SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **RONNIE DALE DEMENT,** Defendant and Appellant.	**CAPITAL CASE** S042660

Fresno 46795-O
~~Sacramento~~ County Superior Court No. ~~4679560~~
The Honorable Stephen R. Henry, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE[1/]

On December 24, 1992, the Fresno County District Attorney (DA) filed an amended information charging appellant with: count one - murder (§ 187) with an allegation he personally used a deadly and dangerous weapon (ligature) (§ 12022, subd. (b)), count two - oral copulation in a local detention facility (§ 288a, subd. (e)), and count three - attempted sodomy in a local detention facility (§§ 664/286, subd. (e)). Count one also alleged four special circumstances: first - he had a prior second degree murder conviction (§ 190.2, subd. (a)(2)), second - the murder occurred while he was engaged in the commission and attempted commission of oral copulation in a local detention facility (§§ 190.2, subd. (a)(17), 288a, subd. (e)), third - the murder occurred while he was engaged in the attempted commission of attempted sodomy in a local detention facility (§§ 190.2, subd. (a)(17), 664/286, subd. (e)), and fourth - he had a prior

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1. "CT," "SCT," and "RT" preceded by corresponding volume numbers or "Pretrial" refer, respectively, to the Clerk's, the Supplemental Clerk's and the Reporter's Transcripts On Appeal; "TABLE" followed by an alphabetic designation refers to attached tables concerning the seating progression of prospective jurors; "AOB" refers to Appellant's Opening Brief. All statutory references are to the Penal Code unless otherwise noted.

second degree murder conviction for which he had served a prior prison term (§ 190.05, subd. (a)). The information further alleged he had prior convictions for offenses including robbery (§ 211), possession of an illegal firearm (§ 12020), and murder (§ 187), which qualified as serious felonies and/or for which he had served prior prison terms (§§ 667, subd. (a), 667.5, subd. (b), 667.7, subds (a)(1), & 1192.7, subd. (c)). (1 CT 181-184.)

On March 15, 1993, appellant filed a motion to set aside counts two and three and the second and third special circumstance allegations (§ 995). (1 CT 203-216.) On May 4, 1993, the prosecution filed its response. (1 CT 228-234.) On May 12, 1993, the trial court denied that motion. (1 CT 237 [as amended]; see 1 CT 236; Pretrial RT 33 (May 12, 1993).) On May 23, 1993, the court ordered the first and fourth special circumstances and the prior allegations bifurcated from the guilt trial. (2 CT 365-366; I RT 102, 152-154.)

On May 24, 1994, jury voir dire began. (2 CT 369.) On June 2, 1994, the defense challenged the prosecutor's peremptory excusal of women per *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). Per mutual agreement, the court considered the matter preserved even though jury selection continued and a panel was sworn. (2 CT 412-413; IV RT 942-943, 946-947; see IV RT 940-941.) Following argument, the court found no prima facie basis to support the *Wheeler* motion. (2 CT 413.)

On June 6, 1994, four alternate jurors were selected, one juror was excused, and an alternate was substituted. (2 CT 430-431.) On June 20, 1994, another juror was excused and an alternate was substituted. (2 CT 473.)

On June 20, 1994, outside the jury's presence, the trial court and the parties discussed potential impeachment the defense sought to pursue concerning witness John Benjamin's history of blackouts. (VI RT 1545-1555; see VI RT 1509, 1544-1545, 1547-1548, 1551-1554, 1556-1557.) The prosecutor objected asserting, inter alia, the impeachment was improper, it was

a collateral matter, and it was remote in time. (VI RT 1552.) The court sustained the objection. (VI RT 1554.)

On June 21, 1994, the defense moved for mistrial based on witness Albert Martinez's testimony; the trial court denied that motion. (2 CT 476-477; VII RT 1741-1743.) Also on June 21, 1994, the defense objected under the state and federal constitutions' confrontation clauses to impeachment of Martinez's testimony with his statements to detectives. (VII RT 1770-1771.) The trial court excluded proffered testimony that Martinez recognized appellant's voice, but it ruled his statements about his personal observations would be admitted for their truth and that the prosecution could inquire into his percipient observations. (VII RT 1778, 1780-1781; see VII RT 1773.) The defense made a continuing objection, which the court rejected. (VII RT 1782-1783.)

On June 23, 1994, the defense moved for mistrial based on witness Bradley Nelson's testimony, but the court deferred ruling pending its decision on the admissibility of "kites" (jailhouse letters) that purportedly contained similar information. (2 CT 483; VIII RT 2096, 2101, 2104; see I RT 104; X RT 2816). On July 5, 1994, the defense submitted a written mistrial motion in that regard. (2 CT 485, 488-491.) On July 12, 1994, after further hearing, the court denied that motion. (2 CT 503; X RT 2845-2846.)

Meanwhile, on July 11, 1994, the defense made non-constitutional objections to part of Detective Sherman Lee's testimony impeaching witness Eric Johnson's testimony, which the court overruled or sustained or which led to rephrasing of inquiries. (X RT 2718-2719, 2721, 2724.) The defense belatedly objected to a statement on relevance grounds, but it abandoned that objection. (X RT 2726-2727.)

Previously, on June 6 and 16, 1994, respectively, the prosecutor submitted trial briefs regarding: admitting photocopies of the kites because the

originals had been misplaced and Evidence Code section 352 considerations on the kites' contents. (2 CT 461-472, 435-440.) On July 5, 6, and 11, 1994, the trial court held an Evidence Code section 402 hearing. (VIII RT 2149-2183, 2187-2189; IX RT 2276-2354; X RT 2606-2624.) On July 11 and 12, 1994, the court and counsel discussed the matter. (X RT 2660-2667, 2740-2748, 2750-2768, 2787-2796.) On July 12, 1994, the court denied the defense's challenges to the kites. (X RT 2748-2750, 2796-2797.) Subsequently, the parties stipulated about the kites and some of their content. (X RT 2813-2816.) Then the court gave a limiting instruction concerning reference to a crime other than that for which appellant was on trial. (X RT 2818-2819.)

In the interim, on July 6 and 11, 1994, the trial court held an Evidence Code section 402 hearing concerning appellant's statements post-invocation of his *Miranda* right to counsel (*Miranda v. Arizona* (1966) 384 U.S. 436). (2 CT 492-493, 498; IX RT 2360-2365; X RT 2624-2660.) The court found the questioning did not amount to an interrogation and the statements were voluntary. Thus, it overruled the defense's objection to their admissibility. (2 CT 498; X RT 2659-2660.)

On July 12 and 13, 1994, the defense moved to dismiss (§ 1118.1) the oral copulation special circumstance and its use in the felony murder allegation, asserting it was separate and apart from the ligature strangulation. (X RT 2851-2852; XI RT 2938-2939.) The matter was put in abeyance while the court and the parties researched appropriate instructions. (XI RT 2940; see VII RT 1832.) The court never struck the oral copulation special circumstance allegation. Instead, it opted to instruct the jury on the germination of the underlying felony and how that affected the second degree murder theory and the special circumstance (XI RT 2983; see XI RT 2942-2943, 2946-2947), impliedly finding there was sufficient evidence to submit those issues to the jury.

On July 12 and 13, 1994, the defense also moved to dismiss (§ 1118.1) the third special circumstance allegation and count three; the court denied that motion. (2 CT 503, 505; X RT 2820, 2846.)

On July 13 and 14, 1994, off-record conferences concerning guilt phase instructions were held. (II CT 505-507; XI RT 2939-2940; see 1 SCT4 147.) On July 14, 1994, various matters concerning those instructions were put on record. (XI RT 2941-2947; see 1 SCT4 147; XX RT 4313-4317.)

On July 14, 1994, the trial court granted the prosecution's motion to strike count one's personal use allegation. (2 CT 507; XI RT 2985.)

On July 15, 1994, after guilt phase closing arguments and outside the jury's presence, the defense moved for a mistrial, claiming it was misconduct for the prosecutor's argument to note witnesses Benjamin and James Bond did not assert their Fifth Amendment rights. (XI RT 3103-3104.) The trial court and counsel discussed the matter, after which the court denied the motion. (XI RT 3104-3107; 2 CT 508-509.)

Also on July 15, 1994, pursuant to the mutual request of both parties, the trial court instructed the jury with, inter alia, CALJIC No. 8.81.17 (1991 Revision) [Special Circumstances–Murder In Commission Of (Unlawful Oral Copulation By A Prisoner Or Attempted Unlawful Sodomy By A Prisoner)]. (2 CT 550-551, 555-556; 3 CT 625, 703; XI RT 3138-3139.) Thereafter, the jury began guilt phase deliberations. (2 CT 511.) On July 18, 1994, the jury sent a note seeking clarification of CALJIC No. 8.81.17. (XI RT 3159, 3162; 2 SCT1 497.) After discussing the inquiry and a proposed response with counsel, the court addressed the jury. (XII RT 3159-3166.) Following a conference and an indication that a juror sought further clarification, the court and defense counsel further clarified the matter for the jury. (XII RT 3166-3167; see XII RT 3168-3169, 3172.) The prosecutor remarked the jurors did not appear fully satisfied. (XII RT 3170.) The defense acknowledged the

court and counsel had done their best, but noted the defense was not waiving a future appellate argument as to the sufficiency of the instructions. (XII RT 3169-3170.)

On July 19, 1994, given the prosecutor's uncomfortableness with the trial court's explanation and the confusing nature of the CALJIC No. 8.81.17 issue, he proposed that the court ask whether the jury unanimously had agreed on count one; if yes, whether it unanimously had agreed on the degree; if yes, whether it could render a verdict if given a new form; if yes, then the court would provide the jury with a form omitting the special circumstances; and if the jury returned a first-degree murder verdict, then the prosecution would move to strike the two special circumstances and the case could proceed onto the special circumstance of whether appellant had a prior second degree murder conviction. (XII RT 3173-3174, 3178; see XII RT 3176-3177; see also XI RT 2966-2967.) The defense, which noted the law's complexity and its own confusion, initially had agreed to the proposal, but withdrew that agreement believing defense counsel would be faulted if jury deliberations were interrupted for such an inquiry. (XII RT 3174-3175, 3179-3180.)

On July 20, 1994, the jury found appellant guilty on count one as a first-degree murder based both on a murder that was premeditated, deliberated, and willful, and on a felony murder based on oral copulation by a prisoner. The jury also found him guilty on count two and found as true the second (temporarily renumbered first) special circumstance that he committed the murder while engaged in the "attempted commission" of oral copulation in a local detention facility. The jury further found him not guilty on count three and found the third (temporarily renumbered second) special circumstance was not true. (2 CT 513-515, 557-558; 3 CT 849-852; XII RT 3182-3194.)

Also on July 20, 1994, various matters concerning the bifurcated special circumstance phase were put on record. (XII RT 3195-3197; see 1 SCT4 148.)

Thereafter, the trial court granted the prosecution's motion to strike the fourth special circumstance and the first through fourth priors. (2 CT 516; XII RT 3204-3205.)

On July 21, 1994, the jury heard a stipulation as to the first special circumstance, and after deliberation, found it to be true. (2 CT 527-529; 3 CT 854.) Thereafter, the penalty phase began. (2 CT 529.)

On July 27 and 28, 1994, off-record conferences concerning penalty phase instructions were held. (2 CT 540-541; XIII RT 3715; XIV RT 3716; see 1 SCT4 148.) On July 28, 1994, various matters concerning those instructions were put on record. (XIV RT 3716-3724; see 1 SCT4 148.)

Also on July 28, 1994, another juror was excused and an alternate was substituted. (2 CT 541.) That same day, the jury began penalty phase deliberations. (2 CT 543.) On August 1, 1994, the jury returned a death verdict. (2 CT 546-547; 3 CT 853.)

On September 21 and 23, 1994, respectively, appellant filed a new trial motion and a supplement to that motion with supporting declarations. (3 CT 862-883, 884-887.) On September 26, 1994, the parties argued the motion, which the trial court denied. (3 CT 897; XV RT 3846-3853.)

Also on September 21, 1994, appellant filed a motion to reduce his penalty of death to life in prison without parole (LWOP) (§ 190.4, subd. (e)). (3 CT 855-861.) On September 26, 1994, the parties argued the motion, which the trial court denied. (3 CT 897; XV RT 3856-3862.) Thereafter, the court sentenced appellant on count one to death and on count two to three years, however, it stayed the latter pending imposition of sentence on count one. (3 CT 897; XV RT 3862-3863.) On September 30, 1994, the trial court filed a Commitment On Warrant Of Death. (3 CT 891-895.)

STATEMENT OF FACTS

The prosecution presented evidence that appellant attacked, beat, kicked, sexually assaulted, and strangled fellow inmate Gregory Andrews in an overcrowded Fresno County Jail cell that the two shared with inmates John Benjamin and Jimmy Bond.

Cell 8's Inmates, Pruno, And Overcrowding

John Benjamin's Testimony

John Benjamin, who has felony convictions for murder, drunk driving, sexual assault, drugs in a custodial facility, and bank robbery, was jailed in April of 1992, pending resolution of a plea arrangement on the latter federal charge. (VI RT 1431-1432, 1485, 1489-1490; X RT 2778-2779.) At trial, he was in federal custody serving 11 years, eight months on the latter and was hoping to get his sentence reduced – the U.S. Attorney can recommend reduction for cooperating, however, Benjamin already had his sentence substantially reduced on appeal and had heard the U.S. Attorney was "pissed off" about Benjamin's winning the appeal and was not going to recommend a further reduction if he cooperated in the instant case. (VI RT 1432, 1490-1492, 1596-1597; X RT 2771-2775, 2779.)[2/]

In late afternoon of April 8, 1992, Benjamin was moved to cell 8 on the second tier of the F-pod, where inmates James Bond and appellant were assigned to a three-bunk "white" cell. (VI RT 1432-1434.)[3/] When Benjamin

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2. Benjamin testified he now has a "snitch jacket" and testifying against appellant is going to cause him some problems and has affected his incarceration housing. (X RT 2771.)

3. Cell assignments are by race or ethnic backgrounds. (VI RT 1433.) Bond testified inmates are pretty much stuck with their own race, but appellant tended to mingle with Hispanics. (IX RT 2531.) When cell doors are open, inmates are free to go in and out of their own and other inmates' cells, to the day

entered the cell, he smelled pruno (i.e., jail-made alcohol) brewing in a plastic trash bag on the third bunk. Benjamin was told if he wanted that bunk, they would bring down the pruno; but he declined and just put his mattress on the floor. (VI RT 1435-1436, 1455-1457, 1511.)

After dinner Andrews came to their floor and then went to appellant, Bond and Benjamin's cell. The trio told him there were already three people living there, whereas there was a white cell downstairs with only two inmates. Appellant told Bond to "roll [Andrews] up" (i.e., to gather his things and tell the officer he had to go into another cell), but the officer said Andrews would stay in their cell. Andrews was locked within their cell for the evening. (VI RT 1435, 1437-1438, 1442-1444.)

Jimmy Bond's Testimony

Jimmy Bond (aka James Bond), who has felony convictions for receiving stolen property, auto theft, possessing methamphetamine, and petty theft with a prior, was jailed on the latter charge on the fourth floor, F pod cell 8 on April 8 and 9, 1992. (IX RT 2370-2371, 2408, 2441-2443.) He later was sent to California Rehabilitation Center on that charge. (IX RT 2408.) At trial, he was in custody on a parole violation for failing to report and faced a minimum of about six months in custody. He asked Prosecutor James Oppliger to talk to his parole officer about getting him into a drug program. The prosecutor talked to someone about work for him and promised to tell his

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room and to the shower; but they are locked within their cells for the evening. (VI RT 1440; VII RT 1698.) Detective Bradley Christian testified inmates "refer to their cell as their house, and you don't come into their house unless you're welcome there," so it would not be unusual for someone to get upset if a stranger came into their cell and looked around while no one was present. (VII RT 1805-1806.)

parole officer he testified. (IX RT 2409-2410, 2493-2498.)[4/]

Andrews was assigned to cell 8 that night. (IX RT 2372.) Putting a fourth person in their cell was more than they cared to have because the cells are designed for only three people. A cell below them had two people, so Bond was slightly annoyed at jail personnel for putting Andrews in there, but he was not upset at Andrews. (IX RT 2372, 2446-2447, 2457-2459, 2463.) Appellant wanted to force Andrews out of his cell and was going to "roll him up." (IX RT 2459-2460; see IX RT 2503-2504 [Bond falsely told detectives appellant was not upset about Andrews being in their cell].) Bond asked Andrews to contact someone and see if they could move him to the cell below. Bond called through the intercom and asked why they were putting a fourth person in their cell when there was room in the cell below, but the classification sergeant said Andrews could not be moved. (IX RT 2373, 2445-2447, 2456, 2460, 2462-2463.)

Foreshadowing Of Appellant's Attack On Andrews

Anthony Williams' Testimony

Anthony Williams, who has felony convictions for rape, petty theft with a prior felony, and crack cocaine sale, was jailed on the latter on April 8, 1992, with Black inmates in F pod on the fourth floor's bottom tier. (VI RT 1373,

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4. Bond denied committing the murder in this case and testified he would not want to be charged with something he did not do. He also said charging him as an accessory, as someone who helped with murder, would be false. (IX RT 2418-2419.) The DA's Office told Bond they knew he was not involved and they would not prosecute him for something he did not do, so Bond did not anticipate being charged. (IX RT 2491.) When Bond testified in this criminal matter, he also testified in a wrongful death civil trial involving the same subject matter. No one in that case was in a position to offer him a favorable disposition on his pending parole violation, but he still testified. (IX RT 2565-2567.)

1378, 1382-1383, 1406.)[5/] That evening he was in the day room with appellant (aka "Pico") and a White inmate, when new inmates arrived, including a White inmate named Greg (Andrews), whom Williams recognized from having seen a couple of times in drug sale areas. (VI RT 1373-1374, 1377-1378, 1412, 1414-1415.) As Andrews came in, appellant and the other inmate said they hoped Andrews would not be put into their cell. (VI RT 1375.) Appellant said something like "They move him in my cell, I'm going to do him. I'm going to kill him," "I'm going to do his ass," however, Williams did not actually believe appellant would do that. (VI RT 1375-1376, 1411, 1413, 1419-1420; see VI RT 1417-1418 ["do somebody" may mean other things besides kill (e.g., steal his food)].) About 30 minutes later, the inmates were locked in their cells for the night. (VI RT 1376.)

Eric Johnson's Testimony And Statements

Eric Johnson, who has felony convictions for robbery, assault, and petty theft, was a trustee jailed on April 9, 1992, in F pod. (VIII RT 2237-2238, 2251.) Johnson denied knowing appellant and said he could not recall if appellant was housed in F pod on that date. (VIII RT 2238, 2243, 2248, 2250.) In contrast, Johnson told Detective Sherman Lee that on April 8, 1992, Andrews arrived in the pod about 9 p.m. and at 10 p.m. Johnson heard appellant, whom he named and described as a White male that acts and speaks like a Hispanic, who has an "E-14 [*sic*; F-14]" tattoo on his neck and is housed

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5. A week before testifying, Williams was paroled from prison on his crack sale case. (VI RT 1383.) No deals were made for his testimony, which he gave because he was subpoenaed. He was not trying to help the DA, he was just telling what he knows occurred. He did not expect help from the parole office in exchange. (VI RT 1383-1384, 1400, 1403-1404, 1421-1422.) Although he could not recall his own release dates, he had pretty good recall of what went on that night and he recalled appellant's statements. (VI RT 1396, 1413.)

in cell 8, say he was "going to take care of the home boy that had just been put into his tank." (X RT 2716-2720, 2724.)[6]

Bradley Nelson's Testimony

Bradley Nelson, who has felony convictions for robbery and second degree burglary, was jailed on April 8, 1992, pending the latter charge in 4-F on the fourth floor's bottom tier directly under appellant's (Pico's) and Andrews' cell. (VIII RT 2078, 2080-2081, 2087, 2089, 2106, 2109.) At trial, he was in prison custody. (VIII RT 2078.) Nelson knew Andrews since 1990, previously had roomed with him for a couple of months, and was friends with him. (VIII RT 2079, 2112.) On April 8, 1992, around 10:00 p.m., Andrews arrived while Nelson was watching TV in the day room. (VIII RT 2080-2081.) Andrews looked tired and said he was under the influence. (VIII RT 2081.) Andrews took his stuff upstairs to his cell and then came back down and ate food that Nelson gave him as Nelson talked to him and watched TV. (VIII RT 2082.) A little after 10:30 p.m., Andrews told Nelson he was tired and going to go up to sleep. As Andrews went upstairs, Nelson saw appellant look at Bond and begin hitting his fist into his hand while smiling and laughing with Bond. Nelson assumed appellant was going to beat Andrews and that Bond was going to help appellant. Nelson looked at appellant as if to ask "what are you guys going to do?" and told Bond, whom he had been friendly with, they better leave Andrews alone because he was his friend. (VIII RT 2082-2084, 2126-2127, 2135, 2138; see VIII RT 2135, 2145-2146 [Nelson thought he told detectives about appellant striking his hand with his fist, but his April 13, 1992, interview lacked that information; Nelson then guessed he had mentioned it during his

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6. Detective Sherman Lee testified "home boy" is a slang term that is used many different ways. While 20 years ago it referred to someone you hang with, someone from your neck of the woods, and someone whom you see eye to eye with, he was unsure what it meant today. (X RT 2723.)

deposition].)

Consumption Of Pruno, Appellant's Interrogation Of Andrews And Forced Oral Copulation, Attempted Sodomy, And Strangling Of Andrews

Benjamin's Testimony

Appellant and Andrews introduced themselves to each other and talked about people, including a female whom they both knew; everything appeared cordial. (VI RT 1449, 1513.) Andrews said he had been on drugs and was tired. He laid his mattress in the cell's walkway, laid on it, and went to sleep. (VI RT 1448-1449, 1513.)

Meanwhile, Bond and appellant took down the pruno and they each drank about 1½ to two quarts of it. (VI RT 1449, 1455, 1457; see VI RT 1544 [Benjamin told detectives appellant probably drank four or five cups and Bond had the same if not a little more].) Benjamin sipped it, but it did not taste like it had a high alcohol content, so he declined. (VI RT 1455-1456, 1544; see VI RT 1541-1423, 1590, 1623, 1653-1654; X RT 2680 [Benjamin told detectives he drank about three cups, however, he did not recall saying that and testified he meant sips]; X RT 2703 [Detective Christian opined Benjamin probably drank pruno the night before based on his interview]; see VI RT 1544-1545, 1556 [Benjamin, who has had blackouts when he drinks, last had one in 1988 or 1989].)

As Andrews slept, appellant mentioned a female whom he and Andrews knew and said he was going to ask Andrews questions about her, and he would know about Andrews if he gave wrong answers. He then woke Andrews by lightly slapping his face. He asked Andrews things like how well he knew the female. Andrews told appellant to leave him alone. (VI RT 1449-1453.) Appellant got angrier, began slapping Andrews harder, punched him about the face many times, and called him "a piece of shit." (VI RT 1454-1455, 1457,

1657, 1659; but see VI RT 1658-1659 [Benjamin's deposition did not mention the punching].) Andrews bled slightly from his lip. (VI RT 1455.)

Bond and Benjamin told appellant to leave Andrews alone, but appellant got more violent with Andrews who was on his mattress trying to cover up. Appellant began calling Andrews a "punk." Andrews said he was not a punk, told appellant to leave him alone, and asked why appellant was doing this. (VI RT 1457, 1459.) Then appellant pulled his penis out through the hole of his boxer shorts and asked in a commanding fashion for Andrews to kiss it. Andrews at first declined, saying he wasn't "like that." Appellant told Andrews "If you just kiss it, I'll leave you alone." As appellant stood over Andrews, who was kind of in a ball on his side, Andrews quickly kissed appellant's penis, which Benjamin described as flaccid and circumcised. (VI RT 1457-1462, 1514-1516.)

After Andrews kissed appellant's penis, appellant began saying "I ought to kill you." (VI RT 1463.) He also began to rip off Andrews' boxer shorts. Andrews tried to hold onto his boxers and resisted a little, but appellant punched and slapped him and told him to put his hands down. Then appellant ripped off Andrews' boxers, rendering him naked, and said "I ought to fuck him" (i.e., sodomize him), but appellant did not do so. He then asked Benjamin and Bond if they wanted to "fuck" Andrews, but they declined. (VI RT 1474-1478, 1514-1516, 1521; but see VI RT 1618-1622, 1653-1654 [Benjamin was unsure if appellant ripped off Andrews' boxers before or after appellant made Andrews kiss his penis and gave differing accounts as to the chronology when talking to detectives when deposed and when testifying at trial].)

Then appellant backed away from Andrews and told Bond "I told you he was a punk, a piece of shit." (VI RT 1460, 1521.) Bond then "jump[ed] on" Andrews, slapping and punching him four to six times. (VI RT 1460-1461, 1522, 1568, 1570; see X RT 2698-2699, 2708-2710 [Benjamin gave similar

account to detectives, saying Bond hit Andrews four to six times with his fists]; VI RT 1660-1661 [Benjamin told a defense investigator Bond hit Andrews hard with his fists and kicked him].) Benjamin told Bond to stay out of it, that it was not his business. (VI RT 1568-1569; see X RT 2681 [Benjamin told detectives he tried to stop Bond].) As Benjamin pulled Bond off Andrews, appellant began punching and kicking Andrews. (VI RT 1461-1462, 1671.) Then Bond told appellant to stop before something serious happens. Bond pulled appellant off, but let go and appellant went back at Andrews, banging him upright into lockers in the rear of the cell. (VI RT 1462-1463, 1568, 1670.) Appellant sounded very emotional, repeatedly remarked about killing Andrews, and rambled about his mother and his brother's death as he hit Andrews, slung him into the lockers, threw him on the ground, and stomped on him; Andrews was yelling, "Leave me alone. Why are you doing this to me?" (VI RT 1463-1464, 1472.) Both Bond and Benjamin repeatedly told appellant to stop but he would not listen. The more they tried to calm him, the more aggressive he got. (VI RT 1471, 1476; X RT 2681 [Benjamin told detectives he verbally tried to stop it].)

Then appellant slung Andrews half under the desk, grabbed a towel, rolled it up, wrapped it around Andrews' throat, and pulled its ends in opposite directions, taunting him a couple of times by tightening it and then releasing pressure. Andrews coughed but appellant told him to be quiet. (VI RT 1465, 1606-1607; see X RT 2687-2688.) Andrews was on his stomach and side, with one leg out and one leg drawn up, but he kind of sat up on his knees when appellant pulled his head back. (VI RT 1466-1467, 1563-1564.) As appellant choked Andrews, appellant referred to his brother and his mother, saying people like Andrews caused his mother's death. (VI RT 1470.) As Bond tried to get appellant to stop choking Andrews, Benjamin slid his back against the "call button" and pushed it a few times. (VI RT 1468, 1471, 1522, 1559-1562,

1604.)[7] He thought Bond also may have pushed it, but he was unsure. (VI RT 1522, 1561-1562, 1653-1654; see VI RT 1522-1523, 1563, 1614-1615 [Benjamin told detectives he did not know whether it was he or Bond who pushed it].)

Apparently in response to the call button, an officer's voice came on the speaker box a few minutes later asking "what do you want?" (VI RT 1469-1470, 1561, 1606; see VI RT 1644-1645.) Appellant immediately yelled out "What time is it?" which inmates often inquire when they push the button at night. The officer told him the time; they may have exchanged a word or two, and their conversation ended. Andrews, who was conscious or semiconscious, uttered a loud sound. (VI RT 1470, 1605-1606, 1612-1615; see VI RT 1616-1617, 1644-1645 [When deposed in 1993, Benjamin said appellant told Andrews to shut up].)[8]

Appellant choked Andrews for 20 seconds to a minute. (VI RT 1471, 1605, 1607-1608.) Andrews passed out and blood came out of his mouth, but his foot was moving and Benjamin could tell he was breathing. (VI RT 1465, 1467-1468.) Andrews' face had bruises and cuts and was beat up pretty bad. (VI RT 1468.) Bond got emotional and told appellant "You're going to kill

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7. Each cell has an intercom wall-speaker with a push button that can be triggered even by people pressing their back against it. When pushed, it activates a light and beeper in the security station. Inmates periodically use it to ask the time and other matters. As a rule, there is an immediate response, wherein the security officer flips up a switch near the call light and opens a two-way communication link. (VII RT 1703-1704, 1709, 1941, 1958-1962, 1962-65; VIII RT 2022-2023, 2029.)

8. Correctional Officer (CO) Michael Demes was the security officer in the glass-enclosed security station in the center of the fourth floor. After the 11:00 p.m. lockup, he received two intercom calls from cell 8. The first asked if anyone would be bussed to another prison or leaving the pod. The second asked for the time. He did not hear anything in the background. (VII RT 2021, 2025-2027.)

him. . . . Leave him alone." (VI RT 1629-1630.)

Between five to 10 minutes after the first choking, appellant grabbed the towel, which was still wrapped around Andrews' neck, pulled him up with it, and choked him a second time. Andrews was face down and appellant was on his back. Bond jumped on appellant trying to pull him off Andrews. Benjamin likewise jumped on Bond trying to pull him with appellant off Andrews. Bond got appellant halfway off Andrews, but appellant still choked Andrews, who passed out. (VI RT 1471-1474, 1563, 1566, 1569; but see VI RT 1589 [Benjamin told detectives he could not tell whether appellant lost consciousness].) After holding the towel on Andrews' neck for over a minute with Andrews' head off the cement, appellant just let go, threw Andrews down on the cement, and said "I killed him." (VI RT 1474, 1479.)

Bond got real emotional, telling appellant "You killed him. You killed him." Then appellant got emotional too. But Benjamin saw Andrews' leg moving and blood coming out and going back into Andrews' mouth and could tell he was breathing, so Benjamin said, "No, he's alive, he's not dead. You guys didn't kill him. It's all right."[9/] Then appellant jumped back on Andrews and choked him for the third and final time as Andrews uttered a hoarse yell. (VI RT 1473, 1479-1480, 1566, 1591, 1608; but see X RT 2691 [Benjamin told detectives he knew Andrews was not dead after the second choking, but he did not say anything]; VI RT 1518-1520, 1574-1576; X RT 2682-2684, 2690, 2699-2700 [Benjamin told detectives he saw movement after each choking, including the third, but he may have been indicating the movement was involuntary after the third choking]; VI RT 1570-1574, X RT 2682 [Benjamin told detectives "The third or the last time [appellant] did it . . ." appellant said

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9. Benjamin later had guilt about saying that because he felt that if he had not said anything, then perhaps Andrews would be alive. (VI RT 1591, 1650.)

"the guy's dead," but Benjamin saw movement – Benjamin testified he was talking about the second time and explained he thinks he was summarizing and may have been a little confused when he gave that account].)

Appellant again remarked Andrews was dead. (VI RT 1629.) Benjamin did not know if Andrews was alive immediately after the third choking, but he expressed that was the case throughout his interview with detectives. (VI RT 1579-1580, 1592, 1654; X RT 2688, 2700; see X RT 2685-2686 [Detective Christian repeatedly asked Benjamin if Andrews was alive after the third choking because he did not believe Benjamin, as the scene indicated that anyone in that cell would have known Andrews was dead given the way Andrews was placed on a mattress, the way the blanket was placed over his body, and the way the mattress was placed under the bunk].)

Bond's Testimony

Before lock-down, Bond briefly talked to Andrews once or twice. (IX RT 2372.) At 11:00 p.m. they were locked in their cells. (IX RT 2373.) Bond had pruno cooking on the top bunk. (IX RT 2371, 2436-2437.) Around midnight to 1:00 or 2:00 a.m., Bond, appellant, and Benjamin drank the pruno. Bond had about eight to 15 cups, which was probably two more than appellant and Benjamin. (IX RT 2374-2375, 2438-2439, 2444, 2465, 2467-2470, 2472, 2518.) Benjamin drank, but Bond did know how much and did not recall if Benjamin and appellant drank the same amount. (IX RT 2470-2471; see X RT 2707 [Bond told detectives Benjamin had been drinking].) Benjamin did not appear very intoxicated, whereas appellant was intoxicated. (IX RT 2569.) Bond, who got high and had a "buzz" from the pruno, testified having alcohol in his system can somewhat affect his memory and cause him to not see things going on. (IX RT 2441, 2472-2473, 2558.)

Meanwhile, Andrews slept on a mattress on the floor in the middle of the cell. (IX RT 2376, 2380, 2471; see IX RT 2384.) About the time they finished

the pruno, appellant said he was going to talk to Andrews and woke him by shaking his shoulders. Andrews asked what was going on. Appellant said he wanted to talk, but Andrews said he was tired and did not want to talk. Appellant said Andrews was going to talk whether he wanted or not and then said stuff about appellant's "wife, the guy knowing him – knowing her or seeing her or something." Andrews said "he met them or seen them or something." Appellant, who had knelt down, got angry and began slapping Andrews, who was covering up trying to avoid being hit and saying something like he was sorry. (IX RT 2376-2380, 2473-2474.)

Then appellant got real violent and began beating Andrews, hitting Andrews' face with his fists and stomping Andrews' head on the floor with his foot. Andrews continued trying to cover up, and asked what he had done and why he was getting beaten, while appellant was yelling. Andrews' nose was swollen, he had a cut under his eye, and marks on his face from the beating, which lasted maybe 15 to 20 minutes. (IX RT 2381-2382, 2394-2395.) Bond stopped it once. He got Andrews off the floor, took him to the sink, washed his face, and tried to talk him into defending himself. In doing so, he slapped Andrews on the cheek once to wake him out of a daze. (IX RT 2383, 2412-2413, 2418, 2483, 2506, 2518; see IX RT 2517, 2798 [Bond told detectives he did not think appellant would kill Andrews and thought it was just a fight so that's why he slapped Andrews and told him to defend himself].)[10/]

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10. Bond testified he did not touch Andrews more than the one slap. (IX RT 2417-2418; see IX RT 2485-2486 [Bond denied hitting Andrews as hitting is different than a slap].) Bond first told detectives he had not touched Andrews. At trial, he explained he had been trying to not say anything because he did not want to get a "rat jacket" which would follow him to prison, where he could get killed. Once detectives told Bond that Benjamin had said appellant did the whole thing and they assured Bond that he was not the "heavy," he opened up and told detectives he had slapped Andrews and what really happened. (IX RT 2419-2421, 2476-2477, 2490, X RT 2707.) He did not recall telling detectives he had slapped Andrews a couple of times, but testified

Andrews said "Why is he doing this?" "I don't want to fight" and got back down on his mattress. (IX RT 2384-2385, 2387.)

Then appellant began talking to Andrews, saying things like he's a "punk" and he was "going to fuck [Andrews]." Appellant took his penis out through the fly of his boxer shorts and said something like "Watch this, the guy's a punk" "Watch him kiss my dick." Appellant told Andrews "Do it." Appellant was on the floor either on his knees or standing next to Andrews, who was on the mattress on the floor. Andrews kissed the head of appellant's semi-erect penis. The kiss was fleeting. Appellant then said "I told you he was a punk." Appellant also asked if anybody else wanted to fuck Andrews or "get their dicks sucked"; Bond and Benjamin both said "no." (IX RT 2385-2388, 2396, 2477-2480, 2482, 2563, 2565.) Bond never saw anyone try to sodomize Andrews. (IX RT 2484-2485.) Bond thought Andrews was just in boxer shorts when first lying on the mattress, but was unsure. Still, he was pretty sure Andrews' boxers came off "when [appellant] was having [Andrews] do the sexual things," but he did not recall how. (IX RT 2387-2388, 2554-2556.)

Meanwhile, the intercom came on where a guard responded and someone from their cell asked something like the time. (IX RT 2401-2402, 2541; see IX RT 2516 [Bond told detectives he thought Andrews pushed the button].) Soon after, appellant began choking Andrews, who was semi-conscious and still on the floor. Appellant was behind Andrews with the towel wrapped around his neck, pulling back on the towel with both ends. Andrews was going out of consciousness. (IX RT 2388-2389, 2391, 2402,

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he told them the best he could recall and he may have said that when not thinking straight. (IX RT 2418, 2517-2518.) At the preliminary hearing, he said he never touched Andrews. At trial, he initially did not recall that testimony and said "I think I pled the Fifth then." He later recalled his preliminary hearing testimony and explained he had not lied when he said he never touched Andrews, but had said "no" on advice of his lawyer. (IX RT 2413-2417.)

2505-2506.) In a serious tone like he meant it, appellant said he was going to kill Andrews. (IX RT 2389-2390, 2522.) Bond was scared and nervous. (IX RT 2390.)

Bond made appellant stop choking Andrews by pulling him off Andrews. Bond tried to reason with appellant, saying it was not right, Andrews did not deserve it, and appellant did not need to do it. But that did not work. (IX RT 2391-2392, 2430-2431, 2506-2508, 2515.) Appellant told Bond to stay out of it, mind his own business, and the same thing could happen to him. (IX RT 2392.)

Bond, who was under the influence of alcohol, agreed to mind his own business and appellant resumed choking Andrews, saying he was going to kill Andrews. (IX RT 2393-2394, 2518, 2558.) Andrews was not very conscious and still on the floor with the towel around his neck. (IX RT 2394.) After about five minutes, Bond again stopped appellant and tried to talk him out of choking Andrews. (IX RT 2395-2396.) Like before, appellant told Bond to stay out of it, mind his own business or he would "be dealt with too." Appellant also said Andrews was a punk and "couldn't handle business being here." (IX RT 2396.)

Then appellant began choking Andrews a third time. Andrews was in the same position and appellant was right behind him with the towel still wrapped around his neck. Appellant had one end of the towel under his foot and was pulling the other end with both hands. (IX RT 2396-2397, 2512; see IX RT 2512 [Bond testified he was mixed up when he told detectives he knew nothing about a third choking].) Meanwhile, Bond walked over and looked out his cell door's window. Appellant finally said, "Fuck it, I'm through with it," and released the towel. (IX RT 2397.) Andrews was unconscious and Bond could not tell if he was breathing. (IX RT 2399; see X RT 2691 [Bond told detectives that he had hoped Andrews was still alive after the third choking, but

he did not know if he was].) Bond did not recall if Andrews was naked or had his boxers back on. (IX RT 2398; see IX RT 2554.)

Altogether Bond pulled appellant off Andrews three times, hitting appellant a couple of times in the process. Each time appellant went back and began "hitting [*sic*; choking?]" Andrews again. (IX RT 2485, 2533-2534.) Benjamin never tried to stop appellant. Instead, he tried to protect Bond from getting involved by telling Bond to mind his own business and pulling Bond off appellant every time. (IX RT 2392-2393, 2421-2422, 2487, 2508, 2544-2545.)

Bond did not participate in the attacks on Andrews. Aside from slapping Andrews' cheek to wake him out of his daze, Bond expressly denied slapping his body, hitting or kicking him, jumping on him, pushing him, and assisting in choking him. (IX RT 2403, 2422, 2431, 2483, 2506.) Likewise, Benjamin never struck or assisted in choking Andrews. (IX RT 2402-2403, 2487, 2544.)

Overhearing Of Appellant's Attack

Williams' Testimony

Williams did not hear anything unusual during the night. (VI RT 1380.)

Martinez's Testimony And Statements

Albert Martinez, who has felony convictions for receiving stolen items, spousal false imprisonment, and petty theft with a prior, testified that on April 8, 1992, he had been jailed on the upper tier of 4-F (F pod) on a parole violation for failing to report his arrest on the latter offense. (VII RT 1684-1686, 1689, 1698, 1708-1709, 1711, 1727-1729; but see VII RT 1801 [Detective Christian testified Martinez was in cell 4-F-12, which is on the lower tier near the pod's center]; see People's 5 [photo of cells].) Martinez served 90 days in jail in June or July of 1992 for the latter offense and was off parole. (VII RT 1711, 1728.) Martinez testified that on April 9, 1992, he is pretty sure he slept through

breakfast and awoke when they began taking inmates from their cells, which is when he learned an inmate was killed. He "had been out of it" and did not recall hearing or seeing anything the preceding night. (VII RT 1688-1690, 1694, 1699, 1712, 1718-1720.) In contrast, Martinez told Detectives Christian and Burke he got up to use the toilet and heard the following: someone calling for help, screaming, "Just leave me alone;" a sound as if a body was thrown against a wall and the toilet; another voice saying "Hey homes, you hear that?"; the sound of someone being beaten; a voice stating or hollering out something to the effect that he wanted to "fuck" him and "stuff;" and finally a voice saying "Shut up." (VII RT 1787-1789, 1801, 1811.)

Johnson's Testimony And Statements

Johnson recalled when the dead body was found, but he did not recall hearing anything unusual like arguing and fighting or someone being beat up the night before. (VIII RT 2238-2239, 2243.) In contrast, Johnson told Detective Sherman Lee during the evening he had heard fighting but he could not tell from where it came. (X RT 2721.)

Nelson's Testimony

At 11:00 p.m. the inmates were locked in their cells. (VIII RT 2083-2084.) Nelson went to sleep, but a cellmate awoke him and his attention was drawn to appellant and Bond laughing and appellant and Andrews yelling. Nelson did not hear Benjamin. It sounded like there was a fight going on upstairs, as if someone was getting thrown around. Nelson heard a lot of jumping and someone running around. Nelson heard appellant talking to Mexican guys next door to him and they were trying to respond, but it was hard for Nelson to hear because of echoing. Nelson heard appellant screaming like an Indian and then he heard Andrews say "Somebody, please get me out of this cell." (VIII RT 2084-2087, 2114, 2117-2120, 2131, 2136-2137.) Nelson

thought about pushing the call button, but then someone in appellant's cell pushed the call button and the officer asked if there was a problem. Nelson could hear them scuffling a little and appellant said "No, there's not a problem in here." After that, the officer got off the intercom. Nelson looked out his cell door's window and saw the officer walk away from the control panel. Then it sounded like the scuffle continued. (VIII RT 2087-2088, 2114-2115, 2140.) Nelson heard Andrews say, "You might as well go ahead and kill me." (VIII RT 2087.) Nelson and his cellmates talked about what was going on but they did not know what to do. Nelson thought about pushing the call button but he did not think it would do much good because it already had been tried and he did not want to be labeled a "rat."[11/] The scuffling did not go on much longer. Then everything got quiet. (VIII RT 2089, 2134-2135, 2140.)

