instructions if the Court wishes.

(21RT 4771.) The trial court responded, "No, don't. All the objections are overruled." (21RT 4771.)

B. The Prosecutor Did Not Commit Misconduct In Any Manner During The People's Closing Argument In The Penalty Phase

As this Court has explained:

> A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore . . . , when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.

(*People v. Morales* (2001) 25 Cal.4th 34, 44, citing *People v. Ayala*, *supra*, 23 Cal.4th at pp. 283-284; accord *People v. Hill* (1998) 17 Cal.4th 800, 819.)

At closing argument, a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom. (*People v. Morales*, *supra*, 25 Cal.4th at p. 44.) "The argument may be vigorous as long

as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." (*People v. Hill*, *supra*, 17 Cal.4th at p. 819, internal quotation marks omitted; *People v. Hillhouse* (2002) 27 Cal.4th 469, 502 [prosecutor may "vigorously attack the defense case and argument if that attack is based on the evidence"].) During argument, a prosecutor may "state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history, or literature[,]" and he may vigorously argue his case. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Wharton* (1991) 53 Cal.3d 522, 567.) "Harsh and vivid attacks on the credibility of opposing witnesses are permitted, and counsel can argue from the evidence that a witness's testimony is unsound, unbelievable, or even a patent lie." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Even the use of "opprobrious epithets" is not necessarily misconduct. (*People v. Hawkins* (1995) 10 Cal.4th 920, 961.)

Although appeals to the sympathy or passions of the jury are inappropriate at the guilt phase:

> at the penalty phase the jury decides a question the resolution of which turns not only on the facts, but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of defendant's background against those that may offend the conscience. [Citations.] In this process, one of the most significant considerations is the nature of the underlying crime. . . . On the one hand, [the court] should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely

subjective response should be curtailed.

(*People v. Haskett*, *supra*, 30 Cal.3d at p. 864.) Given all of the foregoing:

> [A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

(*Boyde v. California* (1990) 494 U.S. 370, 385 [110 S.Ct.1190, 108 L.Ed.2d 316]; see *People v. Gonzales* (1990) 51 Cal.3d 1179, 1224, fn. 21.)

When prosecutorial misconduct has occurred, the defendant must demonstrate that is was prejudicial. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1019.) To be prejudicial, there must be a reasonable possibility that the misconduct influenced the penalty verdict. (*People v. Cunningham*, *supra*, 25Cal.4th at p. 1019.)

Appellant alleges that the prosecutor committed misconduct in discussing Officer's Ganz's status as a police officer, and the role that police officers play in our society. (AOB 240-247.) However, it does not constitute error to argue "that the murder of a peace officer engaged in performing official duties is a particularly aggravated form of murder." (*People v. Mayfield*, *supra*, 14 Cal.4th at p. 803; see also *People v. Brown*, *supra*, 33 Cal.4th at p. 399.) In *People v. Brown*, *supra*, 33 Cal.4th 382, the defendant claimed that the prosecutor committed misconduct during closing argument in the penalty phase of his capital murder trial for killing a peace officer, when the prosecutor stated:

> If you kill a police officer, a good police officer in the performance of his duties, his duties to keep us safe - you folks parked in the jury parking lot. People are out there walking around, the whole county right now, if you stop - let me just take a little liberty with you. Let's stop right now. Everybody that is moving everywhere in Orange County and, then we say [snaps fingers], you can move now, their freedom is

> dependent upon police officers. Because if you don't have a policeman out there, or at least a criminal that has no rights - no feeling about the rights of anyone, if you don't have a policeman to deter that guy, we don't have freedom, if you think about it. And that is what [the victim] stood for. He stood for our freedom. He was there basically enforcing the laws that allowed us-that allows us to move about free. . . . [The victim] that day put on that uniform to protect us and to enforce the law. It is now your turn. . . . And quite frankly, [the victim] did it for us, and I salute [the victim]. You can salute [the victim] by applying the law.

(*Id*. at p. 399.) This Court rejected the defendant's claim that the remarks constituted inflammatory rhetoric and appeals to emotion, and found "nothing objectionable in these remarks." (*Id.* at 399-400.) Moreover, this Court stated:

> In reminding the jurors that we all depend on not only the presence but the commitment of law enforcement officers to help ensure safe and peaceable communities, [the prosecutor] did no more than draw from common experience.

(*Ibid.*)

Similarly, in *Mayfield*, the prosecutor told jurors during the penalty phase of the defendant's capital trial for murdering a police officer:

> We have those officers out there to protect us because there are individuals like Dennis Mayfield in our society. . . . But there's some people that have a total, an absolute disregard for our laws. Dennis Mayfield is one of those. . . . Unfortunately, we have people like Dennis Mayfield. And because of that we need people like [the victim] and all the other officers that came in here, to help us live in this community, in this great state, in this free country that we have. It's free. Yes, it is. Free. We all have our free agency, our ability to choose and to decide. And unfortunately Mr. Mayfield exercised his free agency in a manner

> that goes contrary to the rules of society. . . . You remember what President John Kennedy said. Ask not what your country can do for you. Ask what you can do for your country. A lot of people that have given for their country that have made this a free land. [Sic.] He has not given. He has taken. Taken whatever Dennis Mayfield decided that he wanted throughout his entire adult life.

(*People v. Mayfield*, *supra*, 14 Cal.4th at pp. 803-804.) This Court rejected the defendant's argument that the prosecutor's statement constituted an improper appeal to passion or that it would cause jurors to view the defendant "merely as a symbol or personification of society's criminal element." (*Ibid.*) In the instant case, the prosecutor's argument concerning the role and importance of a police officer's job in society were entirely proper. (*People v. Brown*, *supra*, 33 Cal.4th at p. 399; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 803.)[62]

Appellant relies on *Viereck v. United States* (1943) 318 U.S. 236, 247-248 [63 S.Ct. 561, 87 L.Ed.743], in support of his argument that the prosecutor's comments concerning the role of police officers in society were improper. (AOB 245.) *Viereck* is of no assistance to appellant. In *Viereck*, during the defendant's trial for presenting false documents to a government agency, the prosecutor reminded jurors that the county was involved in World War II, and stated:

> There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their

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62. Appellant's specific complaint that the prosecutor committed misconduct in comparing a police officer to the human immune system has been forfeited by his failure to object at trial. (AOB 242-243; 21RT 4760-4761; see *People v. Brown*, *supra*, 33 Cal.4th at pp. 398-399.) In any event, the comparison complained of did not constitute misconduct. (*People v. Dermott* (2002) 28 Cal.4th 946, 1003 [no misconduct in comparing defendant to a "germ"].)

> ideas of persecution and concentration camps. . . . The American people are relying upon you ladies and gentlemen for their protection against this sort of a crime, just as much as they are relying upon the protection of the [m]en who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you ladies and gentlemen for their protection. We are at war. You have a duty to perform here.

(*Id.* at p. 248.) The High Court, in dicta, found the remarks "wholly irrelevant to any facts or issues in the case" and suggested that they were unduly inflammatory and prejudicial. (*Id.* at pp. 247-248.) Unlike *Viereck*, where the second world war had nothing to do whatsoever with the defendant's trial, appellant was convicted of murdering a police officer in the line of duty, and as such, the prosecutor's comments were entirely relevant and appropriate during the penalty phase of the instant case. (*People v. Brown*, *supra*, 33 Cal.4th at p. 399; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 803; see also *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1059-1061 [prosecutor need not divorce the circumstances under which defendant committed offense from the People's argument in the penalty phase]). Appellant's claims that the prosecutor's argument improperly played upon juror's fears of crime and their gratitude to government institutions and law enforcement must be rejected.[63]

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63. Appellant also contends that the introduction of improper victim impact evidence "compounded the prejudice," and he assigns further errors to portions of the prosecutor's argument discussing victim impact evidence. (AOB 247-251.) However, as previously explained, the trial court committed no error in admitting the People's victim impact evidence in the instant case. (See Argument VI, *supra*.) Furthermore, appellant failed to object to any of the statements which he now alleges served to "compound" the prejudice of the victim impact evidence, and he may not rely upon them in asserting error on appeal. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 398-399.) In any event, the prosecutor's discussion of Officer Ganz's service as a police officer, based solely on the evidence in the record, was entirely proper. (*People v. Brown*, *supra*, 33 Cal.4th at p. 399; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 803; see also *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1059-1061.)

(AOB 245.)

