In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JAVANCE MICKEY WILSON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S118775

San Bernardino County Superior Court Case No. FVA12968
The Honorable James A. Edwards, Judge

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INTRODUCTION

In January of 2000, James Richards, a Yellow Cab driver in the City of San Bernardino, was dispatched to pick up a fare at a local grocery store. The fare was appellant Javance Wilson, who had Richards drive him to a remote, rural area of the county. Once there, Wilson took out a handgun, pointed it at Richards, and ordered him out of the cab. Richards complied, after which Wilson instructed him to get down on his knees, close his eyes, and open his mouth. Again, Richards complied. Fortunately, the gun Wilson put into Richards's mouth misfired when Wilson pulled the trigger. Richards was able to escape into a nearby residence. Wilson fled the scene and remained at large.

About 45 days later, Andres Dominguez, also a Yellow Cab driver in the City of San Bernardino, was dispatched to pick up a fare at the exact same grocery store. Again, the fare was Wilson, and again, Wilson had Dominguez take him to the very same remote, rural area of the county where Wilson previously attempted to murder Richards. This time, however, the gun did not misfire. Wilson shot Dominguez in the head with a .44 Magnum handgun, killing him.

A few hours later, Wilson used the cell phone he took from Dominguez to call for a taxi in Pomona. Victor Henderson, a Yellow Cab driver in Pomona, was dispatched to pick up Wilson. Wilson directed Dominguez to a neighborhood in Pomona, after which Wilson used the same .44 Magnum handgun to rob Dominguez. Dominguez attempted to flee, but Wilson shot him in the back when he was running away. As Dominguez lay on the ground screaming in pain and pleading for his life, Wilson walked up and shot Dominguez in the chest from close range, killing him.

STATEMENT OF THE CASE

On February 6, 2002, the Orange County District Attorney filed a first amended information charging appellant Javance Wilson with premeditated attempted murder of James Richards (count 1; Pen. Code,[1] §§ 664, 187, subd. (a)); robbery of James Richards (count 2; § 211); carjacking (count 3; § 215, subd. (a)); premeditated murder of Andres Dominguez (count 4; § 187, subd. (a)); robbery of Andres Dominguez (count 5; § 211); premeditated murder of Victor Henderson (count 6; § 187, subd. (a)); and robbery of Victor Henderson (count 7; § 211). (2 CT 520-526.) As to counts 1 through 3, the information alleged that Wilson personally used a firearm within the meaning of section 12022.53, subdivision (b). (2 CT 520-522.) As to counts 4 through 7, the information alleged that Wilson personally discharged a firearm causing death within the meaning of section 12022.53, subdivision (d). (2 CT 520-526.) As to counts 4 and 6, the information alleged that Wilson committed multiple murders (§ 190.2, subd. (a)(3)) and committed the murders during the course of a robbery (§ 190.2, subd. (a)(17)). (2 CT 520-526.)

On March 11, 2002, jury selection began. (4 CT 1062-1064.) On April 9, 2002, the jury was sworn. (4 CT 1156-1157.) On May 22, 2002, the case was submitted to the jury for guilt-phase deliberations. (5 CT 1383-1384.) On June 6, 2002, as a result of a deadlocked jury, the trial court declared a mistrial. (6 CT 1619-1620.)

On October 28, 2002, jury selection began for the retrial. (6 CT 1710-1712.) On December 2, 2002, the jury was sworn. (6 CT 1775-1776.) On February 5, 2003, the case was submitted to the jury for guilt-phase deliberations. (9 CT 2495-2497.) On February 13, 2003, the jury found Wilson guilty as charged in counts 1 through 6, and guilty of the lesser

[1] All further unspecified statutory references are to the Penal Code.

included offense of attempted robbery in count 7. The jury found true the multiple-murder and robbery-murder special circumstances, and found true all alleged enhancement allegations. (9 CT 2554-2571, 2584-2586.)

On March 4, 2003, the penalty phase began. (10 CT 2865-2866.) On April 8, 2003, the case was submitted to the jury for penalty-phase deliberations. (10 CT 2980-2981.) On April 17, 2003, the jury returned a verdict of death. (11 CT 3047-3050.)

On August 27, 2003, the court imposed its sentence. As to the noncapital counts, the court sentenced Wilson to 40 years plus life in prison with the possibility of parole. As to the capital murders, the court sentenced Wilson to death. (11 CT 3166-3175.)

STATEMENT OF FACTS

I. GUILT PHASE EVIDENCE

A. Wilson Robs and Attempts to Murder James Richards

James Richards worked as a Yellow Cab driver in the City of San Bernardino. (15 RT 3842.) On January 7, 2000, at about 8:00 p.m., Richards was dispatched to the Stater Brothers Grocery Store in downtown San Bernardino to pick up a fare. (15 RT 3843.) The fare was Wilson, who was waiting for Richards by the front door of the grocery store. (15 RT 3843.) When Richards pulled up, Wilson flagged him down and got into the backseat of the cab. (15 RT 3843-3844.) It was still daylight, just before dusk. (15 RT 3844.)

Wilson explained that he wanted to go to Bloomington and that he would give Richards directions once they got on the freeway. (15 RT 3844.) Wilson was "real friendly, polite, calm, relaxed, nice guy." (15 RT 3845.) As Richards was driving toward Bloomington, Wilson suggested that Richards stop for gas, which he did. (15 RT 3844.) After filling up,

Richards followed Wilson's directions toward Bloomington. (15 RT 3844-3848.)

During the drive, which took 20 to 25 minutes, Richards and Wilson "talked all the way there." (15 RT 3845.) The two men talked about "all kinds of stuff." (15 RT 3845.) But it struck Richards as strange when Wilson asked him if he carried a gun in his cab. (15 RT 3845-3846.) Although Richards was alarmed by the question, he was put at ease because Wilson was "real friendly and nice" and because of the way in which Wilson worked the question into their conversation. (15 RT 3846.) It also struck Richards as strange when Wilson asked him whether he had "a lot of calls" that day. (15 RT 3846.) Richards did not want to admit that he had a lot of money from several calls and was not carrying a weapon, so he lied to Wilson and said he was carrying a gun and that Wilson was his first fare of the night. (15 RT 3846-3847.)

Wilson directed Richards to drive the cab to a rural area on Laurel Avenue in Bloomington. (14 RT 3567; 15 RT 3848.) Laurel Avenue is a partially dirt road where the houses have large lots and are spread apart. (14 RT 3567.) Wilson asked Richards to drive to the end of the road and turn the cab around. (15 RT 3848-3849.) Richards complied, after which he pulled the cab to the side of the road and turned around to tell Wilson the fare was 20 dollars. (15 RT 3849.) It was at that moment Richards first noticed Wilson had a gun pointed directly at his head. (15 RT 3849.)

Wilson ordered Richards to put his hands on his head, after which Wilson robbed Richards of 300 dollars in cash, his wallet, his cigarettes, and the keys to the cab. (15 RT 3849-3850.) Wilson then got out of the back passenger seat of the cab and, while keeping the gun pointed directly at Richards, walked around the front of the cab to the driver's door. (15 RT 3851.) Wilson opened the driver's door and ordered Richards out of the cab. (15 RT 3851.) Wilson told Richards he was going to let him go. (15

RT 3851.) Richards thought Wilson was about to take the cab and leave. (15 RT 3851.)

Once Richards got out of the cab, however, Wilson ordered Richards to follow him behind the cab near a field at the end of the dirt road. (15 RT 3851-3852.) This made Richards nervous because now he thought Wilson may try to kill him. (15 RT 3852.) But Richards complied with Wilson's demands because Wilson continually threatened to shoot Richards. (15 RT 3852.)

Once behind the cab, Wilson ordered Richards to get down on his knees, close his eyes, and open his mouth. (15 RT 3852-3853.) Wilson was pointing the gun directly at Richards's face as he said, "If you don't do it, I am going to shoot you." (15 RT 3852.) Richards reluctantly did as he was told, hoping that "maybe he is just going to hit me in the head and take off." (15 RT 3852.) But suddenly Wilson shoved the gun into Richards's mouth and pulled the trigger. (15 RT 3852-3853.) Richards could feel the gun go into his mouth and could hear a loud clicking noise when the gun misfired. (15 RT 3852-3853.) Wilson hurriedly tried clearing the gun in an effort to make it operational. (See 15 RT 3853.) Richards got up and ran to a nearby house where he started banging on the front door. (15 RT 3853.)

Thomas Day was with his family inside his home on Laurel Avenue when he heard and saw someone acting "very erratic" and "crazy" on his front porch. (14 RT 3568.) The man was Richards, who was pounding on the front door "saying that he was going to be killed and please let him in." (14 RT 3568.) Day cracked open the front door to talk with Richards. (14 RT 3568-3569.) Richards kept repeating that someone was trying to kill him and please let him inside the house. (14 RT 3568-3569.)

At first, Day was reluctant to let Richards into his house because he was not sure "whether this was for real or not." (14 RT 3569.) Day realized the reality of the situation when he looked out into the street and

saw Wilson standing next to a cab pointing a handgun directly at Richards and Day. (14 RT 3569-3570.) Wilson tried firing the gun again, but again the gun misfired. (15 RT 3857.) As Wilson continued his efforts to clear the jam on the gun, Day quickly let Richards into his house. (14 RT 3571-3572; 15 RT 3857.) Day and his family called 911. (14 RT 3571-3572.) Wilson got into the cab and screeched the car's tires as he sped off down the street. (14 RT 3571.)

Once the police arrived to the scene, Richards provided a detailed description of Wilson. (15 RT 3858-3859.) But the police were not able to locate Wilson that night, and Richards did not hear from the police for some time. (15 RT 3861-3862.) This worried Richards because he thought Wilson may try to come after him, particularly because Wilson had Richards's personal information from his wallet. (15 RT 3865.)

Several weeks passed during which time Richards did not have contact with the police regarding Wilson's whereabouts. (15 RT 3861-3862.) That changed when, about 45 days later, Richards saw on the news that a San Bernardino Yellow Cab driver was robbed and murdered at the exact same location where Wilson previously tried to kill Richards. (15 RT 3862.)

B. Wilson Robs and Murders Andres Dominguez

Andres Dominguez worked as a Yellow Cab driver in the City of San Bernardino. (14 RT 3576-3577, 3580.) Shortly before midnight on February 20, 2000, Dominguez was dispatched to the Stater Brothers Grocery Store in downtown San Bernardino to pick up a fare—the exact same grocery store where Richards had previously picked up Wilson. (14 RT 3580.) The fare had Dominguez take him to the end of Laurel Avenue in Bloomington—the exact same rural location where Wilson previously robbed and attempted to kill Richards. (See 15 RT 3773-3774.)

Shortly after midnight, Raul Gonzalez was with his family inside his home at the end of Laurel Avenue when he heard the sound of a loud gunshot come from outside near his house. (15 RT 3773-3776.) Gonzalez looked outside in the direction of the gunshot and saw a cab with the driver's side door open. (15 RT 3775-3776.) Gonzalez's wife called the police. (15 RT 3777.) Gonzalez went outside and discovered the dead body of Andres Dominguez laying near the cab. (15 RT 3777.)

Dominguez had been shot once in the head from close range. (15 RT 3811-3812.) The bullet entered Dominguez's head near his left ear, went through his skull, and lodged in his brain. (15 RT 3811.) The coroner removed the bullet from Dominguez's head; later analysis revealed it was fired from a .44 Magnum. (See 15 RT 3922, 3937-3943.)

Dominguez's cell phone was found missing from his person, even though he always carried it with him. (14 RT 3577; 16 RT 4176.) Wilson's fingerprints were discovered inside Dominguez's cab. (15 RT 4001-4002.)

C. Wilson Murders Victor Henderson

On February 21, 2000, at approximately 1:40 a.m.—less than two hours after Dominguez was shot and killed—Dominguez's cell phone was used to call for a cab in nearby Pomona. (15 RT 3840-3841; 16 RT 4177-4178.) Victor Henderson, who worked as a Yellow Cab driver in Pomona, was dispatched to pick up the fare. (15 RT 3840-3841.)

The fare had Henderson take him to a neighborhood in Pomona near the corner of Hemlock Way and Roderick Avenue. (See 15 RT 3976-3979; 16 RT 4029-4030.) At about 2:30 a.m., several residents in that area awoke to the sound of gunfire near their homes. (15 RT 3976-3979; 16 RT 4029-4030.) Karen Smith, who lived on Hemlock Way, heard the sound of multiple gunshots come from just outside her bedroom window. (15 RT 3977-3978.) Smith could hear someone yelling in pain outside her house.

(15 RT 3978.) As Smith and her husband got up out of bed they heard another gunshot, after which they heard tires screeching. (15 RT 3979.) Smith looked out one of her windows and saw someone jump out of a taxi and start jogging away as the taxi coasted down the street and crashed into the curb by her neighbor's house. (15 RT 3976-3983.)

The person who got out of the cab and started jogging away headed for a getaway car that was waiting nearby. (15 RT 3983.) That person was wearing a puffy white jacket. (15 RT 3984-3985.) As he got to the getaway car he opened the passenger door and started to get in, but the driver of the car took off before he was fully inside the car. (15 RT 3983-3984.) This caused the person's leg to twist underneath the car and drag for a short distance, apparently injuring him. (15 RT 3984-3985; 16 RT 4037-4038.) The person was eventually able to get in the car and flee the scene. (15 RT 3985.)

Several of the neighbors called 911. (15 RT 3979; 16 RT 4032, 4051.) When officers arrived they discovered the dead body of Victor Henderson laying in the street. (16 RT 4062-4063.) Henderson's taxi was found up on the nearby curb with the engine still running and the lights on. (16 RT 4064; 17 RT 4331-4332.) Henderson had been shot twice, once in the back and once in the chest. (15 RT 3800.) The gunshot wound to Henderson's back was consistent with Henderson running away from someone who shot him in the back. (15 RT 3802-3803.) The bullet entered Henderson's spine and likely paralyzed him, dropping him to the ground. (15 RT 3801-3803.) The second gunshot wound was consistent with someone standing over Henderson while he lay on the ground and shooting him at a downward angle. (15 RT 3802-3803.) That bullet traveled through Henderson's heart, esophagus, and wind pipe before lodging in his spine, killing him. (15 RT 3801, 3804.) The coroner removed the bullets

from Henderson's body; later analysis revealed they were fired from a .44 Magnum. (See 15 RT 3922, 3937-3943.)

D. Wilson's Admissions to Phyllis Woodruff

In January and February of 2000, Phyllis Woodruff was dating Sylvester Seeney, Wilson's half brother. [2] (14 RT 3638-3639, 3729.) Woodruff had a good relationship with Wilson. (14 RT 3640.) Wilson and Seeney lived together, so Woodruff would often talk with Wilson and visit with him when she spent time at their apartment. (14 RT 3640.)

On one occasion in early January, Woodruff was talking with Wilson at his apartment as Wilson was looking through a wallet. (14 RT 3645-3646.) Wilson told Woodruff that he took the wallet from a cab driver he recently robbed. (14 RT 3646.) Wilson explained that during the robbery he "stuck the gun in the man's mouth," but the "gun jammed." (14 RT 3646.) Wilson said the cab driver was "lucky that the gun jammed" because otherwise Wilson was "gonna get him." (14 RT 3646.) Wilson was smiling, laughing, and joking around about the robbery. (14 RT 3647.)

When Wilson was showing the wallet to Woodruff, Woodruff could see the picture ID of a young white man inside the wallet. (14 RT 3647.) Woodruff later recognized that man as James Richards when she saw him coming into court for his testimony. (See 14 RT 3647-3648.) In addition, Wilson showed Woodruff the gun he used to rob Richards, the same gun that jammed when he tried to shoot Richards. (14 RT 3648.) Wilson said that he later gave the gun to his friend, Brad McKinney. (14 RT 3642, 3649.) Law enforcement later found that same gun when they executed a search warrant at Brad McKinney's residence. (15 RT 3998-4001.) At trial, Woodruff positively identified that gun as the exact same gun she had previously seen Wilson with when he was bragging about robbing

[2] Wilson and Seeney have the same mother. (See 14 RT 3729.)

Richards. (14 RT 3648-3649.) Richards also identified that gun at trial as the one Wilson used against him. (15 RT 3859-3860.)

On the same day that Wilson showed Woodruff the gun and wallet from the Richards robbery, he also took Woodruff to see the taxi he took from Richards. (14 RT 3649-3650.) Wilson had parked the taxi at a nearby apartment complex. (14 RT 3649-3650.) Woodruff watched as Wilson got into the taxi and "did something to it." (14 RT 3650.) Wilson later explained to her that he had to break the taxi's radio "so they couldn't trace him." (14 RT 3650-3651.)

About a month later—sometime in February—Woodruff saw Wilson with a large number of guns at his residence. (14 RT 3651-3652.) She remembered one of those guns in particular because Wilson was "admiring" it and "boasting" about it. (14 RT 3652-3653.) It was a large black handgun. (14 RT 3652.) Wilson said that he "liked" that gun and that "it would put a big hole in somebody." (14 RT 3652.) At trial, Woodruff was shown the .44 Magnum handgun that was used to murder Dominguez and Henderson. (14 RT 3652.) She positively identified the gun as the exact same large black handgun Wilson had previously showed her. (14 RT 3652.)

Wilson admitted to Woodruff that he obtained all of his guns from various residential burglaries. (14 RT 3653-3654.) This was something of which Woodruff was already well aware as she had participated in many of those burglaries with Wilson. (14 RT 3654.) Specifically, Woodruff acted as the driver for several of the burglaries. (14 RT 3654-3655.) Woodruff kept much of the property that Wilson took during those burglaries, including jewelry, cameras, coins, and clothing. (14 RT 3654-3656.)

E. Wilson's Admissions to Melody Mansfield

Melody Mansfield was Wilson's wife at the time of the murders. (14 RT 3640, 3733-3734.) Mansfield confronted Wilson about the murders,

asking him, "Did you kill the cab drivers?" (14 RT 3734.) Wilson admitted that he killed the cab drivers. (14 RT 3734-3735.)

F. Wilson's Admissions to His Half Brother Sylvester Seeney

In January of 2000, Wilson admitted to Seeney that he had recently robbed a cab driver because he needed money. (14 RT 3737-3738.) Wilson explained that he wasn't able to shoot the cab driver because his gun jammed. (14 RT 3738.) Wilson showed Seeney the wallet he took from the cab driver. (14 RT 3737-3738.) Wilson also took Seeney to see the actual taxi that he took during the robbery. (14 RT 3738.) Wilson had parked the taxi at a nearby apartment complex. (14 RT 3738.)

Subsequently, in February of 2000, Wilson told Seeney that he was again planning to rob some cab drivers because he needed more money. (14 RT 3731-3732.) Wilson showed Seeney a large .44 Magnum handgun. (14 RT 3739.)

A couple days later, on February 20, 2000—hours before Wilson would murder Dominguez and Henderson—Seeney and Wilson were both at a barbeque at Woodruff's house. (14 RT 3730.) At the barbeque, Wilson told Seeney that he was about to go "do some business" and that Seeney should "watch the news." (14 RT 3731, 3733.) Wilson asked Seeney to join him, but Seeney declined because he was on probation and knew that Wilson was "doing wrong." (14 RT 3630-3631.) Also, at Wilson's request, Seeney gave Wilson his white puffy jacket to wear. (14 RT 3631-3632, 3731-3732.)

Within the next couple days—shortly after Wilson murdered Dominguez and Henderson—Wilson admitted to Seeney that he had murdered the cab drivers. (14 RT 3735.) Wilson explained that he killed the men because "he had to make some money" (14 RT 3735.) Wilson stated that one of the cab drivers "begged for his life" but Wilson shot and

killed him anyway because "the driver saw his face." (14 RT 3735, 3739.) In total, Wilson described how he killed two different cab drivers and attempted to kill a third. (14 RT 3737-3740.)

Wilson also told Seeney about how he injured himself during one of the later two robberies. (14 RT 3735-3736.) Specifically, Wilson explained that when he was fleeing the scene of the robbery and murder he "got dragged by the car" and hurt himself. (14 RT 3736.)

On February 24, 2000—a few days after the murders—Seeney took a "road trip" with Wilson and Melody Mansfield. (14 RT 3733-3734.) Mansfield worked as a truck driver and she took Wilson and Seeney with her. (See 14 RT 3733-3734; 15 RT 3961-3962.)

G. Wilson is Located and Arrested in Ohio

In early March of 2000, the San Bernardino County Sheriff's Department received information that Wilson was in Mansfield's semi truck that was headed to Ohio for a delivery. (15 RT 3961-3962; 16 RT 4182.) The San Bernardino County Sheriff's Department conveyed this information to the Ohio State Highway Patrol. (15 RT 3961-3962.) On March 3, 2000, several Ohio State Troopers located the semi truck and pulled it over. (15 RT 3962.) Mansfield was driving the truck and Wilson and Seeney were inside. (15 RT 3962-3963.) When the troopers attempted to inform Wilson why he was being arrested, he cut them off and said, "I know. It's because of those murders." (15 RT 3965.)

Officials with the San Bernardino County Sheriff's Department flew to Ohio and transported Wilson back to California. (16 RT 4183.)

H. Richards Identifies Wilson

Once Wilson was in custody, law enforcement officers contacted Richards and had him look at two different photographic lineups, each of which contained six different men's pictures. (16 RT 4187; 17 RT 4446.)

The first lineup did not contain a picture of Wilson. (16 RT 4165.) As such, Richards did not select anyone from that lineup. (16 RT 4165.) But the second lineup did contain a picture of Wilson. (17 RT 4467.) Richards quickly identified the photo of Wilson as the person who robbed him and attempted to murder him. (17 RT 4467.) When Richards viewed the photos, the picture of Wilson "jumped out at him from the page." (17 RT 4467.)

Richards also positively identified Wilson at trial. (15 RT 3873-3874.) Richards testified that Wilson had a "very distinctive" look to his face and he was "very certain" that Wilson was the person who robbed him and attempted to murder him. (15 RT 3874-3875.)

I. Prior Burglaries and Theft of Firearms

As indicated above, Woodruff testified that she participated in a number of residential burglaries with Wilson and that Wilson stole a large number of firearms during those burglaries. (See 14 RT 3653-3656.)

Joe Diaz testified that in January of 2000 he was living in Victorville. (15 RT 3779-3780.) The morning of January 6, 2000—the day before Wilson would rob Richards—Diaz's home was burglarized. (15 RT 3780-3781.) Diaz had a large number of firearms, all of which were taken. (15 RT 3782-3783.) One of those guns was a Phoenix Arms .22 handgun. (15 RT 3782-3783.) Diaz explained that his .22 handgun "didn't work too well at all" because it would "jam on [him] . . . virtually every time [he would] attempt to use it." (15 RT 3783.) Diaz was shown the gun that was used to rob Richards. (15 RT 3783.) Diaz identified the gun as his .22 handgun that was taken from his house, the same gun with which he had frequent malfunction problems. (15 RT 3783; Ex. 145.)

Charles Whitley testified that he knew Wilson for a long time and was close with his family. (16 RT 4047-4048.) In January or February of 2000, Whitley bought a hunting rifle from Wilson. (16 RT 4046-4047.) That

rifle was shown to Whitley in court and he identified it as the exact same gun he had previously purchased from Wilson. (16 RT 4046-4047; Ex. 158.) The same rifle was shown to Diaz who identified it as one of the firearms taken from his house during the burglary. (15 RT 3782; Ex. 158.)

Grant Fargon testified that in February of 2000 he was living in Victorville. (15 RT 3789.) On February 15, 2000—less than a week before Wilson would murder Dominguez and Henderson—Fargon's home was burglarized. (15 RT 3789-3790.) The house was "ransacked" and a number of Fargon's firearms had been taken. (15 RT 3790.) Those firearms included a number of shotguns and rifles, in addition to a Ruger Super Blackhawk .44 Magnum handgun. (15 RT 3790-3791.) Fargon was shown the gun that was used to murder Dominguez and Henderson. (15 RT 3792.) Diaz identified that gun as his .44 Magnum handgun that was taken from his house. (15 RT 3792.)

J. Additional Prosecution Evidence

Ballistics experts conducted analysis of the .44 Magnum bullets removed from both Dominguez's body and Henderson's body. (15 RT 3922-3923, 3937-3938.) Both experts concluded that all of those bullets were fired from the exact same gun. (15 RT 3922-3923, 3938.) In addition, one of the experts conducted specific analysis of the .44 Magnum handgun that had been taken from Fargon's house during the burglary. (15 RT 3940-3943.) All of the bullets removed from Dominguez's body and Henderson's body were fired from that gun. (15 RT 3940-3943.)