Repositioning And Covering Of Andrews' Body, Cleaning Crime Scene

Benjamin's Testimony

Appellant and Benjamin put Andrews on a mattress, Benjamin covered Andrews with a blanket from the neck down, and appellant and Benjamin scooted the mattress under the bottom bunk. (VI RT 1480-1481, 1570, 1578-1579, 1642-1643; see VI RT 1576, X RT 2700 [Benjamin told detectives he thought Andrews was still alive and did not think Andrews' life was in danger when appellant remarked about putting him under the bunk]; X RT 2700 [Benjamin failed to tell detectives that he helped put the body under the bunk].) Benjamin did not recall the towel being around Andrew's neck at that

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11. Nelson felt a little guilty for not having pushed the intercom button and regretted not getting help for Andrews. (VIII RT 2125, 2140.) When asked if he was testifying to alleviate his guilt, Nelson said he was testifying because he is trying to change his life; telling the truth is the right thing to do, and that is what he is trying to do. (VIII RT 2146.)

time, let alone where the towel was. (VI RT 1578-1579.) There was blood on the floor and on the walls. Appellant told Benjamin and Bond to clean the cell. Benjamin complied because he was scared of appellant. The trio wiped up the blood with towels and boxer shorts that they flushed with other things down the toilet. Benjamin flushed his boxer shorts too because there was blood on them. One of them swept the cell. (VI RT 1480-1481, 1487, 1525, 1565, 1627, 1643.) Appellant told them when the police ask about it, just say he and Andrews fought, they went to bed, and did not know what happened. (VI RT 1482-1483, 1646.)

Bond's Testimony

Appellant asked for help repositioning Andrews on the mattress under the bottom bunk and cleaning blood off the floor. Appellant and Benjamin said something like "Ain't you going to help clean up," so Bond agreed. (IX RT 2397-2399, 2423, 2537-2538.) A sheet or blanket was put over Andrews up to his shoulders, leaving his head exposed. Appellant and Benjamin slid Andrews under the bottom bunk while Bond cleaned the floor. Bond never touched Andrews or his bed. Bond does not recall if Andrews was dressed or seeing anything around his neck at the time. (IX RT 2400, 2428-2429.) Bond did not get blood on his body that night, but he may have got some on his hands when he cleaned up. (IX RT 2422, 2519.) Both Bond and Benjamin used towels to clean up and then flushed them down the toilet to get rid of the evidence. Bond thinks one of those towels was the one appellant had used to choke Andrews, but he was unsure. (IX RT 2397-2398, 2400, 2423, 2428-2429, 2519-2520; but see IX RT 2535-2536 [Bond told detectives they only used toilet paper probably because he did not recall about the towels]; IX RT 2538-2539 [Bond said he was mistaken in his 1993 deposition when he denied that getting rid of evidence or blood was mentioned].) They also flushed

the garbage bag that had held the pruno to hide their drinking. (IX RT 2519.) Bond got rid of evidence because he was scared. (IX RT 2430-2431.) Bond did not think he flushed any boxers and told detectives he had not done so. (IX RT 2428, 2539-2540.)

Appellant's Incriminatory Activities That Morning

Benjamin's Testimony

About an hour after Andrews' body was put under the bunk, the cell doors were unlocked. Andrews did not regain consciousness in the interim. Benjamin, who noticed Andrews' color was turning dark and could not see Andrews breathe, assumed Andrews was dead. (VI RT 1481, 1518, 1528, 1570, 1575-1576, 1646-1647.) Appellant left the cell first, followed 10 or 15 seconds later by Bond and Benjamin. Benjamin went down into the day room area. Appellant stopped at a cell and then went to a Hispanic cell on the first tier. (VI RT 1483-1484, 1523-1524; see X RT 2688.) Bond went to a "white" cell downstairs. Benjamin caught up with him and then appellant came in with some others and remarked about what had happened and for Benjamin and Bond not to say anything or something would happen to them. (VI RT 1484, 1524, 1584.) About 3:30 to 4:00 a.m., food was served. (VI RT 1482, 1487.) Benjamin saw appellant throughout the meal. He was with three or four inmates on the second tier by the shower at the end opposite from their cell. Benjamin did not know if appellant went back into their cell. (VI RT 1487 1583-1584.)

Bond's Testimony

About an hour later after Andrews was put under the bunk, the doors unlocked for breakfast. (IX RT 2400-2401.) In the interim, Bond never saw Andrews move or heard him make a sound. He was unsure if Andrews was alive, but he "didn't think that he'd been choked completely dead." (IX RT

2399, 2401, 2425, 2505, 2509-2511, 2525-2526; but see IX RT 2505 [Bond "thought more that [Andrews] wasn't" still alive][12]; see IX RT 2526 [Bond told detectives he did not think appellant thought Andrews was dead].) Meanwhile, appellant made plans on what he was going to say or do, but Bond could not recall them. (IX RT 2401.) Appellant told Bond stuff like just keep his mouth shut and that he did not see anything, or he would "be dealt with." (IX RT 2401, 2526-2528; see IX RT 2527-2529, 2563 [Although Bond had told detectives appellant did not tell him to keep his mouth shut, Bond later explained that was when he was withholding information or mixed up].)

Williams' Testimony

The next morning as soon as the cell doors were unlocked for breakfast, Williams saw and heard appellant calmly going cell to cell, telling the Chicanos to get rid of any knives or weapons because he had killed a guy upstairs. (VI RT 1379-1382; see VI RT 1422, 1424.)

Martinez's Testimony And Statements

Martinez testified as far as he knew, no one went into appellant's cell between the time the doors were unlocked and the time inmates were locked down due to the homicide. (VII RT 1705-1706.) Martinez further testified he did not know appellant as "Mr. Dement" or "Pico," but he had seen appellant before. He did not recall it being when he was in 4-F, but perhaps he saw appellant on the streets. (VII RT 1685, 1691-1692, 1694.) In contrast, Martinez told Detectives Christian and Burke: when Pico (appellant) came out for breakfast that morning, he came to Martinez's cell where Martinez was lying

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12. Bond was hung over and shook up, so he maybe misunderstood the detectives' question when he told them Andrews was still moving when they went to breakfast. He recalls them asking if Andrews was moving after the first or second choking. (IX RT 2476, 2510-2512.)

down; Martinez overheard appellant bragging to someone that he had just killed somebody, saying he "killed the punk." (VII RT 1789-1790, 1804[13]; but see IX RT 2524 [Bond did not hear appellant boast about having done anything to Andrews].) Martinez told them he had heard appellant say he had beat him and was pretty sure appellant mentioned he was choking him, strangling him. (VII RT 1797, 1807-1808.) Martinez also told them appellant said:

> "he was trying to go up in the guy. That means trying to fuck him, and I can't recall -- I can't -- I remember, but I couldn't actually hear whether he said that he had fucked the guy or he had killed him because he didn't want to let him fuck him. . . ."

(XV RT 1798, 1813-1814; see VII RT 1701-1702, 1725-1726 [Martinez testified the phrase "go up in a guy" can mean to have sex with or stab].) Martinez also said he heard appellant say "the guy greased his butt up." (VII RT 1798.)

Martinez further told Detectives Christian and Burke: Appellant, who smelled like alcohol, asked Martinez to help him drag a body downstairs but Martinez told appellant that he did not want anything to do with it. (VII RT 1790.) Appellant also asked some Black males to remove the body from his cell. (VII RT 1797.) Appellant told Martinez and other people in the pod that "if he got rolled up,[14] the two people that knew what had happened were his two cellies and that they needed to do something to him [*sic*; them]." (VII RT 1791; see VII RT 1695.) Martinez saw appellant, who was walking around talking to other people and joking, pick up a broom and begin sweeping the pod. (VII RT 1812.)

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13. Martinez testified almost every inmate will sometimes brag by telling people what they have done and what they are going to do, so they can get power, status, and make a name for themselves within the jail system; about 50 percent of the time it is hype. (VII RT 1733.)

14. "[R]oll him up" means the inmate voluntarily or involuntarily gathers his things and moves to another cell. (VI RT 1443-1444.)

Johnson's Testimony And Statements

Although Johnson denied making such statements (VIII RT 2247-2249), he told Detective Sherman Lee that after the inmates returned to their cells following breakfast, appellant grabbed a broom and began sweeping as if he was a trustee which appellant had never done before, and that appellant never returned to cell 8 (X RT 2722, 2724).

Nelson's Discovery Of Andrews' Body

Nelson's Testimony

When the doors were unlocked, Nelson and other inmates exited their cells. Bond came downstairs and Nelson met him at the foot of the stairs. Nelson assumed Bond and appellant may have beaten up Andrews and asked "What did you guys do to Greg [(Andrews)]?" Bond looked drunk and was kind of crying. Nelson smelled pruno on his breath. Nelson told Bond "You better not have hurt him" and went upstairs to wake Andrews for breakfast. (VIII RT 2090-2091, 2127, 2133, 2136-2137, 2139.) Appellant was in a cell with Mexicans. (VIII RT 2127-2128.) Nelson did not see Benjamin. (VIII RT 2128.)

Nelson went to Andrews' cell. Its door was closed but unlocked. Nelson opened it and went in. Nelson saw someone covered with a blanket under the bottom bunk. No one else was in the cell. Nelson went to the covered person, assuming it was Andrews, and told him to get up for breakfast but he did not respond. Nelson went over and tried to shake the person but he did not move. (VIII RT 2091, 2128, 2133.) Nelson lifted up the blanket and saw feet, so he went to the other end and lifted it to reveal Andrews' face which was towards the far wall. Blood smears were on his swollen face as if blood had been wiped off of it. Nelson shook Andrews' head and called his name, but Andrews did not respond. Nelson knew he was dead, so Nelson quickly got out

of there leaving the blanket off Andrews' face. Nelson did not see anything around Andrews' neck, but he did not really look. (VIII RT 2092, 2129-2130, 2131-2133.) Nelson then went downstairs to a neighboring cell and told one guy "Hey, Greg's dead," but that inmate did not want anything to do with it so Nelson left. (VIII RT 2092, 2132-2133.) Nelson then talked for a minute to Bond and Benjamin, who were against the day room wall. Benjamin did not smell or look like he had been drinking pruno. Then Nelson returned to his cell where he told his cellmates what he had seen. (VIII RT 2092-2093, 2132-2133, 2138.)

Benjamin's Testimony

Before breakfast was served, an individual with a red-brown mustache who was a friend of Andrews (i.e., Nelson), went into cell 8 to wake Andrews. (VI RT 1581-1582, 1585-1586, 1649.) Benjamin did not see Nelson go into the cell but Nelson returned to his own cell where Benjamin and Bond were inside and Nelson's face expressed anger and hurt. Nelson was upset, asking why they let appellant kill Andrews. (VI RT 1582, 1586, 1648-1649.)

Bond's Testimony

When the doors opened, appellant, Bond, and Benjamin left the cell. Bond went to the day room. About 10 minutes later a stocky blond inmate with possibly a mustache (Nelson), who was a friend of Andrews, went up to Andrews' cell. Then Bond, Benjamin, and Nelson went into Nelson's cell which was right below theirs. Nelson told Bond that Andrews was dead. Nelson asked what went on that night and what all the noise was. Bond may have told him something like there was a fight. Then they talked about what had happened. (IX RT 2403, 2405-2407, 2435, 2529-2530, 2561-2562.)

Appellant's Confrontation With Nelson

Bond's Testimony

As Bond and Benjamin were talking with the guys in Nelson's cell, appellant came in and told Nelson things like "You better keep your mouth shut" about the prior night's activities. (IX RT 2404-2405, 2407, 2435, 2561-2562; see IX RT 2564 [Bond told detectives appellant "challenged" Nelson to keep his mouth shut].)

Martinez's Statements

Martinez told Detectives Christian and Burke: Martinez saw a confrontation between appellant and a big white guy with a goatee (Nelson), who had gone to Andrews' cell to wake him and bring him down for breakfast. Martinez heard appellant tell the goateed man "You ain't got no business in my cell. You know, what the fuck you doing?" Appellant kept reaching into his pants and said "I'll take your wind, you know, I'll do the same to you,"[15/] so Martinez guessed appellant had a knife.[16/] The goateed man said "Get the fuck away from me, man. I got nothing to do with you, nothing to say to you." Appellant told the goateed man "You go get the body out of my cell," but the man refused. (VII RT 1791-1792, 1795-1797, 1805-1806; see VIII RT 2079-2080 [in 1992, Nelson had a goatee], X RT 2674 [Detective Christian testified Nelson was the only inmate who fit the description of a big white guy with a goatee].)

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15. Detective Christian interpreted that statement to mean "I'll kill you, too" because "A dead body no longer breathes. You take their wind." (VII RT 1806-1807.)

16. The parties stipulated there was no knife. The jury was told Martinez's speculation about the knife was merely admitted to give context to his statement and for impeachment. (VII RT 1793-1794.)

Nelson's Testimony

Appellant came into Nelson's cell upset at having learned Nelson had gone into his cell. He told Nelson it was his cell and to "stay the fuck out of" it. (VIII RT 2093-2094.) Nelson thought appellant and he were going to fight, but appellant changed his attitude and asked if Nelson would go upstairs and drag the body onto the tier. Nelson told appellant "You're crazy. He was my friend. I'm not going to help you in any way." (VIII RT 2094.) Appellant was jumping around a little bit and said it did not mean anything for him to take a human life. He told Nelson that if he said anything, he would "deal with it." (VIII RT 2094-2095.) Appellant, who had pruno on his breath and appeared a little drunk, put his hand on Nelson's chest and shook his finger in Nelson's face, saying Nelson would be "through like that" while drawing his finger across his throat. (VIII RT 2107-2108, 2137-2138, 2140; see VIII RT 2140, 2144 [Nelson did not tell detectives appellant drew his finger across his throat, but said appellant had threatened he would be dead if he said anything].) Nelson, who feared for himself, told appellant he would not say anything. (VIII RT 2108; but see VIII RT 2113 [Nelson testified he was not afraid of appellant as he watched his hands in plain view].)

Report Of Body And Law Enforcement Response

Benjamin's Testimony

Bond was in Benjamin's sight the entire time they were out of their cell and they talked about what had happened. Bond told Benjamin this incident would be good for Bond's case and remarked about possibly dealing his way out of his charges. (VI RT 1599-1600, 1630-1631; but see IX RT 2543-2544 [Bond denied making those remarks].) Benjamin did not have similar thoughts about his charges. (VI RT 1636-1637.) About 30 to 45 minutes after being let out of their cell, Benjamin and Bond went back to their cell, shut the door, pushed the call button, and Benjamin notified the officer there was a body in

the cell. (VI RT 1485-1487, 1581.) Guards came running in. They took Benjamin and Bond out, put them in a holding cell, and locked down the remainder of the inmates. (VI RT 1486-1487.)

Bond's Testimony

Bond ate breakfast with Benjamin at the "[W]hite" table while appellant was at the Hispanic table with his friends. (IX RT 2404, 2426.) Bond and Benjamin sat in the corner staying away from others because Bond wanted to talk to Benjamin to get his story straight and discuss what they were going to do with the body. (IX RT 2426; see IX RT 2545-2546 [Bond testified they did not collaborate nor try to figure out what they were going to tell law enforcement; instead, they just talked about what had happened].) Bond told Benjamin that he was worried about being arrested and charged with murder. (IX RT 2436.) As for how to avoid being charged with murder, Bond and Benjamin agreed to just tell the truth and notify law enforcement about the body in the cell. (IX RT 2424, 2426-2427, 2436; but see IX RT 2542 [Bond testified he and Benjamin agreed to just keep quiet].) While appellant was in the day room or another cell, Bond and Benjamin went back up to their cell to check if Andrews was dead or alive. There was a sheet or blanket covering Andrews. (IV RT 2432.) Benjamin closed the door which Bond stood by as Benjamin looked at Andrews. Benjamin said "I think the guy's dead" "It looks like the guy's not breathing." (IX RT 2404, 2407, 2427, 2432-2434; see X RT 2682 [Benjamin told detectives he believed Andrews was dead after breakfast].)[17/]

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17. When they returned to the cell, Bond did not tie a towel around Andrews' neck nor did he see Benjamin do so. (IX RT 2423-2424, 2427.) As for how a towel got tied in an overhand knot around Andrews' neck the morning that he was found, Bond testified "Not unless it was already there." (IX RT 2433; see IX RT 2423-2424 [Bond never saw anyone tie a knot in the towel that was around Andrews' throat nor did he see a knot in that towel].) Detective Christian did not believe anyone returned to the cell and tied the

Bond did not recall if Andrews had his boxers on. (IX RT 2555.) Although Bond initially testified, Benjamin rather than he, pushed the intercom button, he later testified he was unsure but he thought Benjamin told him to push it and he did. Benjamin then told a security officer there was a body in the cell and he wanted the door locked. (IX RT 2404, 2424-2425, 2434, 2568-2569.) Bond and Benjamin stayed in the cell. Five to 10 minutes later, deputies arrived. (IX RT 2404, 2434-2435.)

Other Testimony

About 4:13 a.m., an intercom call came in from cell 8 saying they had a cold body "and you better get somebody up here." CO Demes immediately called sixth floor CO Jose Delgado and fourth floor CO Jesse Gonzales to fourth floor F pod, cell 8 to investigate a "man down" "a possible cold body." (VII RT 1944-1945, 1950, 1965, 1970; VIII RT 2022-2025, 2029.) CO Delgado arrived and saw appellant sweeping the day room. (VII RT 1948, 1958; but see VII RT 1966 [CO Delgado's report did not note that].) Other inmates were locked in their cells. (VII RT 1942, 1949.)

CO Delgado went to cell 8, where he saw an inmate standing along the back wall, an inmate lying on the lower bunk, and another inmate on a mattress covered by a sheet or blanket, on his stomach with his head facing the bunk bed wall. (VII RT 1949-1952, 1972.) CO Delgado asked the two other inmates what was the matter. They both said there was a body in there; one said the

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towel around Andrews' neck after appellant, Bond, and Benjamin had left. Bond's and Benjamin's physical reactions and verbal responses to questions did not cause him to believe otherwise, so he did not ask them about having done so. (X RT 2688, 2691; see X RT 2701 [Detective Christian testified none of the 54 pod inmates said anyone was seen going into that cell when this could have occurred; yet, Nelson went into that cell and Benjamin and Bond returned to it].) He thinks Bond and Benjamin did not pay attention to details like whether a towel was tied around Andrews' neck. (X RT 2713.)

body was cold, the other said, "Get him out of here." CO Delgado told them to stand along the far wall and they complied. (VII RT 1952, 1973.) CO Gonzales remained outside while CO Delgado entered the cell and checked the inmate for a pulse. He checked the wrist and either side of the neck but got none. In checking, he noted the inmate's face was bruised all over, his eyes were black, his fingertips were blue, and his body was cold. (VII RT 1953, 1975-1977.)

Medical Response, Removal Of Towel From Andrews' Neck, Resuscitation Attempts

Various Testimony

About 4:15 a.m., Nurse Opal Lewis came to cell 8 where CO Delgado was standing at the door and other officers were standing around. (VII RT 1893-1896.) Nurse Lewis and LVNs Nathan Doty and Sherrillee Lawson went in the cell and saw a subject, who appeared to be sleeping, prone on a mattress under the bottom bunk, covered by a blanket from the neck down. (VII RT 1895-1896, 1909-1911.) No other inmates were in the cell. (VII RT 1896; IX RT 2452.) To access the subject for treatment, Officer Delgado and LVN Doty pulled the mattress out from under the bunk to the middle of the cell. (VII RT 1897-1898, 1911-1912, 1954, 1979.) The blanket was removed. He was on his stomach and had a jumpsuit across the back of his naked body. (VII RT 1897, 1912, 1957.) When the blanket was pulled back and they turned him over to attempt to take his vital signs, they noticed a rolled, dingy, jail-issue terry-type towel tied around his neck. (VII RT 1898, 1911-1912, 1922, 1954, 1978-1980, 1983, 1986.) His neck and head were purple and bruised, his face was swollen, his eyes were swollen shut, his jaw was clenched,[18] his neck was

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18. Medical staff discussed the fact that rigor mortis possibly had begun. (VII RT 1925.)

wrinkled from the damp twisted towel, and his body was cold. (VII RT 1902, 1926, 1931-1933; but see VII RT 1980 [CO Delgado testified the towel was dry].)

Because the towel was tied in back, they had to turn his body back on its stomach to untie it. (VII RT 1898, 1915-1916, 1982-1983.) The towel, which had been folded on opposite corners into triangles and twisted about three times, was tied in a single, extremely tight overhand knot, which took CO Delgado and Nurse Lewis 15 seconds to two minutes to get untied and removed. (VII RT 1898, 1916, 1920, 1934-1935 1983.) Then they turned him on his back, checked for vital signs, which seemed lacking – Nurse Lewis thought perhaps there was a heartbeat but another nurse checked and could not hear anything – and then they automatically began CPR. (VII RT 1899-1900, 1902, 1924-1925, 1927, 1935, 1986-1988.) The towel was put on the floor beside Nurse Lewis and remained there throughout the procedure. (VII RT 1899, 1923-1924, 1985.)[19/] Emergency medical personnel arrived and continued resuscitation efforts, but ceased when told by a doctor to stop. (VII RT 1904-1905, 1907, 1930, 1956.)

Crime Scene Preservation And Processing

About 5:15 a.m. on April 9, 1992, ID Tech Fox arrived to process and diagram the crime scene in cell F008, fourth floor of pod F at the Fresno

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19. Nurse Lewis later collected the towel and put it in a paper bag, the custody of which went from Nurse Lewis to Correctional Sergeant David Mills, to Deputy Buddy Wilson, to Identification Technician (ID Tech) Robert Brown, and finally to ID Tech Jackie Fox. (VII RT 1905-1907, 1923, 1936, 1938, 2032-2033, 2040, 2042, 2047, 2196-2198.) Nurse Lewis was unaware of any other towels in the bag and Sgt. Mills testified that was the only towel in it. ID Tech Brown testified he did not place anything in the bag. Yet, when ID Tech Fox opened the bag, it contained two towels. (VIII RT 1923, 1937, 2198-2200.)

County main detention facility. (VII RT 1815-1816, 1820-1821.) There may have been distortions in the scene because people who preceded ID Tech Fox may have altered it, however, inmates were locked in other cells and the area was secure. (VII RT 1821, 1868-1870.) At the scene, ID Tech Fox worked with ID Tech Brown and Criminologist Jack Duty and Detective Flores. (VII RT 1820, 1870.)

The cell, which is about 17½ feet long by 6½ feet wide, had a combination toilet/sink metal fixture above which were a light and a mirror, a metal table and metal seat, three metal bed frames that were above one another, a storage area, and a speaker/call box. (VII RT 1825-1828, 1874.) ID Tech Fox located numerous areas of possible blood throughout the cell. (VII RT 1834-1835, 1840-1845.) He recovered a white towel along with a piece of sheet from the cell floor adjacent to Andrews' head and a white towel and three sheets from the cell floor in the southeast corner cell floor. (VII RT 1848-1849, 1855, 1858-1862.) ID Tech Fox received two white towels from ID Tech Brown, who recovered them from another person. (VII RT 1847-1848, 1863-1865.) All those items possibly had blood on them. (VII RT 1855, 1864.) ID Tech Fox did not recall whether there were any blankets in the cell, however, he did not collect any. (VII RT 1890.)

Sgt. Jose Flores was the scene detective who made sure staff collected evidence, took pictures and prepared a written "snapshot" of the scene. (V RT 1358-1359.) Around 5:30 a.m., Sgt. Flores arrived at the main detention facility. (V RT 1360.) He went to the fourth floor where the body was. (V RT 1361.) The whole pod had been evacuated of inmates. (V RT 1364.) F pod was secured; no one was going in or coming out. (V RT 1365.) Other detectives were present and they were mostly interviewing other inmates. (V RT 1365-1366.) He was given a briefing by early scene personnel. (V RT 1365.) Sgt. Flores took a walk through F pod. (V RT 1366.) The cell was on

the second tier furthest to the right. (V RT 1367.)

Incident Report, Strip Search, General Body Exams, And Blood Samples Of Appellant, Bond, And Benjamin

About 4:50 a.m., Deputy Wilson arrived to write an incident report. He had all COs removed from cell 8 to preserve the scene until detectives arrived. He then interviewed COs who may have had knowledge about what occurred. (VIII RT 2030-2031, 2036-2037, 2045.) Meanwhile, appellant, Bond, and Benjamin were escorted to the gym, where CO Kevin Molle contacted them in the presence of Correctional Sergeant Greg Rogers. (VII RT 1941-1942, 1955, 1990; VIII RT 2011, 2013-2015, 2017-2018; IX RT 2451-2452.) CO Molle strip searched them but no contraband or weapons were found. (VIII RT 2015-2016.) The three were then separated to different rooms. (VIII RT 2011-2012, 2015-2016, 2018.) Benjamin told CO Molle that he wanted to talk and appeared agitated, so CO Molle turned him over to Detectives Christian and Burke for an interview. (VIII RT 2018-2019.)

At 10:04 a.m., 11:40 a.m., and 1:00 p.m. respectively, forensic laboratory Criminalist Michael Giberson and ID Tech Fox did general body exams of appellant, Benjamin, and Bond. (VIII RT 2202, 2204, 2211-2212.)

Appellant had a 1½ inch circular reddened and swollen area on back of his right middle knuckle, a scrape and a ¼ inch cut on back of his right thumb web, a small abrasion on back of his left thumb web, an abrasion on back of his upper right arm, a bluish bruise on the outside edge of his right big toe, a small bluish bruise on his left shin about six inches below his knee, and an apparent blood stain on top of his right fourth toe. (VIII RT 2205-2208, 2228-2232, 2235; see XI RT 2926 [photos depict appellant's hands at about 10 a.m. that morning; People's Exhibits 16 & 17].)

Benjamin had no injuries but he had a small smear of possible blood on his right toenail,[20] a discoloration similar to a bruise on the top of his right foot and light smears of possible blood across the top of all his left toes.[21] (VIII RT 2209, 2226, 2232-2233, 2235; see VI RT 1647.)

Bond had a 1½ inch scratch that broke the skin on top of his right shoulder about which he spontaneously said "I did that in the gym this morning for the record," a shallower 1½ inch scratch that broke the skin on his left temple, less than a ½ inch red spot inside his right wrist, a ¾ inch abrasion on the front of his left knee, and a small smear of possible blood on his right big toe. (VIII RT 2209-2211, 2214-2218, 2223; IX RT 2548-2549.) At trial, Bond explained he got the shoulder scratch working out in the gym, after Benjamin and appellant were moved, when he raised up into bicycle handles while using a bench press or something similar. (IX RT 2549-2550.) As for the mark on his left temple, Bond testified it was a scar and Defense Counsel Katherine Hart confirmed he has a very faint scar there. (IX RT 2550-2552.) Bond did not recall the knee abrasion, but testified if it was there, it occurred when he wrestled appellant and Benjamin in the cell. (IX RT 2552-2553.)

At 11:10 a.m., 11:13 a.m., and 11:54 a.m. respectively, blood was drawn from Bond, Benjamin, and appellant. Analyses shows a .07 grams percent ethyl alcohol for Bond and negative results for Benjamin[22] and appellant. (IX RT

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20. Appellant mistakenly states it was across Benjamin's right thumbnail. (AOB 12.)

21. The mark across the toes was consistent with many things including kicking someone, however, given the cell's size and blood on the floor, it would be very easy to pick up blood walking through it, so there was no way to tell whether the mark occurred in that fashion or whether it arose from beating the victim. (VIII RT 2226-2227.)

22. Benjamin's blood had 4.16 mg/l, less than a therapeutic dose, of Meprobamate, an anti-anxiety drug that reduces fear, removes hostility, and gives a sense of well-being. It causes drowsiness and should not be taken with

2571-2572; see IX RT 2577.) Forensic pathologist Venu Gopal testified metabolic clearance rate may vary, but assuming all things are standard, burn-off is about .015 grams percent per hour. (IX RT 2573, 2576, 2583-2584.) Thus, Bond's blood alcohol level reasonably could be estimated at .16 grams percent around 5:00 a.m and over 0.205 grams percent at 2:00 a.m. (IX RT 2584-2586.) Dr. Gopal could not say whether appellant or Benjamin had alcohol, but it is possible for it to have gotten burned off depending on how much and when they drank it. Thus, they could have been at a .12 grams percent at 3:00 a.m. and negative eight hours later. (IX RT 2595-2598.) Generally, at .05 to .09 grams percent, a person would have decreased inhibition, increased self-confidence, decreased attention span, and alteration of judgment for time and distance. At .20 or .21 grams percent, the person would have those symptoms and could be stuporous (i.e., not walk straight). Yet, if the person is used to taking alcohol for a long time, it may not effect his behavior at all. Still, there would be some impaired memory at that level. (IX RT 2577, 2587-2592, 2594.)

Investigative Interviews

Williams

The day Andrews' body was discovered, a Sheriff's Detective (Linda Lee) interviewed Williams who said he knew what had happened, but that he did not want to make a statement unless she could make a deal on his case so he could avoid going to prison and instead be put into a drug program. She said she was not in a position to make deals but she would check into it, so he told her what he knew. He was truthful and essentially told her what he testified to

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alcohol. Combining it with alcohol could increase self-confidence, impair judgment, impair perception and comprehension of what is occurring to some extent, and lead to stupor. (IX RT 2578-2581, 2600.)

at trial; he was pretty sure he gave her the name "Pico," but he did not recall. (VI RT 1384-1385, 1405-1408, 1410-1411, 1420-1421, 1423-1427.) Specifically, he told her:

> "Yeah, I know who done it. The guy told me last night that he was going to do his ass." . . . the guy told him, "We know that mother-fucker. I'm going to do his ass. You watch, I'm going to do his ass."

(VI RT 1426.) No deal was made and she never got back to Williams. (VI RT 1385, 1411.)

Martinez

Martinez testified he does not like law enforcement officers interviewing him. Sometimes he does not tell officers the truth and he has convictions for giving officers false information. (VII RT 1730-1732, 1762.) Martinez, like other inmates, was taken to a gym or hospital where he was interviewed. When asked if he knew anything about what had happened, he truthfully told the deputy "no," he had slept the whole night, and had not heard anything. (VII RT 1688, 1690, 1699, 1706-1708, 1713, 1716, 1754-1755.) Then he was sent to the roof like other inmates. (VII RT 1690.) When the inmates were brought back, everyone was talking about the body found in the cell. (VII RT 1706.)

Martinez testified he never contacted a detective, he did not recall being interviewed by Detectives Christian and Ernie Burke on April 13, 1992, and he did not recall statements he purportedly made to them. (VII RT 1686-1687, 1692-1702, 1704, 1713, 1715, 1756, 1758-1760.) In contrast, Detective Christian, who was present during part of Martinez's testimony, indicated he recognized Martinez from having interviewed him with Detective Burke on April 13, 1992. That interview, which was about 22 minutes, was tape recorded and Detective Christian compared the tape to a transcript which he found to be

accurate. (VII RT 1764-1766, 1783-1784, 1787-1788.)[23]

Martinez told Detective Christian he was jailed on a parole violation with a pending charge of petty theft with a prior. (VII RT 1767.) During their interview, Martinez identified a photo of appellant, whom he knew as "Pico," said he knew appellant from the streets pre-incarceration and he knew why appellant was jailed, "he was the guy with the F-14 tattoo on the back of his neck," and he was housed in a different cell in F pod on the fourth floor. (VII RT 1768-1770, 1798-1799.) Martinez identified photos of: Andrews saying "that was the victim," Bond by his nick name of "James Bond," and Benjamin saying he "was one of Pico's cellies" (i.e., cellmate). (VII RT 1784-1785.)

Martinez told the detectives his statement was free and voluntary, no promises had been made to him, and no threats were made to get his statement. (VII RT 1799-1800.) Martinez told detectives he had spoken to other people and talked to other inmates in the jail about what had happened, however, his responses were very specific about what he actually had heard, as opposed to what was related to him from other inmates, and Detective Christian testified to the former, as opposed to the latter. (VII RT 1802, 1809, 1811-1812.)

In July of 1992, while jailed, Martinez was briefly interviewed by a defense investigator who asked about the purported April 13, 1992, interview. The investigator was checking to see if he was the same Martinez and asked about a different birth date and perhaps a different booking number. Martinez told the investigator there was someone else jailed with his name who had been getting his money orders, and that he did not recall the April interview. The investigator then told him he could leave. (VII RT 1712, 1717-1718,

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23. Before the interview, Martinez told Detective Christian he was employed by Garcia Construction. (VII RT 1803; but see VII RT 1724 [Martinez testified he had been working at California Roof Savers, he never worked for Garcia Construction Company, he did not recall telling law enforcement he did, and he has never heard of that company].)

1754-1756.)

About a month before testifying, Martinez met with DA Investigator Bill Lehman and Prosecutor Oppliger, who gave him reports of interviews he purportedly did on April 9 and 13, 1992. He began reading the latter but did not recall any of it. (VII RT 1713-1716, 1755.) He identified People's 18 as the report (i.e., transcript) handed to him. Its opening paragraph contained his correct name, birth date, and his grandmother's address and phone number. (VII RT 1734-1735.) When shown that report, Martinez got angry because he did not recall saying any of what was in it, he had not used that address in years, he was pretty sure he did not provide it, and his name and address were "given out like it was nothing." (VII RT 1736.) He did not want to go to court. He told Investigator Lehman "Why should I even get involved" and queried "What's my address on there for?" (VII RT 1758.)

Johnson

Johnson asked for a deal before discussing any details with Detective Sherman Lee. The detective told him they already had a deal in the works with another inmate being interviewed so they did not need another, but he would speak on Johnson's behalf when it came time for him to be sentenced on his pending charge. Johnson then made a statement. (X RT 2717.) Johnson testified he was interviewed the same morning the homicide was discovered, however, he did not recall or he denied statements he purportedly made to the detective. (VIII RT 2241-2249.)

Nelson

On April 9, 1992, after law enforcement discovered Andrews' body, Nelson was interviewed by a female detective (Detective Lee), but he told her that he did not see, hear, or know anything about what had happened during the

night because he feared being labeled a "rat," which could jeopardize his life. (VIII RT 2110, 2112-2113, 2142.) About a week later, Nelson was interviewed by Detective Christian and another guy. (VIII RT 2120-2122; see X RT 2674.) Nelson told them he awoke around 1:30 a.m. but did not mention his cellies as having awoke him. (VIII RT 2124.) He told them he thought he heard "his" voice a couple of times, but that it was hard to hear from downstairs. (VIII RT 2125.)

Benjamin

At 7:50 a.m., Benjamin participated in a 40-minute tape-recorded interview with Detectives Christian and Burke, during which he never asked for a deal nor was one offered. (VI RT 1450, 1488, 1673; X RT 2674-2675, 2696-2697, 2770, 2784.) The detectives had sufficient information at that time to narrow their focus on appellant as having committed the murder. (X RT 2687, 2705.) At the start of the interview, Benjamin was told he was not under arrest so he would be put at ease and more willing to give a statement. (X RT 2679, 2695-2696.) He cooperated with law enforcement then and now because it is the right thing to do. His pending robbery charge did not play a role in that. (VI RT 1495-1496.) He was not afraid of being charged with Andrews' murder because he did not have anything to do with it. (VI RT 1643-1644.)[24/] During

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24. Benjamin thought his recall was better now than when he was interviewed on April 9, 1992, because he has repeatedly thought about the incident and has talked about it to psychiatrists and psychologists, which has helped his recall. He explained his recall was good when he talked to detectives, when he gave a deposition in 1993, and when he testified at trial because each time he recalls things a little different. Although some of his recall may be a little different, overall it is what occurred. (VI RT 1492, 1517-1518, 1590-1591, 1641, 1650-1654; see X RT 2771.)

the interview, the detectives asked some leading questions. (X RT 2678.)[25/]

Detective Christian was aware of Benjamin's prior homicide and pending robbery charge at the time of their interview, however, he never thought Benjamin was a sociopathological type (i.e., a manipulative, conniving liar) given the way the interview went and the information they had prior to the interview and from his having viewed the crime scene (i.e., the injuries Andrews sustained during the beating – appellant's injuries to his knuckle were consistent with someone who beats another person). (X RT 2692-2694.)

Bond

About 9:30 a.m., Detectives Christian and Burke interviewed Bond, who never asked for a deal during their interview. (IX RT 2449-2451, 2674; see IX RT 2450 [Defendant's Exhibit J - transcript].) The detectives told Bond he was not under arrest for the homicide and said words to the effect that they were "looking at [appellant]" as being responsible for it. (IX RT 2453, 2686; X RT 2707.) By that time, Detective Christian believed appellant had killed Andrews based on Benjamin's statements, his view of the crime scene, and other interviews and information gathered. Still, Detective Christian *Mirandized* Bond because Benjamin had indicated that Bond had struck Andrews. (X RT 2705-2706.) After being advised of and waiving his *Miranda* rights, Bond gave information to the detectives. (IX RT 2453-2454; see X RT 2705.) Bond was woozy, shook up, and nervous when talking to detectives, so his memory was clearer at trial on certain things than when interviewed. He was thinking pretty straight, but there were times he "was a little mixed up and fuzzy about

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25. Detective Christian explained leading questions are used because "ex-felon[s]" who have been incarcerated for a substantial portion of their life often tend to give partial answers or the least amount of information possible, so they are led down a path to try to get them to reveal more information. (X RT 2677-2678.)

what happened." (IX RT 2513, 2518, 2528.)

Bond falsely told detectives he did not talk to Andrews and falsely said he fell asleep after drinking pruno so he did not hear what appellant had talked about with Andrews, because he did not want detectives to know he knew what had occurred. (IX RT 2455-2456, 2466, 2476.) The detectives worked on Bond and tried to break down his resistance. They provided him with matches and cigarettes, which was a "special treat" because smoking is not allowed in the jail. However, they did not "soften[him] up with smokes." (IX RT 2489-2490.) At first, Bond told detectives he did not see any choking because he was trying to stay out of it, but at some point he decided to tell them he saw two or three chokings. (IX RT 2488-2489, 2509-2510; see X RT 2707 [Bond lied to detectives several times during the interview].) Bond testified he was basically truthful with the detectives, but withheld some things they asked about such as when he told them he did not know how Andrews got under the bunk. (IX RT 2513, 2529, 2540-2541.) At trial, Bond explained that in the early stages of his interview, he took a "I didn't see nothing, I didn't hear nothing" attitude but then a third of the way through, he changed gears in terms of what he told detectives. (IX RT 2564.[26])

Detective Christian testified:

> Benjamin's and Bond's statements are consistent with Andrews' injuries, activities they described are consistent with things other inmates said appellant had said after exiting the cell, and their stories are close enough to where it does not lend a lot of suspicion.

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26. Bond testified there is a "code of silence" among prisoners about giving information to law enforcement where "You don't see nothing, hear nothing, say anything" for their own preservation – the fear is not fear of police, but fear of fellow inmates and gaining a reputation from cooperating with law enforcement. (IX RT 2560-2561, 2567; see IX RT 2567 [there also is a code that an inmate looks out for himself first, which can be getting the best possible deal].) Detective Christian testified he has not had much success in getting statements from inmates regarding jail incidents on prior cases. (X RT 2675.)

(X RT 2711.)

Appellant's Incriminatory Admissions During Treatment Of Injuries

In the presence of Detective Burke, Detective Christian examined appellant's hands for injuries. The middle knuckle of appellant's right hand and the back of that hand were red and swollen. (X RT 2669-2670.) Detective Christian accompanied appellant to Valley Medical Center (VMC). (X RT 2670.) Appellant's right hand was x-rayed. It was not broken, but it was sprained and swollen. (X RT 2694.) While his hand was being x-rayed, appellant complained of pain to his right foot. His right foot was x-rayed as well and then VMC staff wrapped it with an Ace bandage. (X RT 2670-2671.) Around the time that they were at VMC, Detective Christian engaged in small talk with appellant about appellant's wife and Tom Rutledge, who was an associate or friend of hers. Appellant said he knew Rutledge; the two of them were enemies; Rutledge had disrespected him; if they were to get Rutledge into jail with him, then they would not have to worry about taking Rutledge to trial; and that Andrews was Rutledge's friend. (X RT 2671-2674.)

Autopsy

On April 9, 1992, Dr. Michael Chambliss, M.D., a forensic pathologist, who has done 3,000 to 4,000 autopsies, including 20 to 30 strangulation cases, examined and autopsied Andrews' body. (V RT 1251-1252, 1254-1255, 1257, 1336-1337.) Andrews had vomit and blood in his hair and blood on his mouth and face. (V RT 1256, 1326, 1351.) On the front and sides of his neck was a confluent, abraded, horizontal linear mark that seemed associated with ligature material as opposed to hands. (V RT 1255, 1259-1261, 1335, 1339, 1345.) Because the mark was confluent, there is no way to tell if it resulted from single or multiple strangle attempts. (V RT 1341.) He had hemorrhages on the sides of his neck, indicating pressure was significant enough to damage blood

vessels. (V RT 1261.) He also had hemorrhages in the whites of his eyes attributable to constricting pressure around the neck, petechiae hemorrhages under his scalp consistent with asphyxiation, and filling of blood vessels on back of his tongue consistent with strangulation. (V RT 1262, 1315.) He had vomit in his airway, which can occur if he did not die shortly during strangulation. (V RT 1279-1281.)

Andrews' head and face had blunt-trauma injuries such as bruises, abrasions, and lacerations, which were consistent with multiple blows (e.g., severe blows from a fist or having his head struck against a hard object). (V RT 1255, 1265, 1268-1269, 1321.) More specifically, under his scalp there were hemorrhages on the front and both sides of his head; his left eye had bruising of the upper and lower lid with lacerations near the outer corner of the eyebrow and outside his eye; both his cheeks had swelling, but it was more prominent on the left side, which had a bruise and focal abrasion; his mouth had blunt trauma (i.e., the string attachment to the upper lip and the soft gum tissue above two teeth in his right upper jaw were torn); and there was an abrasion on the right side of the chin. (V RT 1265-1267.)

Andrews had a bruise on top of and outside of his left shoulder and on his upper left back and an injury on the left side of his chest below the armpit. (V RT 1270-1271.) He also had bruises on his forearms just above his wrists, on top of his hands that could be consistent with defensive wounds, and on his legs just above his knees. (V RT 1273-1274.) He had fractures of his left fourth through sixth ribs and his right eighth rib, associated with blunt trauma consistent with a kick as opposed to a fist blow. (V RT 1270, 1285.) His external injuries had deep internal hemorrhages as well, indicating significant force was used. (V RT 1272, 1277.)

Neither Andrews genitals nor his anal area showed injuries, however, there was a superficial abrasion on his left buttock. (V RT 1341, 1343.) No

semen was detected around his gums, teeth, or anus. (V RT 1343, 1351.)

Andrews' blood and urine had methamphetamine, amphetamine, cocaine, and cocaine metabolites, indicating he was under the influence of drugs when he died. (V RT 1282-1283, 1286, 1294.) Both methamphetamine and cocaine are stimulants whose general effects speed up the body and make someone more alert and awake. (V RT 1284, 1353.) Cocaine possibly can make a person excited and excitable. (V RT 1294-1295.) Methamphetamine's effects depend on the individual; it can cause an excitatory state where people may have increased heart rate, hallucinations, paranoia, and bizarre behavior. (V RT 1301.) No alcohol was detected in his system so if he had drank pruno, it was not significant. (V RT 1296-1297.) Neither his injuries nor death were associated with drug usage. (V RT 1300, 1352.)