Appellant alleges that the prosecutor improperly appealed to the jury's oath and to societal expectations in arguing for a verdict of death. (AOB 251-255.) Other than appellant's narrow pre-argument objection to the prosecutor's use of the Edmund Burke quotation, he failed to object to any of the portions of the prosecutor's arguments which he contends appealed to societal expectations of a verdict of death, and he has forfeited his remaining claims on appeal. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 398-399.)

In any event, appellant's claims fail on their merits. Appellant challenges the prosecutor's references to the jurors' statements during voir dire that they were capable of imposing a death verdict (21RT 4739-4742), her statement that a verdict of death would constitute justice as "society needs to be able to make sense of horrible things" (21RT 4768), and her concluding remarks that:

> Ladies and gentlemen, as was said in the - - in fact, defense at the end of the guilt phase, "If you follow the law you cannot go wrong." This is a case where society cries out for the death penalty. As jurors, you are the judges and you are the conscience of society. And the law cries out for it because in this case the aggravating evidence so outweighs the mitigating that the only just sentence is the death penalty . . . The defendant deserves the death penalty, he has earned it, and I think as jurors that that is your duty. The death penalty is the only just and appropriate penalty for the defendant in this case.

(21RT 4769-4770; see AOB 251-252.) None of these statements constitute misconduct. (See *People v. Young* (2005) 34 Cal.4th 1149, 1222 [no misconduct in arguing that death penalty would be "good for society" and "teach" society a moral lesson]; *People v. Marlow* (2004) 34 Cal.4th 131, 152 [no misconduct in arguing that defendant's conduct "crossed the line where we

as a society say 'enough.'"]; *People v. Bradford*, *supra*, 14 Cal.4th at p. 1063 [no misconduct in arguing that death penalty was appropriate to protect society]; *People v. Hardy*, *supra*, 2 Cal.4th at p. 211 [no misconduct in arguing that the jury was "obligated as members of this society and as members of this jury" to return a death verdict]; *People v. Robinson* (1964) 61 Cal.2d 373, 389-390 [no misconduct in telling jurors that they are "an arm of society, [and] that society had provided for the death penalty"].) In the instant case, the prosecutor specifically told the jury to "follow the law you cannot go wrong," and that the death penalty was appropriate "because in this case the aggravating evidence so outweighs the mitigating." (21RT 4769-4770.) Thus, contrary to appellant's contention, the prosecutor's remarks were indeed nothing more than a "temperate speech concerning the function of the jury and the rule of law." (*People v. Cornwell* (2005) 37 Cal.4th 50, 92-93.)

Appellant alleges that the prosecutor engaged in speculation in urging jurors that appellant would pose a danger to prison guards if he were serving a term of life without the possibility of parole. (AOB 259-261.) However, this Court has repeatedly rejected penalty phase challenges to a prosecutor's comments concerning the safety of prison guards or other inmates where the comments are based upon appellant's prior violent conduct. (*People v. Michaels* (2002) 28 Cal.4th 486, 540; *People v. Ray* (1996) 13 Cal.4th 313, 353; *People v. Champion* (1995) 9 Cal.4th 879, 940.) The prosecutor's comments were based upon the fact that appellant had already murdered a police officer, and as such, no error occurred. (21RT 4755.) Moreover, appellant's claim that the remark was otherwise inappropriate because the prosecutor had used evidence of mitigation, in the form of the findings of Dr. Humprey, as a part of her argument concerning appellant's future dangerousness, is without merit. (21RT 4754-4755.) As appellant notes, this Court has rejected this precise claim, and he as provided this Court will no

sound reason to reconsider the issue. (See *People v. Davis* (1995) 10 Cal.4th 463, 540.)

Appellant contends that the prosecutor committed misconduct by making "appeals to vengeance" during the People's closing argument. (AOB 261-261-264.) Specifically, appellant contends that the prosecutor committed misconduct in urging the jury to "show [appellant] the same sympathy that he showed to Martin Ganz and the same sympathy that he showed to Catalina Correa," and in making similar remarks that the jury should not show appellant sympathy. (AOB 261-262.) Appellant failed to object to any of the remarks he now challenges, and he has forfeited the claims on appeal. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 398-399.) Moreover, this Court has repeatedly rejected claims that a prosecutor commits misconduct in asking the jury to show the same sympathy to the defendant that the defendant showed to his victims. (*People v. Vieira* (2005) 35 Cal.4th 264, 296; *People v. Navarette* (2003) 30 Cal.4th 458; *People v. Ochoa* (1998) 19 Cal.4th 353, 464-465.) This claim fails.

Appellant errs in stating that the prosecutor argued facts not contained in the record when she told jurors that appellant's father had taken out a second mortgage on the family home in order to visit appellant in federal prison. (AOB 258-259.) During appellant's defense case in the penalty phase, appellant's mother testified that when appellant was in federal prison, Mr. Brady got a second mortgage on the family residence and "took $60,000 out of that so he come to see [appellant] every other weeks [sic]." (19RT 4334.) Thus, it is appellant, and not the prosecutor, who has misstated the record with respect to the instant claim.

Appellant alleges that the prosecutor committed misconduct in comparing appellant to a "Bengal tiger." (AOB 266-267; See 21RT 4753-4754.) Appellant posed no objection to this familiar story, and he may not now

complain about it for the first time on appeal. (*People v. Duncan* (1991) 53 Cal.3d 955, 976-977.) Moreover, this Court has previously rejected the specific challenges appellant raises concerning the Bengal tiger analogy, and he has provided no reason for this Court to reconsider its prior decision. (*Ibid.*)

Appellant alleges that the prosecutor committed *Griffin* error when she told jurors, "we have heard no evidence at all of any remorse from [appellant] and yet for you to vote for life without parole you would need to find some sympathy." (21RT 4754; AOB 256-258.) Appellant posed no objection to this portion of the prosecutor's argument, and he has forfeited his claim of error.[64] (*People v. Brown*, *supra*, 33 Cal.4th at pp. 398-399.) In any event, no *Griffin* error occurred. The prosecutor stated that "we have heard *no evidence* at all of any remorse from appellant," which is nothing more than an argument that the facts set forth in appellant's defense case fail to demonstrate his remorse. (See *People v. Young* (2005) 34 Cal.4th 1149, 1187-1188 ["there is no reasonable likelihood that the jury would have understood (statement that defendant showed no remorse) as referring to defendant's failure to testify"]; *People v. Hughes* (2002) 27 Cal.4th 287, 394 [a prosecutor is entitled to point out to the jury a defendant's lack of remorse, and doing so does not amount to error under *Griffin*]; *People v. Carpenter* (1997) 15 Cal.4th 312, 414 [argument that no evidence existed demonstrating defendant's remorse did not violate *Griffin*]; *People v. Osband* (1996) 13 Cal.4th 622, 724; *People v. Marshall* (1996) 13 Cal.4th 799, 855; *People v. Hardy*, *supra*, 2 Cal.4th at p. 209.) Even if error, this remark, "could not in any event have materially lessened the reliability of the death judgment." (*People v. Marshall*, *supra*, 13 Cal.4th at p. 855.)

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64. Appellant errs in suggesting that "the court had already denied the defense objection at the instruction conference." (AOB 257.) Appellant did not make, and the trial court did not rule on, any assertion of *Griffin* error. Nor did the trial court instruct the parties to object "as seldom as possibile." (AOB 257.)

Appellant asserts that the prosecutor "directly invoked religion in support of a death verdict," when she told jurors that Ms. Correa, appellant's murder victim from the State of Oregon:

> what did we know about Ms. Correa? We know she was 55, we know she was a nurse, we know she had been there doing her grocery shopping, and we know she was just in the way, she was standing by his car. And we know from being a live person that this is how she ended up all because this defendant . . . felt she was in the way, and this is how he deals with people in his way. And she ends up at as someone on the cold bed in the coroner's office. And what I thought was particularly telling, she died wearing her cross. And there was not one thing she did to deserve her life ending in that manner. And there's not one reason you should show any sympathy for this defendant for that crime.

(21RT 4758.) Appellant failed to pose an objection to the prosecutor's statement, and he has forfeited this claim on appeal. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 398-399.)

