SUPREME COURT COPY

In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** v. **CORRELL LAMONT THOMAS,** **Appellant.**	**CAPITAL CASE** Case No. S082828

San Diego County Superior Court Case No. SCE171425
The Honorable Allan J. Preckel, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
ANNIE F. FRASER
Deputy Attorney General
CHRISTOPHER P. BEESLEY
Deputy Attorney General
State Bar No. 236193
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2567
Fax: (619) 645-2581
Email: Christopher.Beesley@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

Within a three week period in May and June 1996, Correll Thomas killed two innocent men. In the first incident, Ricky McDonald came home drunk late one night and found Thomas partying with friends in front of McDonald's apartment. When McDonald accused Thomas and his friends of being too noisy, Thomas and his friend, Kazi Cooksey, confronted McDonald. Thomas punched McDonald, knocking him unconscious. Then, Thomas and Cooksey launched a merciless barrage of kicks and blows to McDonald who lay motionless on the ground. Thomas repeatedly kicked and stomped on McDonald in the chest, abdomen, head, shoulders, and groin while Cooksey bludgeoned McDonald's head with a liquor bottle. At the end of the attack, Thomas stripped McDonald naked. Finally, as McDonald started to awaken and struggled for air, Thomas finished him off by stepping on his throat.

In the second incident, Creed Grote and his friend, Troy Ortiz, were driving to a nightclub when they came to a stop at a traffic signal next to the car Thomas and his girlfriend, Nicole Halstead, were in. Halstead was driving while Thomas sat reclined in the passenger seat. While waiting for the signal, Grote and Ortiz looked over at Halstead and smiled at her. When Thomas realized that Grote and Ortiz had flirted with his girlfriend, he decided to exact revenge. As the light turned green, he pulled out a semiautomatic handgun, chambered a bullet, and ordered Halstead to follow Grote and Ortiz and pull up next to their car. When they caught up with Grote and Ortiz, Thomas leaned out the window, aimed his gun, and fired several shots in rapid succession at them. Thomas killed Grote instantly.

Thomas contends: the trial court (1) abused its discretion in denying his motion to sever the two murder counts; (2) abused its discretion in admitting evidence of prior misconduct to prove mental state and intent;

and (3) erred in giving an unmodified CALJIC No. 2.90 instruction on the beyond-reasonable-doubt standard of proof. None of these guilt phase contentions have merit and this Court should uphold the jury's guilt verdicts.

As to the penalty phase, Thomas argues: (1) the court erred in dismissing one of the prospective jurors for cause; (2) the court erred in instructing the jury that death is a greater punishment than life without the possibility of parole; (3) the evidence was insufficient as to one of the aggravating circumstances; and (4) the prosecutor engaged in misconduct by arguing Thomas's future dangerousness. Thomas also raises several constitutional challenges to California's death penalty law to preserve the claims for further review.

None of Thomas's claims have merit and this Court should affirm the judgment in full.

STATEMENT OF THE CASE

The San Diego District Attorney charged Thomas, in a third amended information, with two counts of murder (counts 1 [victim McDonald] and 2 [victim Grote]; Pen. Code[1] § 187, subd. (a)) and attempted murder (count 3 [victim Ortiz]; §§ 664/187, subd. (a)). The District Attorney also charged

[1] Unless otherwise specified, statutory references are to the Penal Code.

co-defendant[2] Kazi Cooksey with McDonald's murder. (10 CT 1908-1910.) The court impaneled two juries.[3] (7 RT 1272-1275.)

On November 2, 1998, Thomas's jury convicted him of second degree murder (count 1; § 189, subd. (a)), first degree murder (count 2; § 189, subd. (a)), and premeditated, deliberate, and intentional attempted murder (count 3; §§ 664/189).[4] As to the first degree murder (count 2) and attempted murder (count 3) convictions, the jury found that Thomas personally used a firearm (§ 12022.5, subd. (a)). The jury also found, as to the first degree murder, that Thomas intended to inflict great bodily injury or death while discharging a firearm from a motor vehicle (§ 12022.55). Additionally, the jury found three special circumstances to be true: that Thomas lay in wait (§ 190.2, subd. (a)(15)), discharged a firearm from a vehicle (§ 190.2, subd. (a)(21)), and committed multiple murders (§ 190.2, subd. (a)(3)). Finally, the jury found that Thomas had two prior serious felony convictions, within the meaning of the Three Strikes law (§ 667, subds. (b)-(i)). (38 RT 6780-6783; 22 CT 5038-5045.)

---

[2] A third co-defendant, Nicole Halstead, had been charged in the second amended information with being an accessory to murder, murder, and attempted murder. (3 CT 307-310.) However, she ultimately pled guilty to one count of voluntary manslaughter under a plea agreement in which she agreed to testify on behalf of the prosecution. (7 RT 1213-1226.)

[3] Before Halstead pled guilty, the court had concluded to proceed with two juries, one for Halstead and one for Thomas and Cooksey. (5 RT 851-857.) After Halstead's plea, the court decided to keep two juries because of the differing interests between Thomas, who faced capital charges, and Cooksey, who did not. (5 RT 945-958; 7 RT 1254-1256, 1272-1275.)

[4] Cooksey's jury convicted him of second degree murder. (38 RT 6813; 22 CT 5046, 5050-5051.)

On December 1, 1998, the court declared a mistrial as to the penalty phase trial because the jury was unable to reach a verdict. (22 CT 5083.) On September 2, 1999, following a retrial of the penalty phase, the jury returned a death verdict. (60 RT 11802; 23 CT 5202, 5204.)

The court sentenced Thomas to death for the first degree murder (count 2) conviction with special circumstances. The court further imposed, but stayed a sentence of six years for the firearm and great bodily injury enhancements for the first degree murder. The court also imposed, but stayed a sentence of 15 years to life for the second degree murder (count 1), and an indeterminate term of life for the attempted murder (count 3) plus four years for the firearm enhancement. (60 RT 11820-11824; 23 CT 8208.)

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

STATEMENT OF FACTS

I. GUILT PHASE

A. Events Leading to the McDonald Murder (Count 1)

1. McDonald's activities prior to meeting Thomas

Ricky McDonald got along well with his neighbors. (23 RT 4219.) He lived with his fiancé, Jennifer Jones, and her two children whom McDonald regarded as his own. They had lived together since 1989. (26 RT 4880-4881.)

On May 17, 1996, after cashing his paycheck, McDonald went to a Padres baseball game with two of his colleagues, Eduard Valdivia and Mark Brokamp. (26 RT 4812-4813, 4815-4817; 30 RT 5477.) He bought a round of beer for his friends and enjoyed the game with them. (26 RT 4818-4819; 30 RT 5483.) After the game, the trio retired to Brokamp's house where they drank more beer. (26 RT 4820-4821; 30 RT 5478-5479.) After spending time at Brokamp's house, McDonald and Valdivia headed

home, briefly stopping at a Mexican restaurant to get some take-out food. (26 RT 4820-4821.) Although McDonald's blood alcohol level was at least 0.20 percent, Valdivia did not consider him drunk. (25 RT 4637; 26 RT 4821.)

At about 2:00 a.m. on May 18, 1996, McDonald dropped Valdivia off at home and then drove to his own apartment complex. (23 RT 4232-4233; 26 RT 4820-4821.) As he tried to park his car in his parking stall, he ran into the wall. McDonald got out of his car, carried his bag of Mexican take-out, and walked toward his apartment. (23 RT 4232-4233.) In the courtyard in front of his apartment, McDonald fell into the company of Thomas and Thomas's friend, Kazi Cooksey. Thomas and Cooksey savagely and viciously beat, bludgeoned, and kicked McDonald until he was dead. (23 RT 4237-4240, 4242-4244, 4246-4255.)

2. Thomas's activities prior to meeting McDonald

Earlier that afternoon, Thomas, one of his girlfriends, Nicole Halstead, and her roommate, Carolyn Lanham, planned to meet up with Thomas's friend, Cesar Harris, to set Harris and Lanham up on a blind date and to party together as a group. (23 RT 4054-4055.) Thomas, Halstead, and Lanham drove in Halstead's car, with Thomas driving. (22 RT 3852.) After they bought some beer, they drove to Harris's apartment complex -- the same complex where McDonald lived – arriving around 8:00 or 9:00 p.m. (22 RT 3852-3854; 23 RT 4145-4147, 4223-4224.) There, they met up with Harris in the courtyard picnic area of the complex. (22 RT 3859-3860.) Harris fired up a grill and prepared to barbecue some chicken. (23 RT 4151, 4225-4227.) At some point, Cooksey showed up and joined the group. (22 RT 3856-3858; 23 RT 4149-4150, 4227-4229.)

The group hung out and drank beer. (22 RT 3862.) After about an hour, when they ran out of beer, Thomas suggested going to a nearby liquor store to get some more drinks. Halstead, Cooksey, and Thomas left to

procure the drinks. (22 RT 3862-3863; 23 RT 4152-4153, 4230.) When Thomas and his two companions arrived at the liquor store, they saw a few people milling about the store entrance. (22 RT 3864-3865.)

About the same time that Thomas's group arrived at the store, sailors Darrell Milton and Kevin Collins also arrived. They wanted to get some cigarettes after spending the evening at a nightclub. (24 RT 4277-4279, 4288.) As Milton was going into the store, one of the loiterers asked him for a cigarette. (24 RT 4288.) Milton, though drunk, mouthy, and perhaps a bit confrontational, agreed to give him one when he came out of the store. (22 RT 3867; 24 RT 4288.) Milton was also confrontational with Thomas's group, but they initially ignored him and made their purchases – two large bottles of malt liquor and a bottle of brandy. (22 RT 3864-3869.)

As Milton left the store, and just as Thomas and his group were about to drive away, one of the loiterers jumped Milton for being disrespectful. (22 RT 3869-3871; 24 RT 4277-4280, 4288-4290.) This prompted Cooksey and Thomas to immediately run over and join in the fight; they beat and kicked Milton, who fell to the ground and blacked out. (22 RT 3869-3875; 24 RT 4290-4291.) Thomas kicked Milton four to five times in the chest area with sharp, hard, soccer-style kicks. (23 RT 4086, 4231.) Halstead screamed at Thomas and Cooksey to stop and threatened to drive off if they did not desist. This got their attention and they ceased their onslaught. (22 RT 3876-3877.) As they drove off, Thomas muttered, "I should have checked his right pocket." He lamented that because he was left-handed he failed to reach into Milton's right pocket; instead he had only checked the left pocket, which was empty. (22 RT 3877, 3879-3880.)

When Thomas, Cooksey, and Halstead returned to the picnic area in Harris's apartment complex, they found Harris and Lanham sitting at a picnic table. (22 RT 3880-3883.) Harris continued barbecuing and the quintet began consuming the malt liquor and brandy. (22 RT 3881-3882.)

They hung out, ate, and drank. Lanham and Cooksey became quite drunk; Harris also became inebriated. (22 RT 3989-3990, 4003-4004; 23 RT 4152-4153; 24 RT 4372.)

3. The murder

After crashing his car while attempting to park, McDonald walked into the courtyard area in front of his apartment and saw Thomas's group. (22 RT 3883; 23 RT 4232.) McDonald drunkenly cussed them out and exclaimed, "What are you guys doing over here? It's late in front of my apartment. What the hell is going on?" (22 RT 3883; 23 RT 4234-4235; 24 RT 4385-4388.) This enraged Cooksey who got up, approached McDonald, and confronted him, saying, "What, you got a problem?" (22 RT 3888-3889.) Thomas also jumped up and approached McDonald. (22 RT 3888-3889; 23 RT 4234-4240; 24 RT 4385-4388.) Cooksey started shoving McDonald and they exchanged verbal threats and challenged each other. At one point Cooksey punched McDonald, who staggered back a few steps and said, "you better not do it again," and "that didn't hurt." (22 RT 3888-3889; 23 RT 4237-4240.) McDonald lunged toward Cooksey and in response, Thomas, who was behind Cooksey, punched McDonald with his left hand over Cooksey's shoulder. (23 RT 4241.) This blow knocked McDonald unconscious, causing him to fall backward into the bushes and drop his bag of food. (22 RT 3891-3893; 23 RT 4155-4156.)

Rather than leave McDonald alone, however, Thomas and Cooksey launched a barrage of kicks and blows at McDonald as he lay unconscious on his stomach in the bushes. (22 RT 3897-3907; 23 RT 4157-4162, 4186-4189; 24 RT 4412-4413.) After McDonald landed in the bushes, Thomas kicked him in the chest and head about six times. (23 RT 4242-4244.) Harris was able to briefly stop Thomas by telling him, "enough." (23 RT 4245.) After several minutes, Cooksey returned to the unconscious McDonald and started punching him several times; Harris again stopped

him. (23 RT 4246-4247.) Still later, Cooksey grabbed the brandy bottle, returned to McDonald, and began beating him over the head with the bottle. (22 RT 3902-3905.) Cooksey hit McDonald at least 15 times with the bottle and exclaimed, "I'm going to kill you. . . ." (22 RT 4020-4022; 24 RT 4352). Thomas also joined in by again kicking and stomping on McDonald. (22 RT 3899-3900; 23 RT 4248-4253.) Thomas used forceful soccer-style jabbing kicks, just as he had employed against Milton at the liquor store, to kick McDonald in the chest, groin, and neck repeatedly. (22 RT 3897-3898; 23 RT 4135, 4211-4212; 24 RT 4397, 4399; 25 RT 4611-4619, 4623, 4630-4634.) Thomas also stomped hard on McDonald. (22 RT 3903-3906.)

Harris again intervened and stopped Cooksey from bludgeoning McDonald with the bottle. (22 RT 3912-3913; 23 RT 4250-4251.) Thomas, however, continued his assault and stomped on McDonald's head and face three to six times. (23 RT 4251-4253.) He then grabbed McDonald's shorts, pulled them down to his ankles, and swatted his buttocks. (22 RT 3908-3911, 3913-3914; 23 RT 4090; 24 RT 4407-4408.) Thomas also pulled McDonald's shirt up under his arms to expose his torso and took his shoes and socks off. (22 RT 3915-3917; 23 RT 4174, 4253-4255, 4259; 24 RT 4407-4408.)

Finally, Thomas stopped his attack and ordered Lanham to clean up the picnic area. (22 RT 3915, 4164.) After cleaning up and gathering their things, the group returned to Halstead's car. (22 RT 3915-3917; 23 RT 4164; 24 RT 4409-4410.) Upon passing McDonald, who lay on his stomach motionless in the bushes, Halstead, Lanham, and Harris could hear his labored breathing. McDonald made gurgling and snoring sounds as he struggled for air. (22 RT 3920; 23 RT 4093, 4174, 4209-4210, 4213, 4259; 24 RT 4402, 4404.)

At the car, Thomas put McDonald's shoes into the trunk. (22 RT 3915-3916; 23 RT 4096.) Harris tossed McDonald's bag of Mexican food into the car with them. (22 RT 3926-3928; 23 RT 4164, 4257.) Thomas then went back into the complex and did not return for several minutes. (22 RT 3918-3919; 23 RT 4096; 24 RT 4409-4410.) When he returned to the car, he said that McDonald had started to wake up, so he "took care of it." (22 RT 3918-3919.) Thomas had turned McDonald onto his back and stepped on his throat. (23 RT 4096, 4099-4100; 26 RT 4794, 4797-4798.)

4. The aftermath and investigation

Thomas drove Cooksey, Halstead, and Lanham to the beach. (22 RT 3921-3923; 23 RT 4166.) As they were driving, Cooksey and Thomas joked with each other about what they had just done to McDonald. Cooksey congratulated Thomas, telling him, "you got your stripes," and that their efforts amounted to an "M-1," meaning a first degree murder. (22 RT 3923-3925; 23 RT 4166; 25 RT 4473, 4484-4485.) At the beach, Cooksey and Lanham got out of the car and walked down the beach. (23 RT 4166-4167.) Thomas and Halstead stayed in the car, ate some of McDonald's Mexican food, and had sex. (22 RT 3926-3928.) After having sex, Thomas put McDonald's shoes on and instructed Halstead to wipe the blood off his own shoes. (22 RT 3929-3930; 23 RT 4173-4174.) The group spent the rest of the night at the beach. (22 RT 3931; 23 RT 4167.)

Meanwhile, shortly after morning broke, McDonald's fiancé came out of their apartment, saw McDonald lying naked in the bushes, and screamed. (24 RT 4450.) A neighbor heard the commotion and saw McDonald lying on his back in the bushes with his shorts tucked under his elbow. The neighbor pulled the shorts out, draped them over McDonald to cover his nakedness, and then ran to call the police. (24 RT 4437, 4441; 25 RT 4450-4453, 4500.) Police arrived at 6:18 a.m. and secured the area. (24 RT 4431-4432.)

Around 8:00 a.m., Thomas drove the group back to Harris's apartment complex. Thomas and Cooksey got out of the car and walked away; Halstead and Lanham drove home. (22 RT 3931-3932; 23 RT 4167.) After returning to the complex, Thomas did not immediately walk home; instead, he milled about the complex to see what the police were doing. (25 RT 4463-4465.) An officer noticed that Thomas seemed interested in the crime scene. When the officer asked Thomas whether he knew anything about the murder, Thomas identified himself with a false name and claimed that he knew nothing because he had spent the night in Tijuana with some friends. (25 RT 4464-4465.)

Police found a piece of bark with a bloody shoeprint near McDonald's body. (25 RT 4498-4499.) The shoeprint was similar to the soles of the shoes Thomas wore during his attack. (25 RT 4488, 4572-4575.) Additionally, McDonald's DNA was present in blood stains on Thomas's shoes. (26 RT 4845-4846, 4848, 4851-4855.)

McDonald died of multiple blunt force traumatic blows to his head and neck area. The injuries to his head and neck, in combination, caused death. (25 RT 4636; 26 RT 4789-4790.) McDonald's thyroid cartilage, which supports the airway, was fractured through its entire thickness. (25 RT 4630-4632, 4634; 26 RT 4793-4794.)