Andrews' brain had swelling associated with being beaten, strangled, or both. (V RT 1345, 1348-1349, 1355.) Although his blunt-force trauma injuries may have been life-threatening and a significant contributor to his death, Dr. Chambliss opined death was caused by ligature strangulation because the amount of force produced both external and internal injuries to his neck. (V RT 1262-1263, 1331, 1353-1356.) Dr. Chambliss could not determine a time range for death, but all of Andrews' injuries occurred in the same general time frame before death or right around the time of death (i.e., perimortem). (V RT 1271, 1274, 1276-1277, 1308, 1343.)

Benjamin's And Bond's Later Discussions Of Events

Benjamin and Bond were transported from Tehachapi for the preliminary hearing[27/] along with other inmates. During their six or seven hour transport, they sat next to each other and discussed various things including the

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27. Benjamin did not testify at the preliminary hearing. Instead, he merely met with Defense Counsel Hart. (X RT 2736.)

events at issue, but not their prospective testimony. They did not talk the whole time. Bond said what happened was senseless. Bond also said he had been pretty high from drinking and there were parts he did not recall, but Benjamin did not refresh his memory. They talked to other people in the van and often could not hear each other because of other conversations. (IX RT 2546-2547; X RT 2729-2735, 2776, 2781.)

Detective Christian was not concerned Benjamin and Bond sat with each other during transport because they already had given their statements to detectives and because points where they differed when interviewed still existed when they testified at trial. (X RT 2713.) As for differing accounts of the same incident, Detective Christian testified the saying that two people who witness an exciting event will often see and hear it differently holds true for the high percentage of cases for which he has conducted interviews. (X RT 2714-2715.) Additionally, Benjamin testified no one made him aware of whether there were any inconsistencies between his and Bond's statements and no one asked him to change his testimony. (X RT 2769.)

Appellant's Kites Implicating His Involvement In Andrews' Murder

During March and April of 1993, Trinidad Ybarra was housed in Fresno County Jail two cells down from appellant. They communicated with each other by kites (jail house letters) on a line. Ybarra, who had felony convictions for auto theft and residential burglary, was facing two separate cases involving drug possession with a likely state prison commitment. He collected many kites he received from appellant and contacted Detective Christian, requesting a deal on his pending charges in exchange for the kites. Detective Christian told Ybarra that he would contact the DA's Office and present the offer. After a positive handwriting analysis, the contract which appears as Defense Exhibit K was signed, and Ybarra was immediately released on his own recognizance to

be sentenced following his testimony in this case. (X RT 2814, 2816.)[28/]

On April 21, 1993, Ybarra handed Detective Christian a group of 17 to 20 kites which were handwritten either by Ybarra or appellant. (X RT 2814.)[29/] People's Exhibits 35 and 36 represent typed and prepared paragraphs extracted from two separate kites originally handwritten by appellant. They use exactly the same words, but some punctuation has been added to agree with the typewritten form. (X RT 2815-2816.) People's Exhibit 35 provides:

> "I'm doing 29 to life for the 1st one, Dude was my brother but was on the other side of the fence. On this other trip, hey shit happens Homme [*sic*; Homie]. The shit ain't over but I'll say this, Dude had it coming, both of them. I feel no different, it don't bother me. I'm looking at the chair but I don't think they will get me on this trip anyway."

(2 SCT1 379; accord X RT 2816.) People's Exhibit 36 provides:

> "The vato here was a gava. On my carnales, he was a runner. See I'm a half breed myself so there's more to that story than the paper says, tu sabes. Mikio pulled me down for his trial, that why I was here. Ain't no

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28. The contract provided, inter alia: Ybarra would turn over certain kites exchanged between him and appellant; he would provide truthful testimony about the kites and any statements appellant made about Andrews' murder; he would be permitted to plead guilty to one felony count on each of his two cases; any remaining charges, lesser counts and enhancements would be dismissed; and he would receive concurrent sentences and a "paper commitment" to state prison with credit for time served. (X RT 2817-2818; 2 SCT1 484-486 [Defense Exhibit K].) Ybarra never testified because his testimony came in via stipulation. (X RT 2814-2816.)

29. Detective Christian immediately photocopied the originals and then kept their first-generation photocopies in his case file. The originals were booked into the Fresno Sheriff's Office evidence locker, but were removed by Jim Tarver, an expert in handwriting analysis who examined them. Thereafter, they were re-booked into the evidence unit but then misplaced. Despite continuing efforts, the originals have not been located. Based on Ybarra's and Detective Christian's exam of the photocopies' looks, style, content and subject matter, as well as Tarver's expert handwriting analyses of the photocopies and the originals, the parties agreed the originals were written by appellant or Ybarra, and that the photocopies are their exact duplicates. (X RT 2814-2815.)

thing brother before it's over I'll tag a few more, got to keep these fools in check at times."

(2 SCT1 380; accord X RT 2816.) "[V]ato" means "dude," "gava" means "white," "tu sabes" means "do you understand?" (X RT 2816.)

Defense Case

Parole Agent Donald Moore In Regards To Williams' Testimony

Parole Agent Donald Moore testified Williams came to his office shortly after being paroled and met with him briefly for initial instructions. Later that day, Williams returned to Agent Moore's office where Williams met with DA Investigator Mike Trevino. Agent Moore was not present for their meeting. (XI RT 2854-2855, 2857.) Thereafter, Agent Moore spoke to Williams for two minutes about testifying in the instant case, explaining that if a subpoena were issued, then he would be obligated to testify, advising it would be in his best interest to take care of his obligations before leaving, as he had planned to move to Southern California, and stating as soon as he finished testifying, he could return and they would give him paperwork and he could head to Palmdale. Agent Moore did not tell Williams he could not leave until he testified. Although Agent Moore's notes state "Advised would not release suspect to Palmdale area if he did not cooperate with their investigation," he explained that note reflects a conversation he had with Investigator Trevino. Williams returned to Agent Moore's office, presumably after testifying and got a travel permit from the day officer. (XI RT 2856-2859.)

Prison Slang And Culture

Dr. Eric Hickey, a criminologist at California State University Fresno who teaches courses in institutional corrections and has a Ph.D. in social psychology, testified regarding prison slang and culture based on his experience

in having gone to institutions and met offenders since 1985. (XI RT 2861-2866.) He testified there is a power structure within prisons, where inmates must learn to get along with each other. Their position within inmate society may depend upon their history of violence or level of education (e.g., jailhouse lawyers have fairly high status because they work for other inmates). Specialized language can give a special sense of power and control. Slang operates as an internal language which helps to exclude outsiders. It changes over time and variables such as ethnicity and race affect it. (XI RT 2867-2869.) Because prison slang can have different meanings, a fair way to determine what an inmate means is to look at the context within which particular words are used. (XI RT 2889-2890.)

Dr. Hickey testified there is a great deal of machismo and bravado within prison slang in wanting to establish a certain level of control. It is important to be masculine and strong because weaker inmates are preyed upon. Inmates commonly try to puff themselves up to convey how fierce and powerful they are to other inmates. They often assert control through written language, body language, and tattoos. Some tattoos are personal, some are attractive, some are meant to be feared, and sometimes words are on them to intimidate other inmates. (XI RT 2871-2875, 2881.) Inmates constantly overstate or understate why they are in prison, depending on their crimes (e.g., a child molester often will minimize or reconstruct his past, whereas someone with a history of homicide or robbery may embellish what he has done to gain status). (XI RT 2882.) As a survival technique, it is common for inmates to exaggerate or falsify past exploits to make themselves more feared. They know if they can establish a certain superiority, others will not bother them and they will have more respect and favors. Some inmates also have to establish their right to be left alone. (XI RT 2886-2887.)

Dr. Hickey testified sexual assaults are very common when inmates first arrive in prison because certain inmates want to express to the new arrival they are dangerous. (XI RT 2870-2871.) Inmates sometimes use a sexual assault to punish a fellow inmate. (XI RT 2889.) Sexuality is used primarily to control other inmates because by degrading them sexually, it gives the degrader both psychological and physical control as a way to establish superiority. It shows "I can physically do something to you which is very personal to you and you can't do anything about it." (XI RT 2875-5877.) Inmates make sexual threats to other inmates daily as a way of intimidating them, sometimes to play with them and frighten them, often with no actual intent of carrying out the threats. Inmates using bravado often are just venting, whereas those who are quiet are more likely to act out. (XI RT 2870-2871, 2875-2877, 2879.)

Dr. Hickey testified kites are notes, messages, or letters passed from one inmate to another containing information that normally is not intended for administration or correctional officers. Some kites are meant to be strictly confidential and not meant to fall into the hands of anyone but their intended recipient, whereas for other kites, it may not matter who sees them as long as they get to their intended recipient or they may be intended for other people to see. Depending upon the intended recipient, inmates may send kites to puff themselves up and make themselves more feared – if the recipient is a friend, the inmate may say very confidential things to him, whereas, if the recipient is an acquaintance, the inmate may somewhat embellish. (XI RT 2880-2881.)

Dr. Hickey looked at language in kites exchanged between appellant and Ybarra. As for People's Exhibit 36's phrase "Ain't no thing brother before it's over I'll tag a few more," Dr. Hickey had not heard the "tag" used exactly in that context. Still "tag" can mean a number of different things depending upon the declarant's relationship with the intended victim. It can mean to kill, to physically assault, to hurt in some way, to get to, or to sexually assault. If it

involves a family member, it could be to silence him, so he will not talk again about other offenses. To a total stranger it could be a way to let him know the declarant is in charge. (XI RT 2869-2870, 2882.) Overall that phrase could be interpreted probably three or four ways. "Ain't no thing brother" could be interpreted as simply bravado in that the declarant is saying he does not care when he really does, but he is trying to convey he is tough and can "handle the heat." Dr. Hickey interpreted it in that fashion. However, Dr. Hickey also acknowledged it could be interpreted as the declarant is truly saying he really does not care and it would not bother him at all to do what he has already done or what he is going to do in the future. (XI RT 2882-2884.)

As for People's Exhibit 36's phrase "got to keep these fools in check at times," Dr. Hickey testified that suggests they have to maintain control over people who are obviously bothering them in some way (i.e., "we have to handle people who are causing us trouble"). (XI RT 2884.) As for People's Exhibit 35's phrases "shit happens Homme [*sic*; Homie]. The shit ain't over but I'll say this, Dude had it coming, both of them" they are rationalizations, where the declarant is neutralizing what he perhaps has done. Those phrases, as well as the phrases "I feel no different, it don't bother me. I'm looking at the chair," which follow them also have a sense of bravado and machismo to convey "I'm cool, I'm bad, I'm a tough guy." (XI RT 2884-2886.)

Dr. Hickey testified the phrase "I'm going to do him" can have a sexual connotation, but not always. It can be merely intimidation or bravado. (XI RT 2875-2879.) In an all-male institution, the phrase "I'm going to fuck him" could mean literally to have sexual intercourse or oral copulation, or it could mean to mess with him. For the latter meaning, however, it is usually stated as "I'm going to fuck *with* him." (XI RT 2888-2889, emphasis added.) In prison, the term "punk" is usually used to refer to someone who is not only on the lower rung within the system, but someone that is used sexually, who is

"owned" by an inmate and sometimes shared or sold to other inmates. (XI RT 2888; see XI RT 2878-2879 [example of inmate becoming a punk].)

Detective Linda Lee's Interview Of Williams

About 8:30 a.m. on April 9, 1992, Detective Linda Lee began interviewing inmates. She interviewed 17 inmates, including Williams. (XI RT 2891-2893, 2895.) Williams asked for a deal in a roundabout way, saying "I don't want to say anything unless you can help me with my case." She did not make a deal with him. Nonetheless, he conveyed certain information to her and told her that he had knowledge of the homicide. As the interview progressed, he again said he was not going to help her unless she helped him. He also said he knew who had done it, but he would not tell her. He never said the name "Ronnie" or "Pico." She explained to him that she was not in a position to help him, so that is all he wanted to say. (XI RT 2895-2898.)

Irvin Basquez's Overhearing Of Bond's Incriminatory Remark

Irvin Basquez, who has felony convictions for armed robbery, assaults on police officers, and resisting arrest with force and violence, was jailed at the time of trial. (XI RT 2904, 2920.) A few days before testifying, he was in a holding cell while Bond was in a neighboring cell. Bond yelled "What the F's going on here?" and "When are they going to come get me?" repeatedly saying his name was Bond. Officers came and said "All right, 007, be quiet. You're going in a few minutes." Then a female jail employee asked Bond what he was in for. Bond replied "Killing my cellie" and the woman responded "Scared of you." (XI RT 2904-2908, 2913, 2915-2918, 2922.) Basquez knew Bond was a witness in a federal case, but did not know he was a witness in appellant's state case. Later while making conversation, Basquez mentioned the incident to appellant, who was a casual jail acquaintance. (XI RT 2910-2911, 2913.)

Prior Murder Special Circumstance

On June 2, 1991, at 10:40 p.m., appellant killed (his brother) David for which he was convicted of second-degree murder (§ 187) around September 26, 1991. (XII RT 3208-3209.)

Penalty Phase

Prosecution's Case

Prior Convictions For Robberies With A Firearm Use Enhancement, Possessing A Concealed Weapon, Spousal Abuse, And Second-Degree Murder

Documents from a section "969(b) packet" reflect appellant was convicted on March 3, 1983, for three counts of robbery (§ 221 [sic; 211]) with an enhancement for firearm use (§ 12022.5) and on July 11, 1986, for possessing a concealed weapon (§ 12020), all of which were felonies. (XII RT 3312-3317, 3319; 2 SCT1 381-386 [People's Exhibit 39].)

Around September 26, 1991, appellant was convicted of willful and unlawful infliction of corporal injury on a spouse (§ 273.5) for punching his wife Lisa, wherein she suffered a swollen nose and black and blue eyes, on June 2, 1991. (XII RT 3289-3291.) That incident occurred several hours before he committed the second degree murder (§ 187), wherein he shot and killed his brother David. (*Ibid.*)

As for appellant's second degree murder of David, it stemmed from an ongoing dispute over money. Appellant claimed David had stolen appellant's paycheck and spent it on drugs. While David acknowledged taking the money, he denied spending it on drugs and claimed to have paid it back. (XII RT 3291, 3301, 3333-3334, 3339.)

On June 2, 1991, Joel Parker and his girlfriend, Robin Rynes, spent the day with David, his wife and their children at a lake. (XII RT 3294-3295,

3321.) Late that afternoon, they returned to Parker's home. (XII RT 3295.) Both David and Parker, who had been drinking beer that day, continued drinking for about an hour after returning. (XII RT 3321-3323, 3339.)[30/]

Around 4:40 to 5:10 p.m., appellant came by Parker's home, calling out that he wanted to talk to David. (XII RT 3291-3292, 3296-3298, 3343; see XII RT 3300, 3293, 3329.) Parker was standing on his front porch. David also was on the front porch, but was seated. A truck that was parked in front of the porch apparently blocked appellant's view of David. (XII RT 3297, 3324-3325, 3331.) David did not respond to appellant's calls for him to come talk. (XII RT 3298.) Parker went out and talked to appellant, who asked if David was there. (XII RT 3325.) When Parker confirmed David was present, appellant's tone changed. (XII RT 3299.) Parker had seen appellant about three times before and never had a problem with him. (XII RT 3326.) Parker asked appellant to leave and appellant did so. (XII RT 3298.)

Over the next several hours, however, appellant drove to Parker's residence three or four times, saying "I want to talk to my brother." Appellant and David yelled back and forth, and appellant made threats, saying that he was going to kill David. (XII RT 3299, 3327-3329, 3336-3338.) Appellant shouted at David from the car to come out and apologize for taking his money. (XII RT 3291, 3296-3299, 3301.) David would not do so, and yelled back at appellant from Parker's porch. Each time, Parker went outside and talked with appellant. (XII RT 3291, 3305.) Appellant had a gun with him on several of those occasions. (XII RT 3302.) Parker asked appellant not to step on his property and told appellant "Don't start anything." Appellant basically respected that and said he would not get out of the car. (XII RT 3331-3332.)

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30. On occasions when David drank too much, he became loud and argumentative with other people, but never with Parker. (XII RT 3323-3324.) David also had a reputation for being violent with his wife. (XII RT 3351.)

Rynes saw Lisa in the vehicle with appellant. Lisa was covering her face with her hands and was crying. (XII RT 3292.) Parker also saw Lisa with appellant, but Lisa was not with appellant when he later returned with a rifle. (XII RT 3302, 3306, 3326, 3343, 3352.) The rifle was lying on top of the console in the car. (XII RT 3302.) At one point, Rynes was outside talking with appellant when he had the rifle. She convinced him to unload it, but he later reloaded it. (XII RT 3291-3292.) Parker heard Rynes tell appellant "Give me the gun," but appellant refused. (XII RT 3303.)

Parker noticed that about the third time appellant came by, appellant had a beer bottle in his lap and was drinking. Appellant's eyes appeared bloodshot. From that point forward appellant continued to drink. Each time he came by, he appeared more intoxicated. (XII RT 3330-3331; but see XII RT 3344 [Parker could not say appellant was more intoxicated than the first time, but that appellant got emotional].) While talking to Parker about why his own brother would take his money and use it on drugs, appellant broke down and cried for quite a while as he sat in his car. (XII RT 3334-3335.) Appellant had the rifle at that time. (XII RT 3336.)

On the last occasion, which was around 10:40 p.m., appellant came by and yelled at David, "You ain't man enough to talk to me and apologize. You apologize and I'll leave." (XII RT 3291, 3293.) Rynes made an unsuccessful effort to persuade David to stay in the house. (XII RT 3292.) Parker also told David not to come out and tried to keep him from going outside, but David went out the door, and leaped off the porch. (XII RT 3305, 3338, 3340.) Appellant, who was still in his car, had the rifle with him. Parker went to appellant's car and put his arms inside the car across appellant's lap to keep appellant's hands from lifting the gun. (XII RT 3305-3306, 3340-3341.)

Appellant and David were arguing and screaming at each other. (XII RT

3342, 3345.) The more appellant saw David, the more nervous appellant got. It looked to Parker like what David was saying was scaring appellant and that appellant did not know what to do, but that appellant did not want to be sitting in his car while David was walking towards the front of the car. (XII RT 3341-3342.) Appellant told Parker, "Don't do this. Don't stop me." Appellant nudged the door, knocked Parker off balance for a second, and then exited the car with his rifle. (XII RT 3306, 3338-3343.) Appellant had the rifle down to his side, and walked around the back of the car. (XII RT 3306, 3308, 3344.) Appellant kept on saying, "I'm going to kill you." David said something like "Go ahead and kill me if that's what you want to do." (XII RT 3307, 3340.)

About four seconds from the point appellant saw David, he shot. (XII RT 3306-3307.) Specifically, appellant said to Parker something like "I told you I wasn't going to do anything on your property, but he's not on your property." Indeed, David was not on Parker's property. (XII RT 3351-3352.) Appellant aimed the rifle above David's head, towards his head, and then dropped it almost to about half his body, to the arm, and shot – "It was like instant point, drop, fire." David was about 10 feet away. (XII RT 3308, 3346-3347; but see XII RT 3307, 3345 [18 feet away]; see XII RT 3346 [appellant was close enough that he could have shot David in the head or aimed at David's heart if he had wanted].) David was shot on the left side directly under the armpit, just above his stomach. (XII RT 3348.)

Prior to the shot, David looked, realized appellant was aiming, and in a panic, ducked and turned when he was hit with the bullet. David collapsed almost immediately on the opposite side of the street. (XII RT 3307-3309, 3347, 3352.) Appellant turned, ran, and jumped in the car, which apparently had its motor running. He spun the car out and drove off. (XII RT 3309, 3349.)

During the dispute, appellant did [sic?] threaten Parker, appellant never

pointed a weapon at Parker or threatened anyone else in Parker's household, or came on Parker's property. (XII RT 3349-3351.) Soon after the shooting, officers caught appellant. They also recovered the rifle and a shell casing at the scene. (XII RT 3292.)

David, age 35 years, died on June 3, 1991, at 1:11 a.m. as a result of a gunshot wound from a .22 caliber bullet that passed through his arm and entered the left side of his chest, passing through the pleural cavity, the peritoneal cavity, and thereafter lodging in his right kidney. The wound tract is relatively parallel to the ground. (XII RT 3292-3293.)

Jail Incidents - Possessing Shanks, Possessing Contraband, Threat And Assault

On November 17, 1992, CO Albert Rodriguez escorted appellant from the elevators to his jail cell as appellant carried a folder that held paperwork. (XII RT 3223-3225.) While appellant stood in front of his cell getting ready to enter, CO Rodriguez grabbed the folder and set it on a nearby counter. (XII RT 3224.) When CO Rodriguez began to return the folder to appellant, he noticed it did not bend, so he pulled it back and found a piece of metal (i.e., a jail-made shank) stuck on the bottom of the papers. (XII RT 3224, 3226-3227; People's Exhibit 37.) He confiscated the shank, which appellant possessed in violation of regulations. (XII RT 3226.) Appellant did not threaten CO Rodriguez with the shank or for his having found it. (XII RT 3227-3228.) CO Rodriguez has escorted appellant on other occasions without a problem. (XII RT 3228.)

On February 1, 1993, CO Ben Flores went with COs Delgado, Jamanez, Esparza, and Jackson to search appellant's jail cell, where he was housed alone. (XII RT 3239-3241, 3245.) They restrained appellant with handcuffs and removed him from the cell. (XII RT 3241.) CO Flores told appellant his cell was going to be searched. Appellant asked what they were looking for. Flores said, "We're looking for contraband," and asked if appellant had a shank.

Appellant replied, "Well, is that all you're looking for?" then he walked into his cell, went to his sleeping area, reached under a pillow, and pulled out a sharp object (i.e., shank) which he brought back to the door and handed to CO Delgado. (XII RT 3242-3244, 3246-3247, 3249-3250, 3235; People's Exhibit 38.) The shank was a six-inch piece of metal, sharpened at both ends, with one end wrapped in cloth. (XII RT 3232-3233, 3236.) It looked like the metal had come from the inside of a cell's lighting fixture. It was sharpened to a point, apparently from having been rubbed back and forth on the cement, although CO Flores did not recall any rub marks. (XII RT 3248-3249.) The officers searched the cell, finding torn sheets and a bag containing fruit and water. (XII RT 3246.) CO Flores, who has known appellant for a year or more, has never had any problems with appellant nor been threatened by him. (XII RT 3245-3248.) Maybe every month CO Flores hears about shanks being found in the jail. (XII RT 3247-3248.) CO Edward Areyano, who received the shank from CO Flores, testified retrieving shanks is not a rare occurrence. (XII RT 3230, 3237.)

On September 1 or 2, 1993, CO Trainee Joseph Burgen initiated a search of appellant's cell while appellant showered. (XII RT 3263-3265, 3269-3270; see XII RT 3276.) CO Burgen found excessive bedding in the cell. (XII RT 3271.) He also found excessive milk cartons that were stuck to the wall with toothpaste and being used as shelves to store appellant's belongings. CO Burgen removed those cartons as well as photos that were stuck to the wall with toothpaste, a jail-made box, and a necklace made from jail-issue linens; the latter were considered contraband because they were altered from their original state. (XII RT 3266-3267, 3270-3271.) As for the photos, Xerox copies were made and the copies were sent to "classification" to determine if they were gang-related. The photos were returned to appellant. (XII RT 3267-3268.)

Later while CO Burgen transported appellant for an attorney interview,

he noticed appellant had a string earring. CO Burgen stopped and had the string removed by floor medical staff before continuing the transport, although it could have been done after the interview. (XII RT 3271-3275.) Then once they were back on their way to the attorney interview, appellant threatened CO Burgen. (XII RT 3273-3275.)

On September 3, 1993, COs Burgen and Anthony Guerra moved appellant from his cell to the gym for recreation time. (XII RT 3254-3256, 3286.) CO Guerra stood in front and next to appellant as CO Burgen began to remove appellant's restraints in order to allow him to recreate. (XII RT 3256, 3288; see XII RT 3281.) CO Burgen first removed shackles from appellant's legs and then removed handcuffs from appellant's hands which were behind his back. As soon as both of appellant's hands were free, he turned around, struck CO Burgen in the face twice with closed fists, and then grabbed CO Burgen's throat. (XII RT 3255-3258, 3282-3283, 3286-3288.) Appellant pushed CO Burgen backwards about 10 feet, knocking over a desk. CO Guerra, who grabbed the back of appellant's jumpsuit, was slammed into the desk by them. CO Burgen and appellant wrestled. CO Burgen pushed appellant into a wall and they fell to the ground. CO Burgen got control of appellant and had CO Guerra re-shackle appellant. (XII RT 3259-3260, 3283, 3287.) CO Burgen, who was hit above his left eye and on the right side of his mouth, had bruising and a swollen lip. (XII RT 3257-3258, 3260, 3276.) Appellant never tried to swing at CO Guerra nor gave him any problem. (XII RT 3288.)

Defense Case

Appellant's Childhood, Upbringing, Incarceration, Fatherhood, And Substance Abuse

Appellant was born December 3, 1963. (XIII RT 3614.) He came from an impoverished childhood with extremely poor role models. (XIII RT 3410,

3422, 3527.) His mother Laverne was a drug user who was on welfare and in trouble with the law numerous times, including for narcotics sales and child neglect, the latter of which temporarily resulted in Child Protective Services (CPS) taking her children from her. (XIII RT 3410, 3500.) She allowed unsavory people around her children – criminals, drug addicts, bikers, and people who indulge in inappropriate heterosexual and homosexual behavior. (XIII RT 3410, 3422, 3528.) Appellant never met his biological father, and never had a healthy father role model. Instead, he had the criminal types who came to their home. (XIII RT 3411; see XIII RT 3646-3650 [the defense undertook extensive efforts to locate appellant's biological father, as well as maternal relatives, to no avail].)

When appellant lived with Laverne and his four siblings, their home was dirty and unkempt. (XIII RT 3501.) Laverne often hit his sister Theresa, but Theresa did not recall Laverne hitting appellant. (XIII RT 3501, 3503.) When appellant was about five or six years old, people came in and out of their home daily drinking, doing drugs, and sometimes even parking motorcycles in the living room. (XIII RT 3502-3504.) Laverne used marijuana when appellant was at home. (XIII RT 3526-3527.)

Appellant's stepfather, George Disbrow, met Laverne in 1971 and married her in 1972. Disbrow was unemployed and was supported by Laverne's SSI and the kids' AFDC welfare checks. (XIII RT 3466-3467, 3501.) Between 1971 and 1974, they lived in about 10 different homes, which were unkempt. (XIII RT 3470-3471.) Disbrow and Laverne smoked quite a bit of "grass" at least once a week. Disbrow also drank quite a bit. Laverne drank, but not too much, because of her high blood pressure. Appellant was exposed to their drug and alcohol use. (XIII RT 3467-3468, 3472, 3502.) At age 11, Theresa did drugs with Laverne and Disbrow in appellant's presence. (XIII RT 3506-3507, 3509-3510.)

Disbrow remained involved with Laverne, Theresa, and appellant for about three years, one year of which Disbrow went to prison. (XIII RT 3462-3464, 3466, 3506, 3510.) After Disbrow was released from prison and returned to their home, appellant's mother was jailed for about 180 days for selling barbiturates. Disbrow, who was in his older 20's with no parenting experience watched over appellant, about age eight or 10, and Theresa, age 12 or 14. (XIII RT 3464-3465, 3479, 3511, 3515, 3517.) For about 10 days the trio was homeless, living in a campground, during which Disbrow stole food from a neighboring camp to feed them. (XIII RT 3469-3470, 3511-3512.) Disbrow then met a man for whom Disbrow agreed to work and the trio went to live with the man for about a month. (XIII RT 3511.) During that time, partying and talk of homosexual activity occurred. (XIII RT 3512-3513.) The man made a sexual pass at Theresa, whom Disbrow told to "go for it." (XIII RT 3513; but see XIII RT 3477-3478 [Disbrow testified he merely suggested Theresa give the man a kiss on the cheek to thank him for all that he had done].) Disbrow got drunk and beat Theresa in appellant's presence when Theresa, who did not know how to drive, would not drive. (XIII RT 3513-3514.) Then Theresa ran away, contacted social services, and was placed in an emergency foster home. (XIII RT 3514-3515.) Theresa talked with social services and tried to have them remove appellant from that environment, but appellant told them nothing was wrong and later Disbrow took him from town. (XIII RT 3515-3516.)

Disbrow took appellant to North Hollywood, but then Disbrow was arrested for stealing a TV from the home where they had been staying, so appellant went to live with Disbrow's aunt for a couple of weeks. Disbrow made restitution for the TV, which appellant did not know was stolen. (XIII RT 3472-3473.) When appellant's mother got out of jail she wanted appellant

back, so Disbrow gave him $20 and Disbrow's relatives put appellant on a bus, unescorted, to return to Fresno and his mother. (XIII RT 3472-3474.) About 1½ years later Disbrow received a telegram stating appellant had been in a bicycle accident and died, so Disbrow thought he no longer existed. (XIII RT 3474-3475.) Theresa did not return to Laverne's home when Laverne was released from jail because she preferred to stay in foster care, so as to not be in an environment of physical abuse and drugs. (XIII RT 3517-3518.)

Clyde Willis, a former elementary school principal who was familiar with appellant when he was in the fourth through sixth grade, testified appellant seemed to be a normal boy. He played on the playground and in the dorm when they went to a learning center in the mountains, he was very friendly and popular with other boys, and he was not a troublemaker. (XII RT 3365-3368.) Similarly, Guy Wilson, appellant's sixth grade teacher, testified; appellant was a pleasant child, he was more poorly than well dressed, he was not defiant or belligerent, he was not a troublemaker and did not horse around, he made a reasonable effort in the classroom, and he worked and got along well with Wilson. (XII RT 3369-3372.)

When appellant was 11, he lived with Laverne next to Susan Cabrera, Cabrera's husband and Cabrera's one-year-old daughter. (XIII RT 3653-3654, 3658.) Laverne would yell at appellant all the time and she was physically abusive to him on occasions in that she would pull his hair, slap him, shove him, or throw him. Cabrera would tell Laverne that she should not hit appellant but Laverne would just say it was not Cabrera's business. (XIII RT 3655-3657.) Daily, Cabrera smelled "weed" in Laverne's home. Cabrera told Laverne that appellant had said he did not like it, but Laverne said what she and her son did in her house is none of Cabrera's business. (XIII RT 3655, 3657-3658.) Cabrera and appellant developed a mother-son type relationship because he came to her home daily and he stayed with Cabrera's family for days or weeks

at a time while Laverne was gone visiting friends and partying. During that period, Laverne would call to say she would be gone longer, but she never talked to appellant. (XIII RT 3658-3661.) At Cabrera's home, appellant had clean clothes, attended school regularly and had good grades, which was not the situation when he was with his mother. (XIII RT 3655, 3658, 3660–3661, 3664-3665.)

Appellant wanted Cabrera to adopt him because he was happy staying with her; Cabrera wanted appellant to live with her because she could not see him living the lifestyle he otherwise had. Cabrera asked to adopt appellant, but Laverne refused because appellant was her only source of support (through the AFDC payments). After that Laverne moved from the area taking appellant. Cabrera looked for appellant to no avail. (XIII RT 3660-3662.) Later when appellant was 18, he rekindled contact with Cabrera and they maintained monthly contact thereafter. (XIII RT 3663.)

When appellant was 13 or 14, he lived for almost a year with his brother, David, and David's now ex-wife, Patricia. David may have had temporary custody of appellant. Appellant was helpful around the house with David and Patricia's newborn. During that time, Patricia tried to act as a mother figure to appellant. (XIII RT 3534-3540.) Although appellant later killed David, the father of Patricia's two children, she did not hate appellant. (XIII RT 3535.)

Appellant's family was one of the few Caucasian families in a mostly Black and Hispanic area where street gangs were a way of life. He became close friends with many Hispanic neighbors who happened to be gangsters and he became a Hispanic gang member. (XIII RT 3422.) The gangs and the people he lived with were replacements for the father he never had. He learned the social values of the gang and learned it was normal to deal with the world through illegal means. (XIII RT 3423.) This caused conflict with his older brother, Larry, who was a member of the white supremacist Aryan Brotherhood

gang. (XIII RT 3422-3423, 3449.) Larry had been institutionalized in jails and prisons and was in prison during appellant's trial. (XIII RT 3420, 3509.)

In 1978 or 1979, when appellant was 15, he began a relationship with his future wife Lisa, who was about 14. Lisa was in school, but appellant was not. Lisa got pregnant by him and had their first child when she was about 14, while appellant was incarcerated in the California Youth Authority (CYA). (XIII RT 3480-3482, 3541-3542, 3615-3617.) When appellant was released from CYA around age 18, he moved into the home of Lisa's parents, Ruth and Solomon Escobedo, where he lived with Lisa and their child. Appellant helped around the home and with the Escobedo's janitorial business. He also worked various jobs doing lawn and yard work, roofing, and working at a glass company from which he contributed financially to support his child and for household expenses. (XIII RT 3484-3487, 3489, 3551, 3615, 3618, 3625, 3667-3669; see XIII 3650-3651 [Laverne died in 1981, which would have been around that time].) Meanwhile, Ruth and Solomon tried to counsel appellant to help him improve and learn from his wrongs. (XIII RT 3496-3497.) Appellant lived there for about four to six months until he went to prison. (XIII RT 3488, 3617.)

Appellant was in prison for about 7½ years. Lisa and appellant had two more children, both conceived on conjugal visits. (XIII RT 3487-3488, 3490-3491, 3541-3542, 3615-3618, 3629-3630, 3667.) Appellant was out of prison for about a year before he got arrested for killing David. In the interim, appellant worked and sometimes helped Lisa out financially. (XIII RT 3619, 3627-3629.) He also drank during that time and he beat Lisa at times when he was drunk. (XIII RT 3619-3620.) Months after he got out of prison, he began using methamphetamine. (XIII RT 3627-3628.) He was returned to prison for a parole drug violation. (XIII RT 3628.) Although Lisa and appellant are still legally married, she no longer considers herself married to him. (XIII RT 3541,

3550.)

The Affects Of Appellant's Genetics, Childhood, Upbringing, And Substance Abuse On The Formation Of His Personality And Character

Dr. Howard Terrell, M.D., a published, board-certified specialist and part-time UCSF clinical instructor in psychiatry with experience diagnosing and treating mental disorders and serving as a court-appointed expert, evaluated and examined appellant. (XIII RT 3401-3406.) Specifically, he interviewed appellant on January 17 and May 30, 1994, and reviewed records and investigative interviews about appellant's childhood and upbringing to determine what lifestyle influences affected the formation of his personality and character. (XIII RT 3407-3409.)

Dr. Terrell testified everyone is a product of both genetics and their nurturing environment. (XIII RT 3411-3412, 3415-3417.) The fact that appellant was not a troublemaker and functioned relatively well when he was in the fourth through sixth grade, indicates that an early stage of his life he was able to follow social norms, but then as time went on his environment had more influence and the genetics he inherited may have "caught up with him." (XIII RT 3412-3414.)

Medical literature indicates there is a strong genetic predisposition toward substance abuse. (XIII RT 3421, 3457.) Substance abuse was a significant factor in appellant's life. Early in life, he sniffed paint or gasoline. He was a very heavy alcohol drinker. He used cocaine intravenously and by snorting, he also used methamphetamine and heroin intravenously, and sometimes he combined heroin with methamphetamine or cocaine in an advanced form of drug abuse called speed-balling. Further, he got into trouble for "dirty tests" while using drugs when he was on parole. (XIII RT 3423-3424, 3430, 3488, 3618, 3627-3628.)

Dr. Terrell opined appellant's substance abuse and personality were

influenced in large part from his family, both as a result of genetic predisposition and the circumstances of his upbringing. He opined appellant is a drug addict and linked that addiction to the significant amount of substance abuse in his family. His mother Laverne had been incarcerated for a substance-abuse-related offense. His four older siblings, Larry, Lorraine (aka Joy), David, and Theresa, who had different fathers than he did, all had substance abuse problems. The fact that all of his siblings had substance abuse problems is significant. It would not be expected unless something quite overwhelming was the cause. (XIII RT 3410, 3419-3421, 3433, 3458, 3499-3500, 3508-3510, 3520, 3524, 3529-3530, 3539.) Use of substances is associated with criminal violence because those who become intoxicated have less ability to conform to societal norms, to follow the laws and rules, and are more prone to be compulsive, irrational, and violent than when they are sober. (XIII RT 3424-3425.)

Substance Abuse And Appellant's Shooting Of David

Cocaine and methamphetamine are "uppers" that tend to stimulate, increase blood pressure and pulse, and make the user more paranoid and prone to violence, whereas heroin is a "downer." (XIII RT 3424, 3433-3434.) Alcohol may cause some people to be more sociable and disinhibited, whereas it may cause others to be mean, nasty, and violent. (XIII RT 3434.) Combining those substances can lead to a bigger "high" as well as the potential for a disastrous outcome. (XIII RT 3428-3430, 3433-3434.) Appellant told Dr. Terrell that he had been continuously using alcohol, cocaine, methamphetamine, and heroin, and was quite intoxicated for several days leading up his shooting David. (XIII RT 3425-3428; but see XIII RT 3455-3456 [Dr. Terrell testified drug abusers and alcoholics tend to underestimate their consumption, but someone who is accused of a crime that

requires a specific mental state may overestimate it to benefit himself].)

The day David was shot, Lisa was with appellant, although they had broken up by then. She did not know what appellant was on, but he seemed high because he was really tired, he had not slept, and his eyes were red. She saw him drink three 32-ounce bottles of beer and he was very intoxicated. While he and she were in the car that evening, they argued and she hit him in the face with her fist. He hit her back, once. That day he was very angry. She heard him say he wanted David to apologize for taking some money and she saw appellant cry. She was in the car when appellant shot David, but she did not see the shooting because she had her head down. (XIII RT 3550-3562, 3619-3620, 3621-3625, 3626-3628, 3630-3635.)

Appellant's Antisocial Personality Disorder

Using the DSM-IV, Dr. Terrell diagnosed appellant with an antisocial personality disorder (i.e., a strong pattern of improper behavior such as disregarding or violating the rights of others that goes back at least to age 15 years, if not before). Such a disorder usually is caused by a combination of genetic and environmental factors. (XIII RT 3417-3419, 3457.) Given the strong tendency for appellant's family members to abuse drugs, break laws, and conduct themselves outside societal norms, Dr. Terrell opined appellant's antisocial behavior was attributable to both genetics and his horrible nurturing environment. (XIII RT 3458-3459; see XIII RT 3520.) People with an antisocial makeup often have first-degree biological relatives with a similar style of dealing with the world. Part of that is environmental, but genetics also appear to be a very significant influence. (XIII RT 3414-3416.) Antisocial personality disorder usually is lifelong and it usually manifests in the teenage years with violence and lawbreaking, but then it tends to remit as the person gets into his 40's and 50's, when he tends to be less prone to violence, law

breaking, and substance abuse. (XIII RT 3446-3449.) Appellant's manifestation of antisocial personality traits is quite severe. (XIII RT 3460.)

The Affects Of Overcrowding, Alcohol, And A Violent History

Dr. Terrell testified literature and human and animal studies show the more individuals are crowded, the greater the likelihood for violence, arguments, pushing, and shoving. If alcohol is added, the propensity for violence is greater. If the people being crowded have a tendency to commit violent criminal behavior, then the potential for violence, even killing, may increase the longer they are crowded. (XIII RT 3435-3439, 3442.) Studies of human populations show the general trend is the more people are crowded, the more they progress from being relaxed, socially appropriate and nonviolent to an increase in violence with serious assaults and potential for murder. (XIII RT 3439.) There appears to be a biological effect (e.g., blood pressure increases, etc.) and the propensity for shortened tempers and violent behavior is increased. (XIII RT 3440.) Overcrowding can manifest in violent or aggressive behavior within minutes, hours, or days. Many times it is within the first day or so. (XIII RT 3450.)

Dr. Terrell is familiar with the jail cells where appellant was housed. He opined that spending any time in one of those cells with three inmates would be very unpleasant, and it would not be long before people argued about seating and sleeping arrangements and other things in that small, confined environment. With the addition of alcohol, to which many people react in a violent and hostile manner, the potential for violence and aggressive behavior is increased, especially if one or more person has a history of violent behavior when intoxicated. (XIII RT 3443-3444.) He opined overcrowding was a factor in appellant's killing of Andrews, although appellant denied killing Andrews when Dr. Terrell interviewed him. (XIII RT 3450, 3453-3454.)

Appellant's Spiritual Guidance, Attitude Toward Correctional Officers, And Counseling Others

While this case has been pending, appellant has had weekly one- to two-hour visits from Al Medina, a Jehovah's Witness, with whom he developed a friendship. They read Bible scriptures and Medina counsels him. (XIII RT 3567-3570.) Medina thought appellant showed remorse about his past, however, Medina never talked with appellant about Andrews' homicide and when read portions of appellant's kite from People's Exhibit 35 that provides, inter alia "Dude had it coming, both of them. I feel no different, it don't bother me," Medina said that did not sound like appellant. (XIII RT 3570, 3573-3574, 3576; see 2 SCT1 379; X RT 2816.) Medina saw a very positive change in appellant's attitude toward correctional officers over the 2½ years they had been meeting. (XIII RT 3568, 3571-3573.)

CO George Lira, who had many contacts with appellant in jail, testified he had no difficulties transporting appellant to and from court or within the jail. Appellant's cell was very organized and clean. CO Lira saw shelving in his cell, which technically was contraband, but CO Lira exercised discretion and did not tear it out because it was not excessive and he wanted to respect appellant's housing area. (XIII RT 3671-3676.)

Appellant counseled others on avoiding prison gangs, on getting an education or vocational training, and to do something with their lives including inmates Joe Mora (XIII RT 3578-3579, 3583-3585), Michael Wilson (XIII RT 3592-3595), Christopher Jackson (XIII RT 3603-3606), Tamara Scobee (XIII RT 3638-3642), and non-inmates such as his sister-in-law Lori Escobedo's 13-year-old son (XIII RT 3682-3683), a friend Maria Karacha (XIII RT 3686-3689), and his sister-in-law Cathy Olage (III RT 3694-3696; see XIII RT 3697-3698 [Olage testified appellant expressed regret for the life of crime and drugs he led]).

LWOP In Contrast To Death Row; Shanks And Drugs In Prison

Dr. Hickey testified about classification, housing, security, and privileges for prisoners sentenced to LWOP compared to those sentenced to death row. (XII RT 3373- 3399.) LWOP is a serious form of punishment where inmates are locked away with no hope of getting out. But LWOP would be "business as usual" for inmates who already have been institutionalized and would not have the same affect on them as it would on those who would miss things they are close to like family on the outside. (XII RT 3388, 3394-3395.) Inmates still can communicate with the outside world through visits, phone calls, and letters, but sometimes mail is monitored. (XII RT 3395-3396.)