In any event, the prosecutor did not invoke religion in support of a death verdict when she made a passing factual comment that Ms. Correa had died wearing a cross in the midst of a discussion of what jurors knew about Ms. Correa as a person. The prosecutor's subsequent remark that Ms. Correa did not "deserve her life ending in that manner" was not an invocation of, or a reference to, religion. Nor was the prosecutor's subsequent statement that there was "not one reason you should show any sympathy for this defendant for that crime." Appellant's claim that the prosecutor invoked religion by observing that Ms. Correa was wearing a cross at the time of her death fails. (See *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1059-1061; *People v. Roldan*, *supra*, 35 Cal.4th at p. 743.)

Appellant similarly errs in asserting that the prosecutor invoked religion

in support of a death verdict when she told jurors:

> I ask you to let this Christmas and two days after on the 27th, which will be the fifth year anniversary of his death, that those who knew him and loved him can finally have a sense that some justice has occurred.

(21RT 4769-4770.) Appellant failed to object to this argument below and he may not raise this claim on appeal. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 398-399.) Moreover, the prosecutor's argument was based on the anniversary of the murder, and the five years that had elapsed since Officer Ganz's death. The prosecutor's allusion to Christmas was merely a reference point for the anniversary of the murder. The prosecutor did not make any references to Christianity or to religion, and her use of the word "Christmas" did not invoke religion as a basis for a verdict of death. (See *People v. Lewis*, *supra*, 39 Cal.4th at pp. 1059-1061; *People v. Roldan*, *supra*, 35 Cal.4th 646, 743; *Fox v. City of Los Angeles* (1978) 22 Cal.3d 792, 809 [Christmas may be celebrated as a purely secular holiday].)

C. Any Possible Misconduct Was Harmless

Appellant claims that the pervasive misconduct that took place in the prosecutor's closing argument requires reversal of his death sentence under the Fifth, Sixth, and Eighth Amendments of the United States Constitution. (AOB 268-269.) Assuming, for the sake of argument only, that these claims have not been forfeited and any of the prosecutor's arguments were in some way improper, any error was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Juries recognize a prosecutor's argument is merely the statement of an advocate and that it does not constitute evidence (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1224, fn. 21 ["Prosecutorial commentary should not be given undue weight"]; *People v. Sandoval*, *supra*, 4 Cal.4th at p. 184 [jurors are able to recognize "advocate's hyperbole"]), and the jurors here were so instructed. (21RT 4810.) In addition,

as this Court has stated in the past, the reversal of judgment is designed not so much to punish prosecutors as to protect the fair trial rights of defendants. Hence, in the absence of prejudice to the fairness of a trial, prosecutorial misconduct will not trigger reversal. (*People v. Bolton* (1979) 23 Cal.3d 208, 214; see also *People v. Mason*, *supra*, 52 Cal.3d at p. 949.) The ultimate question to be asked is had the prosecutor refrained from the misconduct, is it reasonably possible that a result more favorable to the defendant would have occurred? (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1232.) The answer in this case is no.

The prosecutor's argument must be evaluated in its entirety and in the context of the instructions and the argument presented by defense counsel. (*People v. Hughes*, *supra*, 27 Cal.4th at p. 394.) Here, the court properly instructed the jury on how to reach the ultimate penalty determination (21RT 4704-4708), and the prosecutor argued regarding her interpretation of the evidence in accord with the court's instructions (21RT 4738-4772). (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1283 [jury told that its role was to determine if aggravating circumstances outweighed mitigating and was told that its function was to determine if the death penalty was appropriate; nothing in the prosecutor's argument undercut this advice].) It must be presumed the jury followed the trial court's instructions absent evidence to the contrary. (See *People v. Wrest* (1992) 3 Cal.4th 1088, 1111.)

There is no evidence in this case that the jurors disregarded the court's instructions or that their penalty determination was based on anything other than the facts and the applicable law. Speculation is the only basis to find to the contrary. Appellant's murder of Officer Ganz in this case was senseless and brutal, and the evidence demonstrating appellant's identity and mental state was truly overwhelming. Moreover, appellant's act of killing Ms. Correa and attempting to kill Mr. Dickson to escape responsibility for his string of

robberies occurring along the western coast of the United States was deplorable. It is not reasonably possible that the jury would have reached a result more favorable to appellant absent the prosecutor's alleged misconduct. (See *People v. Jackson*, *supra*, 13 Cal.4th at p. 1232.) For the same reasons, the prosecutor's argument could not have infected the trial with such unfairness as to make appellant's conviction a denial of due process or to render the death verdicts unreliable. (*Ibid*; *People v. Hardy*, *supra*, 2 Cal.4th at p. 173; *People v. Wharton*, *supra*, 53 Cal.3d at p. 569.) Appellant's claims to the contrary, if not forfeited, must be rejected. (See also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1210-1211 [multiple improper biblical references were harmless].)

IX.

THE TRIAL COURT PROPERLY INSTRUCTED THE PENALTY JURY PURSUANT TO CALJIC NO. 17.41.1

Appellant contends the trial court prejudicially erred in instructing the penalty jury with the following version of CALJIC No. 17.41.1:

> The integrity of the trial requires at all times during their deliberations jurors conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or express an intention to disregard the law or to decide the case based on []any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation.

(33 CT 9459.) Appellant maintains the instruction intruded into the deliberative process and thus violated his federal constitutional rights under the Sixth and Fourteenth Amendments to a trial by jury and his state constitutional right to a unanimous verdict. (AOB 270-272.) Respondent submits appellant's contention is foreclosed by this Court's express holding to the contrary in *People v. Engelman* (2002) 28 Cal.4th 436.

In *Engelman*, the defendant raised the identical claim regarding the

giving of CALJIC No. 17.41.1. Although directing under its supervisory power that "CALJIC 17.41.1 not be given in trials conducted in the future" (*People v. Engelman, supra*, 28 Cal.4th at p. 449), this Court it expressly found that the giving of the instruction did not violate a defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict. As stated by this Court:

> We agree with the Court of Appeal that the instruction does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict, and uphold the Court of Appeal's decision affirming the judgment of conviction. As we shall explain, however, caution leads us to conclude that *in the future* the instruction should not be given in criminal trials in California. Although jurors have no right to refuse to deliberate or to disregard the law in reaching their decision, we believe the instruction has the potential to intrude unnecessarily on the deliberative process and affect it adversely—both with respect to the freedom of jurors to express their differing views during deliberations, and the proper receptivity they should accord the views of their fellow jurors. Directing the jury immediately before deliberations begin that jurors are expected to police the reasoning and arguments of their fellow jurors during deliberations, and immediately advise the court if it appears that a fellow juror is deciding the case upon an "improper basis," may curtail or distort deliberations. Any juror is free, of course, to bring to the court's attention any perceived misconduct that occurs in the course of jury deliberations. In our view, however, it is not conducive to the proper functioning of the deliberative process for the trial court to declare—before deliberations begin and before any problem develops—that jurors should oversee the reasoning and decisionmaking

process of their fellow jurors and report perceived improprieties in that process to the court.

(*People v. Engelman, supra*, 28 Cal.4th at pp. 439-440 [emphasis added].) Thus, appellant's claim that his rights under the federal and state Constitutions were violated by the giving of the instruction is meritless. And, since appellant's trial commenced prior to this Court's decision in *Engelman*, appellant has no grounds for complaint.

And, even assuming arguendo the instruction should not have been given, appellant has failed to affirmatively demonstrate prejudice on the instant record. Significantly, appellant readily acknowledges that "no juror called any such problem to the court's attention" and that "there is no way to know what thoughts or arguments were squelched by jurors. . . ." (AOB 272.) Prejudice from an alleged error is never presumed but must be affirmatively demonstrated by the appellant to warrant a reversal of the judgment. Appellant has failed to do so. Accordingly, his claim must be rejected.

Finally, appellant claims *Engelman* was wrongly decided and urges this Court to reconsider its decision. (AOB 270.) Appellant, however, presents nothing new or significant which would or should cause this Court to depart from its earlier holding. (See AOB 270-272.) Accordingly, respondent submits this Court should summarily reject appellant's claim as there is no need to revisit the issue. Moreover, it is entirely proper to reject appellant's complaint by case citation, without additional legal analysis. (E.g., *People v. Welch*, *supra*, 20 Cal.4th at pp. 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

X.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S AUTOMATIC MOTION FOR MODIFICATION OF THE VERDICT UNDER PENAL CODE SECTION 190.4, SUBDIVISION (E)

Appellant contends that the trial court's denial of his automatic motion for modification of the verdict, pursuant to Penal Code section 190.4, subdivision (e), was contrary to law and the evidence presented at trial. (AOB 273-288.) Specifically, appellant claims that the trial court: (1) misunderstood the mitigating scope and effect of appellant's brain damage and failed to properly weigh this evidence against evidence in mitigation; (2) improperly concluded that the evidence was sufficient to establish that he killed Officer Ganz deliberately and with premeditation, and that he did so to avoid a lawful arrest; (3) improperly considered irrelevant and excessive victim impact evidence; and (4) failed to properly balance the totality of the evidence of mitigation against evidence in aggravation. (AOB 273-288.) Appellant's claims are without merit.