B. Grote Murder and Ortiz Attempted Murder (Counts 2 and 3)

1. Grote's and Ortiz's activities prior to meeting Thomas

Creed Grote and Troy Ortiz were best friends. (29 RT 5231.) On June 5, 1996, Ortiz came home at about 10:00 p.m. after working his shift as a waiter. (29 RT 5232.) At about 10:30, Grote called Ortiz and asked whether he wanted to go out to shoot some pool. Ortiz agreed and went to Grote's house. (29 RT 5233.) Grote and Ortiz drove in Grote's

Volkswagen Bug to a bar in El Cajon where they drank some beer and played pool. (29 RT 5233-5234.) After about 45 minutes, they left to go to a topless bar and nightclub in Lemon Grove. (29 RT 5235.) They never reached this second nightclub; Thomas gunned them down while they were driving toward their destination, killing Grote instantly. (27 RT 4998-4999; 29 RT 5251-5252.)

2. Thomas's activities prior to meeting Grote and Ortiz

Earlier that day, Halstead had become embroiled in an argument and fight with the father of her children, Jesse Russell. (27 RT 4952-4956.) Russell and Halstead had a violent relationship and Russell often became verbally and physically abusive toward Halstead, who, in turn, frequently complained to Thomas about Russell's mistreatment. (28 RT 5044-5068.) June 5, 1996, was no exception. That day, Russell hit Halstead several times during an argument that ended when Russell literally picked her up and threw her out of the apartment, causing her to tumble to the ground and hit her head on the concrete walkway. (27 RT 4952-4956; 28 RT 5078-5085.) Halstead, who was livid, decided she had had enough of Russell and called Thomas, urging him to kill Russell. (27 RT 4956-4957; 28 RT 5086-5089.) Thomas agreed and asked Halstead to come pick him up in Southeast San Diego. (27 RT 4956-4957.)

Halstead drove down to get Thomas. (27 RT 4957-4958.) Thomas took over driving Halstead's car and the pair made three short stops at different houses. (27 RT 4958-4961; 28 RT 5108-5109.) At the third stop, Thomas came out with a Tech-9 handgun and clip. Thomas placed both the gun and clip in the trunk of Halstead's car. (27 RT 4962-4963; 28 RT 5109.)

In time, Halstead asked Thomas what he was planning to do. Thomas explained that he intended to pull Russell out of his apartment, confront

him, and then shoot him. (27 RT 4964.) Despite having originally requested Thomas to "do something" about Russell, to "take care" of him, and to "get" him, she now began to panic and earnestly sought to reason with Thomas and talk him out of it. (27 RT 4964-4965; 28 RT 5110-5113.) However, this only irritated Thomas who repeatedly told her to, "just shut up," "just don't worry about it," and "shut up. Why you call me then you know? Why did you call me and say you wanted this done, you know, like call me up on a fake . . . mission?" (27 RT 4965-4966; 28 RT 5112-5113.)

Halstead ultimately succeeded in dissuading Thomas from killing Russell, though Thomas was irritated and resentful about the situation. He drove them to his friend, Don Juan Thompson's house, where he and Thompson began to drink. (27 RT 4967; 28 RT 5115-5116.) For the next few hours, the tension between Thomas and Halstead continued unabated. In fact, Thomas banished Halstead to another room and repeatedly told her to be quiet while he and Thompson continued drinking. (28 RT 5121-5124.) Thomas and Halstead also argued with each other while there. (28 RT 5116, 5121-5125.)

Sometime after midnight, Halstead and Thomas left Thompson's house. (27 RT 4968-4969; 28 RT 5115-5116, 5141.) Thomas told Halstead to drive him to the apartment of another one of his girlfriends, Keisha Thomas.[5] (27 RT 4971-4972; 29 RT 5274.) Keisha lived in an apartment off Broadway in Lemon Grove. (27 RT 4971-4972.) During the drive, Halstead tried to make peace with Thomas, but he was in no conciliatory mood and quietly sat reclined back in the passenger seat. (27 RT 4971; 28 RT 5151, 5155-5159.)

---

[5] Keisha Thomas had no family relationship with appellant Thomas. To avoid confusion, her first name will be used.

3. The Murder and Attempted Murder

When Halstead exited Highway 94 at Spring Street in La Mesa, she stopped in the lane to the right of Grote's VW Bug and waited at the traffic signal. (27 RT 4973-4976; 28 RT 5236-5237.) As she waited for the light to change, Halstead looked over at the Bug and saw Grote and Ortiz who smiled at her and tipped their heads in a salutatory gesture. (27 RT 4977-4978; 29 RT 5238-5239.) Halstead smiled at them and noted that they seemed to be flirting with her. (27 RT 4978-4979.) Thomas also noticed what was going on and broke the silence in the car by asking Halstead whether the guys in the Bug were smiling at her. Halstead, who was still upset with the tension Thomas had unnecessarily created all evening, retorted that they were smiling at him. (27 RT 4979-4980; 28 RT 5165-5167.) This so incensed Thomas that he immediately sat up in his seat and glared at Grote and Ortiz. (27 RT 4980; 28 RT 5166-5167, 29 RT 5241.)

Until Thomas sat up, neither Grote nor Ortiz knew that there was someone in the car with Halstead. (29 RT 5241-5242.) They were shocked and frightened when Thomas sat up; Ortiz exclaimed, "Oh, fuck. We're in trouble now." Ortiz thought that Thomas must have been Halstead's boyfriend and that he was upset with Grote and Ortiz for looking at Halstead. (29 RT 5241-5242.) Grote, however, remained calm and replied, "don't worry about it. We're not stopping to fight anyone." (29 RT 5243.) Ortiz, however, was not reassured, especially as he saw Thomas staring at them while reaching forward in the car as though he were retrieving something from the floor. (29 RT 5243-5248.)

When the light changed green, Grote immediately drove off. (29 RT 5244.) Ortiz kept watch for Halstead's car to see what Thomas and Halstead were doing. (29 RT 5245-5248.) Meanwhile, Thomas yelled at Halstead, who accelerated much slower than Grote, to catch up with the Bug and to turn off her headlights. (27 RT 4981-4982, 4985; 28 RT 5178-

5179.) Halstead complied with his requests. (27 RT 4985; 28 RT 5171-5174, 5181-5182; 29 RT 5247-5250.)

After making a turn onto Broadway, Ortiz frantically looked around for Halstead's car, but could not see it at first. Grote could not see them either. (29 RT 5249-5250.) However, Halstead, had caught up with them. (29 RT 5251-5252.) Meanwhile, Thomas had inserted the clip into the Tech-9 handgun and had retracted the slide of the gun. (27 RT 4986-4991; 28 RT 5185-5188.) He rolled down his window. (27 RT 4993.) Halstead tried to stop Thomas; she told him, "don't, please" and tugged at his jacket to pull him back. (27 RT 4989-4991, 4996.) Thomas snapped back at her, demanded that she let him go, and told her to shut up and drive. (27 RT 4997.) Halstead drove her car in the lane next to the Bug and Thomas leaned out the window with the gun. (27 RT 4989-4991; 28 RT 5160-5185.)

At this point, Ortiz saw Thomas hanging out the window, holding the gun with both hands, aiming it at them. (29 RT 5251-5252.) Ortiz screamed, "oh shit," and tried to pull Grote down just as the window exploded. Grote's head bobbed forward and the car veered off course, rolled, and crashed. (27 RT 4998-4999; 29 RT 5252-5255.) Thomas yelled, "fuck you" as he rapidly fired four shots at Grote and Ortiz. (27 RT 4997; 29 RT 5348-5360.)

Immediately after the shooting, as Halstead continued driving down Broadway, Thomas looked back and saw the Bug crash. He exclaimed, "hey, did you see that?" Halstead replied that she had and started to panic. (27 RT 4999-5000.) As Halstead continued down Broadway, Thomas ordered her to make a U-turn because she had passed Keisha's apartment, where he wanted to go. (27 RT 5001-5002.) Keisha's apartment was back near the area where Grote and Ortiz crashed. (27 RT 5003-5004.) Halstead made the U-turn and dropped Thomas off at Keisha's apartment. (27 RT

5001-5002.) As Thomas got out, he said, "I'll call you later. I love you. Bye." (27 RT 5004.)

After the crash, Ortiz got out of the car and tried to pull Grote out. (29 RT 5254.) Grote, however, was dead. (29 RT 5290-5291, 5294-5295, 5301-5303.) Ortiz ran to call the police. (29 RT 5255.)

4. The aftermath and investigation

Thomas entered Keisha's apartment with the Tech-9 gun. (29 RT 5276-5278.) Upon entry, he took the gun apart and hid its pieces throughout the apartment. (29 RT 5278-5279.) He also went to the window to observe what was going on out on Broadway. (29 RT 5280.) From Keisha's apartment, Thomas was able to survey the police activity that began to amass on Broadway. (27 RT 5015-5016.)

Meanwhile, Halstead drove back to Thompson's house and related what Thomas had done. (27 RT 5012-5013.) She then drove to Lanham's home, arriving after 2:00 a.m., and shared all that had happened with Lanham. (27 RT 5013-5015; 29 RT 5306, 5309.) About an hour after Halstead arrived at Lanham's apartment, Thomas called her to let her know he was in Keisha's apartment. He whispered that he could not talk at that time, that he would call her later, and that he could see the police activity on Broadway. (27 RT 5015-5016.)

The next morning, around 7:00 a.m., Thomas again called Halstead and reported that he believed one of the men had died because he had seen authorities carry a body away from the scene. (27 RT 5017.) Thomas called one last time at about 11:00 a.m., related that the police were gone, and requested Halstead to come and pick him up. (27 RT 5018.) After picking Thomas up, Halstead and Thomas went to Thompson's house where they laid low for a few days. (27 RT 5019-5021.)

In addition to telling Thompson and Lanham about the shooting, Halstead told her sister and her friend, Jody Deere, about what happened.

(27 RT 5021; 30 RT 5395.) Deere urged Halstead to contact the police. When Halstead failed to do so, Deere contacted the police herself. (30 RT 5396-5397.) The police arrested Halstead shortly thereafter. (27 RT 5022.)

Police recovered four shell casings from the crime scene which were all fired from the same semiautomatic weapon. (29 RT 5350-5353.) The casings were consistent with having been fired from a Tech-9 handgun. (29 RT 5320-5323.) Additionally, the locations of the casings were consistent with having been fired in rapid succession from a moving car. (29 RT 5354-5360.) The trajectories of the bullets which passed through Grote's car showed that they were likely fired from a car parallel with Grote's VW Bug. (29 RT 5361-5363.)

Grote suffered three gunshot wounds to the back and lower parts of his head and upper neck which killed him instantly. (29 RT 5290-5291, 5294-5295, 5301-5303.)

C. Defense Evidence

Halstead was the principal witness for the prosecution because she was present during both murders. Consequently, Thomas attacked Halstead's credibility. Halstead had originally been charged as an accessory after the fact in connection with the McDonald murder and with first degree murder and attempted murder in connection with the Grote murder. (3 CT 307-310.) Prior to trial, she pled guilty to voluntary manslaughter in exchange for her testimony in Thomas's trial. (7 RT 1213-1226.) Thomas cross-examined Halstead to show she had a vested interest in blaming him for the murders. (28 RT 5198-5203.) Thomas also called a witness who claimed Halstead had admitted to kicking McDonald. (31 RT 5645.) He also called Halstead's father who testified that Halstead often lied. (33 RT 5932-5933.)

1. Defense to the McDonald murder

The thrust of Thomas's defense to the McDonald murder was that Cooksey was solely responsible for McDonald's death. Thomas called witnesses who testified that Cooksey, who was partially paralyzed on the left side of his body, had considerable strength on his right side – the side he used to swing the bottle to strike McDonald. (30 RT 5441-5443, 5445-5446, 5459-5464.) Thomas called character witnesses who opined that Cooksey was a frighteningly violent man. (30 RT 5470-5476; 31 RT 5652, 5657-5658.)

Thomas also called a pathologist to testify that McDonald died as a result of blood loss and blunt force trauma to his head and that there was no evidence of airway obstruction sufficient to cause death.[6] (30 RT 5522-5527, 5530, 5539, 5540-5546.) However, Thomas's pathologist also testified that the injuries to McDonald's face were consistent with a large man of Thomas's stature stomping on it. (30 RT 5553-5555.) He further conceded that it was possible for McDonald to have died from both blunt force trauma to the head and neck. (30 RT 5560-5561.)

2. Defense to the Grote murder

As to the Grote murder, Thomas attempted to establish he was too intoxicated to form an intent to kill. Thomas called witnesses who testified that he had been drinking heavily during the hours before the Grote murder and that he became so drunk he was unable to handle himself. (33 RT 5938-5943, 5951, 5953, 5962, 5970.) Thomas also established that in the

---

[6] Cooksey's defense at the joint-trial was that Thomas was solely responsible for McDonald's death. Cooksey's pathologists explained that there was no evidence of trauma to the brain sufficient to cause death and that the likely cause of death was airway obstruction as a result of Thomas's actions. (31 RT 5672-5674, 5680-5683, 5675, 5679-5680; 32 RT 5577-5579, 5783-5787, 5789-5790.)

months leading up to the Grote murder, he was taking prescription tranquilizers and sedatives and that these drugs, when taken alone, rendered him unable to walk. (34 RT 6057-6062, 6066, 6099, 6102, 6105-6107.) However, when taken in conjunction with alcohol, these drugs made him hyperactive, unpredictable, and even combative. (34 RT 6063-6065, 6114-6115, 6119.) Thomas argued he had taken these drugs on the day of the Grote murder. (34 RT 6076-6078.) Thomas's expert on the effects of the sedative and tranquilizer drugs explained, however, that because alcohol was also a sedative, its effect in conjunction with the drugs would likely be additive. In other words, alcohol in conjunction with the drugs would likely cause too much sedation and could result in coma or even death. (34 RT 6110, 6114-6115.)

II. PENALTY PHASE

At the penalty phase retrial, the prosecutor presented essentially the same evidence about the McDonald and Grote murders as he had presented to the first jury during the guilt phase. The prosecutor further presented victim impact evidence. At the time of McDonald's death, McDonald had a fiancé, Jennifer Jones. (54 RT 10488-10489.) McDonald was a father figure to Jones's two children who were seven and 15 years old. (54 RT 10489.) At the time of Grote's death, Grote had a child. (54 RT 10563.) He was also engaged to be married and his fiancé was pregnant. This second child was born after Grote's death. (54 RT 10564.)

A. Evidence in Aggravation

In addition to the evidence about the McDonald and Grote murders, the prosecutor introduced evidence about three other serious uncharged crimes in which Thomas had been involved.

1. Stockton robbery and murder

Walter Gregory and Prince Austin owned a club, Gregory's Social Club, in Stockton, California. (55 RT 10696, 10698.) Gregory and Austin ran a clandestine gambling operation, known as the Gambling Shack, inside their club. They had rigged the entrance with a double door set-up, or sally port, which enabled them to monitor who was entering and grant access only to those whom they trusted. (55 RT 10697-10698.)

Thomas had a girlfriend, Theresa Bird, who lived in Stockton with their child. (55 RT 10656.) In January 1995, Thomas traveled to Stockton to visit them. (55 RT 10657, 10682.) While there, Thomas and Bird ran out of money. (55 RT 10659.) However, Thomas found a way to take care of their financial problems. (55 RT 10657-10659.) Thomas and a group of several individuals planned a heist to rob the Gambling Shack on the evening of January 11, 1995. (51 RT 9928-9929; 55 RT 10657, 10729-10731, 10828-10831.) Thomas was armed with a 9-mm handgun while another man was armed with a 12-gauge shotgun. (55 RT 10731, 10739-10740.) Although they had initially planned to storm the club, they realized, upon arrival, that this plan would not work because of the double door entrance. (55 RT 10737-10738.) Consequently, Thomas, the other gunman, and a few others took cover outside the club to ambush exiting gambling patrons. (55 RT 10700-10702, 10737-10738.)

That evening, Austin won $10,000 at the gambling tables inside his club. (55 RT 10700-10702.) As he emerged from the club, the assailants tried to rob him. (55 RT 10665-10666, 10831-10832.) However, Austin had a gun which led Thomas and the other gunman to open fire. (55 RT 10665-10666, 10701-10702, 10832, 10856.) Austin was killed by a shotgun slug that hit him in his chest. (55 RT 10702.) The robbers then fled the scene. (55 RT 10666.) Thomas told Bird, her brother, and his own brother about what he had done and claimed that the shooting occurred as a

result of a mugging gone awry. (55 RT 10665-10667, 10683-10685, 10692, 10789-10791.) He urged Bird not to tell anyone about the shooting. (55 RT 10667-10668.)

2. Shooting near Jesse Russell's home

On September 17, 1995, Halstead got into an argument and fight with Jesse Russell. (51 RT 9931-9932.) Halstead complained to Thomas about Russell's abuse. (51 RT 9932-9933.) Thomas exclaimed that he had enough of Russell's mistreatment of Halstead and said, "I'm going over there right now . . . . This is it. I'm tired of him . . . ." He grabbed a gun and left with Thompson in Halstead's car. (51 RT 9933-9935; 55 RT 10816-10817.)

Thomas and Thompson arrived at Russell's home on Sumner Street, in El Cajon between 10:00 and 11:00 p.m. (55 RT 10815.) Thomas tapped on a back window and asked for Russell. Russell's brother, DeMarco Atkins, who also lived there, responded that Russell was not there. Thomas then said, "Looking for Jesse. I'm going to get him. Looking for Jesse. We're going to get him." Atkins then heard a gun cocked back and saw Thomas and another person running toward the front of the house. Within a few minutes, Atkins heard three gunshots outside. However, no bullets hit the house. After waiting several more minutes, Atkins called the police. (55 RT 10816-10817.) Detectives recovered bullet casings in the street, about 40 to 50 yards in front of Russell's home. (54 RT 10530-10533; 55 RT 10723-10724, 10727-10728.)

