IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

PHILIAN EUGENE LEE,

Defendant and Appellant.

S080550

CAPITAL CASE

Riverside County Superior Court No. CR67398
Christian F. Thierbach, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The Riverside County District Attorney filed an information on July 3, 1996, charging appellant, Philian Eugene Lee (Lee), with murdering Mele Kalani Kekaula on February 22, 1996, in violation of Penal Code section 187, during the commission or attempted commission of rape within the meaning of Penal Code section 190.2, subdivision (a)(17)(iii). Lee was alleged to have personally used a firearm, to wit, a pistol, in violation of Penal Code section 12022.5, subdivision (a) and section 1192.7, subdivision (c) (8), during the commission of that crime. (1 CT 21-22.)

A jury was impaneled on April 6, 1999, and the presentation of the guilt phase evidence commenced on April 7, 1999. (40 CT 10829-10830.) On April 21, 1999, the jury found Lee guilty of murder in the first degree. (40 CT 10861.) The jury found the allegation that Lee personally used a firearm during the commission of the offense was true. (40 CT 10860.) The jury also found the special circumstance allegation that Lee committed the murder during the commission of the crime of attempted rape was true. (40 CT 10862.)

The penalty phase of the jury trial commenced on April 26, 1999. (40 CT 10878.) On May 5, 1999, the jury found the appropriate sentence to be death. (40 CT 10943.) On July 9, 1999, the trial court denied Lee's motion to modify the jury's penalty phase verdict as well as his motion for a new penalty phase trial and imposed a sentence of death. (41 CT 11034-11035.)

STATEMENT OF FACTS

A. GUILT PHASE

1. Prosecution's Case

In the early morning hours of February 22, 1996, Lee shot and killed 17-year-old Mele Kalani Kekaula in Moreno Valley in Riverside County. The facts and circumstances surrounding her murder are detailed below.

On the morning of February 22, 1996, a jogger discovered a body in the vicinity of a water tower located near the eastern end of Cactus Avenue, just past Redlands Boulevard, in Moreno Valley, California. The body, which appeared to be of a Black female teenager, was clad in a T-shirt, panties, socks, and a Pendleton-type of jacket. The young woman's body was on its back and she appeared to have been shot. A significant amount of blood and powder burns were visible on her face. (IX RT 1670-1675; X RT 1832.)

Homicide Detective Dave Fernandez of the Riverside County Sheriff's Department arrived at the Cactus Avenue location at approximately 10:30 that morning. While he was at the scene, Detective Fernandez received notification about a potential witness to the homicide who was at the Riverside County Juvenile Probation Office. Detective Fernandez and Detective Michelle Amicone went directly to the Probation Office where they were met by Probation Officer Richard Olivares. Olivares introduced the detectives to 18-

year-old Devin Bates (Devin) and his parents. (VIII RT 1437, 1441; XII RT 2147-2149.) Devin's probation officer was not in the office that day so Olivares, who was the officer of the day in the juvenile building, spoke with Devin. Olivares observed that Devin was visibly upset, was pacing, wringing his hands, and had tears in his eyes. After hearing what Devin had to say, Olivares called the Moreno Valley Police Department. (VIII RT 1431-1436.) The two detectives took Devin to the Moreno Valley Police Department for a tape recorded interview. During the interview, Detective Fernandez noticed that Devin was visibly upset. (XII RT 2149-2150.)

On the night of Wednesday, February 21, 1996, Devin had been "hanging out" at his home with three of his friends, Zachary, Marquis, and Danyell, when he received a telephone call from another friend named Jarrod Gordon (Jarrod). As a result of that call, the four young men drove to Jarrod's house in Zachary's Ford Taurus. (VIII RT 1441-1443.)

Jarrod lived with his great-aunt, Martina Carpenter, on Ellis Avenue in Perris. In February of 1996, Jarrod was unable to walk due to a gunshot wound he had suffered to his back about a month earlier and he needed a wheelchair to get around. Jarrod was also wearing a full body brace and braces on both of his legs. Mrs. Carpenter was helping Jarrod with his rehabilitation and took him to physical therapy in Loma Linda every Tuesday and Thursday morning. (IX RT 1686-1688.) Mrs. Carpenter had also just helped Jarrod acquire a platinum gray, four-door Nissan Sentra. Jarrod was almost 18 years old and was due to inherit some money from his late grandfather. Mrs. Carpenter purchased the car and took title to it in her own name, but it was intended to be Jarrod's car and Jarrod was to repay her when he received his money. (IX RT 1687.)

Devin and his three friends arrived at Jarrod's house around 7:00 p.m., ostensibly to take Jarrod to the movies. They did not go into the house, but

Mrs. Carpenter did speak to Devin, whom she had met before. Devin showed her what she believed was a driver's license. Mrs. Carpenter gave Devin permission to drive the Sentra, and specifically told Devin that Jarrod was in no condition to drive himself. (IX RT 1689-1690.) Devin had given everyone the impression that he had a driver's license, but he actually only had a learner's permit. (VIII RT 1518; IX 1565.)

When they left Jarrod's house, Devin and Jarrod were in Jarrod's new Sentra and they had Jarrod's wheelchair in the trunk. The other three young men were in the Taurus. However, instead of going to a movie as Mrs. Carpenter had been told, they went to the residence of a very good friend of Jarrod's in Moreno Valley. Jarrod gave Devin directions to the house. (VIII RT 1445-1449.) When Devin was introduced to Jarrod's friend, the man told Devin his name was "Point Blank." Devin identified defendant Lee in the courtroom as the man who said his name was Point Blank. (VIII RT 1448.)

Devin estimated they arrived at Lee's house around 10:00 or 11:00 that night. They stayed at the house for about an hour, then they left to drive around some more and possibly pick up some females. Devin continued driving the Sentra with Jarrod in the front passenger seat, and, this time, with Lee in the back seat. (VIII RT 1450-1452.) The other three young men were following them in the Taurus. At the intersection of Fir and Perris in Moreno Valley, the Taurus was in an accident with another vehicle. Devin stopped the Sentra and made sure everyone involved in the accident was all right. It seemed to Devin that the night was over because the Taurus had been disabled by the collision, so he expressed his desire to go home. Devin said it was then that Jarrod suggested visiting a girl named Mele who lived less than three blocks away.[1/] (VIII RT 1453-1457.)

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1. According to Jarrod, Mele had paged him before the accident with the Taurus occurred. (X RT 1793-1794.)

Jarrod directed Devin to Mele's house and they parked in the driveway. While they waited in the car, Jarrod talked about how he had been sexually intimate with Mele less than two days earlier. (IX RT 1577-1578.) Devin knew Mele and was aware of a rumor circulating at school about Mele possibly having the AIDS virus. Because of that rumor, Jarrod said he had worn two condoms when he had sex with her. (IX RT 1580-1581.) Jarrod then passed out some condoms. Devin took one condom, even though he did not intend to have sex with Mele. Devin did not know how many condoms Lee took, but he saw Lee take at least one. (VIII RT 1457-1460.)

When Mele finally came out of the house, she talked to Jarrod and greeted Devin. Devin did not know if Mele knew Lee or not, and, by the time of trial, did not recall if Mele and Lee were introduced to each other.[2/] Jarrod asked Mele to go with them and Mele accepted his invitation. Mele returned the house for a minute, then she came back out wearing sweat pants, white sneakers, and a Pendleton shirt or jacket. It was after midnight and Mele said she wanted to get back before her mother got home. Mele got into the back seat of the Sentra, on the driver's side. (VII RT 1461-1464.)

Devin started driving around and Lee suggested some lookouts where they could get a view of the valley. Lee provided directions to a lookout off of Pigeon Pass road. (VIII RT 1465.) While they were there, Jarrod fired a handgun that belonged to Lee up into the air. (IX RT 1593.) They stayed at that lookout for about 20 minutes, then they drove back towards Moreno Valley and stopped at a grocery store on Perris Boulevard. They all went into the store, and Mele pushed Jarrod around in his wheelchair. Devin bought something to eat and Jarrod got a bottle of alcohol. Devin was not sure what kind of alcohol it was, but he knew it was hard liquor and thought it might have

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2. Devin testified on April 7th and 8th, 1999, which was more than three years after Mele's murder.

been some kind of Bacardi. Devin estimated the bottle was 12 to 15 inches tall. (VIII RT 1466-1470.)

Because he was driving, Devin did not drink any of the alcohol, but Jarrod, Mele, and Lee did. With no specific destination in mind, they headed towards San Bernardino on the 91 freeway. After they got to San Bernardino, they turned around and headed back towards Riverside. (VIII RT 1471-1473.) They stopped at a gas station near the freeway and Mele took over driving. Devin sat where Mele had been sitting, i.e. in the back seat on the driver's side. As they drove, Devin could see Jarrod and Mele kissing each other and Jarrod was leaning over towards Mele from the front passenger seat. Jarrod was leaning over towards Mele during the entire 45 minutes or so that she drove the car. (VIII RT 1474-1475.)

They stopped at another gas station where Mele got out of the car to use the restroom. (VIII RT 1477.) While she was gone, Jarrod told Devin and Lee that he had his hand down Mele's pants and had been "finger banging" her while she was driving. (IX RT 1597.) Lee then said, "Man, that's nothing. I also done that." (IX RT 1598.) When Mele returned to the car, Devin resumed driving and Mele again sat in the rear passenger seat. (VIII RT 1478-1479.) As they were driving thorough Moreno Valley, Mele and Lee suggested going to another lookout area off of Cactus Avenue. (VIII RT 1479, 1481.) Lee gave Devin directions to the lookout. They drove down Cactus Avenue towards Perris Lake and stopped at the very end of the street near a water tower. (VIII RT 1482-1484.) Devin turned the car around and parked along the side of the road. (VIII RT 1486.)

While they were at the Cactus Avenue lookout, Jarrod, Mele, and Lee continued to drink alcohol. (VIII RT 1483.) They discussed the rumor about Mele having AIDS. Mele said it was not true and that the rumor had been started by females who were jealous of her because of how attractive she was.

(IX RT 1647-1648.) When they first arrived at the lookout, Mele was slurring her words, but, as she continued to drink, she started showing more signs of being intoxicated. Devin described her as "being incoherent, out of it completely. Not passed out, but not aware of her surroundings." (VIII RT 1487-1488.) Mele and Lee both vomited outside of the car, so Devin moved the car about 20 yards down the road, away from the water tower. (VIII RT 1491-1492; IX RT 1671-A.) After Devin moved the car down the road, Mele got out of the car and fell down. She called to Devin for assistance. Devin got out of the car and helped her into the back seat on the driver's side of the car. Devin said "she sort of plopped down as if she was tired," and "slumped down on the seat, then positioned herself towards her back, laying on her back." The rear driver's door was still open and Mele's legs were hanging out of the car. While Devin had been out of the car to help Mele, Jarrod slid from the front passenger seat to the driver's seat, so Devin sat in the front passenger seat. (VIII RT 1493-1497.)

From the front passenger seat, Devin could see Lee standing near Mele's legs. He saw Lee fondling Mele and touching her breasts. He could not see that well, but he thought Lee's hands were underneath Mele's clothing. Mele was not saying anything. Devin said at that point, "she was, if not completely out of it, very close to." (VIII RT 1498-1499.) Then Lee removed Mele's shoes and pants and threw them into the front seat. Lee made a comment about having his "gym hat" on, which Devin understood to mean that Lee was wearing a condom.[3/] Lee's pants were down about six inches below his waist, like "how a plumber has his pants." Lee also said he was "about to get it," or "get some." (VIII RT 1499-1501.) Devin had not actually seen Lee put on a

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3. According to Jarrod, Lee said he had on his "Jimmy hat." (X RT 1756.)

condom, but he had heard the sounds of a zipper and some sort of package being opened. (IX RT 1634.)

Devin saw Lee get on top of Mele, straddling her, and he began moving his hips as if he was having sex. According to Devin, Mele did not say or do anything for at least three minutes, then "she snapped out of it and forced him off of her." (VIII RT 1502-1503.) While Lee was still on top of Mele, Mele said they were mistaking her for a whore. (IX RT 1656.) Lee said "' -- you mistakin' me. You mistakin' me.'" Lee also said something along the lines of, "'you know what we came up on the hill for.'" (XII RT 2162.) According to Jarrod, after Mele told Lee to get off of her and pushed him with her hands, Lee "didn't get right off." (X RT 1806.) After Mele finally managed to push Lee off of her, she said something to the effect of, "'What do you guys take me for? Do you think I'm a toss up whore or something?'" Devin described Mele's tone at that moment as being "[a]lmost in a fit of rage, as if she was disgusted by what was going on." (VIII RT 1504.) According to Jarrod, right after Mele pushed Lee off of her, he got out of the car. (X RT 1807-1808.) According to Devin, Lee and Mele both sat in the back seat, with both back doors open (XII RT 2162), and Mele "was sort of primping herself." Devin looked back at her as if to say, "I'm not the one." (VIII RT 1505.) Devin turned on the done light, but Lee turned it back off and "said he was going to straighten her out." (IX RT 1657.) Mele continued to say things and was "[v]ery angry and upset." (VIII RT 1507-1508.)

After Lee got out of driver's side of the car, he walked around the car to the back passenger side door where Mele was sitting and pulled her out of the car by her arms. (VIII RT 1508-1510.) Mele did not want to get out of the car and resisted. After Lee pulled Mele from the car, she fell to her knees as Lee held her by her forearms. (VIII RT 1510-1512.) While Lee was outside of the car, Jarrod said, "We're just going to leave her here." (IX RT 1553.)

Devin and Jarrod could hear Lee and Mele talking towards the rear of the car, but they could not hear what was being said. Then Devin heard Lee raise his voice and say something like, "Is that it? Is that how it was gonna be?" (VIII RT 1512-1513.) Jarrod recalled hearing Lee say, "It's like that, huh?" (X RT 1766.) Lee wrapped his left arm around Mele's neck. As she was facing him with the crook of his arm behind her neck, Lee pulled his handgun from his back pocket, put it to Mele's forehead, and pulled the trigger. Mele fell to the dirt shoulder of the road, motionless. (VIII RT 1513-1515.) Lee then straddled Mele's head with his feet, held the gun within six inches of her face, and fired six or seven more times. There were no pauses between the shots. (VIII RT 1516.)

Lee ran to the car and got into the back seat. Devin asked Lee why he had done that, but Lee only said,"Drive." Despite his physical condition, Jarrod, who was still in the driver's seat, managed to drive the Sentra down Cactus Avenue to the first intersection, then Lee said that Devin should drive because he was sober. (VIII RT 1516-1518.) Jarrod asked Lee if he was sure she was dead, but Lee did not respond. (IX RT 1658.) Jarrod also asked a question to the effect of, "So is that why they call you Point Blank?" Lee did not respond to that question either. (IX RT 1659.) Lee's demeanor was calm. (VIII RT 1519.) At some point, Lee started singing "almost like verses of rap music, like making gestures towards what he had just done." Devin described it as, "Sort of like giving himself praise." Devin was not sure of exactly what Lee said because Lee was "making it up as he went along." Devin recalled that Lee's rap song was about how "he had to do what he done because he didn't get his nut off." (VIII RT 1520.) Lee also said something about how, "'They're never gonna really have to make a rap about my name being Point Blank.'" (IX RT 1659.)

According to Jarrod, Lee's rap song went something like, "'I didn't want to shoot you, didn't want to kill you, bitch, but you wouldn't give me any pussy.'" (X RT 1775-1776.) Jarrod said those words came from a song by a rap group called The Bone Thugs. Jarrod also said that Lee claimed he did have intercourse with Mele. (X RT 1789-1790.)

As they drove, Lee and Jarrod threw Mele's clothes and the bottle of alcohol out of the car window. The bottle of alcohol was still about one-third full. (VIII RT 1520-1521.) Lee made both Devin and Jarrod swear on their mothers that they would not tell what had happened. (VIII RT 1521-1522.) Lee also said that he would take some marijuana in trade for the gun, or that he would pin the murder on someone else. (VIII RT 1522-1523.)

Devin drove the Sentra to his house. (VIII RT 1519.) After Devin got out of the car, Lee got behind the wheel drove to Jarrod's house in Perris. (X RT 1776.) It was close to 4:30 or 5:00 a.m., when Devin went into his house. Devin's parents had slept in the living room by the fireplace that night and saw him come in. He was very upset and was crying. (VIII RT 1417-1419.) He told his parents what had happened. (VIII RT 1523.) Devin was on probation and they decided to report what had happened to his probation officer. Before they left for the probation department, Devin showered and changed his clothes. He left the clothes he had been wearing on the floor of his bedroom. His parents went to the probation department with Devin. Because they arrived before the probation department opened for the day, they had to wait for the doors to be unlocked at 8:00 or 8:30. (IX RT 1540-1541.)

After Devin told a probation officer what he had witnessed, the police were called and Devin was taken to the Moreno Valley Police Department later that morning where he was interviewed at length. He spoke to the detectives until almost midnight. (VIII RT 1421-1427.) Devin consented to the search of his bedroom at his home on Day Street in Mead Valley. (XI RT 1893.) Black

denim pants and the Adidas sneakers Devin had worn that night were collected from the floor of his bedroom. A sealed Trojan condom was found inside one of the pant pockets. (XI RT 1893-1897.)

In the course of interviewing Devin on February 22, 1996, Detective Fernandez and Detective Gary Thompson drove Devin around Moreno Valley and Perris. Devin pointed out the house where Jarrod lived. He also pointed out the house where Mele lived on Fir Avenue. The location of Mele's house was, in part, how her body was officially identified that day and led to the notification of her family about her death. (XI RT 1949-1950.)

Jarrod's great aunt, Mrs. Carpenter, had seen the Sentra pull into the driveway at about 4:00 a.m. Mrs. Carpenter opened the door and saw Jarrod and Lee. She had been introduced to Lee several weeks earlier. Even though Lee was not the same person she had permitted to drive the car earlier, Mrs. Carpenter thanked him for driving Jarrod home and asked where the other car was with their friends to take him home. There was no other car. Jarrod said something about having car trouble, then he and Lee both laid down on Jarrod's bed and slept in their clothes. (IX RT 1690-1693.)

Jarrod was not sure about what had really happened. While they were in his room, Jarrod said something to Lee about wondering if Mele was really dead. Lee responded, "Yes." Lee said he knew Mele was dead because, "'If the first bullet didn't get her, the second one did, if the second bullet didn't get her, the third one did.'" (X RT 1778-1779.) Lee also described to Jarrod what he had seen as he shot Mele. Jarrod said, "He just said he seen her face. He said he seen her face, pieces of her face coming off and stuff." (X RT 1781.)

Mrs. Carpenter woke them around seven because she had to get Jarrod to physical therapy by 9:00 a.m. Lee directed them to his house in Moreno Valley and they dropped him off on their way to Loma Linda. (IX RT 1693-1694.) That night, some police officers arrived at the house to talk to Jarrod.

Jarrod initially denied being present when Mele was killed. (X RT 1782-1783.) Jarrod explained he had been concerned about the safety of his family and himself because Lee knew where he lived and was still out of custody. (X RT 1773, 1783.) Jarrod did go with the detectives that night to be interviewed. (X RT 1783.)

2. The Search Of Lee's Residence and Lee's Surrender

A search warrant was executed at Lee's residence at 15095 Wintergreen Court in Moreno Valley at 12:30 a.m. on February 23, 1996, but Lee was not present. (X RT 1899-1901.) According to Lee's girlfriend, Khristina Wisdon, who lived with Lee at the Wintergreen Court residence, Lee had called the house at approximately 7:00 on the morning of February 22, 1996, and told her to unlock the front door so he could get in. He said he was at the house of one of Jarrod's relatives. (VIII RT 1394-1401.) When Lee got home, he was wearing the same clothing he had been wearing when he went out the night before. Lee took off his pants and went to bed. Wisdom washed the pants, but she did not check all of the pockets. (VIII RT 1402-1403.) Investigators found a large pair of blue Dickie brand trousers that belonged to Lee inside the dryer when they searched the house. They also found a sealed Trojan condom in the dryer. (X RT 1899-1901.) Wisdom and Lee never used condoms. (VIII RT 1412-1414.)

According to Wisdom, Lee often carried a small handgun in the pocket of his jacket. (VIII RT 1405-1406.) She had last seen the gun a week or two before she was interviewed by investigators. It was in one of Lee's pant pockets. (VIII RT 1406-1407.)

While they were executing the search warrant, Deputy David Topping gave Lee's brother, Lenier, his pager number and said Lee would not be harmed if he turned himself in to authorities. About two hours later, Deputy Topping was paged. When Deputy Topping spoke to Lenier by telephone, Lenier told

him Lee was willing to turn himself in. Deputy Topping subsequently met them at the Moreno Valley Police Station and Lee was taken into custody. No weapons were recovered. (IX RT 1678-1683.)

3. The Crime Scene

Cactus Avenue terminated at its eastern end in a dirt access road to a water tower. (X RT 1908.) The paved road ended approximately 265 feet east of the location of Mele's body. (X RT 1923-1924.) Shoe impressions were observed in the dirt. (X RT 1860.) Six empty .22 caliber shell casings were found near Mele's body. Each of the casings were stamped on the bottom with the letter "C." (X RT 1836-1838.) Five more spent .22 caliber casings were found along the road approximately 30 yards east of Mele's body. Additionally, one unspent .22 caliber bullet was found about seven yards north of the location of the five empty casings. Like the spent casings found near Mele's body, the bottom of each of spent casings and of the live bullet found down the road were stamped with the letter "C." (X RT 1847-1850, 1853.) Near the location of the five spent casings was an amount of fluid that appeared to be vomit. More of what appeared to be vomit was found about five yards away in the direction of Mele's body. (X RT 1854-1855.) The area was thoroughly searched for a gun, but none was found. (X RT 1856.)

The spent casings and the live bullet were examined by a criminalist. All of the casings and the unspent bullet were manufactured by a company called CCI, that stamps the bottom of their bullets with the letter "C." (X RT 1871-1872.) A microscopic comparison of the striations on the casings established that all of the casings had been fired by the same firearm. (X RT 1873.) Based upon the evidence, the criminalist was of the opinion that the casings had been fired from a semi-automatic handgun. (X RT 1874.) A description of the gun by a witness as having a hinged loading mechanism on top suggested the murder weapon was a .22-caliber, semi-automatic Beretta

handgun, which holds eight rounds when fully loaded. That handgun is capable of being fired in two ways, by first pulling the hammer into the cocked position then pulling the trigger, or by simply exerting more pressure on the trigger. (X RT 1875, 1879-1880.)

Jarrod's Sentra and residence were also searched, but no gun was found. (X RT 1860, 1862.) The Sentra was processed for fingerprints. Prints from Devin Bates were found on the top of the trunk lid. (X RT 1915-1918.) Partial palm prints belonging to Lee were found on the outside of the driver's side of the trunk lid, on the outside of the rear quarter-panel on the passenger side of the car, and on the frame of the rear passenger door. (X RT 1919-1922, 1932-1933.)

The gun that fired the bullets that killed Mele was never found. (X RT 1863.)

4. Autopsy Of Mele Kalani Kekaula

Forensic pathologist Robert Ditraglia conducted the post mortem of Mele's body on February 26, 1996. (XI RT 1973, 1975.) Mele was five feet, three inches tall and weighed 152 pounds at the time of her death. (XI RT 1978.) As part of his usual practice, Dr. Ditraglia examined X-rays of the body before performing the autopsy. X-rays of front and side views of Mele's head depicted multiple projectiles, and fragments of projectiles, inside the skull. In all, Dr. Ditraglia observed seven separate bullet wounds to Mele's head. (XI RT 1977-1979.) Beginning at the top of the body and working down, Dr. Ditraglia assigned a number to each of the bullet wounds. (XI RT 1981-1982.)

Gunshot wound No. 1 was located on the upper right of Mele's forehead. (XI RT 1984.) Gunshot wound No. 1 was a contact wound to the forehead. Due to the characteristics of the head, particularly the flat surface of the forehead, when a gun is put against the head and discharged, the smoke and gunpowder are unable to be released into the air and are instead forced between

the skin and the skull creating a characteristic star-shaped entrance wound. (XI RT 1990-1991.) Compared to the size of the other entrance wounds, wound No. 1 was largest at three centimeters in diameter, or more that one inch, which, along with the discoloration around the edge of the skin, was also consistent with being a contact wound. (XI RT 1992.) The bullet that caused wound No. 1 perforated the skull and was recovered from the brain. (XI RT 2000.) Gunshot wound No. 1 was inflicted before death. (XI RT 2002.)

Gunshot wound No. 2 was located in the center of Mele's left cheek, just below her eye. (XI RT 1984, 1987.) The bullet perforated the left cheek bone at an upward angle of 50 degrees, passed through the left eye socket, and entered the brain where it was recovered by Dr. Ditraglia. Gunshot wound No. 2 was inflicted before death. (XI RT 2002-2003.)

Gunshot wound No. 3 was located just left of the middle of Mele's lower lip. (XI RT 1984, 2004.) The bullet traveled through the roof of the mouth and the base of the skull and entered the right side of the brain where it was recovered by Dr. Ditraglia. This wound was also inflicted prior to death. (XI RT 2004.) According to Dr. Ditraglia, wound Nos. 1, 2 and 3 were all fatal gunshot wounds. (XI RT 2004-2005.)