A. The Relevant Proceedings In The Trial Court

On March 8, 1999, appellant filed his Motion to Reduce Penalty to Life Without Possibility of Parole pursuant to Penal Code section 190.4, subdivision (e). (34CT 9502-9516.) In appellant's motion, he set forth the applicable law governing a trial court's duty in ruling on such a motion pursuant to the relevant statute. Appellant then recounted his upbringing in Vietnam during the war where he was exposed to "rocket fire, explosion and bombings as a youngster." (34CT 9509-9510.) Appellant recounted his move to the United States, including his father's substance abuse problems, "unpredictable and extreme mood swings," and alleged acts of having "frequently belittled, bullied, and terrorized" appellant while appellant grew up. (34CT 9510-9511.) Appellant

also alleged that:

> Neuro-psychological testing reveals that the defendant suffers from brain damage, the cause of which may be organic; may be as a result of early childhood trauma suffered during his exposure to acts of war; may be related to the defendant's own substance abuse; or may be the result of a combination of these factors or others.

(34CT 9511.)

Appellant discussed the "enormous outpouring of rage and grief" stemming from Officer Ganz's murder, and asked the trial court, "as a 'Thirteenth Juror', to make an independent determination, free of improper public pressures or influences, as to whether or not death is the appropriate penalty" for appellant. (34CT 9513.) Appellant concluded:

> [Appellant] comes before this Court a child of war; the product of abusive, neglectful parenting; the product of an explosive, substance abusing role model, whose approval the defendant always sought without success; the product of brain damage to some degree which alters [appellant's] ability to perceive the world and form any connection with others in that world. No evidence exists to suggest [appellant] will present a threat in prison to other inmates or correctional officers. Society, including that inside prison walls, is not endangered should [appellant] receive a sentence of life imprisonment without the possibility of parole. [Appellant] submits this evidence in mitigation, taken either in whole or in any one part, outweighs that in aggravation presented at trial.

(34CT 9514.)

On March 16, 1999, the trial court held a hearing on appellant's motion. (22RT 4872-4886.) At the outset of the hearing, the trial court indicated that it had read and considered appellant's written motion, and told the parties:

> I have made an independent determination of the propriety of the penalty. I have made an independent review of the weight of the evidence relating thereto withing the meaning of and pursuant to the dictates of *People* [*v.*] *Alvarez* [(1996)], 14 Cal.4th 155, [] 244; and *People* [*v.*] *Osband* [(1996)], 13 Cal.4th 622, [] 726 and their progeny. Now it is not the Court's intention that I will list every single item of evidence and all of the arguments presented during this trial. For the purposes of clarifying the Court's reasoning, however, there will be a recital of the principal factors which most clearly influence the decision at hand. And I have prepared a document and am prepared to read it and talk my way though it as is my want to do.

(22RT 4872-4873; see 34CT 9544-9553.)

The trial court invited defense counsel to argue on behalf of appellant, and defense counsel told the trial court that the "weight of the evidence does not support a verdict of death in this matter." (22RT 4873.) Specifically, defense counsel challenged the sufficiency of the evidence supporting appellant's intent to kill Officer Ganz, and the jury's finding of premeditation and deliberation. (22RT 4873-4874.) Defense counsel reiterated appellant's contention that the trial court erred in admitting the People's victim impact evidence. (22RT 4874-4875.) Defense counsel also argued that the evidence of appellant's background and upbringing, together with the opinion of Dr. Humphrey that appellant suffered from brain damage, supports a finding that "the weight of the evidence does not support a death verdict in this instance." (22RT 4875.)

The prosecutor argued briefly that the weight of the evidence supported the verdict of death, and asked the trial court to conduct an independent evaluation of the evidence and reach a result consistent with that verdict based on appellant's act of murdering Officer Ganz and Ms. Correa, his attempted murder of Mr. Dickson, and the string of robberies that appellant had

committed in California, Oregon, and Washington. (22RT 4876-4877.)

The trial court then articulated its ruling denying appellant's motion, which is contained in a written Statement of Reasons For Denial of Automatic Motion to Modify Sentence, pursuant to Penal Code section 190.4, subdivision (e), filed in the instant case on the date of the hearing on appellant's motion. (34CT 9544-9553; 22RT 4877-4886.) The trial court told the parties:

> I sat through this entire trial from inception to closing and I have carefully and independently weighed and considered, taken into account, and was guided by the aggravating and mitigating factors as they were set forth under Penal Code section 190.3, and as that section has been interpreted by the higher courts . . . I find that the first degree murder of Martin Ganz was an intentional killing. It was personally committed by [appellant]. I further find the murder was premeditated, it was willful and committed with malice aforethought. I further find that this cold and vicious murder was committed while Martin Ganz, the victim, was engaged in the course of the performance of his duties as a peace officer for the City of Manhattan Beach. That [appellant] intentionally killed Martin Ganz knowing that Martin Ganz was a peace officer engaged in the performance of his duties. [¶] I further find that [appellant] murdered Martin Ganz for the purpose of avoiding or preventing a lawful arrest. . . . [Appellant], for no apparent reason that this Court could find during this entire trial, for no apparent reason whatsoever, other than perhaps to avoid arrest and a return to the federal prison system, truly crossed over society's limit line by assassinating Ganz in cold blood, a truly vicious, cruel, and unnecessary response to a minor traffic violation stop. [¶] Mr. Ganz was shot numerous times, the last and fatal blow being a coup de grace shot to his face while Mr. Ganz was defenseless on the ground behind his patrol car. . . . These are the

circumstances the Court finds under Penal Code section 190.3, subdivision A.

(22RT 4877-4879.)

The trial court discussed appellant's past criminal history, including his federal conviction for bank robbery, and his conduct in killing Ms. Correa, attempting to kill Mr. Dickson, and in robbing a variety of banks and grocery stores, and noted that it had considered this evidence under Penal Code section 190.3, subdivisions (b) and (c). The trial court stated:

> After listening to a myriad of victim witnesses, most of whom positively identified [appellant] to all of these prior violent and felonious acts [], this Court notes that it was most moved by Mr. Arden Schoenborn. I don't know if anybody remembers Mr. Schoenborn besides me, but I sure did. He was a checker/cashier in one of the many Safeway stores that was victimized in the State of Oregon. Mr. Schoenborn related that upon having a gun pointed at his chest, while the defendant attempted to cock and load that gun, he looked straight into the eyes of [appellant] and quote "saw death" close quote. Mr. Schoenborn I thought spoke eloquently for all of the victims of all of these robberies both dealing with the banks and the supermarkets. All of them looked, and the testimony was consistent throughout. What did they all remember. The eyes of [appellant]. That is how they identified him, that is how they knew. And what did they see? They saw death.

(22RT 4881.)

The trial court stated that it had considered the evidence of appellant's upbringing and "did not find this mitigation evidence to be credible as to the defendant's mental condition," pursuant to Penal Code section 190.3, subdivision (d). The trial court also noted that:

> Dr. Lorie Humphrey's feeble attempts to find that [appellant] suffered

from an alleged brain disorder was clearly in this Court's view never established by any supporting evidence of any nature whatsoever. Perhaps her only realistic comment and opinion was that [appellant] quote "sees the world differently" close quote, to say the least. That opinion was established in this case by the tragic litany of felonious behavior and incidents including two murders. [Appellant's] family members attempted to portray a villainous father as a responsible party for [appellant's] extreme duress and/or substantial domination. Penal Code section 190.3, subdivision G. However, the evidence showed a father who supported his family financially, they lived in a lovely home in the Topanga hills with [appellant] riding his motorcycle around in those hills, and the Court did not find any of that to reach by any stretch of the imagination, extreme duress and/or substantial domination. The evidence did show the father who supported his family as I said financially, and appears to never have abused his family. Yes, he was and did use drugs [sic], but there was no evidence that this Court felt that was clear on this record of any abuse by the father. And most certainly, even if it had been presented on this record, he had no role whatsoever in the creation of [appellant's] murderous personality.