3. Home invasion robbery in El Cajon

Tashna Waits and her children lived in an apartment several blocks away from Russell's apartment. (54 RT 10582.) On the evening of September 17, 1995, Waits invited a few friends to her home, including Kim Braeutigan, Ronald Doss, Alton Brown, and Kim's child. (54 RT

10583-10584, 10604-10605; 55 RT 10803-10804; 56 RT 10899-10900.) They were startled when Thomas, who was wielding a handgun, and Thompson stormed in on them. (54 RT 10585-10587, 10606-10607; 55 RT 10805-10808; 56 RT 10901.)

Thomas and Thompson had just tried, unsuccessfully, to confront Russell several blocks away. (55 RT 10816-10817.) When Thomas walked into Waits's apartment, he ordered Doss and Brown at gunpoint to stand up and empty their pockets. (54 RT 10584-10585, 10606-10608; 56 RT 10901-10902.) Meanwhile, Thompson shepherded the women and children into a back bedroom. (54 RT 10586-10587; 55 RT 10809.)

After the men emptied their pockets, Thomas feared they might be armed and ordered them to lift up their shirts so he could ascertain whether they were. (54 RT 10607; 56 RT 10902.) Although Brown complied with the request, Doss only partially lifted his shirt. When Thomas realized that Doss might have been armed, he ordered the men outside. (54 RT 10607-10608; 56 RT 10902.) Doss grabbed his handgun and fired several shots at Thomas. Thomas fired back but fell to the ground when one of Doss's bullets hit him. (54 RT 10590, 10608-10609; 56 RT 10902-10904.)

Hearing the gunshots, Thompson ran out of the back bedroom, grabbed Thomas's gun, and darted from the apartment. (54 RT 10609-10610.) After police arrived, Thomas was taken to the hospital and treated for gunshot wounds. (51 RT 9936; 59 RT 11483.)

Police recovered several shell casings from Waits's apartment. (55 RT 10797.) They also recovered Thomas's gun, which Thompson had tossed into a flowerbed. (55 RT 10796-10797.) A number of shell casings recovered from Waits's apartment matched the casings recovered a few blocks away on Sumner Street, near Russell's home and all of these casings were fired from Thomas's gun. (54 RT 10530-10533.)

B. Defense Evidence in Mitigation

At the penalty phase retrial, Thomas presented much the same defense evidence as to the McDonald and Grote murders as he had during the guilt phase trial. As to the McDonald murder, Thomas also produced a new witness who claimed that Halstead had confessed to having kicked McDonald and having hit him with the brandy bottle.[7] (57 RT 11065-11085.)

As to the Grote murder, Thomas tried to further establish he was taking prescription medications to treat his mental anxiety and that he was under the influence of these drugs in combination with alcohol at the time of the shooting. (59 RT 11193-11201.) Thomas argued that he suffered mental anxiety as a result of being shot and hospitalized in September 1995, when his attempted robbery at Waits' apartment went awry. (57 RT 11261.) He further tried to demonstrate that this anxiety was compounded a few months later, when, in February 1996, police initiated a hot stop of the car in which he was traveling after a funeral and that the police forced him out of the car and to the ground at gunpoint. (57 RT 11146, 11149-11159, 11262-11264.) As a result of this highly stressful incident, Thomas sought psychiatric treatment and consequently received a prescription tranquilizer and sedative. (57 RT 11129-11130, 11146, 11265-11272.)

Thomas sought to minimize the Stockton shooting incident by presenting two witnesses who were present in the parking lot at the time of

---

[7] This witness, Mischelle Walker, was in custody and had met Halstead while they shared a jail cell. Walker had operated under 15 different aliases, four different birth dates, and six different social security numbers. Additionally she had several theft-related felony convictions. (57 RT 11074-11076.) Walker was a different witness than the witness who testified during the guilt phase that Halstead had admitted to kicking McDonald. (See 31 RT 5645.)

the shooting. (56 RT 11029. 11043-11044.) Neither of these witnesses saw Thomas there. (56 RT 11029-11038; 11043-11048.)

Thomas called several friends and family members who testified about Thomas's tragic childhood and about his good character despite the challenges he faced during his formidable years.

Thomas was born in 1973 in the Los Angeles area to Jimmy and Sheila Thomas. (58 RT 11299-11304.) He was the second child to his parents, who were addicted to drugs and alcohol. (58 RT 11330-11336, 11418, 11425-11426, 11442-11443; 59 RT 11509-11511, 11514, 11558.) Therefore, Thomas's childhood was physically and emotionally unstable. In the first 11 years of his life, Thomas lived in nine different homes. (58 RT 11438-11441.) He often endured squalid living conditions and at times there was little to no food in the home. (58 RT 11308-11311, 11312-11315, 11321, 11327, 11420; 59 RT 11559-11560, 11563.) Thomas also endured his parents's continued fights and abusive behavior toward each other and toward him. (58 RT 11305-11306.)

Thomas's parents remained together until Thomas was about four years old. (59 RT 11519.) During these first few years of Thomas's life, his parents were dysfunctional. They fought with each other in front of the children and at one point Sheila pulled a gun on Jimmy. (58 RT 11419-11431; 59 RT 11517.) Additionally, Sheila left her children alone in the house at night. While Jimmy worked graveyard shifts, Sheila would leave the children unattended and sneak out of the house at 2:00 a.m. to go partying. (59 RT 11520-11521.) When Jimmy learned of this, he tried to lock Sheila into the house to prevent her from leaving the children unattended. (58 RT 11417-11418; 59 RT 11557.)

When Thomas's parents separated, Sheila took the boys to San Diego, where she lived near her parents and eventually met Larry Hollings. (58 RT 11429-11431.) Sheila and Hollings lived together off and on for the

next 12 years and had two sons, Larry Jr., and Terry. However, circumstances did not improve. (58 RT 11348-11350.) Sheila continued her drug abuse and neglect of her children. Additionally, Hollings was frequently strung out on drugs and thus incapable of providing paternal support. (58 RT 11351, 11394-11395.) Hollings dealt drugs from the home, exposing Thomas to drug trafficking. (58 RT 11356, 11434-11435.)

Hollings and Sheila fought incessantly in front of the children. (58 RT 11352-11355, 11436, 11442-11443.) In the early years, this bothered Thomas. (58 RT 11352-11355.) Once, after a particularly bad fight, Hollings found Thomas hiding and crying behind a garbage can outside. (58 RT 11357-11358.)

As a result of their parents' dysfunction, the older boys, Cordell and Thomas, found themselves taking on the parental role for their younger half brothers. (58 RT 11362-11366 11368.) On one occasion, Cordell was found in the kitchen trying to pry a can of corn open with a dull knife to feed the younger children. (58 RT 11337-11340, 11344.) The home was in a complete shambles and disarray. Sheets on the beds were filthy, dishes were piled high in the sink, and moldy food remains rotted in the refrigerator. (58 RT 11454-11457.)

Thomas took care of the younger children more than his mother and would regularly awaken his younger brothers, get them ready for the day, and try to get breakfast prepared. (58 RT 11454-11456, 11458, 11468-11469.)

Thomas endured physical beatings from his mother. Thomas was a bed-wetter for a time. Rather than teach him how to overcome this, however, Sheila resorted to beating Thomas. (58 RT 11358-11361, 11433-1434.) When she was strung out on drugs, she would dole out more severe corporal punishment on Thomas and the children. (58 RT 11315-11316.)

To supply her drug habit, Sheila stole from her own children, including Thomas's paper route money. (58 RT 11312-11315.) She also pawned Thomas's radio to get drug money. (58 RT 11367.)

Despite Sheila's failures, Thomas still cared deeply for her. For several years, he tried to persuade her to stop using drugs. (58 RT 11450.) Once, when she injured her leg, Thomas tended to her needs during recovery. (58 RT 11473.)

Thomas often had to call his grandparents and ask them to bring food because they had none in the home. (58 RT 11380-11382.) Sheila would spend what little welfare assistance she received on drugs. (58 RT 11379.) When Thomas was about 14-15 years old, he called his biological father and asked him whether he could call the police on his mother to report that she was neglecting him and his siblings. (59 RT 11530-11540.)

In response, Jimmy came to San Diego to bring Thomas back to Los Angeles. Thomas lived with Jimmy and his second wife and children for about one month. (59 RT 11538-11540.) Thomas did very well and got along with the family until one evening Thomas and the other children were playing outside and making noise. Jimmy asked them several times to be quiet out of courtesy for their elderly neighbors. When they failed to be quiet after several warnings, Jimmy grabbed Thomas's arm. Thomas defensively told his father to "take [his] hands off." This so incensed Jimmy that he stormed into the house, retrieved his gun, and then returned, pointing the gun at Thomas. When Thomas asked his father whether he would hurt him, Jimmy responded, he would take Thomas's "fucking brains out . . . . Your mother brought you into this world and I'll fucking take you out of it." (59 RT 11542-11544.) The following day, Jimmy returned Thomas to his mother. (59 RT 11545.)

Thomas ended up in juvenile custody for a total of three years and two months between the ages of 15 and 21. (58 RT 11410.)

For about six months, Thomas's aunt took Thomas in when he was a youth. (58 RT 11384.) While he lived with his aunt, Thomas attended church regularly and participated in various church activities including service projects, youth groups, and youth choir. (58 RT 11384-11385.) The reverend of the church described Thomas as very respectful and kind toward others. (58 RT 11388-11390.)

When Thomas was between 16 and 18 years old, he moved in with his girlfriend, Cathy, and her family. (59 RT 11571-11575.) Thomas lived with them for an extended period of time and during a significant portion of this time, he was actually at-large as a juvenile hall escapee. (59 RT 11583.) Thomas and Cathy had two children. At the time of trial, these children were seven and eight years old. (59 RT 11586, 11589.) Thomas cared deeply for Cathy and his children. When Cathy was diagnosed with lupus, Thomas stayed by her hospital bedside constantly. (59 RT 11577-11578.) At some point after her recovery, Thomas discovered that Cathy was abusing sleeping pills. He told Cathy's mother about it and urged Cathy to stop. (59 RT 11581-11582.)

When Thomas was 19 or 20 years old, he moved in with Beverly Haynes and her children. (58 RT 11400-11401.) Haynes had a 12-year-old daughter who often ran off and stayed the night out on the streets. Thomas would go out and find her, bring her back, and explain to her the dangers of street life. (58 RT 11404-11405.) Haynes also had a son, who, though chronologically much older, had the physical and mental maturity of an eight year old. The boy was so disabled he could not speak. (58 RT 11401.) Thomas was kind to the boy and befriended him. (58 RT 11402.) The boy reciprocated Thomas's love and continued, years later, to become excited at the mention of Thomas's name. (58 RT 11403.)

Finally, shortly after the shooting incident in El Cajon in September 1995, Thomas successfully prevented Cooksey from shooting a woman.

Thomas, Cooksey, and two girlfriends were at Thompson's house. The group was drinking and playing games. (59 RT 11487, 11495-11496.) Cooksey lost a game of dominos to one of the women. Cooksey, who was drunk, lost control and in his drunken fury pulled out a loaded gun and held it to the woman's head. (59 RT 11487-11488, 11496.) Thomas told him to stop and Cooksey complied. (59 RT 11488, 11497.) Later that evening, when Thomas, Cooksey, and the two girlfriends returned home, they had to help Cooksey inside because of how drunk he was. (59 RT 11489, 11498.) Once inside, they laid Cooksey in the living room. Thomas took the gun from Cooksey and unloaded all the bullets. (59 RT 11490, 11499.) When Cooksey realized he no longer had his gun, he asked for it back. (59 RT 11490-11491, 11500.) After Thomas returned the unloaded weapon, Cooksey held it up, pointed it at the woman who had bested him at dominos, and pulled the trigger several times. He then passed out. (59 RT 11491, 11500-11501.)

ARGUMENT

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THOMAS'S MOTION TO SEVER THE MURDER COUNTS

Thomas asserts the trial court abused its discretion when it denied his pre-trial motion to sever the murder counts. He argues that joinder of the counts rendered his trial fundamentally unfair and resulted in gross prejudice in violation of his Fifth, Sixth, and Fourteenth Amendment rights to due process and a fair trial. (AOB 106-133 [Arg. I].) Thomas's assertions are without merit as the court was well within its discretion in keeping the murder counts consolidated. Additionally, Thomas's assertions of prejudice are wholly speculative. Further, because he cannot demonstrate that the joinder of murder counts prejudiced him, his claims

that his Fifth, Sixth, and Fourteenth Amendment rights to due process and a fair trial were violated necessarily fail.

A. Relevant Proceedings

Prior to trial, Thomas moved to sever the murder counts. He argued that a weak count (the McDonald murder) was joined with a strong one (the Grote murder) and that joinder of such unbalanced counts would lead to cumulative prejudice as the evidence of the stronger count would spill over to reinforce the weaker count. (5 RT 960.) He further asserted that there was no cross-admissibility of evidence and that this was an important factor in determining whether the murder counts should be severed. (5 RT 960-962.) The court agreed with Thomas that it did not appear there was any cross-admissible evidence. (5 RT 963.)

In response, the prosecutor asserted that there was some cross-admissibility of evidence because Keisha Thomas, with whom Thomas stayed immediately after the Grote murder, would testify that when Thomas entered her residence, he took apart his gun and frantically hid its parts throughout the apartment. Keisha would further testify that Thomas told her this was the second time he had done this. (5 RT 964, 966.) The prosecutor theorized that this tended to establish an admission as to both the McDonald and Grote homicides and thus establish a connection between the two crimes. (5 RT 965-966.) Finally, the prosecutor pointed out that after Proposition 115, cross-admissibility was no longer the benchmark for determining severance motions. (5 RT 966-967.)

Thomas replied that because this was a capital case, the court had to engage in a heightened level of scrutiny as it reviewed the severance motion. (5 RT 968-969.) Additionally, he asserted that his statement to Keisha was far too vague to establish that it was cross-admissible as to the McDonald murder. (5 RT 969-971.) Moreover, the statement could have

referred to one of his prior shootings rather than to the McDonald homicide. (5 RT 969-970.)

In rejecting Thomas's argument, the court explained it had given the motion a considerable amount of thought and scrutiny, especially in light of the fact that this was a capital case. (5 RT 971-972.) The court observed that both murders were of the same class and that as such, joinder was statutorily authorized under section 954. (5 RT 972.) The court further recognized that section 954.1 explicitly permitted joinder of crimes even absent cross-admissible evidence. (5 RT 972-973.) The court viewed the prosecutor's proffer of Keisha's testimony about what Thomas told her as nothing more than a mere modicum of cross-admissible evidence and therefore did not consider it to be determinative in reaching its conclusion. (5 RT 973-974.)

Instead, the court viewed the potential prejudice inquiry as the pivotal question in determining whether to grant or deny the motion. (5 RT 975.) The court recognized that it had to make its ruling on potential prejudice with an eye toward what might prospectively unfold at trial. Thus, the court reviewed the record and concluded that Thomas's assertions of prejudice were overly speculative and inadequate. (5 RT 975-976.) The court observed that the strength of evidence for both counts was, "if not evenly balanced, certainly much more balanced" than Thomas argued. (5 RT 977.) Additionally, the court noted that the emotional impact from the two homicides would be balanced and that there would be no danger of inflaming the jury with one of the counts so as to prejudice the other. (5 RT 977.) Accordingly, the court concluded,

> [b]ecause the charged offenses are of the same class, that joinder is proper in the absence of cross admissible evidence. [¶] And parenthetically, concluding that there is at least a modicum of cross admissible evidence in this case as I have discussed,

> and further and most significantly, because the court concludes that the defense has not made an adequate showing of substantial prejudice flowing to defendant to pass from a joinder of the incident and charged murder offenses, for the reasons stated, the motion is denied.

(5 RT 977.)

Thomas renewed the severance motion at the conclusion of the prosecutor's presentation of evidence on the McDonald murder. (27 RT 4939-4940.) He again urged that the evidence against him as to the McDonald murder count was very weak. (27 RT 4940-4942.) The court denied the motion. (27 RT 4943.)

B. The Trial Court Properly Exercised Its Discretion in Denying Thomas's Severance Motion

It is well established that "the law prefers consolidation of charges." (*People v. Smith* (2007) 40 Cal.4th 483, 510; *People v. Manriquez* (2005) 37 Cal.4th 547, 574; *People v. Ochoa* (1998) 19 Cal.4th 353, 409.) When the offenses charged are from the same class, joinder is proper under section 954. (*People v. Soper* (2008) ___ Cal.4th ___ [2009 Cal. Lexis 1100, *18]; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 574; *People v. Kraft* (2000) 23 Cal.4th 978, 1030.) Section 954 states, in relevant part:

> An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.

The severance provisions of section 954 reflect "an apparent legislative recognition that severance may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure

defendants a fair trial." (*People v. Hawkins* (1995) 10 Cal.4th 920, 940, quoting *People v. Bean* (1988) 46 Cal.3d 919, 935; *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 [106 S.Ct. 725, 88 L.Ed.2d 814] ["Improper joinder does not, in itself, violate the Constitution" but rather "rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."].) The defendant must make a "clear showing of prejudice" to prevent consolidation of properly joined charges. (*People v. Stanley* (2006) 39 Cal.4th 913, 933; *People v. Ochoa*, *supra*, 19 Cal.4th at pp. 408-409.)

This Court reviews a trial court's denial of a severance motion for an abuse of discretion. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 408.) "Where the statutory requirements for joinder are met, the defendant must make a clear showing of prejudice to demonstrate that the trial court abused its discretion." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1128, relying on *People v. Stitely* (2005) 35 Cal.4th 514, 531; see also *People v. Soper*, *supra*, 2009 Cal. Lexis at pp. *24-25.) In determining whether the trial court abused its discretion in denying a severance motion, this Court reviews the record before the trial court at the time of its ruling. (*People v. Soper*, *supra*, 2009 Cal. Lexis at p. *25; *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1128.) This Court considers "whether a gross unfairness occurred that denied the defendant a fair trial or due process." (*People v. Smith*, *supra*, 40 Cal.4th at p. 510.) In other words, in order to establish that the trial court abused its discretion in denying a severance motion, a defendant "must clearly establish that there was a substantial danger of prejudice requiring that the charges be tried separately." (*Ibid.*, internal quotations omitted.)