Several people testified that they were with Wilson on February 20, 2000—before he murdered Dominguez and Henderson—and that Wilson did not have a leg injury at that time. (See, e.g., 14 RT 3698, 3725-3726.) Several people also testified that they were with Wilson on February 21, 2000—after he murdered Dominguez and Henderson—and that Wilson did have a leg injury at that time. (See, e.g., 14 RT 3593, 3706, 3725-3726.)

Many of the people who were with Wilson on February 21, 2000 testified regarding various statements he made on that date. Tiffany Hooper testified that she was with Wilson when he asked her whether she would "tell on him" if she found out that he had "robbed a bank or anything like that." (14 RT 3591.) Hooper did not know how to respond. (14 RT 3592.) Sara Bancroft testified that she was with Wilson when he asked her: "What would you do if you found out I robbed somebody?" (14 RT 3708.) Bancroft told Wilson that she would tell the police. (14 RT 3708.) Wilson "giggled" and "nonchalantly just kind of shrugged it off." (14 RT 3708.) Christina Murphy testified that she was with Wilson when he asked her what she would do if she "knew that he had shot someone." (14 RT 3726.) Murphy told Wilson that she would not want to talk to him again. (14 RT 3726.) All of the above statements that Wilson made to various women took place on February 21, 2000—shortly after the Dominguez and Henderson murders. (See 14 RT 3591-3592, 3708, 3726.)

Several people testified that they spent time with Wilson on February 21, 2000, and that he was in a good, happy mood and that he was laughing and joking around quite a bit. (E.g., 14 RT 3591, 3705.)

Ronald Ward testified that in January and February of 2000, he was working as the general manager at the Desert Inn Motel in San Bernardino. (15 RT 3785-3786.) The motel was located adjacent to the same Stater Brothers Grocery Store where both Richards and Dominguez were previously dispatched to pick up Wilson. (15 RT 3786.) Between December of 1999 and February of 2000, one of Wilson's family members was living at the motel. (15 RT 3786.) Ward often saw Wilson at the motel and talked with him on different occasions. (15 RT 3786-3787.) On January 6 or 7, 2000—just before the Richards robbery and attempted murder—Ward saw Wilson at the motel. (15 RT 3787.)

K. Defense Evidence

The defense attacked Richards's credibility by referencing his possible criminal past (see, e.g., 17 RT 4361, 4369, 4376, 4381) and by presenting expert testimony generally challenging the reliability of eye-witness testimony (e.g., 18 RT 4643). The defense also suggested through cross-examination and argument that all of the crimes with which appellant had been charged could have been committed by another person, such as Seeney, Brad McKinney, or Cory McKinney. (See, e.g., 17 RT 4586-4587.)

II. PENALTY PHASE EVIDENCE

A. Evidence in Aggravation

1. Wilson's Criminal History

Wilson previously shot and killed someone. (19 RT 5116.) Specifically, on October 9, 1990, Wilson shot Leonard Joseph Rodriguez seven times, including five times in the back. (19 RT 5116, 5121-5122.) The bodily damage from the barrage of bullets caused Rodriguez to bleed to death internally from a hemorrhage in his chest cavity and abdomen. (19 RT 5120-5121.) On March 28, 1991, Wilson pleaded guilty to voluntary manslaughter as a juvenile and was committed to the California Youth Authority (CYA). (19 RT 5116.) Wilson was released from CYA on August 23, 1999, shortly before he committed the murders in the present case. (19 RT 5117.)

In February 2000, Roy Lee Rowe was staying at a hotel in Victorville. (19 RT 5134.) Wilson knocked on Rowe's door and asked him whether he was "Amanda's dad." (19 RT 5134-5135.) When Rowe replied that he was, Wilson barged in and beat Rowe. (19 RT 5135.) During the attack Wilson said, "Your daughter fucked up my life and I'm going to kill you." (19 RT 5135.) Wilson punched and kicked Rowe many times and threw a

chair at him. (19 RT 5136.) Rowe suffered several injuries from the attack, including multiple cracked ribs. (19 RT 5136.) Rowe had never seen Wilson before. (19 RT 5135.)

During the trial in the present case, Wilson threatened San Bernardino County Deputy Sheriff Maria Brown. (19 RT 5137-5141.) This happened as Wilson was being transported back to jail following a day in court. (19 RT 5139.) Wilson was upset with the manner in which Brown took Wilson's return paperwork from him. (19 RT 5139-5140.) Wilson told Brown, "Snatch something out of my hand again and you're going down." (19 RT 5141.) As Wilson made this threat, he was speaking in a "very loud voice," and appeared "angry," "enraged," and "shaking" with anger. (19 RT 5141.)

B. Victim Impact Evidence

Andres Dominguez's mom discussed the close relationship she had with her son and how often Dominguez would help her. (19 RT 5184-5187.) The day that Wilson killed Dominguez, Dominguez was going to meet his mother and take her to the doctor. (19 RT 5187.) Dominguez never showed up. (19 RT 5187.) Dominguez's death was very hard not only on his mother, but also on his brothers and sister. (19 RT 5186.)

Prior to his death, Dominguez had volunteered for many years at a Christian coffee shop in Fontana. (19 RT 5189.) Dominguez's death was very hard on the owner of the coffee shop, and on many of the customers who came to know him well. (19 RT 5189-5193.)

Victor Henderson's wife of 19 years testified regarding the difficulty of losing her husband and raising their four children alone. (19 RT 5194-5195, 5197-5198.) Henderson's murder was very difficult not only on his wife, but also on his four children who went from being young "lovable children" into being sad, angry children who are always afraid and untrusting of others. (19 RT 5197-5198.) Henderson's 12-year-old

daughter testified regarding the difficulty of growing up without a father. (19 RT 5205-5206.) Henderson's mother and friend also testified about the impact on their lives following Henderson's murder. (19 RT 5207, 5219.)

1. Evidence in Mitigation

Wilson presented testimony from several family members and mental health professionals regarding his troubled upbringing and the time he spent in juvenile detention. (See, e.g., 19 RT 5230, 5256, 5262; 20 RT 5489, 5570; 21 RT 5695, 5724.) Wilson's defense centered around his purported mental illnesses as a result of his history. (See, e.g., 20 RT 5283, 5349, 5417; 21 RT 5600; 21 RT 5760.)

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED RICHARDS'S PRETRIAL AND IN-COURT IDENTIFICATIONS OF WILSON BECAUSE THOSE IDENTIFICATIONS WERE UNTAINTED AND RELIABLE

Wilson contends the trial court erred by denying his motion to exclude Richards's pretrial identification of Wilson from a six-pack photo lineup. (AOB 29-71.) Wilson raises a plethora of various claims as to why he feels the pretrial lineup procedure was unduly suggestive. (AOB 29-71.) He also argues that Richards's in-court identification was tainted by the unduly suggestive pretrial lineup. (AOB 71-109.) These claims are without merit. As demonstrated below, the pretrial lineup procedure was neither unduly suggestive nor unnecessary. In addition, Richards's identification of Wilson was reliable under the totality of the circumstances. Wilson's claim to the contrary is based on speculation and his belief that the jury should have followed the opinion of his expert witness regarding eyewitness identification. The trial court properly admitted Richards's pretrial, and in-court, identifications of Wilson.

A. Facts and Circumstances Regarding Admission of Pretrial Identification

Prior to the start of the second trial, the court indicated that its rulings on motions from the first trial would remain in effect for the second trial. (14 RT 3559-3560.)

Prior to the first trial, Wilson filed a motion to exclude Richards's pretrial identification and any subsequent in-court identification. (3 CT 705-824.) The crux of Wilson's argument was that eye-witness identifications should be regarded as inherently unreliable. (3 CT 705-824.) The prosecution filed a written opposition to Wilson's motion. (4 CT 1065-1077.)

The court conducted a lengthy evidentiary hearing regarding the motion during which several witnesses testified. (4 RT 903-1040.) Specifically, the defense called Kathy Pezdek, a cognitive psychologist, to testify generally about the reliability of eye-witness identification, and to criticize the specific pretrial lineup procedures used in the present case. (4 RT 904-946.) The defense also called the Deputy District Attorney handling the prosecution to testify regarding his contact with Richards prior to the preliminary hearing. (4 RT 955-978.) Both parties also called a number of law enforcement officers to testify regarding the precise pretrial identification procedures used during the course of the investigation. (4 RT 979-1040.)

Following the evidentiary hearing, the court denied Wilson's motion, ruling that Wilson had not met his burden of establishing that the pretrial lineup procedure was unduly suggestive. The court stated:

> I know there was an attempt here to say that the state of the science, if you will, today is that this should be evaluated under Kelly/Frye principles, but that, as defense concedes, has not

been held to be the case by the law, at least at this point, and this court does not believe that it is appropriate to engage in that analysis in this case.

Mr. Williams is correct, there were and there is a lot of evidence, particularly from Dr. Pezdek, about the preferred methods of conducting photo line-ups, conducting them in a sequential fashion, rather than in a composite fashion that was done here, and having them conducted by police officers who do not know who the suspect is, rather than officers who do, to avoid the possibility of some unintentional suggestive words or behavior. And as preferable as that may be, and whether that may become the norm down the road, I think the law is, was the line-up in this case, the photo line-up, so suggestive or impermissibly suggestive as to violate due process? And I don't find any evidence to support such a finding.

Detective Franks directed [Richards] to circle the defendant's photo only after Mr. Richards picked that photo out of the line-up as the one that he believed was the perpetrator. I don't think there was anything about Mr. Williams' conduct at the preliminary hearing or prior to the preliminary hearing that somehow unduly suggested to Mr. Richards that he should identify the defendant. He merely showed him a photocopy of the photo line-up, asked him if that is the one that he looked at, and he identified it as being the one that he did, that it was his signature. He was the one that put the circle around the picture, not Mr. Williams. And he later, of course, identified defendant at the preliminary [hearing].

(4 RT 1080-1081.)

The court went on to explain that many of the arguments made by the defense to support its position—such as Richards's inability to pick Wilson out of a live lineup—were appropriate arguments for the jury. (4 RT 1082.) But those arguments went to the weight of Richards's identification, not to its admissibility, and the jury should be permitted to determine what weight, if any, to give to Richards's identification of Wilson. (4 RT 1082.)

B. The Pretrial Identification Procedure Was Neither Unduly Suggestive Nor Unnecessary

The trial court was correct in its ruling. Many of Wilson's claims—such as that the law enforcement officers should have used "simultaneous photos" and a "double-blind" lineup—was appropriate argument for the jury. But there is no legal precedent requiring any of the specific lineup procedures that Wilson now demands. In addition, Wilson was permitted to present lengthy expert testimony regarding the purported benefit of such procedures, and also presented lengthy argument to the jury on the topic. The jury rejected Wilson's arguments and he is not entitled to a reversal of his convictions based upon those same arguments.

In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, a reviewing court considers two separate factors: (1) whether the identification procedure was unduly suggestive and unnecessary; and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. (*People v. Cunning*ham (2001) 25 Cal.4th 926, 989, citing *Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107 and *Neil v. Biggers* (1972) 409 U.S. 188, 199-200.) "If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable. [Citation.]" (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242, disapproved on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

"The defendant bears the burden of demonstrating the existence of an unreliable identification procedure." (*People v. Cunningham, supra*, 25 Cal.4th at p. 989.) On appeal, the trial court's determination of historical facts and assessment of witness credibility is reviewed with deference, while the court's ultimate legal conclusion regarding whether an identification procedure was or was not unduly suggestive is reviewed de novo. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609.)

As to the first issue, "for a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure." (*People v. Ochoa* (1998) 19 Cal.4th 353, 413.) The question is whether anything caused the defendant to "stand out" from the others in a way that would suggest the witness should select him. (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.) In general, it is "'settled that a photographic identification is sufficiently neutral where the persons in the photographs are similar in age, complexion, physical features and build . . .' [Citation.]" (*People v. Leung* (1992) 5 Cal.App.4th 482, 499, 500 [Asian males "approximately 20 years old with straight black hair, broad noses, small eyes and similar skin tone"].) A suspect's photograph is not impermissibly suggestive if it is similar to that of the others, even if all participants do not share all common features. (See *People v. Cunningham, supra,* 25 Cal.4th at p. 990.)

Here, Wilson raises a number of challenges regarding the pretrial lineup. First, Wilson claims the trial court applied the wrong standard in ruling on the issue because "police identification procedures are only a matter of constitutional law if those procedures are suggestive and lead to an unreliable identification." (AOB 46, emphasis in original, citing *Perry v. New Hampshire* (2012) 132 S.Ct. 716, 724; see also AOB 80-84.) Wilson goes on to argue that the trial court "collapsed the two components

into one" and failed to make specific findings regarding the "separate components of suggestiveness and reliability." (AOB 46, 80-84.)

What Wilson fails to account for is the well-established legal principle that "[o]nly if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification." (*People v. Alexander* (2010) 49 Cal.4th 846, 902, citing *People v. Yeoman* (2003) 31 Cal.4th 93, 125; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.) The trial court in this case squarely addressed whether the pretrial lineup was suggestive and made a clear ruling that nothing about the lineup was "impermissibly suggestive" in any way. (See 4 RT 1080-1081.) Both this court and the United States Supreme Court have previously applied the same standard: "Our task is thus to assess the facts and circumstances of the identifications to determine whether they were 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentifications.'" (*People v. Nation* (1980) 26 Cal.3d 169, 179, quoting *Simmons v. United States* (1968) 390 U.S. 377, 384 [88 S.Ct. 967, 19 L.Ed.2d 1247].) As such, contrary to Wilson's claim, the trial court applied the correct standard and it was unnecessary for the court to reach the question of whether the identification was nevertheless reliable under the totality of the circumstances. (E.g., *People v. Alexander, supra*, 49 Cal.4th at p. 902.)

In a related argument, Wilson claims that "[i]t is time for California to join the ranks of the growing number of states that are reconsidering the Manson approach, in favor of a state standard that places a premium on the reliability of eyewitness identification" and require the prosecution to present evidence that the witness perceived the perpetrator well enough to make an accurate identification. (AOB 99.) Wilson seems to base this argument on his belief that prior to the trial court ruling on the admissibility of Richards's identification, the prosecution should have first proved as a

"preliminary fact" that Richards was qualified to provide testimony. (AOB 96, citing Evid. Code, §§ 400, 403.)

The first problem with Wilson's argument in this regard is that he failed to raise this specific challenge below, thus forfeiting it for appeal. (See, e.g., *People v. Seijas* (2005) 36 Cal.4th 291, 302; *People v. Partida* (2005) 37 Cal.4th 428, 435-436.) Further, there is no reason to conclude, and indeed Wilson points to no specific reason, that Richards was not qualified to provide lay opinion testimony. Rather, Wilson seems to be simply reiterating the same argument that was rejected by the jury and that he now raises in various differing forms: that Richards's testimony, including his identification of Wilson, should be discredited. The jury understandably rejected that argument and found Richards credible, and there is no basis for Wilson revisiting the matter on appeal.

In any event, contrary to Wilson's claim, there is no basis for California to "reconsider" the standard outlined by the United States Supreme Court in *Manson v. Brathwaite, supra*, 432 U.S. at pp. 104-107 and *Neil v. Biggers, supra*, 409 U.S. at pp. 199-200. According to Wilson, it is necessary for California to "reconsider" the United States Supreme Court approach because the focus must be on "reliability." (AOB 99.) That argument seems odd considering that the standard outlined by the United States Supreme Court requires as a necessary component that the identification be "reliable under the totality of the circumstances." (*People v. Cunningham, supra*, 25 Cal.4th at p. 989, citing *Manson v. Brathwaite, supra*, 432 U.S. at pp. 104-107 and *Neil v. Biggers, supra*, 409 U.S. at pp. 199-200.) Presumably an eyewitness identification rendered by a witness who lacked the preliminary qualifications to even present lay opinion testimony would likewise lack the reliability required by the United States Supreme Court standard. As such, Wilson's criticism of California's approach in this regard is without merit.

Wilson next argues that law enforcement officers improperly showed Richards two consecutive six-pack lineups that each contained the same photograph of Wilson. (AOB 55-63.) The main problem with this argument is that it is based on pure speculation and belied by the record.

At trial Richards testified on direct examination that during the course of the investigation two officers initially came to his house and showed him a six-pack photo lineup. (15 RT 3868-3869.) That first lineup—which was marked as exhibit 148—did not contain a photograph of Wilson. (12 CT 3492-3495.) Accordingly, Richards did not identify anybody from that first lineup. (15 RT 3868.) Subsequently—after Wilson became a suspect in the investigation—an officer returned to Richards's home and showed him another six-pack photo lineup. (15 RT 3869.) This lineup—which was marked as exhibit 16—did contain a photograph of Wilson. (12 CT 3422-3423.) Richards testified that when he saw this new six-pack, Wilson "jumped right out, I knew immediately. . . . [I]t was the facial expression, the eyes, the smile was the same as when he pulled the trigger." (15 RT 3869.) The officer had Richards circle the photograph that he selected and sign and date his selection. (15 RT 3869; 12 CT 3422.)

During cross-examination, defense counsel vigorously questioned Richards about whether he was shown two or three photo lineups. (15 RT 3882-3892.) Defense counsel attempted to impeach Richards with his prior testimony from the preliminary hearing and from the first trial. (15 RT 3883-3890.) During the course of this questioning Richards remained unwilling to commit to being shown three lineups, and said that, at most, he "wasn't positive" and it could have been "two or three." (15 RT 3883.) Richards maintained that he was "very, very certain" that the person he selected from exhibit 16 was the same person that put a gun in his mouth and pulled the trigger. (15 RT 3891.) Richards again stated on redirect

examination that he was "not certain" how many six-packs he was shown and that he believed he was shown "two or three" lineups. (15 RT 3900.)

Sergeant Robert Dean with the San Bernardino County Sheriff's Department subsequently testified that he supervised the entire investigation and oversaw the creation and showing of the photo lineups to Richards. (16 RT 4169, 4186-4187.) Sergeant Dean clearly stated that only two different photo lineups were shown to Richards, one that contained Wilson's photograph and one that did not. (16 RT 4187-4190.) Specifically, Richards was shown exhibit 148, which did not contain Wilson's photograph, and was later shown exhibit 16, which did contain Wilson's photograph. (16 RT 4187-4190.) Sergeant Dean explained that, as to exhibit 147—the photo lineup that Wilson now claims was also shown to Richards—that officers initially prepared that lineup, but Sergeant Dean chose not to use that lineup because he felt the pictures were too dissimilar. (16 RT 4190-4191.) As such, he instructed Detective Franks, the homicide detective who was in charge of administering the lineups, not to show Richards exhibit 147. (16 RT 4190-4191.) Sergeant Dean also noted that exhibit 147 did not contain any of the notations or markings that would typically be noted on a photo lineup if it were actually used. (16 RT 4190-4191.)

Detective Scott Franks with the San Bernardino County Sheriff's Department testified that he was working the homicide investigation under the supervision of Sergeant Dean. (17 RT 4443.) Detective Franks was responsible for showing Richards the six-pack photo lineups. (17 RT 4444-4446.) Exhibit 147 was a lineup that was prepared but was never shown to Richards. (17 RT 4445-4446.) That lineup was maintained in the investigative file but was never otherwise used in the case. (17 RT 4445-4446.) Rather, Detective Franks showed Richards what had been marked

as exhibit 16, which was the six-pack lineup from which Richards selected Wilson's photograph as the perpetrator. (17 RT 4446.)

As became apparent at trial, law enforcement officers prepared three different six-pack photo lineups, but only showed two of those lineups to Richards.

Exhibit 148 was the first six-pack created and the first six-pack shown to Richards. This lineup was prepared before Wilson was a suspect and therefore did not contain Wilson's photograph. Exhibit 148 was the first six-pack that officers showed to Richards, from which Richards did not select any of the six photographs.

Exhibit 147 was the second six-pack created; it was never shown to Richards. This lineup was prepared after Wilson was a suspect and therefore did contain his photograph. But Sergeant Dean decided that the pictures were too dissimilar and that a new six-pack should be created. Detective Franks, who administered the lineups, confirmed that he never showed exhibit 147 to Richards. The lineup was maintained in the investigative file.

Exhibit 16 was the third six-pack created and the second six-pack shown to Richards. This lineup also contained Wilson's photograph. This was the first and only lineup shown to Richards that contained Wilson's photograph. When Richards viewed exhibit 16 he "immediately" selected Wilson.

Notwithstanding the testimony at trial establishing the above facts, the court permitted Wilson to admit exhibit 147 into evidence and make arguments regarding his belief that Exhibit 147 was shown to Richards. On appeal, Wilson reiterates the same arguments he made to the jury: that exhibit 147 must have been shown to Richards and that Richards was likely influenced by seeing two consecutive photographs of Wilson. (AOB 55-63.) But the jury either rejected that speculative argument or concluded

from the additional overwhelming evidence implicating Wilson that Richards's identification was unnecessary to reach guilty verdicts. It is for reasons such as this that the trier of fact's determination of the facts and assessment of witness credibility is viewed with deference. (See *People v. Kennedy, supra*, 36 Cal.4th at pp. 608-609.)

Additionally, even if the law enforcement officers in this case had shown Richards exhibit 147, Wilson cites to no authority that prohibits such a procedure. Rather, Wilson claims the consecutive use of the same photograph is simply a "factor" that should be considered. (AOB 55.) For support he cites various studies and articles, and again references the testimony of his expert witness regarding eyewitness identifications. (AOB 55-63.) Again, this line of argument is certainly appropriate for a jury, but Wilson has not pointed to anything regarding the lineup that warranted its outright exclusion from the trial. Indeed, as stated, Wilson had the burden of establishing that the lineup was unduly suggestive and unnecessary. (*People v. Cunningham, supra*, 25 Cal.4th at p. 989.) He has failed to make such a showing.

The same can be said for Wilson's additional arguments regarding the specific lineup procedures, such as his claims that law enforcement officers should have employed a "double-blind" lineup and should have used sequential photographs rather than six-packs. (AOB 47-55.) Wilson again fails to cite any legal authority requiring these procedures, relying again on varies studies and articles, and on the testimony of his expert witness. The problem with this line of argument is that, at best, it suggests preferable methods for administering a pretrial lineup. Nothing Wilson cites declares that these methods are the sine qua non of a valid identification procedure. The trial court referenced this fact when it mentioned that regardless of how "preferable" some of Wilson's proposed procedures may be, there was nothing suggestive about the lineup. (4 RT 1080-1081.) Indeed, there is

simply no evidence, and nothing to suggest, that law enforcement officers even remotely gave Richards some clue as to which photograph in the six-pack might have been the suspect. Accordingly, Wilson has failed to meet his burden of establishing that the pretrial identification procedure was unduly suggestive and unnecessary.

Wilson next argues that Richards's pretrial identification was tainted by comments made by Detective Franks after Richards selected Wilson from the six-pack. (AOB 63-67.) Specifically, Wilson claims the following was improper: "Immediately after reading the admonition, Detective Franks asked Richards, 'What are you pointing to, number 5?'" (AOB 49-50, quoting 12 CT 3550.) Wilson goes on to argue that it was improper for Detective Franks to have Richards circle the photograph he selected. (AOB 50-51.)

Prior to showing Richards the lineup, Detective Franks admonished him as follows:

> In a moment I'm going to show you a group of photographs. This group of photographs may or may not contain the picture of the person who committed the crime that is being investigated. Keep in mind that hair styles, beards, and mustaches can easily change also. The photograph may not always depict the true complexion of the person. It may be lighter or darker than shown in the photo. Pay no attention to markings or numbers that may appear in the photos or any other difference or any type of style of the photographs. When you look at them, please tell me whether or not you see the person that committed the crime. Keep in mind when you look at this just take your time, look at it and just kind of get a picture of the person in your mind.

(12 CT 3550.)

Once the admonishment was finished, the following colloquy took place:

> Detective: What are you pointing to? Number five?

Richards: Yeah.

Detective: What about number five?

Richards: That looks – that looks exactly like the guy right there.

Detective: Okay. Exactly like him?

Richards: Yeah.

Detective: Okay. What I want you to do then is – I want you to circle number five. Circle the whole picture.

Richards: I'm trying to look at everybody else real quick but – he just jumped right out at me.

Detective: Okay. Then circle number five, the whole picture.

Richards: Yeah. Okay.

Detective: Okay. Then what I want you to do is just right here across it just sign your name and we'll put today's date 3/2 of 2000.

(12 CT 3550-3551, emphasis added.)