(22RT 4482-4483.)

The trial court discussed the inapplicability of Penal Code section 190.3, subdivisions (e), (f), (i), and (j), to the circumstances of appellant's case. (22RT 4883.) The Court then continued to discuss appellant's upbringing, stating:

And while the Court clearly believes the testimony of the family members as to their opinions of the mitigating factors of [appellant's] Vietnamese birth and childhood, and relationships with his father, that evidence is clearly, in this Court's view, again outweighed by the aggravating factors discussed in the above paragraphs. Penal Code

section 190.3, subdivision K.

(22RT 4883-4884.)

The trial court concluded its ruling, stating:

The Court acknowledges its function is not to make an independent and de novo penalty determination. Rather, the Court's role is to reweigh the evidence of aggravation and mitigation factors and to determine whether in the Court's independent judgment, the weight of the evidence supports the jury's verdict. The Court is also aware of its obligation to assess the credibility of the witnesses, determine the probative force of the testimony and the weight of the evidence, including reviewing all the designated factors under Penal Code section 190.3, which I have just done. The Court is further cognizant of its obligation to state reasons with sufficient particularity to allow for effective appellate review. [¶] In reaching a conclusion under the standards required by law, the Court has reviewed the testimony presented through an examination of the transcript as well as the Court's own extensive notes, has reassessed the credibility of the witnesses and evaluated the probative force and weight of the evidence, and has reviewed the exhibits. In this review, the Court has made a determination that the verdicts are neither contrary to the law nor contrary to the evidence. The Court further finds that the truth of the special circumstances has been proved beyond a reasonable doubt. The Court's conclusion is that the jury's finding of death is proper according to the law and the facts under an independent review, by this Court, of all of the evidence. [¶] The Court also agrees with the jury's implicit finding that the circumstances in aggravation substantially outweigh the circumstances in mitigation, warranting the penalty of death as to [appellant]. The jury's assessment of the evidence that the factors in

> aggravation substantially outweigh the factors in mitigation and that death is warranted is overwhelmingly supported by the evidence. [¶] As to the credibility of the witnesses, the Court finds that the People's witnesses were credible and reasonable and in reviewing all of the evidence admitted at the guilt phase, the Court is satisfied beyond all doubt that the defendant is guilty. . . . This Court has carefully reviewed the evidence presented by the defense challenging the prosecution evidence regarding the charges involved, including the discrepancies in the descriptions. In reviewing this evidence, the Court fully agrees with the jury's rejection of the conclusions urged by the defense and finds the discrepancies to be of such slight or trivial nature as to carry no impact on the credibility and weight of the prosecution's case. [¶] In reviewing all of the evidence available pursuant to section 190.3 of the Penal Code, and in carefully and separately weighing the aggravating and mitigating factors, this Court finds that the aggravating evidence as to [appellant] so substantially outweighs the mitigating evidence that it warrants the imposition of death instead of life without parole as determined by the jury.

(22RT 4885-4886.)

B. The Trial Court's Denial Of Appellant's Motion For Modification Of The Verdict Was Not Contrary To The Law Or The Evidence Presented At Trial

In ruling on an automatic application for modification of the verdict under Penal Code section 190.4, subdivision (e), the trial judge "shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances . . . and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." The

trial court's ruling must be based only on the evidence presented at trial. (*People v. Sakarias* (2000) 22 Cal.4th 596, 648.) The trial court's

> function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict.

(*People v. Lang* (1989) 49 Cal.3d 991, 1045 [internal citations omitted].) The trial judge must provide a ruling "adequate to assure thoughtful and effective appellate review." (*People v. Arias*, *supra*, 13 Cal.4th at p. 191.) On appeal, this Court "subjects a ruling on a verdict-modification application to independent review." (*People v. Clair* (1992) 2 Cal.4th 629, 689.) This Court has explained:

> Of course, when we conduct such scrutiny, we simply review the trial court's determination after independently considering the record; we do not make a de novo determination of penalty.

(*People v. Mickey*, *supra*, 54 Cal.3d at p. 704.)

In the instant case, the trial court properly carried out its duties pursuant to Penal Code section 190.4, and its ruling on appellant's motion for modification of the verdict was entirely proper. The trial court indicated that it had read and considered appellant's written motion, and told the parties: "I have made an independent determination of the propriety of the penalty," and "I have made an independent review of the weight of the evidence relating thereto withing the meaning of and pursuant to the dictates of *People* [*v.*] *Alvarez* [(1996)], 14 Cal.4th 155, [] 244; and *People* [*v.*] *Osband* [(1996)], 13 Cal.4th 622, [] 726 and their progeny." (22RT 4872-4873.) The trial court also noted:

> I sat through this entire trial from inception to closing and I have

carefully and independently weighed and considered, taken into account, and was guided by the aggravating and mitigating factors as they were set forth under Penal Code section 190.3, and as that section has been interpreted by the higher courts . . .

(22RT 4877-4878.)

The trial court told the parties that it understood that:

the Court's role is to reweigh the evidence of aggravation and mitigation factors and to determine whether in the Court's independent judgment, the weight of the evidence supports the jury's verdict. The Court is also aware of its obligation to assess the credibility of the witnesses, determine the probative force of the testimony and the weight of the evidence, including reviewing all the designated factors under Penal Code section 190.3, which I have just done. . . . In reaching a conclusion under the standards required by law, the Court has reviewed the testimony presented through an examination of the transcript as well as the Court's own extensive notes, has reassessed the credibility of the witnesses and evaluated the probative force and weight of the evidence, and has reviewed the exhibits. In this review, the Court has made a determination that the verdicts are neither contrary to the law nor contrary to the evidence. . . . The Court's conclusion is that the jury's finding of death is proper according to the law and the facts under an independent review, by this Court, of all of the evidence. [¶] The Court also agrees with the jury's implicit finding that the circumstances in aggravation substantially outweigh the circumstances in mitigation, warranting the penalty of death as to [appellant]. The jury's assessment of the evidence that the factors in aggravation substantially outweigh the factors in mitigation and that death is warranted is overwhelmingly supported by the evidence.

(22RT 4885-4886.)

The trial court concluded its ruling stating:

> In reviewing all of the evidence available pursuant to section 190.3 of the Penal Code, and in carefully and separately weighing the aggravating and mitigating factors, this Court finds that the aggravating evidence as to [appellant] so substantially outweighs the mitigating evidence that it warrants the imposition of death instead of life without parole as determined by the jury

(22RT 4886.)

Appellant's claim that the trial court conducted only a "piecemeal" evaluation of the evidence, and that it failed to "weigh the entirety of the mitigation evidence against the entirety of the evidence in aggravation" fails. (AOB 284-285.) Appellant has forfeited this claim by his failure to raise it in the trial court. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1161 [contemporaneous objection rule applies to motions for modification of the verdict in capital proceedings]; *People v. Riel* (2000) 22 Cal.4th 1153, 1220.) In any event, the trial court clearly engaged in the appropriate weighing analysis in rejecting appellant's motion. The trial court,

> *considered* all of the evidence offered in mitigation; it merely found that much of that evidence did not, in fact, mitigate in light of the evidence as a whole. Doing so was entirely proper.