Gunshot wound No. 4 was located just to the right of wound No. 3, towards the right side of Mele's lower lip. (XI RT 1984.) The bullet entered slightly to the right of the midline of the lower lip, fractured teeth on the upper right side of the jaw, and exited Mele's body through the right cheek near the corner of her right eye. Gunshot wound No. 4 was also inflicted prior to death. (XI RT 2005.)

Gunshot wound No. 5 was located to the right of wound No. 4, near the lower corner of the right side of Mele's mouth. (XI RT 1984-1985.) The trajectory of that bullet was essentially "straight into the corner of the mouth" and into the right side of the lower jaw. That bullet caused multiple broken

teeth on the lower right side of the jaw and was recovered in fragments from the inside of the mouth. Wound No. 5 was inflicted before Mele died. (XI RT 2007.)

Gunshot wound No. 6 was also located near the lower left corner of Mele's mouth. (XI RT 1985.) The trajectory of this bullet was at an upward, 45 degree angle. The bullet damaged some of the teeth on the lower jaw and lodged in the roof of the mouth were it was recovered, in a distorted condition, by Dr. Ditraglia. (XI RT 2008.)

Gunshot wound No. 7 was located on the left side of Mele's chin. (XI RT 1985.) The bullet traveled in a slightly upward direction through the chin, left lower jaw, and the back of the mouth cavity. Dr. Ditraglia recovered that bullet from the back of Mele's throat. Gunshot wound No. 7 was also inflicted prior to Mele's death. (XI RT 2009-2010.)

All of the wounds were consistent with a small caliber handgun like a .22. (XI RT 2010.) Dr. Ditraglia opined that gunshot wound No. 7 was inflicted while the gun barrel was within a few inches of Mele's skin based upon the amount of gunshot powder tattooing visible around wound No. 7. (XI RT 2008-2009.) Wound Nos. 2, 3, 4, 5, and 6 all showed variable amounts of powder tattooing. However, because these wounds were clustered so close to each other, it was difficult to separate the powder tattooing of one from the others. (XI RT 2009.)

The cause of Mele's death was gunshot wounds to the head. (XI RT 2023.) Gunshot wound No. 1 was consistent with a person of Lee's height holding a person of Mele's height with an arm around her neck, tilting her head slightly, and putting a .22 caliber handgun against her forehead and pulling the trigger. The remaining gunshot wounds were consistent with a person firing a handgun in close proximity to Mele's face as she lay supine on the ground. (XI RT 2023-2024.)

Evidence was gathered for a sexual assault kit and a blood sample was taken from Mele's body. (XI RT 2021.) Dr. Ditraglia observed no physical evidence of a sexual assault (XI RT 2025-2030), nor did he observe any trauma to Mele's breast or genital areas. (XI RT 2030-2032).

There were two crescent shaped bruises that looked like the letter "C" next to each other on Mele's upper left arm, between the shoulder and elbow. (XI RT 2013.) Dr. Ditraglia described the two bruises as being "almost mirror images to each other." (XI RT 2045.) The bruises were each four centimeters, or more than an inch and a half, in greatest dimension and were caused by "a significant degree of force." (XI RT 2019-2020.) There was a smaller contusion on Mele's lower left arm that could have been caused by someone grabbing and pulling her by her arms. (XI RT 2020.) There was also a bruise on the outside of Mele's right knee. (XI RT 2015-2016.) All of the bruises were sustained while Mele was alive. (XI RT 2016.) Dr. Ditraglia's closest estimate was that Mele sustained the bruises within 24 hours of her death. (XI RT 2035.)

5. Defense Evidence

The sole witness called by the defense during the guilt phase of trial was a criminalist who analyzed a sample of blood taken from Mele's body. At the time of her death, Mele had blood alcohol content of .14 %. (XIII RT 2219-2222.)

B. PENALTY PHASE

1. Prosecution's Case

a. Prior Bad Acts Evidence

In 1992, Riverside County Deputy Sheriff George Stanley was assigned as a school resource officer at the Moreno Valley High School. Stanley, who

was in uniform, was called to assist with a student who was on campus when he was not supposed to be. Stanley identified Lee as having been that student. In February of 1992, when Lee would have been 14-years-old[4/], Lee was approximately 6'1" tall and weighed about 200 pounds. (XIV RT 2461-2462.) Deputy Stanley asked Lee to leave the campus, but Lee refused to do so until he spoke to his brother and started to walk away. When Deputy Stanley grabbed Lee's arm and told Lee he could be arrested for trespassing, Lee pulled away and said if he was touched again he would start swinging. When Lee again began to walk away, Deputy Stanley grabbed his arm and Lee began to struggle. With the assistance of two other men, the dean of students and the campus supervisor, Kenneth Kupchunos, Deputy Stanley wrestled Lee to the ground and handcuffed him. During the struggle, Kupchunos was hit on side of his face. (XIV RT 2463-2466, 2475.)

On October 23, 1992, 13-year-old Josh Hill, and his 11-year-old brother, Jesse, were riding their bicycles to the Badger Springs Middle School in Moreno Valley when they saw two older boys ahead of them. The brothers recognized the two older boys and attempted to avoid them by taking a different route, but they "were stopped on [their] bicycles dead in [their] tracks." Lee (who was 15-years-old at the time) grabbed the handlebars of 11-year-old Jesse's bicycle, and the boy named Dante grabbed the handlebars of Josh's bicycle. Lee and Dante told the brothers to get off of their bikes. Because Lee and Dante were so much bigger than they were, Josh and Jesse got off of their bikes. Lee and Dante got on the bikes and rode them away. Josh estimated this happened just 30 to 40 feet in front of the middle school. While neither Lee nor Dante used a weapon, Josh and Jesse both saw the handle of a knife tucked into Dante's waistband or belt. (XV RT 2560-2575.) Both Josh and Jesse

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4. Lee was born on June 16, 1977. (XV RT 2664.)

identified Lee in court as having been one of their assailants. (XV RT 2564-2565, 2573.)

Norwood Jones, III, testified that on January 11, 1993, when he was 12-years-old, he and another 12-year-old friend named O'Neal Duckworth were with Lee (who was 15-years-old) in the Mountain View Apartments in Moreno Valley. Lee came up with an idea to order pizza, then attack the delivery man from behind with some sticks and take the pizza. Norwood ordered two pizzas from Pizza Hut, using his real address. (XV RT 2577-2581.) The three waited until the time they expected the delivery man to arrive, then Lee and O'Neal went to the front of the apartment complex with their sticks. Norwood stayed in the apartment and buzzed the deliveryman into the complex. When Norwood left the apartment, he saw the deliveryman carrying the pizzas, and Lee and O'Neal behind him carrying their sticks. Norwood heard the deliveryman cry out in pain. Norwood went up to the deliveryman, took the pizzas, and ran away with Lee and O'Neal. (XV RT 2577-2583.)

José Jaramillo was the pizza deliveryman that night. After he entered the apartment complex with the two large pizzas, he "got smacked on the back of the head." It was a pretty hard blow. It knocked the hat off of his head and caused Jaramillo to drop the pizzas. (XV RT 2584-2587.) Another blow to the right side of his forehead knocked him off of his feet. Jaramillo was aware of three men around him, one of whom was much larger than the other two. Two of the men were hitting him with objects. One of the objects appeared to be a broomstick. The other object was bigger than a broomstick, like the size of a bat. The larger man was using the larger weapon. Jaramillo tried to cover his head and face with his hands, but they continued to strike him. They eventually stopped hitting him after he screamed, then they picked up the pizzas and ran away. Jaramillo was covered in blood and he tried to get help from some people in the apartment complex, but they seemed afraid to open their doors or

did not have telephones. Jaramillo returned to his truck and drove himself back to Pizza Hut. Before he got to the door of the restaurant, Jaramillo collapsed and several of his co-workers rushed out to help him. They carried him into the Pizza Hut and called police. Jaramillo was taken to the Day Street Medical Clinic where he was treated. They stopped the bleeding and wrapped his whole head in bandages. When his girlfriend saw him later that night, "[s]he freaked out 'cause [he] looked pretty bad." (XV RT 2584-2594.)

On July 30, 1995, Ronald Gaither and his family were having a barbecue in the front yard of his house on Aristotle Court in Moreno Valley. Gaither was near the house with some of the smaller children, and Gaither's teenage sons and nephew were standing in the driveway with some of their friends. Because Aristotle Court is a cul-de-sac, Gaither took notice of a small gray car driving very slowly by his house in the center of the road. (XIV RT 2477-2480.) There were two people in the car. Gaither looked at the driver, an African-American male, and was struck by his gaze, which Gaither described as "Just sort of cold." The driver was looking at the male and female teenagers in the driveway near the curb. The driver turned the car around at the end of the cul-de-sac, then "hit the gas, really hard." The engine of the car was "really roaring," then the car "bolted and started coming straight for the children." (XIV RT 2480-2482, 2488.) As the car approached, all of the children ran out of its path. (XIV RT 2486.) Gaither's step-son, Walter Fuller, pushed his two or three-year-old cousin out of the path of the car and noticed that the driver was smiling. (XIV RT 2506, 2510.) Gaither's 12 or 13-year-old nephew, Joseph Scruggs, was also in the path of the on-coming car and he had to run out of its way towards the house. (XIV RT 2513-2516.) The car went up over the curb and ran into a fence in the middle of Gaither's front yard. The car stopped there for a minute, but neither the driver or the passenger said anything or made any

attempt to get out of the car before it was driven away through the next door neighbor's yard. (XIV RT 2486-2490.)

Through one of the young people who had been standing near the curb, Gaither was provided with a name and telephone number of the driver. When Gaither called the number, he asked to speak to Philian Lee. (XIV RT 2491-2494, 2509.) None of the witnesses to the event who were called to testify in the penalty phase of Lee's trial were able to identify Lee as the driver of the car. (XIV RT 2488, 2507, 2517.) The trial court took judicial notice of its file in Case No. 329002. In that case, Lee pleaded guilty to a misdemeanor charge of assault with a deadly weapon upon Joseph Scruggs. (Pen. Code, § 245, subd. (a).) The trial court advised the jury that the evidence of the plea was being admitted for the limited purpose of identifying the person involved in the barbecue incident. (XIV RT 2661-2662.)

b. Victim Impact Evidence

Mele's father, Alan Kekaula, who was Hawaiian, explained that his middle daughter's full name had been Melemanunanilanililinokalani Kekaula. "Mele" means song or chant. "Manu" means bird. "Nani" means pretty. "Lanililino" means heaven. So his daughter's name meant pretty songbird in the heavenly skies. Mele had been a typical teenager who liked to socialize with her friends, listen to music and dance. She also played the piano and clarinet. (XV RT 2601-2602.) Mele's father thought Mele's best qualities had been her loyalty to her family and her ability to look past superficial things in other people. (XV RT 2602-2603.) Mele's father thinks of his daughter every day. He still has her clothes in her closet. Her birthday was July 12th, and he thinks about her more on her birthday. Holidays like Christmas and Easter are not the same because "[y]ou're always aware that someone in the family is missing." He wears a necklace with her name on it, so he sees her name in the mirror every time he combs his hair. Seeing Cactus Avenue or the water tower

on the hill from the freeway always reminds him of what happened that night. (XV RT 2610-2612.) The thing Mele's father missed the most was talking to Mele. (XV RT 2612-2614.)

Mele's mother, Linda Kekaula, regarded Mele as a gift she had for 17 years because she thought she had miscarried Mele during the early part of her pregnancy. Like herself, Mele had been musically inclined and loved to sing. (XV RT 2615-2624.) Linda Kekaula initially refused to believe Mele was dead because the photograph shown to her by a deputy coroner did not look anything like Mele. (XV RT 2623-2625.) Linda Kekaula had to tell her two youngest children, Pua and Keoki, about Mele's death. Linda Kekaula grieved so much for Mele that she was afraid she would not be able to take care of her two younger children. She had to force herself to try to put Mele out of her thoughts. (XV RT 2626-2629.)

Mele's sister, Lisa Leilani Kekaula, was eleven years older than Mele. When Mele was about nine years old, Lisa's daughter, Twila, was born. Mele and Twila were very close to each other, more like siblings than aunt and niece. Mele liked playing the clarinet. Whenever Lisa thinks about Mele, the first thing she thinks of is that she does not have her anymore, which makes her cry. (XV RT 2634-2639.)

2. Defense Case

Lee's father, Edward Lee, testified Lee's mother smoked, drank alcohol and took valium and other prescription drugs when she was pregnant with Lee. (XV RT 2664-2670.) When Lee was born, the umbilical cord was wrapped around his neck, which obstructed the flow of oxygen to his brain. When they brought him home, he constantly cried. This went on for four or five years, until Lee started preschool. They took him to the doctor many times. The doctors prescribed some medication, but it did not seem to help. (XV RT 2675-2677.)

Lee was much bigger than his older brother (his brother was three years older than Lee). His body grew more than his head, so his head seemed to be small for his body. Lee was also a slow learner compared to his brother and other children. (XV RT 2677-2678.) Lee's father described two incidents when Lee injured his head when he was a child. Once he fell out of the car when the car door flew open during a turn. Another time he was hit on the head with a golf club by another little boy. His mother took him to the doctor both times. (XV RT 2679-2680.)

Lee's father described different kindergartens and elementary schools Lee attended from the time he was three or four years old. The reason there were so many different schools was because whenever Lee displayed aggressiveness, the teachers would tell them not to bring him back to the school. They never had any behavior or learning problems with their oldest son, Lenier, but Lee's father said he experienced behavior problems with Lee, "[a]lmost on a daily basis." (XV RT 2681-2684.)

When Lee's father started receiving frequent calls from the schools about Lee's behavior, he tried spanking Lee, but he stopped doing that because it "wasn't doing any good." When Lee was about six years old, his father took him to a psychiatrist at Kaiser to see if they could do something about his "bizarre behavior." The psychiatrist asked him if he spanked the children and he said yes, then she said she would have to report him to the police as a child abuser. Lee's father left, but he complained about the doctor. (XV RT 2685-2687.)

The last time Lee's father tried spanking Lee was when Lee was about seven or eight years old. He had been called at work because of problems Lee was causing in the classroom. He decided to try to shame Lee into benaving and spanked him in the school hallway in view of the other children. When Lee

did not make a sound, Lee's father realized the problem was "even deeper than [he] thought." (RT XV 2687-2688.)

Lee's mother and father separated in 1985, and divorced in 1986. Lee's mother initially had primary custody of Lee and his brother, and thier father had custody every other weekend. One Christmas, in approximately 1987 when Lee was nine or ten years old, Lee's mother dropped the boys off with Lee's father and never returned. Less than a year later, Lee's father moved from Los Angeles to Moreno Valley with the boys. By that time, he had married a woman named Patricia. The boys were taken to see Lee's mother every week. (XV RT 2688-2694.)

While they were living in Moreno Valley, Lee's father again sought psychiatric help for Lee. Kaiser referred them to the Canyon Crest Medical Group. Lee was about 13 years old at the time and they gave him a medicine that calmed him down. They had no behavior problems at home, but problems continued at school when Lee "got out with those other boys." (XV RT 2695-2697.) At some point, Lee was placed in the Guadalupe Boys Home in Yucaipa, where Lee did well. Lee was also diagnosed with Attention Deficit Disorder and Hyperactivity. (XV RT 2697-2698.) According to Lee's father, Lee did well for a few days after he was released from the Guadalupe Boys Home. Lee's father also became aware that Lee was drinking alcohol. That started when he was ten or eleven years old, but only happened a couple of times. He once thought he smelled marijuana on Lee. (XV RT 2701-2702.)

Lee had always been respectful to his father, but they had a serious confrontation with each other in 1994 and Lee struck him. Lee ran off and wound up being out on the streets for four or five months. (XV RT 2703-2704.) Lee's father testified he would be devastated if Lee were sentenced to death. (XV RT 2705-2706.)

Lee's brother, Lenier, testified his parents argued a lot and that it often became physical. (XV RT 2929-2930.) When they were living in South Central Los Angeles, their father worked nights in a grocery store and often did not get home until after midnight. Sometimes, after work, their father would go to bars and drink with friends before he went home. (XV RT 2671-2672.) As time went on, their mother's use of alcohol and medications grew worse and she became more hostile. (XV RT 2672-2673.) After their mother got home from work, she would often fall asleep, sometimes with food cooking on the stove. (XVI RT 2939-2942.) Lee's brother also testified that Lee began drinking alcohol on an almost daily basis when Lee was about 13 years old. He told their father about it, and their father "whooped" Lee, but it did not stop Lee from drinking. (XVI RT 2961-2962.) After their father married Patricia, she tried to lay down some rules, but Lee resented them. If anything happened, Patricia would just tell their father about it when he got home, and he would generally give them a "whooping." (XVI RT 2952-2954.)

On June 9, 1996, Khristina Wisdon gave birth to Lee's son, Christopher. Khristina has visited Lee in jail once or twice a week since his arrest. She almost always takes Christopher with her. Christopher also talks on the telephone with his father. Lee always sends letters for Christopher on his birthday and asks about him. Khristina intends to maintain contact with Lee and believes it is important for Christopher to know his father as he grows up. (XVI RT 2784-2787.)

Lee's brother's girlfriend, Wendie Brown, moved into Lee's father's home on Wintergreen Court in early 1994. Wendie and Lee's brother had a son in February of 1995, and named him Junior. Lee acted as Junior's primary babysitter and cared for him like he was his own. Lee and Junior had a strong bond and, after Lee was arrested, Wendie took Junior to visit Lee in jail as often as possible. Every time they talk to Lee on the phone, he always asks about

Junior. (XVI RT 2910-2911, 2919-2921.) Also, Junior is always asking about his uncle and wants to know if he is all right. (XVI RT 2927.)

Dr. Santos Nana-Diego was a psychiatrist with Kaiser Permanente in the Canyon Crest area. In March of 1992, Dr. Nana-Diego conducted a clinical assessment of Philian Lee. Based upon the information obtained from Lee's medical history and family and school evaluations, Dr. Nana-Diego concluded Lee was suffering from Attention Deficit Disorder (ADD) and learning disabilities. (XV RT 2709-2713.) Dr. Nana-Diego prescribed a medication called Cylert for Lee. Cylert was like Ritalin in that it stimulates the attention center of the brain, thus improving the child's ability to focus. (XV RT 2714-2715.)

Kay Palush was a teacher with the Guided Independent Study Program in Moreno Valley. This program was to provide for special education students who were pending expulsion from their regular school. In 1992, Mrs. Palush recalled having Lee as a student twice, once for a short time towards the beginning of the school year, then again for the balance of the school year. She was not sure of the exact dates because school records were only maintained for three or four years. Lee was considered to have ADHD, which is Attention Deficit Hyperactivity Disorder. Mrs. Palush estimated that Lee was performing at two and a half years below his grade level. (XV RT 2739-2744.) Lee was cooperative with Mrs. Palush, and Mrs. Palush could easily tell when Lee was taking his medication. (XV RT 2746.)

Steven Lashawn Hobson was a senior social worker and unit supervisor at the Guadalupe Homes in Yucaipa. The Guadalupe Homes was a residential facility that provided psychological treatment to abused and neglected children, and to children who were made wards of the court through the juvenile probation sector. (XV RT 2751.) Lee was accepted into Guadalupe Homes in May of 1993. When Lee had been at Guadalupe Homes for 45 to 60 days

with inadequate progress, he was referred to a psychiatrist for possible psychotropic medication. (XV RT 2755-2756.) After another 45 to 60 days without improvement, Lee was re-referred to the psychiatrist for another assessment. Lee was being treated for aggression and depression, but they suspected Lee had ADHD. After Lee's medication was changed, Hobson noticed an improvement in his behavior within a week. (XV RT 2757-2758.)

Hobson estimated Lee was at Guadalupe Homes for about nine months. (XV RT 2758-2760.) When Lee's term at Guadalupe Homes ended, Hobson believed that reunifying Lee with his family would not be "healthy." Lee's father had attended monthly therapy sessions but Lee's mother and step-mother had not participated in any of the programs. (XV RT 2762-2763.) Hobson said the type of parenting available in the Lee home was counterproductive. (XV RT 2767.)

In 1993, Dr. Roberto Moreno was a consulting psychiatrist at the Guadalupe Homes. He did not have any independent recollection of Lee. (XVI RT 2899-2902.) According to his notes from July of 1993, Lee was 16-years-old and had been taking Cylert. Dr. Moreno found that Lee displayed symptoms of Attention Deficit Disorder and Hyperactivity and prescribed 50 milligrams of Thorazine, twice a day. (XVI RT 2904-2905.) Dr. Moreno saw Lee on almost a weekly basis. Lee was next prescribed Chlorpromazine, which is a different name for the same medication. By August of 1993, Lee appeared to be responding positively to the medication. The medication was discontinued in January of 1994, because Lee was doing so well. (XVI RT 2906-2907.)

Dr. Cecil Whiting was a clinical neuropsychologist who conducted a series of neurological tests upon Lee in February and March of 1999. Dr. Whiting also interviewed some of Lee's family members. (XVI RT 2796-2803.) This included Lee's mother, who had died shortly before trial. (XVII

RT 2924.) Dr. Whiting opined Lee had suffered brain damage in three areas: the right and left parietal/occipital area on the back of the head which controls vision and memory, and cause a child to have difficulty learning in school (XVI RT 2809-2812); the right temporal area which controls sequential processing (XVI RT 2812-2814); and left temporal lobe which controls or mediates impulses from the midbrain and affects an individual's ability to control violent and aggressive impulses. (XVI RT 2814-2816.) The types of brain damage Dr. Whiting observed in Lee could be the result of pre-natal problems caused by alcohol or drug abuse by the mother (XVI RT 2818-2819), or result from a blow to the head (XVI RT 2821-2828).

ARGUMENT

I.

SUBSTANTIAL EVIDENCE SUPPORTS THE RAPE SPECIAL CIRCUMSTANCE FINDING

Lee claims there is insufficient evidence that he was attempting to rape Mele during the commission of the murder, and therefore the special circumstance finding must be reversed. (AOB 39-75.) Lee contends there is no evidence of an attempted rape because Mele was "passively acquiescing" to his sexual advances, and once she voiced her objections, he got off of her. Because the jury's finding that Lee attempted to rape Mele is supported by substantial evidence, the true special circumstance finding must be affirmed.

The rules governing appellate review of sufficiency of the evidence claims are well established. The reviewing 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 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; *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 Lee 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.) This is an "enormous burden" for a defendant to overcome on appeal. (*People v. Vasco* (2005) 131 Cal.App.4th 137, 161.)

The standard of review for sufficiency of the evidence is the same for special circumstance allegations. That is, whether when viewing the whole record in the light most favorable to the prosecution, it discloses "'substantial evidence – that is, evidence which is reasonable, credible, and of solid value,'" such that a trier of fact could find the special circumstances true beyond a reasonable doubt. (*People v. Elliot* (2005) 37 Cal.4th 453, 466; *People v. Maury* (2003) 30 Cal.4th 1067, 1129.)

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; *People v. Cain* (1995) 10 Cal.4th 1, 39; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138 [review of circumstantial evidence uses the same standard as sufficiency of the evidence].)

Although the reviewing court must ensure that the evidence is reasonable, credible, and of solid value, it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) Thus, if the verdict is supported by substantial evidence, the reviewing court must give due

deference to the trier of fact and not substitute it's evaluation of a witness's credibility for that of the fact finder. (*People v. Jones, supra*, 51 Cal.3d at p. 314.)

Lee was charged with attempted forcible rape[5/] (Pen. Code, § 261, subd. (a) (2)) and it was alleged that the murder of Mele was committed with the special circumstance of having been committed during the commission or attempted commission of rape in violation of section 261. (1 CT 21-22.) Rape was properly defined for the jury as:

> Every person who engages in an act of sexual intercourse with another person who's not the spouse of the perpetrator accomplished against that person's will by means of force, violence, duress or fear of immediate and unlawful bodily injury to that person is guilty of rape.

(XIV RT 2385-2387; Third Supp. CT 79-80.)

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5. Approximately half way through the prosecution's case at trial, because the evidence presented also supported a theory of attempted rape of an intoxicated person (Pen. Code, § 261 subd. (a) (3)), the prosecutor attempted to amend the Information by deleting subdivision "(a) (2)" from the charged Penal Code section 261, in order to be able to rely upon any theory of rape provided in that code section. (X RT 1698-1700.)

When the trial court entertained arguments on the prosecutor's request to amend the Information, Lee's counsel objected and pointed out that more than three years had elapsed since the initial complaint had been charged. Counsel also argued that the opening statement and cross-examination of the witnesses had been done with the objective of establishing that Lee had not attempted to *forcibly* rape the victim because he stopped what he was doing after she realized what was happening and pushed him off of her. (XII RT 2080-2082.) The trial court agreed with the defense and limited the prosecution to the theory of attempted forcible rape. (XII RT 2083.)

During this discussion concerning Penal Code section 261, subdivision (a) (3), the trial court, and later counsel, mistakenly and repeatedly referred to Penal Code section "261 (a) (1)," which is not rape of an intoxicated or drugged person, but is instead rape of a person incapable of consenting due to a mental or physical disability. (XII RT 2067-2083.)

Lee acknowledges that if he attempted to engage in sexual intercourse without Mele's consent, then he attempted to do so against her will. He complains, however, that Mele's mere assent to sexual intercourse cannot be equated with a lack of consent. (AOB 61.) As Penal Code Section 261.6 makes clear:

> In prosecutions under Section 261 . . . in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

(Pen. Code, § 261.6.)