Richards later reiterated during his trial testimony that when he saw the lineup, Wilson "jumped right out, I knew immediately. . . . [I]t was the facial expression, the eyes, the smile was the same as when he pulled the trigger." (15 RT 3869.) Contrary to Wilson's argument, Detective Franks did nothing more than clarify which picture Richards selected and ask him to circle and sign the picture. (12 CRT 3550-3551.) Comments made by the detective after Richards selected Wilson's photograph could not have suggested which photograph Richards should have selected in the first place. The trial court appreciated this reality in observing: "Detective Franks directed [Richards] to circle the defendant's photo only after Mr. Richards picked that photo out of the lineup as the one that he believed was the perpetrator." (4 RT 1081.) In addition, Detective Franks specifically

told Richards that he could not comment on, or "tell [him] anything about," his selection from the lineup. (12 CT 3551.) By all accounts, the detective's actions properly ensured there was no mistake regarding which person "jumped right out" at Richards and that Richards thought looked "exactly like the guy." (12 CT 3551.) This was a case of good police work, not an unduly suggestive lineup procedure.

Wilson also claims that comments made by Detective Franks to Richards following the subsequent live lineup confirmed for Richards that he previously selected the "correct" person from the photo six-pack lineup. (AOB 63-67.) After Richards failed to identify anyone during the live lineup, he and Detective Franks discussed Richards's prior selection from the photo lineup. (12 CT 3555.) Richards reiterated that when he looked at the photo lineup, Wilson's photograph "looked just like the guy." (12 CT 3555-3556.) But at the live lineup, Richards "didn't see him . . . He looked different." (12 CT 3556.)

Richards later testified as follows:

> Q [by prosecutor]: All right. As you were going home [from the live lineup], do you recall – with the detective, do you recall having any conversation about the lineup?
>
> A [by Richards]: Yeah. Yeah, I wasn't sure if he was there or not and I remember trying to like ask the detective or get out of the detective if he was there and I don't know how I went about doing it, but he wouldn't tell me anything. He was like 'You should be able to tell me that, I can't disclose any information,' you know. So I was kind of, I remember saying a few things trying to at least get a nod or a wink or something, but –
>
> Q: Why did you want to know if the guy was in the lineup?
>
> A: At that point I don't think that they had caught him yet and I was worried that they had the one that tried to kill me, you know, or this whole time they wouldn't tell me anything. Like even the pictures they showed me or the live lineup, they never said we have a suspect in custody or anything like that so I

didn't know if even the guy I picked out was the guy they had or if they were still looking for or what, you know.

Q: So you wanted a status on the investigation?

A: Correct, yeah.

Q: Okay. All right. Now, did you ever form the impression as any of these photo lineups were shown to you or the live lineup that the cops were trying to nudge you into identifying somebody?

A: No. They were very professional and they gave me the instructions and they wouldn't say anything. They tape recorded everything and, you know.

Q: Any kind of vocal cues, anything that would have hinted number five or that kind of thing?

A: Not at all, no.

Q: Absolutely not?

A: Absolutely not.

(15 RT 3871-3873.)

Richards was involved in three total lineups in this case: two six-pack photo lineups, and one live lineup. The fact that Richards failed to pick anybody from two of those lineups—the first six-pack and the live lineup—indicates not only that he was exceptionally careful with the process, but also that the law enforcement officers were very careful in not suggesting Wilson's identity. Further, Wilson's argument again fails to reference any comments made by Detective Franks before Richards "immediately" identified Wilson from the six-pack as looking "exactly" like the perpetrator. (15 RT 3869; 12 CT 3550-3551.) Nothing that Detective Franks said or did diminishes the previous immediacy and certainty with which Richards selected Wilson. Again, Wilson's argument was properly directed at the jury and was supported by the testimony of his expert

witness. But nothing in the record indicates that Wilson's identity was somehow suggested to Richards.

Wilson next claims that the Deputy District Attorney handling the prosecution tainted the in-court identification by showing Richards a photocopy of the six-pack photo lineup. (AOB 67-68.) Deputy District Attorney Kent Williams testified that prior to the preliminary hearing he showed Richards a "variety of photographs" and "made reference to all the police reports" in order to "refresh his recollection" and "have him inform me of any mistakes or anything new that he might have recollected." (4 RT 957.) One of the items Williams showed to Richards was a black-and-white photocopy of the six-pack lineup from which Richards previously selected Wilson's photograph. (4 RT 958, 972-973.) Williams testified he wanted to confirm that it was the same six-pack previously shown to Richards and that it was in fact Richards's writing and signature on the six-pack. (4 RT 958.)

Wilson now claims this was improper. The trial court accurately addressed this claim below:

> I don't think there was anything about Mr. Williams' conduct at the preliminary hearing or prior to the preliminary hearing that somehow unduly suggested to Mr. Richards that he should identify the defendant. He merely showed him a photocopy of the photo line-up, asked him if that is the one that he looked at, and he identified it as being the one that he did, that it was his signature. He was the one that put the circle around the picture, not Mr. Williams.

(4 RT 1081.) The trial court was correct. Indeed, it is entirely typical in trial proceedings to meet with witnesses prior to their testimony and go over the evidence that will be discussed. Wilson has failed to cite any authority establishing that this routine practice somehow tainted Richards's prior identification, or his subsequent in-court identification. Again, Richards immediately identified Wilson with a high level of certainty, both

before trial and during each of his subsequent testimonies. There is nothing in the record to suggest that this was the result of some type of impermissible suggestion on the part of law enforcement.

Finally, Wilson claims that the photographs submitted to Richards in the pretrial six-pack lineup were so dissimilar as to suggest Wilson's identity in advance. (AOB 68-71.) Initially, Wilson heavily criticizes the photographs contained in exhibit 147. But as discussed previously, it was established at trial that exhibit 147 was never shown to Richards. (See, e.g., 16 RT 4187-4191; 17 RT 4445-4446.) In fact, as Sergeant Dean discussed at some length, he purposefully chose not to use exhibit 147 because he felt the six photographs were too dissimilar. (16 RT 4190-4191.) It was for that reason that the six-pack lineup contained in exhibit 147 was never used, and law enforcement instead created, and showed to Richards, the six-pack lineup contained in exhibit 16. (16 RT 4190-4191.) Wilson's argument in this regard essentially mirrors the very reasons that law enforcement officers opted not to use the exhibit in the first place.

In addition, to the extent Wilson is criticizing the similarity of the photographs contained in exhibit 16, his argument fails as the photographs very similar. All six photographs appear of similarly aged African American men with little-to-no hair. (Exhibit 16.) All six men have similar facial hair, either a mustache or goatee. (Exhibit 16.) All six photographs are on a similarly colored background, and the faces in all six photographs are of a similar size. (Exhibit 16.) There is simply nothing about exhibit 16 rendering the photographs so dissimilar as to suggest Wilson's identity in advance. As stated above, a suspect's photograph is not impermissibly suggestive if it is similar to that of the others, even if all participants do not share all common features. (See *People v. Cunningham, supra*, 25 Cal.4th at p. 990.) Accordingly, Wilson has failed to establish that the pretrial identification procedure was "so impermissibly suggestive

as to give rise to a very substantial likelihood of irreparable misidentification." (*Simmons v. United States, supra*, 390 U.S. at p. 384.)

C. The Identification Was Nevertheless Reliable Under The Totality Of The Circumstances

Even if Wilson had established that the pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification, Richards's identification of Wilson was nonetheless reliable under the totality of the circumstances. As stated, even where a pretrial identification procedure was unduly suggestive and unnecessary, the identification is still admissible if it was nevertheless reliable under the totality of the circumstances, taking into account such factors as: (1) the opportunity of the witness to view the suspect at the time of the offense; (2) the witness's degree of attention at the time of the offense; (3) the accuracy of his or her prior description of the suspect; (4) the level of certainty demonstrated at the time of the identification; and (5) the lapse of time between the offense and the identification. (*People v. Cunningham, supra*, 25 Cal.4th at p. 989, citing *Manson v. Brathwaite, supra*, 432 U.S. at pp. 104-107 and *Neil v. Biggers, supra*, 409 U.S. at pp. 199-200.)

Here, each of the above factors support the trial court's ruling. As for Richards's opportunity to view Wilson at the time of the offense, Richards first saw Wilson when Wilson was standing by the front door of the Stater Brothers grocery store. (15 RT 3843.) Wilson flagged Richards down and got into the back of his cab. (15 RT 3843-3844.) Richards had the next 20-25 minutes to get to know Wilson as the two of them rode to Wilson's stated destination. (15 RT 3845.) The two men even stopped for gas together at one point during the ride. (15 RT 3844.) Richards and Wilson were not only in close proximity for this entire period of time, they also "talked all the way there" about "all kinds of stuff." (15 RT 3845.)

Richards specifically testified that he had "ample opportunity to view" Wilson not only when he first pulled up to the store, but also during the entire ride as he was "looking over [his] shoulder talking with him." (15 RT 3847.) Thus, Richards had an unencumbered opportunity to view Wilson at close range for an extended period of time, and this was all before Wilson first threatened Richards.

As for Richards's degree of attention, Richards was able to describe the events of the night in detail, indicating he was not impaired and that he had a high level of attention. As stated, Richards had an engaged conversation with Wilson for an extended period of time during the course of the ride. (15 RT 3845.) This was during a time when no crime was yet occurring and no threats had yet been made, so Richards was under no fear or stress at the moment. (15 RT 3845 ["[Wilson] was real friendly, polite, calm, relaxed, nice guy. . . . No tension at all."].) Richards was able to recall not just that he and Wilson talked during the whole ride, but he was also able to recall specific topics of their discussion. (See 15 RT 3845-3847.) For example, Richards recalled that he and Wilson talked about whether Richards carried a gun and the number of fares Richards previously had that night. (15 RT 3845-3847.) The evidence presented during the course of this case indicates that Richards had a high-degree of attention focused on Wilson during the 20-25 minute car ride, and certainly after Wilson revealed his true intention by threatening Richards with his handgun.

As for the accuracy of Richards's prior description of Wilson, Richards provided a detailed description of Wilson's appearance, including his height, weight, race, build, age, hair, facial complexion, and facial hair. (15 RT 3858-3859.) This description fit Wilson's appearance, with the exception of Wilson's weight loss during the pendency of trial, a fact confirmed by many of the witnesses at trial. (See, e.g., 14 RT 3644, 3691.)

In addition, Richards provided a detailed description of the clothing worn by Wilson (15 RT 3845), including a description of the same white puffy jacket that multiple witnesses stated they saw Wilson wear (15 RT 3859). By all accounts, Richards provided a resoundingly accurate description of Wilson.

As for Richards's level of certainty demonstrated at the time of the identification, Richards maintained a high level of certainty regarding his identification throughout the proceedings, from the pretrial identification to the multiple in-court identifications. As mentioned above, during the pretrial lineup, Richards stated that Wilson's photograph "jumped right out, I knew immediately. . . . [I]t was the facial expression, the eyes, the smile was the same as when he pulled the trigger." (15 RT 3869.) Richards was "very, very certain" that the person he selected from the six-pack was the same person who put a gun in his mouth and pulled the trigger. (15 RT 3891.)

Richards maintained this high level of certainty during his subsequent in-court identifications of Wilson. For example, after Richards identified Wilson in court during the second trial, the prosecutor asked Richards, "how certain are you of your identification of Mr. Wilson?" (15 RT 3874.) Richards responded, "Very certain." (15 RT 3874.) Richards also stated that when he identified Wilson at the preliminary hearing, Wilson "looked up and smiled and it was like it was the same exact . . . expression that he had when the gun didn't go off in my mouth." (15 RT 3874.) Richards specifically stated that Wilson had a particular "facial expression" that was "very distinctive." (15 RT 3874.) Richards concluded his testimony on direct examination by reiterating that he was "very certain" that Wilson was the person who robbed him. (15 RT 3875-3876.)

Finally, as to the lapse of time between the offense and the identification, Wilson committed the crimes against Richards on January 7,

2000. (15 RT 3842-3843.) Richards identified Wilson from the six-pack photo lineup with a high degree of certainty less than two months later, on March 2, 2000. (12 CT 3422 [exhibit 16 signed and dated by Richards].) The preliminary hearing—the time of the first in-court identification—started on August 25, 2000. (1 CT 70.) The lapse of time between the offenses against Richards and the identifications was reasonable, particularly in an investigation of this nature. (See, e.g., *United States v. Rivera-Rivera* (1st Cir. 2009) 555 F.3d 277, 284-285 [finding that six months between crime and in-court identification is "de minimis compared to other cases"].)

When the above factors are considered under the totality of the circumstances, Richards's identification of Wilson was reliable and properly admissible. (*People v. Cunningham, supra*, 25 Cal.4th at p. 989; see also *People v. Alexander* (2010) 49 Cal.4th 846, 901-902; *Biggers, supra*, 409 U.S. at pp. 199-200.) Indeed, short of a "very substantial likelihood of irreparable misidentification," any evidence suggesting an incorrect identification is for the jury to weigh. (*Brathwaite, supra*, 432 U.S. at pp. 114, 116.)

In addition, where, as here, the witness's identification has an origin independent of any purported suggestion by law enforcement, that identification should be admitted to the trier of fact. (*People v. Ratliff* (1986) 41 Cal.3d 675, 689 ["While a defendant may attack any lineup, photographic or otherwise, as unduly suggestive [citation], the taint of an unlawful confrontation or lineup may be dispelled if the People show by clear and convincing evidence that the identification of the defendant had an independent origin."]; *People v. Martin* (1970) 2 Cal.3d 822, 831 ["the admission of an in-court identification which has a source or origin 'independent' of the illegal pretrial confrontation is not error"].) Here, notwithstanding any purported suggestion of Wilson's identity by law

enforcement, Richards testified regarding his independent memory of Wilson's "very distinctive" facial expression and appearance. (15 RT 3874-3875.) As such, because Richards's identification had a source independent from any purported suggestion by law enforcement, the trial court properly admitted that identification at trial. (E.g., *People v. Ratliff, supra*, 41 Cal.3d at p. 689; *People v. Martin, supra*, 2 Cal.3d at p. 831.)

D. Any Error In The Admission Of Richards's Identification Of Wilson Was Harmless Beyond A Reasonable Doubt

Even assuming the trial court erroneously admitted an impermissibly suggestive identification that was also unreliable under the totality of the circumstances, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) An error is harmless beyond a reasonable doubt when the error did not contribute to the verdict, i.e. when the error is unimportant in relation to what the record discloses in terms of everything else the jury considered on the issue. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 403.) The verdict does not rest upon Richards identification given there is overwhelming evidence of Wilson's guilt aside from Richards's identification. This evidence included Wilson's admissions to several people, including Phyllis Woodruff, Sylvester Seeney, and Melody Mansfield. Specifically, Wilson gave Woodruff a detailed account of his attempted robbery of Richards that matched exactly with Richards's description of the events. (See 14 RT 3646-3648.) Woodruff not only saw Wilson with Richards's property, but Wilson also showed her the gun he used, the same gun that was later found in the exact same location where Wilson told Woodruff it was located. (See 14 RT 3642, 3647-3649; 15 RT 3859-3860, 3998-4001.) Wilson also showed Woodruff the taxi he took from Richards, and Woodruff watched as Wilson

"did something" to the taxi's radio "so they couldn't trace him." (14 RT 3650-3651.)

Woodruff was also with Wilson when he broke into various houses and stole firearms from inside. (14 RT 3653-3656.) Near the time when Wilson murdered Henderson and Dominguez, he was showing off those firearms to Woodruff, including the same .44 Magnum handgun that was used in the murders. (14 RT 3651-3652.) The owners of those firearms testified at trial and positively identified them as having been previously taken from their houses. (See 15 RT 3783, 3790-3792.)

In addition, the combined testimony of Charles Whitley and Joe Diaz was very strong evidence implicating Wilson. Whitley testified that he had known Wilson and his family for a long time, and that in January or February of 2000—the exact same time as the crimes—Whitley bought a hunting rifle from Wilson. (16 RT 4046-4048.) Joe Diaz testified that in January of 2000 his house was burglarized and many of his firearms had been taken, including a .22 handgun and a hunting rifle. (15 RT 3782-3783.) Diaz identified the .22 handgun that was used to rob Richards as the same gun that was taken from his house. (15 RT 3783.) He also identified the hunting rifle that Whitley purchased from Wilson as the same rifle that was taken from his house during the exact same burglary. (15 RT 3782.)

As stated, Wilson also admitted his role in the crimes to both Melody Mansfield and Sylvester Seeney. Specifically, when Mansfield asked Wilson whether he killed the cab drivers, Wilson admitted that he was the one who committed the murders. (14 RT 3734-3735.) Wilson's admissions to Seeney were even more detailed. Like he did with Woodruff, Wilson told Seeney about his robbery of Richards and explained the events in detail. (14 RT 3737-3738.) In addition, before Wilson committed the Henderson and Dominguez murders, he first told Seeney that he was planning to rob some cab drivers because he needed money. (14 RT 3731-

3732.) Wilson showed Seeney the .44 Magnum handgun he planned to use in the robberies. (14 RT 3739.) And then just before Wilson left to commit the robberies, he told Seeney he was on his way to "do some business" and that Seeney should "watch the news." (14 RT 3731, 3733.)

Within the next couple days, Wilson admitted to Seeney that he had murdered Henderson and Dominguez. (14 RT 3735.) Wilson explained certain details of each incident, including specific statements made by the victims (15 RT 3735, 3739 [one of the cab drivers "begged for his life" but Wilson shot him anyway because "the driver saw his face"]), and that he injured his leg during one of the incidents (14 RT 3735-3736).

When the above evidence the jury considered is viewed in conjunction with the additional prosecution evidence implicating Wilson in the crimes, any error in the admission of Richards's identification was harmless beyond a reasonable doubt. Richards attempts to diminish the strength of the evidence against him by attacking the credibility of the prosecution evidence. (AOB 100-109.) Specifically, Wilson attempts to discredit the testimony of Woodruff and Seeney by arguing that both of them "had motives to perjure themselves and incriminate appellant." (AOB 105.) But in doing so, Wilson ignores the import of the corroboration of both Woodruff and Seeney provided by all the other incriminating evidence separate and apart from Richards's identification. Considering what the record discloses that the jury considered in deciding Wilson's guilt, any error in the admission of Richards's identification was harmless beyond a reasonable doubt. The judgment must be affirmed. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

II. THE TRIAL COURT PROPERLY PRECLUDED DEFENSE COUNSEL FROM INTRODUCING EVIDENCE REGARDING PURPORTED INSTANCES OF DISHONESTY INVOLVING DETECTIVE FRANKS

Wilson claims the trial court abused its discretion and violated his federal constitutional rights by precluding him from introducing evidence that Detective Franks—a defense witness—committed purported acts of dishonesty that were unrelated to his investigation in the present case. (AOB 110-139.) Respondent disagrees. The trial court properly exercised its discretion and did not violate Wilson's federal constitutional rights by excluding collateral, non-criminal acts by Detective Franks because that evidence had only minimal probative value and would have been unduly prejudicial.

A. Detective Franks's Testimony and Investigative Role in Wilson's Case

Detective Scott Franks was a member of the team of homicide detectives working under the supervision of Sergeant Robert Dean to investigate this case. (17 RT 4443.) At the first trial, the prosecution did not call Detective Franks as a witness. (6 CT 1676.) But the defense chose to call him as a witness and question him regarding the pretrial lineup procedures, including how many six-pack photo lineups he showed Richards, two or three. (10 RT 2419-2421.) Detective Franks maintained that exhibit 147 was prepared but never shown to Richards because Sergeant Dean chose not to use that particular lineup. (10 RT 2420.) Detective Franks only showed Richards two photo lineups, the first lineup that did not contain Wilson's photograph, and the second lineup that did contain Wilson's photograph. (10 RT 2419-2421.)

During direct examination of Detective Franks, defense counsel extensively questioned the detective about his involvement with the pretrial identification procedures and challenged his credibility by repeatedly

impeaching him with prior statements. (See 10 RT 2415-2426, 2453-2473.) As a part of this effort to impeach his own witness, defense counsel unexpectedly asked the detective about specific past acts that purportedly reflected upon the detective's honesty and veracity. (10 RT 2467-2470.) Specifically, defense counsel questioned the detective about two incidents from his employment disciplinary history, one involving his undisclosed part-time job as a security guard, and the other involving his misidentifying himself as a Colton police officer rather than a San Bernardino County Sheriff's Deputy. (10 RT 2467-2470.)

Defense counsel's unexpected actions at the first trial led the prosecution to make a motion prior to the second trial that the defense be precluded from introducing extrinsic episodes of misconduct and employment discipline imposed upon Detective Franks. (6 CT 1676-1679.) The prosecution argued that this evidence should be excluded under Evidence Code section 352 because its probative value was substantially outweighed by the potential for prejudice. (6 CT 1676-1679.)

The court conducted a hearing on the motion. (12 RT 3066.) Following argument from both counsel, the trial court ruled that the defense would not be permitted to impeach Detective Franks with the collateral past incidents that the defense claimed reflected upon the detective's honesty and veracity. (12 RT 3077-3079.) The court specifically stated that the probative value of such evidence is "slight in comparison with the potential to confuse or distract the jury." (12 RT 3078-3079.)

During the second trial, the prosecution again presented its case-in-chief without calling Detective Franks as a witness. However, the defense again chose to call Detective Franks during its case-in-chief. (17 RT 4443.) Defense counsel again extensively questioned Detective Franks regarding his role in the pretrial identification procedures involving Richards. (17 RT 4444-4464.) Defense counsel likewise extensively impeached Detective

Franks by pointing out various differences between his prior testimony at the preliminary hearing regarding the pretrial lineups and the actual tape recordings of those lineups. (See 17 RT 4452-4464.) Defense counsel went through many of the detective's prior statements one-by-one and followed each by playing contradictory portions from the recordings. (See 17 RT 4452-4464.)

During the course of his testimony, Detective Franks maintained that he only showed Richards two prior photo lineups, and reiterated that exhibit 147 was prepared but never used. (17 RT 4445-4446.) This same fact had already been established by Sergeant Dean—a previous prosecution witness during its case-in-chief—who testified that Richards had only been shown two photo lineups and that exhibit 147 had never been used. (See 16 RT 4187-4191.)

B. The Trial Court Properly Precluded Defense Counsel From Introducing Evidence Regarding Collateral Past Incidents Of Detective Franks's Conduct

Generally speaking, a witness may be impeached with evidence of prior conduct involving moral turpitude even though the conduct did not result in a felony conviction. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295-296; accord *People v. Clark* (2011) 52 Cal.4th 856, 932.) However, admission of such evidence is subject to a trial court's discretion under Evidence Code section 352, which "empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler, supra*, 4 Cal.4th at p. 296; accord *People v. Lightsey* (2012) 54 Cal.4th 668, 714.) For this reason, a trial court has broad discretion to exclude impeachment evidence if it concludes that such evidence is "collateral, cumulative, confusing, or misleading." (*People v. Price* (1991) 1 Cal.4th 324, 412.)

As this Court has previously noted, "impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present." (*People v. Wheeler, supra*, 4 Cal.4th at p. 296.) Therefore, under Evidence Code section 352, courts should "consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*People v. Wheeler, supra,* at pp. 296-297.)

"A trial court's ruling to admit or exclude evidence offered for impeachment is reviewed for abuse of discretion and will be upheld unless the trial court 'exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 705, quoting *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion [citations]." (*People v. Clark* (2011) 52 Cal.4th 856, 932.)

Applying this standard to the present case, there was no abuse of discretion. The evidence that Wilson sought to admit pertained to two unrelated instances of Detective Franks's purported dishonesty. (See 10 RT 2467-2470.) These past acts of the detective's conduct were entirely collateral from the homicide investigation involving Wilson as a suspect. It is for this very reason that trial courts are vested with such broad discretion regarding the admission of collateral impeachment evidence: trial court's are empowered "to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*People v. Wheeler, supra*, 4 Cal.4th at p. 296.) That is precisely what the trial court did in the present case.

Wilson notes that the evidence he sought to admit was not very time consuming during the first trial. (AOB 127.) But what Wilson fails to acknowledge is that the defense surprised the prosecution at the first trial by unexpectedly introducing this evidence. In fact, as this court has previously explained, it is this very type of "unfair surprise" to which this type of evidence lends itself. (See *People v. Wheeler, supra*, 4 Cal.4th at p. 296.) Had the prosecutor and the trial court been aware that the defense would be seeking to admit this evidence, it would have had an opportunity to address the issue outside the presence of the jury and determine the proper parameters of the proffered evidence. In the event the trial court would have had the opportunity to rule before the question was asked on direct examination, as it did upon retrial, then the prosecutor would have had an opportunity to prepare rebuttal evidence. But due to the unexpected nature of the defense's direct examination of Detective Franks, no such rebuttal evidence was presented and the issue was not exceptionally time consuming. Had the issue been properly noticed—as it was for the second trial—it would have become substantially more time consuming, and therefore presented the potential to become a trial-within-a-trial pertaining to entirely collateral matters. Indeed, the prosecution would be able to bring in character witnesses to support the detective's credibility. (Evid. Code, § 790.) Again, this is the very reason trial court's are afforded such broad discretion to exclude this type of evidence. (See *People v. Wheeler*, *supra*, 4 Cal.4th at p. 296.)