All prisons have a prison within them, where inmates who are difficult to handle are placed. (XII RT 3375.) For example, Corcoran has a Security Housing Unit (SHU), where inmates are placed for the safety of other inmates because they pose a high risk or sometimes for their own safety. (XII RT 3376-3377.) Normally, an attack on an officer will result in an inmate being placed in the SHU. (XII RT 3380-3381.) In the SHU, inmates are locked down 23 hours with one hour to exercise each day. To enable security to be tight and controlled, they are kept from the general prison population and they do not have as many privileges as that general population. Still they are allowed to mingle among themselves as long as there is no trouble. (XI RT 3378-3379.) Unlike inmates in the general population, inmates in the SHU do not have the privilege of being involved in prison industry where they can learn a trade and earn commissary money, they lack educational program opportunities, their visiting is curtailed if not stopped, and they are more isolated because they do not have as much time to be with others. (XII RT 3381, 3383-3384.) Thus, the SHU is more unpleasant because its inmates experience boredom and its isolation can negatively affect their mental status.

(XII RT 3385-3386.) Over time, it is possible for inmates to be reassessed and removed from the SHU depending on their behavior. (XII RT 3379-3380, 3398-3399.)

Dr. Hickey believes death row inmates have greater privileges than inmates in the SHU. Death row inmates perhaps receive a little better treatment; they have certain visiting privileges because they are condemned, and they have the privilege of selecting their last meal. (XII RT 3392-3394.) For some inmates, being on death row gives them a degree of status and notoriety among other inmates. (XII RT 3392.)

Pelican Bay is considered the most restrictive California prison. (XII RT 3375.) It is designed to isolate troublesome inmates, particularly gang members. The reality, however, is that it is rapidly becoming overcrowded such that some inmates are housed together. (XII RT 3382.) If appellant were sentenced to LWOP, Dr. Hickey opined he would be placed in a high security prison, either Corcoran or Pelican Bay, because he would be a threat to other inmates given his record. (XII RT 3375, 3384.) If Dr. Hickey were the prison administrator, he would deny appellant prison industry or work detail because of his risk to other inmates. (XII RT 3384.) If appellant were sent to the SHU, it would be difficult to tell whether he would ever get out and be put into the general prison population. That would depend on the prison administration and would require considerable evaluation. Still, he would be required to spend considerable time in the SHU prior to removal. If he was returned to that general population, then any infraction would cause him to be placed back into the SHU. (XII RT 3388-3389.)

Mora, who is serving LWOP, testified about the living conditions during his first 60 days at Pelican Bay when he spent about 23 hours locked up in a seven foot by twelve foot cell where he just drew, wrote letters and slept. He spent one to 1½ hours in the yard, which is a privilege that can be taken away.

When not on locked down, the inmates can shower daily for 10 minutes, however, three fourths of the time he was there they were on lock down. In the SHU, inmates are locked up 24 hours a day and do not come out for anything. (XIII RT 3579-3583, 3585-3586.)

According to Dr. Hickey, it is common for inmates to possess shanks in correctional facilities, even within the SHU. Possessing a shank suggests a readiness to do violence and use it. Inmates often procure weapons to defend themselves and sometimes to attack other inmates. Possessing a weapon is an infraction that is punishable. (XII 3390-3392.) In prison, drugs are even more prevalent than weapons and are as accessible, if not more accessible, than on the outside. (XII RT 3391-3392.)

How Executing Appellant Would Impact Others

Various family members/friends communicate with appellant through visits, phone contact, and/or letters, including: Theresa (XIII RT 3520), Lorraine (XIII RT 3530-3531), Cabrera (XIII RT 3664), Solomon (XIII RT 3669), Lori Escobedo (XIII RT 3682), Olage (XIII RT 3696), and Ruth and appellant's children (XIII RT 3490-3493, 3544, 3549, 3563, 3668). And various family members described appellant as a loving, caring person and father, who provided for his kids when not incarcerated, namely Ruth (XIII RT 3490-3493); Solomon (XIII RT 3668), Lisa (XIII RT 3543, 3548-3549), Theresa (XIII RT 3522); and Lorraine (XIII RT 3531). As for the impact appellant's execution would have, Theresa said she would be horrified and full of grief (XIII RT 3523), Lorraine said it would cause a piece of her to die too (XIII RT 3531), Lisa said it would hurt their children a lot (XIII RT 3549), Ruth said it would be terrible to face (XIII RT 3495), Karacha said she would be hurt and devastated (XIII RT 3690), and Olage said it would devastate her (XIII RT 3698).

ARGUMENT

I.

THE COURT PROPERLY RULED APPELLANT HAD FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION BASED ON GENDER IN THE PROSECUTION'S EXERCISE OF PEREMPTORY CHALLENGES

Appellant's first argument claims the trial court erred in holding that he had not established a prima facie case of discrimination in the prosecution's exercise of peremptory challenges on the basis of gender. (AOB 52-90.) His claim lacks merit.

A. Factual And Procedural Background[31/]

For voir dire, the parties used a randomized list of prospective jurors and the "six-pack" method, wherein the court impaneled a group of 18 prospects such that 12 were seated in the jury box and six more were seated in front of the box, where they awaited to fill vacancies resulting from cause or peremptory challenges. (I RT 115; II RT 426, 432; see I RT 52-54; III RT 524.) After those six prospects were depleted and a vacancy in the box was created, the court's clerk called seven more prospects, filling the box's vacancy and replenishing six extras. (III RT 634, 720-721, 782-783, 840-841; IV RT 884-885; see I RT 115.) The clerk also replenished any extras that were excused for cause, so each round of peremptories began with a full set of 18 prospects. (III RT 656-657, 731, 787, 789, 791, 793, 842-843; IV RT 890.) Accordingly, before each round, counsel had insight into 18 prospects, as well as advance notice of

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31. Respondent uses last names for prospective jurors who were removed by challenge, but uses initials for prospective jurors who were actually sworn to try the case so as to promote their privacy in the spirit of Code of Civil Procedure section 237. Respondent also uses some first and middle initials and first names where clarity is needed. "♀" refers to female and "♂" refers to male.

the upcoming randomized sequence of the other prospects. (I RT 52, 115; II RT 408; see I RT 53–54; II RT 412-416, 426; 1 SCT1 293-300 [Court's Ex. 4 - randomized list of initial 25 prospects, followed by randomized list of remaining prospects].) As for peremptories, each side could use 20 in selecting the 12 jurors and three in selecting the three alternates. (II RT 416-417.)

To assist this Court in following the seating progression of prospective jurors, respondent attaches five tables:

TABLE A depicts the seating of jurors in the box immediately before any peremptories were exercised. It reflects a 5:7 ratio of females to males, i.e., 42% female.[32]

TABLE B depicts the seating of jurors in the box after the parties exercised their desired peremptories.[33] It reflects a 6:6 ratio of females to males, i.e., 50% female.[34] It also notes that at the time of the *Wheeler* motion, assuming the next female prospect would be seated, the panel had a 7:5 ratio of females to males, i.e., 58% female. (See IV RT 940-941.)

TABLE C depicts the sequence of peremptory challenges with corresponding changes, if any, in the gender ratio and the percentage of females. It reflects the People excused 10 females and three males with five *intervening* passes before the *Wheeler* motion and that the People passed twice

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32. By seat number, prospects before any peremptories included: #1 Jimmie C. ♂, #2 Kimi T. ♀, #3 Satterberg ♀, #4 S. Martin ♀, #5 M. P. Smith ♂, #6 Mohler ♀, #7 H. K. ♂, #8 Coppock ♂, #9 Casey ♀, #10 Joe P. ♂, #11 Combs ♂, and #12 R. Martin ♂. (II RT 426-428; III RT 542, 631.)

33. Of the 20 available peremptories, the People exercised 13 and the defense exercised 15.

34. By seat number, prospects sworn after peremptories included: #1 Jimmie C. ♂, #2 Kimi T. ♀, #3 E. A. ♀, #4 T. R. ♀, #5 T. H. ♀, #6 Suzanne C. ♀, #7 H. K. ♂, #8 L. R. ♀, #9 Christopher F. ♂, #10 Joe P. ♂, #11 R. V. ♂, and #12 L. A. ♂. (II RT 426-427; III RT 542, 633, 781, 840, 876; IV RT 883, 942.)

thereafter.[35] Conversely, it reflects the defense excused 10 males and three females with four *non-intervening* passes before the *Wheeler* motion and that the defense excused one female and one male and then passed once thereafter.[36] It also reflects the initial 5:7 ratio of females to males, i.e., 42% female, dipped to a low of 3:9, i.e., 25% female, rose to a high of 7:5, i.e., 58% female at the time of the *Wheeler* motion, and finally ended at an even 6:6, i.e., 50% female.

TABLE D depicts the same sequence of peremptory challenges with corresponding record citations to the prospects' questionnaires and voir dire.

TABLE E depicts the jury makeup at the close of voir dire and similarly includes corresponding record citations to the sworn jurors' questionnaires and voir dire.

When the prosecution exercised its 13th peremptory, Defense Counsel Hart asked to have a legal matter heard, however, upon inquiry from the court, she indicated it could be deemed reserved. (IV RT 942.) The matter concerned the defense's *Wheeler* motion challenging the prosecutor's excusal of a cognizable group (i.e., women). The court considered the matter preserved by mutual agreement even though jury selection continued and a panel was sworn. (IV RT 943, 946-947; see IV RT 940-941.)

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35. The People exercised peremptories as follows: (1) Mohler ♀, pass, (2) S. Martin ♀, (3) McDermott ♀, (4) Holik ♀, pass, pass, pass, pass, (5) Horn ♀, (6) Ourlian ♀, (7) Nokes ♂, (8) Shephard aka True-Shephard ♀, (9) Gillitzer ♀, (10) Combs ♂, (11) Sanders ♀, (12) Kelly ♂, (13) Taylor ♀ (spurring the *Wheeler* motion), pass, and pass. (III RT 633, 719-720, 779, 781, 838-840, 875; IV RT 881, 883-884, 940, 941-942.)

36. The defense exercised peremptories as follows: (1) Satterberg ♀, (2) Coppock ♂, (3) M.P. Smith ♂, (4) Hutcheson ♂, (5) Steenburgh ♂, (6) R. Martin ♂, (7) Shumaker ♂, (8) M. Jones ♀, (9) Rodat ♂, (10) Powers ♂, (11) Zarasua ♂, (12) Gilmour ♂, (13) Hardaway ♀, pass, pass, pass, pass (followed by the *Wheeler* motion), (14) Davids ♀, (15) Ulrich ♂, pass. (III RT 633-634, 720, 779-781, 839-840, 875-876; IV RT 882-884, 940-942.)

Defense Counsel Hart noted the prosecution had exercised 10 of 13 peremptories against women, whereas the gender makeup of the panel had been equal. (IV RT 947-948.) *Ignoring some passes by the prosecutor*, she also observed six of the peremptories against women had been in a row. (IV RT 948.) Given those numbers, she argued there was a prima facie case the prosecution had exercised challenges disproportionately against women as a cognizable group. (*Ibid.*)

Defense Counsel Hart also remarked:

> Now, I think what's happened here is that *women as a whole on this jury panel have shown that they* have tended to be -- *would be more merciful, less adamant in imposing the death penalty, possibly more compassionate and more likely to entertain life without possibility of parole* as an option. *That is certainly why a District Attorney would want to kick off the women* because they seem to be more lenient and more in favor of life without possibility of parole as a punishment. [¶] Well, if women as a class tend to be more compassionate, more lenient, more predisposed to life without possibility of parole and we're going to exercise our challenges against women, that's really exercising them against a cognizable subgroup. [¶] . . . [¶] So in sum . . . this jury panel must be quashed because of the disproportionate exclusion of challenges against women.

(IV RT 948-949, emphasis added.) Although she further observed the final jury consisted of six women and six men, she argued the peremptory challenges still had been disproportionately exercised. (IV RT 950.) The court remarked:

> I doubt there's been a prima facie showing here because of that fact, and because it's been my evaluation that women seem to be more certain in the expression of their views both ways in this case and their leaning in this case than men have.

(*Ibid.*)

With the understanding the court had not yet determined whether a prima facie case existed, Prosecutor Oppliger argued against such a finding, stating:

> [I]f we go back to the basis of all the *Wheeler* and its progeny type of claims, it is invariably based on a consideration that a particular cognizable group has been excluded from hearing a case. And although Ms. Hart's numbers are correct . . . [¶] . . . [¶] . . . given the fact that there are six women on the jury and six men on the jury, that if women are to be considered a cognizable group, they are as fairly represented as they possibly can be. . . . if we start with the assumption that there are roughly half men and half women in the world and that carries forward to about half the people available for jury service are women and men, then the numbers are literally perfect. [¶] The raw numbers of ten versus three given the ultimate outcome of the jury I don't feel is a sufficient number to raise a prima facie case of group bias.
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> [A] lenient or light attitude on the death penalty is clearly a -- an acceptable reason for an individual bias on the part of a prosecutor. . . . But I guess I should confine my arguments right now to the first prong of this -- the *Wheeler* test. And given the numbers of three versus ten, the fact that we have a -- six members of the remaining members of the jury are women from all -- all walks of life, Hispanic, African American, white women, I just don't think you can make a viable claim of group bias.

(IV RT 951-952.) Nonetheless, Defense Counsel Hart asserted the issue was whether appellant had the right to have challenges exercised in a neutral way, stating:

> Now, there's obviously two rights here. My client has a right to have a fair cross-section of the community decide his case, has a right to a jury of his peers of whatever races and to have both sexes represented. I believe that my client also has a right to have the challenges exercised in a manner that does not exclude cognizable subgroups even though he ends up with a jury that may be reflective of the community.

(IV RT 952.) However, Defense Counsel Hart conceded:

> I'm not sure if there's independent constitutional grounds for claiming that the exercise of peremptories themselves are indicative of a fair jury. In other words, it may be that if -- it may be ultimately that if you have a jury that is representative of the community, that it's not a constitutional violation to have exercised the peremtories.

(IV RT 953.) Thereafter, the court found no prima facie showing existed without further comment. (IV RT 954.)

B. Profiles Of Prospective Jurors Excused By The Prosecutor

1. Mohler ♀

Mohler, age 48 and Spanish or Hispanic, is a receptionist/clerical specialist for Foundation Health. (7 SCT2 1820, 1822.) She has some college education and "4C's". (7 SCT2 1823.) Her leisure activities and interests include weeding, grandchildren, eating, TV, and sleeping. (7 SCT2 1824.) She has been married for four years and previously divorced from a seven year marriage. (7 SCT2 1820.)[37] She has an 18-year-old daughter who earned her GED. (7 SCT2 1820.) She and her husband, who was laid off from the construction field, live with his parents who are retired. (7 SCT2 1821.) Her mother does house maintenance and senior service. (7 SCT2 1822.)

Mohler and her mother have been victims of theft. (7 SCT2 1832.) She feared for her life 20 years ago during a fight with her first husband. (*Ibid.*) She or someone close to her has been prosecuted in a trial. (7 SCT2 1831.) She has people close to her who is/are an alcoholic and a drug addict. (7 SCT2 1833.) Her brother's lawyer did not speak up for him in a family law matter, which was a negative experience, but that would not affect her thinking in this case. (II RT 457, 527; see 7 SCT2 1831.)

Mohler has served on a jury in a drunk driving case where a verdict was reached. (7 SCT2 1824.) Her impression was that the system was a waste of tax money, although she indicated "this time may be different." (7 SCT2 1825.) Although her questionnaire says she is not the kind of person who could hold firmly to her opinion if all 11 other jurors vigorously disagreed with her – "I know I can be convinced otherwise" (7 SCT2 1827), she later said she may have misread the question and that she could stick with her opinion. (II RT

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37. Mohler did not indicate her ex-spouse's current or past occupation(s) as requested. (7 SCT2 1822.)

458-459; III RT 529-530). Although her questionnaire says she somewhat agrees that law enforcement officers are more believable and credible than the average person (7 SCT2 1833), she said she would not believe the testimony of a police officer over any other witness just because that person is a peace officer (II RT 449). She has a hard time judging a person by their demeanor and does not think she could do so; however, when pressed, she said she "could assess the whole situation" if demeanor "were only a small part of it" and when told there would be physical evidence where she would not have to judge a witness's demeanor, she said that she did not think that judging demeanor would be a problem. (III RT 526-529, 532-533.) She will consider the death penalty and is not definitely for or against it. (7 SCT2 1826.) She feels it is used too often on non-White persons. (7SCT2 1826.) As for LWOP, she "would like info on rehab of life imprisonment." (7 SCT2 1827.) She somewhat disagrees that a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (7 SCT2 1828.) She does not think it is the only appropriate punishment for murder and feels there should be other options. (III RT 530-531.) She is neutral to the adage "An eye for an eye," but "influenced by conversations for that adage." (7 SCT2 1828), however, she remarked "I shouldn't say just because he did it he's going to get it too" (III RT 531). She thinks a defendant's background is important for purposes of penalty. (III RT 531.) She could keep an open mind about both penalties. (III RT 532.) She could vote to impose the death penalty if she felt it was correct. (III RT 618.)

2. S. Martin ♀

S. Martin, age 31 and Caucasian, is an office assistant for the State Compensation Insurance Fund. (6 SCT2 1736, 1738.) She is a high school graduate. (6 SCT2 1739.) Her leisure activities and interests include reading

books, bowling, "yard saleing," and thrift store shopping. (6 SCT2 1740.) She has been married for nine years and has a 10-year-old daughter and six-year-old son. (6 SCT2 1736.) She previously worked in clerical and as a cashier and her husband is a merchandiser who sets up grocery store displays. (6 SCT2 1737-1738.) Her father, who used to be a deputy sheriff in Indiana, is a hospital security guard and her mother is a medical/food stamp supervisor for the Department of Social Services. (6 SCT2 1738, 1746.)

In 1981, S. Martin's brother was arrested for and pled guilty to assault on a homosexual man. (6 SCT2 1747.) In 1982, she was a visitor and/or an inmate at the Fresno "farm" but she did not recall what that experience was like. (6 SCT2 1747-1748.) She has family members who are alcoholics and her aunt was a heroin addict who died of AIDS. (6 SCT2 1749; II RT 503.) There was nothing about the situations involving her brother and her aunt that would affect her ability to sit in impartial judgment. (III RT 615.) Her husband, mother, and sister have been victims of theft, arson, mugging, and vandalism. (6 SCT2 1748.) She has donated to Mothers Against Drunk Driving (MADD) and signed the Three Strikes initiative. (6 SCT2 1740; II RT 503, 505.) Long ago, her grandmother and great uncle were killed by a drunk driver. (II RT 503.)

S. Martin has not served as a juror before. (6 SCT2 1740-1741.) She could hold firmly to her opinion if all 11 other jurors vigorously disagreed with her and she strongly believed otherwise. (6 SCT2 1743.) She is neutral to the statement that law enforcement officers are more believable and credible than the average person. (6 SCT2 1749.) She had no problem with the concept that the testimony of a single witness, if believed, is sufficient to prove a fact and she would not require more proof if instructed in that fashion. (III RT 604.) She supports the death penalty in some circumstances and will consider it "for very serious criminals, ie: serial killers, people who can not be rehabilitated . . but it should be very a [*sic*] serious crime" (6 SCT2 1742; II RT 505.) She "no

longer feel[s] it's the only option." (*Ibid.*) She also feels LWOP, which she views as a stiff penalty, "is the only option left" for continuous repeat offenders. (6 SCT2 1743; II RT 503.) She is neutral to the statement that a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (6 SCT2 1744.) She somewhat disagrees with the adage "An eye for an eye." (*Ibid.*) She could return a death verdict if she felt it was appropriate and would be able to affirm it upon being polled individually. (III RT 617-618.)

When asked about whether she cared about a person's background and whether it should affect penalty, she replied: "People need to take responsibility for their actions, but . . . there are circumstances that can cause you to be what you are. . . . I think that you need to have all the facts, everything about every aspect of the case I think to be fair and objective." (II RT 502.)

3. McDermott ♀

McDermott, age 22 and Caucasian, is a homemaker and free-lance article writer for various publications. (6 SCT2 1610, 1612.) She has some college education and has studied business law and court reporting. (6 SCT2 1613.) Her leisure activities and interests include reading, computers, and martial arts. (6 SCT2 1614.) She has been married for three years and has a seven-month-old daughter. (6 SCT2 1610.) She previously worked as a bookkeeper and her husband is a county librarian. (6 SCT2 1611-1612.) In their home also lives her mother, who is a hospital charge nurse. (6 SCT2 1611-1612.)

McDermott's brother is a police officer. (6 SCT2 1620.) She has been a victim of car theft and break-ins. (6 SCT2 1622.)

McDermott has not served as a juror before, but she viewed it as her duty and was prepared to serve if necessary. (6 SCT2 1614-1615; III RT 732-733.) As for what she thought the attorneys were looking for in jurors, she

quoted philosopher John Locke's remark about children – "tabula rasa" meaning a blank slate. (III RT 733; see III RT 785.) She somewhat agrees law enforcement officers are more believable and credible than the average person. (6 SCT2 1623.) Although she was raised to oppose the death penalty, her views have "metamorphized [*sic*]" slowly to support it under certain conditions dictated by law – with the birth of her daughter, she realizes how precious life is such that murder of a loved one would make her more willing to accept the penalty. (6 SCT2 1616.) Still, she "believed it is used too randomly & that the guidelines in determining when to use such measures . . . should be applied evenly with just consideration." (6 SCT2 1616.) She also feels LWOP "is a median between possible rehabilitation & death." (6 SCT2 1617.) She somewhat disagrees a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (6 SCT2 1618.) She does not believe in the adage "An eye for an eye." (*Ibid.*) If they reach the penalty phase, she could keep an open mind in weighing LWOP versus the death penalty. (III RT 734.)

4. Holik ♀

Holik, age 21 and Spanish or Hispanic, is a medical operator for a phone exchange service, so she has experience evaluating whether callers are credible in describing their symptoms or whether they may be lying just to get a prescription. (5 SCT2 1337, 1339; III RT 738-739.) She normally works day shift, but her work rescheduled her for nights and weekends, so combining it with court time would have her "working" seven days a week, usually about 14 hours a day. (III RT 734-736.)[38] She is a high school graduate with some adult education in computer courses. (5 SCT2 1340-1341.) Her leisure activities and

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38. The trial court said it would not let her long work hours interfere with her serving as a juror and asked her to speak to her employer about cooperating, so as not to burden her potential jury service. (III RT 735-736.)

interests include reading, swimming, needlepoint, and fishing. (5 SCT2 1341.) She has been married for five months; and previously divorced from a two-and-a-half year marriage. (5 SCT2 1337.)[39] Both she and her current husband have worked as security guards and in clerical, however, her husband is temporarily disabled. (5 SCT2 1338-1339, 1347.) Also living in their home are her husband's best friend, who is a pre-school teacher, and that friend's fiancé or fiancée, who is an unemployed fast-food worker. (5 SCT2 1338.) Her mother is an eligibility worker for the county welfare department with a law enforcement and family law educational background. (5 SCT2 1339, 1341, 1347; III RT 738.) Her step-father is a computer technician for a law office. (5 SCT2 1339.)

Holik's uncle was arrested when she was very young, but she did not recall the experience and she was unsure if he was prosecuted. (5 SCT2 1348.) Her uncle is a drug addict, but they are not close. Her mother-in-law and step-father are alcoholics. (5 SCT2 1350.) She, her husband, mother, and father have been victims of car break-ins and she testified in one case. (5 SCT2 1349.) She once feared for her life when she was hit head-on by a semi. (*Ibid.*)

Although Holik has not been called for jury service before (5 SCT2 1341-1342), she thought she could evaluate the testimony of convicted felons (III RT 739-740). She somewhat agrees law enforcement officers are more believable and credible than the average person "because they are trained to notice more." (5 SCT2 1350.) Although she supports the death penalty, she does not view it as "an actual form of punishment" because "they die of old age first." (5 SCT2 1343, underline in original.) She expressed "we never follow through very often and seems we give the death penalty out too often." (5 SCT2 1343.) She also feels LWOP "is necessary in a lot of cases where the

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39. Holik did not indicate her ex-spouse's current or past occupation(s) as requested. (7 SCT2 1339.)

death penalty is too harsh." (5 SCT2 1344.) From voir dire, she has a better understanding of LWOP and could return such a sentence, which could be "just as bad in the long run" because "[t]he person going to jail for life might end up like the victim." (III RT 737-738.) Although she strongly agrees a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty if the killing was random or planned viciously, she somewhat agrees it would otherwise be deserving, stating "there must be a reason for everything." (5 SCT2 1345.) She somewhat disagrees with the adage "An eye for an eye," based on her personal philosophy that some things happen as a result of an accident. (*Ibid.*)

Holik asked if the jurors would be given guidelines to follow in assessing penalty. (III RT 773-774.) The trial court responded by, inter alia, reading CALJIC No. 8.85. (III RT 774-777.)

5. Horn ♀[40/41]

Horn, age 55 and Caucasian, is a customer service representative with the Internal Revenue Service. (5 SCT2 1379, 1381.) She is a high school graduate with a GED and previously has worked as a hospital housekeeper, meat wrapper, bakery deliverer, laundry worker, and housewife. (5 SCT2 1381-1382.) Her leisure activities include going to the movies. (5 SCT2 1383.) She is separated from a four-year marriage to a car dealer and has been so for over six years. She has been divorced four times, having married her first

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40. Horn neglected to sign and date her questionnaire, but the court had her remedy that. (III RT 794.)

41. Defense Counsel Hart told Horn "when I started talking with you, I thought you were right in Mr. Oppliger's camp, and now after a little bit of questioning, he's probably going to have some more questions for you."].) Later, Prosecutor Oppliger thought of offering Horn in a challenge for cause, but declined stating "I'm going to be cautious and say I don't want to play with fire." (III RT 837-838; see III RT 810.)

husband, a dance instructor, twice for four or five months. Her other marriages were to a professor, which lasted 12 years, and to a preacher, which lasted eight months. (5 SCT2 1379, 1381.) She has two sons and a daughter, ages 28, 26, and 22, who work as an architect, teacher, and a receptionist, respectively. (5 SCT2 1379.) Her father was a welder and her mother was a school bus driver. (5 SCT2 1381.)

Horn's cousin has been a law officer in Fresno for over 25 years and Judge (now Justice) Marvin Baxter is a school friend of hers, however, she has not seen him for years. (5 SCT2 1389-1390.) Her belongings were taken in a "house robbery." (5 SCT2 1391.) In 1987, her husband was falsely arrested for a robbery and she visited him at the Fresno jail; it was a horrible experience. The guilty party later committed suicide while being apprehended by police. (5 SCT2 1390-1391.) One of her ex-husbands is an alcoholic and she knows a drug addict, but has no tolerance for that person. (5 SCT2 1392.)

Horn has not served as a juror before. (5 SCT2 1383-1384.) She would hold firmly to her opinion even if all 11 other jurors vigorously disagreed with her. (5 SCT2 1386.) She strongly disagrees that law enforcement officers are more believable and credible than the average person. (5 SCT2 1392.) She understands a defendant's background can have some influence in the penalty phase, however, she believes adults are responsible for their actions and should pay for their crimes. (III RT 807-808.) She will consider the death penalty, but has "mixed emotions" – her religious belief is God only can judge, but she gets angry with unnecessary violence in society. (5 SCT2 1385; see III RT 834.) She feels the death penalty is probably not used often enough although she has "mixed feelings" about that. (*Ibid.*) However, "to stand up and say, 'Execute them. I would have a difficult time with it. I really would. I know I would." (III RT 809; accord III RT 810.) She does not know if she could vote for the death penalty if it is warranted; she probably could do it, but she would rather

not make that decision. (III RT 827, 834.) In contrast, she feels very strongly in favor of LWOP (5 SCT2 1386), she is for "three strikes and you're out" (III RT 810), and she would "have no problem with [imposing LWOP] whatsoever" (*ibid.*). She "would probably lean more toward life than death." (III RT 826.) She is neutral to the statement that a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (5 SCT2 1387.) She strongly disagrees with the adage "An eye for an eye" based on her religious convictions and her personal philosophy. (*Ibid.*)

6. Ourlian ♀

Ourlian, age 32 and Caucasian, is a process server who has worked for various attorneys. She and her sister, who also is in the business, file legal documents at court, serve documents on defendants, and do skip tracing. (7 SCT2 1967, 1969, 1978; II RT 343-344; III RT 811-812; see III RT 796.) She has served documents in the Fresno County Jail and thinks inmates there had too much freedom and had better living conditions than in some parts of town. (III RT 831-832.) She has served a document on prospective witness Dr. Errol Leifer, but has no preconceived notions about his believability and would evaluate him like any other witness. (III RT 794-795; 7 SCT2 1982.) She has some college education. (7 SCT2 1970.) Her leisure activities and interests include working out at a gym, movies, and bike riding. (7 SCT2 1971.) She has never married. (7 SCT2 1967.) She lives with her boyfriend, a county sheriff's bailiff who transports inmates. (7 SCT2 1968, 1977; III RT 812.) Her mother is a chef and her father is an automotive salesman. (7 SCT2 1969.) Her uncle also is a sheriff's deputy and the sheriff is a family friend. (7 SCT2 1977, 1982.)

Ourlian has served as a juror in a civil case and was left with the impression that the system is slow. (7 SCT2 1972.) She would hold firmly to

her opinion: "If I make a decision As to what I believe after I have heard The facts - Another Person is not able to Change my mind." (7 SCT2 1974.) From process serving, she has learned every story has two sides. (III RT 813-814.) She somewhat disagrees law enforcement officers are more believable and credible than the average person. (7 SCT2 1980.) She will consider the death penalty and very strongly believes it has been used when necessary "because some people deserve it and others do not. [I]t depends on the case and the facts." (7 SCT2 1973.) She could vote for the death penalty if it is warranted. (III RT 827-828.) She has no problem with LWOP if she feels it is fair. (7 SCT2 1974.) She is neutral to the statement that a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (7 SCT2 1975.) She somewhat agrees with the adage "An eye for an eye." (*Ibid.*)

7. Nokes ♂

Nokes, age 25 and Caucasian, is a college student at FCC (Fresno City College). (7 SCT2 1946, 1948-1949.) His leisure activities and interests include computers and "Faires [*sic*?]." (7 SCT2 1950.) He is divorced from a one-and-a-half year marriage and has a three-year-old son. (7 SCT2 1946.) He lives with his American-Indian girlfriend, who is an assistant auction coordinator at KVPT. (7 SCT2 1947, 1960.) His father is a regional manager for the California Department of Fish and Game (CDFG) and he knows some CDFG wardens. (7 SCT2 1948, 1956-1957.) His mother is a teacher and his step-parent is a realtor. (7 SCT2 1948.)

Nokes has been a mugging victim and once feared for his life while with friends when they were shot at. (7 SCT2 1958.) For five years he has been a recovering alcoholic and recovering drug addict. (7 SCT2 1959, 1961.) He has hypoglycemia and a broken wrist, which is in a cast. (7 SCT2 1960, 1963; III

RT 817-818.)

Nokes has not served as a juror before. (7 SCT2 1950-1951.) He would hold firmly to his opinion even if all 11 other jurors vigorously disagreed with him because he is "stubborn." (7 SCT2 1953.) He is neutral to the statement that law enforcement officers are more believable and credible than the average person. (7 SCT2 1959.) Unlike some cultures that do not give weight to life, he can see that a defendant's background could play a role in the penalty phase. (III RT 819.) He will consider the death penalty in certain cases and very strongly believed it is not used enough: "I was raised believing that punishment would follow transgressions." (7 SCT2 1952; III RT 828.) Although his questionnaire says he feels LWOP is a waste of money and that "Jail For Life Is Not Punishment . . . For Some Crimes" (7 SCT2 1952), he no longer feels that way; he was under the mis-impression LWOP was a general life sentence with parole available (III RT 796). He somewhat agrees that a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (7 SCT2 1954.) He somewhat disagrees with the adage "An eye for an eye" based on his personal philosophy given how he was raised. (*Ibid.*)

8. Shepard (aka True-Shepard) ♀

Shephard, age 34 and Caucasian, is a service representative for an insurance company. (10 SCT2 2827, 2829; III RT 814.) She previously has worked as a recreation leader and a cashier and has some college education. (10 SCT2 2829-2830.) Her leisure activities and interests include skiing, travel, sun tanning, and spending time with her family. (10 SCT2 2831.) She has been married for five years and has two daughters ages two and three-and-a-half. (10 SCT2 2827.) She is divorced from a six and-a-half year marriage. (*Ibid.*) Her current husband is a construction inspector for PG & E.

(10 SCT2 2828.) Her former husband is a welder and a drug addict. (10 SCT2 2829, 2840.) Her father is a bakery equipment operator and her mother is a secretary for the county schools. (10 SCT2 2829.)

Shephard's brother was a reserve police officer several years ago. (10 SCT2 2837.) Her ex-husband was arrested and prosecuted over seven years ago, which caused her sadness because "He was a nice guy;" she has not spoken to him since. (10 SCT2 2838.) However, nothing about his activities would make it difficult for her to sit as a juror. (III RT 817.)

In 1986, Shephard served as a juror in a pimping and pandering case in which another juror refused to make a decision and wanted to vote "undecided;" Shephard tried to mediate with that juror, but got frustrated like the rest of the jurors and backed off; some more patient jurors kept working with that juror who finally decided and verdicts were reached. Although that juror's refusal was an unpleasant aspect, Shephard found the experience positive and interesting. (10 SCT2 2831-2832; III RT 815-816.)[42/] She could hold firmly to her opinion even if all 11 other jurors vigorously disagreed with her because "I am my own person. I do not let other people[']s opinion(s) sway my opinion." (10 SCT2 2834; III RT 816-817.) She strongly disagrees that law enforcement officers are more believable and credible than the average person. (10 SCT2 2840.) She will consider the death penalty, but it "Depends on the nature circumstances of the murder/homicide." (10 SCT2 2833; III RT 828.) As for her general feelings regarding LWOP, that too "Depends on the nature of the crime." (10 SCT2 2834.)[43/] She somewhat agrees that a person who

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42. Appellant mis-describes the other juror as being a "holdout" (using Defense Counsel Hart's word (III RT 815)), who eventually gave in (AOB 71). The juror was not holding out for a particular verdict; instead, she was refusing to make a decision. (III RT 815-816.)

43. Shephard asked the trial court about LWOP, inquiring why Sirhan Sirhan and (Charles) Manson keep coming up for parole. The court explained

intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (10 SCT2 2835.) She does not believe in the adage "An eye for an eye" but her belief is neutral. (*Ibid.*)

9. Gillitzer ♀

Gillitzer, age 59 and Caucasian, is a customer service representative for Sears and a former waitress. (4 SCT2 1169, 1171.) She has some high school. (4 SCT2 1172.) Her leisure activities and interests include travel and camping. (4 SCT2 1173.) She has been married for 33 years and previously divorced from a nine year marriage. (4 SCT2 1169.) Her current husband is a truck mechanic and her former husband is a produce manager for Safeway. (4 SCT2 1170-1171.) She has a son, age 43, and daughter, age 29, who work in the insurance field, a daughter, age 39, who is a home maker, and two sons, ages 34 and 31, who work in the tile and marble field. (4 SCT2 1169.) One of her latter sons lives with her and her husband. (4 SCT2 1170.) Her mother is a homemaker. (4 SCT2 1171.)

Gillitzer's uncle, who is now deceased, was a deputy sheriff in Texas. (4 SCT2 1179.) Three to four years ago, someone close to her was arrested; she did not like it and felt intimidated. (4 SCT2 1180.) Her family had their home broken into and their car stolen. (4 SCT2 1181.) Someone close to her is an alcoholic. (4 SCT2 1182.)

Gillitzer has not served as a juror before. (4 SCT2 1173-1174.) She is unsure whether she could hold firmly to her opinion even if all 11 other jurors vigorously disagreed with her. (4 SCT2 1176.) She somewhat agrees that law enforcement officers are more believable and credible than the average person. (4 SCT2 1182.) She noticed appellant's tattoos, but they would not affect her

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they were convicted under a different law which has been repealed. (III RT 824.)

decision. (4 SCT2 1179; III RT 859.) She would not base her vote at the guilt phase on a desire to avoid the penalty phase. (III RT 846-847, 868.) She will consider the death penalty. She feels it is not used often enough and she does not feel condemned inmates should remain on death row for years and years (4 SCT2 1175); she could impose it and is "for" it (III RT 870). As for LWOP, she feels it "depends on the nature of the crime, should be upheld" (4 SCT2 1176), but she could impose LWOP (III RT 854-855). She somewhat agrees that a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (4 SCT2 1177.) She somewhat agrees with the adage "An eye for an eye" based on her personal philosophy. (*Ibid.*)

10. Combs ♂

Combs, age 52 and Caucasian, is a supervisor in charge of plant sanitation for Hershey Pasta Group and formerly was a supervisor for Hershey Chocolate. (3 SCT2 792, 794.) He has served nearly 14 years in the navy where he was a radioman and did shore patrol; he received an honorable discharge. (3 SCT2 793.) He has some college education and has training in electronics, TTY repair and career counseling. (3 SCT2 795.) His leisure activities and interests include plays, travel, and family. (3 SCT2 796.) He has been married for 33 years and has a son, age 32, who is a parts manager, a son, age 26, who is handicapped, and three daughters, ages 20, 27, and 24, who work as a waitress, in fast foods, and as a housewife, respectively. (3 SCT2 792.) He lives with his handicapped wife, who was a former secretary, and his handicapped son, who was a former US Navy fire fighter. (3 SCT2 793.) His father retired from "For[e]most Creamery." (3 SCT2 794.)

Combs has relatives (cousins, etc.) in the sheriff's department and city police. (3 SCT2 802.) His uncle is an alcoholic, but that has not affected his

life. (3 SCT2 805.)

Combs has never been selected to serve as a juror before. (3 SCT2 796-797.) He could hold firmly to his opinion even if all 11 other jurors vigorously disagreed with him – "I have often been the only one on a point of discussion and I must be conversed [*sic*] and seldom does this happen." (3 SCT2 799.) He somewhat disagrees that law enforcement officers are more believable and credible than the average person. (3 SCT2 805.) He could consider a defendant's background if the court instructed him to do so. (III RT 573.) He will consider the death penalty, but he is "not convienced [*sic*] that our trial/court personnel do a good enough job" (3 SCT2 798) – he bases that opinion on having heard about cases where someone is found guilty, be it a capital case or not, only later to be found innocent and also on such things as that it took two years for this case to get to trial and yet, the jury prospects were left waiting for two-and-a-half hours "because of some technical glitch" (III RT 571-572). He has "no problem with the death penalty – just the system that gets us there." (*Ibid.*) He thinks "it takes entirely too long" to carry out a death sentence, and therefore, "it's cruel to them," but he could set those thoughts aside and vote to impose it if appropriate. (III RT 570-571, 619.) As for his general feelings regarding LWOP: "A good idea but they have it to [*sic*] easy." (3 SCT2 799.) Still, he believes LWOP could be an appropriate sentence for murder. (III RT 573.) He somewhat agrees that a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (3 SCT2 800.) He somewhat agrees with the adage "An eye for an eye" but "feel[s] each case is different." (*Ibid.*) He would not hold the prosecution to a higher standard than proof beyond a reasonable doubt. (III RT 608.)

11. Sanders ♀

Sanders, age 33 and Caucasian, is an office assistant for the county probation department, where she does data entry on juvenile dispositions as a CLETS (California Law Enforcement Telecommunications System) operator. (9 SCT2 2429, 2431, 2439; III RT 853.) She formerly worked as a billing/financial coordinator/secretary and also has had an Arabian Horse farm. (*Ibid.*) She has some college education including courses in criminal investigation, legal evidence, and procedures in the justice system, some of which she has taken from Judge Quashnick. (9 SCT2 2432-2433, 2440.) Her plan is to become an investigator for the DA's Office. (III RT 854.) Her leisure activities and interests include backpacking, gardening, playing with her son, and traveling. (9 SCT2 2433.) She is divorced from a three year marriage to an unemployed mechanic. (9 SCT2 2429, 2431.) She has a son, age three, and lives with her fiancé, who is a cosmetologist (9 SCT2 2430.) Her father is a physician and her mother is an artist. (9 SCT2 2431.)

In 1984 (?) in Madera County, Sanders or someone close to her was arrested and she was in a place of incarceration; she found the experience frightening, but in the end very fair. (9 SCT2 2440-2441.) She has been a date rape victim. (9 SCT2 2441.) She has testified/given a deposition in a medical malpractice suit and in family court. (*Ibid.*) She once feared for her life when her ex-husband had someone follow her and do a "drive by warning" as she picked up her son. (*Ibid.*) She donates yearly on her taxes to the prevention of child abuse. (9 SCT2 2433.) Her ex-husband is an alcoholic and drug addict and is emotionally and physically unpredictable, which causes problems for her family. (9 SCT2 2442.)

Sanders has not served as a juror before. (9 SCT2 2433-2434.) She could hold firmly to her opinion "After viewing all facts, if I am convinced one way or the other and in my heart . . ." even if all 11 other jurors vigorously

disagreed with her. (9 SCT2 2436.) She is neutral to the statement that law enforcement officers are more believable and credible than the average person. (9 SCT2 2442.) She would base her decision for the guilt phase based on the law and the evidence without regard to penalty. (III RT 868-869.) She will consider the death penalty, however, she has "mixed emotions regarding the right of the State to do exactly that which they dictate the citizens from doing - However, there may [*sic*] circumstances warranting this." (9 SCT2 2435.) She feels it is used "Too Random - it seems as though it is used in one case and not in another with the same or more severe [illegible]," however, that was not a strong view, but instead an uneducated observation. (*Ibid.*) She could vote for a death sentence if she felt it was warranted and would be able to affirm it upon being polled individually. (III RT 872, 874.) She supports LWOP and does not feel parole is acceptable for murder. (9 SCT2 2436.) She is neutral to the statement that a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (9 SCT2 2437.) She is neutral to the adage "An eye for an eye" because "each circumstance is unique. What is right in one case may not be right for another." (9 SCT2 2437-2438.)

12. Kelly ♂

Kelly, age 54 and Caucasian, is a state park maintenance worker, as is his wife. (5 SCT2 1463-1465.) He has served four years in the air force and received an honorable discharge. (5 SCT2 1464-1465.) He has an AA degree. (5 SCT2 1466.) His leisure activities and interests include "venteur [*sic*?] at the zoo." (5 SCT2 1467.) He has been married for 12 years and has a son, age 19, who is unemployed with a 10th grade education. (5 SCT2 1463.) He lives with his step son. (5 SCT2 1464.) His father works for the contractor's state license board and his mother is a secretary. (5 SCT2 1465.)

Kelly has been a battery victim. (5 SCT2 1475.) He does not believe that consumption of drugs effects a person's ability to observe, recall, and testify concerning prior events. (5 SCT2 1477.)