A trial court's refusal to grant a severance motion *may* be an abuse of decision where:

> (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of the aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.

(*People v. Smith*, *supra*, 40 Cal.4th at pp. 510-511; *People v. Manriquez*, *supra*, 37 Cal.4th at p. 574; *People v. Valdez* (2004) 32 Cal.4th 73, 120.)

Cross-admissibility can be a factor affecting prejudice. Ordinarily, cross-admissibility dispels any inference of prejudice; however, the absence of cross-admissibility alone does not demonstrate prejudice. (*People v. Soper*, *supra*, 2009 Cal. Lexis at p. *26; *People v. Stitely*, *supra*, 35 Cal.4th at pp. 531-532.) Penal Code section 954.1 specifically provides that evidence concerning one offense need not be admissible as to any other offense in order to be tried together, that is, cross-admissibility of evidence is not dispositive in determining whether to join offenses. (*People v. Soper*, *supra*, 2009 Cal. Lexis at pp. *26-27.)

Additionally, the "joinder of a death penalty case with noncapital charges does not by itself establish prejudice." (*People v. Valdez*, *supra*, 32 Cal.4th at pp. 119-120; *People v. Marshall* (1997) 15 Cal.4th 1, 28.)

Here, the trial court properly exercised its discretion in denying Thomas's severance motion. Because both murder counts (and the attempted murder count) were of the same class, the statutory requirements for joinder were met. (See § 954; *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1128, relying on *People v. Miller* (1990) 50 Cal.3d 954, 987 [murder and attempted murder are both assaultive crimes against the person, and as such are "'offenses of the same class'"].)

Nonetheless, Thomas contends that the trial court abused its discretion in denying the severance motion. He first asserts there was no cross-admissible evidence justifying joinder of the murder counts. (AOB 115-119.) This argument fails because, as this Court has stated, "'cross-admissibility is not the sine qua non of joint trials.'" (*People v. Geier* (2007) 41 Cal.4th 555, 575, quoting *Frank v. Superior Court* (1989) 48 Cal.3d 632, 641; see also § 954.1.) Moreover, there was cross-admissible evidence. At the time Thomas raised his severance motion, the prosecutor proffered that Keisha Thomas would testify that Thomas admitted to her, after the Grote murder, that "this [was] the second time" he had "done this." (5 RT 966.) Thomas urges that this statement was too ambiguous to be relevant. (AOB 115-117.) Not so. "'Relevant evidence' means evidence . . . having *any tendency* in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210, italics added.) Further, "the issue of cross-admissibility 'is not cross-admissibility of the charged offenses but rather the admissibility of relevant evidence' that tends to prove a disputed fact." (*People v. Geier*, *supra*, 41 Cal.4th at p. 576.)

Here, Thomas's statement to Keisha after the Grote murder had a tendency to prove that he had killed before. Thomas's assertion that the statement was too vague or ambiguous fails to appreciate that the threshold for relevance is simply that the evidence has a mere tendency to prove a disputed fact – it need not inexorably establish that fact. (Evid. Code, § 210.) Thomas's admission to Keisha had a tendency to show that the Grote killing was his second homicide.

Thomas further contends that his statement to Keisha, even if relevant, was nonetheless not completely cross-admissible because it would have only been admissible for the Grote murder but not for the McDonald murder. (AOB 118-119.) This contention fails because complete, or "two-

way," cross-admissibility is not necessary to justify joinder. (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1129; *People v. Cummings* (1993) 4 Cal.4th 1233, 1284.) Therefore, because there was at least some cross-admissible evidence, prejudice from the joinder was dispelled. (*People v. Stitely*, *supra*, 35 Cal.4th at pp. 531-532.)

> [E]ven if cross-admissibility did not support consolidation of the cases, the absence of cross-admissibility alone would not be sufficient to establish prejudice where (1) the offenses were properly joinable under section 954, and (2) no other factor relevant to the assessment of prejudice demonstrates an abuse of discretion.

(*People v. Geier*, *supra*, 41 Cal.4th at p. 577, citing *People v. Stitely*, *supra*, 35 Cal.4th at pp. 531-532.) Here, the trial court considered Thomas's statement to Keisha to be, at most, a mere modicum of cross-admissible evidence and concluded that whether there was cross-admissible evidence was not determinative. (5 RT 973, 977.) Consequently, the court focused its analysis on whether Thomas would suffer prejudice if the two murder counts were tried jointly. (5 RT 975-977.) The court's prejudice analysis was amply supported by the record. Despite Thomas's attempts to minimize his culpability as to the McDonald murder (AOB 129), the record demonstrated that he was equally culpable with Cooksey for the murder. Thomas delivered the original knock-out punch to McDonald and then repeatedly kicked him while Cooksey bludgeoned him over the head with a bottle. (22 RT 3891-3893, 3897-3907; 23 RT 4154-4162, 4186-4189, 4241-4244, 4248-4253; 24 RT 4412-4413.) It was immaterial whether McDonald died from his head injuries or from the neck injuries and airway obstruction because "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117.)

Furthermore, not only are aiders and abettors responsible for the intended crimes they intend to facilitate, but they are also liable for the natural and probable consequences of those crimes they intend to aid. (*People v. McCoy, supra,* 25 Cal.4th at p. 1117, relying on *People v. Prettyman* (1996) 14 Cal. 4th 248, 260.) Here, given their actions in concert, both Thomas and Cooksey were equally responsible and culpable for McDonald's death.[8]

Therefore, this was not the type of case in which a weak case was joined with a strong one. Rather, the evidence supporting the McDonald murder count was compelling. Additionally, because both counts involved the same class of crime and were both egregiously callous murders, it was unlikely the jury would be unduly inflamed by the consolidation of the murder counts. (See *People v. Geier*, *supra*, 41 Cal.4th at pp. 575-576 ["Setting aside for a moment the issue of cross-admissibility, none of the other factors for assessing prejudice arising from joinder support defendant's claim that the trial court abused its discretion by granting consolidation."]; see also *People v. Soper*, *supra*, 2009 Cal. Lexis at pp. *41-45.)

Still, Thomas urges that the trial court abused its discretion in denying the severance motion because the *inherent* prejudice of joinder outweighed any state interest in consolidation. Specifically, he asserts that there was no state interest in joinder because there were two juries impaneled – one for himself and one for Cooksey. Thus, he complains that joinder did not bring about any of the public benefits, such as judicial economy, that are usually gained by the consolidation of charges. (AOB 119-122.) The argument is without merit because it is premised upon the assumption that severed

---

[8] Notably, the separately impaneled juries reached precisely the same verdicts as to Thomas and Cooksey: both were guilty of second degree murder. (38 RT 6813; 22 CT 5046, 5050-5051.)

murder charges would have been tried by only two juries: one jury for Thomas and Cooksey as to the McDonald murder and the other jury for Thomas as to the Grote murder. Moreover, Thomas understates the efficiencies achieved as a result of consolidation.

Had the court severed the murder counts, it would have had to impanel three juries rather than just two. The court impaneled separate juries for Thomas and Cooksey because of the differences between a capital and a non-capital defendant.[9] (7 RT 1272-1275.) Further, the prosecutor introduced evidence admissible as to Cooksey that was irrelevant as to Thomas; the prosecutor introduced evidence about two threats Cooksey made to two different witnesses, urging their silence as to the McDonald murder. (22 RT 3933-3935; 23 RT 4263-4267.) This evidence was irrelevant as to Thomas and would have necessitated severance of Thomas and Cooksey's trial on the McDonald murder.

Additionally, Thomas and Cooksey had defenses that conflicted with each other; they both tried to shift culpability for the murder by establishing that McDonald died from the injuries caused by the other defendant. Such conflicting defenses would also have necessitated impanelment of two juries for Thomas and Cooksey as to the McDonald murder so as to avoid confusion. (See *People v. Avila* (2006) 38 Cal.4th 491, 574 [trial court can sever defendants when there is likely confusion from conflicting defenses].) Therefore, contrary to Thomas's assumption on appeal, there would have been two juries – one for him and one for Cooksey – for the McDonald

---

[9] Thomas moved, at one point before trial, for severance from Cooksey because of concerns under *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476], as well as concerns arising from his being a capital case such as jury selection differences between a capital and a non-capital defendant. (5 RT 945-952.)

murder. Consequently, severance of the murder counts would have required a third jury to be impaneled to hear the separate trial for the Grote murder.

Even so, whether consolidation will result in the realization of judicial economy is generally not a *determinative* factor the trial court must consider when evaluating how to rule on a severance motion. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451 ["it would be error to permit [the concern for judicial economy] to override more important and fundamental issues of justice."]; *People v. Keenan* (1988) 46 Cal.3d 478, 500-501.) Moreover, in urging that there was no judicial economy in joinder of the cases, Thomas fails to appreciate the significant systemic efficiencies that are realized through joinder. (*People v. Soper*, *supra*, 2009 Cal. Lexis at pp. *45-47.) Under this Court's recent decision in *Soper*, it is clear that joinder of charges can result in appreciable systemic efficiencies. Had the trial court severed the charges, Thomas's separate criminal proceedings, including "discovery, pretrial motions, as well as trial sessions themselves – would proceed on discrete tracks." (*Id.* at p. *46.) Additionally, had the separate juries returned the same verdicts, Thomas would have had two appeals -- an automatic appeal in this Court for the capital case and an appeal in the Court of Appeal in the non-capital case. (*Id.* at pp. *46-47.) There would have then been the potential for petitions for rehearing and review and any other collateral attacks on the two cases. (*Id.* at p. *47.) Consequently, it is evident that Thomas improperly minimizes the judicial economy and systemic efficiencies that joinder of the charges provided.

Finally, Thomas asserts the trial court used the wrong standard in making its ruling. He claims that the trial court should have recognized that there would have been no realization of judicial economy and therefore should have used the Evidence Code section 1101 analytical framework for evaluating prejudice to determine whether to sever the counts. (AOB 122-

124.) This argument is premised upon the assumption that there was no realization of judicial economy from the joinder of the murder counts. However, as indicated above, consolidation of the counts did result in judicial economy even with the impanelment of two separate juries. Moreover, there is no authority for Thomas's position that some lesser standard for evaluating prejudice should be employed if judicial economy might not be realized as a result of joinder. (*People v. Soper*, *supra*, 2009 Cal. Lexis at pp. *21-25.)

In light of the record, both before trial, when Thomas first raised his severance motion, and after the prosecutor's presentation of the case-in-chief on the McDonald murder, when Thomas renewed the motion, the trial court was well within its discretion in concluding that no undue prejudice would result from joinder of the murder cases. The court correctly concluded that Thomas's assertions of prejudice were overly speculative and inadequate, that the strength of evidence for both counts was evenly balanced, and that neither count would unduly inflame the jury. (5 RT 975-977.) Thomas has failed to demonstrate that the court abused its discretion when it denied his severance motion; the court's ruling was simply not "outside the bounds of reason." (*People v. Geier*, *supra*, 41 Cal.4th at p. 577, quoting *People v. Ochoa*, *supra*, 19 Cal.4th at p. 408.)

C. Thomas is Unable to Show Gross Unfairness or Prejudice Resulted from Joinder of the Murder Counts

Thomas nevertheless insists he suffered gross unfairness in violation of his Fifth, Sixth, and Fourteenth Amendment rights to due process and a fair trial as a result of the consolidated trial on the two murder counts. (AOB 126-130.) The assertion is devoid of merit because Thomas cannot show that his trial was rendered fundamentally unfair. Aside from pure conjecture, speculation, and supposition, he has pointed to nothing that

indicates the jury was swayed in an unfair manner by hearing and considering evidence about both murder counts.

The evidence as to both murders was clear and unequivocal. As stated earlier, Thomas was equally culpable with Cooksey as to the McDonald murder. His ardent attempts to shift all blame for the cause of death to Cooksey did nothing to limit his own criminal culpability. (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1116-1117.) Likewise, the evidence as to the Grote murder was compelling. Halstead detailed the murder in full. Ortiz, who was in the car with Grote, clearly identified Thomas as the shooter – he saw Thomas hanging out of the car window, pointing the gun at them. (28 RT 5251-5255.) Immediately after the shooting, Thomas showed up at Keisha Thomas's apartment and frantically took his gun apart and hid the gun parts in different locations in the apartment. (29 RT 5278-5279.) Because the prosecutor presented such strong evidence as to both murders, Thomas is unable to show any likely spillover effect from one to the other, or the bolstering of a weak case with a strong one.

Additionally, both crimes were of the same class of assaultive conduct and demonstrated an unwavering and complete disregard for life. Thus, neither crime would have particularly inflamed the jury more than the other because they were both callous murders. (See *People v. Geier*, *supra*, 41 Cal.4th at pp. 575-576.)

Further, Thomas has failed to show any actual spillover effect from one murder to the other. The jury acquitted Thomas of first degree murder as to the McDonald homicide despite hearing the evidence of the allegedly "stronger" Grote murder. This tends to show that the jury evaluated the evidence of each murder count independently. (See e.g. *People v. Geier*, *supra*, 41 Cal.4th at p. 578 [rejecting the defendant's claim that there was a spillover effect of evidence admitted in connection with one case into the

other, "much less that such evidentiary spillover resulted in a due process violation."])

Finally, Thomas asserts that the trial court should have sua sponte instructed the jury that evidence as to the McDonald murder was not admissible in determining guilt as to the Grote murder and vice versa. (AOB 130-132.) Thomas acknowledges that the court instructed the jury that the counts were to be considered separately: "each count in this case charges a distinct crime. You must decide each count separately. A defendant may be found guilty or not guilty of any or all of the crimes charged. Your finding as to each count must be stated in a separate verdict." (36 RT 6413-6414; 16 CT 3585 [CALJIC No. 17.02].) This Court has previously rejected precisely the same argument Thomas raises here. (*People v. Geier*, *supra*, 41 Cal.4th at pp. 578-579, citing *People v. Catlin* (2001) 26 Cal.4th 81, 153.) Just as in *Geier*, Thomas failed to request the trial court to instruct the jury as he now asserts the court should have. Consequently, Thomas has forfeited this claim. (*People v. Geier*, *supra*, 41 Cal.4th at p. 579.) In any event, this Court should reject the claim for the same reasons this Court rejected the argument in *Catlin* and *Geier*. (*Ibid.*)

Thomas is wholly unable to make a clear showing of prejudice from joinder of both murders. This Court should conclude that the "trial court's ruling, proper when made, did not produce, in hindsight, 'a gross unfairness ... such as to deprive the defendant of a fair trial or due process of law.'"[10] (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1130.)

---

[10] For the same reasons, this Court should reject Thomas's cursory argument that the trial court abused its discretion in denying his mistrial motion based on the joinder of the murder counts. In raising this argument, Thomas asserts that the prosecutor's failure to elicit the testimony from Keisha wholly eviscerated any reason for joinder. (AOB 125.) As stated (continued...)

Thus, the trial court properly exercised its discretion when it denied Thomas's severance motion. Thomas is unable to show that joinder of the murder counts deprived him of a fair trial or violated his constitutional rights under the Fifth, Sixth, and Fourteenth Amendments. Therefore, this Court should reject his claim.

II. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE LIQUOR STORE ATTACK THAT PRECEDED THE MCDONALD MURDER TO SHOW THOMAS'S STATE OF MIND, MOTIVE, AND INTENT AT THE TIME OF THE MURDER

Thomas contends the trial court abused its discretion in admitting evidence of his attack against Milton at the liquor store in the hours before the McDonald murder. He specifically urges that this evidence was inadmissible for any valid purpose under Evidence Code section 1101 and was therefore improper propensity evidence.[11] He asserts the improper admission of this evidence violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (AOB 134-152 [Arg. II].) The contention is without merit. The trial court was well within its discretion in admitting the evidence to show Thomas's mental state prior to the murder. Further, even if the court erred, Thomas is unable to demonstrate prejudice.

(...continued)
earlier, the trial court did not rely upon cross-admissibility of Keisha's testimony in denying the severance motion. Therefore, the absence of such testimony could have no effect upon the court's ruling.

[11] In his argument heading and factual introduction to the argument, Thomas also asserts the trial court erred in admitting evidence of McDonald's habit and custom in putting the money from his paycheck under his mattress for his fiancé. (AOB 134, 136-137.) However, Thomas does not pursue or develop this issue in any way. This Court should reject any assignment of error regarding this perfunctory claim as it is not properly presented. (*People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19; see also, Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Gray* (2005) 37 Cal.4th 168, 198; *People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8.)

A. Relevant Background

Aside from charging Thomas with two counts of murder and attempted murder, the prosecutor also charged Thomas in the original information with robbery and alleged a robbery special circumstance based on the McDonald homicide. (3 CT 307-310.) However, the court did not hold Thomas to answer on the robbery and robbery special circumstance allegations because there was insufficient evidence after the preliminary hearing to support them. The court explained that although the evidence showed Thomas took McDonald's shoes and food after the killing, it failed to show Thomas formed the requisite larcenous intent prior to the beating and killing. (7 RT 792-795.)

After Halstead pled guilty and agreed to testify for the prosecution, the prosecutor requested to admit evidence of the liquor store altercation involving Milton to show Thomas's mental state prior to the McDonald murder. Halstead would testify that Thomas was disappointed after the Milton beating at having failed to check Milton's right pocket for money. Halstead's testimony would tend to demonstrate that Thomas harbored an intent to steal prior to the McDonald murder. Additionally, Halstead's testimony would show that Thomas was "hyped and aggravated" after the beating which would directly bear upon his mental state just prior to the McDonald murder. (7 RT 1331.)