In addition, this is not the type of situation where the defense was limited in its ability to cross-examine an important prosecution witness. Rather, the defense attempted to create this issue by calling Detective Franks as a witness, questioning him about his role in the investigation, and then arguing that he must be lying and his testimony must be discredited. The defense was free to present any evidence indicating that law

enforcement officers in this case were lying about their roles in the investigation. The defense was likewise free to present any concrete evidence establishing that Richards was in fact shown three photographic lineups. But of course the defense did not do so because no such evidence existed. Rather, the defense attempted to support its speculative premise by calling a detective who was unnecessary to the prosecution's case-in-chief and then attempting to paint him as an untrustworthy law enforcement officer. This is the type of evidence that would tend to inflame the jury and prejudice it against law enforcement in general. It was on this very basis that the trial court accurately excluded the evidence. (12 RT 3077-3079.) Because this was not an arbitrary and capricious abuse of discretion that resulted in a manifest miscarriage of justice, the trial court's ruling must be upheld. (*People v. Ledesma, supra,* 39 Cal.4th at p. 705; *People v. Rodriguez, supra*, 20 Cal.4th at pp. 9-10.)

C. Wilson Forefeited Any Claim of a Constitutional Violation, and In Any Event, The Trial Court's Ruling Did Not Violate Wilson's Constitutional Rights

Wilson claims the trial court's exclusion of this evidence violated his right to confrontation and his due process right to present a defense. (AOB 130-134.) Wilson also argues that the court's ruling resulted in "denial of due process and a fair trial," in addition to "unreliable guilt and penalty determinations." (AOB 134.) As a threshold matter, Wilson did not preserve his constitutional arguments for appeal because he failed to raise these specific arguments at trial. The failure to raise at trial a specific claim of federal constitutional error forfeits the issue on appeal. (*People v. Riccardi* (2012) 54 Cal.4th 758, 797, 801; *People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. Tafoya* (2007) 42 Cal.4th 147, 166; *People v. McCoy* (2013) 215 Cal.App.4th 1510, 1524-1525.)

In any event, Wilson's arguments fail on the merits. The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The United States Supreme Court has held the confrontation right is "fundamental" and "is made obligatory on the States by the Fourteenth Amendment." (*Pointer v. Texas* (1965) 380 U.S. 400, 403.) "'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'" (*Davis v. Alaska* (1974) 415 U.S. 308, 315-316, italics omitted.) "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . [T]he cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." (*Id.* at p. 316.) Hence, the "constitutional right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility" (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 841–842), and "'cross-examination to test the credibility of a prosecution witness is to be given wide latitude'" (*People v. Redmond* (1981) 29 Cal.3d 904, 913).

The main problem with Wilson's claim is that Detective Franks was not an adverse witness whom the defense sought to cross-examine. Rather, Detective Franks was a defense witness and the trial court limited the defense's ability to introduce evidence on direct examination. For this reason, the trial court's ruling does not implicate a defendant's right to confrontation. (U.S. Const., 6th Amend.)

In any event, it remains well established that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant."

(*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679.) "A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624; accord, *People v. Dement* (2011) 53 Cal.4th 1, 52; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 208.) "As long as the cross-examiner has the opportunity to place the witness in his or her proper light, and to put the weight of the witness's testimony and credibility to a reasonable test which allows the fact finder fairly to appraise it, the trial court may permissibly limit cross-examination to prevent undue harassment, expenditure of time, or confusion of the issues." (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1386.)

Under these standards, the trial court did not violate Wilson's Confrontation Clause rights by precluding him from admitting evidence during his direct examination of Detective Franks. Although Wilson was not able to introduce all of the evidence he desired, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20; accord *People v. Riccardi, supra*, 54 Cal.4th at p. 810.) The same can be said for Wilson's additional constitutional claims. As this court has repeatedly stated, "not every restriction on a defendant's desired method of cross-examination is a constitutional violation." (*People v. Ayala* (2000) 23 Cal.4th 225, 301, quoting *People v. Frye* (1998) 18 Cal.4th 894, 946.) Wilson's constitutional claims are without merit.

D. Even Assuming Error, Wilson Cannot Demonstrate Prejudice

Finally, even assuming the trial court somehow erred by excluding the proffered evidence, any such error would be harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 [constitutional error must be assessed for prejudice under the harmless-beyond-a-reasonable-doubt standard]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [error is harmless under state law unless it is reasonably probable that a result more favorable to defendant would have occurred absent error].)

Here, there is no reason to believe the absence of the proffered evidence would have caused the jury to believe that Wilson did not attempt to murder Richards. Certainly the defense could have used this evidence in an effort to tarnish Detective Franks and law enforcement officers in general. But as outlined above, the record contains overwhelming uncontested evidence supporting the jury's conclusion concerning Wilson's guilt, including his multiple admissions of the crimes to several people and his theft and possession of the firearms used in the crimes. (See pt. I.D., *ante*.) For this reason alone, any error was harmless and the judgment should be affirmed. (See *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

Moreover, the proffered evidence would have done nothing to concretely establish that Richards was in fact shown three pretrial photographic lineups. Indeed, notwithstanding Wilson's admission of this evidence at the first trial, Detective Franks nonetheless maintained that he only showed Richards two photographic lineups; exhibit 147 was prepared but never used. (10 RT 2149-2421.) Detective Franks repeated this testimony at the second trial. (17 RT 4445-4446.) In addition, Sergeant Dean had likewise testified that Richards had only been shown two photo lineups and that exhibit 147 had never been used. (See 16 RT 4187-4191.)

Richards's trial testimony also supported this fact when, during vigorous cross-examination by defense counsel, Richards would not agree that Wilson had been shown three photo lineups. (See 15 RT 3882-3892.) Plainly stated, there is simply no evidence concretely establishing that Richards was shown three photo lineups. And even had such evidence existed, at best it would have provided only slight support for an argument that Wilson had already fully presented to the jury: Richards was mistaken in his identification because Wilson's photograph appeared in successive lineups. But as stated above, the jury either rejected that speculative line of reasoning or concluded from the additional overwhelming evidence implicating Wilson that Richards's identification was unnecessary to reach guilty verdicts. Nothing about the proffered evidence would have changed that result.

Finally, Wilson was fully permitted to challenge Detective Franks's credibility by pointing out differences between his prior preliminary hearing testimony regarding the pretrial lineups and the actual tape recordings taken from those lineups. (See 17 RT 4452-4464.) There is no prejudice where, as here, a trial court excludes cumulative evidence concerning a witness's credibility. (*People v. Farley* (2009) 46 Cal.4th 1053, 1105; *People v. Hendrix* (1923) 192 Cal. 441, 450.) As this court previously concluded in a similar situation, "the additional impeachment value of the excluded evidence was minimal in relation to the major areas of impeachment already raised by the admitted evidence, and a reasonable jury would not have received a significantly different impression of [the witness's] credibility even if the excluded evidence had been admitted." (*People v. Whisenhunt, supra,* 44 Cal.4th at p. 208.) The same can be said here. Any impact of the incidents from Detective Franks's employment history pales in comparison to the impact that the detective previously provided false testimony under oath during the preliminary hearing because

he was either lying or mistaken about the specifics of the investigation. As stated, Wilson was fully permitted to admit this very evidence and present argument to the jury in this regard.

For the above reasons, any error in the exclusion of the proffered evidence relating to Detective Franks was harmless under any standard and the judgment must be affirmed. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

III. THE TRIAL COURT DID NOT ERR IN DECLINING TO EXCLUDE SYLVESTER SEENEY'S PRELIMINARY HEARING TESTIMONY BASED ON ALLEGED COERCION AT THE TIME OF HIS EARLIER INTERVIEWS WITH LAW ENFORCEMENT

Wilson argues that the preliminary hearing testimony of prosecution witness Sylvester Seeney should have been excluded in its entirety because it was based on earlier coerced statements. (AOB 140-173.) This claim is without merit. Wilson has failed to establish that Seeney was coerced by law enforcement during his interviews, or that any alleged coercion affected the voluntariness and reliability of his subsequent testimony during the preliminary hearing.

A. Facts and Circumstances Surrounding The Motion to Exclude Sylvester Seeney's Testimony

During the course of its homicide investigation, the San Bernardino County Sheriff's Department received information that Wilson was in Melody Mansfield's semi truck that was headed for Ohio. (15 RT 3961-3962; 16 RT 4182.) The San Bernardino Sheriff's Department conveyed this information to the Ohio State Highway Patrol, who located the semi being driven by Mansfield in Ohio. (15 RT 3962.) Ohio State Troopers pulled the truck over and found Wilson and Sylvester Seeney inside. (15 RT 3962-3963.) Wilson and Seeney were both arrested and held for two to

three days until San Bernardino County law enforcement officers could fly out to extradite them back to California. (16 RT 4182-4185.)

Prior to being transported back to California, Seeney was questioned by Ohio law enforcement officers. (15 RT 3971; 12 CT 3195-3239.) At the outset of the interview, Seeney was advised of, and waived, his *Miranda*[3] rights. (12 CT 3195-3197.) The entire interview was audio recorded. (12 CT 3195-3239.)[4]

Once San Bernardino County law enforcement officers arrived in Ohio, they transported Seeney and Wilson back to California. (16 RT 4182-4185.) Once back in California, San Bernardino County law enforcement officers again interviewed Seeney. (3 RT 808; 16 RT 4159-4160.) Specifically, officers conducted two interviews of Seeney in California, one on March 6, 2000, and the second the following day on March 7, 2000. (3 RT 808.)

Prior to the preliminary hearing, the prosecution reached an immunity agreement with Seeney. (1 CT 86-87.) Specifically, the prosecution granted Seeney immunity regarding his role in various residential burglaries that he committed with Wilson during which Wilson took a number of firearms, including the weapons he used during the commission of the charged crimes. (1 CT 86-87.) Seeney testified at the preliminary hearing consistently with his prior interviews. (1 CT 111-161.)

Prior to the first trial, the defense filed a written motion seeking to exclude any subsequent testimony from Sylvester Seeney on the basis that his prior statements made during the course of the previous interviews were coerced by law enforcement officers. (2 CT 561-577.) The prosecution

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

[4] The relevant portions of the interviews with which Wilson raises issue will be discussed in further detail below.

filed a written opposition arguing there was no coercion during Seeney's prior interviews, and that even if such coercion was present, the defense had not established that Seeney's preliminary hearing testimony was tainted as a result, nor would any subsequent testimony at trial be tainted. (3 CT 677-703.)

The trial court conducted a lengthy hearing regarding the motions. (3 RT 1-44, 797-843; 4 RT 1059-1070.)[5] At the outset of the hearing, the court indicated that it had read all of the motions and the case of *People v. Badgett* (1995) 10 Cal.4th 330. (3 RT 3-4.) The court explained that the burden was on the defense to first establish that Seeney's prior statements during the interviews were coerced by the actions of the law enforcement officers conducting the interviews. (3 RT 3-4.) If such a showing is made, the question would then turn to whether any subsequent testimony would be the product of continuing coercion. (3 RT 4.)

At the hearing, the defense called a number of witnesses, specifically: Ohio Highway Patrol Officer Richard Noel, Ohio Highway Patrol Lieutenant Kelly Hale, Sylvester Seeney,[6] San Bernardino County Sheriff Detective Chris Elvert, and defense investigator Ronald Forbush. (3 RT 1-

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[5] The pagination in the third volume of the Reporter's Transcript appears erroneous. The third volume of the Reporter's Transcript concludes at page 752, followed by pages 1 through 44, followed by pages 797 through 844. For ease of reference, citations to this portion of the transcript will appear directly as the pagination is contained in the Reporter's Transcript.

[6] Seeney was provided with counsel at the hearing and invoked his Fifth Amendment privilege against self-incrimination. (3 RT 799-803.) Seeney and his counsel indicated that Seeney would also invoke his Fifth Amendment privilege if he were subsequently called to testify at trial. (3 RT 803.) Due to this, the trial court ultimately ruled that Seeney was unavailable for trial. (6 RT 1418-1419, 1511.) This will be discussed in greater detail below in part IV.

44, 797-842.) The court also reviewed the recordings of all of the prior interviews of Seeney. (See 3 RT 842-843; 4 RT 1060.)

Following argument from counsel, the court issued a detailed ruling denying the defense motion to exclude Seeney's testimony. (4 RT 1061-1070.) Specifically, the court detailed each of Seeney's interviews with law enforcement and found that none of those interviews were coercive. (4 RT 1061-1070.) As to Seeney's interview in Ohio, the trial court concluded that law enforcement officers never coerced Seeney "and at no time do they try to put words in his mouth." (4 RT 1063.) That interview only lasted about an hour and resulted in no statements incriminating Seeney or Wilson. (4 RT 1063.)

As to Seeney's first interview in San Bernardino, law enforcement officers never made any promises to Seeney other than indicating that they would relay to his probation officer if he was truthful with them. (4 RT 1064.) The court specifically stated that it could "find no evidence of undue coercion in the form of threats or promises . . ." (4 RT 1064.) The court also stated that the specific information provided by Seeney appeared a result of Seeney's personal knowledge rather than a result of any suggestion by law enforcement. (4 RT 1065.)

As to Seeney's second interview in San Bernardino, which took place the day after the first interview, the court noted that the interview was initiated by Seeney when he told law enforcement officers he had more he wanted to say. (4 RT 1065.) The court ruled that the interview contained "no coercion of any type" and that Seeney's statements were not the result of some type of suggestion by the law enforcement officers. (4 RT 1066.)

Finally, the court addressed whether the immunity agreement reached between Seeney and the prosecution at the preliminary hearing coerced Seeney to testify consistently with his prior statements during the interviews. (4 RT 1067-1069.) The court noted that the agreement simply

stated Seeney should "answer such questions and produce such evidence in the case as may be material, competent, and relevant to the case." (4 RT 1067.) Nothing in the agreement suggested that Seeney was required to testify consistently with his prior statements. (4 RT 1068-1069.) Rather, the language in the agreement was very general and is fairly interpreted as simply requiring Seeney to "testify truthfully." (4 RT 1069.)

For the foregoing reasons, the court denied Wilson's motion to exclude Seeney's testimony. (4 RT 1069-1070.)

B. The Trial Court Properly Denied Wilson's Motion To Exclude Seeney's Testimony On The Basis Of Purported Law Enforcement Coercion

Defendants have limited standing to challenge the trial testimony of a witness on the ground that an earlier out-of-court statement made by the witness was the product of police coercion. (*People v. Williams* (2010) 49 Cal.4th 405, 452-453.) A defendant must allege a violation of his or her own personal rights in order to have standing to argue that testimony of a third party should be excluded because it is coerced. (*People v. Badgett* (1995) 10 Cal.4th 330, 343.) It is well settled that a defendant has no standing to object to a violation of the Fourth, Fifth, or Sixth Amendment rights of a third party. (*Id.* at pp. 343-344.) Rather, if a defendant seeks to exclude a third party's testimony on the ground the testimony is somehow coerced or involuntary, any basis for excluding the third party's testimony must be found in a federal constitutional right personal to defendant. (*Id.* at p. 344.) The basis of the claim must be that coercion has affected the third party's trial testimony. (*Ibid.*) Only when the evidence produced at trial is subject to coercion are a defendant's due process rights implicated. (*Ibid.*)

When a defendant seeks to exclude purportedly coerced testimony of a witness or codefendant, it is the defendant's burden to establish the statement was involuntary. (People v. Williams, supra, 49 Cal.4th at p.

453.) Testimony of third parties should not be excluded unless the defendant establishes that improper coercion has impaired the reliability of the testimony. (*Id.* at pp. 452-453.) Even where a defendant shows that a witness's prior statements were the result of coercion, the defendant then has the additional burden of demonstrating that the earlier coercion will directly impair the free and voluntary nature of the anticipated trial testimony. (*Ibid.*, citing *People v. Badgett, supra*, 10 Cal.4th at p. 348.)

On appeal, a reviewing court independently reviews the entire record to determine whether a witness's testimony was coerced, so as to render the defendant's trial unfair. In doing so, however, the court must defer to the trial court's credibility determinations, and to its findings of physical and chronological fact, insofar as they are supported by substantial evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 444.)

Here, while Seeney's testimony at the preliminary hearing was accompanied by an immunity agreement, this is not sufficient to show coercion. As this court recognized in Badgett:

> We have never held, nor has any authority been offered in support of the proposition, that an offer of leniency in return for cooperation with the police renders a third party statement involuntary or eventual trial testimony coerced. On the contrary, . . . we [have] held that testimony given under an immunity agreement does not violate the defendant's right to a fair trial, if the grant of immunity is made on condition the witness testifies fully and fairly.

(*People v. Badgett, supra,* 10 Cal.4th at pp. 354-355.)

This is so even though this court has likewise acknowledged that testifying pursuant to an agreement can involve a "certain degree of compulsion." (*People v. Homick* (2012) 55 Cal.4th 816, 862.) Specifically, this court has explained:

> "[A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." [Citation.] Thus, when the accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to police [citation], or that his testimony result in the defendant's conviction [citation], the accomplice's testimony is "tainted beyond redemption" [citation] and its admission denies the defendant a fair trial. On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is valid.' [Citation.] . . . These principles are violated only when the agreement requires the witness to testify to prior statements 'regardless of their truth,' but not when the truthfulness of those statements is the mutually shared understanding of the witness and the prosecution as the basis for the plea bargain. [Citation.]"

(*People v. Homick, supra*, 55 Cal.4th at pp. 862-863.)

In the present case, Wilson has failed to establish that anything in Seeney's immunity agreement somehow placed him under a strong compulsion to testify in a particular fashion. Rather, Wilson simply points to the prosecutor's offer of proof to the court underlying the immunity agreement. But as the court correctly observed, the immunity agreement contained "very general" language that is fairly interpreted as simply requiring Seeney to testify truthfully. (4 RT 1069.) Contrary to Wilson's claim, this was not a demand for Seeney to testify to his prior statements "regardless of their truth." (*People v. Homick, supra*, 55 Cal.4th at p. 863.) Accordingly, the fact that Seeney testified pursuant to an immunity agreement did not render his testimony coerced.

In addition, it is also worth noting that "mere advice or exhortation by the police that it would be better for the accused to tell the truth" does not render a subsequent statement involuntary. (*People v. Jimenez* (1978) 21 Cal.3d 595, 611, overruled on other grounds in *People v. Cahill* (1993) 5

Cal.4th 478, 509-510, fn. 17.) "There is nothing improper in confronting a suspect with the predicament he or she is in, or with an offer to refrain from prosecuting the suspect if the witness will cooperate with the police investigation." (*People v. Daniels* (1991) 52 Cal.3d 815, 863.) The police "are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime." *(People v. Ray* (1996) 13 Cal.4th 313, 340.) Here, law enforcement officers consistently urged Wilson to simply tell the truth.

Wilson argues his case is similar to *People v. Lee* (2002) 95 Cal.App.4th 772. (AOB 162.) Respondent disagrees. In Lee, the victim was shot in the back of the head at point-blank range as he played dice with Saxon. (*Id.* at pp. 776, 781.) At trial, Saxon testified that, upon hearing gunshots, he went into a fetal position and did not see who shot the victim. (*Id.* at p. 781.) The prosecution then played a recording of an interrogation of Saxon by police polygraph examiner Youngblood in which Saxon said that defendant Lee killed the victim. A few minutes later, Saxon also told two police officers that Lee shot the victim. The next day, however, Saxon recanted his statement. *(Ibid.)* At trial, Saxon testified that his statement that Lee was the killer was false and he only made it because Youngblood pressured him to name Lee as the killer or face trial for the murder himself. (*Id.* at p. 782.)

The Court of Appeal concluded that police coercion by Youngblood made Saxon's prior statement to the police inherently unreliable. (*People v. Lee, supra*, 95 Cal.App.4th at p. 782.) Saxon had voluntarily gone to the police station to be interviewed about the shooting. Youngblood administered a polygraph examination during which he asked if Saxon shot the victim. (*Ibid.*) Youngblood then told Saxon there was a 97 percent probability he was the person who shot the victim. (*Id.* at p. 783.) "Youngblood proceeded to threaten Saxon with a first degree murder

prosecution unless he identified defendant as the killer." (*Ibid.*) "Youngblood told Saxon: 'So right now there's no question in my mind either you are the one that pulled that trigger or [Lee] and you pulled that trigger. Okay. What I am going to tell you now, before this thing gets too far out of hand, work with me or work against me. That's where you are, where you are. Now, that's the reality of it.' Saxon replied, 'I'm with you.'" (*Id.* at p. 784.) Youngblood also suggested a motive for Lee killing the victim, telling Saxon that the victim was seeing Lee's girlfriend. (*Ibid.*)

Youngblood continued: "'The thing is, you got caught up in the middle of this thing. Okay if you didn't shoot the man yourself. I am going to tell you now I want everything. Because if I run you back on this thing again and it still shows that you are the person who shot him, I am going to walk out of here without giving you the results. I will personally write my report today. And turn it in. Okay? Now, if you did shoot the man, I want to know why and what really happened. So I am asking you now, I don't [care] how scared you are. Did you shoot him?'" (*People v. Lee, supra*, 95 Cal.App.4th at pp. 784-785, italics omitted.) Saxon responded that he did not do it. Youngblood then said: "'But you know who did. And you know what happened out there and you are afraid because somebody is going to put a snitch jacket on you.'" (*Id.* at p. 785.) Saxon responded, "'[Lee] shot him.'" (*Ibid.*)

The court acknowledged in Lee, "California courts have long recognized it is sometimes necessary to use deception to get at the truth." (*People v. Lee, supra*, 95 Cal.App.4th at p. 785.) For example, where a police officer falsely told a suspect that his fingerprints were found on the getaway car, the suspect's subsequent confession was admissible. (*People v. Watkins* (1970) 6 Cal.App.3d 119, 125.) Similarly, the false statement that the defendant had been positively identified did not render the

defendant's confession inadmissible. (*People v. Pendarvis* (1961) 189 Cal.App.2d 180, 186.)

In Lee, however, the court concluded: "Youngblood went beyond mere deceit as to the evidence pointing to Saxon as the killer. He also went beyond merely exhorting Saxon to tell the truth. He even went beyond threatening Saxon with prosecution for first degree murder unless he named the real killer. [¶] Youngblood in essence told Saxon: We will prosecute you for first degree murder unless you name [Lee] as the killer." (*People v. Lee, supra,* 95 Cal.App.4th at p. 785.)

The court further noted that Saxon was not Mirandized until after he was told there was a 97 percent probability that he was the killer. (*People v. Lee, supra*, 95 Cal.App.4th at p. 786.) Under the circumstances of the case, the court concluded: "[T]he interrogation of Saxon was not designed to produce the truth as Saxon knew it but to produce evidence to support a version of events the police had already decided upon. In this respect, the police crossed the line between legitimate interrogation and the use of threats to establish a predetermined set of facts." (*Ibid.*)

The present case is readily distinguishable from Lee. In Lee, Youngblood specifically threatened that he would prosecute Saxon unless he named Lee as the killer. Here, the detectives did not present a similar either/or threat to Seeney. In other words, Seeney was not told that either Wilson was going to be charged with murder or he was. Instead, the detectives suggested that Seeney had information about the crimes and urged him to tell the truth about what he knew. Seeney was not led to believe he could avoid criminal prosecution altogether by implicating Wilson. This is very different from Lee.

Nor did the questioning demonstrate a similar intent on the part of the law enforcement officers to produce statements conforming to a version of events they had already decided on. As the court noted, Seeney's

statements were a product of his own personal knowledge and provided great detail that eventually led officers to locate the murder weapon used by Wilson. There is nothing in the record that demonstrates the officers questioned Seeney only "to establish a predetermined set of facts" as was the case in Lee. (*People v. Lee, supra*, 95 Cal.App.4th at p. 786.)

C. Even Assuming Error, Wilson Was Not Prejudiced

Additionally, even assuming, for the sake of argument, that an element of coercion was present in Seeney's prior interviews, reversal is not required. The admission of coerced testimony is subject to harmless error analysis. For purposes of California law, the prejudicial effect of such error is subject to the reasonable-probability test. (*People v. Cahill* (1993) 5 Cal. 4th 478, 509-10, citing Cal. Const. Art. VI.,§13; *People v. Watson, supra*, 46 Cal.2d 818, 836.) However, the more rigorous beyond a reasonable doubt standard of Chapman applies to any federal constitutional error in the admission of coerced testimony. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-311.) Applying the beyond a reasonable doubt standard here, it is clear Wilson was not prejudiced by the admission of Seeney's preliminary hearing testimony.