Lee claims the evidence is insufficient to support the attempted rape special circumstance because Mele merely "passively acquiesced" to his sexual advances until she told him to stop and started to push him off of her. (AOB 59.) The jury was instructed with a modified version of CALJIC No. 10.65 regarding belief as to consent. (XIV RT 2387-2388; Supp. CT 82.) As this Court has made clear, the question before the jury is whether a defendant has a reasonable good faith belief that the other person voluntarily consented to engage in sexual intercourse. (*People v. Maury, supra*, 30 Cal.4th at pp. 423-425, citing *People v. Mayberry* (1975) 15 Cal.3d 143, 153-158.) As this Court has repeatedly explained,

> "The *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent. [¶] In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable. . . ."

(*People v. Maury, supra*, 30 Cal.4th at p. 424, quoting *People v. Williams* (1992) 4 Cal.4th 354, 360-361, fn. omitted.)

The evidence supports the jury's conclusion that Lee did not have a reasonable belief that Mele consented to any sexual contact from him, let alone sexual intercourse. The only possible evidence from which the jury could have inferred such a belief would have been a comment Lee made when Jarrod bragged that he had been "finger banging"Mele as she drove the car. Lee said, "Man, that's nothing. I also done that." (IX RT 1597-1598.) While the trial court allowed that testimony as possible evidence of Lee's state of mind (IX RT 1535), there was testimony that after the murder, Lee also told Jarrod and Devin that he had had intercourse with Mele. (X RT 1786.) Additionally, Jarrod described Lee as being a liar. (X RT 1769.) Neither Jarrod nor Devin observed any romantic or sexual activity between Lee and Mele until Mele appeared to be asleep or passed out on the back seat of the Sentra. Indeed, it was not until Mele was in the compromised position of being asleep or almost passed out on the back seat of the car that Lee took off Mele's shoes and pants and said he was going to "get some" or was "about to get it." (VIII RT 1499-1501.)

Lee argues Mele's "passive acquiescence" supports his claim that he did not attempt to force Mele to have sexual intercourse with him against her will. (AOB 69-70.) There was no evidence that he ever verbally threatened Mele, and, by virtue of his size and his handgun, he had the ability to force Mele to have sex with him had that been his intent, but did not do so. Lee also submits that the evidence does not even support an intent to engage in sexual intercourse because of the discussion about the rumor that Mele had AIDS and the fact that her panties were not taken off of her. (AOB 70-71.) These are arguments for a jury - not a basis for finding insufficient evidence supporting a verdict. Indeed, defense counsel argued these points to the jury. (XIV RT 2290-2294, 2308-2312.)

The prosecution's theory of the attempted forcible rape was that Lee intended to have sex with Mele with or without her consent and that, after Mele realized what was happening and told Lee to get off of her, Lee did not immediately stop what he was trying to do. Instead, Lee remained on top of Mele as she raised her voice and tried to push him off of her. While he was still on top of Mele, Lee said to her, "'you know what we came up on the hill for.'" (XII RT 2162.) After Mele finally pushed Lee off of her, he said something about how "he was going to straighten her out." (IX RT 1657.) Lee then went around to the passenger side of the car and pulled her out of the car by her arms, even though she resisted. Lee and Mele spoke to each other for a short time, then Lee said words to the effect of, "It's like that, huh," before he pulled out his handgun and executed 17-year-old Mele by shooting her seven times in the face. Lee never gave Devin or Jarrod any indication that he believed Mele consented to his sexual advances. To the contrary, Mele's lack of consent was actually described in the rap song Lee sang after the murder: "I didn't want to kill you, bitch, but you wouldn't give me any pussy." (X RT 1775-1776.)

As discussed above, a jury's conviction or true finding on a special allegation may only be set aside due to the insufficiency of the evidence if it clearly appears that upon no hypothesis whatsoever was there sufficient evidence to support it. This Court must presume in support of the judgment the existence of every fact the jury could reasonably infer from the evidence. After drawing all inferences in favor of the judgment, the question is not whether this Court agrees with the jury's true finding, but whether any rational trier of fact could have found the attempted rape special circumstance allegation true beyond a reasonable doubt. As the true finding on the special circumstance allegation is supported by substantial evidence, the jury's true finding in this matter must be affirmed.

II.

SUFFICIENT EVIDENCE SUPPORTS THE FIRST DEGREE MURDER CONVICTION ON A FELONY MURDER THEORY

Lee contends the evidence was also insufficient to support a verdict of first degree murder on a felony murder theory. (AOB 75-80.) Lee also speculates that since the jurors returned their guilty verdict after just one full day of deliberations, in all probability they did not even consider whether Lee committed premeditated and deliberate first degree murder. [6/] (AOB 79-80.) Therefore, Lee reasons, since insufficient evidence was presented to prove Lee murdered Mele during the commission of an attempted rape, and since there was insufficient evidence presented to support his first degree murder conviction based upon a theory that the killing was willful, deliberate, and premeditated (as discussed in Argument VI, *post*), his first degree murder conviction should be reversed and this matter should be remanded to the trial court with directions to enter a verdict of second degree murder. (AOB 80.) To the contrary, the verdict of first degree murder is supported by substantial evidence under a felony murder theory.

As discussed in the preceding argument, in reviewing a claim of insufficient evidence, this Court must review the entire record in the light most favorable to the jury's verdict to determine whether it discloses substantial evidence upon which a reasonable trier of fact could have found the accused guilty beyond a reasonable doubt. (*People v. Johnson, supra,* 26 Cal.3d at p. 578.) This Court must also "presume in support of the judgment the existence of every fact the jury could reasonably infer from the evidence." (*People v. Bloyd, supra,* 43 Cal.3d at pp. 346-347 [citations omitted].) Before a

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6. The jurors retired to commence their deliberations at 1:50 p.m., on April 20, 1999, and notified the court that they had a verdict at 1:00 p.m., on April 21, 1999. (40 CT 10855, 10857.)

conviction can be set aside due to the insufficiency of the evidence to support the jury's verdict, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support it. (*People v. Bolin, supra,* 18 Cal.4th at p. 331.) After drawing all inferences in favor of the judgment, the question is whether any rational trier of fact could have found the accused guilty beyond a reasonable doubt. (*Jackson v. Virginia, supra*, 443 U.S. at pp. 318-319.)

Although this Court must ensure that the evidence is reasonable, credible, and of solid value (*People v. Johnson, supra,* 26 Cal.3d at p. 578), it is the exclusive province of the jury to determine the credibility of a witness and the truth or falsity of the facts upon which that determination depends. (*People v. Ochoa, supra,* 6 Cal.4th at p. 1206.) If the verdict is supported by substantial evidence, this Court must give due deference to the jury and not substitute it's evaluation of a witness's credibility for that of the jury. (*Ibid.*)

The trial court instructed the jury on the concept of first degree felony murder as follows:

> The unlawful killing of a human being whether intentional unintentional or accidental which occurs during the attempted commission of the crime of rape is murder of the first degree when the perpetrator had the specific intent to commit that crime.
>
> The specific intent to commit rape and the commission or attempted commission of such crime must be proved beyond a reasonable doubt.

(Third Supp. CT 71; XIV RT 2383.)

As discussed in the preceding argument, viewing the evidence in the light most favorable to the judgment reflects substantial evidence was presented that proved Lee specifically intended to have sexual intercourse with Mele with or without her consent, and that Lee killed Mele when that intent was thwarted. Neither Jarrod nor Devin observed any sexual activity between Lee and Mele until Mele, apparently due to the alcohol and late hour, fell asleep or appeared to pass out on the back seat. It was at that moment that Lee took off Mele's

shoes and pants, said he had on his "gym hat" or "jimmy hat," and said that he was going to "get some" or was "about to get it." (VIII RT 1499-1501.)

Then the approximately 270-pound Lee climbed on top of the 153-pound Mele and began to move his hips up and down as if in an act of sexual intercourse. After not saying or doing anything for up to three minutes, Mele suddenly seemed to "snap out" of it and started pushing Lee off of her with her arms. (VIII RT 1502-1503.) Devin described Mele at this point as being, "Almost in a fit of rage, as if she was disgusted by what was going on." (VIII RT 1504.) When Mele started to struggle, Lee did not immediately stop what he was doing, but instead remained on top of her as she raised her voice and continued to try to push him off of her. While he was still on top of her, Lee said, "'you know what we came up on the hill for.'" (XII RT 2162.)

After Mele finally managed to pushed him off of her, Lee said "he was going to straighten her out." (IX RT 1657.) Lee went around to the passenger side of the car, pulled Mele out of the car against her will, spoke to her for a few moments before saying, "[i]t's like that, huh," then he pulled out his handgun and shot Mele in the face seven times at point blank range. (VIII RT 1513-1516.) Lee's attempt to have sex with Mele against her will, and his reason for killing her, was perhaps best described by his rap song after the murder: "I didn't want to kill you, bitch, but you wouldn't give me any pussy." (X RT 1775-1776.)

As discussed above, a jury's conviction may only be set aside due to the insufficiency of the evidence if it clearly appears that upon no hypothesis whatsoever was there sufficient evidence to support it. This Court must presume in support of the judgment the existence of every fact the jury could reasonably infer from the evidence. After drawing all inferences in favor of the judgment, the question is not whether this Court agrees with the jury's verdict, but whether any rational trier of fact could have found Lee guilty of felony

murder beyond a reasonable doubt. As Lee's first degree murder conviction based upon a theory of felony murder that the killing was committed during the commission of an attempted rape is supported by substantial evidence, the jury's verdict must be affirmed.

III.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY WITH THE DEFINITION OF CONSENT PROVIDED IN CALJIC NO. 1.23.1

Lee contends the trial court had a sua sponte duty to properly define the concept of "consent" to the jury. Lee does not provide an example of what he contends a proper definition would be, but he faults the definition of consent provided to the jury in CALJIC No. 1.23.1 as that definition "effectively permitted the jury to convict if Mele merely passively acquiesced to an attempt to have intercourse without communicating in any way her unwillingness to engage in such an act." (AOB 80-81.) Specifically, Lee criticizes the definition of consent given to the jury because it did not advise the jury that "consent did not require something more than the victim's mere unexpressed assent." (AOB 84-86.) Lee failed to raise his objections below, or request modification of the instruction in the trial court, and thus his claim has been forfeited on appeal. In any event, his claim is meritless as the trial court properly instructed the jury with a modified version of CALJIC No. 1.23.1.

A. Lee's Claim Has Been Forfeited On Appeal

Although there was a great deal of discussion about the jury instructions concerning the amount of force required, general and specific intent,[7] and

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7. Since rape is a general intent crime (*People v. Osband* (1996) 13 Cal.4th 622, 685 [55 Cal.Rptr.2d 26, 919 P.2d 640]), the requisite criminal intent is the intent to do the prohibited act. (*People v. Daniels* (1975) 14 Cal.3d

whether any belief Lee may have had that Mele consented to his sexual advances was reasonable (XIII RT 2197-2218), Lee never objected to the definition of consent provided in CALJIC No. 1.23.1. The failure to object to an allegedly erroneous instruction in the trial court waives that issue on appeal. (*People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) Thus, Lee's failure to object to the now-challenged instruction precludes him from raising this claim for the first time on appeal. Recognizing this obstacle, Lee cites, *inter alia*, to Penal Code section 1259 (AOB 81-82, fn. 29), which allows an appellate court to review an instructional error which affects a defendant's "substantial rights." (See *People v. Flood* (1998) 18 Cal.4th 470, 479-482, fn. 7; *People v. Miller* (1999) 69 Cal.App.4th 190, 207, fn. 9, quoting *People v. Shoals* (1992) 8 Cal.App.4th 475, 490.) However, as discussed below and in Arguments IV and V, *post*, CALJIC No. 1.23.1 accurately defined the concept of consent for purposes of a charge of rape or attempted rape. In fact, CALJIC No. 1.23.1 provides the same statutory definition of consent set forth by the Legislature in Penal Code section 261.6.

The jury was instructed with the following modified version of CALJIC No. 1.23.1:

> In rape prosecutions under Penal Code section 261 (a) (2), the word "consent" means positive cooperation in an act or attitude as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

(XIV RT 2387; Third Supp. CT 81.)

Penal Code section 261.6 provides:

> In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, "consent" shall be defined to mean positive

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857, 860.) Attempted rape is a specific intent crime. (*People v. Ghent* (1987) 43 Cal.3d 739, 765.)

cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

A current or previous dating or marital relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section 261, 262, 286, 288a, or 289.

Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent.

(Added by Stats.1982, c. 1111, p. 4025, §§ 3. Amended by Stats.1990, c. 271 (A.B.2631), §§ 1; Stats.1994, c. 1188 (S.B.59), §§ 1.)[8/]

As this Court has explained,

The court's role in construing a statute is to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." [Citations.] In determining the Legislature's intent, a court looks first to the words of the statute. [Citation.] "[I]t is the language of the statute itself that has successfully braved the legislative gauntlet." [Citation.]

When looking to the words of the statute, a court gives the language its usual, ordinary meaning. [Citations.] If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs. [Citations.]

(*People v. Snook* (1997) 16 Cal.4th 1210, 1215.)

There is no reason to depart from the definition of consent provided in Penal Code section 261.6, as that definition accurately states the applicable law concerning the concept of consent in rape cases. (See Evid. Code, § 160 ["'Law' includes constitutional, statutory, and decisional law"].) It follows that none of Lee's substantial rights were affected by the accurate definition of consent given to the jury. Thus, this claim should be deemed waived.

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8. According to the Historical and Statutory notes, the 1990 amendment added the second and third paragraphs relating to a current or previous dating relationship and admissibility of evidence, respectively. The 1994 amendment inserted references to Penal Code § 262 and, in the second paragraph, inserted "or marital" following "dating."

B. The Trial Court Properly Instructed The Jury On The Concepts Of The Special Circumstance Of Attempted Rape, Attempted Rape, And Consent

Even if Lee's claim had been properly preserved for appellate review, it would still fail as the trial court properly instructed the jury as to the concept of consent, as well as to the validity of the defense of a reasonable and good faith belief that the other person voluntarily consented to engage in sexual intercourse. Lee reasons that because the jury was told that "against the will" meant "without consent," and told that "consent" meant "a positive cooperation in act or attitude as an exercise of free will," the error was in not telling the jury that a person could theoretically consent to sexual intercourse without actually expressing that consent. (AOB 84-86.) Lee's complaint is meritless as the jury was properly instructed.

The trial court instructed the jury with the following modified version of CALJIC No. 8.80.1 [special circumstances], which was requested by both parties below:

> If you find the defendant in this case guilty of murder of the first degree, you must then determine if the following special circumstance is true or not true. That the murder was committed during the attempted commission of the crime of rape.
>
> The People have the burden of proving the truth of the special circumstance. If you have a reasonable doubt as to whether the special circumstance is true, you must find it to be not true.
>
> In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.
>
> You will state your special finding as to whether the special circumstance is or is not true on the form that will be supplied.

(XIV RT 2384-2385; Third Supp. CT 76-77.)

The trial court also instructed the jury with the following modified version of CALJIC No. 8.81.17 [special circumstances - murder in commission of attempted rape], which was requested by both parties below:

To find that the special circumstance referred to in these instructions as murder in the commission of the attempted rape is true, it must be proved: 1. That the murder was committed while the defendant was engaged in the attempted commission of the crime of rape.

(XIV RT 2385; Third Supp. CT 78.)

The trial court then provided the jury with "Defendant's Special Instruction No. B" as follows:

In the special circumstance allegation it is alleged that a murder was committed during the commission of an attempted rape.

It is also alleged that the defendant is criminally liable for first degree murder on the theory that the alleged victim was killed during the commission of an attempt rape.

The following instruction defines the law of attempt and the offense of attempted rape.

An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done towards its commission.

In determining whether such an act was done, it is necessary to distinguish between mere preparation on the one hand, [and] the actual commencement of the doing of the criminal deed on the other. Mere preparation which may consist of planning the offense or devising, obtaining, or arranging the means for its commission is not sufficient to constitute an attempt. However, acts of a person who intends to commit a crime will constitute an attempt where those acts clearly indicate a certain unambiguous intent to commit that specific crime. These acts must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design.

Rape is defined as follows:

Every person who engages in an act of sexual intercourse with another person who's not the spouse of the perpetrator accomplished against that person's will by means of force, violence, duress or fear of immediate and unlawful bodily injury to that person is guilty of rape.

Any sexual penetration, however slight, constitutes engaging in an act of sexual intercourse. Proof of ejaculation is not required.

"Against that person's will" means without the consent of the alleged victim.

"Force" means that amount of physical force required in the circumstances to overcome the victim's resistance.

"Duress" means a direct or implied threat of force , violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which she would not otherwise perform or acquiesce in an act which she otherwise would not have submitted. The total circumstances, including the age of the alleged victim and her relationship to the defendant are factors to consider in appraising the existence of duress.

The fear of immediate and unlawful bodily injury must be actual and reasonable under the circumstances.

In order to prove the offense of attempted rape, each of the following elements must be proved:

1. A direct but ineffectual act was committed by the defendant towards the commission of rape of the alleged victim;

2. At the time of the act, the defendant had the specific intent to rape the alleged victim;

In order to prove the defendant had the specific intent to rape, each of the following elements must be proved:

1. The defendant had the specific intent to engage in an act of sexual intercourse with the alleged victim;

2. The defendant had the specific intent to engage in an act of sexual intercourse against the will of the alleged victim;

3. The defendant had the specific intent to accomplish an act of sexual intercourse by means of force, violence, duress, menace or fear of immediate or unlawful bodily injury.

(XIV RT 2385-2387; Third Supp. CT 79-80.)

At the request of the prosecution, the trial court instructed the jury with a modified version of CALJIC No. 1.23.1 [consent - defined], as follows:

In rape prosecutions under Penal Code section 261 (a) (2), the word "consent" means positive cooperation in an act or attitude as an exercise

of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

(XIV RT 2387; Third Supp. CT 81.)

The trial court also instructed the jury with a modified version of CALJIC No. 10.65 [belief as to consent - forcible rape], which was requested by the prosecution:

> In the crime of attempted rape, criminal intent must exist at the time of the commission of the attempted rape. There's no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in sexual intercourse. Therefore, a reasonable and good faith belief that there is voluntary consent is a defense to such a charge.
>
> However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress or fear of immediate and unlawful bodily injury on the person or another is not a reasonable good faith belief.
>
> If after a consideration of all of the evidence you have a reasonable doubt that the defendant had the criminal intent at the time of the attempted act of sexual intercourse, you must find the special circumstance not true.

(XIV RT 2387-2388; Supp. CT 82.)

The law does not support Lee's argument that the jury should have been instructed that they could have found Mele consented to sexual contact with Lee by "passively acquiescing" when he removed her shoes and pants and climbed on top of her. It was approximately 4:00 in the morning, 17-year-old Mele had a blood alcohol content of .14% and, after calling for Devin to help her get up after she had fallen outside of the car, had fallen back on the seat and appeared to be asleep or "out of it completely" and "not aware of her surroundings," as described by Devin at trial. (VIII RT 1487-1488.) Lee could not have had an objectively reasonable belief at that moment that Mele was consenting to have sex with him. As this Court has explained, "that belief must be formed under circumstances society will tolerate as reasonable . . ."

(*People v. Williams, supra,* 4 Cal.4th at 361.) The identical claim of instructional error being raised by Lee was rejected in *People v. Gonzalez* (1995) 33 Cal.App.4th 1440, 1443-144, review denied (Jul. 12, 1995). The trial properly instructed the jury regarding the definition of consent set forth in Penal Code section 261.6. Accordingly, Lee's claim should be rejected.

IV.

CALJIC NO. 1.23.1 DOES NOT VIOLATE DUE PROCESS

In an extension of his criticism of CALJIC No. 1.23.1 [consent - defined] in Argument III, *ante*, Lee also contends the definition of consent provided to the jury violated his due process rights because it: (1) provided him with inadequate notice that "passive acquiescence" did not constitute consent; (2) violated the prohibition against ex post facto application of laws as no prior case or statute has "explicitly or implicitly held that a person's mere neutrality or passive acquiescence to a sexual act was enough in itself to prove rape or attempted rape, that is, to prove lack of consent;" and that (3) the "newly limited or diminished definition of consent for rape provided in section 261.6, as applied to [Lee's] case, has removed the requirement of a culpable mental state, a mens rea for the actor." (AOB 86-94.) Since none of Lee's challenges to the instructions was ever raised in the trial court, he has forfeited his claim on appeal. (*People v. Rivera, supra*, 162 Cal.App.3d at 146.) Lee again acknowledges that no objection was made on the grounds now advanced, and again contends his claims should not be deemed waived as his substantial rights are involved. (AOB 87, fn. 31.) In any event, Lee's claim lacks merit.

A. It Is Not Reasonable To Believe That "Passive Acquiescence" Equals Consent

Lee's claim that the definition of consent provided in CALJIC No. 1.23.1 (and Pen. Code, § 261.6) failed to provide him with adequate notice that

"passive acquiescence" did not constitute consent (AOB 88-89) misses the mark. Consent is only a viable defense to a charge of rape or attempted rape if the perpetrator entertained a "*reasonable but mistaken belief in consent.*" (*People v. Maury, supra*, 30 Cal.4th at 423-424, emphasis added.) Lee's term of "passive acquiescence" is simply not an acceptable substitute for the "positive cooperation in act or attitude," which, in conjunction with the victim's requisite "knowledge of the nature of the act," is required in the definition of consent set forth in Penal Code section 261.6. (*People v. Gonzalez, supra*, 33 Cal.App.4th 1444.)

B. The Definition Of Consent Provided In CALJIC No. 1.23.1 Did Not Violate The Prohibition Against Ex Post Facto Application Of Laws

Lee claims that the lack of any prior case or statute to "explicitly or implicitly [hold] that a person's mere neutrality or passive acquiescence to a sexual act was enough in itself to prove rape or attempted rape, that is, to prove lack of consent," amounts to an ex post facto application of law. (AOB 89-91.) Skipping past the more than two decades-long requirement that consent in these circumstances requires a "positive cooperation in act or attitude pursuant to an exercise of free will," and that the victim must also "act freely and voluntarily and have knowledge of the nature of the act" (Pen. Code, § 261.6), Lee submits that his is the first case to ever interpret *passive acquiescence* as constituting a lack of consent. (AOB 89.) To the contrary, similar claims of "passive consent" have been raised and rejected in *People v. Gonzalez, supra*, 33 Cal.App.4th at 1442-1444, and in *People v. Bermudez* (1984) 157 Cal.App.3d 619, 623-625. There simply is no ex post facto violation of the law in the instant matter, nor any new definition of what constitutes a lack of consent.

C. The Definition Of Consent Does Not Suspend The Requisite Mens Rea

Lee next argues that the "newly limited or diminished definition of consent for rape provided in section 261.6, as applied to [Lee's] case, has removed the requirement of a culpable mental state, a mens rea for the actor." (AOB 91-94.) The foundation of Lee's argument is the common law premise that a rape does not occur unless the sex act is against the victim's will. (AOB 92.) Lee then devises a hypothetical situation in which a wife who does not want to have sex with her spouse, passively submits to sexual intercourse. According to Lee's reasoning, under this scenario, a rape has occurred because the wife did not consent to intercourse within the definition provided by CALJIC No. 1.23.1 and Penal Code section 261.6. Moreover, Lee reasons that since the husband had no way of knowing that his wife did not consent, the husband would be guilty of rape even though he had no reason to believe his wife did not consent and never intended to commit a rape. (AOB 92-93.) Therefore, Lee concludes, the definition of consent provided in Penal Code section 261.6 does not pass Constitutional muster, so the true finding on his attempted rape special circumstance must be reversed. (AOB 93-94.)

Lee's argument is academic. Even if the definition of "consent" in Penal Code section 261.6 could be interpreted to require a finding of lack of consent when a person willingly assents to sexual contact, but does so in a passive or compliant manner, that interpretation has no application to the facts in this case as there was no evidence from which the jury could have found Mele's initial failure to resist Lee was the result of her "passive acquiescence" to the sexual contact. The evidence affirmatively established that Mele was literally falling down drunk and semi-conscious when Lee took it upon himself to remove part of her clothing, put on a condom, and climb on top of her.

Devin testified that right after he moved the car down the road from the first location where they had parked on Cactus Avenue, Mele got out of the car and fell down. She called to Devin for assistance. Devin got out of the car and helped her into the back seat on the driver's side of the car. Devin said "she sort of plopped down as if she was tired," and "slumped down on the seat, then positioned herself towards her back, laying on her back." (VIII RT 1492-1496.) Mele had not called for help from Jarrod, who was in a body and leg braces, and, notably, Mele had not called out to Lee for help. Devin then described Mele as she lay on the backseat at this point as being "if not completely out of it, very close to." (VIII RT 1499.) It was not until this moment that Lee made his move and began to remove Mele's clothing. In light of the evidence presented at trial which demonstrated Mele was intoxicated and semi-conscious, and her reaction and rage when she realized what Lee had been attempting to do to her, there simply was no evidence from which the jury could have found Mele's initial lack of resistance was the result of a willful "passive acquiescence" to Lee's actions.

In any event, all of Lee's arguments focus solely upon events while Lee and Mele were in the back seat of the car. In none of his arguments concerning "passive acquiescence" does Lee address his comment about how he "said he was going to straighten her out" (IX RT 1657), how he dragged Mele out of the car by her arms, how he talked to her near the rear of the car, or how he said something to the effect of, "It's like that, huh," before he pulled out his gun and killed her. (X RT 1762-1765.) Nor does Lee mention his rap song about how, "'I didn't want to shoot you, didn't want to kill you, bitch, but you wouldn't give me any pussy.'" (X RT 1775-1776.) A reasonable interpretation of that evidence is that Lee attempted to force Mele to have sex with him, then killed her when she continued to refuse to engage in sexual intercourse with him.