Kelly was called for jury service a long time ago, but was "bumped off," so he has not served as a juror before. (5 SCT2 1467-1468; IV RT 892.) He could not hold firmly to his opinion even if all 11 other jurors vigorously disagreed with him – "I can't disagree with other jurours [*sic*]" – ordinarily in life, he just "kind of go[es] with other people." (5 SCT2 1470; IV RT 891-892.) He strongly disagrees that law enforcement officers are more believable and credible than the average person. (5 SCT2 1476.) He strongly supports the death penalty and feels it is not used enough. (5 SCT2 1469.) As for stating in his questionnaire that he could not set aside his personal feelings and follow the law because he is for the death penalty (5 SCT2 1470), he explained he believes in the death penalty, but would not vote for it because he does not believe in taking someone's life (IV RT 892-893). Although his questionnaire expressed his general feelings regarding LWOP as "none for the death penalty" (5 SCT2 1470), he later said he changed his mind and that he thinks it would be better if the defendant received LWOP, which he now was more partial to imposing (IV RT 902-903). Still, he said he could impose the death penalty if he felt it was the appropriate punishment. (IV RT 902-903, 932-933.) His questionnaire also reflects he strongly agrees that a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty and that he strongly agrees with the adage "An eye for an eye." (5 SCT2 1471.)

13. Taylor ♀

Taylor, age 52 and Caucasian, is a personnel assistant for a community college district. (10 SCT2 2743, 2745.) She is a high school graduate. (10

SCT2 2746.) Her leisure activities and interests include reading, swimming, and walking at the beach. (10 SCT2 2747.) She is divorced from a 22 year marriage to a railroad conductor and has a 28-year-old son, who is a parts technician. (10 SCT2 2743.) Her father is a retired foreman for Fresno city and her mother is a homemaker. (10 SCT2 2745.)

About eight years ago, someone close to Taylor was arrested, which was stressful for her. (10 SCT2 2754.) Seventeen years ago, Taylor and about eight others were victims when two men robbed her office at gunpoint; she feared for her life at the time and later testified at their trial; however, she has put those things behind her so they would not effect her ability to be a juror. (10 SCT2 2755; IV RT 905-907.) A person close to her is a recovering alcoholic. (10 SCT2 2756.) She is acquainted on a professional level with prospective witnesses Linda Lee and Jim Tarver, who are on the adjunct faculty where she works. (10 SCT2 2758; IV RT 907-908.)

Many years ago, Taylor served as a juror in a one-day civil case in which a man sued the city for breaking his toe on a sprinkler, however, she was not exposed to the jury system long enough to form an impression. (10 SCT2 2748.) She could hold firmly to her opinion even if all 11 other jurors vigorously disagreed with her because "I think and act on my own." (10 SCT2 2750.) She is neutral to the statement that law enforcement officers are more believable and credible than the average person. (10 SCT2 2756.) She will consider the death penalty and does not have a strong opinion one way or the other, but if anything, she would say it is used "Too Randomly – versus Consistent." (10 SCT2 2749; IV RT 934.) She believes some crimes warrant LWOP. (10 SCT2 2750.) Thus, she could entertain both options. (IV RT 907, 934.) She is neutral to the statement that a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (10 SCT2 2751.) She is neutral to the adage "An eye for an eye"

because "No one really knows what prompts the actions of each individual." (*Ibid.*)

C. Applicable Law

A prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group membership (e.g., race, gender) violates a defendant's rights to equal protection of the law and to trial by a jury drawn from a representative cross section of the community. (Cal. Const. art. I, §§ 7 & 16, respectively; *People v. Alvarez* (1996) 14 Cal.4th 155, 192-193; *Wheeler, supra*, 22 Cal.3d at pp. 276-277; *Di Donato v. Santini* (1991) 232 Cal.App.3d 721, 731, 737, fn. 7, 738.) It also violates the defendant's right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution. (*J. E. B. v. Alabama ex rel. T. B.* (1994) 511 U.S. 127, 129 [extending the rationale to gender discrimination]; *Powers v. Ohio* (1991) 499 U.S. 400, 409; *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89 (*Batson*)[44] [forbidding prosecutor from using peremptory challenges to exclude jurors "solely on account of their race."].) It is presumed a prosecutor exercises peremptory challenges in a constitutional manner, however, that presumption can be rebutted by a prima facie showing prospective jurors have been excluded on account of unconstitutional group bias. (*People v. Alvarez, supra*, 14 Cal.4th at pp. 193, 198-199; *Wheeler, supra*, 22 Cal.3d at pp. 278-280.)

The prima facie showing is the first step in a three-step process. (*Johnson v. California* (2005) 545 U.S. 162, _ [125 S.Ct. 2410, 2416].) First, to establish a prima facie case, the defendant must "produc[e] evidence

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44. Although appellant did not specifically invoke *Batson* in his objection at trial, this Court has recognized that an objection under *Wheeler* preserves a federal constitutional objection because the legal principle that is applied is ultimately the same. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117 (*Yeoman*); see also *Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1088, fn. 4.)

sufficient to permit the trial judge to draw an inference that discrimination has occurred." (*Id.* at p. __ [125 S.Ct. at pp. 2416-2417] [rejecting more onerous standard that defendant must show it is "more likely than not" that discrimination has occurred].) Second, if the defendant establishes a prima facie case, then the burden shifts to the prosecutor to come forward with a neutral explanation for excluding the prospects. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 193; *Wheeler*, *supra*, 22 Cal.3d at pp. 281-282.) And third, the prosecutor then must persuade the court that his peremptory challenges were based "on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses" and not on group bias. (*Wheeler*, *supra*, 22 Cal.3d at pp. 281-282.) To avoid a finding of purposeful discrimination, the prosecutor is required only to articulate a neutral explanation related to the particular case tried. (*United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 697.)

When a trial court denies a *Wheeler* motion for lack of a prima facie showing, the reviewing court considers the entire record of voir dire for evidence to support the ruling. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200 (*Davenport*); *People v. Howard* (1992) 1 Cal.4th 1132, 1155 (*Howard*).) It will affirm the ruling where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question. (*Ibid.*; *People v. Farnam* (2002) 28 Cal.4th 107, 135 (*Farnam*).)[45/] If it finds the trial

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45. In commenting upon permissible peremptory challenges, the *Wheeler* court noted:

> [T]he law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious *to the apparently trivial*, from the virtually certain *to the highly speculative*.

(*Id.*, 22 Cal.3d at p. 275, emphasis added.) Thus, peremptory challenges may be based on a juror's manner of dress, a juror's unconventional lifestyle, a juror's experiences with crime or with law enforcement, or simply because a juror's

court properly determined no prima facie case existed, it need not review the adequacy of the prosecution's justifications, if any, for the challenges. (*Farnam, supra*, 28 Cal.4th at p. 135, citing *People v. Turner* (1994) 8 Cal.4th 137, 167 (*Turner*).) In conducting its analysis, the reviewing court applies a deferential standard of review in evaluating whether the trial court properly found that no prima facie case exists; such a standard is appropriate because such determinations call upon the trial judge's personal observations. (*Howard, supra*, 1 Cal.4th at p. 1155; see *People v. Johnson* (2003) 30 Cal.4th 1302, 1320-1321 (*Johnson*), overruled on other grounds in *Johnson v. California*, __ U.S. at pp. __ [125 S.Ct. at pp. 2416-2417, 2419]; *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677, 683-684 (en banc).)

Still, appellant urges this Court to follow other jurisdictions that conduct de novo review. (AOB 63; see AOB 58-59, fn. 18.) He asserts de novo review is more appropriate for the first step because it involves a fundamentally legal, rather than factual inquiry, where reliance on the trial judge's ability to observe is essentially irrelevant. (AOB 58-63.) He contrasts that with the third step, which requires credibility determinations. (AOB 60-63.) He also asserts independent (i.e., de novo) review is used when reviewing courts evaluate other issues (e.g., ineffective assistance of counsel, reasonable suspicion or probable cause to support a warrantless search), so the standard should be applied here to promote uniformity of decisions (AOB 62), and that such a standard is appropriate where the evidence is undisputed (AOB 64).

Yet, as this Court in *Johnson* observed, albeit in the context of finding comparative analysis inappropriate for the first time on appeal:

> Differences do exist in the two procedural postures. At the first stage, the party making the challenges is not asked to explain them, so the trial court does not have to judge that party's credibility. But the concerns

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answers on voir dire suggested potential bias. (*Wheeler, supra*, 22 Cal.3d at p. 275.)

about the inability of a reviewing court to judge the dynamics of jury selection on a cold record apply to both stages. A comparison of the jurors' answers is unreliable when divorced from the context of the trial. A trial court, but not a reviewing court, is able to place the answers into context and draw meaning from all the circumstances, including matters not discernable from the record.

Even the Ninth Circuit Court of Appeals . . . reviews a trial court's finding of no prima facie case deferentially. (*Tolbert v. Page*, (9th Cir. 1999) 182 F.3d 677 (in bank).) Its reasoning for giving such deference echoes ours both in giving similar deference and in not engaging in comparative juror analysis for the first time on appeal. "[T]he trial court is better positioned to decide the *Batson* prima facie issue, which involves a '"factual inquiry" that "takes into account all the possible explanatory factors" in the particular case.' [Citation.] Whether or not 'all the relevant circumstances' 'raise an inference' of discrimination will depend on factors such as the attitude and behavior of the challenging attorney and the prospective jurors manifested during voir dire. As a purely practical matter, the trial judge's unique perspective of voir dire enables the judge to have first-hand knowledge and observation of critical events. [Citation.] The trial judge personally witnesses the totality of circumstances that comprises the 'factual inquiry,' including the jurors' demeanor and tone of voice as they answer questions and counsel's demeanor and tone of voice in posing the questions. [Citation.] The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason. . . . In addition, the trial court is 'experienced in supervising voir dire. '[Citations.]

"The appellate court, on the other hand, must judge the existence of a prima facie case from a cold record. An appellate court can read a transcript of the voir dire, but it is not privy to the unspoken atmosphere of the trial court--the nuance, demeanor, body language, expression and gestures of the various players. [Citation.] . . . [T]he prima facie inquiry is so fact-intensive and so dependent on first-hand observations made in open court that the trial court is better positioned to decide the issue. . ." (*Tolbert v. Page*, *supra*, 182 F.3d at pp. 683-684.)

(*Id.* 30 Cal.4th at pp. 1320-1321.) Thus, despite appellant's urging to the contrary, respondent submits a deferential standard of review is appropriate.

Nonetheless, appellant argues the trial court applied an erroneous legal standard, and thus, de novo review is appropriate. (AOB 74-76, 89.) He notes reviewing courts do not accord deference to findings that are based on an erroneous legal standard; instead, independent, or de novo, review is conducted. (AOB 63-64, citing *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1199 & *People v. McGlothen* (1987) 190 Cal.App.3d 1005, 1015.) More specifically, he asserts that at the time of his trial, this Court's controlling decisions in *Howard, supra*, 1 Cal.4th at page 1154 and 1156 and *People v. Sanders* (1990) 51 Cal.3d 471, 500-501, erroneously applied the "strong likelihood" standard, as opposed to the "reasonable inference" standard, in determining whether a prima facie case of discrimination existed. (AOB 74-75.)[46/] While conceding the trial court did not cite any particular test when it found he had failed to establish a prima facie case, he relies on the presumption that trial courts are presumed to know and follow the law and thus, he concludes the trial court applied the more onerous "strong likelihood" test. (AOB 75, citing *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913; *People v. Castaneda* (1975) 52 Cal.App.3d 334, 343.)

Even assuming, arguendo, that the trial court applied the wrong standard, respondent submits appellant failed to produce evidence sufficient to permit the trial court to draw a "reasonable inference" of discrimination. Under such circumstances, the trial court's decision should stand. (*Helvering v. Gowran* (1937) 302 U.S. 238, 245 ["In the review of judicial proceedings the

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46. Although this Court later concluded in *People v. Box* (2000) 23 Cal.4th 1153, 1188, footnote 7, and *Johnson, supra*, 30 Cal.4th at pages 1306, 1313 that the terms "strong likelihood" and "reasonable inference" are different phrasings of the same standard, the United States Supreme Court in *Johnson v. California*, ___ U.S. at pages __ [125 S.Ct. at pages 2416, 2410] found the "strong likelihood" standard was an "inappropriate yardstick by which to measure the sufficiency of a prima facie case" and was "at odds" with *Batson*'s "reasonable inference" standard.

rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason"]; *People v. Zapien* (1993) 4 Cal.4th 929, 976 (*Zapien*) [proper decision will stand despite wrong reasoning].) Thus, regardless of whether deferential or de novo review is applied, this Court should uphold the trial court's finding that appellant failed to establish a prima facie case of group bias.

D. Appellant Failed To Establish A Prima Facie Case Of Discrimination Based On Gender In The Prosecution's Exercise Of Peremptory Challenges

Appellant recognizes this Court must consider the entire record of voir dire (AOB 57-58, see AOB 76), however, his argument fails to note certain pertinent facts:

First, appellant fails to note that before each round of peremptories, counsel had insight into 18 prospects, as well as advance notice of the upcoming randomized sequence of the other prospects. (I RT 52, 115; II RT 408; see I RT 53–54; II RT 412-416, 426; 1 SCT1 293-300 [Court's Ex. 4 - randomized list of initial 25 prospects, followed by randomized list of remaining prospects].) That fact is significant given appellant's assertion that the prosecutor excused jurors who had views normally considered to be pro-prosecution. (AOB 76-78, 84, 87.) Because the prosecutor had questionnaires from all of the prospects and knew the "random" order in which they would be replaced, he may have exercised his peremptories, not because a prospect he excused was particularly undesirable from a prosecution standpoint, but because a future prospect was even more desirable. That circumstance tends to negate a reasonable inference of discrimination.

Second, appellant fails to note that each side could use 20 peremptories in selecting the 12 jurors. (II RT 416.) That the prosecutor used only 13 of the 20 available peremptories tends to negate a reasonable inference of

discrimination because otherwise the prosecutor arguably would have continued to use peremptories to excuse women. Although appellant may argue the prosecutor ceased his alleged discriminatory behavior after the *Wheeler* issue was raised, that would ignore the fact that the prosecutor passed numerous times before it was raised.

Third, as for the prosecutor's passes, appellant omits the fact that the prosecutor had five intervening passes before his *Wheeler* motion. (III RT 633, 781, 838-839.) Thus, although he asserts Ourlian was the "sixth woman in a row so challenged by the prosecution" (AOB 70; see AOB 53), those challenges were not actually "in a row." (See respondent's fn. 35, *ante*.)

Fourth, while the prosecution did not actually challenge six women "in a row," the defense indeed challenged six men in a row (i.e., with no intervening passes and no intervening strikes against women).[47/] Impliedly, the defense found it acceptable to excuse prospects of the same gender in a row. The fact the defense exercised so many of its challenges against prospects of the same gender in a row, whereas the prosecution exercised less in a row (because its challenges actually were separated by some passes), tends to negate a reasonable inference of discrimination.

Fifth, of the ten female prospects that were excused by the prosecutor, only three resulted in adding a male prospect; whereas, the other seven resulted in adding another female prospect. Given that the parties could see which prospects would be seated next, the prosecutor did a poor job of excluding women, assuming arguendo, that was his goal. Further, two of the male prospects excused by the prosecutor actually resulted in female prospects being seated instead. The fact that nine of the thirteen prospects excused by the

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47. The defense's second through seventh peremptory challenges were, respectively: Coppock ♂, M.P. Smith ♂, Hutcheson ♂, Steenburgh ♂, R. Martin ♂, and Shumaker ♂. (III RT 633, 720, 779, 781.)

prosecutor resulted in the seating of nine female prospects tends to negate a reasonable inference of discrimination.

Sixth, while appellant notes by the time he made his *Wheeler* motion, the gender makeup of the 38 prospective jurors consisted of 19 women and 19 men, with the prosecution exercising 10 of its 13 challenges against women (i.e., 77%), excusing 53% of the women and 16% of the men (AOB 83-84), he omits the fact that the defense had done just the opposite. Specifically, the defense exercised 10 of its 13 challenges against men (i.e., 77%), excusing 53% of the men and 16% of the women. (Respondent's fn. 36, *ante*, and respondent's Table C *post.*) Impliedly, the defense found it acceptable to excuse jurors in those ratios. The fact the defense exercised its challenges against men and women in identical percentages that the prosecution exercised its challenges against women and men tends to negate a reasonable inference of discrimination. Hence, appellant's reliance upon these statistics to establish a prima facie case (see AOB 81-83) should be rejected.

Seventh, appellant fails to note how the ratio of females to males changed during the exercise of peremptory challenges. Specifically, the prospective jury had an initial 5:7 ratio of females to males, i.e., 42% female, it dipped to a low of 3:9, i.e., 25% female, it then rose to a high of 7:5, i.e., 58% female at the time of the *Wheeler* motion, and it finally ended at an even 6:6, i.e., 50% female. (Respondent's Table C *post.*) The fact that the ratio of females to males increased from its initial ratio, ultimately doubling from is lowest point, and finally reach parity tends to negate a reasonable inference of discrimination. Thus, contrary to appellant's claim (AOB 85-86; see AOB 52-53), the trial court's prefatory remark "I doubt there's been a prima facie showing here because [the final jury consisted of six women and six men]" (IV RT 950) was sound.

Appellant also complains the prosecutor asked little or no questions of some of female prospects that he excused. (AOB 76, 84; see AOB 65, fn. 21, AOB 67, 68, 70, 72, 79, 87.) Yet, in criticizing the prosecutor's limited questioning, he fails to appreciate: the court's desire for the attorneys to be efficient and focused in their examination, the prosecutor's technique of using general questions to speed things along, the detailed information the prosecutor already had from the prospects' questionnaires, and the prosecutor's goal of not wasting the time of prospects whom he had already had decided to excuse based on that information.

When Prosecutor Oppliger initially introduced himself to the prospective jurors, he said "Look forward to talking to *all* of you." (II RT 434, emphasis added.) Thus, it appears he initially had planned to question all of the prospects if given the opportunity. Thereafter, however, the court told the prospects "Your introductions to us will not be as lengthy as they are in shorter cases where we get to cover most of the questionnaire orally." (II RT 435.) Then at one point during voir dire, the court encouraged the parties, particularly Defense Counsel Hart, "to become more efficient and more focused with the examination" stating "it's time to focus. You may consider the use of general questions, and I suggest you don't always need to respond to the jurors when they have concerns . . ." (III RT 567-568.) Later, in explaining his questioning technique, Prosecutor Oppliger remarked:

> I'm going to try and move with some speed. In order to do that, I'm going to spend some time in the beginning setting out some questions . . . I'm going to ask *each and every* juror the same question, although I will not ask the whole question, I'll just say remember my question and I want to get your response to it. [¶] Some of the questions I'll ask later on, I'm just going to ask, you know, "Does anybody feel . . ." and I'm going to look for heads "okay," shaking and what not.

(III RT 589-590, emphasis added.) He also explained the anticipated use of peremptories and how that may affect his questioning, stating:

> [W]e get so many peremptory challenges on a death penalty case, and it's for whatever whim, caprice, good reason. We actually don't try to go on whim and caprice. We try to have a feel that maybe we just can't articulate. *Maybe some question buried in your questionnaire that we read and we just didn't bother to ask you about.* [¶] I'll tell you with some people, *if I've already got you marked down that* I'm not going to *– I'm going to exercise a peremptory, I may not ask you any questions. I'm not going to waste your time talking to you.*

(III RT 593, emphasis added.)

With another group of prospects, Prosecutor Oppliger remarked:

> I'm going to do the same thing that I did with the last group. I'm going to briefly remind you of questions . . . So I'll kind of be looking at you for a response. If you have a response to the questions I've asked. [¶] I don't want you folks to think that I don't care about the case because I'm going through these quickly. It's just that *there really is quite an adequate amount of information in your questionnaire. They're so chock full of information* that we don't normally get when we're asking and looking at a jury. We have to ask all the questions. But this is actually kind of easier for us because *everything is in writing*, we've had time to look it over.

(III RT 767-768, emphasis added; see III RT 589-590.) Thereafter, in asking whether they could put aside the issue of punishment when determining whether guilt and special circumstances were proven, he did not question female prospects McDermott and Holik, but instead remarked: "I'm not leaving you ladies out by mistake. I'm going to be frank with you. You said things in your *questionnaires* that I'm probably going to exercise peremptories on you." (III RT 771, emphasis added.) Significantly, he questioned other female prospects, i.e. M. Jones and Collister,[48] about that issue. (III RT 770-771.) Thus, although he omitted some women, his asking other female prospects tends to negate a reasonable inference of discrimination.

Moreover, Defense Counsel Hart likewise relied on a prospect's questionnaire in declining not to ask any questions. Specifically, as to female

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48. Collister was later excused for cause. (III RT 777.)

prospect Moll's beliefs concerning the death penalty, Defense Counsel Hart said "I've read her questionnaire and it substantiates what she said in court, so I have no questions." (IV RT 889.) Also, although the court questioned virtually all prospects, it remarked "Ms. Sanders, I should say I don't have any questions for you." (III RT 851.) Similarly, Defense Counsel Neal Pedowitz asked female prospect T. R. "Am I going to hurt your feelings if I don't ask you any questions at all?" He then briefly asked only whether she could see herself "doing either one of these two jobs [(i.e., determining guilt and penalty)] if you have to do it based on the evidence." (III RT 860.) The fact that other participants found it unnecessary to ask questions of some prospects likewise tends to negate a reasonable inference of discrimination.

Given the thoroughness of the roughly 20-page, 87-question, multi-sub-question questionnaire and the court's encouraging the parties to be efficient and focused in oral examination, the prosecutor's decision to not question or to ask limited questions of some prospects cannot be viewed as discriminatory.

As previously noted appellant asserts the prosecutor excused jurors who had views normally considered to be pro-prosecution. (AOB 76-78, 84, 87.) In doing so, he makes a comparative analysis of the ten female prospects whom the prosecution excused to the six male prospects who were retained. (AOB 77-78, 83-84, 87-88 and fns. 33-38, 65.) Yet, as already mentioned, this Court has expressly rejected the use of comparative juror analysis *for the first time on appeal* when reviewing the trial court's decision that a prima facie case has not been shown. (*Johnson, supra*, 30 Cal.4th at pp. 1306, 1319-1325.) In the trial court, aside from merely pointing out the frequency and sequence of the prosecutor's peremptory challenges of female and male prospects, appellant did not engage in any comparative analysis of those struck to those retained. Thus, his attempt to engage in a comparative analysis of their questionnaires and voir

dire responses now is procedurally barred and cannot be considered here.

Further, although the Ninth Circuit permits comparative analysis (see e.g., *Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1427), such analysis is not constitutionally compelled on appellate review. (*Johnson, supra*, 30 Cal.4th at p. 1323-1324.)[49] Moreover, appellant's comparison is not very enlightening because it does not shed any light on why the prosecutor might reasonably have challenged some female jurors, but not others. Again, an appellant court will affirm a trial court's ruling of no prima facie case where the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question. (*Howard, supra*, 1 Cal.4th at p. 1155; *Farnam, supra*, 28 Cal.4th at p. 135.) Thus, a more telling comparison would have been for him to compare the 10 female prospects whom the prosecution excused to the six female prospects who were retained. If he would have done so and if he were to have established no discernable difference between the two groups, then he would have been in a much better position to assert there was a reasonable inference of discrimination.

Nonetheless, appellant lists a myriad of things for the excused female prospects which he contends would cause them to have views normally considered to be pro-prosecution (e.g., they, their family, and/or close friends were in law enforcement; they or their close family were crime victims; some agreed law enforcement witnesses would be more credible than the average person; one supported "Three Strikes" and MADD, etc.). (AOB 76-78.) The obvious inference is those were not the reasons the prosecutor excused those

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49. In *Johnson, supra*, 30 Cal.4th at p. 1324, fn. 6, this Court observed that *Burks v. Borg* had noted "the United States Supreme Court 'has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right.' (*Burks v. Borg, supra*, 27 F.3d at p. 1427.)"

jurors. He ignores other grounds upon which the prosecutor might reasonably have challenged the jurors in question.

For example, he argues Ourlian expressed disagreement and disapproval at what she considered lenient treatment of inmates at the jail. (AOB 78.) More specifically, Ourlian said she thought inmates in the local jail had too much freedom and had better living conditions than in some parts of town. (III RT 831-832.) As for their freedom, she remarked:

> I've served documents in the Fresno County Jail on various occasions, and at one time when I was in there it was, I think dinner time, and I – and it was negative . . . because I thought that these guys or females should be shackled . . . and *they were all walking somewhat free in a building*. And they weren't free to go out.

(III RT 831-832, emphasis added.) Her observation that inmates had too much freedom during meal time played right into the defense's SODDI (Some Other Dude Did It) defense in that it lent credence to the defense theory that some other inmate entered the cell and killed Andrews after the doors opened for breakfast. (XI RT 2978 [Prosecutor Oppliger remarked during his initial closing argument "of course the defense sooner or later is going to waltz in here and say, 'Some other dude did it . . .'"], XI RT 3056-3057 [Defense Counsel Pedowitz, noting Benjamin had said he thought Andrews was alive when the doors opened for breakfast and 30 to 45 minutes later Andrews was found dead, argued "If Greg Andrews was alive when that door opened and if everybody is uncontroverted that [appellant] never went back to that cell, somebody else killed Greg Andrews."], XI RT 3075 ["if Mr. Andrews is alive in that cell for between 30 and 45 minutes without having a towel around his neck, tied in a knot, *anybody in F pod could have killed him, anybody.* Except [appellant] because . . . he's the only person that never went back to cell 8 . . ." (emphasis added)]; accord XI RT 3062-3064, 3069-3071, 3076-3078; see XI RT 3080 [in rebuttal, Prosecutor Oppliger remarked "Mr. Pedowitz's defense: He says that four went in, three came out, and some other dude did it, later on."], XI RT

3095 ["that some other dude went up and copied [appellant's] method of murder . . . is patently absurd."].) Thus, Ourlian's belief that inmates in the local jail had too much freedom during meal time provided a ground upon which the prosecutor might reasonably have challenged her.

Further, of the 10 female prospects whom the prosecution excused, eight (Mohler, S. Martin, Holik, Horn, Shephard, Gillitzer, Sanders, and Taylor) had themselves or close relatives who had adversary contacts with the criminal justice system or negative experiences with law enforcement. Specifically, Mohler or someone close to her had been prosecuted in a trial. (7 SCT2 1831.) S. Martin's brother was arrested for and pled guilty to assault on a homosexual man in 1981 (6 SCT2 1747)[50], although S. Martin claimed nothing about that situation would affect her ability to sit in impartial judgment. (III RT 615.) Holik's uncle was arrested when she was very young, although she did not recall the experience and she was unsure if he was prosecuted. (5 SCT2 1348.) Horn's husband was falsely arrested for a robbery in 1987 and she visited him at the Fresno jail; it was a horrible experience; the guilty party later committed suicide while being apprehended by police. (5 SCT2 1390-1391.) Shephard's ex-husband was arrested and prosecuted over seven years ago, which caused her sadness because "He was a nice guy;" she has not spoken to him since (10 SCT2 2838); however, she claimed nothing about his activities would make it difficult for her to sit as a juror (III RT 817). Gillitzer had someone close to her who was arrested three to four years ago; she did not like it and felt intimidated. (4 SCT2 1180.) Sanders or someone close to her was arrested and she was in a place of incarceration in 1984 (?); she found the experience frightening, but in the end very fair. (9 SCT2 2440-2441.) And Taylor had someone close to

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50. In 1982, S. Martin was a visitor and/or an inmate at the Fresno "farm" but she did not recall what that experience was like. (6 SCT2 1747-1748.)

her who was arrested about eight years ago, which was stressful. (10 SCT2 2754.)

It is permissible to surmise that a close relative's adversary contact with the criminal justice system might make a juror unsympathetic to the prosecution, and a peremptory challenge may be proper on that basis. (*People v. Arias* (1996) 13 Cal.4th 92, 138; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; *People v. Allen* (1989) 212 Cal.App.3d 306, 312.) Moreover, this Court has repeatedly upheld the exercise of peremptory challenges to jurors who have expressed a negative experience with law enforcement. (*Turner, supra*, 8 Cal.4th at p. 171, citing *People v. Walker* (1988) 47 Cal.3d 605, 625-626; *People v. Wheeler, supra*, 22 Cal.3d at pp. 275, 277, fn. 18.) Thus, such adversary contacts with the criminal justice system and negative experiences with law enforcement provided grounds upon which the prosecutor might reasonably have challenged those prospects.

Additionally, Mohler, Holik, and Horn each demonstrated an inability to follow simple directions and pay attention to detail. Specifically, neither Mohler (7 SCT2 1822) nor Holik (7 SCT2 1339) indicated their ex-spouse's current or past occupation(s) as the questionnaire required. (7 SCT2 1822.) Similarly, Horn neglected to sign and date her questionnaire. (III RT 794.) Their inability to follow directions and observe detail provided grounds upon which the prosecutor might reasonably have challenged them.

As for Sanders, she may have identified too closely to the prosecution in some respects. Specifically, she had taken courses in criminal investigation, legal evidence, and procedures in the justice system (9 SCT2 2432-2433, 2440) and her plan was to become an investigator for the DA's Office (III RT 854). The prosecutor reasonably may have felt other jurors would not take Sanders' opinion seriously or that he had unfairly "stacked the deck" against appellant given Sanders' career aspirations to become affiliated with his office. That

provided grounds upon which the prosecutor might reasonably have challenged her.

Also, Mohler and Shephard both had prior jury service experiences that demonstrated non-desirable traits. Specifically, Mohler had served on a jury in a drunk driving case, where a verdict was reached. (7 SCT2 1824.) Her impression was that the system was a "Waste of tax money." (7 SCT2 1825.) Although she said "this time may be different" (*ibid.*), a juror with a mindset that the system may be a waste of tax money may not take the process, let alone deliberation duties, seriously. Shephard served as a juror in a pimping and pandering case in which another juror refused to make a decision; Shephard tried to mediate with that juror, but got frustrated and backed off while some more patient jurors kept working with that juror, who finally decided and verdicts were reached. (10 SCT2 2831-2832; III RT 815-816.) Her getting frustrated and backing off, rather than exercising more patience with the other juror demonstrated that she may lack the ability to work well with other jurors in deliberation. Thus, their prior jury service experiences provided grounds upon which the prosecutor might reasonably have challenged them.

Likewise, Gillitzer had an undesirable trait in that she was unsure whether she could hold firmly to her opinion even if all 11 other jurors vigorously disagreed with her. (4 SCT2 1176.)[51] In contrast, a prosecutor generally would want a juror to stand up for his or her opinion, and only abandon it if the other jurors demonstrated it was wrong.[52] Similarly, Mohler

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51. Male prospect Kelly, whom the prosecution also excused (IV RT 940), expressed a similar inability to hold firmly to his opinion (5 SCT2 1470; IV RT 891-892).

52. Male prospect Nokes, whom the prosecution also excused (III RT 875) expressed just the opposite, indicating he would stubbornly hold to his opinion (7 SCT2 1953). That trait is equally undesirable because it implies he would be unwilling to abandon his opinion even if other jurors demonstrated

had an undesirable trait in that she did not think she could judge a person by their demeanor. (III RT 526-529, 532-533.) Although she said she "could assess the whole situation" if demeanor "were only a small part of it" and she did not think it would be a problem when she was told physical evidence did not require judging demeanor, (III RT 526-529, 532-533), her assurances were not satisfying because demeanor played a major role in the case given the need to assess the credibility of witnesses like appellant's cellmates Benjamin and Bond and other inmate witnesses. Thus, those undesirable traits provided grounds upon which the prosecutor might reasonably have challenged them.

Further, S. Martin expressed a desire for more information than may have been reasonably available in assessing penalty. Specifically, when asked about whether she cared about a person's background and whether it should effect penalty, she replied in part: "there are circumstances that can cause you to be what you are. . . . I think that *you need to have all the facts, everything about every aspect of the case* . . .." (II RT 502, emphasis added.) Her remarks indicate that she would not have been satisfied if she did not receive evidence about every aspect of the defendant's life, which may have been more information than reasonably available. That trait provided grounds upon which the prosecutor might reasonably have challenged her.

Moreover, Mohler, McDermott, Holik, Horn, Sanders, and Taylor gave responses indicating they were inclined to not impose the death penalty. *Batson* does not extend to prohibit the prosecution from using peremptory challenges to remove prospective jurors who appear opposed to the death penalty. (*Dennis v. Mitchell* (6th Cir. 2003) 354 F.3d 511, 526; *Grosier v. Welborn* (7th Cir. 1999) 175 F.3d 504, 510; *Pitsonbarger v. Gramley* (7th Cir. 1998) 141 F.3d

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he was wrong. (See *Washington v. Johnson* (5th Cir. 1996) 90 F.3d 945, 954 [that prospective juror appeared obstinate and therefore might not deliberate with others was deemed race neutral].)

728, 735 (7th Cir. 1998); *People v. Turner*, *supra*, 8 Cal.4th at p. 171 [peremptory challenge against death penalty skeptic who is otherwise not excusable for cause is proper].)[53/]

Specifically, Mohler somewhat disagrees that a person who intentionally kills another person, not in self-defense or defense of others, deserves the death penalty. (7 SCT2 1828.) McDermott, who was raised to oppose the death penalty, said she would consider it because her views have "metamorphized [*sic*]" slowly to support it under certain conditions dictated by law; however, she also said she "believed it is used too randomly . . ." (6 SCT2 1616.) Holik expressed "we never follow through very often and seems we give the death penalty out too often." (5 SCT2 1343.) She remarked that LWOP could be "just as bad in the long run" because "[t]he person going to jail for life might end up like the victim." (III RT 737-738.) Although Horn said she would consider the death penalty, she also indicated she has "mixed emotions" – her religious belief is God only can judge, but she gets angry with unnecessary violence in society. (5 SCT2 1385; see III RT 834.) She further said "to stand up and say, 'Execute them,' I would have a difficult time with it. I really would. I know I would." (III RT 809; accord III RT 810.) She does not know if she could vote for the death penalty if it is warranted; she probably could do it, but she would rather not make that decision. (III RT 827, 834.) In contrast, she feels very strongly in favor of LWOP (5 SCT2 1386), which she would have no problem imposing (III RT 810), and she viewed herself as "probably lean[ing] more toward life than death" (III RT 826).[54/] Sanders similarly said

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53. Indeed Prosecutor Oppliger noted he "could cite cases where a lenient or light attitude on the death penalty is clearly a -- an acceptable reason for an individual bias on the part of a prosecutor." (IV RT 951.)

54. Again male prospect Kelly expressed a similar sentiment, stating he believes in the death penalty, but would not vote for it because he does not believe in taking someone's life (IV RT 892-893) and he was more partial to

she would consider the death penalty, however, she has "mixed emotions regarding the right of the State to do exactly that which they dictate the citizens from doing . . .." (9 SCT2 2435.) She feels it is used "Too Random - it seems as though it is used in one case and not in another with the same or more severe [illegible]," however, that was not a strong view, but instead an uneducated observation. (*Ibid.*) Taylor likewise said she would consider the death penalty and does not have a strong opinion one way or the other, but if anything, she would say it is used "Too Randomly – versus Consistent." (10 SCT2 2749; IV RT 934.) Their responses indicating they were inclined to not impose the death penalty provided grounds upon which the prosecutor might reasonably have challenged them.

Nonetheless, appellant notes the trial court's secondary prefatory remark (AOB 53, 86; see AOB 52) wherein the court said:

> I doubt there's been a prima facie showing . . . because it's been my evaluation that women seem to be more certain in the expression of their views both ways in this case and their leaning in this case than men have.

(IV RT 950.) He argues the court's remark lends no support for its ruling. (AOB 85-87.) Particularly, he complains "'More certain[ty]' in expression of one's views simply does not explain any basis for peremptory challenges, without reference to the views expressed." (AOB 86-87.) Yet, the court's remark appears responsive to Defense Counsel Hart's remark, which indeed referenced those views. In particular, Defense Counsel Hart observed:

> Now, I think what's happened here is that *women as a whole on this jury panel have shown that they* have tended to be -- *would be more merciful, less adamant in imposing the death penalty, possibly more compassionate and more likely to entertain life without possibility of parole* as an option. *That is certainly why a District Attorney would want to kick off the women* because they seem to be more lenient and more in favor of life without possibility of parole as a punishment.

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imposing LWOP (IV RT 902-903).

(IV RT 948-949, emphasis added.) When viewed in this context and considered in light of the prospects' questionnaires and oral responses, the court's prefatory remarks concerning the views expressed by the female prospects indeed finds support in the record. Moreover, this context negates appellant's claim (AOB 87-89) that the court based its ruling on improper group bias and discriminatory considerations.

Still, in attempting to show a prima facie case was shown, appellant asserts "the ten excluded jurors had only their group membership in common" (AOB 79, citing *Wheeler*, *supra*, 22 Cal.3d at p. 280 and *People v. Turner* (1986) 42 Cal.3d 711, 719.) In doing so, he notes the female prospects' ages, marital status, affiliation with gun ownership, employment, and education. (AOB 79-81.) Yet, the prosecutor did not excuse just the ten females; he also excused three males. Thus, among "excluded jurors," not even their group membership as to gender was in common. Moreover, as argued above, the record discloses that the female prospects whom the prosecutor excused had many shared traits unrelated to gender that were potentially offensive to a prosecutor. (See *Burgess v. Alabama* (1998) 827 So.2d 134, 149-150 (*Burgess*) [no prima facie case where venire consisted of 20 men and 21 women and prosecutor used 11 of its 15 peremptory strikes to remove women, resulting in jury composed of eight men and four women; finding, in part, record lacked sufficient evidence that female prospects who were struck shared only characteristics of gender].)

Accordingly, based upon the foregoing, appellant failed to establish a prima facie case of discrimination based on gender. As such, he has failed to establish that his rights to equal protection of the law and to trial by a jury drawn from a representative cross section of the community under the state constitution and that his right to equal protection of the laws under the federal constitution were denied. Hence, the trial court's ruling should be upheld.

E. Even Assuming Arguendo, The Trial Court Erred, Automatic Reversal Is Inappropriate

Even assuming arguendo, the trial court erred in failing to find that appellant had made the requisite prima facie showing of group bias, the remedy he now seeks, i.e., automatic reversal of the conviction and death sentence, is inappropriate. (AOB 89-90; see AOB 64.) As previously noted, a defendant's establishing a prima facie case of group bias is just the first step in a three-step process. (*Johnson v. California*, *supra*, __ U.S. at p. _ [125 S.Ct. at p. 2416].) The second step shifts the burden to the prosecutor to come forward with a neutral explanation for excluding the prospects. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 193; *Wheeler*, *supra*, 22 Cal.3d at pp. 281-282.) And the third step requires the prosecutor to persuade the court that his peremptory challenges were based "on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses" and not on group bias. (*Wheeler*, *supra*, 22 Cal.3d at pp. 281-282.) Automatic reversal would thus, deprive the prosecutor of the second and third steps.

Accordingly, assuming arguendo that the trial court erred, the matter should be remanded for an evidentiary hearing to allow those remaining steps to occur. (*Johnson v. California*, *supra*, __ U.S. at p. _ [125 S.Ct. at p. 2419] [remanding case for further proceedings, as opposed to automatically reversing conviction]; see *Harris v. Kuhlmann* (2d Cir. 2003) 346 F.3d 330, 348, 357 [remanding matter for district court to conduct reconstruction hearing to determine whether prosecutor's use of peremptory strikes complied with constitutional requirements outlined in *Batson*, finding district court abused its discretion in failing to attempt reconstruction where state offered prosecutor's testimony and prosecutor had used notes]; *Jordan v. Lefevre* (2d Cir. 2002) 293 F.3d 587, 593-594 [discussing whether *Batson* hearing can be constructed (nine years) later without simply granting writ – it depends on whether district court

can make reasoned determination of prosecutor's state of mind, according substantial deference to district court's determination of feasibility of reconstruction and credibility assessments].)

II.

APPELLANT'S CHALLENGES TO JOHNSON'S OUT-OF-COURT STATEMENTS ARE NOT COGNIZABLE AND HIS CHALLENGES TO MARTINEZ'S OUT-OF-COURT STATEMENTS SHOULD BE LIMITED; IN ANY EVENT, THEIR ADMISSION DID NOT VIOLATE HIS CONSTITUTIONAL RIGHTS; EVEN ASSUMING ARGUENDO, THE COURT ERRED IN ADMITTING THEIR STATEMENTS, ITS ERROR WAS HARMLESS

Appellant's second argument claims admission of Martinez's and Johnson's out-of-court statements violated his rights under the state and federal constitutions to due process, to confront the witnesses against him, to a fair jury trial, to reliable determinations of facts, to a reliable adjudication at all phases of his capital case, and to be free from cruel and unusual punishment. (AOB 91, 120-121, citing Cal. Const., art. I, §§ 1, 7, 15-17; U.S. Const., 5th, 6th, 8th & 14th Amends.; see AOB 404-405.) He essentially seeks a blanket rule that would prevent impeaching an available percipient witness with out-of-court statements reportedly made to law enforcement when the witness denies making the statements or claims/feigns lack of recall as to whether he had made them. (AOB 100-116.) Yet, his challenges to Johnson's out-of-court statements are not cognizable because he did not raise his constitutional objections below. Moreover, he challenged Martinez's out-of-court statements only under the confrontation clause. Thus, his challenges should be so limited on appeal. In any event, their admission did not violate his constitutional rights. Further, even assuming arguendo, the court erred, its error was harmless.

A. Factual Background

1. Martinez's Testimony

Martinez, who has felony convictions for receiving stolen items, spousal

false imprisonment, and petty theft with a prior, testified that on April 8, 1992, he had been jailed on the upper tier of 4-F (F pod) on a parole violation for failing to report his arrest on the latter offense. (VII RT 1684-1686, 1689, 1698, 1708-1709, 1711, 1727-1729.) Martinez served 90 days in jail in June or July of 1992 for that offense and was off parole. (VII RT 1711, 1728.)

Martinez testified he did not know appellant as "Mr. Dement" or "Pico," although he had seen appellant before. Martinez did not recall it being when he was jailed in 4-F, but perhaps it was on the street. (VII RT 1685, 1691-1692, 1694.) On April 9, 1992, he is pretty sure he slept through breakfast and awoke when they began taking inmates from their cells, which is when he learned an inmate was killed. He "had been out of it" and did not recall hearing or seeing anything the preceding night. (VII RT 1688-1690, 1694, 1699, 1712, 1718-1720.) As far as he knew, no one went into appellant's cell between the time the doors were unlocked and the time inmates were locked down due to the homicide. (VII RT 1705-1706.) He does not like officers interviewing him, sometimes he does not tell them the truth, and he has convictions for giving officers false information. (VII RT 1730-1732, 1762.) When a deputy asked that morning if he knew anything about what had happened, he truthfully told the deputy "no," he had slept the whole night, and had not heard anything. (VII RT 1688, 1690, 1699, 1706-1708, 1713, 1716, 1754-1755.) Then he was sent to the roof like other inmates. (VII RT 1690.) When the inmates were brought back, everyone was talking about the body found in the cell. (VII RT 1706.)