Wilson has failed to demonstrate Seeney's preliminary hearing testimony was coerced or rendered unreliable by any such prior coercion, or that admission of his testimony deprived Wilson of a fair trial. Indeed, Wilson was free to argue to the jury in the same vein that he now argues. He was free to argue that Seeney's testimony should be discredited because Seeney was 18 years old at the time of the interviews, or because Seeney had a motive to be dishonest during those interviews. Likewise, Wilson was free to argue that Seeney's testimony should be discredited because he was coerced by law enforcement. But Wilson failed to make the requisite showing to have Seeney's testimony excluded in its entirety. Because Wilson failed to establish that Seeney's preliminary hearing testimony was

coerced, the trial court properly denied Wilson's motion to exclude Seeney's testimony. (See *People v. Williams, supra*, 49 Cal.4th at pp. 452-453; *People v. Badgett, supra*, 10 Cal.4th at pp. 343-344, 348.)

Finally, Seeney's testimony was largely duplicative of Phyllis Woodruff's testimony. As stated above, Wilson admitted his role in the Richards robbery not only to Seeney, but also to Woodruff, who provided detailed testimony in this regard at trial. (See, e.g., 14 RT 3646-3647.) Woodruff likewise testified regarding having seen Wilson with the murder weapon just before the shootings, and regarding Wilson's role in the burglaries when the firearms were taken. (14 RT 3651-3656.) As such, any error in the admission of Seeney's testimony was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

IV. THE TRIAL COURT PROPERLY EXCLUDED SYLVESTER SEENEY'S PURPORTED RECANTATION THAT WILSON SOUGHT TO INTRODUCE THROUGH THE TESTIMONY OF A DEFENSE INVESTIGATOR

Wilson claims the trial court prejudicially abused its discretion when it precluded the defense from questioning defense investigator Ronald Forbush regarding statements that Seeney had made to him during a prior interview. (AOB 174-198.) Specifically, Wilson claims Seeney recanted his prior incrimination of Wilson during a private interview with Forbush, and that Forbush should have been able to testify regarding Seeney's statements made during the interview. (AOB 174-198.) Respondent disagrees. Forbush's testimony in this regard would have been pure hearsay that did not qualify under any applicable exception to the hearsay rule. As such, the trial court properly precluded Forbush from testifying regarding Seeney's out-of-court statements.

A. Facts and Circumstances Surrounding The Defense's Interview of Seeney and The Trial Court's Ruling Excluding Hearsay Evidence

In December 2001, defense investigator Ronald Forbush and defense counsel Joseph Canty conducted a private interview with Sylvester Seeney at the California Youth Authority. (3 RT 837-839; 1 Supp. CT 241-258.) During the interview, defense counsel and Forbush pressed Seeney about his prior statements that he made to law enforcement implicating Wilson. (1 Supp. CT 241-258.) Defense counsel suggested to Seeney: "So you kind of felt like, well, [the officers] know what they want to hear from me and if they don't hear it from me I'm going to be in big trouble." (1 Supp. CT 251.) Seeney agreed. (1 Supp. CT 251.)

Following this exchange, defense counsel and Forbush pressed Seeney regarding his prior statement that he had seen Wilson with a .44 Magnum handgun. (1 Supp. CT 251-256.) Seeney stated that he "don't really know guns" and he was not sure if the gun he saw was a .44 Magnum handgun "or a shotgun or something." (1 Supp. CT 251.) Forbush then drew a "real rough drawing" of what he believed a .44 Magnum looked like and asked Seeney if that was the type of gun he saw. (1 Supp. CT 252-253.) After looking at the drawing, Seeney said, "I didn't see no big gun like that." (1 Supp. CT 253.) Seeney later decided that he did know what kind of gun he saw: "I just seen a deuce five." (1 Supp. CT 254.) Seeney stated that it was not Wilson who he saw with the gun, but somebody else, probably "C-Note" or "Nutty," but he could not remember for sure. (1 Supp. CT 254-256.) Seeney explained that he "forgot some of it" because it had been so long. (1 Supp. CT 256.) Near the conclusion of the interview, Forbush asked Seeney: "Did [Wilson] say that he used any kind of gun like that doing any killings or robberies or anything like that?" (1 Supp. CT 256.) Seeney responded, "No." (1 Supp. CT 256.)

During the defense's case-in-chief at the second trial, defense counsel informed the prosecutor for the first time that he intended to call Forbush as a witness and elicit Seeney's prior statements through Forbush's testimony. (17 RT 4399-4400.) Defense counsel did not seek to introduce this evidence at the first trial. (17 RT 4400.) The prosecutor objected to the proffered testimony on the ground that it was inadmissible, unreliable hearsay. (17 RT 4400.) Defense counsel stated that he sought to admit Seeney's statements through Forbush as "subsequent inconsistent statements." (17 RT 4401.) The trial court recognized that the proffered testimony was hearsay and that the prior inconsistent statements exception did not appear applicable. (17 RT 4402.) The court did not make a final ruling at that time, but rather asked defense counsel to provide additional legal authority on the subject prior to offering Forbush's testimony into evidence. (17 RT 4402.)

Defense counsel subsequently sent an e-mail to the court arguing that Seeney's statements were admissible through Forbush as inconsistent statements under Evidence Code section 1235, and as declarations against interest under Evidence Code section 1230. (8 CT 2202.) The prosecutor responded to defense counsel's e-mail with one of his own arguing that neither of the cited hearsay exceptions were applicable. (8 CT 2204-2205.)

The court addressed the issue outside the presence of the jury. (17 RT 4482-4498.) At the outset, the court indicated that it had reviewed the "edited transcript" from the Fobush/Seeney interview that defense counsel was seeking to admit through Forbush's testimony. (17 RT 4482-4483.) The court noted that defense counsel was seeking to admit the transcript as an inconsistent statement under Evidence Code sections 1235 and 770, and also as a declaration against interest under Evidence Code section 1230. (17 RT 4483.)

The court first addressed whether the transcript was admissible as an inconsistent statement under Evidence Code sections 1235 and 770. (17 RT 4484.) The court noted that under the inconsistent statements exception to the hearsay rule, there is a requirement that the declarant be given an opportunity during his testimony to explain or deny the purported inconsistent statement. (17 RT 4484-4485.) The court read a portion of the law revision commission comments underlying that hearsay exception explaining that the danger of unreliability is '"largely nonexistent'" in the inconsistent statement context because '"[t]he trier of fact has the declarant before it and can observe his manner and the nature of his testimony as he denies or tries to explain away the inconsistency.'" (17 RT 4484.)

When asked to address this requirement, defense counsel argued that Evidence Code section 770 was prefaced with "unless the interests of justice otherwise require." (17 RT 4486.) Defense counsel argued that this was a situation where the interests of justice required admission of the evidence even though Seeney would not be given an opportunity to explain or deny his purported inconsistent statement. (17 RT 4486-4487.) Following additional argument from both counsel (17 RT 4486-4490), the court ruled that the transcript was not admissible as an inconsistent statement under Evidence Code sections 1235 and 770. (17 RT 4490-4491.) The court stated that the proffered evidence contained an "inherent reliability issue" and that the requirements of Evidence Code sections 1235 and 770 had not been satisfied. (17 RT 4491.)

The court then turned to whether the transcript was admissible as a declaration against interest under Evidence Code section 1230. (17 RT 4491.) The court stated initially that after reviewing the entire transcript, most of it contained statements that would not be against Seeney's interest. (17 RT 4491.) As the court explained: "None of Mr. Seeney's statements on their face would meet that definition [of a statement against interest]. . . .

The only statements that I could see that conceivably would come within that category would be his statements about whether [Wilson] told him about or admitted to committing the murders and the robberies and whether he saw [Wilson] with a .44 Magnum prior to the murders and robberies." (17 RT 4491-4492.) The court explained that those statements "on their face are not against penal interest or otherwise," but rather are simply circumstantial evidence that a reasonable person in Seeney's situation might have reasonably understood he was subjecting himself to a possible charge of perjury. (17 RT 4492.) The court noted that Seeney never admitted to lying at the preliminary hearing or otherwise being dishonest during his previous sworn testimony. (17 RT 4492.) The court also explained that the declaration against interest exception necessarily involves a subjective component because the "reliability factor for that exception" is that a person would not make false statements when he or she knows such statements would subject them to liability. (17 RT 4492.)

Defense counsel argued that Seeney's statements amounted to an admission of perjury. (17 RT 4492-4494.) The prosecutor argued that Seeney's statements appeared aimed at simply helping his brother[7] and did not involve any indication that Seeney could potentially be later held liable for perjury due to his previous testimony at the preliminary hearing. (17 RT 4494.) The prosecutor also argued that Seeney's statements lacked the requisite reliability to warrant admission under Evidence Code section 1230. (17 RT 4494-4495.)

Following argument from both counsel, the court ruled that the proffered evidence did not qualify as a declaration against interest under Evidence Code section 1230. (17 RT 4496, 4498.)

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[7] As previously noted in the Statement of Facts, Seeney is Wilson's half-brother. (14 RT 3729.)

B. Seeney's Statements Were Not Admissible as Declarations Against Interest Pursuant to Evidence Code Section 1230

Wilson first claims the trial court abused its discretion by not admitting the transcript of Seeney's interview as a declaration against interest under Evidence Code section 1230. (AOB 181-183.) This claim is without merit.

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200, subd. (a).) Unless an exception applies, "hearsay evidence is inadmissible." (Evid. Code, § 1200, subd. (b).)

Under Evidence Code section 1230: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true" (Evid. Code, § 1230.) As the trial court in the present case noted, the overarching principle that hearsay statements are unreliable is diminished with declarations against interest because people generally will not make false statements when he or she knows such statements will subject them to criminal liability. (17 RT 4492.) As such, the proponent of such evidence has the burden of establishing: (1) the declarant is unavailable; (2) the declaration was against the declarant's penal interest when made; and (3) the declaration was sufficiently reliable or trustworthy to warrant admission despite its hearsay character. (*People v. Duarte* (2000) 24 Cal.4th 603, 610–611; *People v. Brown* (2003) 31 Cal.4th 518, 535.)

There is "no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception." (*People v. Tran* (2013) 215 Cal.App.4th 1207, 1216, quoting *People v. Greenberger* (1997) 58 Cal.App.4th 298, 334-335.) The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant, and anything else relevant to the inquiry. (*People v. Tran, supra*, 215 Cal.App.4th at p. 1217; accord *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174–175.)

Courts have recognized that the least trustworthy or reliable circumstance obtains when the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others. (*People v. Tran, supra*, 215 Cal.App.4th at p. 1217.) But courts have "found a strong assurance of trustworthiness" when the statement is made in a "purely private, personal setting," or in a "'"conversation . . . between friends in a noncoercive setting that fosters uninhibited disclosures."' [Citations.]" (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 760.)

An appellate court independently reviews the trial court's preliminary determination whether a hearsay statement is sufficiently trustworthy to qualify as a declaration against penal interest. (*People v. Tran, supra*, 215 Cal.App.4th at pp. 1217-1218; *People v. Cervantes, supra*, 118 Cal.App.4th at pp. 174-175; see also *Lilly v. Virginia* (1999) 527 U.S. 116, 137 [independent review applies in determining whether a hearsay statement has sufficient "guarantees of trustworthiness" to satisfy the confrontation clause].) However, an appellate court reviews the trial court's ultimate decision to admit or exclude the statement for an abuse of discretion, bearing in mind that the scope of the court's discretion is limited by the

applicable law and reversal is appropriate only when there is no reasonable basis for the court's ruling. (*People v. Tran, supra*, at pp. 1217-1218; *People v. Brown* (2003) 31 Cal.4th 518, 534 [evidentiary rulings reviewed for abuse of discretion].)

Here, initially, much of the transcript of the Seeney interview that Wilson sought to admit was just general hearsay pertaining to matters such as Seeney's arrest in Ohio. (1 Supp. CT 241-258.) Wilson did not seek to admit mere snippets of the interview that he believed qualified as declarations against interest, but rather sought to admit an 18-page transcript from the interview, much of which was just general hearsay that was in no way contrary to Seeney's interest. (17 RT 4482-4498; 1 Supp. CT 241-258.) The trial court noted this when it reached its ruling, explaining that most of the transcript Wilson sought to admit contained statements that would not even arguably be against Seeney's interest. (17 RT 4491.)

As for the portions of the transcript that Wilson now claims were against Seeney's interest—namely the portions that Wilson claims conflicted with Seeney's preliminary hearing testimony—the requirements of Evidence Code section 1230 are nonetheless unsatisfied. First, as the trial court noted, there is no indication that Seeney was admitting he falsified prior sworn testimony. The transcript contains no mention of Seeney's prior testimony, whether that testimony was truthful, or whether Seeney was admitting to violating his prior oath by speaking with defense counsel and the defense investigator. (1 Supp. CT 241-258.) As the prosecutor argued below, "exposure to perjury" appears the "last thing on [Seeney's] mind." (8 CT 2204.) Rather, Seeney simply seemed to be "seizing upon the leading questions tendered by the defense investigator" in an effort to "reverse the damage he's done to his brother by his earlier

truthfulness." (8 CT 2204.) The prosecutor's argument in this regard was correct.

Second, and more to the point, the Seeney interview lacked the requisite reliability and trustworthiness to warrant admission as a declaration against interest under Evidence Code section 1230. As this court has explained, "[i]n determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*People v. Geier* (2007) 41 Cal.4th 555, 584, implicitly abrogated on another point in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, as acknowledged in *People v. Houston* (2012) 54 Cal.4th 1186, 1220.) Assessing trustworthiness requires the court to """"apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human being actually conduct themselves in the circumstances material under the exception."""" (*People v. Geier, supra*, 41 Cal.4th at p. 584, quoting *People v. Duarte, supra*, 20 Cal.4th at p. 614.)

Here, Seeney was interviewed while still incarcerated himself. Only defense counsel and the defense investigator were present with Seeney during the interview. The interview took place on the eve of the first trial. Seeney admittedly loved his brother (14 RT 3729) and it must have been difficult for him to face the very real possibility that his brother could be convicted and suffer severe punishment, partly based on Seeney's testimony. This is not the type of interview that contains the requisite reliability and trustworthiness to warrant admission as a declaration against interest under Evidence Code section 1230.

Indeed, one can imagine the precedent that would have been established had the trial court admitted the transcript as a declaration

against interest. Anytime an individual has provided testimony incriminating a loved one—a very common occurrence in criminal prosecutions—the defense could simply hire a defense investigator to inform the individual that all they have to do is recant any prior incriminating testimony and: (1) that person will not have to testify against their loved one because they can simply "plead the Fifth"; and (2) it will greatly assist their loved one's chances at trial. Such an outcome cannot be envisioned by the reliability requirement of Evidence Code section 1230. As stated, the focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. (See, e.g., *People v. Tran, supra*, 215 Cal.App.4th at p. 1216.) As the trial court correctly concluded, that trustworthiness is wholly lacking as it relates to the Seeney interview transcript that Wilson sought to admit.

C. Seeney's Statements Were Not Admissible as Prior Inconsistent Statements Pursuant to Evidence Code Sections 770 and 1235

Wilson next argues that the trial court abused its discretion by not admitting the transcript from the Seeney interview as a prior inconsistent statement. (AOB 183-192.) This argument is likewise without merit.

Evidence Code section 1235, which is included in the portion of the Evidence Code entitled "Prior Statements of Witnesses," states: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." (Evid. Code, § 1235.) Evidence Code section 770 requires, among other things, that the testifying witness was examined regarding his prior inconsistent statement "as to give him an opportunity to explain or deny the statement." (Evid. Code, § 770, subd. (a).)

Here, again, the initial problem with Wilson's argument is that much of the 18-page transcript that he sought to admit was not inconsistent with, but rather supplemental to, Seeney's preliminary hearing testimony. In any event, as the trial court accurately noted, the linchpin of the prior inconsistent statements exception to the hearsay rule is that the danger of unreliability is greatly diminished because '"[t]he trier of fact has the declarant before it and can observe his manner and the nature of his testimony as he denies or tries to explain away the inconsistency.'" (17 RT 4484.) Indeed, this requirement is expressly included within the parameters of Evidence Code section 770, subdivision (a), which states that the declarant must have "have an opportunity to explain or to deny the statement." (Evid. Code, § 770, subd. (a).)

In an effort to circumvent this requirement, defense counsel argued below that the "interests of justice" required that the transcript be admitted even though the specific requirements of Evidence Code section 770 would not be satisfied. The court properly rejected this argument, concluding in its broad discretion that the transcript was generally unreliable and not admissible under Evidence Code sections 770 and 1235. (17 RT 4491.)

Indeed, Wilson impliedly concedes as much, as he does not now challenge the trial court's ruling in this regard. Rather, he argues, for the first time on appeal, that the trial court should have admitted the statement under Evidence Code section 1202. (AOB 183-192.) As explained below, Wilson's Evidence Code section 1202 argument is both forfeited and meritless.

D. Any Claim that Seeney's Statement Was Admissible Pursuant to Evidence Code Section 1202 is Forfeited and Meritless

Wilson's argument that Seeney's statement was admissible pursuant to Evidence Code section 1202 was never raised below , thus has been forfeited on appeal. (See, e.g., *People v. Saunders* (1993) 5 Cal.4th 580, 590.) An analysis under Evidence Code section 1202 is much different from an analysis under Evidence Code sections 770 and 1235, which were the code sections cited by, and relied upon by, Wilson in the trial court. Wilson attempts to circumvent this procedural bar by arguing that although he did not cite or mention Evidence Code section 1202 below, defense counsel's argument below "clearly invoked the substance of that provision." (AOB 184.) Not so. Defense counsel's argument was limited to arguing that the transcript was admissible under Evidence Code sections 770 and 1235, and that the general requirement that a declarant have an opportunity to explain or deny any inconsistency should be overcome by the "interests of justice" language contained within Evidence Code section 770. (17 RT 4484-4490.) Defense counsel never argued in any fashion that the 18-page Seeney transcript should be admitted under Evidence Code section 1202, and thus the trial court never analyzed the issue under that section. As such, Wilson has forfeited this claim for appeal. (E.g., *People v. Saunders, supra*, 5 Cal.4th at p. 590.)

In any event, Evidence Code section 1202 is inapplicable in this case. Evidence Code section 1202 states, in relevant part:

> Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct.

(Evid. Code, § 1202.)

Evidence Code section 1202 applies where a hearsay statement by a declarant who is not a witness is admitted into evidence by the prosecution. (See *People v. Corella* (2004) 122 Cal.App.4th 461, 470.) Evidence Code section 1202 does not apply to the impeachment of a witness who has previously testified. (*People v. Williams* (1976) 16 Cal.3d 663, 668, superseded by statute on other grounds as stated in *People v. Martinez* (2003) 113 Cal.App.4th 400, 408 [Evidence Code section 1202 deals with the impeachment of a declarant whose hearsay statement is in evidence as distinguished from the impeachment of a witness who has testified].)

Here, Seeney does not qualify as a hearsay declarant under Evidence Code section 1202. Rather he was an in-court witness who testified at the preliminary hearing, and no hearsay statement by him had been received in evidence as hearsay evidence through his testimony or that of another witness. For this reason, Evidence Code section 1202 is inapplicable. (E.g., *People v. Williams, supra*, 16 Cal.3d at pp. 668-669.)

E. Any Error In The Exclusion Of The Transcript Of Seeney's Interview Was Harmless

Initially, Wilson argues that the exclusion of the Seeney transcript amounted to federal constitutional error by claiming that the court violated his due process right to present a defense and to a fair trial. (AOB 192-195.) But it is well established that application of the ordinary rules of evidence, such as the exclusion of inadmissible hearsay, "does not impermissibly infringe on a defendant's right to present a defense." (*People v. Mincey* (1992) 2 Cal.4th 408, 440.) In other words, if a trial court erroneously excludes or rejects defense evidence, the error is one of state law and not one "of constitutional dimension." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) As such, Wilson's effort to raise the

purported error to the level of a federal constitutional violation is unavailing.

Rather, any error in the trial court's admission or exclusion of evidence is an error only of state law and is subject to the Watson harmless error test. (See *People v. Partida* (2005) 37 Cal.4th 428, 439, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70.) Under this test, the reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Partida, supra*, 37 Cal.4th at p. 439, citing *People v. Earp* (1999) 20 Cal.4th 826, 878, and *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Here, it is not reasonably probable that Wilson would have received a more favorable result had the trial court admitted the 18-page transcript of the Seeney interview. First, as discussed above, the Seeney interview was patently unbelievable in that it was elicited privately by defense counsel and the defense investigator without any law enforcement present, and the interview took place on the eve of the first trial while Seeney was still incarcerated himself. Furthermore, the nature of the interview is that Seeney essentially agrees with the very leading questions and assumptions suggested by defense counsel and the defense investigator. (See 1 Supp. CT 241-258.) This is not the type of evidence that would have had a devastating impact on the prosecution, as Wilson now suggests.

Further, as outlined above, the evidence against Wilson was overwhelming. Even assuming, for the mere sake of argument, that admission of the Seeney interview would have completely destroyed Seeney's credibility in the eyes of the jury, it would have done nothing to undercut the largely duplicative testimony of Phyllis Woodruff. As stated, Wilson made a number of incriminating statements to Woodruff, and like Seeney, Woodruff also observed Wilson not only with the property he took during the Richards robbery, but also with the .44 Magnum he used to

murder Henderson and Dominguez. (See 14 RT 3646-3648, 3651-3654.) And this was in addition to the plethora of additional evidence implicating Wilson in the crimes. Because there was no reasonable probability Wilson would have received a more favorable result had the trial court admitted the proffered 18-page transcript, the judgment must be affirmed. (See *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Moreover, for the same reasons discussed above, even assuming the exclusion of the transcript was of a federal constitutional magnitude, Wilson was not prejudiced even under the more rigorous Chapman beyond a reasonable doubt standard, as there is no reason to believe the jury would have reached a different verdict with the benefit of the 18-page transcript.

V. THE TRIAL COURT PROPERLY ADMITTED SEENEY'S BRIEF STATEMENT TO HENRY WOODRUFF AS EVIDENCE OF SEENEY'S THEN EXISTING MENTAL STATE UNDER EVIDENCE CODE SECTION 1250

Wilson argues that the trial court prejudicially abused its discretion by admitting a statement Seeney made to Henry Woodruff. (AOB 199-207.) Specifically, Wilson claims the statement was inadmissible hearsay and it was improper for the court to admit the statement as evidence of Seeney's then existing mental state because the statement was irrelevant and untrustworthy. (AOB 199-207.) Respondent disagrees. A chief aspect of Wilson's defense was that it was Seeney who committed the robberies and murders. Seeney's prior statement to Henry Woodruff was relevant to disassociate Seeney with the charged crimes. The brief statement was made under trustworthy circumstances and the jury was properly afforded the opportunity to determine what weight, if any, to give that statement. Accordingly, the trial court's ruling was correct.

During the second trial, Wilson raised a hearsay objection just prior to the testimony of Henry Woodruff and Phyllis Woodruff. (14 RT 3622.) Specifically, Wilson asked the court to exclude any testimony from either

of the Woodruffs regarding statements that Seeney had previously made to them. (14 RT 3622-3623.)

As to Henry Woodruff, the prosecutor indicated that he intended to elicit testimony that at Henry Woodruff's barbeque (which took place just hours before the Henderson and Dominguez murders), Seeney told Henry Woodruff that he did not want to go "down the hill" with Wilson because Seeney was on probation and he did not want to violate his probation. (14 RT 3623.)

Following discussion from both counsel, the court ruled that Seeney's statement to Henry Woodruff fit within the then existing mental state exception to the hearsay rule. (14 RT 3625.) Thus, even assuming that the proffered evidence was hearsay in that it was being offered for its truth, it was nonetheless admissible under the then existing mental state exception to the hearsay rule. (14 RT 3625.)

Shortly thereafter, Henry Woodruff testified that on February 20, 2000, he was having a barbeque at his house. (14 RT 3629.) Wilson and Seeney were both at the barbeque, among other people. (14 RT 3629-3630.) Woodruff then testified as follows:

> [Wilson] was there for a short time. He carried his self in a nice manner. He was polite. I had a few words with him. . . . [Seeney] told me that he didn't want to go down the hill with [Wilson] because [Wilson] was doing wrong, and that [Seeney] was on probation, and he would violate his probation if he went down the hill. So I told [Seeney] he could stay. So when [Wilson] came to get [Seeney], I told [Wilson] what [Seeney] had said, so [Wilson] agreed to leave [Seeney] there.

(14 RT 3630.)

Wilson now argues that the trial court prejudicially abused its discretion by admitting the above brief testimony from Henry Woodruff. This argument is without merit.

As stated, hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200, subd. (a).) Unless an exception applies, "hearsay evidence is inadmissible." (Evid. Code, § 1200, subd. (b).)