The totality of the instructions given to the jury, including the definition of rape and attempted rape provided in Defendant's Special Instruction No. B (XIV RT 2386-2387; Third Supp. CT 79-80), the defense of a belief in consent provided in CALJIC No. 10.65 (XIV RT 2387-2388; Supp. CT 82), and the specific instruction that the People had the burden of proving the truth of the special circumstance allegation beyond a reasonable doubt (XIV RT 2384; Supp. CT 76), belie Lee's argument that the jury may have found the attempted forcible rape special circumstance allegation true even if they believed Mele merely passively acquiesced to his initial sexual advances. The instructions made it clear that the People had to prove Lee attempted to have sexual intercourse with Mele against her will, and that he attempted to do so by force. (*People v. Gonzalez, supra*, 33 Cal.App.4th at 1444, citing *People v. Bermudez, supra*, 157 Cal.App.3d at p. 624.) There was no error in the instruction, and giving CALJIC No. 1.23.1 does not violate any due process rights

V.

CALJIC NO. 1.23.1 DOES NOT SHIFT THE BURDEN OF PROVING A LACK OF CONSENT TO THE DEFENSE, NOR LESSEN THE PROSECUTION'S BURDEN OF PROOF

Lee next contends that his due process rights were denied because the definition of consent in CALJIC No. 1.23.1 given to the jury below created an irrebuttable presumption of a lack of consent absent his victim expressly communicating by act or attitude that she was cooperating in the sexual act. (AOB 94-99.) While Lee failed to object to the instruction below, he contends he has not forfeited his constitutional challenge because his substantial rights are affected. (AOB 95, fn. 34.) Assuming that Lee's claim has not been forfeited, it should still be denied because it is without merit.

Lee's challenge to the effect from enactment of Penal Code section 261.6 and the 1980 amendment to Penal Code section 261, which eliminated

the requirement of a victim's resistance, was rejected by the Fifth District Court of Appeal in a case where the the victim did not resist being raped in her home out of fear that her six-week-old infant would be harmed. The court concluded:

> Though not applying section 261.6 to this case, we find nothing novel in its emphasis on positively displayed willingness to join in the sexual act rather than mere submissiveness. The law has outgrown the resistance concept; a person demanding sexual favors can no longer rely on a position of strength which draws no physical or verbal protest.

(*People v. Bermudez, supra*, 157 Cal.App.3d at p. 624.)

Similarly, the Second District Court of Appeal has rejected the argument that CALJIC No. 1.23.1 violates due process by shifting the burden of proof on consent to the defense thereby creating an unconstitutional presumption of lack of consent. (*People v. Gonzalez, supra*, 33 Cal.App.4th at pp. 1443-1444.) The jury instructions as a whole, including those for the target offense (assault with intent to commit unlawful oral copulation), clearly indicated the prosecution had the burden of proving a lack of consent. (*Id.*, at p. 1443.) Moreover, CALJIC No. 1.23.1 "merely defined consent." (*Ibid.*) In rejecting the argument that "passive consent" is a defense to a forcible sex crime, the court observed that the prosecution was required to prove the charged crime was committed against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury. (*Id.*, at p. 1444.)

Whether Lee has been afforded his constitutional rights rests with how a reasonable juror would have interpreted CALJIC No. 1.23.1. (*Francis v. Franklin* (1985) 471 U.S. 307, 315 [85 L.Ed.2d 344, 105 S.Ct. 1965]; *People v. Burgener* (1986) 41 Cal.3d 505, 538-539.) Reading the instructions given below as a whole, there is no reasonable likelihood the jury would have understood the instructions in the manner Lee is urging on appeal. As discussed in detail in Argument III, *ante*, the jurors were instructed that the People had the burden of proving the truth of the sole special circumstance beyond a reasonable doubt (XIV RT 2384-2385; Third Supp. CT 76-77

[CALJIC No. 8.80.1]), which included proving that Lee had the specific intent to rape Mele, and that Lee made a direct, but ineffectual, act towards the commission of that offense. (XIV RT 2385-2387; Third Supp. CT 79-80 [Defendant's Special Instruction No. B].) The jury was also instructed with the language of CALJIC No. 2.90, that Lee is "presumed to be innocent until the contrary is proved," and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (XIV RT 2379; Third Supp. CT 62.) Accordingly, Lee's claim of instructional error should be rejected as the instructions taken as a whole clearly indicate that the prosecution bore the burden beyond a reasonable doubt of proving that Lee intended to rape Mele. (*People v. Cain, supra*, 10 Cal.4th at p. 36 [in light of clear and specific instructions, no reasonable likelihood jury misled by instructions].)

Finally, even assuming that CALJIC No. 1.23.1 implicates due process concerns, any error in giving the instruction would be harmless under the standard of review enunciated in *Chapman* v. *California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705,710-711, because given the facts of this case, it is clear beyond a reasonable doubt that Mele was not a willing participant in Lee's sexual advances. For these reasons, Lee's claim should be denied.

VI.

SUFFICIENT EVIDENCE OF PREMEDITATION AND DELIBERATION SUPPORTS THE VERDICT OF FIRST DEGREE MURDER

Lee contends insufficient evidence supports his first degree murder conviction based upon the theory that he acted willfully, deliberately, and with premeditation. (AOB 100-105.) Lee's claim is without merit.

A murder that is premeditated and deliberate is murder in the first degree. (Pen. Code, § 189.) "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.)[9/] 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* (2005) 35 Cal.4th 514, 543.) As this Court has explained,

> 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.)

As discussed in Argument I, *ante*, this 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 value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

(*People v. Johnson, supra*, 26 Cal.3d at p. 578.)

A reviewing court typically 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.

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9. The jury was instructed with CALJIC No. 8.20 [Deliberate and Premeditated Murder], which provides in part:

> To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.

(Third Supp. CT 69-70; XIV RT 2383.)

(*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, supra*, 18 Cal.4th at pp. 331-332.) Moreover, "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.)

Lee argues the evidence demonstrates that he was intoxicated that night and that he killed Mele in an outburst of rage born in frustrated sexual passion after she forcefully rejected his advances. (AOB 102-104.) The jury heard and rejected the same argument below. In reviewing sufficiency of the evidence claims, it is irrelevant that evidence presented at trial was possibly consistent with a different interpretation than 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.)

All three factors identified by this Court as aids to determining premeditation and deliberation, namely, preexisting motive, planning activity, and the manner of killing (*People v. Stitely, supra*, 35 Cal.4th at p. 543), are present in the instant matter and support a conviction for first degree premeditated and deliberate murder.

As to Lee's motive, one of the prosecution's theories was that Lee murdered Mele by repeatedly shooting her at point blank range out of his desire to live up to, or earn, his nickname of Point Blank. (XIII RT 2254.) The evidence showed that Lee was armed with a loaded handgun, as he often was. After Mele fell to the ground, Lee stood over her, with his feet on either side of her head, and shot her in the face six more times at close range. While the pathologist testified that only three of the shots were fatal, all of the shots had been aimed at Mele's face and were fired when the gun was either in contact with Mele's skin or when the gun was held within a few inches from the skin. When Jarrod asked Lee if that was why he was called Point Blank, Lee said nothing, but he subsequently said they would not have to make up a song about his name being Point Blank. Another possible motive for the murder was described by Lee himself when he rapped, "I didn't want to kill you, bitch, but you wouldn't give me any pussy." (X RT 1775-1776.)

Lee's actions that night clearly demonstrated his planning of the murder. Lee's act of carrying around a loaded handgun 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* (2003) 31 Cal.4th 197, 232.) The prosecutor argued that the evidence about Jarrod firing the gun into the air at the first lookout off of Pigeon Pass Road, and the five spent casings from the murder weapon found further down Cactus Avenue, in addition to the seven shots that killed Mele, indicated Lee had to reload the gun that night before the murder. (XIII RT 2257-2258.) Indeed, Jarrod testified

that he saw Lee reload the gun after firing it at the Pigeon Pass lookout. (X RT 1729.) That meant Lee was not only carrying a loaded handgun that night - he was also carrying extra ammunition. After Mele fought him off of her, Lee made the comment that he was "going to straighten her out," before he forcibly pulled her from the car. Moments later, after a brief exchange that neither Jarrod nor Devin could hear, Lee said something to the effect of, "It's like that, huh." Then he pulled the handgun from his pocket, put it to Mele's forehead, and pulled the trigger. After Mele fell motionless to the ground, Lee stood over her, straddling her head with his feet, and pulled the trigger six more times. Later on, at Jarrod's house, when Jarrod asked him if Mele was really dead, Lee made the illuminating comment about how if the first bullet didn't kill her, the second one did, and if the second bullet didn't kill her, the third one did, and so on. All of 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.)

Finally, Lee's cold and calculated manner of killing Mele by shooting her seven times in the face is itself sufficient to support the jury's verdict. (*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].)

Considering the totality of the evidence presented at trial, and presuming the existence of every fact in support of the judgment that the jury could reasonably infer from the evidence, substantial evidence of Lee's premeditation and deliberation existed. Accordingly, Lee's claim must be rejected.

VII.

THE TRIAL COURT PROPERLY ADMITTED LEE'S NICKNAME INTO EVIDENCE

Lee contends the trial court abused its discretion under Evidence Code section 352 by allowing his nickname "*Point Blank*" into evidence because it was highly prejudicial and improperly suggested he was linked to criminal street gangs. (AOB 105-118.) Lee also claims that the prejudice from the admission of this nickname into evidence caused him to be denied his federal constitutional right to due process of law, his right to be tried upon relevant evidence, his right to an impartial jury, and his rights to reliable determinations of his guilt, death penalty eligibility, and penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, and under Article I, sections 7, 15, 16, and 17 of the California Constitution. (AOB 116-118.) He also complains a special instruction confused the jury regarding consideration of the evidence of his nickname. (AOB 113.) Lee's claim fails as the trial court properly found the prejudicial impact of the nickname was outweighed by its probative value, and Lee cannot complain about the special instruction on appeal because any error was invited. In any event, the jury was properly instructed regarding Lee's nickname.

Lee moved to exclude any reference to his "moniker" of Point Blank. (I RT 27.) The trial court found the nickname or moniker of Point Blank was "certainly relevant," but agreed with the prosecution's suggestion that any other reference to criminal street gangs should be sanitized. (I RT 29.) Lee's attorney argued that there was really no issue as to identity and, given the way the victim in this case was killed, the moniker would be highly prejudicial in the guilt phase. (I RT 30.) The trial court found the nickname was relevant to the issue of intent because Lee was charged with an "execution-style murder." (I

RT 30.) The trial court held there was no undue prejudice, as the probative value of the evidence outweighed any prejudice. (I RT 34-35.)

About a week later, Lee renewed his motion. The trial court expressly found the evidence was relevant as to the identity of the killer, and to the killer's intent - particularly if a defense of voluntary intoxication were to be raised. (II RT 271-272.) The trial court again ruled that the probative value outweighed any prejudice. (II RT 282-283.)

Contrary to Lee's claim that his nickname was irrelevant, the admission of the nickname evidence was relevant to identifying Lee and to establishing his intent, namely, that Lee committed the murder in a particular manner in order to live up to his nickname. Evidence of the nickname was also necessary to explain Jarrod's question in the car after Mele was shot seven times in the face at point blank range, i.e., ""So, is that why they call you Point Blank?"" (IX RT 1659), and was key to allowing the jury to understand the significance of Lee's post-murder boast about how, ""[t]hey're never gonna really have to make a rap about my name being Point Blank."" (IX RT 1659.)

This Court found no abuse of discretion in a trial court's decision to allow the defendant's nickname of "Bam" or "Bam Bam" to be admitted into evidence. (*People v. Brown* (2003) 31 Cal.4th 518 (cert. den. 541 U.S. 1045, 124 S.Ct. 2160, 158 L.Ed.2d 736, 72 USLW 3711 (U.S.Cal. May 17, 2004) (NO. 03-8557) In *Brown*, the victim of a carjacking had been shot once in the throat before she was pulled from the vehicle and dumped in the street. The defense tried to convince the trial court to exclude the nickname of "Bam" or "Bam Bam," which had been given to the accused as a child and was from the Flintstones cartoon series. The trial court in *Brown* acknowledged that the nickname """has some negative connotations. ''Bam'' might have a connotation associated with weapons. When a gun is fired it goes-some people describe it

as going "bam."'" (*Id.*, at p. 548.) As this Court noted, the trial court in *Brown*,

> . . . carefully weighed defendant's concern over the potentially prejudicial effect of the nickname with the prosecutor's assertion that many of the witnesses knew defendant only by that name. The court then reasonably concluded that it would be impossible to sanitize the entire trial of any references to the nickname, but instructed the prosecution to minimize its use in order to reduce any prejudice. Our review of the record supports these decisions; sometimes reference to defendant's nickname was necessary to render a witness's testimony understandable, but there was no gratuitous use of, or reference to, the nickname.

(*People v. Brown, supra*, 31 Cal.4th at pp. 550-551.)

This case is distinguishable from *Brown* in that Lee's nickname was relevant to the issue of intent since Mele had been killed execution style. (I RT 30.) This case is consistent with *Brown* in that the trial court limited the prosecutor to only asking two witnesses, Devin Bates and Jarrod Gordon, about Lee's nickname of Point Blank. (II RT 285; VIII RT 448; X RT 1708.) Indeed, when Devin first met Lee on the night of Mele's murder, Lee told Devin that his name was Point Blank. (VIII RT 1446, 1448.) When the prosecutor started to ask Khristina Wisdom about the hat Lee had worn that night bearing the name of Point Blank (because the prosecutor believed that was within the trial court's parameters as Devin Bates had met Lee that night and only knew him as Point Blank), the defense objection was sustained and the trial court directed the jurors to disregard the mention of any wording on a hat. (VIII RT 1371-1373.)[10/]

Moreover, the trial court and parties agreed that after the prosecutor introduced the evidence of Lee's nickname of Point Blank through Devin Bates

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10. The admission of the evidence of Lee's tattoo of Point Blank on his arm, and of the hat he wore with the words Point Blank, had been discussed by the parties, but the trial court had made no final ruling on the matter before the prosecutor asked the question about the hat. (II RT 283.)

and Jarrod Gordon, Lee would no longer be referred to by that nickname, but would instead be called something like "the defendant," "Phil," or "Mr. Lee." (II RT 284-286.) Just as happened in *Brown,* some of the uses of the nickname of Point Blank in the guilt phase of trial in this matter were in the form of witness responses to questions, even though they had been instructed not to refer to Lee as Point Blank. (e.g., VIII RT 1484; IX RT 1602.) However, most of the uses of the nickname were the result of the defense's strong reliance upon prior statements made by Devin and Jarrod. Both Devin and Jarrod had been interviewed at length shortly after the murder, and their interviews had been tape recorded. Devin and Jarrod had also testified in Lee's preliminary hearing in this matter, and were each subjected to lengthy direct and cross-examinations. (See 1 CT 33-138 [Jarrod] and 1 CT 139-209 [Devin].) For example, Lee's counsel asked Devin if he remembered being asked, "'Before that, did you ever see Point Blank making sexual advances toward Mele?'" (IX RT 1613, see also IX RT 1598, 1599, 1613; IX RT 1673-A.)

Aside from the issues of how Lee was referred to in court, or the use of his nickname in prior statements by the witnesses, the evidence that Lee used the nickname of Point Blank was necessary to explain some of the prosecution's other evidence against Lee. Moments after the murder, Jarrod asked Lee, ""So, is that why they call you Point Blank?"" Lee did not respond to Jarrod's question. (IX RT 1659.) The nickname of Point Blank was also necessary for the jury to understand the full significance of Lee's rap song about how, ""[t]hey're never gonna really have to make a rap about my name being Point Blank."" (IX RT 1659.) The information about Lee's nickname was necessary for the jury to be able to understand that evidence. (*People v. Brown, supra*, 31 Cal.4th at pp. 550-551.)

The trial court in this matter reasonably found that the probative value of Lee's nickname was not substantially outweighed by a danger of undue

prejudice. (Evid. Code, § 352.) Contrary to Lee's arguments, other than the nickname itself, no evidence that suggested Lee was a member of a criminal street gang was admitted into evidence.

Lee's attempt to bolster this claim by citing to the prosecutor's use of his nickname in her opening statement and closing arguments also fails. (See AOB 112.) Lee's nickname of Point Blank was admitted into evidence and found to be relevant to both identity and to intent since the victim was killed execution style. (I RT 30.). There is nothing improper about utilizing facts that have been admitted into evidence in closing arguments. (*People v. Thomas* (1992) 2 Cal.4th 489, 526.)

Lee's also contends that the admission of his nickname of Point Blank also caused him to be denied various federal constitutional rights. (AOB 116-118.) The application of ordinary rules of evidence generally do not impermissibly infringe upon a capital defendant's constitutional rights. (*People v. Prince* (2007) 40 Cal.4th 1179, 1229.) The admission of Lee's nickname did not infringe upon his constitutional rights.

The jury in this case was also instructed that "this evidence may not be considered by you to prove that the defendant is a person of bad character, has a disposition to commit crimes, or has ever acted in a manner consistent with this nickname." (XIV RT 2371-2372.) There is no reason to believe that the jury did not follow this instruction.

Lee complains that the jury was confused by "Defendant's Special Instruction No. A."(AOB 113.) Any error in giving "Defendant's Special Instruction No. A" would constitute invited error, and foreclose any challenge on appeal. (*People v. Wickersham* (1982) 32 Cal.3d 307, 330.) The doctrine of invited error applies to jury instructions if the record reflects that counsel made a conscious tactical choice regarding a particular instruction. (*People v. Cooper* (1991) 53 Cal.3d 771, 831.) The record evidences a tactical decision

by counsel in requesting the special instruction be given. The trial court indicated a willingness to give an admonition while noting that defense counsel may not want such an instruction to be given. (II RT 282-283.) Afterwards, Lee's defense trial counsel drafted and submitted the instruction Lee now complains about on appeal.[11/] Accordingly, any error would be invited, and preclude relief on appeal.

Lee complains that Defendant's Special Instruction No. A was confusing to the jurors because it first told them they could consider the nickname to prove he intended to kill Mele Kekaula, then told them they could not consider the nickname to prove Lee actually killed Mele. (AOB 113.) The instruction clearly conveyed to the jurors that they could not consider Lee's

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11. The trial court instructed the jury with Defendant's Special Instruction No. A, which was a modification of former CALJIC No. 2.09, as follows:

> Evidence has been introduced for the purpose of showing that the defendant had a nickname. This evidence, if believed, was introduced for a limited purpose and may only be considered by you for that purpose. The limited purpose for which this evidence was introduced was to prove that, one, defendant was the person introduced to Devin Bates on February 21, 1996, and, two, the defendant intended to kill Mele Kakuala.
>
> You are not permitted to consider this evidence for any other purpose. You are not permitted to consider this evidence as proof that defendant killed, raped or attempted to rape Ms. Kekaula. Further, this evidence may not be considered by you to prove that the defendant is a person of bad character, has a disposition to commit crimes, or has ever acted in a manner consistent with this nickname. No evidence has been presented that on any prior occasion defendant acted in a manner referenced by this nickname.
>
> For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence.

(XIV RT 2371-2372; Third Supp. CT 40.)

nickname of Point Blank as proof that he killed Mele, or as proof that he had a bad character. However, if the jurors found beyond a reasonable doubt that Lee was the person who killed Mele, they could consider Lee's nickname evidence as proof that he had intended to kill her. Indeed, this was the precise argument advanced by the prosecution at trial. (XIII RT 2252-2254.)

Finally, even assuming, arguendo any error in admitting Lee's nickname of Point Blank into evidence, and instruction of the jury with Defendant's Special Instruction No. A, Lee was not prejudiced. There is no reasonable probability that absent admission of the nickname and/or instruction with the modified version of CALJIC No. 2.09, Lee would have enjoyed a more favorable outcome. (*People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243.) Further, even assuming a denial of Lee's constitutional rights, Lee cannot demonstrate prejudice under the more onerous standard for error of a constitutional magnitude as it is clear beyond a reasonable doubt that Lee would not have enjoyed a different outcome absent the admission of evidence of his nickname. (*Chapman* v. *California, supra*, 386 U.S. at p. 24.) The evidence of Lee's premeditated and deliberate execution of his victim, shooting her seven times in the face, did not rest with the jury learning his nickname was "Point Blank."

VIII.

THE TRIAL COURT PROPERLY INSTRUCTED ON THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Lee contends he was denied his federal constitutional right to due process of law as a result of several standard CALJIC instructions given to the jury during the guilt phase of his trial. (AOB 119-132.) Lee forfeited any challenge to the instructions by failing to raise his concerns below. Moreover, even if he had properly preserved this claim, it is meritless.

A. Lee Forfeited This Claim By Failing To Preserve It Below

Lee did not object to any of these instructions below. In fact, Lee requested CALJIC Nos. 201, 2.21.2, 2.22, 8.20, 8.83, and 8.83.1. (Third Supp. CT 36, 48,49,69, 83-84.) Because none of his substantial rights were adversely affected by these CALJIC instructions, Lee's instant appellate claims of instructional error have been waived. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503 ["A party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial."]; *People v. Flood, supra*, 18 Cal.4th at p. 482, fn. 7; *cf., People v. Noble* (2002) 100 Cal.App.4th 184, 189 ["Because the claimed error affects defendant's substantial rights, it was not waived by the failure to object to the instruction"]; Pen. Code, § 1259 [preserving for appellate review any instructional error affecting substantial rights].) In any event, even if these claims had been properly preserved for appellate review, they would otherwise fail as this Court has rejected identical claims presented in other cases and there is no reason for this Court to revisit its holdings in those cases.

B. CALJIC Nos. 2.01, 2.02, 8.83 And 8.83.1 Are Valid Instructions

Lee contends the last paragraphs of the circumstantial evidence (CALJIC Nos. 2.01 and 2.02)[12/] and specific intent/mental state instructions (CALJIC

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12. The trial court instructed the jury with CALJIC No. 2.01 [Sufficiency Of Circumstantial Evidence - Generally] as follows:

> However, a finding of guilt as to any crime may not be based upon circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be

> circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which such inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence as to - - as to the crime itself or the use of the firearm allegation or the special circumstance, permits two reasonable interpretations[,] one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation with - - that points to his innocence and reject that interpretation that points to his guilt.
>
> **If, on the one hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.**

(VIV RT 2368-2369; Third Supp. CT 36 (emphasis added).)

The trial court instructed the jury with CALJIC No. 2.02 [Sufficiency Of Circumstantial Evidence To Prove Specific Intent Or Mental State] as to the charged murder as follows:

> The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crime charged in Count I or the special circumstance to be true unless the proved surrounding circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state, but (2) cannot. Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence. **If, on the other hand one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.**

(XIV RT 2369-2370; Third Supp. CT 37 (emphasis added).)

13. The trial court instructed the jury with CALJIC No. 8.83 [Special Circumstance - Sufficiency Of Circumstantial Evidence - Generally] as follows:

> You are not permitted to find a special circumstance alleged in this case to be true based upon circumstantial evidence unless the proved circumstance, is not only (1) consistent with the theory that the special circumstance is true, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of a special circumstance must be proved beyond a reasonable doubt.
>
> In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which that inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of the special circumstance and the other to its untruth, you must adopt the interpretation which points to its untruth and reject the interpretation that points to its truth.
>
> **If, on the other hand, one interpretation of that evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.**

(VIV RT 2388-2389; Third Supp. CT 83 (emphasis added.)

The trial court instructed the jury with a modified version of CALJIC No. 8.83.1 [Special Circumstances - Sufficiency Of Circumstantial Evidence To Prove Required Mental State] as to the charged murder as follows:

> The specific intent with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true, unless the proved surrounding circumstances are not only (1) consistent with the theory that the defendant had the required specific intent, but (2) cannot be reconciled with any other rational conclusion.

given below denied him due process by undermining the requirement of proof beyond a reasonable doubt by misleading the jurors into believing they could find Lee guilty if he "*reasonably appeared* to be guilty." (AOB 120.) Lee focuses on the language in the instructions that states "if one interpretation of the evidence 'appears to you to be reasonable and the other interpretation to be unreasonable, you *must* accept the reasonable interpretation and reject the unreasonable.'" (*Id.*) Lee argues this language has the effect of reversing the burden of proof by creating an impermissible mandatory presumption that requires a jury to accept any reasonable incriminating interpretation of circumstantial evidence unless the defendant rebuts it by producing a reasonable exculpatory explanation. (AOB 122.) This Court has rejected Lee's complaints regarding the standard CALJIC circumstantial evidence instructions when, as here, the jury is given CALJIC No. 2.90 defining the prosecution's burden of proof beyond a reasonable doubt.[14/] (*People v. Nakahara* (2003) 30 Cal.4th

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> Also, if the evidence as to any specific intent is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent and the other to the absence of the specific intent, you must adopt that interpretation which points to the absence of the specific intent.
>
> **If on the other hand one interpretation of the evidence as to the specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.**

(XIV RT 2389; Third Supp. CT 84 (emphasis added.)