(*People v. Smith* (2003) 30 Cal.4th 581, 640 [italics in original].) The court's discussion as a whole made clear that it applied the correct standard in weighing the evidence in mitigation against the evidence in aggravation, and in concluding that the jury's verdict was supported by the weight of the evidence presented. (*Ibid*; see also *People v. Lewis*, *supra*, 39 Cal.4th at p. 1064; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1163; *People v. Schmeck* (2005) 37 Cal.4th 240, 308; *People v. Moon*, *supra*, 37 Cal.4th pp. 45-46; *People v. Young* (2005)

34 Cal.4th 1149, 1229-1230.) As such, appellant's claim that the matter must be remanded to the trial court must be rejected. (See AOB 287-288.)[65]

Appellant specifically contends that the trial court "misunderstood and failed to give effect to the mitigating force of the evidence concerning [appellant's] brain damage and its effect on his mental condition." (AOB 273-278.) Respondent disagrees. The trial court considered the evidence offered in mitigation concerning appellant's alleged brain damage, but simply found that it had no convincing force whatsoever. (22RT 4482-4483.) The trial court was entitled to determine, as it did, that the evidence appellant presented concerning his alleged brain damage was unconvincing. (See *People v. Smith*, *supra*, 30 Cal.4th at p. 640 [trial court is entitled to make credibility determinations in ruling on a verdict modification motion]; *People v. Proctor* (1992) 4 Cal.4th 499, 555.) The trial court did not misunderstand appellant's evidence, it "simply found that the mitigating evidence presented by defendant did not amount to an extenuating circumstance and thus did not outweigh the aggravating evidence." (*People v. Rogers* (2006) 39 Cal.4th 826, 910-911; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1163 [trial court's "remarks concerning the mitigating evidence defendant offered reveal that it considered all such evidence although finding it worthy of little weight"]; *People v. Elliot* (2005) 37 Cal.4th 453, 486 [trial court did not err in rejecting mitigating force

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65. Appellant's claim that the trial court failed to consider the evidence concerning his upbringing and alleged brain damage under subdivisions (d), (g), (h), and (k), of Penal Code section 190.3, has been forfeited by his failure to object to the trial court's ruling on this basis. (AOB 277; see *People v. Guerra*, *supra*, 37 Cal.4th at p. 1161.) The trial court discussed each of these factors in its ruling denying appellant's verdict modification motion. (34CT 9548.) Moreover, the trial court's "failure to mention [certain] specific matters in mitigation implies, not that they were overlooked or deemed legally irrelevant, but simply that the court found them insubstantial and unpersuasive." (*People v. Weaver* (2001) 26 Cal.4th 876, 991; see also *People v. Lewis*, *supra*, 39 Cal.4th at p. 1064.)

of defense expert's testimony and finding that weight of evidence in aggravation outweighed evidence in mitigation]; *People v. Dunkle* (2005) 36 Cal.4th 861, 933, 937-938 [trial court did not err in rejecting defense expert's testimony regarding mental illness during ruling on verdict modification motion, as it considered the evidence, but simply did not accord it substantial mitigating weight]; *People v. Ramos* (2004) 34 Cal.4th 494, 532 [trial court did not fail to consider evidence of mental illness, but simply found the evidence unconvincing].) Appellant's actual complaint is not that the trial court's findings "are unsupported by the evidence. Rather, [his] complaint is that the trial court viewed the evidence differently than he does and drew inferences unfavorable to him." (*People v. Young*, *supra*, 34 Cal.4th at p. 1228.)

Appellant's contention that the trial court erred in concluding that appellant acted with premeditation and deliberation in killing Officer Ganz is without merit, as overwhelming evidence supported this conclusion. (AOB 283-284; see respondent's Argument II, *supra.*) Similarly, appellant's contention that the trial court erred in considering victim impact testimony of various robbery victims pursuant to Penal Code section 190.3, subdivisions (b), and (c), fail for the reasons stated in respondent's Argument VI, *supra*. (AOB 285-286.)

Appellant contends that the trial court erred in ruling on his motion for modification of the verdict because it found that the evidence presented at trial was insufficient to sustain the jury's true finding on the special circumstance allegation that appellant killed Officer Ganz to avoid a lawful arrest (Pen. Code, § 190.2, subd. (a)(5)). (AOB 278-282.) This claim is without merit. Appellant never raised this claim in his written motion or his remarks to the trial court during the hearing on his motion, and appellant never objected to the trial court's ruling on this basis during the hearing on his motion. (34CT 9502-9515; 22RT 4873-4876.) As a result, appellant may not challenge the trial

court's ruling on this basis on appeal. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1161; *People v. Riel, supra,* 22 Cal.4th at p. 1220.)

In any event, appellant's claim is without merit. At the time that appellant murdered Officer Ganz, he was on supervised release following his federal conviction for bank robbery, and he was aware that revocation of his supervised release was mandatory in the event that he possessed a firearm. (9RT 2158-2164.) When Officer Ganz stopped appellant's vehicle, appellant was in the midst of committing a continuing act that violated the terms of his supervised release by possessing a firearm, and an act that constituted a felony under California law. (See Pen. Code, § 12021, subd. (a).) It was reasonable to conclude that appellant killed Officer Ganz to avoid arrest or a return to federal custody, especially in light of any other possible motivation for his conduct. (See *People v. Hughes*, *supra*, 27 Cal.4th at p. 334; *People v. Cummings*, *supra*, 4 Cal.4th at pp. 1300-1301; *People v. Superior Court* (*Wells*), *supra*, 27 Cal.3d at p. 672; *People v. Durham*, *supra*, 70 Cal.2d at p. 189; *People v. Robillard*, *supra*, 55 Cal.2d at p. 100; *People v. Powell*, *supra*, 40 Cal.App.3d at pp. 154-155; *People v. Meyes*, *supra*, 198 Cal.App.2d at pp. 495-496.) Thus, the trial court's conclusion that appellant killed to avoid arrest "reflects a reasonable interpretation of the evidence presented to the jury." (*People v. Guerra*, *supra*, 37 Cal.4th at pp. 1161-1162.)

Assuming the evidence did not support the trial court's finding, appellant "fails to show a reasonable possibility any such error might have affected its ruling on the automatic application." (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 937.) Appellant makes no challenge to the special-circumstance findings that he killed Officer Ganz in the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)), or that he had suffered a prior conviction for first degree murder (Pen. Code, § 190.2, subd. (a)(2)). The trial court did not place great weight on appellant's motive in killing Officer Ganz in ruling on appellant's motion,

stating:

> [Appellant], *for no apparent reason that this Court could find during this entire trial, for no apparent reason whatsoever*, other than *perhaps* to avoid arrest and a return to the federal prison system, truly crossed over society's limit line by assassinating Ganz in cold blood, a truly vicious, cruel, and unnecessary response to a minor traffic violation stop.

(22RT 4878-4879 [italics added].) Thus, there is no reasonable possibility any error might have affected the trial court's ruling on appellant's motion for modification of the verdict and the automatic motion under Penal Code section 190.4, subdivision (e). (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 937.)

Given that the trial court applied the correct standard in weighing the evidence in mitigation against the evidence in aggravation, and properly concluded that the jury's verdict was supported by the weight of the evidence presented, appellant's challenges to the trial court's ruling on his motion for modification of the verdict fail. (*People v. Lewis*, *supra*, 39 Cal.4th at p. 1064; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1163; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 308; *People v. Moon*, *supra*, 37 Cal.4th at pp. 45-46; *People v. Young*, *supra*, 34 Cal.4th at pp. 1229-1230.)

XI.

PROSECUTORIAL DISCRETION TO SELECT ELIGIBLE CASES IN WHICH THE DEATH PENALTY IS SOUGHT DOES NOT VIOLATE THE FEDERAL OR STATE CONSTITUTIONS

Appellant contends the death penalty in California is arbitrarily sought and imposed depending on the county in which the defendant is prosecuted. Maintaining there is no uniform treatment within the state, appellant argues that county prosecutors can use different standards in deciding which cases to select as eligible for the death penalty. Such a system, appellant continues, treats defendants differently and thus violates the Eighth and Fourteenth Amendments

of the federal Constitution, as well as Article IV, section 16(a) of the California Constitution. (AOB 289-291.) This Court has repeatedly rejected this identical contention.

> [P]rosecutorial discretion to select those eligible cases in which the death penalty would actually be sought does not in and of itself evidence an arbitrary and capricious capital punishment system or offend principles of equal protection, due process, or cruel and/or unusual punishment.

(*People v. Keenan* (1988) 46 Cal.3d 478, 505 [citing numerous high court decisions]; see *People v. Carter* (2005) 36 Cal.4th 1215, 1280; *People v. Anderson* (2001) 25 Cal.4th 543, 601-602; *People v. Box* (2000) 23 Cal.4th 1153, 1217; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479; *People v. Williams* (1997) 16 Cal.4th 153, 278.) Indeed, in *People v. Holt* (1997) 15 Cal.4th 619, 702, this Court expressly rejected the claim raised by appellant, namely, that vesting the county district attorney with complete discretion over the selection of cases in which to seek the death penalty creates an unconstitutionally substantial risk of county-by-county charging decisions for defendants with similar background who commit similar crimes. As this Court later reaffirmed in *People v. Yeoman* (2003) 31 Cal.4th 93, 250, giving the district attorney of each county the discretion to decide whether to seek the death penalty in a particular case does not render such decisions arbitrary, even in the absence of statewide standards for, or oversight of, such decisions. (See also *People v. Carter*, *supra*, 36 Cal.4th at p. 1280 ["The circumstance that under California law an individual prosecutor has discretion to seek the death penalty in a particular case did not deny defendant his constitutional rights to equal protection of the laws or to due process of law."])