Evidence Code section 1250 [statement of declarant's then existing mental or physical state] provides:

> (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind . . . (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's then existing state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue to the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.
>
> (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

(Evid. Code, § 1250.)

Evidence Code section 1252 affords a trial court discretion to exclude an otherwise untrustworthy statement that nonetheless qualifies under the then existing mental state exception: "Evidence of a statement is inadmissible under this article if the statement was made under circumstances such as to indicate its lack of trustworthiness." (Evid. Code, § 1252.) A trial court's ruling on whether a statement is sufficiently trustworthy to be admitted under Evidence Code section 1250's mental state exception is reviewed for an abuse of discretion. (People v. Edwards (1991) 54 Cal.3d 787, 819-820.)

Initially, Seeney's statement to Henry Woodruff falls within two different categories of evidence with two different reasons for admissibility: a portion of the statement was hearsay that was admissible under Evidence Code section 1250, and a portion of the statement was nonhearsay.[8]

In the hearsay category was Seeney's direct declaration of his then existing mental state: that he did not want to go with Wilson. Although this is a statement that was offered for its truth and was otherwise hearsay, it was nonetheless admissible under the hearsay exception contained in Evidence Code section 1250. Indeed, Evidence Code section 1250 contains two distinct manners in which evidence of this nature may be admissible: to prove Seeney's then existing state of mind (Evid. Code, § 1250, subd. (a)(1)), and to prove Seeney's acts or conduct (Evid. Code, § 1250, subd. (a)(2)). Seeney's statement that he did not want to leave the barbeque with his brother was admissible under both of these theories.

Wilson argues that Seeney's then existing mental state "was not relevant to any issue in dispute." (AOB 201.) Not so. Wilson's defense at trial was one of mistaken identity. To support this line of defense, Wilson presented two related theories: (1) Richards's identification should be

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[8] In his Opening Brief, Wilson cites and discusses Evidence Code section 1251, which pertains to a declarant's existing state of mind at some point prior to the out-of-court statement. (AOB 201-202.) That section is inapplicable in the present case because Seeney's out-of-court statement to Henry Woodruff pertained to his then existing state of mind *at the time of the statement*. Specifically, as discussed above, Seeney's statement to Woodruff was that Seeney, at that time, did not want to leave the barbeque with Wilson because he felt Wilson was about to be "doing wrong." (14 RT 3630.) This is not a situation where at some point after the barbeque Seeney told Woodruff what he was previously feeling at the barbeque. As such, Evidence Code section 1250 is the applicable hearsay exception. (Evid. Code, § 1250.)

discredited; and (2) the crimes were not committed by Wilson, but by a third party, such as Seeney or one of the McKinney brothers. Wilson made repeated efforts at trial, and reiterates many of those efforts now on appeal, to implicate Seeney in the commission of the crimes. Based on this theory of defense, Seeney's mental state just prior to the commission of the Henderson and Dominguez murders was undoubtedly relevant and "an issue in the action." (Evid. Code, § 1250, subd. (a)(1).) Seeney's statements were likewise relevant to "prove or explain" his actions in not leaving the barbeque with Wilson. (Evid. Code, § 1250, subd. (a)(2).) As such, Seeney's statement that he did not want to leave with his brother was properly admitted under Evidence Code section 1250.

In the nonhearsay category was Seeney's indirect declaration of the reason that he did not want to leave with Wilson: because he believed Wilson was "doing wrong." That portion of Seeney's statement was not admissible under Evidence Code section 1250, subdivision (b), which expressly states that it does not apply to "evidence of a statement of memory or belief to prove the fact remembered or believed." (Evid. Code, § 1250, subd. (b).) But Seeney's belief that Wilson was "doing wrong" was not itself admitted for the truth, but rather was admitted to circumstantially prove Seeney's state of mind in not wanting to leave with Wilson. (See *People v. Riccardi* (2012) 54 Cal.4th 758, 822.) Again, this evidence was relevant and necessary to counter Wilson's claim that Seeney was the person who committed the charged crimes.

Wilson also argues that the court should have excluded Seeney's statement as untrustworthy under Evidence Code section 1252. (AOB 203-204.) As stated, a hearsay statement that would otherwise be admissible under Evidence Code section 1250 is inadmissible if made under circumstances that indicate the statement's lack of trustworthiness. (Evid. Code, §§ 1250, 1252.) A statement is trustworthy within the meaning of

Evidence Code section 1252 when it is """made in a natural manner, and not under circumstances of suspicion. . . ."" (*People v. Harris* (2013) 57 Cal.4th 804, 844, quoting *People v. Ervine* (2009) 47 Cal.4th 745, 778-779.)

Here, Wilson provides a number of reasons that he believes discredits Seeney's statement, such as his belief that Seeney had a motive to lie to Henry Woodruff because Seeney was dating Woodruff's daughter. (AOB 203-204.) Wilson does not provide concrete evidence to support his supposition, but rather argues that Seeney had a general motive to lie to Henry Woodruff so he could remain in his "good graces." (AOB 204.) This type of speculation does not render a statement untrustworthy under Evidence Code section 1252, but is rather appropriate argument for a jury to consider when determining the weight of the admitted evidence. (See *People v. Harris, supra*, 57 Cal.4th at p. 844 [Appellant's arguments did not go to the trustworthiness of the statements, but rather to the weight, if any, the jury ought to place on the statements].) Wilson was fully permitted to argue to the jury that it should discredit Seeney's statement to Henry Woodruff, but Wilson has not provided any basis to now establish that the statement should have been excluded outright as lacking trustworthiness under Evidence Code section 1252.

Finally, even assuming the court erred by admitting Seeney's brief statement to Henry Woodruff, any error was harmless. Initially, Wilson again attempts to raise the purported error to one of federal constitutional dimension. (AOB 204-207.) Specifically, Wilson claims that the admission of Seeney's statement to Woodruff deprived him of his due process right to a fair trial. (AOB 204-207.) But as stated above, it is well established that application of the ordinary rules of evidence, such as a court's ruling regarding the admission or exclusion of purported hearsay evidence, does not infringe upon a defendant's federal constitutional rights.

(See, e.g., *People v. Mincey, supra*, 2 Cal.4th at p. 440; *People v. Fudge, supra,* 7 Cal.4th at pp. 1102-1103.) Rather, any error in the trial court's admission or exclusion of evidence is an error only of state law and is subject to the Watson harmless error test. (See *People v. Partida, supra*, 37 Cal.4th at p. 439, citing *Estelle v. McGuire, supra*, 502 U.S. at p. 70.) Under this test, the reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Partida, supra*, 37 Cal.4th at p. 439, citing *People v. Earp, supra*, 20 Cal.4th at p. 878, and *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Here, it is not reasonably probable that Wilson would have received a more favorable result had the trial court excluded Seeney's brief statement to Henry Woodruff. First, in retrospect, Seeney's statement to Henry Woodruff provided the defense with additional ammunition to attack Seeney's credibility. That is because at the preliminary hearing, Seeney testified that Wilson never asked him to leave the barbeque with him to go commit robberies. (1 CT 119.) That testimony inferentially conflicted with Henry Woodruff's trial testimony that Wilson asked Seeney to leave with him but Seeney chose not to do so because he was worried that Wilson would be "doing wrong." In this regard, Seeney's brief statement to Henry Woodruff was not the type of evidence that would have an unfairly devastating impact on Wilson's defense. Indeed, it provided Wilson with yet additional ammunition to attack Seeney's credibility.

Second, Seeney's statement to Henry Woodruff was of little import to the trial. The fleeting statement did more to disassociate Seeney with the crimes than it did to associate Wilson with the crimes. Further, any potential for prejudice posed by the statement paled in comparison to Seeney's properly admitted testimony regarding having seen Wilson with the murder weapon and that Wilson personally admitted to Seeney that he

committed the murders. And this was supplemental to the additional overwhelming evidence implicating Wilson in the crimes, as outlined in more detail above. For these reasons, there is no reasonable probability Wilson would have received a more favorable result had the trial court excluded Seeney's statement to Henry Woodruff. As such, the judgment should be affirmed. (See *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Moreover, even assuming for the sake of argument that the denial of Wilson's motion to exclude Seeney's statement to Henry Woodruff constitutes an error of federal constitutional magnitude, for the same reasons discussed above, Wilson was not prejudiced even under the more rigorous Chapman beyond a reasonable doubt standard, as there is no reason to believe the jury would have reached a different verdict without the benefit of Seeney's statement.

VI. THE TRIAL COURT PROPERLY ADMITTED WILSON'S STATEMENTS MADE TO LAW ENFORCEMENT OFFICERS IN CALIFORNIA BECAUSE EVEN IF WILSON HAD PREVIOUSLY INVOKED HIS RIGHT TO REMAIN SILENT, HE THEREAFTER REINITIATED CONTACT WITH THE OFFICERS

Wilson argues the trial court erred by denying his motion to exclude statements he made during an interview with law enforcement officers in California. (AOB 208-237.) Specifically, Wilson claims that the entirety of the California interview should have been excluded because he had previously invoked his right to remain silent during the Ohio interview. (AOB 208-237.) This claim is without merit. As the trial court noted, even assuming Wilson invoked his right to remain silent in Ohio, he thereafter reinitiated contact with law enforcement and sought to continue his conversation with the officers. As such, the trial court correctly ruled that there was no *Miranda* violation.

A. Facts and Circumstances Surrounding The Motion to Exclude Wilson's Statements Based On A Purported *Miranda* Violation

Following Wilson's arrest in Ohio, prior to being transported back to California, Wilson was interviewed by San Bernardino County Sheriff's Detective Scott Franks and Pomona Police Department Investigator Allen Maxwell (4 RT 980-1016 [pretrial motion testimony of Detective Franks]; 4 RT 1028-1034 [pretrial motion testimony of Investigator Maxwell]; 12 CT 3361-3410 [transcript of interview].) San Bernardino County Sherriff's Sergeant Robert Dean was also present during a portion of the interview. (4 RT 985.) The interview was recorded. (4 RT 982.)

The following day Wilson was transported back to California via a San Bernardino County Sheriff's jet. (4 RT 871-872.) Wilson was accompanied by San Bernardino County Sheriff's Detective Jay Hagen, Detective Franks, Sergeant Dean, and Investigator Maxwell. (See 4 RT 871.) During the course of the flight, Wilson attempted to initiate a conversation with Detective Hagen about the case. (4 RT 872-873.) Detective Hagen informed Wilson that "it wasn't the proper place and time to talk about the case or anything involving the case and that we would sit down and talk after we got back to California." (4 RT 873.)

Once back in California, Detective Hagen arranged for an interview room so he could speak with Wilson, as Wilson had requested. (4 RT 873-874.) Detective Hagen thereafter interviewed Wilson. (4 RT 870-893 [pretrial motion testimony of Detective Hagen]; 11 CT 3267-3290; 12 CT 3291-3360 [transcript of interview].) The interview was recorded. (4 RT 874-877.)

Prior to the first trial, the defense filed a motion to exclude all of Wilson's prior statements to law enforcement—the Ohio interview, the brief discussions during the transport back to California, and the California

interview—on the grounds that his statements were all involuntary and elicited in violation of *Miranda*. (3 CT 593-613.) The prosecution filed a written opposition. (3 CT 825-852.)

During the course of accepting evidence regarding various pretrial motions,[9] the court heard testimony from multiple witnesses relating to the issue of Wilson's prior statements to law enforcement. Specifically, the court heard testimony from Detective Hagen (4 RT 870-893), Detective Franks (4 RT 980-1016), and Investigator Maxwell (4 RT 1028-1034). The court also reviewed the transcripts and recordings of the interviews. (4 RT 1070.)

As for the Ohio interview with Detective Franks, the court noted that law enforcement initially provided Wilson with a *Miranda* advisement, and Wilson waived his *Miranda* rights and agreed to talk with the officers. (4 RT 1070.) Subsequently, during the course of that interview, Wilson stated: "I can't answer no more questions then, man." (4 RT 1071.) The court noted that, regardless of the equivocal nature of Wilson's statement, Detective Franks testified that he believed Wilson was, at that time, invoking his right to remain silent. (4 RT 1071.) For that reason, the court ruled that any of Wilson's subsequent statements during that interview would not be admissible. (4 RT 1071-1072.)

The court next noted that, during Wilson's transport back to California, Wilson made efforts to reinitiate contact with law enforcement by attempting to initiate a conversation with Detective Hagen. (4 RT 1072.) Then, during the subsequent interview that took place with

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[9] Due to the overlap of facts, the trial court conducted a joint evidentiary hearing regarding the defense motions pertaining to the exclusion of Wilson's statements, the exclusion of Seeney's statements, and the exclusion of Richards's identification. (See 4 RT 1059.)

Detective Hagen once back in California, Wilson reaffirmed his desire to reinitiate contact with law enforcement. (4 RT 1073-1074.)

During the California interview, law enforcement officers were never coercive and never made any promises or implications of leniency. (4 RT 1073-1074.) Further, although on multiple instances during that interview Wilson mentioned his right to remain silent and his right to an attorney, those statement were made in passing and in no way demonstrated an invocation of those rights. (4 RT 1075-1079.) Rather, Wilson demonstrated that by all accounts he sought to continue the interview in an effort to obtain as much information as he could from law enforcement. (4 RT 1075-1079.) The court went through each instance when Wilson mentioned his rights and noted how in each instance it was Wilson, not Detective Hagen, who continued the interview by asking additional questions. (4 RT 1075-1079.) The court ultimately ruled that the entirety of the California interview would be admissible. (4 RT 1079.)

Subsequently, during the prosecution's case-in-chief at the second trial, defense counsel stated that after reviewing the transcript of the California interview, he realized that he previously "overlooked" what he felt was a pertinent issue. (16 RT 4214-4216.) Specifically, defense counsel noted that during the California interview, there was a moment when Wilson and Detective Hagen took a break from the interview to smoke a cigarette. (16 RT 4214-4216.) Due to this, defense counsel sought to revisit the issue. (16 RT 4217-4218.)

The court agreed to hold an additional evidentiary hearing to determine the nature of the cigarette break, and what, if any, conversations may have taken place in that break during the interview. (See 16 RT 4236-4238.)

Detective Hagen testified that near the time when "the interview appeared to be over" Wilson asked him for a cigarette. (16 RT 4239.)

Detective Hagen gave Wilson a cigarette. (16 RT 4239.) The two of them, in addition to Detective Rodriguez, smoked cigarettes on the patio outside the rear entryway of the police station. (16 RT 4239.) During that time, Wilson continued asking questions about the case and attempted to elicit information from the officers. (16 RT 4240-4241.) The entire cigarette break lasted about seven or eight minutes. (16 RT 4240.) At the end of the cigarette break, Wilson asked to go back and continue the interview. (16 RT 4241.) Detective Hagen and Wilson returned to the interview room and continued their discussion. (16 RT 4241-4242.)

Detective Rodriguez testified that he was present during the cigarette break. (16 RT 4258.) Detective Rodriguez stated that during the cigarette break Wilson initiated additional discussion and that it was Wilson who "maintained the continuation of the conversation." (16 RT 4258.) Wilson was very talkative and, at the end of the cigarette break, he indicated he was willing to continue talking in the interview room. (16 RT 4258-4259.)

Following argument from both attorneys, the court maintained its prior ruling regarding the admission of Wilson's prior statements to law enforcement. (16 RT 4279-4281.) The court determined that Detective Hagen and Detective Rodriguez were both credible. (16 RT 4281.) As for the cigarette break, the court found that even if Wilson had invoked his right to remain silent just prior to the cigarette break, he reinitiated the interview during and after the break. (16 RT 4280-4281.) As such, it was proper for the officers to return to the interview room and continue the conversation after the cigarette break was finished. (16 RT 4281.)

A recording of the California interview was played for the jury. (16 RT 4318-4320.)

B. The Trial Court Properly Admitted Wilson's Statements

Even assuming Wilson unambiguously invoked his right to remain silent during the Ohio interview, he thereafter reinitiated contact with law enforcement when he sought to continue his conversation with the officers during the flight to California. In fact, as discussed in more detail below, the entire California interview is permeated with evidence that Wilson sought to continue the conversation and learn what evidence the officers had against him. The trial court therefore properly admitted Wilson's statements from that interview.

A suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning; the police must explain this right to him before questioning begins. (*Miranda v. Arizona* (1966) 384 U.S. 436, 469-473.) If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to conduct questioning. (*North Carolina v. Butler* (1979) 441 U.S. 369, 372-376.) *Miranda* dictates that, upon a suspect's subsequent invocation of his or her right to remain silent, the interrogation must cease. (*Miranda v. Arizona, supra*, 384 U.S. at pp. 473-474; *People v. Martinez* (2010) 47 Cal.4th 911, 947.) However, interrogating officers need only cease the interrogation when the suspect unambiguously invokes his right to remain silent. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 381.) If an ambiguous statement is made, the interrogators "are permitted to pose a limited number of followup questions to render more apparent the true intent of the defendant." (*People v. Williams* (2010) 49 Cal.4th 405, 429.) Although it is often "good police practice" for officers to make clarifying inquiries when the suspect makes an ambiguous or equivocal statement, there is no duty to do so. (*People v. Nelson* (2012) 53 Cal.4th 367, 377; *Davis v. United States* (1994) 512 U.S. 452, 461.) The test is

objective, not subjective: How would a reasonable officer understand defendant's statement in the circumstances presented? (*People v. Nelson, supra*, 53 Cal.4th at p. 384.)

Remarks that facially suggest a desire to halt police questioning do not, in fact, invoke the right to silence if they are reasonably viewed as unclear or equivocal. There is no specific language required or hard line demarcating what is considered an equivocal invocation. (See, e.g., *People v. Stitely* (2005) 35 Cal.4th 514, 534 [defendant's statement "I think it's about time for me to stop talking" reasonably interpreted as only an expression of frustration]; *People v. Jennings* (1988) 46 Cal.3d 963, 977-978, fn. omitted [defendant's remarks, "You're scaring the living shit out of me. I'm not going to talk," and "I'm not saying shit to you no more, man. . . . That's it. I shut up" expressed "only momentary frustration and animosity" under the circumstances]; *People v. Farnam* (2002) 28 Cal.4th 107, 181 [ambiguity present in "'I'm not going to answer any of your fucking questions,'" and "'Fuck this, I'm not staying here anymore'"]; *People v. Martinez, supra*, 47 Cal.4th at pp. 949-950 [the defendant's remark, "That's all I can tell you," was reasonably viewed as meaning only "That's my story, and I'll stick with it"]; *People v. Vance* (2010) 188 Cal.App.4th 1182, 1211 [ambiguous invocation where suspect stated, "'I don't have a side of the story' and 'I don't want to talk about it'"].)

If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "'if they guess wrong,'" and place a significant burden on society's interest in prosecuting criminal activity. (*Berghuis v. Thompkins, supra*, 560 U.S. at p. 382.) If a suspect has invoked his or her Fifth Amendment right, further questioning is forbidden unless the suspect personally initiates further communications, exchanges, or conversations. (*People v. Gamache*

(2010) 48 Cal.4th 347, 384.) The question whether the suspect or the police reinitiated communication after the suspect's invocation of Fifth Amendment rights is predominately factual and reviewed under the substantial evidence standard. (*Id.* at p. 385.)

In considering a claim on appeal that statements were admitted in violation of a suspect's *Miranda* rights, the appellate court independently reviews the trial court's legal determination and defers to its factual findings if substantial evidence supports them. (*People v. Williams, supra*, 49 Cal.4th at p. 425.) Thus, a reviewing court must "accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence." (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.) In addition, a reviewing court should "'give great weight to the considered conclusions'" of the trial court. (*People v. Jennings, supra,* 46 Cal.3d at p. 979; see *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1239.)

Here, Wilson makes two related claims: (1) that the entirety of the California interview should have been excluded due to his prior invocation during the Ohio interview; and (2) the portion of the California interview after the cigarette break should have been excluded because Wilson's statements just prior to the break constituted an invocation. (AOB 227-233.) But as the trial court correctly concluded, even assuming Wilson's comments amounted to an unambiguous invocation, it was Wilson, not the law enforcement officers, who continually persisted in continuing the conversation.

As for Wilson's claim that the entirety of the California interview should have been excluded due to his prior invocation during the Ohio interview, as stated, the trial court found that Wilson's comments during the Ohio interview amounted to an invocation of his right to remain silent. (4 RT 1071.) Specifically, the court noted that during the Ohio interview,

Wilson stated: "I can't answer no more questions then, man." (4 RT 1071.) The court explained that regardless of the equivocal nature of Wilson's statement, Detective Franks testified that he subjectively believed that Wilson was, at that time, invoking his right to remain silent. (4 RT 1071.) The court therefore ruled that the remainder of the Ohio interview was not admissible. (4 RT 1071-1072.)

Wilson now claims that the entirety of the subsequent California interview should have been excluded due to his prior invocation during the Ohio interview. (AOB 227-231.) But as outlined above, Detective Hagen testified at the evidentiary hearing that during the flight back to California, Wilson made efforts to reinitiate the conversation. (4 RT 872-873.) Specifically, Detective Hagen stated that during the flight back to California, the plane stopped in Albuquerque for fuel. (4 RT 872.) During that fuel stop, Wilson approached Detective Hagen and expressed concern for his family and wanted to know if he could have a confidential conversation with him. (4 RT 872-873.) Detective Hagen informed Wilson that they could "sit down and talk" once they got back to California. (4 RT 873.) Wilson agreed. (4 RT 873.) Then, at the outset of the recorded conversation in California, Detective Hagen asked Wilson about when Wilson asked Detective Hagen to talk in Albuquerque. (11 CT 3268.) Wilson confirmed that in Albuquerque he asked Detective Hagen whether he could keep his statements confidential if he decided to "say something." (11 CT 3268.) Thereafter the two had the recorded conversation with which Wilson now raises issue. (11 CT 3267-3290; 12 CT 3291-3360.)

In reaching its ruling, the court noted that the California interview took place because Wilson initiated it. (4 RT 1073-1079.) Thus, even assuming Wilson previously invoked his right to remain silent during the Ohio interview, he reinitiated contact with law enforcement and therefore

that interview did not run afoul of *Miranda*. (4 RT 1073-1079.) The court was correct. Once a suspect invokes his or her *Miranda* rights, further questioning is permitted when the suspect "initiates further communication, exchanges, or conversations with the authorities." (*People v. Gamache* (2010) 48 Cal.4th 347, 384.) "'An accused "initiates"' further communication, exchanges, or conversations of the requisite nature 'when he speaks words or engages in conduct that can be "fairly said to represent a desire" on his part "to open up a more generalized discussion relating directly or indirectly to the investigation."'" (*People v. San Nic*olas (2004) 34 Cal.4th 614, 642; accord *People v. Waidla* (2000) 22 Cal.4th 690, 727.)

As the court correctly explained, it was Wilson, not law enforcement officers, who initiated the California interview. (4 RT 1072-1074.) This was established by the testimony of Detective Hagen, who stated that Wilson approached him during the fuel stop and attempted to initiate a conversation. (4 RT 872-873.) Detective Hagen informed Wilson that it was not the proper time and place to have a discussion, but that they could sit down and talk once they were back in California. (4 RT 873.) Then, once back in California, Detective Hagen arranged for an interview room and had a discussion with Wilson, as Wilson had requested. (4 RT 874.) At the outset of that interview, Wilson reaffirmed that he initiated the contact. (See 11 CT 3268.) In fact, as the trial court stated, the entirety of the interview is replete with Wilson's statements indicating that he was willing to keep talking with the officers in an effort to learn about the evidence they had against him. (4 RT 1077.) By all accounts, Wilson's actions demonstrated a desire on his part to open up a discussion relating to the investigation. As such, the trial court properly denied Wilson's motion to exclude the entirety of the interview. (*People v. San Nicolas, supra*, 34 Cal.4th at p. 642; *People v. Waidla, supra*, 22 Cal.4th at p. 727.)

Wilson next claims that even if he reinitiated the conversation with law enforcement during the fuel stop, the court should have nonetheless suppressed the portion of the California interview after the cigarette break because Wilson's statements just before the break constituted an invocation. (AOB 231-233.) The colloquy between Wilson and Detective Hagen just before the cigarette break is as follows:

> Wilson: There is no explanation. Whether or not a man use it if I shoot this man right now I don't give a fuck what my explanation is my ass is grass.
>
> Detective: Okay.
>
> Detective: Why don't we get back to that conversation we're having out there on tarmac out there?
>
> Wilson: I'm not discussing it any no further until I talk to the DA, man.
>
> Detective: The DA ain't going to talk to you.
>
> Wilson: Like – fuck he ain't.
>
> Detective: He ain't going to talk to you.
>
> Wilson: Well, fuck it then.
>
> Detective: Okay. All right. That's no problem. That's no problem.
>
> Wilson: I ain't going to discuss it further. I mean, I'm was trying to be cooperative with you.
>
> Detective: I tell you what, your partner is going to be jail within the next few days and when he tells us everything that he wants to tell us and lay it all on you because the first guy to the table usually gets the best consideration when it comes to the DA. After we get him, what you got to say really doesn't make any difference because you got your opportunity to tell us right now. Okay? The reason you're not telling us is because you're in over your head and you're not playing a game with a couple fucking little traffic cops or a couple of little fuck guys –

Wilson: I'm sorry to say – I'm not trying to put you down, man, but it seems I am.