14. The jury was instructed with the reasonable doubt instruction of CALJIC No. 2.90 as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved and in case of a reasonable doubt whether his guilty is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.

705, 714-715.) Indeed, this Court has repeatedly held that when the circumstantial evidence instructions are read in conjunction with other standard instructions including CALJIC No. 2.90, the prosecution's burden of proof beyond a reasonable doubt is not diluted or reduced. (*People v. Nakahara, supra*, 30 Cal.4th at pp. 714-715; *People v. Maury, supra*, 30 Cal.4th at pp. 428-429; *People v. Hughes* (2002) 27 Cal.4th 287, 346-347; *People v. Osband, supra*, 13 Cal.4th at pp. 678-679; *People v. Ray* (1996) 13 Cal.4th 313, 347-348; *People v. Wilson* (1992) 3 Cal.4th 926, 942-943; *People v. Jennings* (1991) 53 Cal.3d 334, 386.)

When read in context, it is clear that the jury was required only to reject unreasonable interpretations of the evidence and to accept a reasonable interpretation that was consistent with the evidence. (*People v. Hughes, supra*, 27 Cal.4th at pp. 346-347.) Lee offers no reason for this Court to overrule the long line of cases upholding the propriety of these instructions. Accordingly, even assuming his claim concerning CALJIC Nos. 2.01, 2.02, 8.83 and 8.83.1, has been preserved for appeal, it should be denied.

C. The Balance Of The Reasonable Doubt Instructions Given Below Are Also Valid

Lee also contends the following standard jury instructions, individually and collectively, "further diluted the constitutionally mandated reasonable doubt standard:" CALJIC No. 1.00 [Respective Duties Of Judge And Jury]; CALJIC

> Reasonable doubt is defined as follows: It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, after the entire comparison and consideration of all of the evidence, leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(XIV RT 2379; Third Supp. 62.)

No. 2.51 [Motive]; CALJIC No. 2.21.1 [Discrepancies In Testimony]; CALJIC No. 2.21.2 [Witness Willfully False]; CALJIC No. 2.22 [Weighing Conflicting Testimony]; CALJIC No. 2.27 [Sufficiency of Evidence of One Witness];; and CALJIC No. 8.20 [Deliberate and Premeditated Murder]. (AOB 123-128.) Lee submits each of these instructions, in different ways, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. (AOB 123-125.) According to Lee, these instructions effectively replaced the reasonable doubt standard with a "'preponderance of the evidence'" standard. (AOB 123.) Assuming arguendo that Lee preserved this claim for appeal, it should be denied as meritless.

1. CALJIC No. 1.00 Was Properly Given

Lee's criticism of CALJIC No. 1.00 is that instead of instructing the jurors that they had to determine if he was "not guilty" or "guilty beyond a reasonable doubt," this instruction gave the jurors a "choice between 'guilt' and 'innocence.'"[15/] (AOB 124.) This Court has previously rejected this

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15. The jury was instructed with CALJIC No. 1.00 as follows:

> You have heard all of the evidence and the arguments of the attorneys, and it is now my duty to instruct you on the law that applies in this case. The law requires that I read the instructions to you. You will have these instructions in written form in the juryroom to refer to during your deliberations.
>
> You must base your decision on the facts and the law.
>
> You have two duties to perform. First, you must determine what facts have been proved from the evidence received in the trial and not from any other source. A fact is something proved by the evidence or by stipulation. A stipulation is an agreement between the attorneys regarding the facts. Second, you must apply the law that I state to you to the facts as you determine them and in this way arrive at your verdict and any finding you are instructed to include in your verdict.

identical claim. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1139; *People v. Nakahara, supra*, 30 Cal.4th at p. 714; *People v. Frye* (1998) 18 Cal.4th 894, 957-958.) Lee provides no basis for this Court departing from its prior decisions rejecting his assignment of error.

2. CALJIC No. 2.51 Was Properly Given

Lee contends CALJIC No. 2.51 "allowed the jury to determine guilt based on the presence of alleged motive and shifted the burden of proof to [Lee] to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof."[16] (AOB 124.) Lee also argues that this

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> You must accept and follow the law as I state it to you, regardless of whether you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.
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> You must not be influenced by pity for or prejudice against the defendant. You must not be biased against the defendant because he has been arrested for this offense, charged with a crime or brought to trial. None of these circumstances is evidence of guilt, and you must not infer or assume from any - - from any or all of them that the defendant [is] more likely to be guilty than not guilty. You must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law and reach a just verdict regardless of the consequences.

(XIV RT 2365-2366; Third Supp. CT 30-31.)

16. The jury was instructed with CALJIC No. 2.51 [Motive Not an Element] as follows:

> Motive is not an element to the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show defendant is not guilty.

instruction "effectively placed the burden or proof on [Lee] to show an alternative motive to that advanced by the prosecutor." (AOB 124-125.) As this Court concluded in *People v. Snow* (2003) 30 Cal.4th 43, CALJIC No. 2.51 "tells the jury that motive is not an element of the crime charged (murder) and need not be shown, which leaves little conceptual room for the idea that motive could establish all the elements of murder." (*Id.* at p. 98; *People v. Guerra, supra*, 37 Cal.4th at p. 1134; *People v. Cleveland* (2004) 32 Cal.4th 704, 750.) This Court has specifically determined that CALJIC No. 2.51 neither lessens the prosecution's burden of proof (*People v. Frye, supra,* 18 Cal.4th at p. 958), nor shifts the burden of proof to the accused (*People v. Noguera* (1992) 4 Cal.4th 599, 633-634). Accordingly, even if Lee properly preserved his claim on appeal, it nevertheless fails on its merits.

3. CALJIC Nos. 2.21.1 And 2.21.2 Were Properly Given

Lee asserts CALJIC Nos. 2.21.1 and 2.21.2 "lessened the prosecution's burden of proof" because the instructions "authorized the jury to reject the testimony of a witness 'willfully false in one material part of his or her testimony' unless 'from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars.'"[17/] (AOB 125, emphasis in the

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(XIV RT 2375; Third Supp. CT 53.)

17. The trial court instructed the jury with CALJIC No. 2.21.1 [Discrepancies in Testimony] as follows:

> Discrepancies in a witness' testimony or between a witness' testimony and that of other witnesses, if there were any, do not necessarily meant that a witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to an important matter or only to something trivial should be considered by you.

original.) Lee reasons the prosecution's burden of proof was lessened because the instructions allowed the jury "to credit prosecution witnesses by finding only a 'mere probability of truth' in their testimony." (AOB 125.) However, this Court has already rejected this contention. (*People v. Nakahara, supra*, 30 Cal.4th at p. 714, citing *People v. Hillhouse, supra*, 27 Cal.4th at p. 493, and *People v. Riel* (2000) 22 Cal.4th 1153,1200; see also *People v. Guerra, supra*, 37 Cal.4th at p. 1139.) This Court has held that when CALJIC No. 2.21.2 is considered in conjunction with CALJIC No. 1.01 [Instructions to be Considered as a Whole] and CALJIC No. 2.90 [Burden of Proof], "the jury was adequately told to apply CALJIC No. 2.21.2 'only as part of the process of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt.'[Citation.]" (*People v. Maury, supra*, 30 Cal.4th at p. 429, quoting *People v. Foster* (1995) 34 Cal.App.4th 766, 775.) Accordingly, Lee's challenge to CALJIC Nos. 2.21.1 and 2.21.2 should be rejected.

4. CALJIC No. 2.22 Was Properly Given

Lee claims the language in CALJIC No. 2.22 about "which party has presented evidence that is comparatively more convincing than that presented by the other party" lessens the prosecution's burden of proof of beyond a

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(XIV RT 2373-2374; Third Supp. CT 47.)

The trial court also instructed the jury with CALJIC No. 2.21.2 [Witness Willfully False] as follows:

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

(XIV RT 2374; Third Supp. CT 48.)

reasonable doubt to "something that is indistinguishable from the lesser 'preponderance of the evidence standard.'"[18/] (AOB 126.) This Court rejected the identical claim when it was raised in *People v. Maury, supra,* 30 Cal.4th at p. 429. This Court found that when considered in conjunction with CALJIC No. 1.01 [Instructions to be Considered as a Whole] and CALJIC No. 2.90 [Reasonable Doubt], CALJIC No. 2.22 instructed the jury to "'weigh the relative convincing force of the evidence . . . only as part of the process of determining whether the prosecution had met its fundamental burden'" of proof beyond a reasonable doubt. (*People v. Maury, supra*, 30 Cal.4th at p. 429 [citation omitted].) As CALJIC No. 2.22 did not lessen the prosecution's burden of proof, Lee's contention, even if properly preserved, lacks merit.

5. CALJIC No. 2.27 Was Properly Given

Lee asserts CALJIC No. 2.27 improperly suggests the defense has the burden of proving facts. (AOB 127.) However, as with the previously discussed instructions, this instruction simply explains that the jury may consider the testimony of one witness concerning a fact to be sufficient for the

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18. The trial court instructed the jurors with CALJIC No. 2.22 [Weighing Conflicting Testimony] as follows:

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

(XIV RT 2374; Third Supp. CT 49.)

proof of that fact.[19] CALJIC No. 2.27 properly directs a jury to make findings using reasonable factual interpretations over those that require unreasonable interpretations. (*People v. Noguera, supra,* 4 Cal.4th at pp. 633-634.) When considered with all of the other instructions provided to the jury, CALJIC No. 2.27 does not dilute the prosecution's burden of proof. Instead, CALJIC No. 2.27 simply advises the jury on how to evaluate a fact proved solely by the testimony of one witness. (*People v. Gammage* (1992) 2 Cal.4th 693, 700.) While CALJIC No. 2.27 does not refer to the prosecution's burden of proving each element beyond a reasonable doubt, the instruction, when read in conjunction with the other instructions, in no way lessens the prosecution's burden of proof. (*People v. Montiel* (1993) 5 Cal.4th 877, 941.)

Lee relies upon dicta in *People v. Turner* (1990) 50 Cal.3d 668, 697, as proof that this Court has found fault with the wording in CALJIC No. 2.27. (AOB 127.) However, as this Court explained in rejecting the argument that CALJIC No. 2.27 implies the defense must bear the burden of proving the truth of the testimony of any defense witness called to the stand:

> In [*Turner*] we rejected an identical challenge to the guilt judgment in a capital case. We acknowledged some ambiguity in the modified instruction's undifferentiated reference to "proof" of "facts," but we made clear that application of the single-witness instruction against the prosecution alone would accord the testimony of defense witnesses an unwarranted aura of veracity.

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19. The trial court instructed the jury with CALJIC No. 2.27 [Sufficiency of Evidence of One Witness] as follows:

> You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of the fact. You should carefully review all the evidence upon which the proof of that fact depends.

(XIV RT 2375; Third Supp. CT 52.)

(*People v. Montiel, supra*, 5 Cal.4th at p. 941, citing *People v. Turner, supra*, 50 Cal.3d at pp. 695-697.)

Moreover, given the instructions that the prosecution had the burden of proving the elements of the offenses beyond a reasonable doubt, this Court stated: "'[w]e cannot imagine that the generalized reference to 'proof' of 'facts' in CALJIC No. 2.27 would be construed by a reasonable jury to undermine these much-stressed principles.'" (*People v. Montiel, supra*, 5 Cal.4th at p. 941, quoting *People v. Turner, supra*, 50 Cal.3d at p. 697.) Lee has not provided any reason for this Court to revisit its previous decisions rejecting this challenge to CALJIC No. 2.27. Accordingly, Lee's claim should be rejected.

6. CALJIC No. 8.20 Was Properly Given

Lee asserts the word "precluding," as used in the last sentence of the second paragraph of CALJIC No. 8.20,[20/] could be interpreted as requiring the

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20. The trial court instructed the jury with CALJIC No. 8.20 [Deliberate and Premeditated Murder] as follows:

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree.
>
> The word "willful" as used in this instruction means intentional.
>
> The word "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. The word "premeditated" means considered beforehand.
>
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other conditions precluding the idea of deliberation, it is murder of the first degree.

defense "to absolutely eliminate the possibility of deliberation, rather than to raise a reasonable doubt about that element." (AOB 127.) This Court rejected the identical claim in *People v. Nakahara, supra*, 30 Cal.4th at p. 715. Lee provides no reason for this Court to hold otherwise in his case.

The specific phrase in CALJIC No. 8.20 that Lee contends could be misinterpreted by the jury reads:

> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation so that it must have been formed upon preexisting reflection and not under a sudden heat of passion or other conditions **precluding** the idea of deliberation, it is murder of the first degree.

When considered in conjunction with the standard reasonable doubt instructions given below, particularly the presumption of innocence and the People's burden of proof specified in CALJIC No. 2.90, this Court found CALJIC No. 8.20 "made it clear that a criminal defendant is not required to absolutely preclude the element of deliberation." (*People v. Nakahara, supra*,

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> The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.
>
> The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.
>
> To constitute a premeditated and deliberate killing, the slayer must consider and weigh the question of killing and reasons for and against such a choice and having in mind the consequences he decides to and does kill.

(XIV RT 2382-2383; Third Supp. CT 69-70.)

30 Cal.4th at p. 715.) Accordingly, Lee's instant claim concerning CALJIC No. 8.20 must be rejected.

Lee's complaints regarding CALJIC Nos. 2.01, 2.21.2, 2.22, 8.20, 8.83 and 8.83.1 were not properly preserved below, and have already been found meritless by this Court. Lee provides no justification for this Court revisiting its decisions rejecting his arguments.[21] Thus, the claims should be denied.

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21. In encouraging this Court to revisit its prior holdings, Lee acknowledges this Court's precedent rejecting his contentions, but argues this Court's reliance on instruction with CALJIC No. 2.90 should be reconsidered in light of the Ninth Circuit's decision in *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 817-818.) (AOB 128-131.) Nothing in the Ninth Circuit's decision in *Gibson* warrants reconsideration of this Court's precedent as the decision is not on point. In *Gibson*, the accused was charged with committing several sexual offenses, and the trial court, pursuant to Evidence Code section 1108, permitted the admission of evidence of his prior sexual offenses. Instructing the jury with a former version of CALJIC No. 2.50.01, the trial court essentially told the jury that if it found the accused had committed the prior offenses, it could, but was not required to, infer he was likely to have committed the charged crimes. (*Gibson v. Ortiz, supra*, 387 F.3d at pp. 817- 818.) The trial court in *Gibson* also instructed the jury with a modified version of CALJIC No. 2.50.1, informing the jury that it was the prosecutor's burden to prove by a preponderance of the evidence that the accused had committed the prior offenses. Following Gibson's trial, CALJIC No. 2.50.01 was revised to clarify that if the jury found by a preponderance of the evidence that the accused committed the prior sexual offenses, this would not be sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses. (*Gibson v. Ortiz*, 387 F.3d at pp. 817-818.)

The Ninth Circuit found that in being instructed with both CALJIC No. 2.50.01 and the former version of CALJIC No. 2.50.1, the prosecution's burden has been unconstitutionally reduced. The Ninth Circuit further concluded that the error could not have been cured by instruction with CALJIC No. 2.90 because it would not have explained which of the two irreconcilable instructions the jurors applied, the one requiring proof by a preponderance of the evidence, or the one requiring proof beyond a reasonable doubt. (*Gibson v. Ortiz, supra*, 387 F.3d at pp. 822-823, 825.)

IX.

THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING THE GUILT PHASE CLOSING ARGUMENT

Lee contends the prosecutor committed misconduct in the guilt phase of his trial by egregiously exaggerating the evidence in describing Mele as starting to scream and struggle. Lee also claims the trial court contributed to the prosecutor's misconduct because the trial court's ruling on his objection gave the jury the impression "that the prosecution's statement of the facts could properly be inferred from the evidence." (AOB 132-134.) Lee argues the cumulative prejudice from prosecutorial misconduct during closing argument, the admission of the evidence of his nickname of Point Blank (Argument VII), and the jury instructions that lessened the prosecution's burden of proof (Argument VIII), "so infected the trial with unfairness as to make the resulting conviction a denial of due process" and his rights under the Fifth, Eighth, and Fourteenth Amendments. (AOB 134-135.) Lee's contentions lack merit.

Prosecutorial misconduct is reversible under the federal Constitution when it ""infects the trial with such unfairness as to make the conviction a denial of due process."" (*People v. Guerra, supra*, 37 Cal.4th at p. 1124, quoting *People v. Morales* (2001) 25 Cal.4th 34, 44, and citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144, and *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431.) ""Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only

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In Lee's case, the jury was not instructed that any facts could be established by a preponderance of the evidence, thus the potential for confusion at issue in *Gibson* is not presented in Lee's case. Nothing in the overall charge to the jury in Lee's case contradicted or negated CALJIC No. 2.90. Accordingly, *Gibson* provides no basis for this Court to reconsider its holdings rejecting Lee's challenges to the standard jury instructions given in his case.

if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury."" (*People v. Guerra, supra*, 37 Cal.4th at p. 1124, quoting *People v. Morales, supra,* 25 Cal.4th at p. 44; accord *People v. Hill* (1998) 17 Cal.4th 800, 819.)

Regarding the scope of permissible argument, a prosecutor is given "'wide latitude,'"and 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.'" [Citation] "'It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.'" (*People v. Hill, supra*, 17 Cal.4th at p. 819, quoting *People v. Wharton* (1991) 53 Cal.3d 522, 567-568.)

If misconduct is established from a prosecutor's comments to 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. Harrison* (2005) 35 Cal.4th 208, 244; *People v. Valdez* (2004) 32 Cal.4th 73, 132-133.)

During the People's closing argument, the prosecutor addressed whether the evidence showed that Lee had a reasonable belief that Mele consented to his sexual advances. In anticipation of a defense argument that Lee may have believed Mele would have consented to having sex with him based upon statements made by Jarrod (all of which had been made outside of Mele's presence), the prosecutor utilized a hypothetical story about a wealthy and generous woman who has given her boyfriend of two weeks some of her possessions as gifts. The boyfriend tells two of his friends that the woman would probably give some of her things to them as well, so the three go to the woman's house and knock on the door and are invited in. During the course of the evening, the woman serves alcohol, and, drinking some alcohol herself,

starts to feel its effects. Then the woman sees one of her boyfriend's friends pick up an item that belongs to her and put it in his pocket. The woman objects and a tug-of-war ensues when the woman tries to get the item back. As soon as she successfully pulls the item away from the man, the man pulls out a gun and kills her. The prosecutor argued that in effect illustrated what happened to Mele Kekaula. (XIII RT 2268-2270.)

The prosecutor pointed out that Jarrod could not consent for Mele, that Mele regarded Jarrod as her boyfriend, and that Mele had not even been dressed to go out that night. Nothing Mele had done that night, including riding around in the car, drinking alcohol, and engaging in any sexual contact with Jarrod while she was driving, would have given Lee a reasonable belief that Mele consented to having sex with him. (XIII RT 2271-2273.)

As Mele continued to drink alcohol, her degree of intoxication increases. Mele began slurring her words, then she fell outside of the car and needed Devin's help to get back up. With a blood alcohol level of .14%, the prosecutor described Mele as "a 17-year-old girl that has had too much to drink." (XIII RT 2273-2274.) After Devin helped Mele back into the car, she fell back onto the back seat and was in a sedated state. The prosecutor argued that if she had been left alone, she probably would have just fallen asleep. However, it was then that Lee takes off her shoes and pants, puts on a condom, and places all "270 pounds 6' 4" of him on top of Mele Kekaula." (XIII RT 2274.)

The prosecutor asked if it was reasonable for Lee to believe that Mele has consented to what he was doing to her. Then Mele "comes to" and begins pushing and saying, "'I'm not like this,'" but Lee does not get off of her immediately. It took him 10, 15, or 20 seconds. (XIII RT 2275.) Lee finds fault with the argument by the prosecution that followed these comments, specifically:

> She says no, and he is still on top of her, still attempting to get what he wants when he wants it from her because she is not a woman, she's

not a young woman to him. She's an end to a means. "'You know what we came up here for,'" he says. Now, isn't that interesting. "'You know what we came up here for.'" Right? *What was Jarrod Gordon and Devin Bates' reaction when the defendant takes off Mele['s] pants and gets on top of her and she starts to scream and struggle? No badges of merit for either one of them at all.*

MR. MYERS: Excuse me. There's no evidence that anybody is screaming, or there's any kind of violent struggle as being described by counsel.

THE COURT: *Well, there's evidence that her voice was raised. Overruled on that point. The struggle is open to interpretation. The jury can recall the testimony.*

(XIII RT 2275-2276 [emphasis added].)

The prosecutor's description that once Mele realized what was happening, "she starts to scream and struggle" (XIII RT 2275-2276), was a fair comment on the evidence based upon the testimony of Devin Bates and Jarrod Gordon.

While there were inconsistencies in details given by Devin and Jarrod between their initial interviews with police, their preliminary hearing testimony, and their trial testimony, the jury was aware of their various statements. This evidence included Devin's description that after Lee had been on top of Mele for "at least three minutes," she "snapped out of it and forced him off of her." (VIII RT 1503.) Devin described Mele as pushing against Lee with both of her hands as if "in a push-up position." Mele was saying things like, "'What do you guys take me for? Do you think I'm a toss-up whore or something?'" Upon being asked Mele's tone of voice when she said this, Devin responded: "Almost in a fit of rage, as if she was disgusted by what was going on." (VIII RT 1504.) According to Devin, right after Mele pushed Lee off of her, she continued to say things. Devin described Mele as being "[v]ery angry and upset." When asked if Mele was speaking loudly or softly at this point, Devin responded, "Loudly." (VIII RT 1507-1508.)

Jarrod testified he did not remember Mele's exact words when Lee was on top of her, but he remembered that she wanted him to get off of her. When he was asked about the tone or volume of Mele's voice, Jarrod responded: "Loud voice." (X RT 1760.) Jarrod described Mele as "pushing him off" of her (X RT 1761), although Lee "didn't get right off." (X RT 1806.) Jarrod said Mele was drunk and that, "It wasn't like she was hitting him or something like that. She just pushed him." (X RT 1807.)

In light of the testimony of Jarrod and Devin at trial, the prosecutor's argument that Mele started to "scream and struggle" was within the scope of permissible argument because it was a fair comment on the evidence. (*People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Harrison, supra*, 35 Cal.4th at p. 249.) Therefore, the trial court did not err by overruling Lee's objection that there had been no evidence of screaming or "any kind of a violent struggle," when it ruled, "Well, there's evidence that her voice was raised. Overruled on that point. The struggle is open to interpretation. The jury can recall the testimony." (XIII RT 2275-2276.) The trial court's comments properly reaffirmed that the jurors were to reach their own conclusions based upon the evidence introduced at trial.

Even assuming arguendo that the prosecutor's description of Mele screaming and struggling was improper argument, and that the trial court's comment was erroneous, Lee was not prejudiced. Lee had the opportunity to address the People's challenged misstatement in his own closing argument (XIV RT 2286-2336.) Moreover, the jury could not possibly have been misled by any misstatement in this portion of the prosecutor's closing argument. The jury heard all of the testimony of Devin Bates and Jarrod Gordon, as well as the testimony of Detective David Fernandez about his interview of Devin on February 22, 1996 (XII 2147-2169) at trial. As a result of a request in juror note No. 1, they also heard a readback of the testimony of those three witnesses

concerning the events that occurred after Mele fell outside of the car. (40 CT 10855-10856.)

Prosecutorial misconduct does not require reversal unless it is reasonably probable that, but for the misconduct, the defendant would have received a better result. (*People v. Crew* (2003) 31 Cal.4th 822, 836; *People v. Gionis* (1995) 9 Cal.4th 1196, 1220; *People v. Espinoza* (1992) 3 Cal.4th 806, 821; *People v. Haskett* (1982) 30 Cal.3d 841, 866.) By providing CALJIC Nos. 1.00 and 1.02, the trial court instructed the jury that the statements made by attorneys were not evidence, and that they were to decide the case based on the evidence adduced at trial and not from any other source. (XIV RT 2367; Third Supp. CT 30-31, 32.) The jury is presumed to follow the trial court's instruction. (*People v. Hill, supra*, 3 Cal.4th at p. 1011; *People v. Pinholster* (1992) 1 Cal.4th 865, 925; *People v. Bonin* (1988) 46 Cal.3d 659, 699.) Nothing in the prosecutor's argument, or in the trial court's ruling on Lee's objection to that argument, could properly be characterized as prejudicial or so egregious as to have denied Lee a fair trial. (*People v. Sanchez* (1995) 12 Cal.4th 1, 69.)

Moreover, the evidence of Lee's guilt speaks for itself. "Whatever the test of prejudice this court applies to the present case, it is certain that any reasonable jury would have reached the same verdict even in the absence of the prosecutor's remarks." (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) In other words, the jury's guilt phase verdict was based on the strength of the evidence, not on a single alleged misstatement made by the prosecutor during closing argument. Accordingly, this claim of error should be denied.

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X.

EVIDENCE OF ACTS OF FORCE OR VIOLENCE LEE COMMITTED AS A JUVENILE WERE PROPERLY ADMITTED DURING THE PENALTY PHASE OF TRIAL

Lee claims his death sentence must be vacated because the admission of the evidence of prior bad acts he committed as a juvenile violated his federal Constitutional rights to a fair trial, due process, effective representation, to be free from cruel and unusual punishment, and to a reliable and individualized sentencing determination by a fair and impartial jury. (AOB 137-143.) Lee's prior bad acts as a juvenile, all of which involved force, threats of force, or violence, were properly admitted in the penalty phase of his trial.