Appellant readily acknowledges that this Court has repeatedly rejected the claim he raises on appeal (see AOB 291) but urges reconsideration of those

decisions because of *Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 148 L.Ed.2d 388], a case involving the 2000 Presidential election. A majority of the Court halted a recount in certain Florida counties because of a lack of consistent standards in evaluating ballots. *Bush v. Gore, supra*, is inapposite. First, *Bush v. Gore, supra,* involved an election, not the exercise of discretion as to whether to seek imposition of the death penalty. Second, the difference in treatment of a criminal defendant based on prosecutorial discretion in deciding whether to seek the death penalty in a particular case is simply not the same as a lack of an adequate and consistent statewide standard to insure the accuracy of a vote count. Third, this Court, subsequent to *Bush v. Gore, supra*, has repeatedly rejected appellant's equal protection claim regarding the prosecutorial discretion to select eligible cases for the death penalty. (see e.g., *People v. Carter, supra*, 36 Cal.4th at p. 1280; *People v. Yeoman, supra*, 31 Cal.4th at p. 250.) Thus, this Court should decline appellant's invitation to reconsider its prior decisions.

XII.

APPELLANT'S CONSTITUTIONAL RIGHTS HAVE NOT BEEN VIOLATED DUE TO A DELAY IN THE APPOINTMENT OF APPELLATE COUNSEL

Relying on *Barker v. Wingo* (1972) 407 U.S. 514, *Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, and *United States v. Antoine* (9th Cir. 1990) 906 F.Ed 1379, appellant contends his equal protection and due process rights on appeal have been prejudicially violated because he has been forced to wait an inordinate amount of time ("almost three years") between the pronouncement of the death sentence and the appointment of appellate counsel. (AOB 292-299.) This Court has repeatedly rejected similar claims (see *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ochoa* (2001) 26 Cal.4th 398, 462-464; *People v. Welch*, *supra*, 20 Cal.4th at pp. 775-776; *People v. Holt*, *supra*, 15

Cal.4th at pp. 708-709) and appellant has not provided any legitimate reason for this Court to reconsider its prior decisions. Accordingly, the claim should be summarily rejected.

Indeed, the identical contention raised by appellant was expressly rejected by this Court in *People v. Welch, supra*, 20 Cal.4th at pages 775-776:

> Defendant contends that an almost three-year delay in the appointment of appellate counsel denied him a right to a speedy appeal, in violation of his Fourteenth Amendment right of due process. He relies on *U.S. v. Antoine* (9th Cir. 1990) 906 F.2d 1379, 1382, and *Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, 1546, for the existence of such a right. As we stated in *People v. Holt, supra*, 15 Cal.4th at page 709, in addressing an identical claim, these decisions do not address "the unique demands of appellate representation in capital cases. [¶] [Moreover,] [n]either this court, nor the United States Supreme Court, has extended the Sixth Amendment right to speedy trial to appeals in the manner suggested by defendant. Assuming, but not deciding, that such a right exists, defendant fails to demonstrate that the delay inherent in the procedures by which California recruits, screens, and appoints attorneys to represent capital defendants on appeal, is not necessary to ensure that competent representation is available for indigent capital appellants. Moreover, defendant fails to suggest any impact that the delay could have had on the validity of the judgment rendered before that delay occurred.

The same is true in the instant case – appellant fails to demonstrate any impact the delay could have had on the validity of the judgment rendered before the delay occurred. (See AOB 292-299.) Accordingly, appellant's claim must be rejected.

XIII.

EXECUTION FOLLOWING CONFINEMENT DOES NOT CONSTITUTE A VIOLATION OF THE EIGHTH AMENDMENT'S BAR AGAINST CRUEL AND UNUSUAL PUNISHMENT OR INTERNATIONAL LAW

In a claim related to the one raised in Argument 12, appellant contends that his execution following a lengthy confinement under a sentence of death would constitute cruel and unusual punishment in violation of the Eighth Amendment, as well as constitute a violation of international law. (AOB 307.) This Court has repeatedly rejected the claim that an execution following a delay of confinement constitutes cruel and unusual punishment in violation of the Eighth Amendment. (*People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 462-464; *People v. Anderson*, *supra*, 25 Cal.4th at pp. 605-606; *People v. Frye* (1998) 18 Cal.4th 894, 1030-1031.) As this Court noted in *Frye*, quoting the Ninth Circuit's opinion in *Mckensie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1466:

> "It would indeed be a mockery of justice if the delay incurred during the prosecution of claims that fail on the merits could itself accrue into a substantive claim to the very relief that had been sought and properly denied in the first place."

Likewise, appellant's claim regarding a violation of international law (see AOB 305-307) fails. As this Court noted in *People v. Burgener* (2003) 29 Cal.4th 833, 885:

> Defendant contends the alleged violations of law he has described above also constituted violations of customary international law. As in *People v. Hillhouse* (2002) 27 Cal.4th 469 [117 Cal.Rptr.2d 45, 40 P.3d 754], we need not consider whether a violation of state or federal constitutional law would also violate international law, "'because defendant has failed to establish the premise that his trial involved

> violations of state and federal constitutional law . . . .'" (*Id.* at p. 511.) "Moreover, had defendant shown prejudicial error under domestic law, we would have set aside the judgment on that basis without recourse to international law." (*Ibid.*)

The same is true here: appellant's claim regarding a violation of international law must be rejected because appellant has failed to establish the premise that his trial involved a violation of state or federal constitutional law.

XIV.

APPELLANT'S CHALLENGES TO THE 1978 DEATH PENALTY SENTENCING SCHEME LACK MERIT

Appellant alleges numerous aspects of the 1978 death penalty sentencing scheme violate the United States Constitution. (AOB 308-363.) But, as appellant readily acknowledge (AOB 308), most of these claims have been raised and repeatedly rejected in prior capital appeals before this Court. Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected. Moreover, it is entirely proper to reject appellant's complaints by case citation, without additional legal analysis. (E.g., *People v. Bell* (2007) 40 Cal.4th 582, 619-621; *People v. Welch*, *supra*, 20 Cal.4th at pp. 771-772; *People v. Fairbank*, *supra*, 16 Cal.4th at pp. 1255-1256.)

A. The Special Circumstances In Section 190.2 Are Not Overboard And Perform The Narrowing Function

Appellant contends the failure of California's death penalty law to meaningfully distinguish those murders in which the death penalty is imposed from those in which it is not is in violation of the Eighth and Fourteenth Amendments and requires reversal of the death judgment. Specifically, appellant argues his death sentences is invalid because section 190.2 is impermissibly broad and fails adequately to narrow the class of persons eligible

for the death penalty. (AOB 309-313.)

The United States Supreme Court has found that California's requirement of a special-circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by appellant that California's death penalty law contains so many special circumstances that it fails to perform the narrowing function required under the Eighth Amendment or that the statutory categories have been construed in an unduly expansive manner. (*People v. Avila, supra,* 38 Cal.4th at p. 614; *People v. Huggins, supra*, 38 Cal.4th at p. 254; *People v. Crew,* (2003) 31 Cal.4th 822, 860; *People v. Yeoman* (2003) 31 Cal.4th 93, 164; accord *People v. Pollack*, *supra*, 32 Cal.4th at p. 1196; *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Bolden* (2002) 29 Cal.4th 515, 566; see also *People v. Burgener* (2003) 29 Cal.4th 833, 884 ["Section 190.2, despite the number of special circumstances it includes, adequately performs its constitutionally required narrowing function."]; *People v. Kraft* (2000) 23 Cal.4th 978, 1078 ["The scope of prosecutorial discretion whether to seek the death penalty in a given case does not render the law constitutionally invalid."].) Appellant's claim must be rejected.

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

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

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

Appellant contends the death penalty is invalid because section 190.3, factor (a), as applied allows arbitrary and capricious imposition of death in

violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 313-319.) Specifically, appellant contends factor (a) has been applied in a "wanton and freakish" manner that almost all features of every murder have been found to be "aggravating" within the meaning of the statute. (AOB 313.) The issue is without merit.

The United States Supreme Court has specifically addressed the issue of whether section 190.3, factor (a), is constitutionally vague or improper. In *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2360, 129 L.Ed.2d 750], the Supreme Court stated:

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

(*Id.* at p. 976.)