Detective: Okay. Well –

Wilson: The same little shit you're playing with me is the same shit I heard ten years ago when I first did that other shit.

Detective: All right. Killed people ten years ago, are you?

Wilson: Huh?

Detective: Are you killing people –

Wilson: I just got out of prison for killing somebody, man.

Detective: You killing multiple people like you did the other night?

Wilson: so now – oh, now I did it.

Detective: No doubt you did it.

Wilson: First I'm accused.

Detective: No, dude –

Wilson: If you have no doubt, we don't need to talk no more, sir.

Detective: You're right. You're right.

Wilson: Right?

Detective: We don't.

Wilson: So just put me back in my room and –

Detective: Okay. Sounds good. Sounds good.

Wilson: Sorry I couldn't work out no better, chief.

Detective: You say you wanted to cooperate. I know there's somebody else involved.

Wilson: Am I going to be able to get a cigarette from you?

Detective: Yeah. You thought I was going to say no, huh? You don't think I'll give you one? I told you whether you talk to me or not that has nothing to do with whether I give you a cigarette. Okay.

Wilson: Right now?

Detective: Yeah.

(12 CT 3291-3293.)

Initially, it is questionable whether Wilson ever seriously invoked his right to remain silent during the above colloquy, or whether he was simply repeating his pattern of mentioning his rights while continuing to explore what evidence law enforcement had against him. As the trial court noted: "There were several times, as pointed out by [defense counsel] in the first motion, that [Wilson] seemingly invoked his Fifth Amendment right, but then would keep on talking, and by talking keep on asking questions in large part of the detectives, questions about what they know, what evidence they had against him." (16 RT 4280.) As stated, interrogating officers need only cease the interrogation when the suspect unambiguously invokes his right to remain silent. (*Berghuis v. Thompkins, supra*, 560 U.S. at p. 381.) The test is objective, not subjective: How would a reasonable officer understand defendant's statement in the circumstances presented? (*People v. Nelson, supra*, 53 Cal.4th at p. 384.)

Here, based on Wilson's pattern of statements during the interview, a reasonable police officer under these circumstances could interpret Wilson's comments not as a clear and unambiguous effort to invoke his rights, but rather as a continued effort to explore what evidence law enforcement officers had against him. But in any event, Detective Hagen erred on the side of caution and decided to terminate the interview. (12 CT 3293.) It was at that time that Wilson requested a cigarette. (12 CT 3293.)

Then, as Detective Hagen and Detective Rodriguez testified, during the cigarette break Wilson reinitiated the conversation when he continued to ask questions about the case and attempted to elicit additional information from the officers. (16 RT 4239-4241, 4258-4259.) At the end of the cigarette break, it was Wilson who requested that they return to the interview room and continue their discussion. (16 RT 4241-4242, 4258-4259.)

As the trial court explained, this was consistent with Wilson's pattern of conduct during the entire interview:

> I think detective Hagen may have believed this time that [Wilson] was invoking his Fifth Amendment privilege, and hence he terminated the interview, but apparently as before the defendant continued his interrogation of the detectives outside of the interview room, and continued to make his statements about his concern for his family and wanting to know what evidence they had against him. So it seemed like nothing really changed from all of the other times that he had seemingly not wanted to talk, but then kept on with the interview.

(16 RT 4280.) The trial court went on to explain that it had "no reason to disbelieve Detective Hagen or Detective Rodriguez" and that based on their testimony, in addition to "the totality of the circumstances leading up to that point," Wilson did in fact reinitiate the interview during the cigarette break, "and therefore the continuation was proper." (16 RT 4281.)

The trial court was correct. As stated, once a suspect invokes his or her *Miranda* rights, further questioning is permitted when the suspect "initiates further communication, exchanges, or conversations with the authorities." (*People v. Gamache, supra*, 48 Cal.4th at p. 384.) That is precisely what Wilson did during the cigarette break. The trial court's conclusion in that regard was solidified not only by Wilson's pattern of conduct during the entirety of the interview, but also by the testimony of Detective Hagen and Detective Rodriguez, both of whom the trial court

found credible. As stated, a reviewing court must "accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence" (*People v. Cunningham, supra*, 25 Cal.4th at p. 992), and should also "'give great weight to the considered conclusions'" of the trial court (*People v. Jennings, supra*, 46 Cal.3d at p. 979). Thus, even assuming, for the sake of argument, that Wilson invoked his right to remain silent just prior to the cigarette break, he effectively undid that invocation by reinitiating the conversation. (*People v. Gamache, supra*, 48 Cal.4th at p. 384.) As such, the trial court correctly ruled that continuation of the interview was proper.

C. Even Assuming Error, Wilson Was Not Prejudiced

Admission of statements obtained in violation of *Miranda* is subject to harmless error analysis under the Chapman beyond a reasonable doubt harmless error standard. (*People v. Sims* (1993) 5 Cal.4th 405, 447-448.) Here, any error in admitting Wilson's statements from the interrogation was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24; During the interrogation, Wilson repeatedly denied any and all responsibility for the charged crimes. Accordingly, at most, Wilson's statements during the interrogation amounted to minor circumstantial evidence supporting the much more damaging evidence that had already been properly admitted. This additional evidence—which included Wilson's admissions to the crimes to several people and his possession of the murder weapon—is outlined in greater detail above.

As Wilson discusses in his opening brief, the prosecutor's comments regarding Wilson's statements primarily amounted to the prosecutor's interpretation of Wilson's manner during the interview, rather than any overly damning statements implicating Wilson in the crimes. (AOB 223-226, citing 18 RT 4941-4945.) That is because no such statements were elicited during the interview. Stated another way, Wilson's interview was

far from the smoking gun that Wilson now paints it, and even had the trial court excluded this evidence, the result would have been identical. Because any error in the admission of Wilson's statements was harmless beyond a reasonable doubt, the judgment must be affirmed. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

VII. THE TRIAL COURT PROPERLY DENIED WILSON'S REQUEST FOR A NEW TRIAL BECAUSE WILSON'S CLAIM HIS COUNSEL PREVENTED HIM FROM TESTIFYING WAS UNTIMELY AND UNTRUE

Wilson claims the trial court prejudicially abused its discretion when it denied his motion for a new trial raised on the grounds that his trial counsel prevented his from testifying on his own behalf. (AOB 238-244.) This claim is without merit. Initially, Wilson's new trial motion based on his trial counsel purportedly preventing him from testifying in the guilt phase was untimely made. Indeed, it was mentioned for the first time on the date scheduled for sentencing, well after the jury reached its guilty verdict and that verdict had been entered. In addition, as defense trial counsel testified under oath at the hearing on the motion, he never in any way prevented Wilson from testifying. The court found this testimony credible and appropriately denied Wilson's motion.

A. Facts and Circumstances Surrounding Wilson's New Trial Motion Claiming He Was Prevented from Testifying in His Own Behalf During the Guilt Phase

After both the guilt and penalty phase verdicts had been returned, and on the day scheduled for sentencing, defense counsel informed the court that when reviewing the probation report he noticed that Wilson had informed the probation officer that during trial he requested to testify "but his attorney advised against it and refused to allow it." (22 RT 5999.) Defense counsel sought to continue the probation hearing and have the court appoint alternate counsel to explore the issue. (22 RT 5999-6000.)

The court agreed to continue the sentencing hearing and appointed alternate counsel to explore whether Wilson was deprived of his constitutional right to testify on his own behalf. (16 RT 6003-6004.) The court thereafter appointed defense counsel Grover Porter to represent Wilson on the issue. (16 RT 6008-6009.)

The newly appointed defense counsel filed a motion for new trial arguing that Wilson was deprived of his constitutional right to testify in his own defense. (11 CT 3150-3158.) In support of the motion, the defense submitted a declaration from Wilson wherein Wilson claimed that he informed his trial counsel that he wished to testify and his trial counsel "told me that I couldn't testify and walked away, not allowing any further discussion." (11 CT 3157.) The prosecution filed a written opposition arguing that Wilson's claim was untimely and lacked credibility. (11 CT 3159-3165.)

The court conducted a hearing regarding the motion. (22 RT 6021-6022.) At the hearing, defense counsel initially submitted on his motion and Wilson's declaration. (22 RT 6035.) The prosecution called Wilson's trial counsel, Joseph Canty, to testify regarding the issue. (22 RT 6036.) Canty testified that he had been a practicing criminal law attorney since 1967 and he was aware of a criminal defendant's absolute constitutional right to testify on his or her own behalf. (22 RT 6036.) Canty stated that although he advised Wilson against testifying, he never in any way prevented Wilson from testifying. (22 RT 6036-6037.) Specifically, Canty was asked: "Did you ever deny Mr. Wilson his right to testify?" (22 RT 6036.) Canty responded: "I did not." (22 RT 6036.) Canty was also asked: "Did you ever tell [Wilson] in emphatic, conclusive terms that he was not going to testify in this case?" (22 RT 6036.) Canty responded: "No." (22 RT 6036.) Canty testified that although he had strategic, tactical

reasons for suggesting that Wilson not testify, he never prevented him from testifying. (22 RT 6036-6037.)

Following Canty's testimony, and brief additional argument from both counsel, the court denied the motion for new trial. (22 RT 6038-6041.) In so doing, the court found Canty credible and believed his testimony that he did not prevent Wilson from testifying. (22 RT 6039-6040.) The court noted the "obvious" reasons supporting Canty's decision to discourage Wilson from testifying, such as "the prior criminal history of Mr. Wilson that would have come before the jury." (22 RT 6039.) The court did not believe Wilson's claim that Canty prevented or prohibited him from testifying. (22 RT 6040.)

The court also noted that Wilson's motion was untimely. (22 RT 6039-6040.) Specifically, the court cited prior authority holding that a criminal defendant who wishes to invoke his or her right to testify must make a proper and timely demand. (22 RT 6039-6040.) The court went on to explain that Wilson had "never been shy" about personally addressing the court and letting his requests be known. (22 RT 6040.) For the foregoing reasons, the court denied the motion. (22 RT 6040-6041.)

B. The Trial Court Correctly Denied Wilson's Motion For A New Trial

Initially, Wilson's claim below that his trial counsel prevented him from testifying was not timely raised. While it is true that a criminal defendant has a fundamental constitutional right to testify on his or her own behalf, that right must be "timely" asserted. (*People v. Robles* (1970) 2 Cal.3d 205, 215.) As the Court of Appeal stated in a nearly identical situation:

> Defendant did not apprise the court he desired to testify at any time during the trial proceeding when the right could have been accorded him, instead he waited until an adverse verdict was rendered against him before advising the court

> he had really wanted to take the stand after all, then demanded a new trial—another chance before a new jury—on the ground his counsel had "deprived" him of his right. The obvious unreasonableness of such an approach doubtless led to the established rule that a defendant who desires to take the stand contrary to the advice of his counsel must make a proper and timely demand.

(*People v. Guillen* (1974) 37 Cal.App.3d 976, 984-985, citing *People v. Robles, supra*, 2 Cal.3d at p. 215.)

Here, as the prosecutor and the trial court noted, although Wilson had "never been shy about speaking or letting his requests be known," it was not until after the jury had reached an adverse verdict and the date had come for sentencing that Wilson decided to speak up. (22 RT 6040.)[10] Indeed, what Wilson essentially requests is that all criminal defendants be afforded the ultimate trump card any time the jury reaches a verdict with which he or she disagrees. As this Court has previously explained, a criminal defendant making a claim such as the one Wilson makes in the present case invites the Court "to adopt a rule requiring that trial courts obtain an affirmative waiver on the record whenever a defendant fails to testify at trial, and reversing any conviction obtained in the absence of such a waiver." (*People v. Alcala* (1992) 4 Cal.4th 742, 805.) This Court has repeatedly rejected such a rule. (*Ibid.*, citing *People v. Hendricks* (1987) 43 Cal.3d 584, 592-594, *People v. Murphy* (1972) 8 Cal.3d 349, 366-367, and *People v. Cox* (1991) 53 Cal.3d 618, 671.)

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[10] The record is replete with examples of Wilson personally addressing the court. One contextually appropriate example occurred prior to trial when Wilson demanded his right to a speedy trial and objected to his defense counsel's request for a continuance. (2 RT 440-442.) During his exchange with the court, Wilson quoted the Sixth Amendment in support of his position and argued that defense counsel did not have the ability to diminish his constitutional rights. (2 RT 441-442.)

As this Court has further explained, a trial judge "may safely assume" that a represented criminal defendant who does not testify "is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel's trial strategy." (*People v. Alcala, supra*, 4 Cal.4th at p. 805.) Otherwise, "the judge would have to conduct a law seminar prior to every criminal trial." (*Ibid.*) For these reasons this Court has held:

> When the record fails to disclose a timely and adequate demand to testify, 'a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.'

(*Id.* at pp. 805-806, citing *People v. Hayes* (1991) 229 Cal.App.3d 1226, 1231-1232, and *People v. Guillen, supra*, 37 Cal.App.3d at pp. 984-985.) Because Wilson failed to make such a "timely and adequate" request to testify, he has forfeited his claim. (*People v. Alcala, supra*, 4 Cal.4th at pp. 805-806.)

In any event, the trial court correctly concluded that Wilson's claim was not believable. On appeal, a trial court's ruling on a motion for new trial is reviewed under the deferential abuse of discretion standard. (E.g., *People v. Homick* (2012) 55 Cal.4th 816, 894, citing *People v. Hoyos* (2007) 41 Cal.4th 872, 917, fn. 27.) As such, a trial court's ruling denying a defendant's motion for new trial will not be disturbed unless the defendant establishes a "manifest and unmistakable abuse of discretion." (*People v. Homick, supra*, 55 Cal.4th at p. 894.) Wilson has failed to make such a showing. Indeed, other than Wilson's self-serving declaration, there was no indication whatsoever that Wilson's trial counsel prevented him from testifying.[11] In addition, Wilson's trial counsel testified under oath

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[11] Wilson acknowledges there is no obligation for a trial court to inform a defendant of his or her right to testify on their own behalf, nor any (continued...)

that although he advised Wilson against taking the stand for tactical reasons, he never prevented Wilson from testifying. Based on this, in addition to Wilson's history of making his wishes known during the proceedings, the trial court acted well within the bounds of reason when it found that Wilson's claim lacked credibility and therefore denied the motion. Because there was no abuse of discretion, the trial court's denial of the new trial motion should be upheld. (*People v. Homick, supra*, 55 Cal.4th at p. 894.)

VIII. THE TRIAL COURT PROPERLY FOUND THAT DEFENSE COUNSEL ESTABLISHED GOOD CAUSE TO CONTINUE THE TRIAL DATE OVER WILSON'S OBJECTION

Wilson claims the trial court violated his statutory and constitutional speedy trial rights when it granted defense counsel's motion for a continuance over Wilson's objection. (AOB 245-256.) To the contrary, the trial court properly exercised its discretion in granting Wilson's counsel an adequate amount of time to complete trial preparation after Wilson changed

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(...continued)
duty to take a waiver of that right unless a conflict is brought to the court's attention. (AOB 240, citing *People v. Enraca* (2012) 53 Cal.4th 735, 762.) Nevertheless, Wilson argues that the trial court erred in failing to determine whether he was in fact aware of his right to testify in the guilt phase. Specifically, Wilson claims the court should have made such a determination before deciding whether Wilson was deprived of that right since Wilson claimed in his declaration that he was not aware of his right to testify in his own defense until after he was convicted in the guilt phase. (AOB 241-242.) Wilson's argument ignores the fact the trial court did not find Wilson's self-serving declaration credible. (22 RT 6040 [court states that it "just do[es] not believe" the representation set forth in Wilson's declaration that Canty prohibited him from testifying].) Accordingly, it was not necessary for the trial court to separately and expressly determine whether Wilson was subjectively aware of his right to testify before denying his new trial motion.

his mind and insisted on proceeding to trial regardless of whether his counsel had sufficient time to be properly prepared.

A. Facts and Circumstances Regarding Counsel's Continuance Request

On November 8, 2001, defense counsel filed a motion for a continuance of the trial date scheduled for December 3, 2001. (2 CT 492-493.) Defense counsel sought to continue the trial three months to March 4, 2002. (2 CT 492-493.) In support of his motion, defense counsel declared that he was not prepared to proceed to trial on the scheduled date, and that additional preparatory steps were necessary prior to trial. (2 CT 492-493.) Defense counsel explained that he was currently assigned two other capital cases, one of which required counsel's attention during a lengthy jury trial conducted earlier that year, and one of which was older than the Wilson case and had an upcoming trial date. (2 CT 492-493.) Defense counsel stated he had previously prioritized the other case over Wilson's because it was older and therefore he anticipated that it would proceed to trial earlier. (2 CT 493.) But Wilson had just recently decided that he no longer was willing to waive time, after which defense counsel shifted his focus to the Wilson case, and anticipated that the remaining preparation for the Wilson case would take an additional three months beyond the then currently scheduled trial date. (2 CT 492-493.)

The court conducted a hearing on the motion. (2 RT 436.) At the hearing, defense counsel explained generally that there were "a number of things left to do in terms of investigation, preparation, motions that have to be prepared and heard, which I feel cannot be completed within the timeframe that Mr. Wilson is seeking to have his case tried." (2 RT 437.) Defense counsel offered to explain in camera the specific additional preparatory steps he sought to complete prior to trial. (2 RT 437.) The

prosecution did not oppose the motion to continue, and agreed to defense counsel's requested date in early March. (2 RT 438.)

The court believed that defense counsel had a reasonable basis for not completing all necessary trial preparation up to that point because of his involvement with his other capital cases. (2 RT 438-439.) Given Wilson's newfound desire to invoke his speedy trial rights and proceed to trial as quickly as possible, defense counsel indicated that he would turn his full attention and effort to Wilson's case. (2 RT 439.) The court felt that defense counsel should be afforded a reasonable amount of time to complete his trial preparation. (2 RT 439.) The court therefore found that good cause existed and granted defense counsel's request to continue the trial date three months. (2 RT 439.)

The court allowed Wilson to put his concerns on the record. (2 RT 441.) During his statement, Wilson mentioned his right to a speedy trial and quoted the Sixth Amendment. (2 RT 441-442.) Wilson specifically requested that defense counsel's "request for additional time be denied." (2 RT 442.) Wilson never requested the matter be dismissed. (2 RT 441-442.)

The court explained that it needed to give defense counsel adequate time to prepare for trial and that it would be in Wilson's best interest if defense counsel had an additional three months to prepare for trial. (2 RT 443.) The court maintained its ruling to grant defense counsel's request to continue the trial date to March 4, 2002. (2 RT 443-445.) This led Wilson to request a "Marsden hearing." (2 RT 443.)[12]

Motions for the trial began as scheduled on March 4, 2002. (2 RT 483.)

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[12] *People v. Marsden* (1970) 2 Cal.3d 118.

B. The Trial Court Properly Granted Defense Counsel's Request For A Continuance Over Wilson's Objection

Wilson claims the trial court should have dismissed his case under Penal Code section 1382. (AOB 247-252.) Penal Code section 1382 states, in relevant part:

> (a) The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases: [¶]...[¶] (2) In a felony case, when a defendant is not brought to trial within 60 days of the defendant's arraignment on an ... information,.... However, an action shall not be dismissed under this paragraph if either of the following circumstances exists: [¶] (A) The defendant enters a general waiver of the 60-day trial requirement. A general waiver of the 60-day trial requirement entitles the superior court to set or continue a trial date without the sanction of dismissal should the case fail to proceed on the date set for trial. If the defendant after proper notice to all parties, later withdraws, in open court, his or her waiver in the superior court, the defendant shall be brought to trial within 60 days of the date of that withdrawal. Upon the withdrawal of a general time waiver in open court, a trial date shall be set and all parties shall be properly notified of that date. If a general time waiver is not expressly entered, subparagraph (B) shall apply. [¶] (B) The defendant requests or consents to the setting of a trial date beyond the 60-day period. In the absence of an express general time waiver from the defendant, or upon the withdrawal of a general time waiver, the court shall set a trial date. Whenever a case is set for trial beyond the 60-day period by request or consent, expressed or implied, of the defendant without a general waiver, the defendant shall be brought to trial on the date set for trial or within 10 days thereafter."

The 10 days is "10 days subsequent to the last date to which the defendant consented." (*Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960, 975.) The trial court's denial of a motion to dismiss on statutory grounds is reviewed for an abuse of discretion. (*People v. Shane* (2004) 115 Cal.App.4th 196, 200.)

Here, initially, Wilson never requested the trial court dismiss his case. (See 2 RT 441-442.) Rather, as stated, Wilson specifically requested only that defense counsel's "request for additional time be denied." (2 RT 442.) Indeed, Wilson made it very clear that he was not willing to waive additional time and that he sought to proceed to trial on the then scheduled date in December 2001. (2 RT 441-442.) Based on this, Wilson cannot now claim, for the first time on appeal, that the trial court somehow abused its discretion by not dismissing the matter on its own motion. (See, e.g., *People v. Wilson* (1963) 60 Cal.2d 139, 146-148 [a defendant's failure to bring a motion to dismiss forfeits any claim he may have otherwise had under Penal Code section 1382]; accord, *People v. Wright* (1990) 52 Cal.3d 367, 389.) Indeed, as this Court explained in Wilson, it is not enough for a criminal defendant to simply object to the date; he or she must also demand a motion to dismiss. (*People v. Wilson, supra*, 60 Cal.2d at p. 147; see *Castaneda v. Municipal Court* (1972) 25 Cal.App.3d 588, 593-594.)

In any event, even assuming Wilson's mention of the Sixth Amendment and his speedy trial rights is construed as a motion to dismiss, the trial court still properly denied any such motion because defense counsel's motion to continue was supported by good cause. "What constitutes good cause for the delay of a criminal trial is a matter that lies within the discretion of the trial court." (*People v. Johnson* (1980) 26 Cal.3d 557, 570.) The relevant factors to determine good cause under Penal Code section 1382 are: (1) The nature and strength of the justification for the delay; (2) The duration of the delay; and (3) The prejudice to either the defendant or the prosecution that is likely to result from the delay. (*People v. Sutton* (2010) 48 Cal.4th 533, 546; *People v. Hajjaj* (2010) 50 Cal.4th 1184, 1196-1197.)

Past decisions further establish that in making its good-cause determination, a trial court must consider all of the relevant circumstances

of the particular case, "applying principles of common sense to the totality of circumstances. . . ." (*Stroud v. Superior Court* (2000) 23 Cal.4th 952, 969; see, e.g., *Jensen v. Superior Court* (2008) 160 Cal.App.4th 266, 270-275.) A trial court "has broad discretion to determine whether good cause exists to grant a continuance of the trial." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) In reviewing a trial court's good-cause determination, an appellate court applies an "abuse of discretion" standard. (*Ibid.*; see *People v. Shane* (2004) 115 Cal.App.4th 196, 200-203; *Hollis v. Superior Court* (1985) 165 Cal.App.3d 642, 645.)

Here, defense counsel's motion for a three-month continuance of the trial date was supported by good cause. Wilson cites and heavily relies upon cases discussing the notion that a criminal defendant should not be denied his right to a speedy trial due to congested courthouses and grossly overworked public defenders. (AOB 247-251, citing, e.g., *People v. Johnson* (1980) 26 Cal.3d 557, 567.) But that is not what took place in the present case. There was no issue regarding unavailability of a courtroom due to congestion or unavailability of defense counsel due to conflicting case assignments. Rather, at the time defense counsel requested a continuance, he had previously prioritized one of his other cases over Wilson's case.

As the trial court correctly alluded, defense counsel's previous prioritization of duties was appropriate given that his other case was older and expected to proceed to trial sooner, and because Wilson had repeatedly been willing to waive time on his case. It was not until just before the December 2001 trial date that Wilson decided that he was no longer willing to waive time and he sought to proceed to trial as soon as possible. At that point, defense counsel shifted his priorities and "devote[d] his full efforts preparing for this case." (2 RT 443.) But as the court stated, it was

necessary that defense counsel be given adequate time to prepare for trial given Wilson's newfound desire to proceed to trial quickly.