Based on the prosecutor's proffer, the court agreed that evidence of the Milton incident would be admissible. (7 RT 1339-1340; 21 RT 3714-3716.) The court explained that there were substantial similarities between the Milton incident and the McDonald murder and that the Milton assault was admissible under Evidence Code section 1101, subdivision (b), to support a robbery-felony-murder *theory* of liability for the first-degree murder of McDonald. Independent of the robbery-felony-murder theory, the court additionally observed that the Milton incident was close enough in

time to the McDonald murder so as to have relevance as to Thomas's mental state at the time of the murder. The two incidents were close enough in time that the latter could be viewed as a continuing course of conduct that started with the Milton incident. The court further noted that the probative value of the evidence outweighed its prejudicial impact. (7 RT 1339-1340.)

After the prosecutor presented the evidence about the Milton incident, the court provided a limiting instruction to the jury that it could not consider the evidence for any purpose other than what it demonstrated about Thomas's mental state. (23 RT 4051-4052.) The court explained that the jury could consider the evidence "only for the limited purpose of determining if it tend[ed] to show the intent and/or mental state which is a necessary element of the crime of murder of Ricky McDonald as charged in count 1 of the information." (23 RT 4051.)

At the conclusion of the evidence, the court decided that the prosecutor had failed to establish that Thomas harbored an intent to steal before killing McDonald. Consequently, the court denied the prosecutor's request to instruct the jury on a felony murder theory of first degree murder for the McDonald homicide. (35 RT 6281.) Nonetheless, the Milton incident was still relevant and admissible to prove Thomas's mental state in the moments prior to the murder. Accordingly, the court instructed the jury,

> [e]vidence has been introduced for the purpose of showing that the defendant engaged in conduct, more particularly the liquor store incident, other than that for which he is on trial. This evidence, if believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show the intent and/or mental state which is a necessary element of the crime of murder of

> Ricky McDonald as charged in count 1 of the information. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider this evidence for any other purpose.

(36 RT 6384; 16 CT 3517 [CALJIC No. 2.50, mod.].)

B. The Prosecutor was Entitled to Pursue a Robbery Felony Murder Theory for the McDonald Homicide

Thomas claims the trial court erred in ruling, before trial, that the prosecutor could proceed with a robbery-felony-murder theory for the McDonald homicide. He urges that because the original robbery and robbery special circumstance allegations were dismissed for insufficient evidence, the prosecutor was precluded from proceeding on a felony murder theory based on robbery. (AOB 138-141.) This claim fails. Although Thomas was not bound over on robbery and a robbery special circumstance allegation, he was nonetheless bound over on murder. Consequently, the prosecutor was free as to which *theory* of murder to pursue at trial.

This Court's ruling in *People v. Davis* (1995) 10 Cal.4th 463, is on point. There, the prosecutor charged the defendant with assault to commit rape, attempted rape, murder, and alleged a rape special circumstance. After the preliminary hearing, the court dismissed the assault to commit rape, attempted rape, and rape special circumstance allegations. (*Id.* at p. 512.) Nevertheless, before trial, the prosecutor requested the court to admit newly discovered evidence in support of a rape felony murder theory. Over the defendant's objection, the court granted the request and stated that "if the evidence presented supported an instruction on felony murder, such instruction would be given." (*Ibid.*)

On appeal, like Thomas here, the defendant claimed that the prosecutor was estopped from proceeding on a rape felony murder theory in light of the dismissal of all rape-related allegations after the preliminary hearing. (*People v. Davis*, *supra*, 10 Cal.4th at p. 514.) This court rejected the claim, explaining that the dismissal of the rape-related allegations had nothing to do with the murder charge and which theories the prosecutor could pursue in support of that charge. (*Ibid.*) This Court noted that "[d]ismissal of the [rape] charges put defendant in the same position he would have been in if they had not been filed. The absence of the rape-related charges did not preclude the trial court from instructing the jury on any theory of murder, including felony murder." (*Ibid.* & fn. 10.)

So too here. Under *Davis*, it is immaterial whether the robbery allegations were dismissed at the preliminary hearing. The prosecutor was free to proceed on a robbery-felony-murder theory and present evidence in support thereof.

C. The Trial Court Properly Exercised its Discretion in Admitting Evidence of the Milton Assault

Thomas next contends that even if the prosecutor could proceed on a robbery felony murder theory, the trial court nonetheless erred in admitting the Milton incident to prove intent or mental state. He asserts the Milton incident was too dissimilar from the McDonald homicide to be admissible under Evidence Code section 1101. (AOB 141-149.) The trial court properly exercised its discretion in admitting the evidence about the Milton assault because it tended to show Thomas's mental state, a heightened state of agitation, shortly before he killed McDonald.

Evidence of other crimes is not admissible to prove the defendant's propensity to commit the charged offense. (Evid. Code, § 1101, subd. (a).) However, such evidence is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity,

absence of mistake or accident . . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) Thus, Evidence Code section 1101, subdivision (b), clarifies that subdivision (a) "does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

The evidence pertaining to the other crimes and the charged offenses must share common features. (*People v. McDermott* (2002) 28 Cal.4th 946, 999; *People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-403.) The trial court has discretion to admit evidence of other crimes committed by a defendant if such evidence is relevant to prove some fact at issue (such as motive, intent, preparation, or identity) and if the probative value of the evidence outweighs its prejudicial effect. (*People v. Hawkins, supra,* 10 Cal.4th at p. 951; *People v. Daniels* (1991) 52 Cal.3d 815, 856.) A defendant's plea of not guilty puts in issue all of the elements of the charged offense, including intent, for the purpose of deciding the admissibility of evidence of uncharged misconduct. (*People v. Carpenter* (1997) 15 Cal.4th 312, 379; *People v. Daniels, supra*, 52 Cal.3d at pp. 857-858; see also *People v. Ewoldt, supra*, 7 Cal.4th at p. 400, fn. 4.)

When reviewing the admission of evidence of other offenses, a court must consider (1) the materiality of the fact to be proved or disproved; (2) the probative value of the other crime evidence to prove or disprove the fact; and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. (*People v. Hawkins, supra*, 10 Cal.4th at p. 951; *People v. Daniels, supra*, 52 Cal.3d at p. 856.)

The materiality of the uncharged offense or offenses depends on the degree of similarity between the present offense and the prior uncharged offense. This Court has required varying levels of similarity, depending on the type of fact to be proved. For example, using prior crimes to prove

identity requires the highest degree of similarity. (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Lenart* (2004) 32 Cal.4th 1107, 1123; *People v. Ewoldt, supra*, 7 Cal.4th at p. 403 [To prove identity, the prior offense and charged crime "must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts"].) A lesser degree of similarity is required to establish the existence of a common design or plan. (*Id.* at pp. 402, 403 [To demonstrate the existence of a common plan, "the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual."].) The least degree of similarity is required to establish relevance on the issues of knowledge and intent. Accordingly, where admission of a prior offense is sought to establish intent or knowledge, the uncharged conduct need only be sufficiently similar to the charged offenses to support the inference that the defendant probably harbored the same knowledge and intent in each instance. (*People v. Lewis* (2001) 25 Cal.4th 610, 636-637; *People v. Kipp, supra*, 18 Cal.4th at pp. 369-371; *People v. Carpenter, supra*, 15 Cal.4th at p. 379.)

Uncharged offenses admitted pursuant to Evidence Code section 1101, subdivision (b), are subject to the balancing test of Evidence Code section 352, which provides, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Accordingly, before admitting uncharged crimes evidence under section 1101, the trial court must conclude that its probative value outweighs any prejudice. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-403.)

This Court reviews a trial court's ruling admitting evidence under Evidence Code section 1101 for an abuse of discretion, examining the evidence in the light most favorable to the court's ruling. (*People v. Catlin*, *supra*, 26 Cal.4th at p. 120; *People v. Kipp*, *supra*, 18 Cal.4th at pp. 369-370.) The trial court's ruling should be upheld unless its decision was arbitrary, capricious, or irrational. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.)

At the time the prosecutor requested to admit evidence of the Milton assault, he theorized that Thomas's disappointment at having failed to obtain any money during the Milton beating would show that Thomas intended to rob McDonald in the later altercation. (7 RT 1331.) Based on this theory and the prosecutor's offer of proof, the trial court allowed the prosecutor to present evidence about the Milton incident to prove Thomas's intent and mental state at the time of the murder. The court observed,

> As to the evidence pertaining to the alleged beating and/or robbery and/or attempted robbery of Darryl Milton some hours preceding the homicide of Ricky McDonald, in the court's view, there are sufficient similarities between this occurrence and the killing of Ricky McDonald so as to permit the admission of this Evidence pursuant to Evidence Code section 1101 (b). [¶] As to the element of intent and/or mental state, the court is further and separately of the view that the evidence regarding the Milton incident is relevant and admissible as demonstrating a continuing course of conduct by and between the defendants in this case.

(7 RT 1339-1340.)

The trial court properly exercised its discretion in admitting evidence of the Milton incident because that incident and the McDonald homicide bore sufficient similarities to prove Thomas's intent and mental state in the time before the murder. In both incidents, the victims were intoxicated and verbally abusive; in many ways, both victims instigated the resultant fights.

(22 RT 3867-3869, 3883; 23 RT 4234-4235; 24 RT 4385-4388.) In response to what they perceived as both victims' inexcusable disrespect, Thomas and Cooksey decided to fall upon and beat them. (22 RT 3869-3871, 3869-3875, 3888-3889; 23 RT 4234-4240; 24 RT 4277-4280, 4288-4291, 4385-4388.) Indeed, the manner in which Thomas and Cooksey beat both victims was the same; as to Milton, Cooksey fell to his knees and repeatedly punched Milton while Thomas kicked Milton several times; as to McDonald, Cooksey fell to his knees and repeatedly bludgeoned McDonald with a bottle while Thomas kicked McDonald numerous times. (22 RT 3869-3875, 3891-3893, 3897-3907; 23 RT 4086, 4154-4162, 4186-4189, 4231, 4241; 24 RT 4290-4291, 4412-4413.) In both instances, Thomas kicked the victims with the same forceful soccer-style jabbing kicks. (22 RT 3897-3898; 23 RT 4135, 4211-4212; 24 RT 4397, 4399; 25 RT 4611-4619, 4623, 4630-4634.) Additionally, in both instances, someone had to stop Thomas and Cooksey from continuing their vicious barrage; Halstead threatened to drive away in order to stop Thomas and Cooksey from beating Milton; Cesar Harris had to pull Cooksey off of McDonald to stop the bludgeoning. (22 RT 3876-3877, 3912-3913; 23 RT 4245-4247, 4250-4251.) At the end of the Milton beating, Thomas searched Milton's right pocket; at the end of the McDonald beating, Thomas pulled off McDonald's shorts, socks, and shoes and ultimately took his food and shoes. (22 RT 3877, 3879-3880, 3908-3911, 3913-3914, 3926-3928; 23 RT 4090, 4096, 4164, 4257; 24 RT 4407-4408.) Thus, the two incidents bore substantial similarities with each other so as to be admissible to prove intent and mental state under Evidence Code section 1101, subdivision (b).

Thomas argues, however, that the Milton incident was rendered irrelevant and inadmissible once the trial court ruled, during the conference on jury instructions, that the prosecutor had failed to establish an intent to

rob that could support a robbery-felony-murder theory. (AOB 141-149.) This argument fails to appreciate that even if the evidence were not relevant to prove an intent to rob, it was still relevant to demonstrate his heightened state of aggravation and volatility in the time shortly before the McDonald murder.

In making its ruling, prior to trial, that the Milton incident was admissible, the trial court explained two *separate* and *independent* bases for admissibility under Evidence Code section 1101, subdivision (b). First, the evidence was admissible to prove an intent to commit robbery for the purpose of establishing felony murder as a theory for the first degree murder of McDonald. Second, the evidence was admissible to demonstrate Thomas's mental state prior to the McDonald murder, the murder serving as the culmination of a course of conduct that began with the Milton beating. (7 RT 1339-1340.) To prove murder, the prosecutor had to establish that Thomas unlawfully killed McDonald with malice aforethought. (§ 187, subd. (a).) Malice can be either express or implied. (§ 188.) Express malice aforethought requires proof of a specific intent to kill. (§ 188.) Implied malice can be shown when "the killing resulted from an intentional act; . . . the natural consequences of the act are dangerous to human life; and . . . the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life." (CALJIC No. 8.11; § 188; *People v. Knoller* (2007) 41 Cal.4th 139, 143.) To prove that the McDonald murder was of the first degree, the prosecutor had to further establish that the killing was willful, deliberate, and premeditated. (§ 189.) Therefore, to prove murder, the prosecutor had to establish Thomas's mental state or intent in the moments preceding, and at the time of, the killing.

Mental state and intent are rarely susceptible of direct proof and must therefore be proven circumstantially. (*People v. Beeman* (1984) 35 Cal.3d

547, 558-559 [specific intent must often be inferred from circumstantial evidence as "[d]irect evidence of the mental state of the accused is rarely available except through his or her testimony"].) Consequently, the circumstances and actions of a defendant in the time leading up to a particular crime are relevant to demonstrate the defendant's mental state and intentions at the time of the crime. (See *People v. Smith* (2005) 37 Cal.4th 733, 741 [mental state is often "inferred from the defendant's acts and the circumstances of the crime"]; *People v. Risenhoover* (1968) 70 Cal.2d 39, 51-52 [circumstances surrounding a crime can show a "defendant committed the killing with malice aforethought"].)

Here, the Milton incident was relevant to show Thomas's mental state in the hour or so preceding McDonald's arrival. Thomas had been involved in a substantial fight with Milton in which he kicked the victim numerous times. (22 RT 3869-3875; 23 RT 4086, 4231; 24 RT 4290-4291.) He had been the subject of Milton's abusive language and he retaliated with physical force. (22 RT 3864-3869.) He was riled and aggravated as a result of the Milton incident. (22 RT 3877, 3879-3880.) This altercation was therefore directly relevant to show Thomas's state of mind when he was confronted a second time in the same evening with a confrontational intoxicated man. Consequently, the trial court was well within its discretion in admitting the evidence of the Milton incident to show Thomas's mental state and specific intent at the time he beat and killed McDonald.

Therefore, in light of all the evidence, even though the Milton incident was ultimately not relevant or usable to prove Thomas harbored an intent to rob, it was nonetheless still relevant evidence of Thomas's mental state and hence, his specific intent, at the time of the murder.

D. Harmless Error

Even if the trial court erred in admitting evidence of the Milton altercation, Thomas nonetheless is unable to demonstrate prejudice. The erroneous admission of evidence is evaluated under the *Watson*[12] harmless error standard, whether there is a reasonable probability a more favorable result would have been reached. (*People v. Malone* (1988) 47 Cal.3d 1, 22 [prejudice in admitting evidence under Evidence Code section 1101 is evaluated under the *Watson* harmless error standard].) Here, Thomas cannot show that even if the Milton incident had been excluded, there is a reasonable probability he would have achieved a more favorable result as to the McDonald murder.

The jury convicted Thomas of second degree murder. Thomas seems to argue that the Milton incident likely prevented the jury from finding adequate provocation to reduce the charge to manslaughter. (AOB 150-151.) This assertion ignores the merciless beating Thomas unleashed upon McDonald even after he fell unconscious into the bushes. (22 RT 3897-3900, 3903-3906; 23 RT 4135, 4211-4212, 4242-4244, 4248-4253; 24 RT 4397, 4399; 25 RT 4611-4619, 4623, 4630-4634.) It further ignores the evidence suggesting that Thomas finished McDonald off by stepping on his throat when McDonald started to awaken. (22 RT 3918-3919; 23 RT 4096, 4099-4100; 26 RT 4794, 4797-4798.) Moreover, the jury's knowledge of the Milton incident likely inured to Thomas's benefit. This incident would have shown that Thomas had already been subjected to Milton's indignity and that his sensitivity to provocation had already been engaged and inflamed. This may explain why the jury rejected the prosecutor's theory of premeditation and deliberation. However, even though the jury may

---

[12] *People v. Watson* (1956) 46 Cal.2d 818, 836-837.

have concluded there was insufficient evidence to establish premeditation and deliberation, there certainly was not sufficient provocation to eliminate the element of malice. Therefore the jury properly rejected a manslaughter conviction. Because the evidence was overwhelming that Thomas murdered McDonald, he cannot show that admission of the Milton incident was prejudicial.

Further, the trial court admonished the jury that it could not consider the Milton incident for any purpose other than how it bore upon Thomas's mental state and intent. (23 RT 4051.) The court explicitly instructed the jury that it could not use the Milton incident as evidence of criminal propensity. (36 RT 6384; 16 CT 3517 [CALJIC No. 2.50, modified].) Because the jury is presumed to follow these limiting instructions, Thomas cannot demonstrate that the jury considered the incident for an improper purpose. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) Additionally, the prosecutor did not use the incident during closing argument or draw attention to it in any way.

Finally, Thomas asserts that admission of the Milton incident rendered his trial fundamentally unfair in violation of his due process rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments because there were no reasonable inferences that the jury could draw from that evidence except for his criminal disposition. (AOB 134, 149, 152.) This claim fails because the jury could draw reasonable inferences about Thomas's mental state from the Milton incident. As explained, because the prosecutor had to prove Thomas's mental state or intent to establish murder, the events leading up to the murder were directly relevant in establishing his state of mind. The Milton incident tended to show Thomas's agitated state in the hour preceding the murder. (See e.g. *People v. Talbot* (1966) 64 Cal.3d 691, 709-710, overruled on other grounds in *People v. Ireland* (1969) 70 Cal.2d 522, 540 and *People v. Wilson* (1969) 1

Cal.3d 431, 4423; *Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1104; Cf. *People v. Anderson* (1968) 70 Cal.2d 15, 33.) Moreover, this Court has "long observed that '[a]pplication of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights.'" (*People v. Lindberg* (2008) 45 Cal.4th 1, 26, quoting *People v. Kraft, supra,* 23 Cal.4th at p. 1035.) Accordingly, Thomas cannot show that his trial was rendered fundamentally unfair.

III. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT THE PROSECUTOR HAD TO PROVE ALL ELEMENTS OF OFFENSES AND FACTUAL ALLEGATIONS BEYOND A REASONABLE DOUBT

Thomas asserts the trial court erred in failing to give a modified version of CALJIC No. 2.90, the reasonable doubt instruction. He specifically urges that although CALJIC No. 2.90 correctly defines the concept of guilt beyond a reasonable doubt, it nevertheless fails to explicitly articulate that *each element* of the crime must be proven beyond a reasonable doubt. Finally, Thomas asserts that the trial court's error violated his rights to due process of law, jury trial, and reliable penalty determination in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 153-155 [Arg. III].) The claims are specious because the instructions, as a whole, clearly stated that all elements for the crimes and special circumstance findings had to be proven beyond a reasonable doubt.

It is well settled that the prosecutor must prove every element of the offense beyond a reasonable doubt and that the jury instructions should explain this requirement. (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [114 S.Ct. 1239, 127 L.Ed.2d 583], citing *In re Winship* (1970) 397 U.S. 358 [90 S.Ct. 1068, 25 L.Ed.2d 368]; *Middleton v. McNeil* (2004) 541 U.S. 433, 437 [124 S.Ct. 1830, 158 L.Ed.2d 701].) However, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due

process violation. The question is "'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" (*Middleton v. McNeil*, *supra*, 541 U.S. at p. 437, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385].) "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." (*Middleton v. McNeil*, *supra*, 541 U.S. at p. 437, quoting *Boyde v. California* (1990) 494 U.S. 370, 378 [110 S.Ct. 1190, 108 L.Ed.2d 316].)

Here, Thomas requested the trial court to modify CALJIC No. 2.90 to expressly state that the prosecution had to prove each element of all offenses beyond a reasonable doubt. (14 CT 2932-2934, 2942-2944.) The court declined the request (35 RT 6232) and instructed the jury with the standard CALJIC (6th ed.) No. 2.90 instruction:

> The defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt 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. 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 which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(36 RT 6388; 16 RT 3528.)

Thomas does not quarrel with the constitutionality of the foregoing instruction in defining the concept of proof beyond a reasonable doubt.[13]

---

[13] Indeed, in light of *People v. Freeman* (1994) 8 Cal.4th 450, 501-504 and *Victor v. Nebraska*, *supra*, 511 U.S. at pp. 7-17, an argument (continued...)

Instead, he urges that because the instruction failed to instruct the jury that all offense elements had to be proven beyond a reasonable doubt, the instruction was deficient. The argument rests upon a myopic view of the jury instructions. When the instructions are examined in the aggregate, it is readily apparent that the jury was fully and adequately instructed that it had to find all elements for the crimes proved beyond a reasonable doubt. (*Middleton v. McNeil*, *supra*, 541 U.S. at p. 437.)

Aside from properly explaining the proof beyond a reasonable doubt standard, the court, in explaining circumstantial evidence, clearly instructed the jury that,

> each fact which is essential to commit a set of circumstances necessary to establish a 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 upon which the inference necessarily rests must be proved beyond a reasonable doubt.

(36 RT 6379-6380; 16 CT 3504 [CALJIC No. 2.01], italics added.)

Moreover, the court repeatedly explained that all elements and facts had to be proven beyond a reasonable doubt. For example, in defining aider and abettor liability, the court explained,

> in order to find the defendant guilty on an aiding and abetting theory of the crime of murder of Ricky McDonald as charged in count 1, *you must be satisfied beyond a reasonable doubt of all of the following*: first, the crime of battery with serious bodily injury was committed. Second, that the defendant aided and abetted that crime. Third, that a co-principal in that crime committed the crime of

---

(...continued)
challenging the constitutionality of the definition of reasonable doubt, as provided in CALJIC No. 2.90, would be meritless.

> murder. And fourth, the crime of murder was a natural and probable consequence of the commission of the crime of battery with serious bodily injury.

(36 RT 6390; 16 RT 3532 [CALJIC No. 3.02], italics added.)

In defining murder, the court instructed that "*each of the following elements must be proved beyond any reasonable doubt*: first, a human being was killed; second, the killing was unlawful; and third, the killing was done with malice aforethought." (36 RT 6395; 16 CT 3545 [CALJIC No. 8.10], italics added.) In defining attempted murder, the court instructed, "in order to prove attempted murder, *each of the following elements must be proved beyond any reasonable doubt*: first, a direct but ineffectual act was done by one person towards killing another human being; and second, the person committing the act harbored express malice aforethought, namely, a specific intent to kill, unlawfully, another human being." (36 RT 6399; 16 CT 3554 [CALJIC No. 8.66], italics added.) The court also defined the lesser-included offenses, voluntary and involuntary manslaughter, as well as assault (as the predicate for involuntary manslaughter) by clearly articulating that every element had to be proven beyond a reasonable doubt. (36 RT 6402, 6404-6405; 16 CT 3560 [CALJIC No. 8340], 3565-3566 [CALJIC Nos. 8.45 and 9.00].)

Additionally, the court instructed,

> to establish that a killing is murder and not manslaughter, *the burden is on the people to prove beyond a reasonable doubt each of the elements* of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel.

(36 RT 6405; 16 CT 3567 [CALJIC No. 8.50], italics added.)

Finally, as to the special circumstances, the court instructed that all facts supporting the special circumstance findings had to be proven beyond a reasonable doubt. (36 RT 6410-6412; 16 CT 3577-3579 [CALJIC Nos.

8.80.1, 8.81.3, and 8.81.15], 3581-3582 [CALJIC Nos. 8.81.21 and 8.83].) Likewise the court instructed that all factual allegations as to the firearm enhancements had to be proven beyond a reasonable doubt. (36 RT 6408; 16 CT 3574-3575 [CALJIC No. 17.19 and Instruction on § 12022.55].)

As evident from the foregoing instructions, the jury was amply and repeatedly instructed that it had to find all offense elements and special circumstance factors proven beyond a reasonable doubt. Taking the instructions together, the jury necessarily understood that any findings of guilt, as to the crimes, or truth, as to the special circumstance and enhancement allegations, required the prosecutor to have established all elements and factual predicates by proof beyond a reasonable doubt. (See *People v. Snow* (2003) 30 Cal.4th 43, 97-98.) Therefore, Thomas's entire argument is baseless.

For the same reasons, Thomas's constitutional claims, that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights were violated, fail. The instructions, as a whole amply instructed the jury that it had to find every element of each offense beyond a reasonable doubt, as required under the Constitution. (See *Middleton v. McNeil*, *supra*, 541 U.S. at p. 437.) Therefore, Thomas cannot establish that the court's instructions violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

IV. THE TRIAL COURT PROPERLY GRANTED THE PROSECUTOR'S CHALLENGE OF A PROSPECTIVE PENALTY PHASE JUROR FOR CAUSE

Thomas asserts the trial court abused its discretion in excusing prospective juror Laura G. for cause. He further claims that his rights to due process of law, fair trial, impartial jury, and reliable penalty determination protected under the Fifth, Sixth, Eighth, and Fourteenth Amendments were violated. (AOB 156-166 [Arg. IV.]) The assertion is without merit. The trial court was well within its discretion in excusing

Laura G. for cause because her responses on the jury qualification questionnaire and during voir dire indicated her impaired ability to conscientiously consider all sentencing alternatives.

As part of the juror qualification and selection process, all prospective jurors responded to a lengthy written juror questionnaire. The purpose of the questionnaire was to provide the trial court and counsel with background information about each juror and, in particular, their personal views on capital punishment and their feelings about serving as a juror in Thomas's penalty phase retrial. (48 CT 11498-11499.)

Laura G. filled out her questionnaire on June 4, 1999. (48 CT 11526.) She expressed an unequivocal opposition to capital punishment. (48 CT 11514, 11520-11523.) Laura G. stated that she did not want to serve as a juror in Thomas's case because she did not believe in the death penalty. She candidly articulated that she did not believe she could be fair and impartial because of her prejudice and bias against the death penalty. She further expressed that her bias, prejudice, or preconceived notions in opposition to capital punishment would affect her decision-making if selected to serve on the jury. (48 CT 11514.)

Although Laura G. responded that she worked well in groups, would try to be open to the views of other jurors, and would try to follow the law even if she disagreed with it (48 CT 11515-11516), she also stated, without reservation, that the death penalty was not applicable in any case and served no function in society (48 CT 11522). Laura G. stated she was "AGAINST!" the death penalty and that she was far more comfortable with life imprisonment as the ultimate punishment. (48 CT 11520-11521, original capitalization and exclamation point.) Because she did not believe in capital punishment, she further believed it was imposed too often. (48 CT 11520.)

Laura G.'s views on capital punishment were so strong that she stated she would automatically vote for life without the possibility of parole regardless of the facts of the case. (48 CT 11522-11523.) She admitted that her views on the death penalty were strong enough so as to impair her ability to perform her duties as a juror. (48 CT 11523.) She further candidly acknowledged her views would prevent her from listening to all evidence presented by the prosecution before reaching a decision. (48 CT 11523.)

In responding to the concluding questions, Laura G. reiterated her unwillingness to serve as a juror on the case. She believed she could not be fair and impartial because of her prejudice against capital punishment. (48 CT 11525.)

Thomas requested the court to engage in follow-up questioning during voir dire for several of Laura G.'s written responses. (19 CT 4306.) However, rather than explicitly specifying what he wanted the court to ask, Thomas pointed to 20 written questions and answers upon which he sought further clarification. (45 RT 8221; 19 CT 4306.)

During voir dire on July 8, 1999, one month after Laura G. filled out her questionnaire, the court[14] asked whether any jurors harbored feelings of either strong support or opposition toward capital punishment such that they would automatically cast their vote based on such strong views. (46 RT 8496-8497.) Laura G. identified herself as someone who had such entrenched views. (46 RT 8497.)

Subsequently, during individual voir dire, Laura G. expressed that when she was young, she harbored some doubts about the death penalty,

---

[14] The court, rather than counsel, conducted voir dire. However, counsel were invited to request the court to ask clarifying questions. (See 8 RT 1561-1566 [overview of the court's voir dire procedures]; 45 RT 8221.)

but that as she grew older and especially in recent years, her views against capital punishment solidified. (46 RT 8552.) She expressed that she would feel guilty if she were to condemn someone to die and that in recent years these feelings were rooted in her spiritual beliefs. (46 RT 8552-8553.)

When the court specifically asked whether Laura G. believed she could ever cast a vote in favor of capital punishment in a case, she quibbled that she could not answer the question in a vacuum. (46 RT 8553.) Later, when the court asked whether she could be open as a juror, Laura G. again vacillated by first stating that she would give her honest opinion and try to be open minded, but then concluded by stating she could not be open if picked to serve as a juror to decide a question of life or death. (46 RT 8556.) Still later, she expressed a strong preference for life imprisonment and that she was unable to answer whether she had the ability to reach a verdict of death. (46 RT 8558.)

Laura G. did express, however, that if she were to create a penal system, she would likely provide for capital punishment as a possible sanction. But even in this acknowledgment, Laura G. expressed her strong preference for life imprisonment in sequestered penal colonies. She further articulated that even in her penological scheme, it would be very difficult to condemn someone to die – especially if she were personally involved in the decision-making process. (46 RT 8553-8554.)

Based on Laura G.'s responses, the prosecutor requested the court to excuse her for cause. The prosecutor observed that Laura G. had effectively dodged each of the court's questions as to whether she would be able to set aside her personal feelings and reach a death judgment if the circumstances so provided. (46 RT 8559.) Over Thomas's objection, the court excused her. Based on her questionnaire responses and her answers to the court's voir dire examination, the court concluded that Laura G.

exhibited a "very strong implied, if not actual, bias against the death penalty." (46 RT 8560.)

The United States Supreme Court set forth the proper methods for selecting qualified jurors in a capital case in *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83 L.Ed.2d 841]. (*People v. Roldan* (2005) 35 Cal.4th 646, 696.) Following *Witt*, this Court explained that a trial court is required "to determine 'whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Ibid.*) Therefore "a prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. Jenkins* (2000) 22 Cal.4th 900, 987.)

A prospective juror's bias against the death penalty need not be "proven with unmistakable clarity." (*People v. Haley* (2004) 34 Cal.4th 283, 306.) "Instead, 'it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.'" (*Ibid.*)

In reviewing the trial court's decision to excuse a juror for cause under the *Witt* standard, this Court examines "'the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would 'substantially impair the performance of [the juror's] duties . . . .' was fairly supported by the record." (*People v. Roldan, supra*, 35 Cal.4th at p. 696.) Moreover, "[t]he determination of a juror's qualifications falls '"within the wide discretion of the trial court, seldom disturbed on appeal."'" (*People v. Haley, supra*, 34 Cal.4th at p. 306.) Consequently, this Court will uphold a trial court's determination regarding a juror's views on capital punishment and whether they would prevent or substantially impair the performance of the juror's duties so long as they are supported by substantial evidence, '"'accepting as binding the trial

court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous."'" (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 987; see also *People v. Wilson* (2005) 36 Cal.4th 309, 324.)

Here, the trial court was well within its discretion in excusing Laura G. for cause. Her responses to the questionnaire and during voir dire unequivocally demonstrated that her strong objection to capital punishment would lead her to automatically decide the matter in favor of life imprisonment regardless of the evidence. (48 CT 11514, 11520-11523; 46 RT 8553-8554, 8556, 8558.) So strong were her predilections that she candidly admitted she could not be a fair and impartial juror because she would not listen to all the evidence the prosecutor would present. (48 CT 11514, 11525; 46 RT 8556, 8558.) During voir dire, the court was able to observe Laura G.'s demeanor during her responses which clearly expressed her antipathy toward capital punishment and her inability to set those feelings aside. She remarked a couple of times that it would be very difficult for her to condemn a man to die. (46 RT 8552, 8554.) She admitted she could not be open if selected to serve as a juror. (46 RT 8556.)

To the extent that Laura G.'s responses during voir dire examination may have been equivocal, this Court has explained,

> [i]n many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts.

(*People v. Roldan, supra*, 35 Cal.4th at p. 696, quoting *People v. Fudge* (1994) 7 Cal.4th 1075, 1093-1094.) The trial court observed Laura G.'s responses during voir dire and was able to conclude that she harbored a "very strong implied, if not actual, bias against" capital punishment. (46 RT 8560.)

Further, Laura G.'s statements that it would be difficult for her to condemn a man to death rendered additional support for the trial court's conclusions. This Court has held that "it [is] permissible to excuse a juror who [has] indicated [she] would have a 'hard time' voting for the death penalty or would find the decision 'very difficult.' [Citation.]" (*People v. Roldan, supra*, 35 Cal.4th at p. 697.) The record discloses substantial evidence supporting the trial court's discretionary decision to excuse Laura G. for cause.

Nevertheless, Thomas asserts that the court never asked the right question – that is, whether Laura G. would be able to set aside her personal feelings and apply the law as stated by the court. (AOB 161-166.) First, Thomas has forfeited this claim. Thomas never requested the trial court to ask what he now asserts the court should have asked. Instead, Thomas listed 20 questions and answers from Laura G.'s questionnaire for which he asked the court to seek clarification. He did not provide the court with any additional questions regarding these questions to specifically ask Laura G. (19 CT 4306.) Therefore, Thomas's claim, that the trial court should have explicitly asked "whether [Laura G.'s] views on capital punishment... would prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath" (AOB 164), has been forfeited. (See e.g. *People v. Staten* (2000) 24 Cal.4th 434, 451-452 [a defendant cannot complain on appeal that the judge failed to ask specific questions during voir dire unless he requested the trial court to do so]; see also *People v. Horton* (1995) 11 Cal. 4th 1068, 1093 [defendant's failure to

ask further questions of prospective jurors after being provided an opportunity to do so forfeits later complaint as to the trial court's voir dire].)

Next, Thomas's reliance upon *People v. Stewart* (2004) 33 Cal.4th 425, is misplaced. (AOB 162, 164-166.) In *Stewart*, this Court explained that "a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would "'prevent or substantially impair'" the performance of his or her duties" before granting a challenge for cause. (*Id.* at p. 445.) In *Stewart*, the trial court granted five of the prosecutor's challenges for cause based upon the jurors' responses to one question on a written questionnaire without any further clarification to resolve inherent ambiguities in the written responses. (*Id.* at pp. 444-445.) This Court concluded that the trial court erred in granting the challenges because it did not have sufficient information to determine whether the jurors could set aside their personal feelings about capital punishment and fairly apply the law in accordance with their duties as jurors. (*Id.* at p. 446) Thus, in *Stewart*, the trial court should have engaged in some follow-up questioning to make this determination. (*Id.* at pp. 451, 454-455.)

By stark contrast, here, the trial court had a wealth of responses from Laura G., including her juror questionnaire responses and her responses during voir dire in which the court extensively followed up upon her written responses. Laura G.'s written and verbal responses amply demonstrated her inability to set aside her personal feelings if selected to serve as a juror. Her answers indicated that she would automatically vote for life without the possibility of parole based upon her personal feelings. Such responses disqualified her. (See *People v. Avila, supra* , 38 Cal.4th at p. 531 ["Any juror who 'automatically' would vote in ways that precluded the death penalty would clearly be disqualified under *Witt*."].) Further,

Laura's responses to the trial court's follow-up questions were sufficient to leave the court with a "definite impression" that she could not be impartial. (*People v. Millwee* (1998) 18 Cal.4th 96, 146.) Accordingly, the trial properly exercised its discretion in excusing Laura G. for cause.