This Court recently held in *People v. Guerra, supra,* 37 Cal.4th at p. 1165, that "Section 190.3, factor (a), is neither vague nor overbroad, and does not impermissibly permit arbitrary and capricious imposition of the death penalty." Indeed, this Court has consistently rejected this claim and followed the ruling by the Supreme Court. (See, e.g., *People v. Smith, supra*, 35 Cal.4th at p. 373; *People v. Brown, supra,* 33 Cal.4th at p. 401; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1053.) There is no need for this Court to revisit the issue.

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

Appellant also contends California's death penalty statute contains no

safeguards to avoid arbitrary and capricious sentencing and therefore violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. He raises numerous sub-claims in support of this claim. (AOB 320-352.) All of these claims are without merit.

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

Appellant asserts his death sentence violates the Eighth and Fourteenth Amendments for the following reasons: (1) because his death sentence was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors, appellant's constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of the death penalty was violated (AOB 321-335); (2) the penalty jury was not instructed that it could impose a death sentence only if it was persuaded beyond a reasonable doubt that the aggravating factors outweighed the mitigating factors and that death was the appropriate penalty (AOB 336-339); (3) even if proof beyond a reasonable doubt was not constitutionally required for finding (a) that an aggravating factor exists, (b) that the aggravating factors outweigh the mitigating factors, and (c) that death is the appropriate sentence, then proof by a preponderance of the evidence is constitutionally compelled as to each such finding (AOB 340-341); (4) some burden of proof is required at the penalty phase in order to establish a tie-breaking rule and ensure even-handedness (AOB 341-342); and (5) even if a burden of proof is not constitutionally required, the trial court erred in failing to instruct the jury to that effect (AOB 342-343). Appellant's contentions are without merit, because this Court has previously rejected them.

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

Appellant argues, however, that this Court's decisions are invalid in light of *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348; 147 L.Ed.2d 435]. (AOB 321-329.) This Court has considered and rejected appellant's argument by finding that neither *Ring* nor *Apprendi* affect California's death penalty law. (*People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Martinez* (2003) 31 Cal.4th 673, 700; *People v. Cox* (2003) 30 Cal.4th 916, 971-972; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 271-272.) The same is true as to *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]. (*People v. Monterroso, supra,* 34 Cal.4th at p. 796; *People v. Morisson* (2004) 34 Cal.4th 698.)

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

Appellant maintains California law violates the Sixth, Eighth, and Fourteenth Amendments by failing to require that the jury base any death sentence on written findings regarding aggravating factors. (AOB 343-346.) This Court has held, and should continue to so hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Avila*, *supra*, 38 Cal.4th at p. 614; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Bolden, supra*, 29 Cal.4th at p. 566; *People v. Hughes*, *supra*, 27 Cal.4th at p. 405; *People v. Welch*, *supra*, 20 Cal.4th at p. 772.) The above decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 1441, 108 L.Ed.2d 725].)

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

Appellant contends the failure of California's death penalty statute to require intercase proportionality review violates their Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (AOB 346-350.) Appellant's point is not well taken. Intercase proportionate review is not constitutionally required in California (*Pulley v. Harris, supra,* 465 U.S. at pp. 51-54; *People v. Wright* (1990) 52 Cal.3d 367, 448-449), and this Court has consistently declined to undertake it (*People v. Avila*, *supra*, 38 Cal.4th at p. 615; *People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Lenard* (2004) 32 Cal.4th 1107, 1131).

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

Appellant argues the trial court erred in failing to label the factors as aggravating and/or mitigating, thus precluding a fair, reliable, and evenhanded administration of the capital sanction. (AOB 351-352.) He is wrong.

Sentencing factors are not unconstitutional simply because they do not specify which are aggravating and which are mitigating. (*People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Crew, supra*, 31 Cal.4th at p. 860.) As this Court has stated, "the trial court's failure to label the statutory sentencing factors as either aggravating or mitigating [i]s not error." (*People v. Williams* (1997) 16 Cal.4th 635, 669.)

In addition, the United States Supreme Court has held that "[a] capital sentencer . . . need not be instructed how to weigh any particular fact in the capital sentencing decision." (*Tuilaepa v. California, supra,* 512 U.S. at p. 979.) Thus, the trial court is not constitutionally required to instruct the jury that certain sentencing factors are relevant only in mitigation. (*People v. Kraft, supra*, 23 Cal.4th at pp. 1078-1079.) Accordingly, "[a]lthough [labeling the factors] would be a correct statement of law [citation], a specific instruction to that effect is not required, at least not until the court or parties make an improper or contrary suggestion." (*People v. Livaditis* (1992) 2 Cal.4th 759, 784; see also *People v. Carpenter* (1997) 15 Cal.4th 312, 420 [although some factors may be only aggravating or mitigating, because it is self-evident, the trial court need not identify which is which]; *People v. Samayoa* (1997) 15 Cal.4th 795, 862 ["[t]he jury need not be instructed as to which sentencing factors are aggravating and which are mitigating"].) Under this well-established authority, the trial court properly instructed the jury.

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

Appellant claims the absence of intercase proportionality review at trial or on appeal violates his rights to equal protection of the law under the Fourteenth Amendment to the United States Constitution. Appellant maintains it is unfair to afford non-capital inmates such review under former section 1170, subdivision (f), of the Determinate Sentencing Law, but not to allow such review to capital defendants. Appellant acknowledges that this Court rejected this claim in *People v. Allen* (1986) 42 Cal.3d 1222. (AOB 355-358.)

This Court, however, has consistently rejected the claim that equal protection requires that capital defendants be provided with the same sentence review afforded felons under the determinate sentencing law. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1165; *People v. Manriquez* (2005) 37 Cal.4th 547, 589; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Harris, supra,* 37 Cal.4th at p. 366; *People v. Cox, supra,* 30 Cal.4th at p. 970; *People v. Lewis, supra,* 26 Cal.4th at p. 395; *People v. Anderson, supra,* 25 Cal.4th at p. 602; *People v. Ramos* (1997) 15 Cal.4th 1133, 1182.) As aptly noted by this Court in *People v. Cox* (1991) 53 Cal.3d 618, 691:

> . . . [I]n *People v. Allen, supra*, 42 Cal.3d 1222, we rejected "the notion that equal protection principles mandate that the 'disparate sentencing' procedure of section 1170, subdivision (f) must be extended to capital cases." (*Id.* at pp. 1287-1288.) Section 1170, subdivision (f), is intended to promote the uniform-sentence goals of the Determinate Sentencing Act and sets forth a process for implementing that goal by which the Board of Prison Terms reviews comparable cases to determine if different punishments are being imposed for substantially similar criminal conduct. (42 Cal.3d at p. 1286.) "*[P]ersons convicted under*

the death penalty are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act and accordingly cannot assert a meritorious claim to the 'benefits' of the act under the equal protection clause [citations]." (*People v. Williams, supra*, 45 Cal.3d at p. 1330, emphasis added.)

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

E. International Law

Appellant asserts California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency and violates the Eighth and Fourteenth Amendments. (AOB 360-363.) This claim was specifically rejected in *People v. Ghent* (1987) 43 Cal.3d 739, 778-779 (discussing the 1977 death penalty statute). Moreover, the use of the death penalty in California does not violate international norms where, as here, the sentence of death is rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Hillhouse, supra*, 27 Cal.4th at p. 511; see *People v. Avila, supra,* 38 Cal.4th at p. 615; *People v. Perry* (2006) 38 Cal.4th 302, 321; *People v. Guerra, supra,* 37 Cal.4th at p. 1164; *People v. Bolden, supra,* 29 Cal.4th at p. 567.) Appellant does provide reason for this Court to revisit the issue here, and thus, it should be rejected.

CONCLUSION

Accordingly, for the reasons stated, respondent respectfully asks this Court to affirm appellant's judgment of conviction and death sentence.

Dated: April 5, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 64624 words.

Dated: April 5, 2007

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **THE PEOPLE v. ROGER HOAN BRADY** Case No.: **S078404**

I declare:

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

On **April 6, 2007**, I served the attached **RESPONDENT'S BRIEF (Capital Case)** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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The Hon. STEPHEN E. O'NEIL, Judge

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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 **April 6, 2007**, at Los Angeles, California.

Felipe P. Andaya
Declarant

Signature

NPH:fpa
LA1999XS0018