On January 27, 1999, the People filed a Statement in Aggravation which provided formal notice of evidence the People intended to introduce as evidence in aggravation which involved the use of, or threat to use, force or violence, specifically: **(1)** Lee's use of force and violence upon Kenneth Kupchunos on February 6, 1992 (incident when 14-year-old Lee[22/] struggled and struck campus supervisor Kupchunos after Lee refused to leave campus of Moreno Valley High School); **(2)** Lee's taking of property by force or fear from Josh and Jesse Hill on October 23, 1992 (incident when 15-year-old Lee and a cohort demanded and took the bicycles from 13 and 11-year-old brothers near Badger Springs Middle School in Moreno Valley); **(3)** The taking of property by force from José Jaramillo on or about January 10, 1993 (incident involving 15-year-old Lee's physical attack and robbery of pizza delivery man with broom stick or bat at Mountain View Apartments in Moreno Valley); **(4)** The nature and circumstances involving Lee's assault and battery upon his father on July 5, 1994 (incident when 17-year-old Lee slapped or punched his father and ran

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22. Lee was born on June 16, 1977 (XV RT 2664), making him 18 years and eight months old when he murdered Mele Kekaula on February 22, 1996.

out of house after they argued); **(5)** The nature and circumstances surrounding Lee's assault with a deadly weapon upon Joseph Scruggs and Willie Troupe on July 30, 1995 (incident when 18-year-old Lee drove car towards group of young people attending a barbecue in front of Ronald Gaither's house on Aristotle Court in Moreno Valley). (2 CT 557-558.)[23]

On March 19, 1999, Lee filed two interrelated motions to exclude the evidence underlying his juvenile court adjudications from the penalty phase of his trial on the bases that the admission of such evidence would violate various federal Constitutional rights including the rights against cruel and unusual punishment, equal protection, and due process (22 CT 5850-5874), and, *inter alia*, requested a hearing to determine the admissibility of certain aggravating evidence pursuant to *People v. Phillips* (1985) 41 Cal.3d. 29, 74. (22 CT 5921-5946.)

On April 22, 1999, after the jury returned its guilty verdict and true finding of the special circumstance, the trial court heard argument concerning the admissibility and scope of the penalty phase evidence. (XIV RT 2406.) To the extent Lee argued the death penalty statutes in California were unconstitutional, the defense motion was denied. (XIV RT 2410.) Then, at the direction of the trial court, the prosecutor made an offer of proof as to the evidence she intended to introduce concerning instances of Lee's prior bad acts. The trial court found all of the proffered evidence was appropriate for the jury to consider and denied Lee's motion to exclude the evidence. (XIV RT 2411-2424.)

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23. While a First Amended Statement in Aggravation was filed on February 23, 1999, which included the addition of the People's intent to introduce evidence of Lee's assault and battery upon Oshaunga Combs on or about August 2, 1992, in Riverside County. (3 CT 669-670), the prosecution subsequently indicated the People would proceed only with the evidence identified in the initial Statement in Aggravation filed on January 27, 1999. (XIV RT 2411.)

Penal Code section 190.3, factor (b), provides in relevant part:

> If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true . . . the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole.
>
> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

This Court has repeatedly held evidence of prior violent juvenile conduct that would have been a crime if committed by an adult is admissible under Penal Code section 190.3, factor (b). (*People v. Lewis* (2001) 26 Cal. 4th 334, 378-379; *People v. Barnett* (1998) 17 Cal.4th 1044, 1174-1175; *People v. Avena* (1996) 13 Cal.4th 394, 426; *People v. Champion* (1995) 9 Cal.4th 879, 936-937; *People v. Raley* (1992) 2 Cal.4th 870, 909-910; *People v. Pinholster, supra*, 1 Cal.4th at p. 959; *People v. Burton* (1989) 48 Cal.3d 843, 862.) Prior violent criminal activity as a juvenile, even though disposed of in a juvenile proceeding, is properly admissible in the penalty phase of a trial as Penal Code section 190.3, factor (b), does not require a felony conviction. (*People v. Cox* (1991) 53 Cal.3d 618, 688-689.)

Lee relies upon the United States Supreme Court's rational in *Roper v. Simmons* (2005) 543 U.S. 551 [125 S. Ct. 1183, 161 L.Ed.2d 1], that it is cruel and unusual punishment to impose a death judgment on someone who was under 18 years of age at the time of the crime because, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." (AOB 138-139, quoting *Roper v. Simmons, supra*, 543 U.S. at pp. 569-570.) The flaw in Lee's reasoning is that his penalty verdict is attributable to his conduct when he was an adult, namely, murder with a special

circumstance finding, not his past juvenile criminal activity. (*People v. Raley, supra*, 2 Cal.4th at p. 909.)

In determining the appropriate penalty for the murder of Mele, the jury was entitled to have as much information as possible and it was entitled to know about Lee's propensity for violence and prior criminal conduct. Accordingly, the trial court properly admitted, and the jury properly considered, evidence Lee's prior violent juvenile criminal activity.

XI.

EVIDENCE OF LEE'S GUILTY PLEA TO A MISDEMEANOR CHARGE OF ASSAULT WITH A DEADLY WEAPON WAS PROPERLY ADMITTED FOR THE LIMITED PURPOSE OF ESTABLISHING HIS IDENTITY AS THE DRIVER OF THE CAR INVOLVED IN A PRIOR BAD ACT

Lee contends the trial court's taking of judicial notice of his guilty plea to a misdemeanor violation of assault with a deadly weapon (Pen. Code, § 245, subd. (a)) for the purpose of identifying the individual who may have been involved in the incident with the car driven towards the people attending the barbecue was erroneous because it was double hearsay and because the statutory and case law in effect at the time of Mele Kekaula's murder did not allow the introduction of a misdemeanor conviction to prove misdemeanor conduct. He further argues his death sentence must be vacated as a result of the admission of the evidence of his plea. (AOB 143-145.) Lee's claim fails as there was no error.

Ronald Gaither, Walter Fuller, and Joseph Scruggs testified about the incident when a car was driven at high speed towards a group of young people in front of Ronald Gaither's home on the Aristotle Court cul-de-sac. (XIV RT 2477, 2498, 2513.) Ronald Gaither testified that he noticed a small gray car driving very slowly past his house. There were at least two people in the car

and the driver was looking at a group of teenagers, which included Gaither's sons and their friends, as they stood near the curb. Gaither described the driver's gaze as, "Just sort of cold." (XIV RT 2479-2480.) Other than describing the driver as an African-American male, Gaither was unable to identify the driver of the car. (XIV RT 2488.) After the car was driven towards the young people up over the curb and into a fence in the middle of Gaither's front yard, the car was driven away through the next door neighbor's yard. (XIV RT 2486-2490.) Some of the young ladies who had been with his sons described the driver and provided a name and telephone number to Gaither. Gaither called the number and asked to speak to Philian Lee. (XIV RT 2491-2494.)

Joseph Scruggs testified that he had not seen the driver of the car. (XIV RT 2517.) Walter Fuller, Ronald Gaither's step-son, testified that he did not get a good look at the driver and did not remember his face. (XIV RT 2507-2508.) One of the females named Wanda said something to Walter about the driver, and Walter did remember the driver having a smile on his face. (XIV RT 2509-2510.)

The prosecutor sought to admit Lee's admission to committing the assault with the vehicle in the form of his guilty plea to a misdemeanor violation of Penal Code section 245, subdivision (a). (XIV RT 2519, citing *People v. Ray, supra*, 13 Cal.4th at pp. 367-368 (George, C.J., conc.).) Lee's trial counsel objected on the basis that misdemeanor convictions were not admissible under *People v. Wheeler* (1992) 4 Cal.4th 284. The trial noted the prosecutor was relying on Lee's admission, as opposed to the fact of conviction itself. (XIV RT 2520.) The prosecutor argued that Lee should not be permitted to shield himself from an admission because it also happens to be a guilty plea with respect to a misdemeanor conviction. (XIV RT 2521-2522.)

The trial court advised and instructed the jurors as follows:

> All right. Ladies and gentlemen, at this time Court is going to take judicial notice of one of its own files, particularly Case 329002. That is a misdemeanor case involving the defendant, Mr. Lee.
>
> And what judicial notice is, is basically the Court recognizing events that took place in one of it other cases. And in this particular case, on January 10, 1996, Mr. Philian Eugene Lee entered a plea of guilty to a charge of violating Penal Code Section 245 Subdivision (a) Subsection (1), a misdemeanor. The victim being Joseph Scruggs.
>
> Now, by taking judicial notice of this fact, the Court is in effect admitting this into evidence, but it's admitted for a very limited purpose. And you're instructed that that limited purpose is simply as it relates to the identity of the individual who may have been involved in the incident involving the car at the barbecue that you heard about the other day. It is offered for no other purpose other than what I have just described to you.
>
> It is not, and I emphasize "not" to be considered by you as a factor in aggravation that you may wish to consider in determining the appropriate penalty. It again is offered for the limited purpose of assisting you in determining the identity of the individual involved in that incident.

(XV RT 2661-2662.)

Lee contends the trial court erred in admitting "the fact of a misdemeanor conviction." (AOB 147, quoting *People v. Wheeler, supra*, 4 Cal.4th at p. 288 .) Lee also argues that the law in effect at the time of Mele's killing precluded admission of a misdemeanor conviction as it was not until 10 months after Mele's murder that Evidence Code section 452.5 was enacted which permits the admission of records of a criminal conviction "to prove commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record." (AOB 148-149.) Contrary to Lee's claim on appeal, the law at the time of the offense did not exclude evidence of misdemeanor convictions for all purposes (see AOB 150). The trial court simply relied on the general principal that the identity of a perpetrator may be established by an admission.

Moreover, no evidence of Lee's misdemeanor *conviction* of assault with a deadly weapon was admitted. The trial court only told the jury it was *taking judicial notice of Lee's guilty plea* to that offense.

In any event, it is unnecessary to address whether Lee's misdemeanor plea in Case No. 329002 was inadmissible hearsay because, as a record of the state court, it was properly subject to judicial notice by the trial court. (Evid. Code, § 452, subd. (d) [Matters which may be judicially noticed].) The record of Lee's guilty plea in Case No. 329002, was prepared "by and within the scope of duty of a public employee," "at or near the time of the act, condition, or event, " and the "method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1280 [Record by public employee].) Additionally, Evidence Code section 1220 [Admission of party] provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ." Thus, as a party admission, Lee's plea was excepted from the hearsay rule and was properly admissible to establish identity. (See *Lake v. Reed* (1997) 16 Cal.4th 448, 461 [admission to driving admissible to establish element of driving under the influence in DMV hearing].)

Moreover, as noted by the trial court, the prosecutor had already introduced evidence about the assault with the vehicle by way of three witnesses. The identity of the driver of the car was not an element of the offense of assault with a deadly weapon, but the driver's identity was subject to being established by an admission. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1057; see also CALJIC No. 2.72 [Corpus delecti must be proved independent of admission or confession].)

Indeed, both the Evidence Code and the intent of the electorate, as evidenced by the passing of the Initiative measure in 1982 ("Victim's Bill of Rights"), demonstrate that the taking of judicial notice of Lee's guilty plea in

Riverside County Superior Court Case No. 329002 was consistent with statute and legislative purpose.

> [R]elevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule or evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103.

(Cal. Const., art. I, § 28, subd. (d) [Right to Truth-in-Evidence].)

Felony or misdemeanor notwithstanding, the driving of a vehicle at a high rate of speed towards a group of people certainly involves "the use or attempted use of force or violence" addressed in Penal Code section 190.3, factor (b). Thus, the record demonstrates that the trial court was acting within its discretion when it took judicial notice of Lee's guilty plea in Case No. 329002. (Evid. Code, § 352.) Since there was a sufficient showing of the corpus delicti of the assault with a deadly weapon prior to the taking of the judicial notice of Lee's guilty plea to the charge to establish identity, Lee's instant claim of error must fail.

Moreover, had the trial court not taken judicial notice of Lee's plea (which the trial court found to be a confession instead of an admission), the prosecutor could have established Lee's identity as the person who committed the assault with the car in other ways. The prosecutor advised the trial court that she could call Deputy Bryan Melhbrech to the stand. Deputy Melhbrech had responded to the Aristotle Court call and his report reflected that Walter Fuller was one of the individuals who had recognized Lee as the driver, which was contrary to Walter's trial testimony about not seeing the driver's face or recognizing him. (XV RT 2544.) The interview had taken place ten minutes after the event. (XV RT 2546-2547.) Lee's trial counsel objected to this because the prosecutor had not confronted Walter on the stand about the statement he had made to the deputy, and the witness had been excused and was

not subject to being recalled. (XV RT 2544-2545.) However, Walter Fuller could have been called back to the stand and asked about his identification of Lee to the deputy. The contents of Deputy Melhbrech's report might have refreshed Walter's memory. If Walter still maintained that he had not seen the driver, his testimony could have been impeached with his prior inconsistent statement to Deputy Melhbrech. Either way, Lee's identity as the driver would have been established.

Given all of the circumstances, the taking of judicial notice by the trial court, and the trial court's instruction to the jury that Lee's guilty plea was offered for the limited purpose of identifying "the individual who may have been involved in the incident involving the car at the barbecue" (XV RT 2662), was an appropriate resolution adequately safeguarding the interests of Lee and the prosecution. It allow the People the truth in evidence mandated by the state constitution, and it allowed the defense to be able to argue that Lee may not have been involved as the driver, but as the passenger. (XV RT 2657-2658.) Even assuming error, Lee was not prejudiced as he would not have enjoyed a more favorable outcome absent the jury being permitted to consider his guilty plea for the limited purpose permitted by the trial court's admonition. Accordingly, Lee's claim of prejudicial error should be denied.

XII.

INTERCASE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED

Lee contends the lack of intercase proportionality review in capital cases in California, which is afforded in non-capital cases in this state, violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitutuion (AOB 156-160) because it allows capital defendants to be subjected to proceedings which are conducted in a "constitutionally arbitrary, unreviewable manner, or which are skewed in favor of execution." (AOB 160.)

This claim has been rejected by the United States Supreme Court. (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed. 2d 29].) This Court has also repeatedly rejected this claim. (See e.g., *People v. Panah* (2005) 35 Cal.4th 395, 500; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Prieto* (2003) 30 Cal.4th 226, 276; *People v. Burgener* (2003) 29 Cal.4th 833, 885; *People v. Anderson* (2001) 25 Cal.4th 543, 602; *People v. Millwee* (1998) 18 Cal.4th 96, 168; and *People v. Stanley* (1995) 10 Cal.4th 764, 842). There is no reason why this Court should change its position on this issue. Accordingly, this claim should be denied.

XIII.

CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE CONSTITUTIONAL

Lee presents a multi-faceted argument that California's death penalty sentencing statute (Penal Code, § 190.3), and the standard penalty phase jury instructions, are unconstitutional because they fail to require the appropriate burden of proof. (AOB 160-190.) Lee submits that the jurors should be instructed that the prosecution bears the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, and of proving that death is the appropriate penalty under all of the circumstances. (AOB 161-182.) These contentions are without merit because, with the exception of the prosecution's burden of proving the truth of a prior conviction or bad act beyond a reasonable doubt, neither side bears a burden of proof in the penalty phase of a capital trial.

In this argument, Lee also presents the sub-claims that California's death and penalty statute jury instructions violate the Sixth, Eighth, and Fourteenth Amendments to the Constitution because they fail to require juror unanimity on the aggravating factors (AOB 182-189), and, like the presumption of innocence

in a non-capital trial, fail to instruct the jury on the presumption of life (AOB 189-190). These claims also lack merit and should be rejected.

"Unlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; see also *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; *People v. Daniels* (1991) 52 Cal.3d 815, 890; and *People v. Carpenter* (1997) 15 Cal. 4th 312, 417-418.) This Court has repeatedly rejected any claims that focus on a burden of proof in the penalty phase. (*People v. Welch, supra*, 20 Cal. 4th at pp. 767-768; *People v. Ochoa* (1998) 19 Cal.4th 353, 479; *People v. Snow, supra*, 30 Cal.4th at p. 126; *People v. Box* (2000) 23 Cal.4th 1153, 1216; *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418; *People v. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Holt* (1997) 15 Cal.4th 619, 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) Lee fails to offer any valid reason why this Court should vary from its past decisions.

Lee's contention that the United States Supreme Court's holdings in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Apprendi v. New Jersey* (2000) 520 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] compel a different conclusion (AOB 162-173), also fails. This Court has determined that *Ring* and *Apprendi* simply have no application to the penalty phase procedures of this state. (*People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Morrison* (2004) 34 Cal. 4th 698, 730; *People v. Brown* (2004) 33 Cal.4th 382, 402; *People v. Prieto, supra*, 30 Cal.4th at pp. 262-264, 271-272, 275.) The United States Supreme Court's subsequent decision in *Blakely v. Washington, supra,*

542 U.S. 296, did not alter this conclusion. (*People v. Ward* (2005) 36 Cal.4th 186, 221.)

As this Court explained,

> [U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole. ([Pen. Code] § 190.2, subd. (a).) Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*.

(*People v. Anderson, supra*, 25 Cal.4th at pp. 589-590, fn. 14.)

Lee's sub-claim that California's death penalty statute and jury instructions are unconstitutional because they fail to require juror unanimity on the aggravating factors (AOB 182-189), should be rejected. This Court has repeatedly determined that penalty phase juries do not need to unanimously agree as to which aggravating circumstances apply. (*People v. Dunkle* (2005) 36 Cal.4th 861, 939; *People v. Davis* (2005) 36 Cal.4th 510, 572; *People v. Carter* (2005) 36 Cal.4th 1215, 1280 [jury not required to agree unanimously as to aggravating circumstances]; *People v. Frye, supra*, 18 Cal.4th 894; *People v. Bolin, supra,* 18 Cal.4th at pp. 345-346.)

Likewise, Lee's sub-claim that, as the correlate of the presumption of innocence in non-capital jury trials, penalty phase jurors should be instructed that there is a "presumption of life" (AOB 189-190), should also be rejected. As this Court has explained,

> [N]either death nor life is presumptively appropriate or inappropriate under any set of circumstances, but in all cases the determination of the appropriate penalty remains a question for each individual juror.

(*People v. Samayoa* (1997) 15 Cal.4th 795, 853.)

Lee offers no valid reason why this Court should revisit these issues. Accordingly, the instant claims should be denied.

XIV.

CALJIC NO. 8.88 PROPERLY INSTRUCTS THE JURY ON THE SCOPE OF ITS SENTENCING DISCRETION

Lee contends CALJIC No. 8.88 is constitutionally infirm for a number of reasons. (AOB 190-208.) Specifically, Lee faults the instruction for failing to tell the jurors that if they determined that mitigation outweighed aggravation, they were required to return a recommendation of life without the possibility of parole. (AOB 194-197.) Lee also claims the instruction uses the impermissibly vague term "so substantial" in telling the jurors how to weigh the aggravating and mitigating circumstances, thus creating a "presumption in favor of death." (AOB 198-201.) Lee next claims the use of the broader term "warrants," instead of the narrower term "appropriate," fails to clearly tell jurors that their central inquiry is to determine if the death penalty is appropriate, as opposed to simply determining that the death penalty is an authorized sentence. (AOB 201-204.) Finally, Lee claims the terms "aggravating" and "mitigating" are themselves vague and ambiguous, thus making CALJIC No. 8.88 constitutionally infirm. (AOB 204-205.) This Court has rejected identical claims concerning this jury instruction. In any event, all of these claims have been forfeited as Lee never raised them below.

Both the People and Lee requested that the jury be instructed with CALJIC No. 8.88 [Penalty Trial - Concluding Instruction]. (40 CT 10944; 41 CT 10995.) The trial court instructed the jury with a modified version of CALJIC No. 8.88.[24/] (XVII RT 3065-3066; 41 CT 10995-10996.) None of the

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24. The jury was instructed with CALJIC No. 8.88 as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without the possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence and after having heard and considered the arguments of counsel, you should

complaints Lee now raises about CALJIC No. 8.88 were ever presented to the trial court. As Lee failed to request any of the amplifications or modifications

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

(XVII RT 3065-3066; 41 CT 10995-10996.)

he now claims were necessary to protect his constitutional rights, these claims have been forfeited. (*People v. Arias* (1996) 13 Cal.4th 92, 171; *People v. Bonin* (1989) 47 Cal.3d 808, 856; but see Pen. Code, § 1259.)

Even if the instant claims had been properly preserved, this Court has repeatedly held that CALJIC No. 8.88 is adequate to ensure reliability in a death verdict since it makes clear to the jurors that each juror must reach an individual decision that evidence or factors the individual juror believes are aggravating outweigh those the juror deems mitigating. (*People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Jones* (2003) 30 Cal.4th 1084, 1128; *People v. Prieto, supra*, 30 Cal.4th at pp. 263-264; *People v. Boyette* (2002) 29 Cal.4th 381, 464-465; *People v. Ochoa* (2001) 26 Cal.4th 398, 452; *People v. Coddington* (2000) 23 Cal.4th 529, 642.)

Lee's contention that CALJIC No. 8.88 is deficient because it fails to expressly advise the jurors that if they determined the circumstances in mitigation outweighed circumstances in aggravation, they were required to return a verdict of life without the possibility of parole (AOB 194-197), has been repeatedly rejected by this Court. (See *People v. Moon, supra,* 37 Cal.4th at p. 24; *People v. Coffman & Marlow* (2004) 34 Cal.4th 1, 124; *People v. Hughes, supra*, 27 Cal.4th at p. 405, citing *People v. Duncan* (1991) 53 Cal.3d 955, 978; *People v. Kipp* (1998) 18 Cal.4th 349, 381; and *People v. Dennis, supra*, 17 Cal.4th at p. 552.)

Likewise, Lee's claim that the instruction uses the impermissibly vague term "so substantial" in telling the jurors how to weigh the aggravating and mitigating circumstances creates a "presumption in favor of death" (AOB 198-201), and his related argument that this flaw in the instruction could have misled the jury into believing that Lee bore the burden of proving death was not the appropriate sentence (AOB 201), has also been rejected by this Court. Indeed, this Court has consistently rejected the claim that the "so substantial"

language of CALJIC No. 8.88 is unconstitutionally vague. (See *People v. Harris* (2005) 37 Cal.4th 310, 361; *People v. Coffman & Marlow, supra*, 34 Cal.4th at p. 124; *People v. Griffin* (2004) 33 Cal.4th 536, 593; *People v. Prieto, supra*, 30 Cal.4th at p. 273; *People v. Breaux* (1991) 1 Cal.4th 281, 315-316.) This Court also found that CALJIC No. 8.88 "was not defective for failing to inform the jury as to which side bore the burden of persuading it of the appropriateness or inappropriateness of a death verdict. . . " (*People v. Coffman & Marlow, supra*, 34 Cal.4th at p. 125; *People v. Hayes* (1990) 52 Cal.3d 557, 643 ["Because the determination of penalty is essentially moral and normative [citation], and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion"].) As this Court explained:

> Defendant also faults CALJIC No. 8.88 for calling on the jury to impose death if they find "substantial" aggravating factors, implicitly compelling a death verdict if aggravating circumstances outweighed mitigating ones. Defendant observes that under our case law, the jury may reject a death sentence even if mitigating circumstances do not outweigh aggravating ones. Our reading of the instruction discloses no compulsion on the jury to impose death under such circumstances. Instead, the instruction simply explains that no death verdict is appropriate unless substantial aggravating circumstances exist which outweigh the mitigating ones. This instruction was proper under our case law.

(*People v. Taylor* (2001) 26 Cal.4th 1155, 1181.)

Lee's claim that the use of the broader term "warrants," instead of the narrower term "appropriate," fails to clearly tell jurors that their central inquiry is to determine if the death penalty is appropriate, as opposed to simply being an authorized sentence (AOB 201-204), has also been rejected by this Court. (*People v. Moon, supra*, 37 Cal.4th at p. 43, citing *People v. Boyette, supra*, 29 Cal.4th at p. 465; *People v. Griffin, supra*, 33 Cal.4th at p. 593; *People v. Medina* (1995) 11 Cal.4th 694, 781; *People v. Breaux, supra*, 1 Cal.4th at pp. 315-316.)

Finally, Lee's claim that the terms "aggravating" and "mitigating" are "not commonly understood terms," thus making CALJIC No. 8.88 constitutionally infirm (AOB 204-205), is without merit and had also been rejected by this Court. As set forth above, the instruction itself provided the jury with accurate and understandable definitions of what constitutes an "aggravating factor" or "mitigating circumstance." (XVII RT 3065-3066; 41 CT 10995-10996.) This Court has held that trial courts are not required to further define the terms "aggravating" and "mitigating" to assist the jury in determining penalty - even if requested to do so by the defendant. (*People v. Johnson* (1994) 6 Cal.4th 1, 50, citing *People v. Malone* (1988) 47 Cal. 3d 1, 55; see also *People v. Stitely, supra*, 35 Cal.4th at p. 574.)

As this Court explained in *Malone*, "aggravation" and "mitigation" are commonly understood terms. A trial court is not required to instruct on the meaning of terms that are commonly understood. (*People v. Malone, supra*, 47 Cal.3d at p. 55, relying on *People v. Page* (1980) 104 Cal.App.3d 569, 577 [statutory language is generally sufficient].) This Court observed that a jury, without definition of the terms "aggravation" and "mitigation," is capable of deciding which of the statutory factors increase the "guilt or enormity" of a crime and which extenuate or reduce the degree of moral culpability. (*People v. Malone, supra*, 47 Cal.3d at p. 55, citing *People v. Davenport* (1986) 41 Cal.3d 247, 289, and *People v. Ghent, supra*, 43 Cal.3d at p. 777 [determining which factors are "applicable"].)