Martinez testified he never contacted a detective, he did not recall being interviewed by Detectives Christian and Burke on April 13, 1992, and he did not recall statements he reportedly made to them. (VII RT 1686-1687, 1692-1702, 1704, 1713, 1715, 1756, 1758-1760.) He further testified he had been working at California Roof Savers, he never worked for Garcia

Construction Company, he did not recall telling law enforcement he did, and he has never heard of that company. (VII RT 1724.) In July of 1992, Martinez was briefly interviewed by a defense investigator, who asked about the reported April 13, 1992, interview. The investigator was checking to see if he was the same Martinez and asked about a different birth date and perhaps a different booking number. Martinez told him there was someone else jailed with his name, who had been getting his money orders, and he did not recall the April interview. (VII RT 1712, 1717-1718, 1754-1756.)

About a month before testifying, Martinez met with DA Investigator Lehman and Prosecutor Oppliger, who gave him reports of interviews he reportedly did on April 9 and 13, 1992. He began reading the latter, but did not recall any of it. (VII RT 1713-1716, 1755.) He identified People's 18 as the report (i.e., transcript) handed to him. Its opening paragraph contained his correct name, birth date, and his grandmother's address and phone number. (VII RT 1734-1735.) When shown that report, Martinez got angry because he did not recall saying any of what was in it, he had not used that address in years, he was pretty sure he did not provide it, and his name and address were "given out like it was nothing." (VII RT 1736.) He did not want to go to court. He told Investigator Lehman "Why should I even get involved" and queried "What's my address on there for?" (VII RT 1758.)

2. Detective Christian's Testimony Impeaching Martinez's Testimony

Detective Christian testified Martinez was in cell 4-F-12, which is on the lower tier near the pod's center. (VII RT 1801.) Detective Christian, who was present during part of Martinez's testimony, testified he recognized Martinez from having interviewed him with Detective Burke on April 13, 1992. (VII RT

1764-1765, 1783-1784.)[55] During their interview, Martinez identified a photo of appellant, whom he knew as "Pico," saying "he was the guy with the F-14 tattoo on the back of his neck," housed in a different cell in F pod on the fourth floor. He said he knew appellant from the streets pre-incarceration and he knew why appellant was jailed. (VII RT 1768-1770, 1798-1799.) Martinez also identified photos of: Andrews saying "that was the victim," Bond by his nick name of "James Bond," and Benjamin saying he "was one of Pico's cellies." (VII RT 1784-1785.) Martinez told detectives he had spoken to other people and talked to other inmates in the jail about what had happened, however, his responses were very specific about what he actually had heard, as opposed to what was related to him from other inmates, and Detective Christian testified to the former, as opposed to the latter. (VII RT 1802, 1809, 1811-1812.)

More specifically, Martinez told the detectives that during the evening he got up to use the toilet and heard: someone calling for help screaming "Just leave me alone." the sound as if a body was thrown against a wall and the toilet, another voice say "Hey homes, you hear that?" the sound of someone being beaten, a voice state or holler out something to the effect that he wanted to fuck him and stuff, and a voice say "Shut up." (VII RT 1787-1789, 1801, 1811.)

Martinez also told the detectives: when Pico (appellant) came out for breakfast that morning, he came to Martinez's cell where Martinez was lying down; Martinez overheard him bragging to someone that he had just killed somebody, saying he "killed the punk." (VII RT 1789-1790, 1804.) Martinez also heard appellant say he had beat him and was pretty sure appellant mentioned he was choking him, strangling him. (VII RT 1797, 1807-1808.) Martinez further said appellant had said:

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55. Before the interview, Martinez told Detective Christian he was employed by Garcia Construction. (VII RT 1803.) Martinez told Detective Christian he was jailed on a parole violation with a pending charge of petty theft with a prior. (VII RT 1767.)

> "he was trying to go up in the guy. That means trying to fuck him, and I can't recall -- I can't -- I remember, but I couldn't actually hear whether he said that he had fucked the guy or he had killed him because he didn't want to let him fuck him. . . ."

(XV RT 1798, 1813-1814.) Martinez also said he heard appellant say "the guy greased his butt up." (VII RT 1798.)

Martinez further told detectives: Appellant, who smelled like alcohol, asked Martinez to help him drag a body downstairs, but Martinez told appellant that he did not want anything to do with it. (VII RT 1790.) Appellant also asked some Black males to remove the body from his cell. (VII RT 1797.) Appellant told Martinez and other people in the pod that "if he got rolled up, the two people that knew what had happened were his two cellies and that they needed to do something to him [*sic*; them]." (VII RT 1791; see VII RT 1695.) Martinez saw appellant, who was walking around talking to other people and joking, pick up a broom and begin sweeping the pod. (VII RT 1812.)

Martinez additionally told detectives: Martinez saw a confrontation between appellant and a big white guy with a goatee (Nelson), who had gone to Andrews' cell to wake him and bring him down for breakfast. Martinez heard appellant tell the goateed man "You ain't got no business in my cell. You know, what the fuck you doing?" Appellant kept reaching into his pants and said "I'll take your wind, you know, I'll do the same to you," so Martinez guessed appellant had a knife.[56/] The goateed man said "Get the fuck away from me, man. I got nothing to do with you, nothing to say to you." Appellant told the goateed man "You go get the body out of my cell," but the man refused. (VII RT 1791-1792, 1795-1797, 1805-1806.)

Lastly, Martinez told the detectives his statement was free and voluntary, no promises had been made to him, and no threats were made to get his statement. (VII RT 1799-1800.)

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56. See respondent's footnotes 15 and 16, *ante*.

3. Johnson's Testimony

Eric Johnson, who has felony convictions for robbery, assault, and petty theft, was a trustee jailed on April 9, 1992, in F pod. (VIII RT 2237-2238, 2251.) He denied knowing appellant and said he could not recall if appellant was housed in F pod on that date. (VIII RT 2238, 2243, 2248, 2250.) Johnson testified he was interviewed the same morning the homicide was discovered, but he either did not recall or denied statements he reportedly made. (VIII RT 2241-2249.)

Johnson recalled when the dead body was found, but he did not recall hearing anything unusual like arguing and fighting or someone being beat up the night before. (VIII RT 2238-2239, 2243.) Johnson denied telling a detective that after the inmates returned to their cells following breakfast, appellant grabbed a broom and began sweeping, which appellant had never done before, and that appellant never returned to cell 8. (VIII RT 2247-2249.)

4. Detective Sherman Lee's Testimony Impeaching Johnson's Testimony

Detective Sherman Lee interviewed Johnson, who asked for a deal before discussing any details. The detective told him they already had a deal in the works with another inmate being interviewed so they did not need another, but he would speak on Johnson's behalf when it came time for him to be sentenced on his pending charge. Johnson then made a statement. (X RT 2717.) He told the detective that on April 8, 1992, Andrews arrived in the pod about 9 p.m. and at 10 p.m. Johnson heard appellant, whom he named and described as a White male that acts and speaks like a Hispanic, who has an "E-14 [sic; F-14]" tattoo on his neck and is housed in cell 8, say he was "going to take care of the home boy that had just been put into his tank." (X RT

2716-2720, 2724.)[57] Johnson further told the detective that during the evening he heard fighting, but he could not tell from where it came. (X RT 2721.) He also told the detective that after the inmates returned to their cells following breakfast, appellant grabbed a broom and began sweeping as if he was a trustee, which appellant had never done before, and that appellant never returned to cell 8. (X RT 2722, 2724.)

B. Procedural Background

As for the prosecution's impeachment of Martinez's testimony with his reported statements to Detectives Christian and Burke, the defense objected under the state and federal constitutions' confrontation clause, arguing it was unable to cross-examine him about those statements because he denied making them. (VII RT 1770-1771.) The trial court said it intended to find Martinez's lack of recall was feigned and contrived. (VII RT 1773, 1780.) Still, it ruled proffered testimony that Martinez recognized appellant's voice saying various things was not trustworthy, as it purported to identify the voice of a casual acquaintance. Thus, it excluded such evidence. (VII RT 1778, 1780.) As to Martinez's reported statements to detectives about his personal observations, however, it ruled such evidence would be admitted for its truth. (VII RT 1780-1781.) It further ruled the prosecution could inquire into Martinez's percipient observations (i.e., hearing banging sounds, cries for help, and another voice yell things). (VII RT 1781.) The defense made a continuing state and

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57. Johnson told the detective that he "knew there was going to be trouble" because appellant had made that statement. (X RT 2718.) The trial court initially struck that remark as being speculative and ordered the jury to disregard it. (X RT 2718, 2722.) After further argument outside the jury's presence, the court said it was "inclined now to leave it in for its context only," but it never retracted its order for the jury to disregard it. (X RT 2726-2727.) Later, the prosecutor argued to the jury that Johnson told the detective "he knew there was going to be a problem that night" because appellant had made that statement. (X RT 2995-2996.)

federal confrontation clause objection with respect to the admission of Martinez's out-of-court statements. (VII RT 1782-1783.) The court cited *People v. Shipe* (37 Cal.App.3d [*sic*; (1975) 49 Cal.App.3d 343]) and remarked:

> [Y]ou have invoked the confrontation clause that you are not able to confront this witness Mr. Martinez directly and that may be true under certain circumstances. Here, however, he is available and remains available to the extent that he will -- that he can be confronted further. It may be a theory only, but that's the law as I understand it.

(VII RT 1782.)

As for the prosecution's impeachment of Johnson's testimony with his reported statements to Detective Sherman Lee, the defense never objected under the state and federal constitutions. Instead, the defense made non-constitutional objections to specific portions of the detective's testimony, objecting: "Foundation. Narrative," "Statement of – [speculation]," "Hearsay," "Hearsay," "renew[ing] all the motions I previously made," "Relevance," "Based on the speculation you ruled on before," and "Calls for speculation, asked and answered." (X RT 2718-2719, 2721, 2724.) The defense also belatedly objected to one statement, asserting "without expert testimony to explain prison slang it's just without relevance," however, it abandoned that objection. (X RT 2726-2727.)

C. Appellant's Challenges To Johnson's Out-Of-Court Statements Are Not Cognizable And His Challenges To Martinez's Out-Of-Court Statements Should Be Limited Solely To The Confrontation Clause

As the Procedural Background in subheading B reveals, the defense never objected on state and federal constitutional grounds to the prosecution's impeachment of Johnson's testimony with his reported statements to the detective. Instead, the defense made only non-constitutional objections to specific portions of the detective's testimony. When a party does not raise an argument below, he may not do so on appeal. (*People v. Clark* (1993) 5 Cal.4th

950, 988, fn. 13 (*Clark*) [although defendant had made hearsay and Evid. Code, § 352 objections below, those did not preserve constitutional objection]; *People v. Raley* (1992) 2 Cal.4th 870, 892 (*Raley*); see e.g., *People v. Gordon* (1990) 50 Cal.3d 1223, 1240, fn. 2 (*Gordon*) [Evid. Code, § 1101 objection does not preserve constitutional objection].) As this Court has explained:

> Evidence Code section 353, subdivision (a), provides that a judgment shall not be reversed because of the erroneous admission of evidence unless there was a timely objection "so stated as to make clear the specific ground of the objection . . . ." "The reason for the requirement is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal."

(*Zapien, supra*, 4 Cal.4th at p. 979, citations omitted; see also *Gordon, supra*, 50 Cal.3d at pp. 1251-1252 [failure to raise and develop claim below deprives appellate court of adequate record for review].)

Because appellant failed to raise his state and federal constitutional challenges to the impeachment of Johnson's testimony below, his challenges to admission of Johnson's out-of-court statements are waived. (*Zapien, supra*, 4 Cal.4th at p. 980; *People v. Rogers* (1978) 21 Cal.3d 542, 548 (*Rogers*) [admissibility of evidence will not be reviewed absent specific and timely objection in trial court on ground sought to be urged on appeal].)

Nonetheless, in a footnote, appellant asserts he has not waived his right to argue his confrontation clause argument as to the admission of Johnson's out-of-court statements because failure to object is excused when "trial counsel could not reasonably anticipate a dramatic change in the law." (AOB 98, fn. 74, citing *People v. Welch* (1993) 5 Cal.4th 228, 237.) For support, he relies upon *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn.2, which held the failure to object on confrontation grounds was excusable where the

governing law, *Ohio v. Roberts* (1980) 448 U.S. 56, 66 [confrontation clause does not bar admission of hearsay evidence with guarantees of trustworthiness] provided scant ground for objection. Yet, the "dramatic change in the law" at issue in *People v. Johnson*, *supra*, 121 Cal.App.4th at p. 1410-1413 involved whether the scenario presented in *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*), which concerned admission of testimonial statements of an *absent* declarant, applied. In contrast here, Martinez *was present and testified at trial*. Thus, that change in the law is inapplicable to the scenario presented here and hence, it does not excuse the defense's failure to object on confrontation grounds.

Further, as the Procedural Background reveals, the defense based its challenges to the impeachment of Martinez's testimony below solely upon the confrontation clause of the state and federal constitutions. (VII RT 1770-1771.) Thus, appellant's other constitutional challenges to the admission of Martinez's out-of-court statements should not be permitted to be raised here. (*Clark*, *supra*, 5 Cal.4th at p. 988, fn. 13; *Zapien*, *supra*, 4 Cal.4th at p. 980; *Raley*, *supra*, 2 Cal.4th at p. 892; *Gordon*, *supra*, 50 Cal.3d at p. 1240, fn. 2; *Rogers*, *supra*, 21 Cal.3d at p. 548.)

D. Applicable Law

The Sixth Amendment to the United States Constitution provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Article 1 section 15 of the California Constitution similarly provides "[t]he defendant in a criminal cause has the right . . . to be confronted with the witnesses against the defendant."

In *Crawford*, the United States Supreme court held that when the prosecution seeks to introduce testimonial statements of a witness who is *absent from trial*, the Sixth Amendment requires a showing that the witness is unavailable and that the defendant has had a prior opportunity to cross-examine

the witness. (*Id.* 541 U.S. at pp. 59, 68.) The Supreme Court said "testimony . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Id.* at p. 51.) The Court explained, "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Ibid.*) Although the Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,'" it cited examples of some testimonial statements, including statements made during police interrogations. (*Id.* at p. 68.) The Supreme Court further observed:

> [W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present to defend or explain it.

(*Crawford, supra*, 541 U.S. at p. 59, fn. 9.)

E. Admission Of Martinez's And Johnson's Statements Did Not Violate Appellant's Right To Confrontation

Initially, respondent agrees with appellant (AOB 101) that Martinez's and Johnson's statements to detectives are testimonial statements within the meaning of *Crawford* because they were made during police interrogations. (*Crawford, supra*, 541 U.S. at p. 68.) Still, appellant incorrectly alludes to Martinez and Johnson as being "in-custody informants" (i.e., jailhouse informants), who stood to gain from implicating him. (AOB 108-109, 111-112, fn. 78 [citing § 1127a], 113, 120; see AOB 153, 404.) Section 1127a provides in pertinent part:

> an 'in-custody informant' means a person, *other than a . . . percipient witness* . . . whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution.

(Emphasis added.) The prosecution proffered Martinez and Johnson as percipient witnesses, not in-custody informants. While Johnson had asked for

a deal before discussing any details, none was extended (although the detective said he would speak on Johnson's behalf at sentencing). (X RT 2717.) Moreover, no evidence was presented that Martinez asked for or received any benefits in exchange for his statement to detectives. On the contrary, Detective Christian testified Martinez said no promises had been made to him. (VII RT 1799-1800.) Regardless of how they are labeled, both Martinez and Johnson were readily available for cross-examination. Their availability alone satisfied the confrontation clause. (*United States v. Owens* (1988) 484 U.S. 554, 560 (*Owens*); *California v. Green* (1970) 399 U.S. 149, 158 (*Green*).)

Martinez testified he did not recall being interviewed by Detectives Christian and Burke, and he did not recall statements he reportedly made to them. (VII RT 1686-1687, 1692-1702, 1704, 1713, 1715, 1756, 1758-1760.) He also denied having worked for Garcia Construction company (VII 1724), which Detective Christian had attributed to his having stated (VII RT 1803), and he testified another inmate with his same name had been jailed (VII RT 1718). Impliedly relying on that testimony, appellant asserts:

> if the jury determined that this Martinez was not the person who made the statement, *it would probably assume* that another Martinez did make the statement, and continue to consider its contents whether or not they had heard testimony from the actual declarant.

(AOB 115, emphasis added.) His assertion should be rejected as purely speculative. Notably, Detective Christian, who was present during part of Martinez's testimony, testified he recognized Martinez from having interviewed him with Detective Burke on April 13, 1992. (VII RT 1764-1765, 1783-1784.) According to Detective Christian, Martinez said he was jailed on a parole violation with a pending charge of petty theft with a prior (VII RT 1767), which was consistent with Martinez's testimony as to why he had been jailed (VII RT 1685, 1711-1712, 1727-1729). Moreover, the trial court, which was in the best position to assess Martinez's demeanor and credibility, made a preliminary

finding that Martinez's lack of recall of having talked to detectives was feigned and contrived. (VII RT 1773, 1780.)

Nonetheless, in asserting his claim, appellant relies upon *Douglas v. Alabama* (1965) 380 U.S. 415, 419-420 and *People v. Shipe*, *supra*, 49 Cal.App.3d at pages 346-349 (AOB 100-101, 107; see VII RT 1782), which found confrontation clause violations where co-defendants, who had made confessions inculpating the defendants, refused to testify on Fifth Amendment grounds. Yet here, Johnson and Martinez were not co-defendants and they did not refuse to testify. Appellant also relies on *People v. Rios* (1985) 163 Cal.App.3d 852, 865-866 (AOB 114-115), which found a confrontation clause violation where two witnesses, who had made statements prior to trial, refused to answer questions when called to testify at trial. Again, however, Johnson and Martinez did not refuse to testify. Thus, those cases are inapplicable.

Appellant also cites *Nelson v. O'Neil* (1971) 402 U.S. 622, 627-630 (*Nelson*), which found no confrontation clause violation where a co-defendant denied making an out-of-court statement implicating the defendant and testified favorably for the defendant. (AOB 105, 107.) While noting *Nelson* presents a factual scenario closer to the instant case, he argues it is distinguishable because Martinez and Johnson were not co-defendants (i.e., they lacked a common interest) and they testified neutrally regarding him. (AOB 105.) He then relies on *United States v. Brown* (2d Cir. 1983) 699 F.2d 585, 591-593, which distinguished *Nelson* and found a confrontation clause violation where the co-defendant likewise denied making a statement implicating the defendant, but unlike *Nelson* there was no common defense and the co-defendant made no attempt to exculpate the defendant. (AOB 106.) Yet, the lack of a common interest is a distinction without significance because Martinez and Johnson were not co-defendants. Also, while Martinez and Johnson did not affirmatively testify to exculpatory information concerning appellant, their denials and failure

to confirm making statements implicating him were indeed favorable to his defense.

Appellant also relies on *People v. Simmons* (1981) 123 Cal.App.3d 677, 681-682, which found a confrontation clause violation where the declarant had given an oral and signed, written statement to police recounting the defendant's admission and had remarked to a third party that the defendant had asked the declarant to accompany him to the crime scene, but then the declarant suffered a head injury with retrograde amnesia such that he was unable to confirm the truth of his declarations, let alone that he had even made them, thereby significantly diminishing the opportunity to test the declarant's prior statements through cross-examination. (AOB 106-107; citing *Green*, *supra*, 399 U.S. at p. 169, fn. 18, which reserved ruling on whether a declarant's memory loss between a prior statement and trial would require excluding the prior statement due to the inability to effectively cross-examine the declarant on its truth].) Yet, *Simmons* is distinguishable because, as previously noted, the trial court here made a preliminary finding that Martinez's lack of recall was feigned and contrived. (VII RT 1773, 1780.) Although the trial court did not make a similar finding as to Johnson's lack of recall, it had no reason to do so because appellant never made a confrontation challenge to the prosecution's impeachment of Johnson.

Moreover in *Owens*, the Supreme Court considered the issue left unanswered by *Green*: whether the confrontation clause bars testimony concerning a prior, out-of-court statement where the witness is unable, because of memory loss, to replicate the statement in court. (*Owens*, *supra*, 484 U.S. at pp. 558-559.) In holding the confrontation clause does not prohibit such out-of-court statements, the Supreme Court embraced the view of Justice Harlan's concurring opinion in *Green*, wherein he said that a witness's inability to

> "recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence."

(*Owens*, *supra*, 484 U.S. at p. 558, quoting *Green*, 399 U.S. at p. 188 (Harlan, J. concurring).) The Court explained that, when a declarant is available as a witness at trial, there is no need to explore whether the prior statement was made under circumstances showing "indicia of reliability" or "particularized guarantees of trustworthiness." (*Id.* at p. 560.)

> We do not think such an inquiry is called for when a hearsay declarant is present at trial and subject to unrestricted cross-examination. In that situation as the Court recognized in *Green*, the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements.

(*Ibid.*)

Recently, a similar argument to that raised by appellant was rejected in *People v. Martinez* (2005) 125 Cal.App.4th 1035 (*Martinez*), where the victim testified at trial, but repudiated her prior accounts inculpating defendant including her preliminary hearing testimony, her statements to police, and other out-of-court statements, which the prosecution introduced. (*Id.* at pp. 1041, 1050.) The defendant argued use of the victim's out-of-court statements violated *Crawford*, but the court rejected that argument, noting *Crawford*

> made clear, however, that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." [Citation.]

(*Martinez*, *supra*, 125 Cal.App.4th at pp. 1049-1050.) Acknowledging *Crawford*'s language in that regard (AOB 102, 103, fn. 76), appellant focuses on its use of the words "defend or explain" and asserts the declarant must, at the very least, affirm having made the out-of-court statement for it to be admitted for impeachment (AOB 101-102; accord AOB 114-116). Yet, as *Martinez*

observed, because the declarant:

> was present, testified, and submitted to cross-examination, the use of her prior out-of-court statements did not violate the confrontation clause. Her testimony at trial gave the jury the opportunity to assess her demeanor as she attempted *to deny* or explain away the prior statements. The confrontation clause requires no more. (*People v. Perez* (2000) 82 Cal.App.4th 760, 766.)

(*Id.* 125 Cal.App.4th at p. 1051, emphasis added, parallel citation omitted.) Similarly, in *People v. Perez* (2000) 82 Cal.App.4th 760, where the witness professed total inability to recall the crime or her statements to police, which thereby narrowed the practical scope of cross-examination, the court held:

> her presence at trial as a testifying witness gave the jury the opportunity to assess her demeanor and whether any credibility should be given to her testimony or her prior statements. This was all the constitutional right to confrontation required. (*United States v. Owens*, *supra*, 484 U.S. 554, 558-560 [108 S. Ct. 838, 842-843]; *People v. Cummings* [(1993)] 4 Cal.4th 1233, 1292, fn. 32; *People v. O'Quinn* [(1980)] 109 Cal.App.3d 219, 226-228.)

(*Id.* at p. 760.) For the same reasons here, because Martinez and Johnson appeared at trial and were subject to cross-examination, wherein the jury had the opportunity to assess their demeanor and whether any credibility should be given to their claimed lack of recall and denials, there was no confrontation clause violation in admitting their out-of-court statements made to detectives. Hence, appellant's claim should be rejected.

F. Even Assuming Arguendo, The Trial Court Erred In Admitting Martinez's And Johnson's Out-of-court Statements, Its Error Was Harmless

In asserting prejudice, appellant contends this was a close case. (AOB 116-120.) For support, he asserts the credibility of the primary prosecution witnesses is suspect on the subjects that he, as opposed to Bond, Benjamin or Nelson, strangled and tied the towel around Andrews' neck, and that an oral copulation occurred or was attempted. In making that assertion, he notes the

trial court remarked:

> "[the s]tatus of this case is this, that one of three men could have performed this killing. One of four men could have performed this killing, at least the final touches of it, according to the evidence, [¶] And those who have testified are at least suspect in their testimony. They have been impeached from wall to wall on a variety of subjects. They could also be found to be co-participants as far as that's concerned, whose testimony may require corroboration by the jury."

(AOB 116 quoting X RT 2796; see also AOB 6, 192, 315.) Yet, the court made those remarks in the context of admitting the kite evidence. (X RT 2796-2797.) The kite evidence, which the prosecutor equated to handwritten confessions (XI RT 2974, 2996-2999), enhanced the credibility of those prosecution witnesses because it served to corroborate their accounts that appellant had attacked and killed Andrews.

Moreover, in denying appellant's motion to reduce his sentence of death to LWOP, the trial court later observed:

> There's been some indication that -- regular indication, argument that neither of the inmates should be believed because of their motives to lie and all of that line of discussion. The point -- one of the points that I have to express is there's been no real evidence to the contrary. There's no suggestion that either of those people, by the evidence, participated in the act of killing.

(XV RT 3860, emphasis added.) The court's point is sound. There was no affirmative evidence that someone other than appellant had killed Andrews.

In further arguing that this was a close case, appellant asserts the jury deliberated for four days, during which it requested read-back of testimony, asked to review an autopsy report that had not been admitted into evidence, and demonstrated some confusion regarding the instructions involving the (temporarily renumbered first and) second special circumstance. (AOB 116-117.) Yet, the jury had multiple issues to decide in determining whether appellant was guilty of the three counts alleged or any lesser offenses, as well as whether two special circumstance allegations were true. Also although jury

deliberations spanned four days, actual deliberation time was only 12 hours and 18 minutes. (2 CT 508, 510-513.) "Rather than proving the case was close, the length of the deliberations suggests the jury conscientiously performed its duty." (*People v. Carpenter* (1997) 15 Cal.4th 312, 422 (*Carpenter*); *People v. Walker* (1995) 31 Cal.App.4th 432, 438-439 (*Walker*) [length of deliberations could as easily be reconciled with jury's conscientious performance of its civic duty, rather than its difficulty in reaching decision].) The jury's requests for read-back, review of the autopsy report, and clarification on the special circumstance instructions similarly evidences that it conscientiously performed its duty.

Additionally, appellant argues the prosecutor considered the case close because he offered to "dismiss [*sic*; strike]" the two special circumstances on which the jury was deliberating if inquiry showed the jury already had reached a verdict (of first-degree murder) on count one. (AOB 117, citing XII RT 3173-3179; see also AOB 248.) Yet, Prosecutor Oppliger's offer was a reflection of the complexity of the legal issues involved, not the closeness of the facts. Specifically, he was uncomfortable with the court's explanations regarding the special circumstances and its instructions, which he felt did not correctly state the law; he contended the issue was confusing. (XII RT 3176-3177; see XII RT 3179-3180 [Defense Counsel Hart remarked "I admit I agree with Mr. Oppliger, the specials are complex. The more I read it the less it makes sense to me. Indeed, these analyses of the special circumstance say it doesn't make sense. So I agree the law is complex and doesn't really make sense in this area."].) Prosecutor Oppliger also observed factually, as he already had argued to the jury, if the murder was preplanned and premeditated, then one could argue the felony murder special circumstances were impossible to commit because they would be incidental to it. (XII RT 3177.) From a practical standpoint, his offer recognized the case easily could proceed onto the second

stage of the three-stage trial, i.e., the special circumstance as to whether appellant had a prior second degree murder conviction (XII RT 3174, 3178), which respondent submits was essentially a "gimme" as evidenced by appellant's later stipulation to conviction (X RT 3208-3209). Thus, contrary to appellant's assertion, the prosecutor's offer to strike the special circumstances does not indicate he considered the case close.

Here, evidence that appellant attacked and killed his cellmate is strong. Appellant had a motive to attack and kill Andrews based on appellant's animosity towards Andrews' friend Rutledge, who was appellant's enemy and about whom appellant voiced a threat that Rutledge essentially would suffer the same fate as Andrews if Rutledge were to be jailed with him. (X RT 2671-2674.) Appellant essentially confessed to having killed Andrews in the kites when he stated "I'm doing 29 to life for the first one. Dude was my brother . . . On this other trip, hey, shit happens . . . The shit ain't over . . . dude had it coming, both of them. . . ." and "Before it's over, I'll tag a few more. . . ." (X RT 2816.) In short, he had the means, motive, and opportunity, and he confessed to doing it.

Moreover, appellant's attack on Andrews was foreshadowed in Williams' and Nelson's testimony. Specifically, Williams testified as Andrews came in, appellant and the other inmate said they hoped Andrews would not be put into their cell and appellant said something like "They move him in my cell, I'm going to do him. I'm going to kill him," "I'm going to do his ass." (VI RT 1375-1376, 1411, 1413, 1419-1420.) Nelson similarly testified as Andrews went up to his cell, Nelson saw appellant look at Bond and begin hitting his fist into his hand while smiling and laughing with Bond. (VIII RT 2082-2083, 2135.)

Further, appellant's cellmates Benjamin and Bond each identified him as the perpetrator. Although, he asserts their testimony was inherently suspect

(AOB 119), neither Benjamin nor Bond had an identifiable motive to attack and kill Andrews and neither of them confessed to murdering him. As Detective Christian testified: Benjamin's and Bond's statements are consistent with Andrews' injuries, activities they described are consistent with things other inmates said appellant had said after exiting the cell, and their stories are close enough to where it does not lend a lot of suspicion. (X RT 2711.) More specifically, the forensic evidence indicates Andrews was attacked and killed in the manner in which Benjamin and Bond described: his head and face had blunt-trauma injuries consistent with multiple blows; he had bruises on his shoulder, upper back, forearms and legs; he had multiple rib fractures consistent with being kicked; his external injuries had deep internal hemorrhages indicating significant force was used; and his death was caused by ligature strangulation. (V RT 1255, 1263-1263, 1265-1274, 1277, 1285, 1321, 1331, 1353-1356.) Also, Benjamin's and Bond's testimony was corroborated by evidence of appellant's physical injuries and complaint of pain: his right hand was sprained with a 1½ inch circular reddened and swollen area on back of his middle knuckle, a scrape and a ¼ inch cut on back of his right thumb web, a small abrasion on back of his left thumb web, an abrasion on the back of his upper right arm, a small bruise on his left shin about six inches below his knee, a bruise on the outside edge of his right big toe, and a complaint of pain to his right foot. (VIII RT 2205-2208, 2228-2232, 2670-2671.) As Detective Christian testified, appellant's injuries to his knuckle were consistent with someone who beats another person. (X RT 2693-2694.)

Additionally, appellant engaged in incriminatory behavior following the attack. Specifically, Williams testified the next morning as soon as the cell doors were unlocked for breakfast, he saw and heard appellant calmly going from cell to cell, telling the Chicanos to get rid of any knives or weapons because he had killed a guy upstairs. (VI RT 1379-1382; see VI RT 1422,

1424.) Nelson testified appellant asked Nelson to go upstairs and drag the body onto the tier. (VIII RT 2094.) Although appellant argues that merely demonstrates he wanted Andrews' body out of his cell (AOB 119), it was consistent with his wanting to draw suspicion away from himself by removing the body from his cell to an area that was more accessible to other inmates. Nelson also testified appellant threatened him, saying it did not mean anything for him to take a human life, that if Nelson said anything, he would "deal with it," and Nelson would be "through like that" as he drew his finger across his throat. (VIII RT 2094-2095, 2107-2108, 2137-2138, 2140; see VIII RT 2140, 2144.) Lastly, when officers were summoned to the fourth floor to investigate the report of a cold body in cell 8, CO Delgado arrived and saw appellant sweeping the day room while all the other inmates were locked in their cells (VII RT 1942, 1948-1949, 1958), which suggests he was trying to act nonchalant and distance himself from his cell.

Accordingly, based upon the foregoing, even assuming arguendo that the trial court erred in admitting Martinez's and Johnson's out-of-court statements, its error was harmless because it is not reasonably probable appellant would have obtained a more favorable result if their statements had not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) For the same reasons, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

III.

THE COURT PROPERLY ADMITTED APPELLANT'S STATEMENTS TO DETECTIVE CHRISTIAN BECAUSE THEY WERE NOT ELICITED AS A RESULT OF CUSTODIAL INTERROGATION OR ITS FUNCTIONAL EQUIVALENT

Appellant's third argument claims the trial court erred in admitting his statements in response to Detective Christian after appellant had invoked his right to counsel under *Miranda*, *supra*, 384 U.S. at page 436, thereby violating his rights under the state and federal constitutions. (AOB 122-141, citing Cal. Const., art. I, §§ 7, 15; U.S. Const. 5th & 14th Amends.; see AOB 405.) Not so. His statements arose during casual conversation and, although they were in part a product of Detective Christian's remarks, they were not made under circumstances reasonably likely to elicit an incriminating response, let alone under circumstances where the detective should have known they were likely to do so. Hence, they were admissible.

A. Factual And Procedural Background

At an Evidence Code section 402, subdivision (b) hearing, Detective Christian testified about appellant's invocation of his *Miranda* rights and statements appellant later made during a casual conversation, while awaiting treatment at a hospital:

On April 9, 1992, about 12:15 p.m., Detective Christian advised appellant, who was in custody, of his *Miranda* rights; he then asked appellant if he wanted to talk; appellant replied "I'd like to see an attorney," so the interview terminated at 12:17 p.m. (IX RT 2361; X RT 2626-2628, 2642-2643.) Thereafter, Detectives Christian and Burke noticed the knuckle on appellant's right, middle finger was red and substantially swollen, such that it appeared possibly broken. (X RT 2632, 2643.) They then took him to Valley Medical Center (VMC) for x-rays and treatment of injuries to his hand and to

his right foot, for which he complained of pain. (IX RT 2361; X RT 2628, 2630-2631; see X RT 2632 [the jail infirmary lacked x-ray equipment, so no x-rays could be done there].)

Detective Christian explained the reasons appellant was taken to VMC were: (1) to fulfill the sheriff's department's policy of treating injuries of persons in custody prior to booking;[58/] and (2) to gather evidence through x-rays (e.g., to show his hand was used as a weapon) in furtherance of their investigation. (X RT 2628-2629, 2631-2632, 2637-2638, 2650.) Although he could not recall how much time they spent at VMC, from experience they were probably there two hours, maybe less. (X RT 2635.)

Recently, Detective Christian had worked a homicide investigation where Thomas Rutledge had been arrested in South Lake Tahoe with appellant's wife Patricia; so, while waiting for nurses to treat appellant, he mentioned having spoken to her about that homicide, although he did not discuss what she had said. (IX RT 2362; X RT 2624-2625, 2637, 2646.) He initiated that topic and appellant made statements as a result. (X RT 2640-2641.) He did not remind appellant that what appellant said might be used against appellant or that appellant had the right to have an attorney present because he "didn't believe at the time that it was going on we were referring to the incident that had happened earlier that day." (X RT 2642, 1644.) He expressly denied any intent to elicit incriminating statements from appellant about Andrews' homicide. (X RT 2650.)

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58. Per his department's policy, Detective Christian had taken other suspects to VMC on numerous occasions. (X RT 2643.) Although appellant had been booked on a prior incident, the booking process would be repeated for his new offense. (X RT 2629.)

As summarized in Detective Christian's report:[59]

> I told Ronnie that I had interviewed his wife, Patricia Dement, regarding a homicide that was under investigation and had occurred in February of 1992.[60] Ronnie then stated that he knew that, and that he was going to take care of Tom Rutledge for getting her involved in that incident. [¶] I then asked Ronnie if he knew Tom Rutledge, and he stated that he did and that he and Tom were enemies, stating that Tom had disrespected him. Ronnie stated he knew Tom was under investigation for murder and that he had heard a rumor that Tom was involved in that matter, and if we were able to get Tom into the jail with him, we would not have to worry about the murders anymore.
>
> Ronnie then asked me what the name of the subject was, and I asked him who he was referring to, and he stated, "You know, the guy that went to sleep." I then advised Ronnie that the subject's name was Greg Andrews, and Ronnie merely nodded his head yes, and stated, "He was a friend of Tom's." Ronnie would say no more regarding the incident.

(IX RT 2363-2364; accord X RT 2639-2640, 2645.)

Detective Christian, who did not know whether Detective Burke was present when appellant made those statements, explained his mentioning of recently having spoken to appellant's wife was not part of an interrogation in respect to Andrews' murder. Instead, it was just conversation (i.e., small talk) while they waited with appellant for things to be done. (IX RT 2364; X RT 2637-2638; 2641.) As Detective Christian put it:

> [Appellant] had already invoked. It was clear to me that we were not going to have any interrogation and we were not going to discuss the homicide under which he was in custody for [(i.e., Andrews' homicide)].

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59. The report merely indicated this conversation arose "After suspect Ronnie Dement had invoked his right to counsel and the interview was terminated." (IX RT 2363.)

60. Detective Christian testified:

> I told [appellant] that I had spoken with her regarding a homicide that Tom Rutledge was in custody for and that she had been picked up with him in South Lake Tahoe where he had been arrested on an armed robbery.

(X RT 2645; accord X RT 2637.)

And we did not discuss the homicide under which he was in custody for. (X RT 2638.)

> We had been with [appellant] for some period of time and were looking at spending a couple more hours. I was making conversation with him. We were standing there staring at each other basically.

(X RT 2625.) Detective Christian mentioned appellant's wife "because it was a topic that both him and I had some knowledge about and we could hold a conversation over it." (X RT 2636, 2644, 2650.) He did not know what the relationship between Rutledge and appellant's wife was. (X RT 2637.) At that point, he had no reason to think they had anything to do with Andrews' murder, as neither of their names had arisen in that investigation. (IX RT 2364-2365; X RT 2625, 2645.)[61]

As for what else they discussed while waiting, Detective Christian testified:

> There wasn't much that we did talk about at all. It was a lot of time lapse where Detective Burke and I would talk other things . . . and [appellant] would sit quietly. [¶] . . . [¶] . . . A lot of time we would spend kidding [appellant] about his F-14 tattoo and him being a fighter pilot.

(X RT 2649-2650.) He also testified "It's very possible" they discussed the attractiveness of nurses there, however, he could not recall. (X RT 2641.)

VMC's medical staff could not tell from the x-rays whether appellant's foot was broken. His foot was wrapped with an Ace bandage and he was given support, possibly a crutch. His hand was not broken, but merely sprained, so nothing could be given for it. Follow-up treatment was to be done by jail infirmary staff. (X RT 2634.)

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61. After appellant volunteered his remarks, however, Detective Christian came "to suspect that that may play a part in the motive that caused [Andrews'] killing." (X RT 2625.)

Prosecutor Oppliger asserted appellant's statements that he and Rutledge are enemies, that he was willing to do harm to Rutledge, and that Andrews was Rutledge' friend were relevant. (X RT 2652.) Defense Counsel Pedowitz, noting the *Miranda* admonition had been given and that appellant unequivocally had invoked his right to counsel, asserted: appellant was taken to VMC "to gather evidence, for no other reason;" an attempt to engage someone into conversation to elicit information violates *Miranda*; talking about interviewing someone's wife is designed to elicit a response because its "the fastest way to get a rise out of another person;" and this was not small talk because they were talking about a specific crime – "this type of discussion is oriented to one purpose and one purpose only: It's the detectives doing there job, they're trying to get more information." (X RT 2653-2654, 2656.)

Prosecutor Oppliger conceded appellant's statement was a product of Detective Christian's statement, but argued: there is no proof that it was an interrogation; any such inference is speculative; instead, the proof is it was "small talk;" and it was not designed to elicit incriminating information in this case. (X RT 2657-2658.) In support, he submitted a preliminary hearing brief on voluntary statements from a different matter that cited cases defining what "interrogation" means. (X RT 2626, 2657; 1 SCT3 55, citing *People v. Siegenthaler* (1972) 7 Cal.3d 465, 470 (*Siegenthaler*) and *People v. Amos* (1977) 70 Cal.App.3d 562, 568 (*Amos*); see 1 SCT1 219-220, 222-223 [Prosecutor Oppliger's declaration and attachment].)

Defense Counsel Pedowitz argued the Supreme Court just came down with a case that says the test is "not the intent necessarily of the officer, it's the totality of the circumstances." (X RT 2658.) As for their totality, he argued:

> we got the prisoner sitting with two homicide detectives. He's already invoked his *Miranda* admonition. He's been told that he's under arrest for a brand new homicide and he's sitting there with these two detectives for two hours, period. And this is the type of discussion that ensues.

(*Ibid.*) He argued "it doesn't have to necessarily be Q and A"; rather, if they converse and information is derived, then it is a successful interrogation. (X RT 2658-2659.)

In denying appellant's challenge to the evidence, the trial court ruled:

> This is remarkably similar to the *Rhode Island versus Innis* case, 446 US 291, and the cases cited by Counsel . . . *People versus Amos* 70 CA3d 568 and *People versus Siegenthaler*, 7 Cal.3d 465 are also on point. . . . [¶] . . . [¶] [W]hether it's totality of the circumstances or interrogation, it boils down to the same thing. I've heard testimony from a person I believe to be a professional police officer who gives a credible and believable account of what occurred on the day in question -- and by that account, the speculation that was sought to be of use, and I can understand that, "Why are you taking – ["] that was one of my question[s] that I had written out for myself. "Why are you taking him out to Valley Medical Center?" I thought he had a good reason for that. [¶] What does this have -- what does he have in common with two people who are waiting? Well, the wife is in common. That was something that was just recent. This does not appear to me to be interrogation. It was the Defendant's volunteered statement to my mind that when he brought up the name of -- that is the person of Mr. Andrews, that brings that statement to the Court's attention, it appears to be voluntary. The objection is overruled.

(X RT 2659-2660.)

Thereafter, Detective Christian testified to appellant's statements, indicating that while engaged in small talk with appellant about appellant's wife and Rutledge, who was an associate or friend of hers, appellant said: he knew Rutledge; the two of them were enemies; Rutledge had disrespected him; if they were to get Rutledge into jail with him, then they would not have to worry about taking Rutledge to trial; and that Andrews was Rutledge's friend. (X RT 2671-2674.) During guilt phase arguments, Prosecutor Oppliger noted he did not have to prove motive, but he offered appellant's animosity towards Rutledge as an explanation for his killing of Andrews. (XI RT 2975-2977.)

B. Applicable Law

> [T]o protect the exercise of the privilege against self-incrimination, the United States Supreme Court has declared that persons subject to custodial[62] interrogation must be informed of certain rights, including the right to counsel, and that once such a person invokes the right to counsel, the police must cease interrogation until counsel is provided or the suspect initiates further contact and makes it clear that he or she wishes to proceed without counsel. (*Miranda v. Arizona*, *supra, 384* U.S. at p. 474 (*Miranda*); *Edwards v. Arizona* (1981) 451 U.S. 477, 482, 484-485 (*Edwards*); see also *Rhode Island v. Innis* (1980) 446 U.S. 291, 293.)