Had the court not granted the continuance, it would have placed Wilson in the position of proceeding to trial with an admittedly unprepared defense attorney to provide representation. Perhaps it is reasons such as this that has led this Court to explain: "'A continuance granted at the request of counsel normally constitutes . . . good cause [citation], at least in the absence of evidence showing incompetency of counsel [citation] or circumstances where counsel's request for a continuance is prompted only by the need to [serve] other clients and the defendant himself objects to the delay. [Citation.]'" (*People v. Memro* (1995) 11 Cal.4th 786, 852-853, quoting *People v. Wright* (1990) 52 Cal.3d 367, 389.) "If counsel seeks reasonable time to prepare a defendant's case, and the delay is for defendant's benefit, a continuance over the defendant's objection is justified." (*People v. Lomax* (2010) 49 Cal.4th 530, 556.) That is exactly what took place here.

Further, defense counsel accurately estimated that he would only need about three months beyond the then scheduled trial date to finalize the necessary preparations. As stated, trial began as scheduled in March 2002 with no additional continuance requests. (2 RT 483.) For the above reasons, the trial court correctly concluded that good cause supported defense counsel's request to continue the trial date, and therefore Wilson's claim is without merit. (E.g., *People v. Sutton, supra*, 48 Cal.4th at p. 546; *People v. Hajjaj, supra*, 50 Cal.4th at pp. 1196-1197.)

Finally, even assuming Wilson's comments are deemed a motion to dismiss on speedy trial grounds, and even assuming the trial court abused its discretion by finding good cause to support the continuance, Wilson has nonetheless failed to demonstrate that the three-month continuance resulted in prejudice.

Post conviction review of a speedy trial claim requires that the defendant show prejudice flowing from the delay of the trial. (*People v. Martinez (*2000) 22 Cal.4th 750, 769; *People v. Johnson* (1980) 26 Cal.3d 557, 574.)

The state constitutional right to a speedy trial ""serves a three-fold purpose. . . ." [Citation.] "It protects the accused . . . against prolonged imprisonment; it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime; and . . . it prevents him from being 'exposed to the hazard of a trial, after so great a lapse of time' that 'the means of proving his innocence may not be within his reach' – as, for instance, by the loss of witnesses or the dulling of memory.'" [Citation.] The question posed in evaluating a speedy trial claim is whether delay at the state's hands unreasonably prejudices these interests. [Citations.] The test is necessarily a balancing one: 'prejudice to the defendant resulting from the delay must be weighed against justification for the delay.' [Citation.]" (*Craft v. Superior Court* (2006) 140 Cal.App.4th 1533, 1540.)

Similarly, once the federal constitutional speedy trial right attaches, courts balance four criteria to determine whether the right has been violated: (1) the length of the delay; (2) whether the government or the defendant is more to blame for the delay; (3) whether the defendant asserted his right to a speedy trial in due course; and (4) whether the defendant suffered prejudice from the delay. (*Doggett v. United States* (1992) 505 U.S. 647, 651-652; *Vermont v. Brillon* (2009) 556 U.S. 81, 90.) Under the federal Constitution, an uncommonly long delay creates a rebuttable presumption of prejudice. (*People v. Lowe* (2007) 40 Cal.4th 937, 942.) In contrast, when only the state constitutional speedy trial right applies, the defendant has the initial burden to affirmatively show prejudice; the burden then shifts to the prosecution to show justification for

the delay; and then the court weighs the justification against the actual prejudice suffered by the defendant. (*Ibid.*)

Here, Wilson does not suggest or argue that the continuance in any way impacted his ability to defend himself against the charges. Rather, Wilson only argues that he was prejudiced as a result of the three-month continuance because it "produced great anxiety." (AOB 253, 255-256.) But as stated, granting the three-month continuance placed Wilson in a better procedural position by ensuring he proceeded to trial with a competent defense attorney with all avenues of investigation and trial preparation fully explored. Because Wilson has not established that he suffered prejudice as a result of the continuance, his claim is without merit. (See, e.g., *Craft v. Superior Court, supra*, 140 Cal.App.4th at p. 1540; *Doggett v. United States, supra*, 505 U.S. at pp. 651-652; *Vermont v. Brillon, supra*, 556 U.S. at p. 90.)

IX. THE VARIOUS STANDARD JURY INSTRUCTIONS DID NOT UNDERMINE THE REASONABLE DOUBT STANDARD

Wilson argues that various standard guilt-phase jury instructions undermined the requirement of proof beyond a reasonable doubt. (AOB 257-266.) Specifically, Wilson raises issue with the following standard jury instructions: CALJIC No. 2.01 [sufficiency of circumstantial evidence—generally], CALJIC No. 2.21.2 [witness willfully false], CALJIC No. 2.22 [weighing conflicting testimony], CALJIC 2.27 [sufficiency of testimony of one witness], CALJIC No. 2.51 [motive], and CALJIC No. 8.20 [deliberate and premeditated murder]. (AOB 257-266.) As Wilson concedes, however, this Court has repeatedly rejected constitutional challenges to these instructions. (See, e.g., *People v. Moore* (2011) 51 Cal.4th 386, 414-415; *People v. Brasure* (2008) 42 Cal.4th 1037, 1058-1059; *People v. Kelly* (2007) 42 Cal.4th 763, 792; *People v.*

Nakahara (2003) 30 Cal.4th 705, 713-714.) Because Wilson adds nothing new to warrant this Court reexamining its prior decisions, his arguments should again be rejected. (E.g., *People v. Pearson* (2012) 53 Cal.4th 306, 326.)

X. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Wilson claims that California's death penalty statue, as interpreted by this Court and applied at his trial, violates the Unites States Constitution. (AOB 267-281.) Specifically, Wilson raises several "routine" challenges to the constitutionality of California's death penalty statute, challenges which he acknowledges have been repeatedly rejected by this Court. (AOB 267-281.) Wilson has not presented sufficient reasoning to revisit these issues; therefore, extended discussion is unnecessary and appellant's claims should all be rejected consistent with this Court's previous rulings. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

A. Penal Code Section 190.2 Is Not Impermissibly Broad

Wilson claims that Penal Code section 190.2 is impermissibly broad because it "does not meaningfully narrow the pool of murderers eligible for the death penalty" in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 267-268.) He contends the reach of Penal Code section 190.2 has been extended so far that it now encompasses nearly every first degree murder, and that the statute now "makes almost all first degree murder[er]s eligible for the death penalty." (AOB 267-268.) These claims have been rejected in numerous decisions, and Wilson gives this Court no reason to reconsider them. (See *People v. Carrasco* (2014) 59 Cal.4th 924, 970; *People v. Myles* (2012) 53 Cal.4th 1181, 1224; *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Snow* (2003) 30 Cal.4th 43, 125.)

B. Penal Code Section 190.3, Subdivision (a), Does Not Allow The ArbitraryAnd Capricious Imposition Of The Death Penalty

Wilson claims that Penal Code section 190.3, subdivision (a), due to its lack of narrowing, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the "concept of 'aggravating factors' has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as 'aggravating.'" (AOB 268-269.) This challenge has been repeatedly rejected by this Court. (See, e.g., *People v. Curl* (2009) 46 Cal.4th 339, 362; *People v. Loker* (2008) 44 Cal.4th 691, 755; *People v. Salcido* (2008) 44 Cal.4th 93, 166; *People v. Mendoza* (2007) 42 Cal.4th 686, 708; *People v. Guerra* (2006) 37 Cal.4th 1067, 1165; see also *Tuilaepa v. California, supra*, (1994) 512 U.S. at p. 976 [explaining that Penal Code section 190.3, subdivision (a), was "neither vague nor otherwise improper under our Eighth Amendment jurisprudence"]). As explained in Tuilaepa, a focus on the facts of the crime permits an individualized penalty determination. (*Tuilaepa v. California, supra*, 512 U.S. at p. 972; *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 304, 307 [110 S.Ct. 1078, 108 L.Ed.2d 255].) Thus, possible randomness in the penalty determination disappears when the aggravating factor does not require a "yes" or "no" answer, but only points the sentencer to a relevant subject matter. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 975-976.)

Wilson points to no factors in his own case that were arbitrarily or capriciously applied, nor does he specify which aggravating factors in his case "ha[ve] been applied in a wanton and freakish manner. . ." Wilson does not, and cannot, demonstrate that factor (a) was presented to the jury in his case in other than a constitutional manner. Noticeably missing from

Wilson's analysis is any showing that the facts of his crime or other relevant factors were improperly relied on by the jury. Accordingly, this claim should be rejected.

C. California's Death Penalty Statute And The Accompanying Jury Instructions Set Forth The Appropriate Standards The Jury Has To Apply

1. The trial court was not required to instruct the jury that it may impose a sentence of death only if it was persuaded beyond a reasonable doubt that aggravating factors outweighed mitigating factors

Wilson contends that his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. (AOB 270-272.) Specifically, Wilson complains that his rights under the Sixth, Eighth, and Fourteenth Amendments were violated because the "jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence." (AOB 270-272.)

This Court has repeatedly reaffirmed its rulings that instructions on burden of proof or persuasion are not required at this stage of the proceedings, and should not be given. (See *People v. Boyce* (2014) 59 Cal.4th 672, 723–724; *People v. Carrington, supra*, 47 Cal.4th at p. 200; *People v. Hoyos* (2007) 41 Cal.4th 872, 926, disapproved of on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919-920 ; *People v. Blair* (2005) 36 Cal.4th 686, 753, disapproved of on another ground in *People v. Black, supra*, 58 Cal.4th at p. 919 .) In addition, this Court has rejected the claim made by Wilson that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], mandate that the prosecution bear the burden of proof. (*People v. Boyce, supra*, 59 Cal.4th at pp. 723–

724 ; citing *People v. DeHoyos* (2013) 57 Cal.4th 79, 149–150; *People v. Cowan* (2010) 50 Cal.4th 401, 508-509; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Wilson presents no persuasive reason why this Court should revisit the issue and his claim should thus be denied.

2. The death penalty law is not unconstitutional for failing to impose a burden of proof

Wilson claims that the jury should have been instructed that the State bore the burden of proof. (AOB 272-273.) Specifically, Wilson contends that his "jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence." (AOB 272-273.) In the alternative, he argues if there is no burden of proof, then the trial court should have informed the jury of the absence of any burden of proof. (AOB 273.)

This Court has previously held that there is no requirement that the jury be instructed during the penalty phase regarding the burden of proof for finding aggravating and mitigating circumstances in reaching a penalty determination. The only burden of proof that is applicable in the penalty phase relates to aggravating evidence of other crimes under factor (b) (See *People v. Foster* (2010) 50 Cal.4th 1301, 1364; and aggravating evidence of prior convictions under factor (c) (See, *People v. Williams* (2010) 49 Cal.4th 405, 459); otherwise there is no burden of proof applied to aggravating evidence. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1319; *People v. Burney, supra*, 47 Cal.4th at p. 268; *People v. Morgan, supra*, 42 Cal.4th at p. 626; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Brown* (2004) 33 Cal.4th 382, 401.) Nor was the court required to articulate the converse, i.e., that there is no burden of proof at the penalty phase. (*People v. Streeter* (2012) 54 Cal.4th 205, 268.) This Court has also

rejected any instruction on the presumption of life. (*People v. Arias, supra*, 13 Cal.4th at p. 190.) Wilson has offered no persuasive reason to reconsider this argument so his claim must be rejected.

3. Unanimous jury findings are not required in the penalty phase of a capital trial

Wilson claims that his death sentence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because his death verdict was not premised on unanimous jury findings and therefore "there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty." (AOB 273-274.) This Court has consistently rejected these claims. (*People v. Hamilton* (2009) 45 Cal.4th 863, 960; *People v. Kelly, supra*, 42 Cal.4th at pp. 800-801; *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Riggs* (2008) 44 Cal.4th 248, 329; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 228.)

Wilson further contends that this "failure to require that the jury unanimously find the aggravating factors true also violates the Equal Protection Clause of the federal constitution." (AOB 273-274.) Here, too, this Court has held on numerous occasions that capital and non-capital defendants are not similarly situated and thus may be treated differently without violating equal protection principles. (*People v. Vines* (2011) 51 Cal.4th 830, 891-892; *People v. Nelson* (2011) 51 Cal. 4th 198, 227; *People v. Manriquez* (2005) 37 Cal.4th 547, 590; *People v. Hinton* (2006) 37 Cal.4th 839, 912; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Boyette, supra*, 29 Cal.4th at pp. 465-467.) Wilson's claims should therefore be denied.

In addition, this Court has consistently held that the jury need not unanimously find unadjudicated criminal activity true beyond a reasonable doubt before individual jurors may consider them. (*People v. Foster* (2010)

50 Cal.4th 1301, 1364; *People v. Ward, supra*, 36 Cal.4th at pp. 221-222; *People v. Anderson* (2001) 25 Cal.4th 543, 590 and cases cited therein.) As this Court stated in Anderson, "We have consistently applied the rule that while an individual juror may consider violent 'other crimes' in aggravation only if he or she deems them established beyond a reasonable doubt, the jury need not unanimously find other crimes true beyond a reasonable doubt before individual jurors may consider them." (*People v. Anderson, supra*, 25 Cal.4th at p. 590.)

4. The words "so substantial" in CALJIC No. 8.88 did not render the penalty phase instructions constitutionally deficient

Wilson claims that the instructions caused the penalty determination to turn on an impermissibly vague and ambiguous standard. (AOB 275.) Specifically, Wilson contends that the phrase "so substantial" in CALJIC No. 8.88 violates the Eighth and Fourteenth Amendments to the United States Constitution because it "is an impermissibly broad term that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. (AOB 275.)

This Court has previously found that the "so substantial" language embodied in the penalty phase instructions was not impermissibly vague and ambiguous. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1179; see *People v. Boyette, supra,* 29 Cal.4th at pp. 464-465; see also *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Thus, CALJIC No. 8.88, as it related to the comparison of aggravating and mitigating factors, was not unconstitutionally vague or overbroad.

5. CALJIC No. 8.88 correctly instructed the jury as to its sentencing responsibilities

Wilson claims that the instructions failed to inform the jury that the central determination is whether death is the appropriate punishment. (AOB 275-276.) Specifically, Wilson faults CALJIC No. 8.88 because "it instructs them they can return a death verdict if the aggravating evidence 'warrants' death rather than life without parole." (AOB 275-276.) This Court has repeatedly held that "CALJIC No. 8.88 provides constitutionally sufficient guidance to the jury on the weighing of aggravating and mitigating factors." (*People v. Howard* (2010) 51 Cal.4th 15, 39; see also, e.g., *People v. Butler* (2009) 46 Cal.4th 847, 873-875; *People v. Geier*, *supra*, 41 Cal.4th at pp. 618-619.) As Wilson acknowledges, this Court in *People v. Arias, supra*, 13 Cal.4th at p. 171, rejected this specific contention. Because Wilson offers no compelling reason to revisit this argument, his claim should be denied.

6. The trial court properly refrained from instructing the jury on the "presumption of life"

Wilson claims that his penalty jury should have been instructed on the "presumption of life" because "[t]he presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case" and "[i]n the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence." (AOB 276-277.) Wilson recognizes that this Court has rejected this claim in *People v. Arias, supra*, 13 Cal.4th at p. 190,[13] but insists this case was wrongly decided because "California's death penalty law is remarkably

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[13] See also *People v. Howard, supra*, 51 Cal.4th 15, at pages 38-39, *People v. Jennings* (2010) 50 Cal.4th 616, 689, and *People v. Abilez, supra*, 41 Cal. 4th at pages 472, 532; *People v. Perry* (2006) 38 Cal.4th 302, 321; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137.

deficient in the protections needed to insure the consistent and reliable imposition of capital punishment." (AOB 276-277.) As Wilson did not request at trial that the trial court instruct the jury on the "presumption of life," he has forfeited his ability to raise this claim on appeal. In any event, Wilson has not presented any compelling reason for this Court to revisit its previous holdings. Thus, Wilson's claim must be denied.

Initially, Wilson did not ask the trial court to instruct the jury that the law required its deliberation be made in consideration of a "presumption of life" standard of review. His failure to request that the jury be so instructed forfeits this issue on appeal. Had Wilson timely objected to the absence of a "presumption of life" instruction, the trial court and counsel could have discussed the reasons for the court omitting such an instruction, including the fact that federal constitutional law does not require such an instruction be given. Wilson's failure to raise a timely objection prevented the trial court from presenting on the record any and all reasons it may have had for not including that instruction among all the instructions given. Therefore, notwithstanding Wilson's contention that the "presumption of life" instruction is constitutionally mandated (AOB 276-277), his failure to object to the penalty phase instructions not including a "presumption of life" instruction bars him from raising this issue for the first time on appeal. (See *People v. Rogers, supra*, 39 Cal.4th at p. 877; see also *People v. Delgado* (1993) 5 Cal.4th 312, 331; *People v. Medina* (1990) 51 Cal.3d 870, 902.)

Even if cognizable on appeal, Wilson's claim fails. As set forth above, this Court has repeatedly held that neither state nor federal law require a trial court give an instruction on the "presumption of life" and Wilson does not provide this Court with legal authority or compelling reason to reverse its earlier decisions. Although not articulated in the federal Constitution, the United States Supreme Court has long declared the

presumption of innocence a fundamental principle of our system of criminal justice. (*Estelle v. Williams* (1976) 425 U.S. 501, 503 [96 S.Ct. 1691, 48 L.Ed.2d 126], citing *Coffin v. United States* (1895) 156 U.S. 432, 453 [15 S.Ct. 394, 39 L.Ed.481].) However, unlike the "presumption of innocence," Wilson's proffered "presumption of life" principle has neither been declared a fundamental principle of the criminal justice system by the United States Supreme Court nor it is entitled to the status of a "fundamental principle" by this Court. Wilson's mere claim the "presumption of life" is constitutionally required, without more, should be rejected and his request this issue be reviewed for the first time on appeal should be barred.

Furthermore, Wilson does not provide this Court legal authority or compelling reason to reverse its earlier decisions that reject the argument that a penalty phase jury should be instructed its deliberation should take into account a presumption of life standard of review. As this Court earlier ruled in Arias, the state may otherwise structure the penalty determination as it sees fit, so long as it satisfies the requirement of individualized sentencing by allowing the jury to consider all relevant mitigating evidence. (*People v. Arias, supra*, 13 Cal.4th at p. 190, referring to *Tuilaepa v. California, supra*, 512 U.S. at p. 972, *Boyde v. California, supra*, 494 U.S. at p. 377 [upholding 1978 law's provision that sentencer "shall" impose death if aggravation outweighs mitigation], and *Zant v. Stephens, supra*, 462 U.S. at p. 875 [once defendant is death eligible, statute may give jury "unbridled" discretion to apply aggravating and mitigating sentencing factors].) Following that analysis, this Court has subsequently rejected similar claims of error and reaffirmed its decision that a trial court need not give a "presumption of life" instruction. (See, e.g., *People v. Young, supra*, 34 Cal.4th at p. 1233; *People v. Prieto, supra*, 30 Cal.4th at p. 271; *People*

v. Kipp, supra, 26 Cal.4th at p. 1137; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064.) A similar conclusion should be reached here.

Accordingly, Wilson's claim should be rejected.

D. The United States Constitution Does Not Require Jurors To Return Written Findings Regarding Aggravating Factors

Wilson claims that failing to require the jury to make written findings violated his right to meaningful appellate review. (AOB 277.) This contention has also been repeatedly rejected by this Court, and Wilson offers no persuasive reasons to revisit this issue. (See, e.g., *People v. Gonzales* (2011) 51 Cal.4th 894, 957; *People v. Cook* (2006) 39 Cal.4th 566, 619; *People v. Robinson* (2005) 37 Cal.4th 592, 655; *People v. Zamudio, supra*, 43 Cal.4th at p. 373.)

E. The Trial Court Properly Instructed The Jury On Mitigating And Aggravating Factors

Wilson claims the trial court erred by failing to "omit" "inapplicable" sentencing factors. (AOB 278.) In *People v. Ghent, supra*, 43 Cal.3d at pages 776-777, this Court rejected a similar claim, explaining that to delete the inapplicable factors would prejudice the defendant, and that the jury is capable of deciding which factors are applicable in a particular case. (See also *People v. Cook, supra*, 39 Cal.4th at p. 619.) Wilson has provided no reason to revisit this argument so his claim should therefore be denied.

F. California's Capital Sentencing Scheme Does Not Require Inter-Case Proportionality Review

Wilson claims that the prohibition against inter-case proportionality review results in arbitrary and disproportionate imposition of the death penalty. (AOB 278.) This Court has rejected the argument that inter-case proportionality analysis is required under California's death penalty law or by the federal or state constitutions. (See, e.g., *People v. Hillhouse, supra*,

27 Cal.4th at p. 511; see also *People v. Foster, supra*, 50 Cal.4th at p. 1368). Wilson's claim should be denied.

G. California's Capital Sentencing Scheme Does Not Violate The Equal Protection Clause

Wilson claims that California's capital sentencing scheme violates the Equal Protection Clause because it "provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with noncapital crimes. . ." (AOB 278-279.) However, because capital defendants are not similarly situated to noncapital defendants, the Equal Protection Clause does not require that Wilson receive the same procedural rights as noncapital defendants. (*People v. McKinnon* (2011) 52 Cal.4th 610, 698; *People v. Manriquez, supra*, 37 Cal.4th at p. 590 .) Wilson's claim should be denied.

H. Intercounty Disparities In Capital Charging Practices Does Not Violate The Equal Protection Clause

Wilson claims that "different counties having different standards for seeking a death sentence violate[s] his Fourteenth Amendment Rights." (AOB 279.) As Wilson concedes, however, this Court has rejected this very argument. (E.g., *People v. Brady* (2010) 50 Cal.4th 547, 589.) Wilson's claim should be denied.

I. California's Use Of The Death Penalty Does Not Violate International Law

Wilson claims that California's use of the death penalty as a regular form of punishment falls short of international norms. (AOB 279-281.) This Court has previously held that international law does not compel the elimination of capital punishment in California. (*People v. Vines, supra*, 51 Cal.4th at pp. 891-892; *People v. Snow, supra*, 30 Cal.4th at p. 127; see also *People v. Ghent, supra*, 43 Cal.3d at pp. 778-779.) Wilson's arguments must be denied.

XI. THERE WAS NO CUMULATIVE ERROR

Wilson claims that his convictions and death sentence must be reversed because the errors at his trial were cumulatively prejudicial. (AOB 282-287.) However, because no error was committed or, to the extent error did occur, Wilson has failed to demonstrate prejudice, reversal of Wilson's convictions and death sentence is not warranted and Wilson's claim should be denied.

Where no single error warrants reversal, the cumulative effect of all the errors may, in a particular case, require reversal in accordance with the due process guarantee. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 [93 S.Ct. 1038, 35 L.Ed.2d 297] [finding that the combined effect of all the individual errors denied the defendant his right to due process and a fair trial]; *People v. Hill, supra*, 17 Cal.4th at p. 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"].)

However, even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009.) Where, as in the present case, few or no errors have occurred, and where any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (*People v. Price, supra*, 1 Cal.4th at p. 465.) The essential question is whether the defendant's guilt was fairly adjudicated, and in that regard a court will not reverse a judgment absent a clear showing of a miscarriage of justice. (*People v. Hill, supra*, 17 Cal.4th at p. 844; see also *People v. Cunningham, supra*, 25 Cal.4th at p. 1009.) For the reasons explained above, there was no error in this case, and even if there was error it was harmless. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692; *People v. Ochoa* (1998) 19 Cal.4th 353, 447, 458.) Thus, even considered in the aggregate, the alleged errors could not have affected the

outcome of trial. Wilson received a fair trial, there was no miscarriage of justice, and his claim of cumulative error should therefore be rejected.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the judgment be affirmed in its entirety.

Dated: November 17, 2014

Respectfully submitted,

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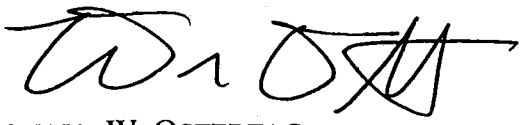

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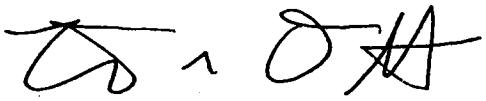
CERTIFICATE OF COMPLIANCE

I certify that the attached respondent's brief uses a 13 point Times New Roman font and contains 40,380 words.

Dated: November 17, 2014

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Wilson***
No.: **S118775**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 20, 2014, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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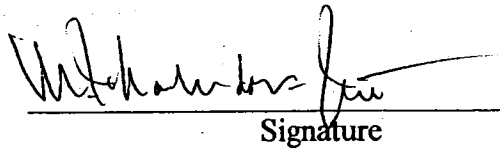
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 20, 2014, at San Diego, California.

M. I. Salvador-Jett
Declarant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