Finally, to the extent Thomas asserts that the trial court's excusing Laura G. for cause violated his constitutional rights, the claim is forfeited. Although Thomas expressed his belief that Laura G. passed for cause, he never raised any constitutional objection to the prosecutor's challenge. (46 RT 8559-8560.) Therefore, he has forfeited the claim that his constitutional rights were violated. (See *People v. Carrera* (1989) 49 Cal.3d 291, 331, fn. 29 ["As no objection was made to the jury selection process in the trial court, it is not clear that defendant has preserved his right of appeal on this point."].) Moreover, because Thomas has failed to show the trial court abused its discretion in excusing Laura G. for cause, he is unable to show a violation of his constitutional rights to due process, a fair trial, an impartial jury, or a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (See e.g. *People v. Millwee*, *supra*, 18 Cal.4th at pp. 146-147 [because there was no error in excusing the jurors for cause, there could be no deprivation of the defendant's rights to fair trial, impartial jury, or reliable penalty determination].)

V. THE TRIAL COURT PROPERLY INSTRUCTED THE PENALTY PHASE JURY THAT DEATH IS A GREATER PUNISHMENT THAN LIFE WITHOUT THE POSSIBILITY OF PAROLE

Thomas contends the trial court erred when it instructed the jury that death, as a matter of law, is a greater punishment than life without the possibility of parole. He argues that it was for the jury to decide which punishment was greater and that the court's instruction, removing the issue from the jury, undermined his rights to due process, an impartial jury, and a reliable penalty determination under the Fifth, Sixth, Eighth, and

Fourteenth Amendments. (AOB 167-177 [Arg. V].) Thomas forfeited this claim in the trial court by failing to raise an objection to the instruction. Further, the contention is untenable because statutorily, death *is* a greater punishment than life without the possibility of parole and thus the trial court's instructions, which were correct statements of law, were proper.

A. Procedural Background

During the first penalty phase trial, the prosecutor requested the court to explicitly instruct the jury that, as a matter of law, death is a punishment greater than life without the possibility of parole. (41 RT 7531.) The court acknowledged that under the law, death was indisputably the greater punishment. The only question that remained was whether the jury should be explicitly so instructed. When the court invited comment from the defense, the defense asked for time to think about the issue. (41 RT 7551-7552.) Later, the defense agreed that informing the jury that death was the greater punishment would be appropriate. (41 RT 7641-7642.) This penalty phase trial resulted in a mistrial because the jury was unable to reach a verdict. (22 CT 5083.) At the penalty phase retrial, Thomas interposed no objections to instructing the jury that death was the greater punishment.

The court instructed that no juror could

> render a penalty verdict without fully assuming that the sentence he or she votes for will be carried out. That is, that the defendant will spend the rest of his natural life in prison or will be put to death. *For all purposes you must consider and accept that death is a greater penalty than life imprisonment without possibility of parole.*

(60 RT 11686; 21 CT 4700, italics added.) In explaining how to determine which punishment to affix, and the weighing of aggravating and mitigating factors, the court referred to the imposition of life imprisonment as a

"sentence less than death." (60 RT 11688-11689; 21 CT 4702-4703; CALJIC No. 8.85.)

B. Thomas Forfeited His Claim

Thomas's failure to object to the court's instruction that death is a greater punishment than life without the possibility of parole has forfeited his claim on appeal. Generally, a defendant's failure to interpose an objection to a jury instruction forfeits appellate review of the claim. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) Moreover, a defendant's agreement or consent with a court's proposed instruction forfeits later complaint. (*Id.* at p. 1193.) This rule of forfeiture applies to "claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights." (*In re Seaton* (2004) 34 Cal.4th 193, 198; *People v. Marks* (2003) 31 Cal.4th 197, 236-237.)

C. The Trial Court Properly Instructed the Jury that Death is a Greater Punishment than Life Without the Possibility of Parole

Thomas contends that there is no California statute or court decision that specifies death as the greater punishment. (AOB 170-174.) Not so. This Court has previously rejected Thomas's argument and articulated that death is the greater punishment and that the trial court can so instruct the jury. This Court has clearly stated, "[t]hat death is considered to be a more severe punishment than life is explicit in California law." (*People v. Harris* (2005) 37 Cal.4th 310, 361.) Further, the Legislature considers death to be the greater punishment and specifies, under section 190.3, that if the aggravating factors substantially outweigh the mitigating factors, then the jury can impose a death sentence. (See also *People v. Duncan* (1991) 53 Cal.3d 955, 978-979.)

In *Harris*, the jury asked the court, during its penalty deliberations, whether life without parole in prison is a greater punishment than death. (*People v. Harris*, *supra*, 37 Cal.4th at p. 361.) The trial court responded,

> Under the law . . . and regardless of your personal belief as to what is harder on somebody or what is more severe or what is the tougher penalty, under the law the death penalty is the more severe penalty. Life in prison is not as severe as the death penalty. That is the law and that is the law you have to follow.

(*Ibid.*) On appeal, the defendant contended, like Thomas here, that this instruction invaded the jury's deliberations in making a normative decision as to the appropriate punishment. This Court rejected the claim and observed that death is the greater punishment and that the instruction to the jury was appropriate. (*Ibid.*)

So too here. Although Thomas attempts to show that some people may consider life without the possibility of parole as a greater punishment than death, it is quite clear that under California law, death is the greater punishment. (*People v. Harris*, *supra*, 37 Cal.4th at p. 361; § 190.3.) Accordingly, the court properly instructed the jury that death is the greater punishment; this was an accurate statement of California law. (See *People v. Harris*, *supra*, 37 Cal.4th at p. 361.) Moreover, Thomas's attempt, on appeal, to introduce newspaper articles and anecdotal evidence that there are people who consider life without the possibility of parole to be a greater punishment than death (AOB 172-173, 175) is improper and not cognizable because such materials were never presented to the trial court and because Thomas has not requested this Court to take judicial notice of such matters. (*People v. Sanders* (2003) 31 Cal.4th 318, 323, fn. 1; *People v. Amador* (2000) 24 Cal.4th 387, 394 [declining to take judicial notice of materials that were not part of the trial record].)

Thomas further asserts that the court's instruction removed the penalty determination from the jury. (AOB 174-176.) However, he has failed to show how the instruction, which was a correct statement of law, removed the penalty determination from the jury's consideration. Indeed, *Harris* clarifies that because death is the greater punishment under California law, there is no danger of arbitrary or capricious imposition of such a punishment when the jury is explicitly so instructed. (*People v. Harris*, *supra*, 37 Cal.4th at p. 361.) This is because the jury cannot return a judgment of death, unless it is "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (*Ibid.*, citing *People v. Duncan*, *supra*, 53 Cal.3d at pp. 977-979.) Nothing in the court's instruction changed the determination the jury had to make.

Additionally, Thomas never argued to the jury the theory he now advances on appeal: that death might be a lesser punishment than life without the possibility of parole. Instead, Thomas's counsel stressed that the jury was not required to impose a sentence of death and indeed asked the jury to spare Thomas's life. (60 RT 11719-11720, 11787-11788, 11790.) Counsel pointed out that the jury was limited in what it could consider as aggravating evidence but unlimited in what it could consider as mitigating evidence so as to impose a sentence less than death. (60 RT 11725-11726.) Counsel further articulated that the jury was always free to reject a death sentence, even if it concluded the aggravating factors substantially outweighed the mitigating factors. (60 RT 11727, 11787.) Counsel stated that there were far worse cases than Thomas's for which the death penalty might be appropriate. (60 RT 11751-11752.) Finally, counsel argued that life without the possibility of parole, despite being a harsh punishment, was nonetheless the proper punishment for Thomas. (60 RT 11758-11760, 11788, 11790.) Given Thomas's theory at trial that life

without the possibility of parole was a lesser punishment, he cannot now assert a contradictory theory on appeal. (See *People ex rel. Totten v. Colonia Chiques,* 156 Cal.App.4th 31, 40 [finding that the defendant's new theory on appeal had been waived for failure to raise it in the trial court].)

Finally, to the extent Thomas seeks to assert that *Apprendi*[15] and its progeny[16] altered the nature of the instructions the trial court was required to give the jury on how to approach the penalty determination (AOB 176-177), this Court has squarely rejected such challenges. (*People v. Salcido* (2008) 44 Cal.4th 93, 167.) Thomas provides no basis for this Court to revisit its prior holdings on this claim.

Because Thomas is unable to show that the trial court's instruction was invalid or improper, he is further unable to show that the instruction violated his rights to due process, a jury trial, or a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (See e.g. *People v. Marks*, *supra*, 31 Cal.4th at pp. 236-237 [summarily rejecting the defendant's constitutional claims because the trial court's instructions correctly stated the law].)

---

[15] *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].

[16] *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].

VI. SUBSTANTIAL EVIDENCE SUPPORTED THE AGGRAVATING FACTOR THAT THOMAS DISCHARGED A FIREARM IN FRONT OF RUSSELL'S HOME AND THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THIS CRIMINAL ACTIVITY AS AGGRAVATING EVIDENCE

Thomas asserts the evidence was insufficient to establish, as an aggravating factor, that he negligently discharged a firearm near Jesse Russell's home on the evening of September 17, 1995. He specifically focuses on a stipulation with respect to that shooting and claims the stipulation failed to establish that he discharged the firearm. Thus, Thomas contends that because the evidence about the shooting was insufficient, the trial court erred in admitting evidence about it and in instructing the jury that it could consider this uncharged crime as an aggravating factor under section 190.3, subdivision (b). He further argues that the jury's consideration of this incident violated his Fifth, Eighth, and Fourteenth Amendment rights to due process and a reliable penalty determination. (AOB 178-186 [Arg. VI].) The claim is without merit because the stipulation cannot be viewed in isolation but must be viewed together with all other evidence that was presented about the shooting near Russell's home. Reviewed as a whole, the record discloses substantial evidence that Thomas negligently discharged a firearm near Russell's home. Consequently, the court properly admitted evidence of the incident and appropriately instructed the jury how to use that evidence.

A. Background

The prosecutor presented evidence that on September 17, 1995, Halstead asked Thomas to "get" Russell because she had gotten into another fight with him. Thomas exclaimed he had enough of Russell's abuse toward Halstead and announced, "I'm going over there right now . . . This is it. I'm tired of him . . . ." He grabbed a gun and left with

Thompson in Halstead's car. (51 RT 9931-9935; 54 RT 10530-10533; 55 RT 10816-10817.)

To prove what transpired next, the prosecutor presented a stipulation as to what DeMarco Atkins would state if called to testify:

> He, Mr. Atkins, was at 1170 Sumner Street on September 17th, 1995 between 10:00 and 11:00 p.m. [¶] He lived at that address. Also living there was his mother, his nephew and his cousin . . . . Jesse Russell is the brother of Demarco Atkins. [¶] Demarco Atkins would further testify that he knew Nicole Halstead because she was his brother, Jesse Russell's, girlfriend. Something unusual happened. Two people came up to the window and asked for Jesse. Demarco Atkins said, "he's not here." But that was it. It was the window by the driveway, a window to a bedroom all the way in the back. [¶] Also in that room with Demarco Atkins was his cousin and nephew, his cousin being Derek Brown, his nephew being Ivory Payne. The people outside tapped on the window and a voice said, "is Jesse here?" [¶] Atkins said, "no." [¶] Then Demarco Atkins waited and then he heard a gun cocked back. That was it. The voice said . . . , "looking for Jesse. I'm going to get him. Looking for Jesse. We're going to get him." [¶] The next thing he heard was a gun cocked back, and he saw them start running up towards the front of the house. He and/or the other occupants of the apartment were laying down. Then he heard some shots. He, Demarco Atkins, was laying down because he thought they were going to shoot the house. [¶] He recognized the person's voice who was speaking. It was Correll Thomas. He knew Correll Thomas from prior to that day. He heard about two or three shots. After hearing the shots, he waited for 3 to 5 minutes at the most and called the police. The police came out and he gave them a statement about what had happened. [¶] . . . All Mr. Atkins heard was one person. It was a male voice that said, "is Jesse here?" [¶] Atkins said no, and the male voice said, "I was looking for Jesse. I want to get him." To the best he can remember,

> those are the words that were said. Then a little while later he heard a cock of the gun and a little while after heard gunshots. It was as they crawled toward the front of the house that they heard the gunshots, which was a couple of minutes after he had heard the last words. [¶] He did not see anyone doing the shooting because he was inside the house. There was no way of knowing which of the two fired the shots. There were no shots inside the house. No shots came inside the house. No window was broken. No door was shot or anything. He did not hear the shots strike anything at all.

(55 RT 10815-10817; 20 CT 4576.)

Detectives recovered three bullet casings in the street, about 40 to 50 yards in front of Russell's home. (54 RT 10530-10533; 55 RT 10723-10724, 10727-10728.) The bullet casings matched several of the casings recovered from Waits' apartment after the shootout Thomas had with Ronald Doss later that evening and were all fired from Thomas's gun. (54 RT 10530-10533; 55 RT 10723-10724; 10796-10797.)

The trial court instructed the jury as to the factors it was to consider in determining whether to impose the death penalty or life imprisonment without the possibility of parole. As to "factor (b)" under section 190.3, the court explained that the jury could consider "the presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceedings which involve the use or attempted use of force or violence or the express or implied threat to use force or violence . . . ." (60 RT 11687; 21 CT 4701; CALJIC No. 8.85.) The court then provided instructions as to the potential theories of criminal liability for the different uncharged criminal acts, including the attack on Milton at the liquor store, the Stockton robbery and murder, the robbery and shooting at Tashna Waits' home, and the shooting near Jesse Russell's home. (60 RT 11691-11693; 21 CT 4706-4708.)

As to the shooting near Russell's home, the court specifically instructed,

> [c]oncerning the shooting in the area of Jesse Russell's residence on September 17th, 1995, you are limited to a consideration of the possible or potential offense of grossly negligent discharge of a firearm. Every person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a crime.

(60 RT 11693; 21 CT 4708 [§ 246.3, mod.].)

B. Discussion

Thomas asserts that the evidence was insufficient to demonstrate that he negligently discharged a firearm near Russell's home and that the trial court should not have instructed the jury about this unadjudicated offense. (AOB 180-182, 184.) He further claims that such a crime did not constitute a crime of violence directed against a person and was therefore inadmissible as "factor (b)" evidence in aggravation under section 190.3. (AOB 182-183.) Finally he asserts that the jury's consideration of this incident resulted in a violation of his due process rights and an unreliable penalty determination in violation of his Fifth, Eighth, and Fourteenth Amendment rights. (AOB 184-186.) None of these contentions have merit.

In considering which punishment to affix, a jury is permitted, under section 190.3, subdivision (b), to consider "the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence." Such "criminal activity" must violate a penal statute and the "force or violence" must be directed against a person or persons. (*People v. Claire* (1992) 2 Cal.4th 629, 672.) "Evidence of other criminal activity involving force or violence may be admitted in aggravation only if

it can support a finding by a rational trier of fact as to the existence of such activity beyond a reasonable doubt." (*People v. Claire, supra*, 2 Cal.4th at pp. 672-673.)

Furthermore, "the analysis is not one that is made on the basis of the abstract, definitional nature of the offense," rather, it is based on "the *conduct* of the defendant which gave rise to the offense." (*People v. Padilla* (1995) 11 Cal.4th 891, 963, overruled on another ground in *People v. Hill* (1995) 17 Cal. 4th 800, 823, fn. 1.) For example, in *Padilla*, the prosecutor presented evidence during the penalty phase that the defendant committed the crime of being an ex-felon in possession of a firearm and that in the perpetration of this crime, he committed acts of violence toward others by pointing the weapon at them. (*People v. Padilla, supra*, 11 Cal.4th at pp. 962-963.) The trial court instructed the jury that "evidence had been introduced which showed that defendant was an 'ex-convict in possession of a firearm,' and that such possession '. . . involved the express or implied use of force or violence or the threat of force or violence.'" (*Id.* at p. 962.) This Court explained that such instruction was proper because the circumstances underlying the defendant's criminal conduct manifested violence toward others and was hence proper for consideration under "factor (b)" of section 190.3. (*Id.* at p. 963.) In other words, although the crime of being an ex-felon in possession of a firearm, in the abstract, may not be a crime of violence directed at a person, the circumstances of what the defendant did to commit the crime, showed a threat of force or violence against a person or persons.

Section 246.3, subdivision (a), provides, in pertinent part, "any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense . . . ." Thomas's challenge to the sufficiency of the evidence fails to appreciate that the full panoply of evidence presented to the jury supported that he

violated section 246.3 and that the circumstances surrounding this crime showed that he used a threat of force or violence against a person or persons.

The main thrust of Thomas's argument is that the stipulation failed to demonstrate that *he* discharged the gun. (AOB 180-182.) In making this argument, Thomas improperly looks at the stipulation in isolation. However, the stipulation did not constitute the only evidence about the shooting and cannot be viewed in an evidentiary vacuum. When reviewed as a whole, the record discloses substantial evidence that Thomas fired the shots near Russell's home. It is undisputed that Thomas went to Russell's' home – Atkins recognized Thomas's voice. (55 RT 10816-10817.) Further, it is undisputed that Thomas fired the same gun later at Waits' apartment. (54 RT 10530-10533; 55 RT 10723-10724, 10796-10797.) Moreover, Halstead's testimony showed that Thomas went to Russell's home with the express purpose to "get" Russell after Halstead complained of Russell's abusive behavior toward her earlier that day. (51 RT 9931-9935; 54 RT 10530-10533; 55 RT 10816-10817.) Outside the back window of Russell's place, Thomas issued verbal threats against Russell when he told Atkins he was looking for Russell and wanted to "get" him. Someone then cocked the gun. (55 RT 10815-10817.) Given Thomas's threats and his later indisputable possession of the gun, the circumstances supported the inference that Thomas was the person who had the gun at Russell's home and was the person who cocked it and fired it. (See 54 RT 10530-10533; 55 RT 10723-10724, 10796-10797.)