(*People v. Peevy* (1998) 17 Cal.4th 1184, 1187-1188, parallel citations omitted.) Yet, even after a suspect has requested counsel, police "are free to inform the suspect of the facts of a second investigation as long as such communications does not constitute interrogation." (*Arizona v. Roberson* (1988) 486 U.S. 675, 687 (*Roberson*).)

For *Miranda*, "interrogation" includes both express questioning and its functional equivalent – words or actions of the police (other than those normally attendant with arrest and custody) which they should know are reasonably likely to elicit an incriminating response from the suspect. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 (*Innis*); *Boyer*, *supra*, 48 Cal.3d at p. 273; *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 241-242.) The relevant inquiries for determining whether an interrogation occurred are: whether, under the totality of the circumstances, the words or actions of the police were *reasonably likely* to elicit an incriminating response from the

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62. For *Miranda*, "'[c]ustody' means 'a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [citations omitted]." (*People v. Boyer* (1989) 48 Cal.3d 247, 271 (*Boyer*).) Yet, a subject who is already incarcerated is not "in-custody" for *Miranda* purposes unless restraints are placed upon his freedom beyond his normal prisoner setting. (*Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 427-428; *People v. Anthony* (1986) 185 Cal.App.3d 1114, 1121-1122.) Respondent assumes appellant, who already was incarcerated, was subjected to such added restraints.

suspect; and if so, whether the police *should have known* their words or actions were likely to do so. (*People v. O'Sullivan*, *supra*, 217 Cal.App.3d at p. 242.) Although those inquiries require an objective review, both the suspect's perception[63] and the officer's subjective intent are relevant. (*Ibid.*; *People v. Wader* (1993) 5 Cal.4th 610, 637.) Further, "[s]ubstantial deference on the question of what constitutes interrogation must be paid to the trial courts, who can best evaluate the circumstances in which such statements are made and detect their coercive aspects." (*United States v. Payne* (4th Cir. 1992) 954 F.2d 199, 202 (*Payne*).)

"Statements volunteered when not in response to an interrogation are admissible against a defendant, even after an initial assertion of the right to remain silent." (*People v. McDaniel* (1976) 16 Cal.3d 156, 172; accord *Miranda*, 384 U.S. at p. 478.) Moreover, "[i]ncriminating statements made in the course of casual conversation are not products of a custodial interrogation. [Citation]." (*United States v. Satterfield* (11th Cir. 1984) 743 F.2d 827, 849; *accord United States v. Lynch* (1993) 813 F.Supp. 911, 912-916; *State v. FitzGerald* (Vt. 1996) 165 Vt. 343, 344-346 [683 A.2d 10, 12-13].) Additionally,

> The *Innis* definition of interrogation is not so broad as to capture within *Miranda*'s reach all declaratory statements by police officers concerning the nature of the charges against the suspect and the evidence relating to those charges.

(*Payne*, *supra*, 954 F.2d at p. 202.)

Lastly, statements obtained during custodial interrogation in violation of *Miranda* (i.e., without full advisement of rights and an effective waiver) are inadmissible to establish guilt at trial. (*Miranda*, *supra*, 384 U.S. at pp. 476-477, 479; *Boyer*, *supra*, 48 Cal.3d at p. 271.) When such statements are erroneously admitted, no reversal is required if their introduction into evidence

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63. No evidence of appellant's perception was presented here.

was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Johnson* (1993) 6 Cal.4th 1, 32-33; *People v. Cahill* (1993) 5 Cal.4th 478, 540-541; *People v. Sims* (1993) 5 Cal.4th 405, 447-448 (*Sims*); *People v. Turner* (1984) 37 Cal.3d 302, 319, overruled on another ground in *People v. Anderson* (1987) 43 Cal.3d 1104, 1115, 1149-1150.)

C. The Court Properly Admitted Appellant's Statements To Detective Christian

It is uncontested that appellant was informed of his *Miranda* rights and that he invoked his right to counsel. What is at issue is whether Detective Christian continued to interrogate appellant after that invocation. No such continued interrogation or its functional equivalent, occurred. Instead, appellant statements arose during casual conversation (i.e., "small talk"). Although they were in part a product of Detective Christian's remarks, they were not made under circumstances reasonably likely to elicit an incriminating response, let alone under circumstances where the detective should have known they were likely to do so. Hence, they were admissible.

Nonetheless, appellant asserts the conversation, which was initiated by Detective Christian and extended by the detective's supplying information to appellant about this case, constituted interrogation. (AOB 125, 130-140.) In asserting his claim, he argues the trial court applied an erroneous legal standard and thus, no deference should be accorded to its findings, and instead independent or de novo review applies. (AOB 129-130, 139.) Specifically, he contends the court relied upon *Siegenthaler* and *Amos*, for determining whether a suspect's statements were the product of interrogation, however, both of those cases predate *Innis* and state a standard that focuses on the police's intent, which is incompatible with the standard in *Innis*.

Notably, however, the court expressly relied upon *Innis* as being "remarkably similar" to the instant case. (X RT 2659.) Thus, it impliedly

applied *Innis*' standard. As for the court's reliance on *Siegenthaler* and *Amos*, which it noted were cited by counsel, the court merely remarked that they were also on point. Significantly, Prosecutor Oppliger cited those cases for the following propositions:

> RULE
>
> Miranda Rule is only applicable to custodial interrogation. Miranda does not apply to a statement voluntarily and gratuitously interjected during conversation with officers. People v. Siegenthaler 7 Cal.3d 465 at [p.] 470.
>
> STANDARD IN APPLICATION OF RULE
>
> Factual issue is:
>
> A. Was statement made under "circumstances which could not be construed as an attempt to elicit information from defendant. *People vs. Siegenthaler* 7 Cal3d 465 at [p.] 470.
>
> B. Was the statement "not a product of a process of interrogation designed to elicit incriminating evidence". *People v. Amos* 70 CA3d 562 at 568.

(1 SCT3 55.) Those limited propositions are compatible with *Innis*. Hence, contrary to appellant's claim, the trial court did not apply an erroneous standard.

Appellant also notes this Court has said trial court findings of whether an interrogation occurred are generally reviewed for clear error, i.e., they are upheld if supported by substantial evidence. (AOB 127, citing *People v. Mickey* (1991) 54 Cal.3d 612, 649.) Citing various Ninth Circuit cases, however, he argues that when there is no factual dispute as to the giving of *Miranda* warnings and as to questions and answers, as in the instant case, then the issue of whether an interrogation occurred is a mixed question of law and fact reviewed de novo. (AOB 128-129.) He further notes where the evidence is uncontradicted, this Court has found independent review is warranted. (AOB 128, citing *Sims, supra,* 5 Cal.4th at p. 440; *People v. Crittenden* (1994) 9 Cal.4th 83, 128 (*Crittenden*); *People v. Johnson*, *supra*, 6 Cal.4th at p. 25; *People v. Mattson* (1990) 50 Cal.3d 826, 857-858; *Boyer, supra,* 48 Cal.3d at

p. 263.)

Appellant fails to note, however, that this Court ""must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported."" (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 128, quoting *People v. Johnson*, *supra*, 6 Cal.4th at p. 25 and *Boyer*, *supra*, 48 Cal.3d at p. 263.) Here, the inference that appellant sought to deduce – that detectives took him to VMC "to gather evidence, for no other reason" and engaged him in a conversation about his wife in order "to get a rise out of" him "to get more information" so as to elicit an incriminatory response (X RT 2653-2654, 2656) – was disputed. Prosecutor Oppliger expressly argued such an inference was speculative. (X RT 2657-2658.) The trial court resolved that disputed inference adversely to appellant, finding:

> the speculation that was sought to be of use, and I can understand that, "Why are you taking -- ["]that was one of my question[s] that I had written out for myself. "Why are you taking him out to Valley Medical Center?" I thought [Detective Christian] had a good reason for that.

(X RT 2659.) The record supports that finding.

Specifically, Detective Christian said his reasons for taking appellant to VMC were two-fold: (1) to fulfill the sheriff's department's policy of treating injuries of persons in custody prior to booking; and (2) to gather evidence through x-rays (e.g., to show his hand was used as a weapon) in furtherance of their investigation. (X RT 2628-2629, 2631-2632, 2637-2638, 2650.) According to Detective Christian's testimony, taking appellant for treatment pre-booking was not unusual because he had taken other suspects to VMC per his department's policy on numerous occasions. (X RT 2643.) Further, although appellant had been booked on a prior incident, the booking process would be repeated for his new offense (X RT 2629), thereby substantiating the need for pre-booking treatment. Although Detective Christian said he also took appellant to VMC to gather evidence, he explained that was to gather physical

evidence (i.e., x-rays) as opposed to verbal information. Accordingly, this Court must accept the trial court's resolution of that disputed inference because it was substantially supported by the record. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 128, *People v. Johnson*, *supra*, 6 Cal.4th at p. 25; *Boyer*, *supra*, 48 Cal.3d at p. 263.)

Likewise, the trial court made credibility evaluations. Specifically, the court said "I've heard testimony from a person I believe to be a professional police officer who gives a credible and believable account of what occurred on the day in question." (X RT 2659.) Thereafter, the court said:

> what does he have in common with two people who are waiting? Well, the wife is in common. That was something that was just recent. This does not appear to me to be interrogation.

(X RT 2659-2660.) Thus, the court impliedly found that Detective Christian's explanation that he was just "making conversation" (X RT 2625) was credible. The record supports that finding. The time the trio spent waiting at the hospital – about two hours (X RT 2635) – is a long time for anyone to just sit around and say nothing. Given that Detective Christian had recently interviewed appellant's wife in an unrelated case (IX RT 2362), he and appellant had something in common (i.e., appellant's wife) about which to talk. Further, their having made small talk is evidenced by Detective Christian's testimony that they spent a lot of time "kidding [appellant] about his F-14 tattoo and him being a fighter pilot." (X RT 2649-2650.) Hence, this Court must accept the trial court's evaluation of Detective Christian's credibility because it was substantially supported by the record. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 128; *People v. Johnson*, *supra*, 6 Cal.4th at p. 25; *Boyer*, *supra*, 48 Cal.3d at p. 263.)

Nonetheless, appellant cites *Crittenden*, *supra*, 9 Cal.4th at page 128 for the proposition that a suspect's statements are presumed involuntary if there is no break in custody and the police initiate a meeting in the absence of counsel

post-invocation. (AOB 126.) Although Detective Christian initiated the conversation and arguably extended it by supplying information to appellant about this case (i.e., Andrews' name), his testimony rebutted the presumption of involuntariness and established that appellant's statement's were voluntarily made during "small talk." Moreover, regardless of whether this Court applies clear error or de novo review, those statements were not the product of "custodial interrogation" or its "functional equivalent." (See *Innis*, *supra*, 446 U.S. at pp. 300-301; cf. *In re Albert R.* (1980) 112 Cal.App.3d 783, 789 [officer's "chitchat" while transporting minor to jail, after minor chose to remain silent, wherein officer made direct accusation that minor had knowingly sold stolen car and described it as cold-blooded act, constituted words reasonably likely to evoke incriminating response].)

Here, Detective Christian's statements to appellant about his wife and Rutledge were not of the type that he should have known were "reasonably likely to elicit an incriminating response." (*Rhode Island v. Innis*, *supra*, 446 U.S. at p. 301; *Burgess*, *supra*, 827 So.2d at pp. 173-176 [continued conversation between defendant and investigator did not amount to functional equivalent of interrogation where there was no evidence in record to suggest investigator's "small talk" with defendant was psychological ploy that investigator should have realized would result in incriminating response]; *State v. FitzGerald*, *supra*, 683 A.2d at pp.12-13 [no interrogation where defendant, who had invoked privilege against self-incrimination and said he wished to speak to attorney, initiated casual conversation with transporting detective inquiring whereabouts of his friend Ricky; the detective replied, "he's in Texas, why?" to which defendant said "That's good, he had nothing to do with it" – no evidence detective knew or should have know his words were likely to elicit incriminating response].)

Further, although appellant repeatedly suggests Detective Christian "baited" appellant by querying him about his wife's "involvement with another man" (AOB 129, 131-134; see AOB 136, 139), Detective Christian expressly testified:

> I never asked him if she was dating anybody else. I don't -- and I don't know what the relationship between those two were. All I told him was that I talked to her after she had been picked up in South Lake Tahoe with Tom Rutledge.

(X RT 2637.) Hence, appellant's wife's "involvement" with Rutledge was not among the topics that Detective Christian discussed. Also, while appellant notes the detectives made fun of his tattoo, which he equates with further baiting of him to provoke an ill-considered incriminatory response (AOB 135), the detectives' remarks fell far short of the situation presented in *United States v. Brown* (9th Cir. 1984) 720 F.2d 1059, 1063-1064, 1068-1069) upon which appellant relies (AOB 132-134), wherein an officer intentionally baited a defendant by uttering hostile, taunting, provocative questions and epithets that lead to a heated exchange in which defendant made incriminating statements. Here, the detectives merely were "kidding [appellant] about his F-14 tattoo and him being a fighter pilot." (X RT 2649-2650.)

Notably, even after a suspect has requested counsel, police "are free to inform the suspect of the facts of a second investigation as long as such communications does not constitute interrogation." (*Roberson, supra*, 486 U.S. at p. 687.) If informing a suspect about the facts of a second investigation involving that suspect is permissible, then certainly informing appellant about an unrelated homicide investigation involving someone else was permissible, so long as it did not amount to an interrogation.

Although Detective Christian asked appellant whether he knew Rutledge (IX RT 2363, 2640), he had no reason to think Rutledge had anything to do with Andrews' murder because Rutledge's name, let alone the name of

appellant's wife had not arisen in that investigation (IX RT 2364; X RT 2625, 2645). Thus, the detective's query appears to have been based upon mere curiosity while simply making conversation, as opposed to purposeful interrogation about the instant case. (*Innis*, *supra*, 446 U.S. at p. 303 ["Given the fact that the entire conversation appears to have consisted of no more than a few offhand remarks, we cannot say that the officers should have known that it was reasonably likely that [the defendant] would so respond"]; see *United States v. Thomas* (W.D.N.Y. 1997) 961 F. Supp. 43, 45 [while escorted for booking, defendant muttered about showing ID to patrolman in altercation which lead to arrest; escorting officer asked why defendant simply did not show ID; defendant said it stemmed from prior problem with patrolman; court viewed officer's query as to altercation's genesis "as more 'the product of curiosity' than the result of a purposeful interrogation [Citation]"].)

Moreover, a simple "yes" would have been responsive to Detective Christian's query as to whether appellant knew Rutledge. Instead, appellant volunteered spontaneous, unsolicited information that he and Rutledge were enemies, that Rutledge had disrespected him, and added a threat that if they were able to get Rutledge into the jail with him, then they would not have to worry about taking Rutledge to trial. (IX RT 2363-2364.) His unsolicited, spontaneous, and voluntary statements fall outside *Miranda*. (*United States v. Satterfield*, *supra*, 743 F.2d at pp. 848-849 [no *Miranda* violation where FBI Agent and defendant engaged in "small talk" or "casual conversation" (e.g., about sports, a concert, and the county) during transport to police station and defendant, who had been advised of and did not waive *Miranda* rights, remarked "he wanted to make it clear that he was not really a mean man, but that he simply had too many people that got him into trouble" – statement was volunteered; notably, neither agent nor fellow agent in the car discussed case or questioned defendant about events leading to his arrest]; see *United States*

v. Thomas, *supra*, 961 F.Supp. at pp. 45-46 [even assuming arguendo, query about altercation's genesis reflected investigative purpose and created coercive effect, it was not calculated to induce admission as to defendant's intent; defendant's further comment that he would have killed patrolman if another patrolman had not been present was unsolicited, spontaneous, and voluntary statement that falls outside *Miranda*'s requirements]; cf. *United States v. Lynch*, *supra,* 813 F.Supp. at pp. 912-919 [during transport to arraignment, defendant, who twice had been advised of and declined to waive *Miranda* rights, made incriminating statements in casual conversation he had initiated; two statements were admissible because they were entirely voluntary and not product of custodial interrogation; but third statement, which was prefaced by officer's remarks implying defendant had been tied to crime through video or photographic evidence, was elicited in violation of his constitutional rights because it was involuntary and product of functional equivalent of interrogation given that officer reasonably should have known remarks would likely elicit incriminatory response].)

As for appellant's claim that Detective Christian's improperly extended the conversation by supplying information to appellant about this case (i.e., Andrews' name) in response to appellant's inquiry (AOB 125, 134-135, 136, fn. 86, 137-139), the instant case is much like *Burgess*. In *Burgess*, the defendant made an unequivocal request for counsel, so questioning ceased; while one investigator went to talk to a superior, another investigator and defendant engaged in "small talk . . . to relieve the boredom"; their "casual conversation" lasted 10 to 20 minutes; ultimately, defendant asked what the charges, if any, would be and what the punishment was; the investigator told him the charge was capital murder and the penalty was LWOP or the electric chair; the defendant began to ask something, but the investigator said "you have asked for an attorney and I cannot talk with you about the case until you get an attorney;"

after sitting there for a minute or two, the defendant said "it doesn't make any difference, I'm dying of brain cancer . . ." and then gave a narrative account of his crime; the investigator then asked the defendant if he would write a statement and defendant agreed, writing it down on a form that again advised him of his *Miranda* rights. (Burgess, *supra*, 827 So.2d at pp. 173-174.) In rejecting the defendant's claims that the police continued to interrogate him after he made an unequivocal request for counsel and that the State did not meet its "heavy burden" to show his statement was voluntary, the *Burgess* court held:

> There is no evidence in the record to suggest that [Investigator] Long's "small talk" with Burgess was a psychological ploy that Long should have realized would result in an incriminating response by Burgess. As Justice Powell noted in his concurring opinion in *Edwards*, *there is a difference between "custodial interrogation" and "custodial conversation:"*
>
> "Communications between police and a suspect in custody are common-place. It is useful to contrast the circumstances of this case with typical, and permissible, custodial communications between police and a suspect who has asked for counsel. For example, *police do not impermissibly 'initiate' renewed interrogation by engaging in routine conversations with suspects about unrelated matters."*
>
> 451 U.S. at 490. The United States Supreme Court held in *Arizona v. Mauro*, 481 U.S. 520 (1987), that in the absence of "compelling influences, psychological ploys, or direct questioning," the "possibility" that an accused will incriminate himself, even the subjective "hope" on the part of the police that he will do so, is not the functional equivalent of interrogation. 481 U.S. at 528-29.
>
> We find that Burgess initiated further conversation about the murder/robbery investigation when he asked Long about the charges against him and the possible punishment. We do not find that Long's straightforward answers to those questions were a "compulsion, ploy, or artifice" to prompt an incriminating response from Burgess. . . .

(*Burgess*, *supra*, 827 So.2d at pp. 175-176, parallel citations omitted, emphasis added.) Similarly here, although not prefaced by a reminder that appellant had invoked his *Miranda* rights, appellant initiated further conversation about the instant case when he asked Detective Christian what the name of the subject

was, "You know, the guy that went to sleep."[64] The detective then advised him the subject's name was Greg Andrews. (IX RT 2364; X RT 2640.) Detective Christian's straightforward answer to that question was not a compulsion, ploy or artifice to prompt appellant's incriminating response that Andrews was Rutledge's friend. (IX RT 2364.) Providing appellant with the name of the person whom he was arrested for killing did not amount to interrogation. (See *Payne*, *supra*, 954 F.2d at p. 202 [*Innis* definition of interrogation is not so broad as to capture within *Miranda*'s reach all declaratory statements by officers concerning nature of charge against suspect and evidence relating to charge].)

Additionally, appellant's assertion that Detective Christian should have drawn some connection between appellant's query and their discussion about appellant's wife and Rutledge (AOB 136-138) is absurd. While detectives may be skilled in deductive reasoning, they are not clairvoyant. Here, Detective Christian testified that it was only after appellant had volunteered his remarks that he came "to suspect that that may play a part in the motive that caused [Andrews'] killing." (X RT 2625.)

Lastly, appellant argues Detective Christian's report which states "Ronnie would say no more regarding the incident" (IX RT 2364) strongly suggests that the detective attempted to get appellant to say more and is inconsistent with the detective's testimony that this was mere conversation (AOB 138). Yet, the detective's report entry is consistent with an interpretation that throughout the rest of the time that appellant spent with the detective, appellant never said anything more about Andrews' homicide.

Accordingly, based upon the foregoing, substantial evidence supports the trial court's finding that no interrogation, or its functional equivalent,

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64. Thus, appellant's assertion that he "did not initiate any part of the conversation" (AOB 129) is erroneous.

occurred following appellant's invocation of his right to counsel. Instead, appellant's statements arose during mere casual conversation. Although they were in part a product of Detective Christian's remarks, they were not made under circumstances reasonably likely to elicit an incriminating response, let alone under circumstances where the detective should have known they were likely to do so. Hence, the trial court properly admitted appellant's statements.

IV.

THE COURT PROPERLY DENIED APPELLANT'S MISTRIAL MOTION CONCERNING NELSON'S REMARK THAT APPELLANT HAD BOASTED ABOUT KILLING HIS BROTHER; IN ANY EVENT, THERE WAS NO HARM BECAUSE THE REMARK WAS CUMULATIVE OF OTHER EVIDENCE WHICH THE COURT AND THE PROSECUTOR TOLD THE JURY NOT TO MISUSE

Appellant's fourth argument claims the trial court erred in denying the mistrial motion concerning Nelson's unsolicited remark that appellant had boasted about killing his brother, thereby violating his rights under the state and federal constitutions. (AOB 142-155, citing Cal. Const., art. I, §§ 1, 7, 15-17; U.S. Const., 5th, 6th, 8th & 14th Amends.; see AOB 405.) In asserting his claim, he complains the court failed to consider the effect of its nearly three-week delay in telling the jury to disregard the testimony; he asserts that delay compounded the prejudice. (AOB 145, 147-149, 151-152.) Yet, the court's delay in admonishment was attributable to defense tactics because the defense strategically chose to not have the jury admonished soon after the remark. Further, once the court struck that testimony, it thoroughly and repeatedly admonished the jury to disregard it, thereby curing any prejudice. Thus, the court acted well within its discretion in denying the mistrial motion. Moreover, there was no harm because the remark was cumulative of admissible evidence that appellant had boasted about killing his brother in "kites" – jailhouse letters (I RT 104; X RT 2816) – which the jury was told could not be misused to show he was predisposed to commit such an offense.

A. Factual And Procedural Background

On June 23, 1994, before Nelson testified, the prosecutor asked the trial court to admonish Nelson to avoid certain subjects, including prior murder; the defense joined in that request. (VIII RT 2074.) Outside the jury's presence, the

court admonished Nelson, in part: "Do not volunteer or answer a question that would relate any of your knowledge about [appellant] being involved in a prior murder" "Don't tell us anything about it" to which Nelson agreed. (VIII RT 2075-2076.) During testimony of a confrontation appellant had with Nelson about his having gone into appellant's cell, however, the following colloquy occurred:

> [PROSECUTOR OPPLIGER:] Did -- during this course of events where you felt you were being threatened, did Mr. Dement take -- was he doing anything physically?
>
> [NELSON:] Well, he was kind of jumping around a little bit and stuff, and, you know, he was -- he told me that -- you know, he'd bragged before about killing his brother and stuff -- oop[65/] -- and anyway he said that -- he said that it didn't mean anything for him to take a human life.

(VIII RT 2095.)

Four questions later, the defense requested a conference. Then outside the jury's presence, the defense moved for a mistrial for Nelson's having mentioned that appellant "bragged before about killing his brother." (VIII RT 2096.) The prosecutor argued if Nelson's remark was to be in isolation, then he would ask the court simply to strike it and instruct the jury. He noted, however, he soon would present a motion on the admissibility of appellant's kites that reference appellant's murdering his brother. Thus, he suggested the court defer ruling on the mistrial motion until it determined the kites' admissibility because if information in the kites were admissible, then Nelson's remark also would be admissible and relevant. (VIII RT 2097-2098; see 2 CT 461-472 [prosecutor's

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65. Nelson gestured, putting his hand up over his face at the time. (VIII RT 2096-2097.) In describing that gesture outside the jury's presence, Defense Counsel Hart said "The witness made a gesture like the witness knew that he --" to which Nelson cut her off, declaring "I made a mistake." (VIII RT 2096; see X RT 2844.) Later, in response to trial court inquiries, Nelson said he did not want to make that remark, he "didn't mean to," and he did not want to foul up the trial. (VIII RT 2101.)

trial brief regarding kites].)

The defense argued appellant's prior murder would be used merely to establish his authorship of the kites, which might be stipulated so evidence of his prior would be sanitized from them. (VIII RT 2098, 2100.) The prosecutor replied the kites' authorship was a separate issue and he would be offering evidence of the prior murder to give context to appellant's confession within the kites. (VIII RT 2099.) The defense then asserted that even if the prosecution could offer that evidence, the victim's identity (his brother) was extraordinarily prejudicial. (VIII RT 2102.)

The defense further argued the court should rule on the mistrial motion on the basis of the record as it stood, rather than on evidence that may be admissible later. (VIII RT 2103-2104.) The defense also argued leaving prejudicial evidence in while the court defers its ruling may "condition" the court to be more likely to rule in favor of the prosecution as to future evidence. (*Ibid.*)

The prosecutor noted the alternative was for the court to give a corrective instruction, stating the preferred method is to immediately address issues and use a curative instruction. (VIII RT 2098.) The prosecutor added he did not know if that would draw undue attention to Nelson's remark, and so whether to instruct would be a tactical decision for the defense, but that he would join in whatever the defense wanted to do (i.e., wait or have an immediate curative instruction). (*Ibid.*) The defense, however, tactically chose not "to have a curative instruction read at the present time" and instead chose "to simply not say anything about that." (VIII RT 2103.) Thereafter, the court offered to give a nonspeculation instruction that would have told the jurors not to speculate on what Nelson's remark meant, if they even believed appellant had uttered those words. (VIII RT 2104.) The defense declined that offer and instead merely requested Nelson be readmonished, which the court did. (VIII

RT 2104-2105.)

Meanwhile, the trial court deferred ruling on the mistrial motion pending its decision on the kites' admissibility. (VIII RT 2101, 2104.) Proceedings resumed, but the court soon recessed for an 11-day "vacation" until July 5, 1994. (VIII RT 2106, 2147; see I RT 125; II RT 247, 375, 434.)

On July 5, 1994 (filed August 11, 1994), the defense submitted a written mistrial motion, asserting that prejudice from improper revelation of appellant's prior killing could not be resolved by admonishing the jury to ignore it because this case was closely balanced. (VII RT 2149; 2 CT 485, 488-491, citing *People v. Allen* (1978) 77 Cal.App.3d 924, *People v. Ozuna* (1963) 213 Cal.App.2d 338, and *People v. Figuieredo* (1955) 130 Cal.App.2d 498.)

Also on July 5, 1994, the trial court held an Evidence Code section 402 hearing concerning the kites' admissibility. (VIII RT 2149-2183, 2187-2189.) Ybarra failed to appear to testify. (VIII RT 2181.) Thus, per the prosecutor's request, the court took a break in those proceedings to allow detectives to locate Ybarra, and thereby stayed consideration of the mistrial motion. Although the court asked if there were objections to deferring the matters, none were raised. (VIII RT 2183, 2187, 2189.)

Nonetheless, the prosecutor informed the trial court of cases he planned to rely on in opposing the mistrial motion. (VIII RT 2192-2194, citing *People v. Bonin* (1988) 46 Cal.3d 659, 680-690 (*Bonin*), *People v. Price*, presumably (1991) 1 Cal.4th 324, 428 (*Price*), *People v. Jennings* (1991) 53 Cal.3d 334, 373-375 (*Jennings*), *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1237 (*Gonzalez*), *People v. Thompson* (1992) 7 Cal.App.4th 1966, 1973-1974, and *People v. Eckstrom* (1986) 187 Cal.App.3d 323, 329-330 (*Eckstrom*).) He also said he would take the position the court should admonish the jury, irrespective of the defense's wishes and further, that if the defense was to waive admonishment, then it should be the defendant's personal waiver. (VIII RT

2193, disagreeing with *Jennings*, *supra*, 53 Cal.3d at pp. 373-375 [defense attorney alone may waive admonishment].)

On July 6, 1994, the hearing regarding the kites' admissibility continued and Ybarra testified. (IX RT 2276-2354.) During his testimony, he said he had talked to Parole Officer Mike Castro. (IX RT 2345.) The defense had not anticipated that name coming up, so per the defense's request, the admissibility proceedings were deferred to allow the defense's investigator to interview Officer Castro. (IX RT 2353-2354.)

On July 7, 1994, no proceedings on the kites' admissibility took place. (See IX RT 2449-2604.) The trial court then recessed until July 11, 1994. (IX RT 2601, 2604-2605.)

On July 11, 1994, Parole Officer Castro testified. (X RT 2606-2623.) At that point all evidence on the kites had been offered. (X RT 2623-2624.) Later, the trial court and counsel discussed the kites' admissibility. (X RT 2660-2667.)

On July 12, 1994, they held further discussions on the kites' admissibility. (X RT 2740-2748, 2750-2768, 2787-2796.) The trial court then denied the defense's various challenges to the kites. (X RT 2748-2750, 2796-2797.) In doing so, it remarked it was unable to excise a part about appellant's brother from one kite. (X RT 2796.)

Subsequently, the parties entered into a stipulation about the kites and some of their content. (X RT 2813-2816.) Thereafter, the trial court gave a limiting instruction to the jury concerning reference to a crime other than that for which appellant was on trial. (X RT 2818-2819.) Then the People rested its case, subject to introduction of physical evidence. (X RT 2819.)

Later that day, there was further argument on the motion for mistrial. (X RT 2840-2845.) The defense argued Nelson's statement that appellant had boasted about killing his brother was very prejudicial, as compounded by his

hand-to-face gesture signaling he had made a "boo-boo," and that the jury logically would link appellant's boasting with his having been in custody, so as to conclude he was in custody for killing his brother. (X RT 2840, 2844.) The prosecutor argued Nelson's nonresponsive statement was not so prejudicial as to violate due process or the right to a fair hearing because similar evidence was before the jury. (X RT 2842-2843.) Still, he argued "the Court should take the bull by the horns and instruct the jury that that was an unresponsive answer." (X RT 2843.) He further argued that while appellate courts will not disturb counsel's "tactical decision such as was made in this case" (to not have the jury admonished), the defendant should at least join in that waiver because an instruction is the proper remedy for a nonresponsive answer. (*Ibid.*)

The prosecutor also argued if the court were to strike the evidence, then that would call it to the jury's attention anyway so "why not give the cautionary instruction on top of that." (X RT 2843.) The defense agreed that if the court did not grant a mistrial, then it would want an instruction because the statement "has lain there for almost two weeks, and it has grown tentacles and taproots, and we can't just strike it, we've got to prune it and snip it back in some way." (X RT 2843.) Still, the defense argued the jury inescapably would use it as evidence of predisposition to commit the charged offense despite a curative admonishment not to do so. (X RT 2844-2845.) Asserting the instant case was not "open-and-shut," the defense noted cases that have evaluated the severity and prejudice of mentioning about prior crimes and bad acts have considered the closeness of the case. (X RT 2844-2845.)

Thereafter, the trial court denied the mistrial motion stating:

> I'll be happy to entertain any sort of an instruction that you want to tender to me. I have considered myself and did at the time and I regret that I didn't at that very moment take appropriate action. I feel that when you talk to a jury, that is when the Judge does and explains to them just what their responsibility is and make it clear to them, maybe even less formally than an instruction, I believe they do their best to try to abide

by that.

> I agree however that this kind of evidence, sometimes the decision making is a little easier for them. I don't think it's so much of a disposition but if the evidence of guilt is there, I agree with you, that it may make it a little easier for them and that's an influence. I agree with that.
>
> *In view of the other evidence they have on that subject, I believe that a fair trial may still be had.* I don't think -- I believe that's the only issue. And I will do my utmost to give a fuller explanation, and an informal one if you want on that very subject and I think we need to call attention to that so they know how to deal with it. Not to hope it goes away all together. . . .

(X RT 2845-2846, emphasis added.)

On July 13, 1994, after the defense rested its case pending some motions (XI RT 2925; see XI RT 2930), the trial court gave a cautionary instruction to the jury, thoroughly explaining that Nelson's remark was nonresponsive, improper, and should be disregarded. (XI RT 2928-2930.)

Thereafter, on July 14, 1994, in his initial closing argument, the prosecutor argued the significance of the kites Ybarra had received from appellant, while reminding the jury it could not misuse the kites' evidence about a prior killing to conclude that appellant had a predisposition to commit such an offense. (XI RT 2996-2999.)

On July 15, 1994, prior to deliberations, the trial court readmonished the jury not to consider Nelson's remark. (XI RT 3109-3110.) The court further reminded the jury of how to evaluate evidence that was admitted for a limited purpose, impliedly including evidence such as the kites. (XI RT 3112-3113.)

On September 21, 1994, in a motion for new trial appellant asserted, inter alia, that his mistrial motion concerning Nelson's remark should have been granted. (3 CT 862, 866-867.) On September 26, 1994, the parties argued the matter. (XV RT 3851.) The court then denied the motion without comment. (XV RT 3853.)

B. Applicable Law

Grounds for mistrial include the situation where a witness improperly volunteers information that has been excluded by a prior court ruling. (*People v. Williams* (1997) 16 Cal.4th 153, 211 (*Williams*).) Yet, a mistrial motion may be granted only if there is error plus incurable prejudice, i.e., prejudice that cannot be cured by an admonition or instruction. (*People v. Hines* (1997) 15 Cal.4th 997, 1038 (*Hines*); *People v. Price* (1991) 1 Cal.4th 324, 431(*Price*); *People v. Wharton* (1991) 53 Cal.3d 522, 565 (*Wharton*); *Eckstrom*, *supra*, 187 Cal.App.3d at p. 330.) Because a determination of whether a particular incident is incurably prejudicial is by nature a speculative matter, the trial court is vested with "considerable discretion" in ruling on mistrial motions and its ruling is reviewed under the deferential abuse-of-discretion standard. (*Hines*, *supra*, 15 Cal.4th at p. 1038; *Price*, *supra*, 1 Cal.4th at pp. 428, 430; *People v. Cooper* (1991) 53 Cal.3d 771, 838-839 (*Cooper*); *Wharton*, *supra*, 53 Cal.3d at p. 565; *Eckstrom*, *supra*, 187 Cal.App.3d at p. 330.)

When an unsolicited and inadmissible comment is volunteered by a witness, the prejudicial effect of the unsolicited comment may be cured by the trial court's admonition to the jury to disregard the comment. "A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith." (*People v. Allen*, *supra*, 77 Cal.App.3d at p. 934 (*Allen*); see *People v. Morris* (1991) 53 Cal.3d 152, 194 (*Morris*) [trial court's admonition, which jury is presumed to have followed, cured any prejudice resulting from witness's improper statement]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1374 (*Olguin*) [jurors are presumed to adhere to court's instructions absent evidence to contrary]; *People v. Williamson* (1985) 172 Cal.App.3d 737, 750 (*Williamson*) ["We presume that the jury heeded the admonition and any error was cured."].) Only in exceptional cases will the court's admonition be insufficient to cure the prejudicial effect of the

improper evidence. (*Allen*, *supra*, 77 Cal.App.3d at p. 935.) As stated by the court in *People v. Martin* (1983) 150 Cal.App.3d 148 (*Martin*):

> Absent any evidence to the contrary, we assume the jury was able to follow the trial court's admonition and disregard the statement. Juries often hear unsolicited and inadmissible comments and in order for trials to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment; absent evidence to the contrary the error is deemed cured.

(*Id.* at p. 163.)

Generally, evidence of prior arrests or convictions is inadmissible. (*People v. Anderson* (1978) 20 Cal.3d 647, 650; Evid. Code, § 1101, subd. (a).) However, courts have found such errors may be harmless. (See e.g., *People v. Williams* (1981) 115 Cal.App.3d 446, 453 [improper remark about defendant's parole status was harmless because it was not reasonably probable he would have obtained more favorable result given admission of prior offenses and substantial evidence pointing to his identity as perpetrator]; *People v. Morgan* (1978) 87 Cal.App.3d 59, 76, overruled on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 490-498 [improper references to defendant's parole status and residence in a half-way house were harmless where evidence of guilt was almost overwhelming, citing *Watson*, *supra*, 46 Cal.2d at p. 836); *People v. Stinson* (1963) 214 Cal.App.2d 476, 479, 481-482 (*Stinson*) [officer's nonresponsive reference to defendant's parole status was harmless because there was no reasonable probability jury would have acquitted defendant if error had not occurred.) As the *Stinson* court observed:

> Improper evidence of prior offenses results in reversal only where the appellate court's review of the trial record reveals a closely balanced state of the evidence. [Citations.] The same error, viewed in the light of a record which points convincingly to guilt, is consistently regarded as nonprejudicial. [Citations].

(*Id.* at 214 Cal.App.2d at p. 482.)

C. The Court's Delay In Admonishing The Jury Was Attributable To Defense Tactics

Appellant complains the trial court failed to consider the effect of its nearly three-week delay in telling the jury to disregard Nelson's remark. He asserts that delay compounded the prejudice. (AOB 145, 147-149, 151-152.) Yet, he overlooks that the defense strategically chose to not have the jury admonished soon after the remark. Thus, he should not be permitted to complain of the delay on appeal.

Initially, appellant mischaracterizes the length of delay in the court's admonishment, the number of admonishments given, and the jury's consideration of Nelson's remark in the interim. Nelson made the remark on June 23, 1994 (16th trial day). (VIII RT 2095; 2 CT 482.) Although appellant claims the court did not admonish the jury until July 15, 1994 (24th trial day) (AOB 148, fn. 89), the court gave an earlier admonishment on July 13, 1994 (22d trial day). (XI RT 2928-2930; 2 CT 504). Thus, while his argument implies the jury received only one admonishment (AOB 144-145, 148, fn. 89), it actually received two. (XI RT 2928-2930, 3109-3110.) Also, although he argues the alleged harm was "compounded by the jury's consideration of the evidence, including all the witnesses presented by the defense, for almost three weeks" (AOB 147-148; accord AOB 149, 152), the jury was not in session for that three-week period. Instead, the jury recessed for an 11-day "vacation" from June 24, to July 4, 1994 (VIII RT 2147; see I RT 125; II RT 247, 375, 434) as well as a three-day break from July 8 to 10, 1994. (IX RT 2601, 2604-2605.) Presumably, the jurors had better things to do over there 14-day hiatus than "consider[]" Nelson's remark.

Moreover, although the admonishment's delay permitted Nelson's remark to remain in evidence while other evidence was presented, including defense evidence, the defense opted for that delay. Specifically, in requesting

the court to defer ruling on the mistrial motion, the prosecutor noted the alternative was for the court to give a corrective instruction, stating the preferred method is to immediately address issues and use a curative instruction. (VIII RT 2098.) The prosecutor added he did not know if that would draw undue attention to Nelson's remark, and so whether to instruct would be a tactical decision for the defense, but that he would join in whatever the defense wanted to do (i.e., wait or have an immediate curative instruction). (*Ibid.*) The court then sought the defense's opinion on a curative instruction and recessed so defense counsel could confer. (VIII RT 2102.) When proceedings resumed, Defense Counsel Hart stated:

> Mr. Pedowitz and I have had a chance to confer about this issue, and *we do not wish to have a curative instruction read at the present time.* Our feeling about curative instructions is that in many cases, they tend to emphasize the testimony rather than diminish it in its importance. I'm sure that's not always true but *our opinion at this point is to simply not say anything about that.*

(VIII RT 2103, emphasis added.) Thereafter, the court remarked:

> what was actually said by this witness, that does not amount to a statement that [appellant] has been convicted of a crime, particularly the crime this witness has alluded to. Bragging about something is not -- does not make it so. *I could give a nonspeculation instruction.* "Don't speculate on what this meant if you even believe it, that the words were uttered." Just want you to examine those possibilities. And apparently you have.

(VIII RT 2104, emphasis added.) The defense declined the court's offer for such an instruction. Instead, Defense Counsel Pedowitz said "I would *just* request a readmonition" to Nelson. (VIII RT 2104-2105, emphasis added.)

Accordingly, the foregoing analysis establishes that although the trial court later regretted not having explained and clarified to the jurors their responsibility at the time Nelson made the improper remark (X RT 2845), it was the defense's strategic choice to not have the jury admonished that led to the admonishment's delay. Thus, appellant should not now be permitted to

complain on appeal about that delay. (Cf. *Jennings*, *supra*, 53 Cal.3d at pp. 373-375 [witnesses gave nonresponsive testimony indicating defendant had been in prison and had a prior arrest; after each incident, trial court discussed admission of improper testimony with defense counsel and prosecutor, clearly appreciating potential for prejudice; court and prosecutor both left it to defense counsel to propose appropriate remedial action, however, defense counsel failed to object or request curative admonition (or seek other remedy such as special jury instruction or stipulation from prosecutor) thereby waiving issue].)

D. The Court Properly Denied Appellant's Mistrial Motion

Appellant claims "[e]ven an immediate admonition to the jury to disregard Nelson's disclosure would have been futile, given the substantial prejudicial effect of such information." (AOB 147; see AOB 152.) Respondent disagrees. The trial court's admonishment was not futile when given and thus, it certainly would not have been futile had it been given earlier. Once the trial court struck Nelson's remark, it thoroughly and repeatedly admonished the jury to disregard it. Its admonishments cured any prejudice.

Although appellant mentions the court's admonishment to the jury was given immediately before deliberations (AOB 144-145, 148, fn. 89), he fails to mention that the court gave a more thorough explanation and admonishment to the jury two days earlier. More specifically, on July 13, 1994, after the defense rested its case pending some motions (XI RT 2925; see XI RT 2930), the trial court gave a cautionary instruction to the jury which, in the words of Defense Counsel Pedowitz, both "[t]he prosecution and the defense have agreed that that's an appropriate instruction" (XI RT 2928). In doing so, the court, with the defense's consent, gave "a little introduction to explain what happened." (*Ibid.*) Specifically, the court informed the jury:

> Ladies and gentlemen, we were shocked several days ago almost into losing our wits about us when a witness, Brad Nelson, violated a very

direct admonition that I had given him, and you may recall at the time he said, "Whoops," and we recessed shortly after that.

You may recall that during the course of his testimony he indicated that he had heard, we don't know from whom, perhaps -- well, we don't know for sure from the testimony, that he heard that Mr. Dement was bragging about killing his brother. That was his testimony.

It was nonresponsive to any question, and I am now admonishing you to disregard it and treat it as though you never heard of it. I very specifically cautioned him that we wanted Mr. Dement to get a very fair trial in this case.

I've given you a cautionary instruction already to indicate -- to make sense of some of these kites that you've heard; that if it does make sense to you, that you may consider for a limited purpose that reference of the killing of the brother, true or false; it doesn't make any difference, but it gives meaning to the statement. But Mr. Nelson inadvertently, I think, but who knows, relayed something that you should not be considering in this part of the trial, and that is not something, true or false, for you to speculate on.