Lee cites to the results of studies set forth in two articles to refute this Court's holding that "aggravating" and "mitigating" are commonly understood terms that do not require further definition. (AOB 204, citing *Deciding to Take Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death* by Haney, Sontag, and Costanzo (1994) 50 J. Soc. Issues 149; and *Comprehending Life and Death Matters: A Preliminary Study of California's*

Capital Penalty Instructions by Haney and Lynch (1994) 18 Law & Hum. Behav. 411.) This Court addressed and rejected a similar argument in *People v. Welch, supra*, 20 Cal.4th at p. 701, wherein the appellant relied on the contents of the same two articles. (*Id.* at pp. 772-773.) This Court has already held that the presumption that the jurors understood and followed the mitigation instruction supplied to them was not rebutted by contrary empirical assertions which were based on research that was not part of the record of that case and had not been subjected to cross-examination. (*Id.* at p. 773, citing *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 26.) Lee provides no basis for this Court revisiting its prior holdings rejecting his claim.

Lee's claim that the cumulative effect of the multiple flaws alleged in CALJIC No. 8.88 resulted in the denial of his rights to due process of law and to be free of cruel and unusual punishment (AOB 205-208), should also be rejected. This Court has repeatedly held that the standard instructions in CALJIC No. 8.88 adequately advised the jurors on the scope of their discretion to reject the death penalty and to return a life without possibility of parole verdict. This Court has also held that instruction is not inconsistent with the requirement set forth in Penal Code section 190.3, which provides: "If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances[,] the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole." (*People v. Carter, supra*, 36 Cal.4th at p. 1279; *People v. Stitely, supra*, 35 Cal.4th at p. 574, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192; see also *People v. Lenart* (2004) 32 Cal.4th 1107, 1135; *People v. Gurule* (2002) 28 Cal.4th 557, 661-662.)

As stated above, this Court has repeatedly rejected the claims Lee now raises, and should do so here. (See *People v. Moon, supra*, 37 Cal.4th at pp. 42- 43; *People v. Boyette, supra*, 29 Cal.4th at p. 464 ["We agree none of the

claims has merit and that no reason appears to reconsider our past decisions."]; *People v. Taylor, supra*, 26 Cal.4th at p. 1183 ["Once again, as defendant acknowledges, we have repeatedly rejected similar arguments, and we see no compelling reason to reconsider them here."].) Lee fails to offer a compelling reason for this Court to revisit any of its prior holdings. Accordingly, if this Court determines any of these claims have not been waived by Lee's failure to present them to the trial court, these claims should nevertheless be denied.

XV.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON AGGRAVATING AND MITIGATING CIRCUMSTANCES

Lee contends the trial court's instructions about mitigating and aggravating factors (in CALJIC Nos. 8.85 and 8.88), in conjunction with the admission of evidence of his prior unajudicated violent criminal activity pursuant to Penal Code section 190.3, factor (b), rendered his death sentence unconstitutional. (AOB 208-234.) Lee prefaces this argument with an attack on Penal Code section 190.3, factor (a)[25], and criticizes the jury's ability to consider what he describes as "the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death . . . " (AOB 208-211, e.g., consideration that a victim struggled or that a victim did not struggle as a

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25. Penal Code section 190.3 provides in relevant part:

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

circumstance of the crime.) While Lee acknowledges that Penal Code section 190.3, factor (a) "survived a facial Eight Amendment challenge" (AOB 209, citing *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [114 S. Ct. 2360, 129 L.Ed.2d 750], J. Blackmun's dissenting opinion), Lee fails to otherwise address the United States Supreme Court's determination in *Tuilaepa* that Penal Code section 190.3, factors (a) and (b) were neither vague nor constitutionally deficient. (*Tuilaepa v. California, supra,* 512 U.S. at pp. 975-977.) In any event, as noted by Justice Kennedy in the majority opinion,

> Competing arguments by adversary parties bring perspective to a problem, and thus serve to promote a more reasoned decision, providing guidance as to a factor jurors most likely would discuss in any event.

(*Tuilaepa v. California, supra,* 512 U.S. at p. 977 [rejecting claim that factor (i) of Penal Code section 190.3, age of defendant at time of crime, was unconstitutionally vague].)

In the instant argument, Lee asserts the use of unajudicated criminal activity as a factor in aggravation under Penal Code section 190.3, factor (b), and the failure to require a unanimous jury finding on the unajudicated acts of violence, render his death sentence unconstitutional. (AOB 215-218.) According to Lee, the absence of a requirement of juror unanimity on the unajudicated acts of violence allowed the jurors to impose a death verdict based upon "unreliable factual findings that were never deliberated, debated, or discussed." (AOB 218-221.) Lee also claims the failure of the trial court to instruct the jurors that the factors listed in CALJIC No. 8.85 (d) and (h) were mitigating factors, left the jurors free to conclude that any absence of those two factors could be considered aggravating factors. (AOB 221-222.) To this claim, Lee adds the argument that the inclusion of the word "extreme" in CALJIC No. 8.85 (d) (i.e., whether offense committed while "under the influence of extreme mental or emotional disturbance") "acted as a barrier to the consideration of mitigation" in violation of various constitutional rights. (AOB

223.) Finally, Lee claims California's death penalty provisions violate the United States Constitution by failing to require the jury to provide written findings as to the aggravating factors (AOB 223-226), and by failing to provide the same procedural safeguards provided to non-capital defendants (AOB 226-234). All of these claims have previously been rejected by this Court, and Lee provides no reason for this Court to reconsider those holdings. Moreover, as only one aspect of the juror unanimity claim concerning the aggravating factors was ever presented to the trial court, the balance of the claims raised in the instant argument have not been properly preserved for appeal.

A. As Only One Portion Of One Of These Claims Was Ever Presented To The Trial Court, Most Of The Claims In This Argument Have Been Waived

Lee submitted 21 proposed special jury instructions to the trial court in the penalty phase of his trial. (40 CT 10896-10926.) One of those proposed instructions was as follows:

> DEFENDANT'S SPECIAL INSTRUCTION No. M
>
> AGGRAVATION - REASONABLE DOUBT STANDARD
>
> Before you may consider any fact or set of facts as a[] factor(s) in aggravation, all twelve jurors must find that the fact or set of facts has been established by the evidence beyond a reasonable doubt. You may not consider any fact or set of facts as a factor in aggravation unless all of you are satisfied beyond a reasonable doubt that the facts or set of facts is true.
>
> If you find any fact or set of facts to be true beyond a reasonable doubt, you are the sole judges of whether that fact or set of facts constitutes an aggravating circumstance as defined in these instructions.
>
> Further, if you find any aggravating factors present, you are the sole judges of what weight, if any, that factor should be given.

(40 CT 10917.)

The trial court refused to provide this proposed instruction to the jury. (40 CT 10917.) As discussed in more detail in Argument XVI, *post*, the trial

court was of the opinion that most of the issues referred to in all of Lee's proposed special instructions were adequately covered by the standard CALJIC instructions. (XVII RT 2986.) The trial court explained that it was mindful of how often criminal convictions were reversed for instructional errors and wanted to avoid "the dangers of departing from the established and published jury instructions." (XVII RT 2989.) The trial court did agree, however, to instruct the jury with four of Lee's proposed special instructions.[26] (XVII RT 2986-2988.)

As set forth above, while Lee's proposed special instruction No. M included the requirement that all of the jurors must unanimously agree upon any aggravating factor, the proposed instruction also included the requirement that all of the jurors must additionally find any aggravating factors true beyond a reasonable doubt. California's death penalty law expresses no preference as to the appropriate punishment. (*People v. Samayoa, supra*, 15 Cal.4th at p. 852.) Except for other crimes evidence, this Court has specifically held that trial courts should not instruct at all on the burden of proving any mitigating or aggravating circumstances. (*People v. Holt, supra*, 15 Cal.4th at pp. 682-684.)

In any event, with the exception of the claim concerning juror unanimity as to the aggravating factors, none of the claims presented in the instant argument were ever presented to the trial court. Accordingly, the balance of the instant claims have been waived. (*People v. Arias, supra*, 13 Cal.4th at p. 171; *People v. Bonin, supra*, 47 Cal.3d at p. 856.)

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26. The trial court instructed the jury with Lee's Special Instruction No. F (41 CT 10984), and with modified versions of Lee's Special Instruction No. E (41 CT 10983), No. L (41 CT 10985), and No. S (41 CT 10986). None of these special instructions are implicated in any of Lee's claims on appeal.

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

Lee asserts the use of unajudicated criminal activity as a factor in aggravation under Penal Code section 190.3, factor (b), and the failure to require a unanimous jury finding on the unajudicated acts of violence, render his death sentence unconstitutional. (AOB 215-218.)

With regard to unadjudicated criminal activity, in determining penalty, Penal Code section 190.3, factor (b), allows the trier of fact to take into account:

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

(XVII RT 3056-3057; 41 CT 10971 [CALJIC No. 8.85].)

Lee's claim that consideration of unadjudicated criminal activity at the penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, thereby rendering the death sentence unreliable (AOB 215), must be rejected because Penal Code section 190.3, factor (b), has consistently been found to be constitutional by this Court. Indeed, it is well settled that the introduction of unadjudicated evidence under factor (b) does not offend the state or federal Constitutions. (*People v. Boyer* (2006) 38 Cal.4th 412, 483 ["Nor is factor (b) (defendant's other violent criminal activity) unconstitutional insofar as it permits consideration of unadjudicated crimes"]; *People v. Chatman* (2006) 38 Cal.4th 344, 410; *People v. Guerra, supra*, 37 Cal.4th aat p. 1165; *People v. Hinton* (2006) 37 Cal.4th 839, 913; *People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Kipp, supra*, 26 Cal.4th at p. 1138.)

This Court has "long held that a jury may consider such evidence in aggravation if it finds beyond a reasonable doubt that the defendant did in fact commit such criminal acts." (*People v. Samayoa, supra*, 15 Cal.4th at p. 863.)

Factor (b) is also not impermissibly vague; both the United States Supreme Court and this Court have rejected that contention. (*Tuilaepa v. California, supra*, 512 U.S. at p. 976 [114 S.Ct. at p. 2637]; *People v. Lewis, supra*, 25 Cal.4th at p. 677.) The United States Supreme Court stated:

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

(*Tuilaepa v. California, supra*, 512 U.S. at p. 976 [114 S.Ct. at p. 2637].)

The United States Supreme Court specifically held that "[f]actor (b) is not vague." (*Ibid.*)

Likewise, Lee's claim that the absence of a requirement of juror unanimity on the unajudicated acts of violence allowed the jurors to impose a death verdict based upon "unreliable factual findings that were never deliberated, debated, or discussed" (AOB 218-221), has also been rejected by this Court. Jurors are not required to unanimously agree on the aggravating circumstances supporting a death penalty because aggravating circumstances are not elements of an offense. (*People v. Stanley, supra*, 39 Cal.4th at p. 963; *People v. Medina, supra*, 11 Cal.4th at p. 782.)

Lee submits this Court's decisions on this point have been invalidated by the United States Supreme Court's holding in *Ring v. Arizona, supra*, 536 U.S. at p. 584. (AOB 217-218.) This Court has considered and rejected similar claims by finding that *Ring v. Arizona*, and the earlier case of *Apprendi v. New Jersey, supra*, 530 U.S. at p. 466, "have no application to the penalty phase procedures of this state." (*People v. Martinez* (2003) 31 Cal.4th 673, 700; *People v. Cox* (2003) 30 Cal.4th 916, 971-972.) The same is true as to *Blakely v. Washington, supra*, 542 U.S. at p. 296. (*People v. Monterroso, supra*, 34 Cal.4th at p. 796; *People v. Morisson, supra*, 34 Cal.4th at p. 698.)

California's death penalty law does not violate the Sixth, Eighth, or Fourteenth Amendments by failing to require unanimous jury agreement on any

particular aggravating factor. Neither the federal nor the state Constitution require jurors to agree unanimously as to aggravating factors. (*People v. Fairbank* (1997) 16 Cal. 4th 1223, 1255; *People v. Osband, supra*, 13 Cal.4th at p. 710.) Accordingly, this claim should be rejected.

C. The Trial Court Did Not Err In Failing To Label The Mitigating Factors

Lee also claims that the trial court's failure to instruct the jurors that the factors listed in CALJIC No. 8.85 (d) and (h)[27] were mitigating factors left the jurors free to conclude that the absence of those two factors could be considered aggravating factors. (AOB 221-222.) To this claim, Lee adds the argument that the inclusion of the word "extreme" in CALJIC No. 8.85 (d) (i.e., whether offense committed while "under the influence of extreme mental or emotional disturbance") "acted as a barrier to the consideration of mitigation" in violation of various constitutional rights. (AOB 223.) Lee is mistaken.

This Court has held that trial courts are not required to instruct that Penal Code section 190.3, factors (d) and (h) could only mitigate, and not aggravate, the crime. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1430; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Brown, supra*, 33 Cal.4th at p. 402.)

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27. CALJIC No. 8.85 provides in pertinent part:

> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> [(h)] Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(XVII RT 3057; 41 CT 10971.)

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 [114 S.Ct. at p. 2638].) 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.) "Although [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, supra*, 15 Cal.4th at p. 420 [although some factors may be only aggravating or mitigating, because it is self-evident, the trial court need not identify which is which]; *People v. Samayoa, supra*, 15 Cal.4th at p. 862 ["[t]he jury need not be instructed as to which sentencing factors are aggravating and which are mitigating "].) Also, it matters not that factors (d) and (h) both happen to begin with the words "whether or not." (*People v. Moon, supra*, 37 Cal.4th at p. 42, citing *People v. Morrison, supra*, 34 Cal.4th at p. 730.)

Lee's related claim that the inclusion of the word "extreme" in the CALJIC No. 8.85 (d) instruction acted as a barrier to the consideration of the mitigating factor of any mental or emotional disturbance (AOB 223), has also been rejected by this Court. This Court has held that the word "extreme," as set forth in the death penalty statute, has a common sense meaning which is not impermissibly vague. (*People v. Brown, supra*, 33 Cal.4th at p. 402; *People v. Jones* (1997) 15 Cal.4th 119, 190.)

Significantly, the trial court in the instant matter also instructed the jury with CALJIC No. 8.85 factor (k) as follows:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant

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

(XVII RT 3057; 41 CT 10972.)

As this Court has noted,

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

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

Accordingly, Lee's claim that the jury was in any way inhibited in its consideration of mitigating factors should be rejected.

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

Lee claims the failure to require the jury to provide written findings as to the aggravating factors renders his death sentence unconstitutional. (AOB 223-226.) This Court has held, and should continue to hold, that juries need not make written findings disclosing the reasons for its penalty determination. (*People v. Avila* (2006) 38 Cal.4th 491, 614; *People v. Elliot, supra*, 37 Cal.4th at p. 488; *People v. Bolden* (2002) 29 Cal.4th 515, 566; *People v. Hughes, supra*, 27 Cal.4th at p. 405; *People v. Welch, supra*, 20 Cal.4th at p. 772, citing *People v. Montiel, supra*, 5 Cal.4th at p. 943.) All of these 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].) Accordingly, this claim should be denied.

E. California's Death Penalty Law Does Not Violate The Equal Protection Clause Of The Federal Constitution

Lee claims California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, thus constituting a violation of the equal protection provisions of the United States Constitution. (AOB 226-234.) This Court has rejected virtually identical claims because the two classes of defendants are not similarly situated. (*People v. Bell* (1989) 49 Cal.3d 502, 553; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.)

As this Court has explained:

> [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. ([*Id.*] 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].' [Citation.]

(*People v. Cox, supra*, 53 Cal. 3d at p. 691.)

Accordingly, Lee's equal protection claim must also be rejected.

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XVI.

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY WITH MOST OF LEE'S PROPOSED PENALTY PHASE INSTRUCTIONS

Lee contends the trial court's refusal to instruct the jury with seven of his proposed special instructions rendered his death sentence unconstitutional. (AOB 234-261.) To the contrary, all of the contents of the rejected instructions at issue were either adequately covered in the standard CALJIC instructions provided to the jury, or involved unnecessary or inaccurate statements of law.

As noted in the previous argument, Lee submitted 21 proposed special jury instructions to the trial court in the penalty phase of his trial. (40 CT 10896-10926.) The trial court agreed to instruct the jury with Lee's Special Instruction No. F (41 CT 10984 [aggravation does not include deterrence or cost of execution or life imprisonment]), and with modified versions of Lee's Special Instruction No. E (41 CT 10983 [aggravation - victim impact]), No. L (41 CT 10985 [mitigation -- lingering doubt]), and No. S (41 CT 10986 [life imprisonment means just that, death sentence means defendant will be execute]). (XVII RT 2986-2988.) Lee's counsel argued that the CALJIC instructions were "'only a framework'" and stressed that most of the rejected special instructions concerned aggravating and mitigating evidence. (XVII RT 2988, citing *People v. Dyer* (1988) 45 Cal.3d 26, and *People v. Adcox* (1988) 47 Cal.3d 207.) The trial court properly refused to instruct the jury with any of the remaining special instructions submitted by Lee by stating, "The rest of the instructions, I'm of the opinion, are adequately covered in the various CALJICs." (XVII RT 2988.)

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A. The Trial Court Properly Rejected Proposed Special Instruction No. H

Lee contends the trial court's refusal to instruct the jury with his proposed Special Instruction No. H was erroneous because the language was not argumentative and was a correct statement of the law as it was taken, almost word for word, from the opinion in *People v. Wharton, supra*, 53 Cal.3d at p. 600, fn. 23. (AOB 238.) Lee further claims Special Instruction No. H was necessary to "assure that the jury understood the breadth of the scope of circumstances that could be considered in mitigation." (AOB 240-241.) Lee is mistaken.

Lee's proposed special instruction No. H provided:

> DEFENDANT'S SPECIAL INSTRUCTION NO. H
>
> MITIGATION - UNSPECIFIED MITIGATING CIRCUMSTANCES
>
> The mitigating circumstances which have been read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. As a juror you should pay careful attention to each of those factors, however, you should not limit your consideration of mitigating circumstances to the factors specified.
>
> In addition to these factors, a juror may consider any other circumstances relating to the case or to the defendant, as shown by the evidence presented, as a reason for not imposing the death penalty.
>
> A juror may find that a mitigating circumstance exists if there is any evidence to support it, no matter how weak the evidence is.

(40 CT 10907.)

Lee's reliance on *Wharton* is misplaced as this Court did not state such an instruction was required, but only that such an instruction would not be error if given. (*People v. Wharton, supra*, 53 Cal.3d at p. 599.) In any event, there was no error. The contents of proposed Special Instruction No. H were adequately covered in CALJIC No. 8.85 factor (k) and in CALJIC No. 8.88.

CALJIC No. 8.85 (k) provides, in pertinent part, that the jurors may take into consideration:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he's on trial.

(XVII RT 3057; 41 CT 10972.)

CALJIC No. 8.88 provides in pertinent part:

> A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You're free to assign whatever moral or sympathetic value you deem appropriate to each and all of the varying factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

(XVII RT 3065-3066; 41 CT 10995-10996.)

Accordingly, the trial court was not required to give defense Special Instruction No. H because most of it was duplicative of the instructions provided in CALJIC Nos. 8.85 factor (k) and 8.88. (*People v. Jones* (1998) 17 Cal.4th 279, 314 [a trial court need not give duplicative instructions.]; accord *People v. Gurule, supra*, 28 Cal.4th at p. 659; *People v. Hines* (1997) 15 Cal.4th 997, 1068.) Moreover, in *People v. Carpenter, supra*, 15 Cal.4th at p. 312, this Court clarified that during the penalty phase of a capital trial, instructions on the burden of proof are unnecessary because the decision-making process is inherently moral and normative rather than factual. Therefore, except for other crimes evidence that is used as an aggravating

factor, trial courts should not instruct the jury on any burden of proof. (*Id.*, at pp. 417-418.) Thus, it would have been error for the trial court in this instance to have instructed the jury that it could consider mitigating circumstances "no matter how weak the evidence is." Accordingly, as the trial court properly refused to instruct the jury with Lee's Special Instruction No. H, this claim should be denied.

B. The Trial Court Properly Rejected Proposed Special Instruction Nos. I & J

Lee contends the trial court erred when it refused to provide the jury with his Special Instruction Nos. I and J because those instructions expressly told the jury that it could consider a number of specific mitigating factors including Lee's intoxication at the time of the murder, his background, character, history, devotion to family, devotion from family, mental deficiency, deprivations in life, lack of family stability, and any other aspect of Lee's background which might arouse sympathy. (AOB 244-247.) Lee is mistaken.

Lee's proposed special instruction No. I provided:

> DEFENDANT'S SPECIAL INSTRUCTION NO. I
>
> MITIGATION - EXTENUATING CIRCUMSTANCES
>
> In determining whether any circumstance has been presented which extenuates the gravity of the present offense, even though not a legal excuse for said crimes, you may consider, but are not limited to any of the following:
>
> 1. Whether the manner in which the crime was carried out demonstrated a lack of premeditation, deliberation, or intent;
> 2. Whether the manner in which the crime was carried out demonstrated a lack of sophistication or professionalism on the part of the defendant;
> 3. Whether the defendant did not attempt to flee or escape when accused of the crime, or attempt to use force or violence in an effort to avoid arrest;

4. Whether the defendant participated in the crime under circumstances of coercion or duress, or his conduct was partially excusable for some other reason not amounting to a defense;

5. Whether the defendant committed the crime while under the influence of a mental or emotional disturbance, even though the disturbance was not extreme, nor that it amounted to legal insanity or an inability to form a specific intent;

6. Whether the defendant committed the crime while his capacity to appreciate the criminality of his conduct to the requirements of law was impaired due to the effects of intoxication;

7. Whether the evidence, although not establishing a reasonable doubt, creates a lingering or residual doubt concerning the defendant's guilt of the present crimes.

As instructed, mitigating factors include any sympathetic, compassionate, merciful or other aspect of the defendant's background, character, record or social, psychological or medical history, which is offered as a basis for a sentence less than death, whether or not related to the offenses for which he stands convicted.

Among the mitigating factors which you may consider, and which relate to the defendant, are the following:

1. Whether the defendant's psychological growth and development affected his adult psychology and personality;

2. Whether the defendant suffered any emotional or psychological problems as an adolescent that prevented him from acquiring necessary social skills and maturity;

3. Whether the defendant was a loving and helpful person in his relationships with his friends and relatives;

4. The likely effect of a death sentence on the defendant's family and friends;

5. Whether facts in the defendant's upbringing, early family life, and childhood contributed to his conduct;

6. Whether the defendant had a history of alcohol and/or drug abuse or addiction, and whether such abuse and/or addiction had an effect on his behavior and which contributed to his criminal conduct;

7. Whether the defendant has positively adjusted to the type of structured and institutionalized environment in which he will live the rest of his life if given a sentence of life in prison without the possibility of parole;

8. Whether the defendant's age evidenced a lack of maturity or emotional development at the time of the commission of the crime;

9. Whether the defendant has the willingness and ability to comply with the terms of a sentence of life without the possibility of parole;

10. Whether the defendant has the potential for rehabilitation and for contributing affirmatively to the lives of his family, friends, and fellow inmates;

11. Whether or not the defendant will be a danger to others if sentenced to life imprisonment without the possibility of parole;

12. Whether any other facts exist which may be considered as extenuating or reducing the defendant's degree of moral culpability for the crime committed, or which might justify a sentence of less than death even though such facts would not justify or excuse the offense.

(40 CT 10908-10910.)

Lee's proposed special instruction No. J provided:

DEFENDANT'S SPECIAL INSTRUCTION NO. J

MITIGATION - SYMPATHY

In determining whether the appropriate punishment in this matter is death or life imprisonment without the possibility of parole, in mitigation, you must consider any circumstance which tends to extenuate the gravity of the crime, even though it is not a legal excuse for the commission of the crimes. Any mercy, pity, compassion, sympathy or other aspect of the defendant's character or record that has been offered into evidence as a basis for a sentence of life imprisonment without the possibility of parole must be considered, whether or not it is related to the offense for which he has been convicted.

It is in this regard, you must consider the defendant's background, character, history, and any devotion or affection for his family and they for him. You must also consider anything favorable to him during his life or any other mitigating circumstance.

In considering this evidence, you are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you find are relevant.

(40 CT 10912.)

The trial court properly rejected these two special instructions as the appropriate penalty factors to be considered were adequately covered by CALJIC No. 8.85, and the jury's ability to consider and embrace any sympathy for Lee was covered in CALJIC No. 8.88.

Moreover, many of the 19 items listed as mitigating factors in Lee's Special Instruction No. I were confusing or were simply not required. Trial courts are not expected to label factors as mitigating or aggravating. (*People v. Frye, supra*, 18 Cal.4th at p. 1026; *People v. Carpenter, supra*, 15 Cal.4th at p. 420.) There is certainly no requirement that trial courts should provide a jury with a laundry list of mitigating factors to be considered. Accordingly, the trial court properly refused to give Special Instruction No. I.