Furthermore, as required under section 190.3, subdivision (b), this incident involved the "express or implied threat to use force or violence." As a result of Thomas's actions, Atkins felt threatened and dropped to the floor as a precautionary measure. Within minutes of the threats and cocking of the gun, Atkins heard three shots fired on the street in front of

Russell's home. (55 RT 10816-10817.) Taken together, the evidence of this incident overwhelmingly established that Thomas strove to threaten a person – Jesse Russell – and that he negligently discharged a gun near Russell's home to display a serious and well-founded intention to make good on his threat. (See e.g. *People v. Montiel* (1993) 5 Cal.4th 877, 916-917 [verbal threats, while perhaps not criminal in isolation, can help show the full context of violent criminal activity and illustrate the heightened and aggravated nature of a defendant's unlawful conduct]; see also *People v. Claire, supra*, 2 Cal.4th at pp. 676-677.) The firing of the gun, three times, on a residential street also threatened the peace and safety of the residents in the area. (See e.g. *People v. Clem* (2000) 78 Cal.App.4th 346, 353 [a violation of section 246.3 is inherently dangerous because the willful discharge of a firearm can result in "injury or death, but the risk will always be that someone might die. '[I]mminent deadly consequences [are] inherent in the act . . . .'"]) Atkins himself felt threatened by Thomas's actions. (55 RT 10816-10817.)

Therefore, substantial evidence supported the reasonable inference that Thomas negligently discharged a firearm in front of Russell's home almost immediately after threatening to "get" Russell and cocking his gun. Further, given the residential area where the shooting took place, it was reasonable for the jury to conclude that discharging the gun could result in injury or death as required under section 246.3. Consequently, because substantial evidence supported this criminal activity and showed Thomas engaged in acts of force or violence directed toward a person or persons, the trial court properly instructed the jury on this incident as "factor (b)" evidence under section 190.3.[17]

---

[17] Thomas's argument (AOB 180-182) that there was no evidence he discharged a firearm at a dwelling within the meaning of section 246 is a (continued...)

Because substantial evidence supported the shooting near Russell's home and because the jury properly could consider this incident, Thomas is unable to demonstrate that the admission of this incident led to an infringement of his due process rights or to an unreliable penalty determination under the Fifth, Eighth, and Fourteenth Amendments. (See e.g. *People v. Montiel*, *supra*, 5 Cal.4th at pp. 916-917; see also *People v. Anderson* (2001) 25 Cal.4th 543, 584, 587.) Moreover, even if the evidence were insufficient to establish the offense, this incident was the weakest and most insignificant of aggravating factors and could not undermine confidence in the penalty judgment because of the heinous nature of the underlying "capital murder and the other evidence of defendant's violence and recidivism." (*People v. Montiel*, *supra*, 5 Cal.4th at pp. 918, 930; see also *People v. Clair*, *supra*, 2 Cal.4th at p. 681.)

VII. THE PROSECUTOR PROPERLY ARGUED THOMAS'S FUTURE DANGEROUSNESS TO THE PENALTY PHASE JURY

Thomas argues that the prosecutor engaged in misconduct by arguing Thomas's future dangerousness during closing argument. He asserts that such argument was impermissible because it had no evidentiary support and further because the concept of future dangerousness is not tethered to any statutory aggravating factors. He claims that such argument resulted in a lack of due process, an unfair trial, and an unreliable penalty determination in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (AOB 187-198 [Arg. VII].) This claim is specious because this Court has repeatedly held that a prosecutor can rely upon the evidence adduced during

---

(...continued)
red herring and is of no legal moment as this was not a theory of criminal liability for the jury to consider in evaluating the shooting in front of Russell's home. (See 60 RT 11691-11693; 21 CT 4706-4708.)

the penalty phase to argue that a defendant's likelihood of posing a future threat of harm in prison warrants imposition of the death penalty.

Prior to the penalty phase retrial, Thomas moved to preclude the prosecutor from arguing future dangerousness during closing argument. (43 RT 4963.) He urged that the prosecutor was not going to produce any evidence that would support or warrant such an argument. (43 RT 7963-7966, 7968.) The court denied the motion, observing that substantial evidence supported the argument and such argument was permissible under California law. (43 RT 7968-7969.) Thomas reiterated the objection prior to closing argument. He urged that there was no statutory basis for such argument. (59 RT 11599-11601.) Again, the court denied the motion; however, the court admonished the prosecutor to refrain from delivering an inflaming discourse about the potential orphans and widows that would be left behind by murdered prison guards. (59 RT 11659-11661.)

Towards the end of his closing argument, the prosecutor discussed the concept of future dangerousness. (60 RT 11716-11719.) The prosecutor explained that as long as Thomas lived, he would continue to have contact with other people. (60 RT 11716-11717.) The prosecutor observed that the evidence demonstrated Thomas had the ability to be nice to people if he liked them. (60 RT 11717.) However, the evidence also showed that if Thomas did not like a person, he had no reservations about imposing his will upon them, even to the point of death. (60 RT 11717-11718.) Thus, the prosecutor urged it was Thomas's nature to pose a risk to anyone he did not like and with whom he would have contact, such as prison officials, guards, workers, and other inmates. (60 RT 11716-11719.)

This Court has repeatedly held that argument directed at a defendant's future dangerousness is permissible at the penalty phase of a capital trial, provided that it is based on evidence of the defendant's past conduct rather than expert testimony and is not used as a factor in aggravation. (*People v.*

Zambrano, *supra*, 41 Cal.4th at p. 1179; *People v. Bradford* (1997) 14 Cal.4th 1005, 1064; *People v. Fierro* (1991)1 Cal.4th 173, 249.) As this Court has explained, a prosecutor's

> "argument directed to a defendant's future dangerousness, when based on evidence of the defendant's past conduct rather than expert opinion, is proper . . . ." [Citations.] Contrary to defendant's assertion, the argument did not "implant in the jurors' minds the concept that execution is the only way to protect society." [¶] Defendant argues that future dangerousness is not a statutory aggravating factor. That is correct, and the prosecutor did not present it as such. It is, however, an inference properly drawn from defendant's commission of the underlying crime and evidence of other violent conduct. [Citations.]

(*People v. Davenport II* (1995) 11 Cal.4th 1171, 1223.)

Consequently, open, far-ranging, and colorful argument at the penalty phase is permissible as long as it is based upon admissible evidence or inferences drawn from that evidence. (See *People v. Zambrano*, *supra*, 41 Cal.4th 1082 at p. 1179; *People v. Bell* (1989) 49 Cal.3d 502, 549.) Although "the prosecutor may not present expert evidence of future dangerousness as an aggravating factor . . . he may argue from the defendant's past conduct, as indicated in the record, that the defendant will be a danger in prison." (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1179; *People v. Boyette* (2002) 29 Cal.4th 381, 446 [also noting that evidence of, and consequently argument about, future dangerousness is not barred by the United States Constitution]; *People v. Michaels* (2002) 28 Cal.4th 486, 540-541.)

Contrary to Thomas's argument (AOB 191-194), there was ample evidence of his violent past, including the attempted robbery and murder in Stockton, the negligent discharge of a firearm near Russell's home while Thomas was looking to "get him," the attempted robbery in El Cajon that

followed shortly thereafter, the assault and attempted robbery of Milton at the liquor store just before the McDonald murder, and the McDonald and Grote murders. Each of these instances of prior violence were properly admitted as aggravating evidence under Penal Code section 190.3. The prosecutor asked the jury to infer from Thomas's numerous crimes of violence that he was inherently dangerous and unlikely to change if incarcerated for the rest of his natural life. In other words, the prosecutor clearly argued on the basis of properly admitted aggravating evidence that Thomas deserved the death penalty under the statutory scheme. (*People v. Millwee*, *supra*, 18 Cal.4th at p. 153; see also *People v. Ray* (1996) 13 Cal.4th 313, 353; *People v. Pinholster* (1992) 1 Cal.4th 865, 963-964.) Therefore, the prosecutor was entitled to argue Thomas's future dangerousness based on the properly admitted evidence of his extensive history of violence. (*People v. Ray*, *supra*, 13 Cal.4th at p. 353.)

Further, to the extent Thomas contends that there was no "in-custody" evidence showing that he would pose a threat in prison (AOB 193-194), this Court has explicitly rejected the argument. (*People v. Taylor* (1990) 52 Cal.3d 719, 750 [evidentiary support for a future dangerousness argument does not require evidence of in-custody violence but can arise "from defendant's record of violence outside the prison walls"].) Here, the record discloses ample evidence of Thomas's violence in society such that the jury could reasonably infer his future dangerousness.

Thomas also contends that because future dangerousness is not a statutory aggravating factor in California, prosecutorial argument about it results in a lack of due process, an unfair trial, and an unreliable penalty determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. In other words, because future dangerousness is not a statutory factor in aggravation, the jury is not guided on how to use future dangerousness and is left to unguided and improper speculation. (AOB

194-195.) In *People v. Michaels, supra*, this Court rejected the notion that because future dangerousness is not an aggravating factor, the prosecutor cannot argue it unless it is in rebuttal to defense argument or evidence. (*People v. Michaels*, *supra*, 28 Cal.4th at p. 540.) This Court explained it has "repeatedly declined to find error or misconduct where argument concerning a defendant's future dangerousness in custody is based on evidence of his past violent crimes admitted under one of the specific aggravating categories of section 190.3." (*Ibid.*) The Court further explained it has "never held that in closing argument a prosecutor may not comment on the possibility that if the defendant is not executed he or she will remain a danger to others. Rather, we have concluded that the prosecutor may make such comments when they are supported by the evidence." (*Id.* at pp. 540-541; see also *People Davenport II*, *supra*, 11 Cal.4th at p. 1223 [although future dangerousness is not an aggravating factor it is still a proper inference that the prosecutor can argue]; *People v. Zambrano*, *supra*, 41 Cal.4th at p. 1179 ["The prosecutor was entitled to present his argument in colorful terms."].)

Despite this Court's holdings in *Michaels*, *Davenport*, and *Zambrano* that future dangerousness arguments are permissible even though there is no statutory basis for such arguments, appellant contends that such argument is unconstitutional. To support this position, appellant asserts that the United States Supreme Court has never approved a prosecutor's future dangerousness argument outside the context of such argument being tethered to a statutory factor. (AOB 195-198.) Other than the fact that the United States Supreme Court has not addressed the issue within the context presented here, appellant presents no authority for the conclusion that the prosecutor's future dangerousness arguments deprived him of due process,

a fair trial, or a reliable penalty determination.[18] Therefore, Thomas has failed to establish that the prosecutor's future dangerousness argument compromised his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, a fair trial, and a reliable penalty determination.

VIII. CALIFORNIA'S CAPITAL PUNISHMENT SCHEME IS CONSTITUTIONAL

To preserve these issues for later federal review, Thomas raises multiple constitutional challenges to California's capital punishment statutory scheme. (AOB 199-233 [Arg. VIII].) This Court has previously rejected all of the claims. Thomas presents no compelling reason for this Court to depart from its prior resolution of these issues.

---

[18] Even if the prosecutor's future dangerousness argument could be construed as improper, it "is not enough that the prosecutor's remarks were undesirable or even universally condemned." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144].) Instead, "[t]he relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Ibid.*, quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431].) Here, Thomas cannot make such a showing. As stated, the prosecutor presented compelling evidence of his violent past – evidence which was properly admitted under statutory factors in aggravation. Therefore, the prosecutor's brief argument about Thomas's future dangerousness could not reasonably be viewed as having infected the trial with fundamental unfairness. Additionally, throughout his argument, the prosecutor explained the relevant aggravating factors and the evidence supporting those factors. (60 RT 11698, 11702-11708.) The prosecutor also encouraged the jurors to carefully weigh all the evidence – both mitigating and aggravating. (60 RT 11701, 11713-11715.) Therefore, the prosecutor's argument, when viewed as a whole, could not violate the well-established constitutional rule that the penalty of death must be based on an individualized consideration of all the relevant aggravating and mitigating factors. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 606 [98 S.Ct. 2954, 57 L.Ed.2d 973].)

A. California's Death Penalty Statute Adequately Narrows the Class of Death Eligible Defendants and "Factor (A)" is Constitutional

Thomas asserts that section 190.2 is "impermissibly broad," in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments because it "fails to identify the few cases in which the death penalty might be appropriate." (AOB 199-203 [Arg. VIIı (A)].) He further asserts that "Factor (A)" violates the Fifth, Sixth, Eighth, and Fourteenth Amendments because its application can lead to arbitrary and capricious imposition of death verdicts. (AOB 203-205 [Arg. VIII (B)].) This Court has repeatedly rejected both arguments. (*People v. Howard* (2008) 42 Cal.4th 1000, 1031; *People v. Blair* (2005) 36 Cal.4th 686, 752; *People v. Seaton* (2001) 26 Cal.4th 598, 691; *People v. Barnett* (1998) 17 Cal.4th 1044, 1179.) Thomas provides no reason for this Court to revisit its prior holdings that the Death Penalty Law adequately narrows the category of death eligible defendants and that "Factor (A)" is constitutional.

B. California's Death Penalty Law Provides for Adequate Procedural Safeguards

Thomas claims that California's Death Penalty Law fails to provide sufficient procedural safeguards under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 205-228 [Arg. VIII (C)].) He specifically urges that the jury should have been required, especially in light of *Apprendi* and its progeny, to make unanimous findings as to the existence of aggravating circumstances (AOB 206-214), that the jury should have found all aggravating circumstances by proof beyond a reasonable doubt (AOB 214-216), that the court should have instructed the jury that it could only impose a death sentence if it found the aggravating circumstances outweighed the mitigating circumstances by proof beyond a reasonable doubt and that it was persuaded that death was the appropriate punishment

beyond a reasonable doubt (AOB 216-219), that the jury should have been required to make written findings (AOB 219-221), that inter-case proportionality review of punishments is necessary (AOB 222-223), that reliance on unadjudicated crimes as aggravating evidence was improper and even if proper should have been found true beyond a reasonable doubt (AOB 224), that less restrictive adjectives to describe mitigating factors should have been used (AOB 225), and that the trial court should have instructed that several mitigating factors could only be considered for the purposes of mitigation. (AOB 225-228.)

This Court has consistently rejected every one of these itemized claims. (*People v. Howard*, *supra*, 42 Cal.4th at pp. 1031-1032; *People v. Blair*, *supra*, 36 Cal.4th 686, 753-754, and cases cited therein.) Thomas presents no reasons for this Court to depart from its well-settled holdings that California's procedural safeguards in penalty phase trials are constitutional.

C. California's Death Penalty Law Does Not Violate the Equal Protection Guarantee of the United States Constitution by Denying Procedural Safeguards to Capital Defendants That are Afforded to Non-Capital Defendants Because Capital Sentencing Considerations are Wholly Different than Those in Non-Capital Cases

Thomas contends that California's Death Penalty Law violates the equal protection guarantee of the United States Constitution because it denies procedural safeguards to capital defendants that are afforded to non-capital defendants. (AOB 228-230 [Arg. VIII (D)].) This Court has consistently rejected the identical claim. (*People v. Howard*, *supra*, 42 Cal.4th at p. 1032; *People v. Blair*, *supra*, 36 Cal.4th 686, 754, see also *People v. Ramos* (1997) 15 Cal.4th 1133, 1182.) Thomas fails to provide any reason for this Court to depart from its prior holdings that California's death penalty law does not violate equal protection.

D. California's Use of the Death Penalty Does Not Fall Short of International Norms

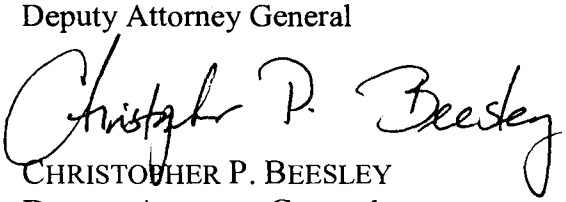
Finally, Thomas contends California's death penalty statute violates the United States Constitution because the use of the death penalty as a regular form of punishment falls short of international norms of human decency and violates international law as set forth in the International Covenant on Civil and Political Rights (ICCPR). (AOB 231-233 [Arg. VIII, (E)].) This claim has been repeatedly rejected by this Court, which has stated that "'[i]nternational law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citations.]'" (*People v. Morgan* (2007) 42 Cal.4th 593, 627-628, quoting *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; see also *People v. Howard*, *supra*, 42 Cal.4th at p. 1032; *People v. Blair*, *supra*, 36 Cal.4th at pp. 754-755; *People v. Elliot* (2005) 37 Cal.4th 453, 488.) Thomas has not presented any persuasive reason for this Court to reconsider its prior decisions rejecting his claim.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court to affirm the guilt and penalty phase verdicts and judgment in full.

Dated: March 4, 2009

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
ANNIE F. FRASER
Deputy Attorney General



CHRISTOPHER P. BEESLEY
Deputy Attorney General
Attornevs for Respondent

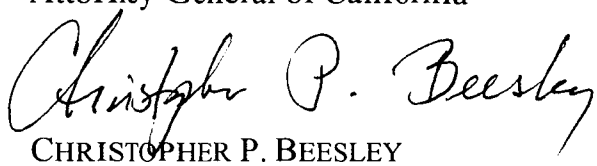
SD1999XS0015
70149973.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 25,861 words.

Dated: March 4, 2009

EDMUND G. BROWN JR.
Attorney General of California



CHRISTOPHER P. BEESLEY
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Correll L. Thomas** No.: **S082828**

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 March 6, 2009, 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:

Barry L. Morris
Attorney at Law
1220 Oakland Blvd., Suite 220
Walnut Creek, CA 94596
(two copies)

The Honorable Bonnie M. Dumanis
District Attorney
San Diego County District Attorney's Office
330 West Broadway, Suite 1320
San Diego, CA 92101

Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

The Honorable Allan J. Preckel, Judge
San Diego County Superior Court
East County Regional Center
Department EC-12
250 East Main
El Cajon, CA 92020

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 March 6, 2009, at San Diego, California.

R. Tolentino
Declarant

R Tolentino
Signature

SD1999XS0015
80340753.doc