In *People v. Hines, supra*, 15 Cal.4th at p. 997, this Court determined a proposed special instruction advising the jury that it should not limit its consideration of mitigating factors to just those factors specifically listed by the trial court was duplicative of CALJIC No. 8.85 factor (k). (*People v. Hines, supra*, 15 Cal.4th at pp. 1068-1069.) Just as in *Hines*, much of Lee's proposed Special Instruction No. J was duplicative of CALJIC No. 8.85, factor (k). It was also duplicative of CALJIC No. 8.85 factor (d) [mental or emotional disturbance], factor (h) [impairment due to mental defect or intoxication], and factor (i) [age of defendant], so it was properly refused by the trial court.

C. The Trial Court Properly Rejected Proposed Special Instruction No. N

Lee next claims that the trial court's refusal to instruct the jury with his Special Instruction No. N could have allowed the jurors to believe that they

were required to unanimously agree on any factors in mitigation. (AOB 248-250.) As this claim lacks merit, it should be rejected.

Lee's proposed special instruction No. J provided:

DEFENDANT'S SPECIAL INSTRUCTION NO. N

MITIGATION - UNANIMITY NOT REQUIRED

> With regard to the applicable factors in mitigation, each juror must make his or her own individual assessment of the weight to be given such evidence.
>
> A factor in mitigation need not be proven beyond a reasonable doubt, nor even by a preponderance of the evidence.
>
> Unlike a factor in aggravation, there is no requirement that all jurors agree on any factor in mitigation. Each juror must make an individual evaluation of each factor offered in mitigation, and each juror should weigh and consider such matters regardless of whether or not they are accepted by other jurors.

(40 CT 10918.)

Lee argues the trial court's refusal to give the above instruction violates the United States Supreme Court's holdings in *Mills v. Maryland* (1988) 486 U.S. 367 [108 S.Ct.1860, 100 L.Ed.2d 384], and *McKoy v. North Carolina* (1990) 494 U.S. 433 [110 S.Ct. 1227, 108 L.Ed.2d 369]. (AOB 249-250.) In those two cases, the United States Supreme Court found error when there was an implicit requirement that the jury must unanimously find a mitigating factor to be present before any juror could consider it as mitigation in determining penalty. (*People v. Weaver* (2001) 26 Cal.4th 876, 988.) In *Weaver*, as it had previously held in *People v. Breaux, supra*, 1 Cal. 4th at p. 314, this Court found that the standard penalty phase instructions did not run afoul of the *Mills-McKoy* rule. Nothing has changed in the interval between *Breaux*, *Weaver*, and the instant case, so there is nor reason for this Court to reverse its position on the instant claim.

Moreover, unlike the Maryland and North Carolina statutes and procedures, jurors in California are not misled by instructions to believe they

have to unanimously find a mitigating factor to be present before one or more jurors could take it into account in determining the appropriate sentence. It is clear from the instructions given in this case that the only aspect of the penalty trial which required jury unanimity was the ultimate jury verdict as to which penalty should be imposed. (*People v. Weaver, supra*, 26 Cal.4th at p. 988; *People v. Breaux, supra*, 1 Cal.4th at p. 315; 41 CT 10996 [CALJIC No. 8.88].) Accordingly, as the trial court properly refused to provide Special Instruction No. N, the instant claim should be rejected.

D. The Trial Court Properly Rejected Proposed Special Instruction No. P

Lee claims the trial court erred by refusing to provide the jurors with his Special Instruction No. P, which told the jurors that a single mitigating factor may outweigh multiple aggravating factors. (AOB 250-254.) Lee is mistaken.

Lee's proposed special instruction No. P provided:

> DEFENDANT'S SPECIAL INSTRUCTION NO. P
>
> AGGRAVATION MUST OUTWEIGH MITIGATION
>
> In determining which factors in aggravation and mitigation are applicable to your penalty determination, you may only consider those which are supported by the evidence presented. Not all factors set forth in these instructions may be relevant, and a factor which is not relevant should be disregarded.
>
> In evaluating the evidence presented in aggravation and mitigation, you must decide the appropriate penalty not by merely counting the number of factors on each side, but by subjectively weighing all of the factors as a whole, based upon their relative convincing force on the ultimate question of punishment.
>
> Each juror is free to assign whatever moral, compassionate, merciful or sympathetic weight you deem appropriate to each and all of the various factors you are permitted to consider.
>
> In order to return a sentence of death, each of you must be persuaded that the evidence presented in aggravation is so substantial in

comparison with that presented in mitigation, that it warrants the penalty of death, rather than life imprisonment without the possibility of parole.

The relative weight of the applicable factors in aggravation and mitigation, when considered as a whole, are for you to determine. In this regard, a single factor in mitigation may outweigh any number of factors in aggravation, and may be sufficient to support a decision that death is not the appropriate punishment in this case.

If you are not persuaded beyond a reasonable doubt that the factors in aggravation substantially outweigh those factors presented in mitigation, then you must render a verdict of life imprisonment without the possibility of parole.

If you should conclude that the circumstances in mitigation are equal to or outweigh those in aggravation, you must render a verdict of life imprisonment without the possibility of parole.

Even if the factors in aggravation outweigh those presented in mitigation, or you find that there are no applicable factors in mitigation, you may still reject a verdict of death and render a verdict of life imprisonment without the possibility of parole, if you feel that life without parole is the appropriate punishment to be imposed.

(40 CT 10920-10921.)

The trial court properly refused to provide the jury with this special instruction. For the most part, the proper contents of Lee's proposed Special Instruction No. P were adequately covered in CALJC No. 8.85 factor (k), and in CALJIC No. 8.88. Moreover, parts of the Lee's proposed Special Instruction No. P were inaccurate or were not supported by law. Lee's language about a single mitigating factor possibly outweighing multiple aggravating factors was argumentative and improperly implied that mitigating factors simply carried more weight than did aggravating ones. The propriety of Lee's language about the jury being required to find that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt has been specifically rejected by this Court. (*People v. Medina, supra*, 11 Cal.4th at p. 782; *People v. Berryman* (1993) 6 Cal.4th 1048, 1101; *People v. Diaz* (1992) 3 Cal.4th 485, 569.) Indeed, except for other crimes evidence, a trial court

should not instruct at all on the burden of proving mitigating or aggravating circumstances. (*People v. Holt, supra*, 15 Cal.4th at pp. 682-684; *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418.)

Accordingly, because this proposed instruction improperly invited the jury to draw an inference favorable to one of the parties, inappropriately advised the jury as to a burden of proof, and needlessly duplicated the standard instruction on mitigation, the trial court properly refused it. (See *People v. Catlin* (2001) 26 Cal.4th 81, 173-174; *People v. Earp* (1999) 20 Cal.4th 826, 886.)

E. The Trial Court Properly Rejected Proposed Special Instruction No. R

Lee claims the trial court erred by refusing to instruct the jury that if it had any doubt as to penalty, it should give him the benefit of the doubt and impose life imprisonment. (AOB 255-256.) This claim lacks merit.

Lee's proposed special instruction No. R provided:

> DEFENDANT'S SPECIAL INSTRUCTION NO. R
>
> DOUBT AS TO PUNISHMENT
>
> If you should have a doubt as to which penalty is appropriate, death or life imprisonment without the possibility of parole, you must give the defendant the benefit of the doubt, and render a verdict fixing the punishment as life without the possibility of parole.

(40 CT 10923.)

This Court has repeatedly rejected identical claims. (*People v. Sanchez, supra*, 12 Cal.4th at p. 81; *People v. Hawthorne, supra*, 4 Cal.4th at p. 79; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779.) Moreover, Lee's Special Instruction No. R was simply not necessary as the matter was adequately covered in CALJIC No. 8.88. In order for the jury to return a death verdict, each of the jurors was required to "be persuaded that the aggravating circumstances [were] so substantial in comparison with the mitigating

circumstances that it warrant[ed] death instead of life without parole." (41 CT 10996 [CALJIC No. 8. 88].) The jury verdict of death necessarily refutes any notion that the jurors viewed the aggravating circumstances and mitigating circumstances as being in "equipoise." Accordingly, as Lee is unable to show that any error or prejudice flowed from the trial court's rejection of Special Instruction No. R, this claim should be denied.

F. The Trial Court Properly Rejected Proposed Special Instruction No. T

Lee claims the trial court erred by refusing to provide the jurors with his proposed Special Instruction No. T. (AOB 256-259.) Special Instruction No. T provided:

> DEFENDANT'S SPECIAL INSTRUCTION NO. T
>
> DEATH IS WORST PUNISHMENT
>
> In determining whether the appropriate penalty in this matter is death or life imprisonment without the possibility of parole, regardless of your personal opinions and beliefs, you are instructed that the law considers the more extreme punishment to be the death penalty, and not life imprisonment without the possibility of parole.

(40 CT 10925.)

Lee claims the requested instruction was a correct statement of law and was supported by the authority provided to the trial court, namely *People v. Hernandez* (1988) 47 Cal.3d 315, 362. (AOB 257; 40 CT 10925.) Contrary to Lee's claim, this Court's statement that death is "qualitatively different from all other punishments and is the 'ultimate penalty' in the sense of the most severe penalty the law can impose" (*People v. Hernandez, supra*, 47 Cal.3d at p. 362, citations omitted), was an observation, not a statement of law. Nothing in *Hernandez* supports Lee's claim that he was entitled to an instruction that death was the more extreme punishment.

In any event, CALJIC No. 8.88's express burden of requiring aggravating circumstances to be so substantial in comparison to mitigation effectively conveys that death is the more serious punishment. (See *People v. Harris, supra*, 37 Cal.4th at p. 361.) Accordingly, the trial court properly refused the requested instruction.

G. There Was No Cumulative Error In The Trial Court's Rulings Concerning Lee's Proposed Special Instructions

Finally, Lee contends he was prejudiced by the cumulative effect of the trial court's erroneous refusal to give his special instructions. (AOB 259-261.) As explained above, Lee's requested instructions were duplicative, inaccurate, or argumentative. The concepts of aggravation and mitigation were adequately conveyed in the pattern CALJIC instructions provided to the jury. "If none of the claimed errors were individual errors, they cannot constitute cumulative errors that somehow affected the penalty verdict." (*People v. Beeler* (1995) 9 Cal.4th 953, 994.) Accordingly, Lee's claim of collective instructional error should be rejected by this Court.

XVII.

LEE'S CHALLENGES TO CALIFORNIA'S DEATH PENALTY STATUTES HAVE ALL BEEN REPEATEDLY REJECTED BY THIS COURT AND ARE NOT PROPERLY BEFORE THIS COURT

Lee contends several aspects of California's death penalty sentencing scheme violate the United States Constitution. (AOB 261-274.) Lee concedes that most of these claims have previously been rejected by this Court in other capital appeals. (AOB 261.) Because Lee fails to raise anything new or significant which would cause this Court to depart from its prior holdings, all of Lee's instant claims should be rejected. Moreover, as Lee's instant claims were never presented to the trial court and concern matters outside of the record

in this case, they are not properly before this Court on appeal. (*People v. Williams* (1997) 16 Cal.4th 153, 206; *People v. Ashmus* (1991) 54 Cal.3d 932, 985, fn.15.)

A. The Special Circumstances Set Forth in Penal Code Section 190.2 Are Not Constitutionally Overbroad Because They Sufficiently Narrow the Class of Murder Cases Eligible for the Death Penalty

Lee contends the failure of California's death-penalty law to meaningfully distinguish those murders in which the death penalty is imposed from those in which it is not requires reversal of the death judgment in this case. Specifically, Lee argues Penal Code section 190.2 is impermissibly broad and fails to adequately narrow the class of persons eligible for the death penalty. (AOB 263-266.) Lee is mistaken.

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, supra*, 465 U.S. at p. 53.) Likewise, this Court has repeatedly rejected, and should continue to reject, the claim 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. Barnett, supra*, 17 Cal.4th at p. 1179; *People v. Arias, supra*, 13 Cal.4th at pp. 186-187; see also *People v. Burgener, supra*, 29 Cal.4th at p. 884 ["Section 190.2, despite the number of special circumstances it includes, adequately performs its constitutionally required narrowing function"].) Accordingly, even if this claim was properly before this Court, it should be rejected.

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B. California's Death Penalty Statutes Are Not Arbitrary

Lee contends the administration of California's death penalty is so arbitrary that it constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution. (AOB 267.) In presenting this claim, Lee relies solely upon Judge Noonan's dissenting opinion in *Jeffers v. Lewis* (9th Cir. 1994) 38 F.3d 411, 425-427 (AOB 267), and fails to set forth the exact context of his claim or provide any specific argument in support thereof. Accordingly, he has failed to state a claim entitling him to relief. Additionally, this Court should decline to consider this claim because it is waived and is premised on evidence and matters outside the record on appeal and cannot be resolved without reference thereto.

Even if this claim was properly pending in this appeal, it lacks merit. In his dissenting opinion in *Jeffers v. Lewis, supra*, 38 F.3d at pp. 425- 427, Judge Noonan opined that Arizona's capital sentencing scheme violated the Eighth Amendment because between 1977 and 1992, 103 people were sentenced to death in that state, but only one person was executed. When *Jeffers* was decided, 117 people were under a sentence of death in Arizona, but no one was executed in 1993 or 1994. (*Id.*, at p. 425 .) Other than asserting that "[t]he circumstances of California's administration of the death penalty, especially as they exist at this time, are strikingly similar to those in Arizona discussed in Judge Noonan's dissenting opinion" (AOB 267), Lee completely fails to specify the basis of his complaint.

In any event, this Court need not address the merits of the instant claim because it is not properly pending before this Court. (*People v. Williams, supra,*16 Cal.4th at p. 206; *People v. Ashmus, supra*, 54 Cal.3d at p. 985, fn.15.)

C. California's Death Penalty Statutes Do Not Permit Unconstitutionally Unbounded Prosecutorial Discretion

Lee claims California's death penalty statutes are unconstitutional because they allow prosecutors the "sole authority to make what is literally a life or death decision, without any legal standards to be used as guidance." (AOB 267-269.) Even if this claim was properly before this Court in the instant appeal, it lacks merit as similar claims have been rejected by the United States Supreme Court (*Proffitt v. Florida* (1976) 428 U.S. 242, 254 [96 S.Ct. 2960, 49 L.Ed.2d 913]; *Gregg v. Georgia* (1976) 428 U.S. 153, 199 [96 S.Ct. 2909, 49 L.Ed.2d 859]), and by this Court (*People v. Ledesma, supra*, 39 Cal.4th at p. 663; *People v. Cornwell* (2005) 37 Cal.4th 50, 105.)

As this Court has explained, "[t]he scope of prosecutorial discretion whether to seek the death penalty in a given case does not render the law constitutionally invalid." (*People v. Kraft, supra*, 23 Cal.4th at p. 1078; accord *People v. Ray, supra*, 13 Cal. 4th at p. 356; *People v. Crittenden* (1994) 9 Cal.4th 83, 152, 155-156; and *People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.) There is no reason why Lee's instant claim, even if it had been preserved for appeal, should not be similarly rejected.

D. Evidence Of Prior Unadjudicated Criminal Activity Involving Force Or Violence Is Properly Admissible In The Penalty Phase Of A Capital Trial

Lee next contends that the admission of evidence of prior unadjudicated criminal activity[28] in the penalty phase of a trial is unconstitutional because it violates the United States Supreme Court's determination that due process

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28. Lee's argument does not acknowledge the limits in place on the type of evidence of unadjudicated criminal activity that is admissible in the penalty phase of a trial. Only unadjudicated activity "which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" may be admitted. (Pen. Code, § 190.3, factor (b).)

requires any aggravating factor to be found true by a jury beyond a reasonable doubt. (AOB 269-270.) As support for this position, Lee relies upon the holdings in *Ring v. Arizona, supra*, 536 U.S. at p. 584, *Apprendi v. New Jersey, supra*, 530 U.S. at p. 466, and *Blakely v. Washington, supra*, 542 U.S. at p. 296. (AOB 270.) This claim should be rejected as this Court has repeatedly held that the holdings in these cases "have no application to the penalty phase procedures of this state." (*People v. Martinez, supra*, 31 Cal.4th at p. 700; *People v. Cox, supra*, 30 Cal.4th at pp. 971-972; *People v. Monterroso, supra*, 34 Cal.4th at p. 796; *People v. Morisson, supra*, 34 Cal.4th at p. 698.) Accordingly, even if this claim was properly before this Court, it should be denied.

E. California's Post-conviction Administration Of Death Penalty Cases Is Constitutional

Lee contends the post-conviction administration of California death penalty cases violates the United States Constitution because it is "'fraught with arbitrariness, discrimination, caprice, and mistake.'" (AOB 270, quoting *Callins v. Collins* (1994) 510 U.S. 1141, 1144 [114 S.Ct. 1127, 127 L.Ed.2d 435] (Blackmun, J., dissenting).) In presenting this argument, Lee relies exclusively upon Justice Blackmun's view as expressed in his dissent from the Court's order denying a writ of certiorari in the capital case of *Callins v. Collins, supra*, 510 U.S. at pp. 1143-1159. (AOB 270-271.) A similar attack upon the constitutionality of California's death penalty law which was also based upon Justice Blackmun's dissent in *Callins* was rejected by this Court in *People v. Fairbanks* (1998) 16 Cal.4th 1223, 1255. There is no reason for this Court to reconsider its holding. The United States Supreme Court has found California's death penalty statutes constitutional. (*Tuilaepa v. California, supra*, 512 U.S. at p. 980.) Thus, even if this claim had been properly preserved for appellate review, it should be rejected.

F. Use Of The Death Penalty Does Not Violate International Law And/Or The Constitution

Relying primarily upon Justice Blackman's concurring opinion in *Sawyer v. Whitley* (1992) 505 U.S. 333, 350-360, [112 S.Ct. 2514, 120 L.Ed.2d 269], Lee submits the procedural barriers to meaningful state and federal habeas review of capital cases "'undermine[] the very legitimacy of capital punishment itself.'" (AOB 271-272, quoting *Sawyer v. Whitley, supra*, 505 U.S. at p. 360 (Blackmun, J., concurring).) As Lee failed to present this claim to the trial court, it is not properly preserved for appellate review. Moreover, this claim is not appropriate for appellate review as it goes beyond the matters in the trial court record and is otherwise without merit.

In his concurring opinion in *Sawyer v. Whitley, supra*, 505 U.S. 333, Justice Blackmun expressed skepticism regarding whether, with each new decision from the United States Supreme Court constricting the ability of the federal courts to remedy constitutional errors, the death penalty can be imposed fairly and in accordance with the requirements of the Eighth Amendment. (*Id.*, at pp. 350-351.) Justice Blackmun opined that the more the High Court constrains the power of federal courts to reach the constitutional claims of those sentenced to death in state court, the more the Court undermines the very legitimacy of capital punishment itself. (*Id.*, at p. 360.)

Because this claim is not based upon any matter in the appellate record, it is not a proper claim on appeal. In any event, the limits placed on a defendant's right to federal habeas corpus review and relief have consistently been found by the high court to be proper and constitutional. (See *Calderon v. Thompson* (1998) 523 U.S. 538, 554-555, 558 [118 S.Ct. 1489, 140 L.Ed.2d 728]; *Felker v. Turpin* (1996) 518 U.S. 651, 654-665 [116 S.Ct. 2333, 135 L.Ed.2d 827]; 28 U.S.C. § 2244, subd. (b) [AEDPA].) These limits reflect the United States Supreme Court's respect for "'the State's interest in the finality of

convictions that have survived direct review within the state court system'" balanced with need to remedy actual injustice. (*Calderon v. Thompson, supra*, 523 U.S. at p. 554-558; *In re Clark* (1993) 5 Cal.4th 750, 787-788.) This Court has found the limits placed on a defendant's right to state habeas corpus review and relief to be entirely proper and constitutional. (*Id.* at pp. 750, 763-799; see also *In re Robbins* (1998) 18 Cal.4th 770, 777-778.) Accordingly, even if this claim was properly before the Court in the instant appeal, Lee's appellate claim that procedural barriers to meaningful state and federal habeas review of capital cases has rendered capital punishment unconstitutional must be rejected.

G. Use Of The Death Penalty Does Not Violate International Law And/Or The Constitution

Lee contends the use of the death penalty "as a regular form of punishment falls short of international norms of human decency," thus violating the United States Constitution. (AOB 272-274.) Similar claims have been rejected by this Court and there is no reason for this Court to reconsider its holdings.

Lee's portrayal of the death penalty as a "regular form of punishment" (AOB 272) is inaccurate because California does not employ capital punishment in such a manner. As this Court explained:

> The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)

(*People v. Demetrulias* (2006) 39 Cal.4th 1, 43-44.)

In any event, this Court has previously rejected the same claim now raised by Lee. (*People v. Blair* (2005) 36 Cal.4th 686, 754.)

> As the United States Supreme Court recently explained, although international authorities and norms are relevant to the consideration

> whether a punishment is cruel and unusual under the Eighth Amendment, they are not controlling. (*Roper v. Simmons* (2005) 543 U.S. 551, 575-578 [125 S.Ct. 1183, 161 L.Ed.2d 1; see also *id.* at pp. 604-605 (dis. opn. of O'Connor, J .).) Eighth Amendment analysis instead hinges upon whether there is a national consensus in this country against a particular punishment. (*Roper v. Simmons, supra*, 543 U.S. at pp. 562-566, 125 S.Ct. at pp. 1191-1194.) Defendant makes no claim that there exists a national consensus against the use of the death penalty as currently employed.

(*People v. Blair, supra*, 36 Cal.4th at pp. 754-755.)

Lee is likewise unable to assert that there is a national consensus against the death penalty as it is currently employed. Accordingly, even if this claim was properly pending before this Court, Lee's instant constitutional challenge to the death penalty "as a regular form of punishment" should nevertheless be rejected.

XVIII.

INTERNATIONAL LAW DOES NOT REQUIRE LEE'S CONVICTION OR SENTENCE TO BE SET ASIDE

Lee claims he was deprived of a fair trial and a reliable penalty in violation of customary international law as evidenced by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Declaration of the Rights and Duties of Man. (AOB 274-286.) Lee failed to raise this claim below, and accordingly, has therefore forfeited this claim on appeal. In any event, this claim lacks merit.

In *People v. Ramos* (2004) 34 Cal.4th 494, this Court explained it had previously held that international laws and treaties did not compel the elimination of the death penalty in California when such penalty had been rendered in accordance with state and federal constitutional and statutory requirements. (*Id.*, at pp. 533-534, citing *People v. Hillhouse, supra*, 27 Cal.4th at p. 511; *People v. Jenkins* (2000) 22 Cal.4th 900, 1055.) This Court further explained that the same international treaties and resolutions upon which Lee

now relies have not "been held effective as domestic law." (*People v. Ghent, supra*, 43 Cal.3d at p. 779; see also *People v. Hillhouse, supra*, 27 Cal.4th at p. 511.) Accordingly, those international treaties and resolutions are not a basis for reversing the judgment in this case.

> Because defendant has entirely failed to establish the predicates of his argument - that he suffered prejudicial violations of due process . . . during his trial - we have no occasion to consider whether such violations would also violate international law.

(*People v. Jones, supra*, 29 Cal.4th at p. 1268.)

"International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements." (*People v. Hillhouse, supra*, 27 Cal.4th at p. 511, citations omitted.) Accordingly, Lee's claim is meritless.

XIX.

LEE'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED

Lee contends the cumulative effect of the alleged errors in the guilt and penalty phases undermined the fundamental fairness of his trial and the reliability of his death sentence, therefore the guilt verdicts and death judgment should be reversed. (AOB 286-298.) As explained in each of the responses to Lee's individual claims (*ante*), neither the trial court nor the prosecution committed any errors, so there were no errors to accumulate. Accordingly, the cumulative error doctrine does not apply. (See *People v. Beeler, supra*, 9 Cal.4th at p. 994 ["[i]f none of the claimed errors were individual errors, they cannot constitute cumulative errors that somehow affected the . . . verdict"].)

Whether considered individually or in the aggregate, the alleged errors could not have affected the outcome of the trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa, supra*, 26 Cal.4th at p. 458; *People v. Catlin, supra*, 26 Cal.4th at p. 180; see also *People v. Williams* (2006)

40 Cal.4th 287, 339; *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1065-1066; *People v. Stanley* (2006) 39 Cal.4th 913, 966; *People v. Avila, supra*, 38 Cal.4th at p. 615; *People v. Boyer, supra*, 38 Cal.4th at p. 489.)

Moreover, even assuming the trial court had erred in some respect, Lee has failed to show that he was in any way denied due process or a fair trial. (See *People v. Mincey* (1992) 2 Cal.4th 408, 454 ["[a] defendant is entitled to a fair trial, not a perfect one"].) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box, supra*, 23 Cal.4th at p. 1219.) The record shows that Lee received a fair trial. Therefore, Lee's claim of cumulative error should be rejected.

CONCLUSION

Based upon the foregoing, respondent respectfully requests the judgment be affirmed in its entirety.

Dated: February 8, 2008

Respectfully submitted,

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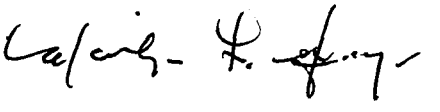

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70114056.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 42837 words.

Dated: February 8, 2008

Respectfully submitted,

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Attorney General of the State of California

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Philian Eugene Lee** No.: **S080550**

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

On February 8, 2008, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 8, 2008, at San Diego, California.

D. Perez
Declarant

Signature

70114406.wpd