Your issue is going to be has the evidence proved Mr. Dement guilty of any crime based on what you've heard? Not on what he may have done before or why he may have been in jail. That's not a concern of yours at this point. So the -- we talked about it, here's the cautionary instruction that I'm going to give you that has been -- I've asked the attorneys to help me with, and we'll see what this one says.

The witness, Brad Nelson, testified that the defendant had bragged about committing a crime other than the crime for which defendant is on trial in the current case. Mr. Nelson's testimony on a separate crime is hereby stricken, it is hereby stricken, and you're admonished to disregard such testimony. Do not allow Mr. Nelson's testimony on that uncharged, alleged crime to enter into deliberations. Mr. Dement's guilt or innocence must be determined without regard to any alleged prior conduct.

I think you can appreciate the sense of that. When we say it is -- it is inappropriate for you to believe that what you hear, something either outside of the trial or something that may have gone on before, and to then conclude, well, if he's a bad guy, then he must have been committing the instant offense, that's not a basis for your decision. You look at the evidence that's been presented on that subject. And that's where you're limited.

> Okay. I hope I -- I don't know how I can make this any clearer, and I have the confidence that you're going to do your duty, whatever it may be, based on the evidence you do have. Okay?

(XI RT 2928-2930.)

Later, on July 15, 1994, before deliberations, the trial court reminded the jury:

> Do not consider for any purpose any offer of evidence that was rejected or any evidence that was stricken by the Court; treat it as though you had never heard of it.
>
> These preliminary instructions I'm sure you've heard before and they are now in their written form. Many of these instructions we've covered before and they will sound familiar to you, I hope.
>
> Referring to striking of testimony, the witness Brad Nelson testified that the defendant had bragged about committing a crime other than the crime for which defendant is on trial in the current case. Mr. Nelson's testimony on a separate crime is hereby stricken and you are hereby instructed to disregard such testimony. Do not allow Mr. Nelson's testimony on an uncharged alleged crime to enter into your deliberations. Mr. Dement's guilt or innocence must be determined without regard to any alleged prior conduct.
>
> You must decide all the questions of fact in this case from the evidence received in this trial and not from any other source.

(XI RT 3109-3110.) The court further admonished the jury:

> Certain evidence was admitted for a limited purpose. At the time this evidence was admitted you were admonished that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. Do not consider such evidence for any purpose except for the limited purpose for which it was admitted.

(XI RT 3112-3113.) That the court re-emphasized these points immediately before deliberations served as a strong reminder to the jury for it to follow the court's previous admonishments so as to not let the stricken evidence and any improper considerations enter into its deliberations.

Accordingly, the trial court thoroughly and repeatedly admonished the jury to disregard Nelson's brief, unresponsive, improper remark. The court's

finding that its admonishments would cure any possible harm was well within its discretion, especially given that Nelson's remark was cumulative of admissible evidence that appellant similarly had boasted about killing his brother in kites (see respondent's Arg. V *post* [responding to appellant's claim that kites were erroneously admitted]). (*People v. Price*, *supra*, 1 Cal.4th at pp. 428-431 [witness's brief, improperly volunteered, reference to having taken lie detector test was cured by admonishment; likewise another witness's improper disclosure that defendant admitted having served many years in prison also was cured by admonishment; neither event mandated mistrial]; *Wharton*, *supra*, 53 Cal.3d at pp. 565-566 [prosecution witness's implication that defendant had caused or ordered the injuries evident on witness for being a "snitch" was cured by admonition and subsequent testimony; rejecting as mere speculation defendant's argument that jury disregarded admonishment because remark was made on Thursday and admonition did not come until following Monday]; see also *Gonzalez*, *supra*, 51 Cal.3d at p. 1237 [appellate court found as "patently unpersuasive" defendant's claim that admonition was insufficient to unring bell where potentially inflammatory evidence was introduced in penalty phase on tangential issue, albeit no mistrial motion had been made, but trial court later struck it for lack of foundation and then court gave fully sufficient admonishment for jury to disregard it].) Hence, the court acted well within its wide discretion in denying appellant's mistrial motion. (*Hines*, *supra*, 15 Cal.4th at p. 1038; *Cooper*, *supra*, 53 Cal.3d at pp. 838-839.)

Further, because nothing in the record indicates the jury failed to comply with the trial court's admonishments, it is presumed the jury understood, correlated and followed those admonitions and that any harm was cured. (*Morris*, *supra*, 53 Cal.3d at p. 194; *Olguin*, *supra*, 31 Cal.App.4th at p. 1374; *Williamson*, *supra*, 172 Cal.App.3d at p. 750; *Martin*, *supra*, 150 Cal.App.3d at p. 163.) Thus, any possible harm was cured when the court struck the

non-responsive remark and admonished the jury to disregard it.

In light of the trial court's admonitions to the jury, the presumption that the jury followed the instructions, and the strength of the evidence of appellant's guilt – including appellant's confession in the kites and his motive based on his animosity towards Andrews' friend Rutledge – the court's refusal to grant a mistrial did not amount to prejudicial error under the tests enunciated in *Watson*, *supra*, 46 Cal.2d at page 836 or *Chapman*, *supra*, 386 U.S. at page 24. (See *People v. Bonin*, *supra*, 46 Cal.3d at pp. 680-690 & fn. 2 [where prosecutor elicited irrelevant, inadmissible testimony that defendant admitted to 14 killings in addition to four murders for which he was on trial as well as to two murders which were introduced to establish identity, trial was not rendered fundamentally unfair because it constituted isolated instance in lengthy and otherwise well-conducted trial; further because evidence of guilt, albeit in large part circumstantial, was overwhelming, there was no reasonable probability outcome more favorable to defendant would have resulted had evidence not been elicited], overruled on other ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 to extent it suggested showing of bad faith is required to establish prosecutorial misconduct.)

E. In Any Event, There Was No Harm Because The Remark Was Cumulative Of Other Evidence Which The Court And The Prosecutor Told The Jury Not To Misuse

Moreover, there was no harm because Nelson's remark was cumulative of admissible evidence that appellant similarly had boasted about killing his brother in kites and because the court and the prosecutor stressed to the jury that the kites should not be misused to show appellant was predisposed to commit such an offense.

Here, the trial court denied the defense's various challenges to the kites. (X RT 2748-2750, 2796-2797.) In doing so, it remarked it was unable to excise

a part about appellant's brother from one kite:

> I tried to read this without the reference to the brother, and it doesn't make sense. It doesn't show that they were talking about a killing when they were talking about trips and tags. . . .

(X RT 2796.)

Subsequently, the parties entered into a stipulation about the kites. (X RT 2813-2816.) Inter alia, they stipulated appellant wrote various kites, passages of which included:

> I'm doing 29 to life for the first one. Dude was my brother but was on the other side of the fence. On this other trip, hey, shit happens, homey [sic; homie]. The shit ain't over but I'll say this, dude had it coming, both of them. I feel no different. It don't bother me. I'm looking at the chair but I don't think they will get me on this trip anyway.

and

> The vato here was a gava. On my carnales, he was a runner. See, I'm a half-breed myself so there's more to that story than the paper says. Tu sa[b]es? Mikio pulled me down for his trial. That's why I was here. Ain't no thing, brother. Before it's over, I'll tag a few more. Got to keep these fools in check at times.

(X RT 2815-2816; accord 2 SCT1 379-380 [People's Exhibits 35 & 36].)[66/]

Thereafter, on July 12, 1994 (21st trial day), the trial court gave a limiting instruction to the jury concerning reference to a crime other than that for which appellant is on trial. (X RT 2818-2819.) That instruction provided:

> Ladies and gentlemen, *evidence has been introduced which includes a reference showing that the Defendant committed a crime other than that for which he is on trial.* Such evidence, if believed, was not received and may not be considered by you to prove that the Defendant is a person of bad character or that he has a disposition to commit crimes. The *evidence was received and may be considered by you only for the limited purpose of providing context and meaning to the written statement made by the Defendant.* [¶] The Defendant in a criminal action

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66. It was stipulated: "vato" means "dude," "gava" means "white," "tu sabes" means "do you understand?" and "kite" means "jail house letter." (X RT 2816.)

> has the right to expect that his guilt or innocence will be decided by the evidence brought before the jury and without regard to any alleged prior conduct. Therefore, you must only consider this evidence for the limited purpose for which it was introduced.

(*Ibid.*, emphasis added.) Because this limiting instruction was given while Nelson's remark was still in evidence, the jury necessarily would have thought it applied to that remark as well as to the kites. Thus, the jury would have thought Nelson's remark could be considered "only for the limited purpose of providing context and meaning to the written statement made by the Defendant." (X RT 2818.) Hence, the limiting instruction actually served to alleviate any harm from Nelson's remark in the interim before the court struck it and told the jury to disregard it the following day (XI RT 2928-2930).

Notably, in arguing his position to the jury, the prosecutor did not reference Nelson's remark that had been stricken. Instead, he relied upon evidence in the kites, wherein appellant similarly had boasted about killing his brother:

> Going to read these together and comment upon them a little bit. [¶] This is Dement himself . . . "I'm doing 29 to life for the first one. Dude was my brother but was on the other side of the fence. On this other trip, hey, shit happens, homey [sic; homie]. The shit ain't over, but I'll say this, dude had it coming, both of them. I feel no different. It don't bother me. I'm looking at the chair but I don't think they will get me on this trip anyway." [¶] Mr. Dement uses "trip" to talk about a murder beef. . . .
>
> *Now, you've received a cautionary instruction. I want you to follow that, okay? About using a prior killing to -- it would be misuse to conclude that that means the Defendant has a predisposition or something like that.*
>
> [T]he next one, is a confession. The only reason that you can tell that it is a confession to the second murder is by considering it with respect to the first one. And so, the statement about killing of the brother gives meaning and context to the phrase, "on this other trip, hey, shit happens, homey [sic; homie]." And it also -- you wouldn't understand what the phrase when it says, "The shit ain't over but I'll say this, the dude . . ." Greg Andrews, ". . . had it coming, both of them.". . .

> This letter also gives meaning to the second kite or letter, which also contains a handwritten confession. . . . [¶] . . . [¶] "The vato here was a gava." Okay, the dude here was a white or white boy. . . . The guy here was Greg Andrews. "On my carnales . . ." on my brother, ". . . he was a runner." Now again, we're talking about the two murders. And there's some language that's simply filler. . . . Ain't no thing, brother. Before it's over, I'll tag a few more." I suggest to you that you can't tag a few more unless you tagged a few before. "Got to keep these fools in check at times."
>
> Now, that sitting on its own is not a confession, but again, you need to read it in context of the fact that you know from the first letter, "I'm doing 29 to life for the first one. Dude was my brother but was on the other side of the fence."
>
> So when you read those two together and in conjunction with others, and properly using them . . . *Not taking this evidence of a prior killing and misusing it*, but taking this for what it's worth to explain, simply to explain how these sentences, how these two paragraphs constitute a handwritten confession to the crime of murder of Greg Andrews.

(XI RT 2996-2999, emphasis added.)

Nonetheless, appellant notes the kites made no mention of "murder" and thus, even assuming that they refer to his having killed his brother, he asserts the prosecutor's characterization of their referencing murder was unsupported and prejudicial. (AOB 150-151, 154 and AOB 150, fn. 90.) Contrary to his claim, the prosecutor's characterization was a fair comment on the evidence. Specifically, one of appellant's kites said "I'm doing 29 to life for *the first one*. Dude was my brother . . . On *this other trip* . . . dude had it coming, *both* of them. . . . *I'm looking at the chair* but I don't think they will get me *on this trip* anyway." (X RT 2816, emphasis added.) Even Defense Counsel Hart argued to the jury that "a reasonable interpretation of that can be that 'on this other trip' is referring to why Mr. Dement is in jail and why he is being prosecuted." (XI RT 3025.) Given that appellant's instant "trip" involved a murder charge where he was "looking at the chair" (the proverbial "execution chair" – i.e., capital punishment), it is reasonable to infer that "the first one" also involved a murder,

especially given his remark "dude had it coming, both of them" which implied the same fate that befell the second "dude," befell the first "dude" (his brother). This is bolstered by the fact that another of appellant's kite's said "Before it's over, I'll *tag* a few more." (X RT 2816, emphasis added.) Given that Criminologist Hickey said "tag" can mean, inter alia, "kill" (XI RT 2870), appellant's remark that he will "tag a few more" when considered in conjunction with the references in the other kite, collectively indicate the type of "tag" he was referring to was murder.

Notably, the defense never objected to the prosecutor's characterization of the kites as referencing murder as being a mischaracterization of the evidence. Again, "[w]hen a party does not raise an argument below, he may not do so on appeal. (*Clark*, *supra*, 5 Cal.4th at p. 988, fn. 13; *Raley*, *supra*, 2 Cal.4th at p. 892.) Further, the prosecutor's characterization of the "first one" (X RT 2816) as a murder was obviously in good faith given Ms. Hart's concession outside the jury's presence that appellant's prior for "killing of the brother" was a "second-degree murder conviction." (X RT 2791-2792.) Also, appellant's assertion that the kite's reference to his having killed his brother provided "unwarranted character evidence suggesting an even more heartless killing than the homicide of Andrews," which "distorted the jury's consideration, whether consciously or not, of the evidence . . ." (AOB 153-154) is purely speculative.

Further, although appellant claims the "trial court discounted the prejudice due to a misperception or misunderstanding of 'the other evidence they have on the subject . . . .' (AOB 145, citing X RT 2846; accord AOB 149, 154), there was no misperception or misunderstanding. Again, those kites provided the jury with other evidence that appellant had killed, i.e., murdered, his brother.

In sum, the kites contained evidence that appellant similarly had boasted about killing his brother. That evidence was cumulative of Nelson's stricken remark. Thus, the temporary introduction of Nelson's remark, albeit over a lengthy time frame, was harmless. (*See People v. Hamilton* (1985) 41 Cal.3d 408, 427, vacated on other grounds in *California v. Hamilton* (1986) 478 U.S. 1017 [in capital case, error in admitting evidence of defendant's prior convictions was harmless under *Watson* partially for reason that jury would have known anyway about his prior].) Adding to its harmlessness was the fact that both the court and the prosecutor stressed to the jury that a reference showing appellant committed a crime other than that for which he was on trial should not be misused to show he was a person of bad character or predisposed to commit such an offense. Hence, there was no harm.

Even assuming arguendo, the trial court's admonition was ineffective, evidence that appellant had killed his cellmate is strong. As explained in respondent's Argument II, subheading F *ante*, contrary to appellant's claim (AOB 153), the jury's deliberations did not indicate the case was close. Moreover, appellant had a motive to attack and kill Andrews based on appellant's animosity towards Andrews' friend Rutledge, who was appellant's enemy and about whom appellant voiced a threat that Rutledge essentially would suffer the same fate. (X RT 2671-2674.) Appellant essentially confessed to having killed Andrews in the kites. (X RT 2816.)

Further, various witnesses consistently foreshadowed appellant's attack on Andrews: Williams testified as Andrews came in, appellant said he would kill Andrews if Andrews was put in his cell (VI RT 1375-1376, 1411, 1413, 1419-1420); Nelson testified as Andrews went up to his cell, appellant looked at Bond and begin hitting his fist into his hand while smiling and laughing (VIII RT 2082-2083, 2135); and Johnson told detectives after Andrews arrived, Johnson heard appellant say he was "going to take care of the home boy that

had just been put into his tank" (X RT 2716-2720, 2724).

As percipient witnesses, both Martinez's (VII RT 1787-1789, 1801, 1811) and Johnson's (X RT 2721) statements to detectives were consistent with Nelson's description of overhearing an inmate being attacked (VIII RT 2084-2087, 2114, 2117-2120, 2131, 2136-2137) and with Benjamin's and Bond's descriptions of the attack. Benjamin and Bond identified appellant as the perpetrator. Although, appellant asserts their testimony was suspect because they gave self-serving testimony (AOB 153), unlike him, neither of them had an identifiable motive to attack and kill Andrews and neither of them confessed to his murder. Also, the forensic evidence indicates Andrews was attacked and killed in the manner in which Benjamin and Bond described (i.e., blunt-trauma injuries consistent with multiple blows, kick(s), and ligature strangulation). (V RT 1255, 1263-1263, 1265-1274, 1277, 1285, 1321, 1331, 1353-1356; see X RT 2711.) Their testimony also was corroborated by evidence of appellant's physical injuries and complaint of pain, which were consistent with his having hit and kicked Andrews. (VIII RT 2205-2208, 2228-2232, 2670-2671; see X RT 2693-2694.)

Additionally, appellant engaged in incriminatory behavior following the attack in that: Williams saw and heard appellant going cell to cell, telling the Chicanos to get rid of any knives or weapons because he had killed a guy upstairs (VI RT 1379-1382; see VI RT 1422, 1424); Martinez heard appellant brag he had just "killed the punk" and say he had beat him – he was pretty sure appellant mentioned choking him, strangling him – and he heard appellant say "he was trying to go up in the guy" and "the guy greased his butt up." (VII RT 1789-1790, 1797-1798, 1804, 1807-1808, 1813-1814); Martinez heard appellant tell him and others in the pod that "if he got rolled up, the two people that knew what had happened were his two cellies and that they needed to do something to him [sic; them]" (VII RT 1791); appellant asked Martinez to help

him drag a body downstairs, asked some Black males to remove the body from his cell (VII RT 1790, 1797), and similarly asked Nelson to go upstairs and drag the body onto the tier (VIII RT 2094), which suggests he was wanting to draw suspicion away from himself by removing the body from his cell; appellant also threatened Nelson would suffer a similar fate if he said anything (VIII RT 2094-2095, 2107-2108, 2137-2138, 2140; see VIII RT 2140, 2144); and when officers arrived to investigate the body in cell 8 as all the other inmates were locked in their cells, appellant was sweeping the day room as if he was a trustee which he had never done before, which suggests he was trying to act nonchalant and distance himself from his cell (VII RT 1812, 1942, 1948-1949, 1958; X RT 2722, 2724).

Based on the foregoing, there is no reasonable probability that a result more favorable to appellant would have been reached in absence of the improper remark and the allegedly futile instruction. (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580-1581 [where trial court struck witness's inadvertent reference to defendant's parole states and ordered jury to disregard it, any error in trial court's failure to grant a mistrial motion was harmless because it was not reasonably probable defendant would have obtained a more favorable result if the remark had not been made given overwhelming evidence of guilt]; *Watson*, *supra*, 46 Cal.2d at p. 836.) For the same reasons, any error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

Accordingly, neither appellant's state nor federal constitutional rights to due process, to a fair trial, to a reliable adjudication at all stages of his capital case, and to be free from cruel and/or unusual punishment were violated. Hence, his claim should be rejected.

V.

THE COURT PROPERLY ADMITTED APPELLANT'S WRITTEN STATEMENTS; EVEN ASSUMING ARGUENDO, THE COURT ERRED IN ADMITTING THEM, ANY ERROR WAS HARMLESS

Appellant's fifth argument claims the trial court erroneously admitted his written statements contained within the kites because the prosecution obtained those in violation of his Sixth Amendment rights under *Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*) and *United States v. Henry* (1980) 447 U.S. 264 (*Henry*), and thereby violated his rights under the state and federal constitutions. (AOB 156-157, 175-182, 190-193, citing Cal. Const., art. I, §§ 1, 7, 15-17; U.S. Const., 5th, 6th, 8th & 14th Amends.; see AOB 405.) He also claims the kites' admission violated state law (Evid. Code, §§ 210, 350-352, 1101) because they had little or no probative value in contrast to their prejudicial and inflammatory nature, they contained irrelevant evidence, and they amounted to inadmissible criminal propensity evidence. (AOB 156-157, 182-190, 193.) He further claims the state-law violation amounted to a state and federal constitutional violation because the state arbitrarily withheld a nonconstitutional statutory right. (AOB 193.) He additionally claims the prosecution's reliance on the kites in the penalty phase, denied his rights to due process, a fair and reliable adjudication of penalty, and to be free from cruel and unusual punishment. (AOB 190-191, 193-194, citing Cal. Const., art. I, §§ 7, 15-17; U.S. Const., 5th, 6th, 8th & 14th Amends.) His claims lack merit because the trial court properly admitted the kites. Further, even assuming arguendo, the court erred, its error was harmless.

A. Facts Developed At The Evidence Code Section 402 Hearing

1. Detective Christian's Testimony

Around April 1, 1993, per Ybarra's request, Detective Christian "pulled"

him from a jail holding area (as opposed to his cell), and interviewed him in the sheriff's office for about 10 minutes. (VIII RT 2151, 2159, 2162, 2165.) Ybarra told the detective he had never worked for law enforcement but, that as a "Northern Structure dropout," he had "debriefed," wherein he gave information to the California Department of Corrections (CDC) about his former gang so he would be properly classified. (VIII RT 2174-2177.) Ybarra, who had charges pending for possessing a marijuana cigarette and faced being returned to prison on a parole violation, said he did not want to go back to CDC: he was having marital problems, he had a new baby, and if he went back to CDC, then he was "going to be hit" (i.e., an attempt would be made on his life). (VIII RT 2159-2160, 2164-2165, 2178-2179.) Ybarra told Detective Christian he and appellant had been writing to each other almost daily and that he had "a bunch of letters" from appellant in his cell. (VIII RT 2159-2161, 2163, 2178-2179.) Ybarra asked if anything could be done about his present charges. The detective told him that was up to his attorney and the DA's Office and said he could make no promises. (VIII RT 2160.)

Ybarra did not bring the writings with him and said he wanted to speak with his attorney Bill Fernside to look into a deal before giving the writings to the detective. (VIII RT 2159-2160, 2163, 2178.) Ybarra mentioned specific statements in appellant's kites, which Detective Christian was interested in, so the detective told Ybarra to have his attorney get in touch with him. (VIII RT 2169.)[67/] Detective Christian told Ybarra to retain anything he received from appellant, however, he did not tell Ybarra to send kites to appellant. (VIII RT 2160.) He did not recall whether Ybarra asked if he should keep writing appellant, but he specifically told Ybarra: not to elicit information from

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67. Detective Christian testified Ybarra said he had received a kite before April 1, 1993, from appellant, which the detective identified as People's Exhibit 32, page 3; however, Ybarra's statement was not admitted for its truth. (VIII RT 2169-2170.)

appellant "on our behalf," not to ask appellant anything specific to this case, that appellant already had invoked his right to counsel, and that Ybarra was not to discuss the case with appellant and then bring those letters to the detective. (VIII RT 2161.) Detective Christian testified he had heard of a case that says that a law enforcement officer cannot request a person who is in custody, who is an informant, to elicit incriminating statements from someone else in custody and "That's exactly why I did not do that." (*Ibid.*) The detective did not document anything on their first contact. (VIII RT 2165.)

About a week later, Detective Christian spoke with Attorney Fernside by phone and asked him to be present when Ybarra brought letters in because Ybarra wanted him present. (VIII RT 2166.) Detective Christian then arranged to have Ybarra brought over to the sheriff's office for an interview. (*Ibid.*) On April 21, 1993, Attorney Fernside and Ybarra, who was still incarcerated, came to Detective Christian's office and met with him. (VIII RT 2164, 2166.) Prosecutor Oppliger was aware of their meeting and had told the detective that whether the People would enter into a deal for Ybarra's testimony depended on what Ybarra had. (VIII RT 2164, 2167.) The detective told Attorney Fernside he was interested in having the prosecution cut a deal with Ybarra in exchange for Ybarra's providing the kites, but said Attorney Fernside would have to work that out with the DA's Office–Detective Christian was in no position to say what could be offered. No deal had been worked out at that time. (VIII RT 2164-2167.) Attorney Fernside, who had picked up the kites from Ybarra a couple of days earlier, turned them over to the detective. (VIII RT 2167.) Detective Christian did not tell Ybarra he was going to receive favorable or lenient treatment within the criminal justice system for his cooperation–the detective had no authority to make those kinds of offers or assurances. Instead, he told Ybarra that it has been his past experience that should the kites turn out to be written by appellant and be admissible, then the DA will probably make

some kind of deal with him. (VIII RT 2167-2168.) At the time, Ybarra's major concern was not going back into prison because of the hit that was out on him. (VIII RT 2168.)

Detective Christian later was told Ybarra would get a "paper commitment" where he would serve his violation in the local facility, rather than in CDC. (VIII RT 2180.)

2. Ybarra's Testimony

Ybarra, who has been convicted of several felonies, testified that after he was paroled back around 1990 or 1991, he volunteered to "debrief" (i.e., give a written statement on everything he knows about his gang), but he never completed it. (IX RT 2282-2283, 2286-2287.) His reason for debriefing was he wanted to get out of the gang, the Nuestra Raza (a.k.a. the Northern Structure) because he was "tired of taking orders from fools." (IX RT 2296, 2342, 2337-2338.) He did not begin the written part until his first parole violation when he was placed in Corcoran SHU, where the gang coordinator told him to give everything he knew about his prison gang for as long as he lived. (IX RT 2286, 2288, 2298.) Around 1991, the coordinator said he wanted Ybarra to go undercover to infiltrate prison gangs and prove he wanted out; but his cover was blown making it impossible to infiltrate. (IX RT 2288-2289.) He wrote kites to the coordinator saying that, but he never got a response. (IX RT 2293-2294.) He still continued the written part, giving CDC everything he knew including copies of the gang's constitution. (IX RT 2287, 2290.)

Ybarra was paroled in February of 1991. (IX RT 2294.) He discussed debriefing with his parole officer, who kept saying "they" would go over what he wrote. (IX RT 2294-2295.) Near the end of 1992, he got "busted" for possessing methamphetamine for sales and battery on a police officer, but no charges were filed. (IX RT 2296.)

Ybarra remained out on parole until he was arrested on January 14, 1993, on drug charges along with a parole hold. (IX RT 2294, 2297, 2332.) Around January 15, 1993, he was housed in administrative segregation, two cells from appellant; thereafter, they exchanged written contact almost daily by sending kites on "fish lines." (IX RT 2277-2279, 2297, 2346.) Appellant "got at" Ybarra first and tried to "interrogate" Ybarra. Ybarra reversed that, however, and began getting information and names from appellant because Ybarra, who could tell appellant was a gang member or sympathizer, "wanted to know what he was all about, know of my surroundings" to determine whether appellant posed a personal danger. (IX RT 2299, 2344, 2347, 2349.)[68] Ybarra wrote kites to appellant to get names of gang members and sympathizers with the intention of debriefing so he could turn them over to CDC to show Ybarra had reformed and wanted out of the gang. (IX RT 2299-2300, 2343-2344.) Previously, a gang coordinator had told Ybarra the paperwork Ybarra had given him, which Ybarra had already given to CDC, was "BS . . . not enough, that [he] would have to give up-to-date names," so Ybarra saved appellant's kites to debrief. (IX RT 2344, 2347-2348.)[69]

During a "shakedown" of Ybarra's jail tier looking for knives, a sheriff's deputy found the kites. (IX RT 2300-2301.) Ybarra told the deputy that he was

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68. Ybarra testified one rule of gang membership is never tell people you are a member, so to find out if someone is a member you write and exchange names to see if they know fellow gangsters. (IX RT 2338-2339.) His early communication with appellant was exchanging names of people they knew. (*Ibid.*)

69. Ybarra testified one gang coordinator he talked to was Parole Officer Mike Castro, but they had not talked for probably a couple of years. (IX RT 2345.) While jailed, he tried to get in touch with Parole Officer Castro "looking out for my protection of when I get to Wasco," but never got a hold of him. (*Ibid.*) He also never talked to his parole officer while in jail. (IX RT 2309, 2320.)

trying to debrief, so the deputy gave him back the papers. (IX RT 2301.) Ybarra then submitted a "request" saying he could obtain information on the murderer of "Andrew Gregory [*sic*]," and as a result, he spoke to Detective Christian. (*Ibid.*)

Ybarra told Detective Christian he had kites from appellant and could get information from appellant and "pretty much" asked for a deal on his pending charges to avoid going to prison in exchange. (IX RT 2301-2303, 2340-2342.) Ybarra could not recall how many kites he had received before he talked to the detective, but he had more than three. (IX RT 2302, 2304-2305.) As for kites he received beforehand, Ybarra identified People's Exhibit 32 pages 1, 2, 4, 9, 10, 15. (IX RT 2326-2327, 2329-2330.) As for People's Exhibit 32 page 3, Ybarra "guess[ed] that it was pretty much after" his initial meeting with the detective, however he was not positive. (IX RT 2327.) As for People's Exhibit 32's other pages, Ybarra either got those after talking to the detective or he was unsure about when he got them. (IX RT 2329.) When Ybarra initially talked to the detective, he did not have a kite that he thought was a confession. (IX RT 2304, 2328.)[70]

Detective Christian told Ybarra that he could not tell Ybarra to collect kites from appellant and if Ybarra did obtain information, the best Ybarra could do was write another request and turn it in and either he or another detective would show them to the D.A. and possibly Ybarra could work out a deal in his case, but he did not promise anything specific and said he could not guarantee Ybarra anything. (IX RT 2302-2303, 2341.)

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70. Ybarra testified appellant never actually confessed to him in any letter. Although the statement "Dude had it coming, both of them. I feel no different. It didn't bother me" was sort of the statement he was trying to get from appellant, he wanted more; he wanted a straight-out confession "on paper because homeboy pretty much bragged about it anyways." (IX RT 2328.)

Thereafter, Ybarra decided to get more kites from appellant to get as much information as he could to use for himself. (IX RT 2309.) He kept writing to appellant, trying to get him to confess on paper that he murdered Andrews because he was hoping to get a deal either to get out or for lower charges because he did not want to go back to "the system." (IX RT 2303-2305, 2327-2329.) In some kites, appellant would not outright say he did it, but he would write things like "I got to do what I got to do." (IX RT 2306.)

Ybarra obtained more kites from appellant, including one which he thought was some type of confession. (IX RT 2305, 2313.) Ybarra contacted Detective Christian. Ybarra was pulled out of his cell and then he went to the detective's office with his lawyer where he handed the detective a packet of all the kites he had against appellant. (IX RT 2278-2279, 2313-2315, 2339-2340.)[71] Handing over those kites was not part of his debriefing. (IX RT 2299.) The detective told Ybarra all he could do was turn them over to the prosecutor and "there was no guarantee he was going to get back at me." (IX RT 2313-2314.) Ultimately, the detective spoke to Ybarra's lawyer and informed Ybarra the prosecution was willing to enter a deal – in exchange for providing kites and truthful testimony concerning them, Ybarra would plead guilty to two counts, the remaining counts would be dismissed and he would get a "paper commitment" to prison. (IX RT 2314-2317, 2322-2323, 2334; see 2 SCT1 449-451 [Defense Exhibit H - Contract for Testimony].) After Ybarra signed the contract and pled guilty to the charges; he was released and now awaits sentencing after testifying in this case. (IX RT 2332-2334; see 2 SCT1 452-454 [Defense Exhibit I - Ybarra's letter to Prosecutor Oppliger seeking release].)

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71. Ybarra identified People's Exhibit 32 as a photocopy of the kites he had turned over to Detective Christian. (IX RT 2281.)

Ybarra was discharged from parole on February 28, 1994, but his discharge has nothing to do with any deal; he merely served his parole time. (IX RT 2319-2320.) Ybarra testified he has never fully debriefed because every time he tried, "the system has screwed me" and in the eyes of CDC, he is still a member of the Northern Structure. (IX RT 2319, 2324.) Ybarra's intent, should he ever be arrested again or placed on parole was to pursue the debriefing process; however, he would debrief even if not on parole. (IX RT 2325, 2335.) He testified that just because one goes through the debriefing process, CDC does not always certify you as a dropout. (IX RT 2342.)

Ybarra testified no one told him to report any statements appellant made about Andrews' murder: "No, I did it on my -- that on my own. I was trying to attain that on my own. No one ever told me to do anything" (IX RT 2320) – "Anybody knows that . . . if you know about a murder . . . the law's going to want to know about it" (IX RT 2343). Ybarra testified:

> I did get at him for debriefing matters to begin with. . . . and then after he told me he was in for 187,[72] then I got the idea of he's giving me all these names, maybe I can work him on confessing, and I knew that if I could get that, I pretty much knew that I'd get a deal from the D.A.

(IX RT 2348.) Ybarra denied trying to obtain information about the murder of David (appellant's brother): "No, he just gave that up by himself." (IX RT 2320-2321.)

3. Parole Officer Castro's Testimony

Parole Officer Castro, a gang institutional coordinator for CDC's Fresno parole unit, testified "debriefing" is a process for gang members who wish to disassociate themselves from a prison or street gang. (X RT 2606-2608.) It involves having them provide information about their gang experiences and membership. The information first is given verbally to the institution's gang

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72. "187" is the code section that defines "Murder."

coordinator or their parole officer if they are not in custody, and then in a written history. Sometimes they may be given a polygraph. If the information given is adequate, then CDC will consider them unaffiliated. If it is inadequate, then CDC continues to assign active gang status to them. (X RT 2608.) Many times gangsters who say they want to debrief are really trying to debrief the interviewer to see what the interviewer knows about the gang; it's a frequent "cat-and-mouse game." (X RT 2619.)

If an individual succeeds in becoming unaffiliated, then his level of parole supervision can be decreased. (X RT 2608-2609.) If that person is later imprisoned, then he may be placed in protective custody to protect him from active members who consider him to be a turncoat. As time passes, however, he may be put out into the general prison population. (X RT 2609-2610.) An inmate to whom CDC has assigned gang status may be sent to a maximum-security, level 4 institution such as Pelican Bay, where restrictions are significantly harsher and the inmates are substantially isolated with very little movement outside their cells. Avoiding such segregated housing is a main motivation for debriefing. (X RT 2613, 2618, 2621-2623.) Thus, the information gleaned from debriefing has a lot to do with classification of inmates. (X RT 2618.)

Parole Officer Castro did *not* consider debriefing to be a lifetime process. (X RT 2618.) He explained, however, that a person who debriefs places himself in a position where he may be subjected to retaliation from his former gang during the entire time he may be under CDC's jurisdiction, so in that sense it is a lifetime thing. (X RT 2618-2619.)

Over a year ago, while Ybarra was on parole and before he was jailed in January of 1993, his current parole agent told Parole Officer Castro that Ybarra wanted to speak to someone about disassociating himself. That was the second time he had been approached on the issue because Ybarra's former

parole agent also had done so, but nothing transpired. This time, Parole Officer Castro met with Ybarra. (X RT 2610-2611.) They met to fulfill the first step of the debriefing process, i.e. an interview. Ybarra provided Parole Officer Castro with a copy of a written history he had previously submitted to an institutional coordinator before he was paroled. (X RT 2612.) The information was a good history, but a lot of it was old so Parole Officer Castro inquired about that. (X RT 2612, 2615, 2619-2620.) He also questioned why Ybarra was coming forward given that Ybarra had already initiated debriefing. (X RT 2615.) Ybarra became so vague about nicknames mentioned in his written history that Parole Officer Castro did not feel Ybarra was being totally honest as far as current information. (X RT 2612, 2619-2620.) It got to the point where Parole Officer Castro wondered whether Ybarra was trying to debrief him instead. (X RT 2620.)

Parole Officer Castro did not understand Ybarra's motivation to debrief because Ybarra was not in custody or facing any parole violations. (X RT 2613-2614.) His "send-off" to Ybarra was telling him that if he went back into CDC, then he should contact an institutional investigator and make it known he wanted to provide specific and additional information related to his gang activity. (X RT 2614-2615, 2620.) He also told Ybarra that he was doing well on parole so debriefing should not be an issue because he would not go back to prison if he kept up his performance. (X RT 2614, 2620-2621.) Parole Officer Castro testified "I did not tell him to get any additional information." (X RT 2615.)

B. Procedural Background Including Arguments Raised Concerning The Kites' Admissibility And The Court's Rulings

On June 6, 1994, Prosecutor Oppliger submitted a trial brief regarding admitting photocopies of the kites because the originals had been misplaced. (2 CT 435-440.) On June 16, 1994, he submitted a trial brief regarding

Evidence Code section 352 considerations on the kites' contents. (2 CT 461-472.) On July 6, 11, and 12, 1994, the court heard arguments and made rulings on various issues concerning their admissibility. (IX RT 2350-2354; X RT 2660-2667, 2740-2768, 2787-2797.)

1. *Massiah/Henry* Issue

The defense claimed the kites were inadmissible as fruits of the *Massiah* doctrine, alleging law enforcement deliberately elicited incriminating statements after appellant's right to counsel attached, thereby violating the Sixth Amendment. (IX RT 2350-2353, citing *Henry*).) The defense argued: once Ybarra embarked on debriefing, it was a life-long process wherein he became an agent of law enforcement; the Corcoran gang coordinator encouraged him to get information about other alleged gangsters; Parole Officer Castro told him the information he gave was insufficient and if he went into custody, then he should contact the gang coordinator in whatever prison he was in, thereby inadvertently reinforcing the agency relationship; when jailed, Ybarra kept trying to get more information; he undertook a plan to extract information from appellant – it began with his intent to get information for debriefing, but evolved into his idea of extracting a confession; he expected to get a deal from the DA if he got information about the murder; when he approached Detective Christian for a deal, he was not discouraged from gathering evidence and initiating conversations; he was not relocated, so he remained within appellant's proximity; and getting kites with appellant's incriminatory statements about other crimes was a reasonably foreseeable consequence of his preexisting arrangement with CDC to supply information on gang activities. (IX RT 2351-2353; X RT 2660-2666, 2744-2746.)

The prosecution conceded the statements were the product of interrogation. (X RT 2741.) Still, it contested a law enforcement agency relationship was created for Ybarra to continue to provide information,

especially information related to Andrews' murder. (X RT 2741-2743.) The prosecutor argued: the only contact one could infer an agency from would be the original CDC debriefing; Parole Officer Castro's subsequent discussion of potential debriefing in the future if Ybarra ended up in state prison did not create an agency; that concerned if Ybarra got to CDC, as opposed to jail; debriefing is a process whereby the institution and the inmate reach a classification status that is a concern for security and housing reasons; it is unreasonable to suggest that a gangster would forever become an agent of law enforcement when he has been debriefed to get particular housing; even assuming arguendo, Ybarra became an "agent for life" with respect to informing on gangs, the scope of the agency would be limited to just that; Ybarra acted outside that scope by gathering information on Andrews' murder for his own benefit. (X RT 2741-2743.)

The court inquired whether it could find there exists an open offer of leniency for anyone to provide valuable information to the DA in a case more important than his such that it creates a government policy whereby anyone can take advantage of it, thus, impliedly creating an agency relationship. (X RT 2744.) The prosecution argued such an open-offer theory would make virtually every person who came forward, except a true novice, a government agent, thereby precluding them testifying and that *Massiah* did not encompass that theory. (X RT 2747-2748.) The defense in turn argued that scenario was not applicable because Ybarra "had contacts with law enforcement reinforced all the way through."

Thereafter, the trial court denied the *Massiah* challenge, stating:

> I think these notions of scope of agency . . . remoteness, place where this occurred . . . they were talking about a prison versus a jail, where [CDC] is located . . . boils down to this: The prison of course is where convicts are. People have been convicted. . . . the State doesn't worry so much about their right to attorneys. The right to counsel is the issue where Massiah lands. In other words, has it been compromised by some

government action.

> [W]e ask the question: Was the incriminating statement gained as a result of government action to deliberately elicit from the accused in the absence of counsel that information? . . . The open offer theory or even the [CDC] debriefing theory, there has to be the recognition that somebody is accused of something and has counsel or right to counsel and that the government is taking some steps to have somebody compromise that right. And here, I don't believe [CDC] has been that focussed. I don't think they meant their debriefing to apply to settings outside their prison walls, and certainly wasn't encouraged by them, by Mr. Castro, to avoid getting back to CDC. And it was clear that this was not encouraged by Officer Christian. Quite the contrary. [¶] So . . . the claim of compromise of right to counsel because of government activity does not apply and the objection for the receipt of the letters or communications are denied . . .

(X RT 2748-2750.)

2. Lack Of Originals

The originals of the kites were misplaced, so the prosecutor sought to introduce photocopies under former Evidence Code section 1501. (2 CT 435-436; X RT 2750.) The defense objected, but the trial court overruled that objection. (X RT 2750.)

3. Evidence Code Section 352 And Relevance

Copies of 17 pages of handwritten kites appear in People's Exhibit 32. (2 SCT1 361-378.) Anticipating a stipulation to their authenticity, the prosecution sought to introduce passages from only pages 3 and 4 of those kites. (2 CT 462-463; 2 SCT1 364-365; X RT 2752-2753.) The passage from page 3 provided:

> I'm doing 29 to life for the first one Dude was my brother but was on the other side of the fence. on this other trip hey shit happens Homie the shit ain't over but I'll say this Dude had it coming both of them. I feel no different it don't bother me. I'm looking at the chair but I don't think they will get me on this trip anyway.

(2 SCT1 364, some capitalization omitted.) The passage from page 4 provided:

> [T]he vato here was a gava. on my carnal. he was an A.B. runner. see, im a half breed myself so there's more to that story than the paper says. tu sabes. Mikio pulled me down for his trial that why i was here. Aint no thing, brother before its over I'll tag a few more got to keep these fools in chek at times.

(2 SCT1 365, underline in original, some capitalization omitted.)

The defense challenged the kites as lacking foundation and relevancy, asserting their language was meaningless without interpretation of their slang; thereby implying a challenge under Evidence Code section 352,[73] that their introduction would tend to confuse the jury because of their lack of clear meaning. (X RT 2750-2751; see X RT 2751 [court's remarks].) The prosecutor proffered that Ybarra would testify to the Spanish slang (e.g., vato, gava); he also asserted the "A.B." reference for Aryan Brotherhood would require a great deal of explanation, but it could be sanitized to "he was a [blank];" he noted the term "tag" has various meanings – some sinister, some not – that are used commonly in the English language, and that "hom[ie]" is commonly known as a derivative of "home boy" meaning somebody from your home town. (X RT 2753-2755, 2795-2796.)

The defense challenged the kites' portions "I'm doing 29 to life for the first one Dude was my Brother but was on the other side of the fence," "Both of them," and "carnal" under Evidence Code section 352 because those refer to his prior conviction, which it contended would be unduly prejudicial and irrelevant. (X RT 2756, 2758-2759, 2764, 2794; see X RT 2757.) The prosecutor argued those portions make the context understandable and whole as a confession, whereas removing those portions would lessen their probative

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73. Evidence Code section 352 provides:

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

value. (X RT 2761, 2787, 2793.) The defense conceded that point, stating:

> [T]he statements referring to the brother do add a little emphasis. It makes it . . . clearer . . . as to an intent, but I think it's marginal. I can't sit here and argue that it doesn't add some meaning and that it doesn't in context make the other statement clearer. I'd be deceiving the Court if I tried to argue that.

(X RT 2790.) However, the defense argued the probative value is not enhanced much by leaving the other statement in when compared with its prejudice and that the thrust of the language comes through if that statement is omitted. (X RT 2790, 2793.)

The defense likewise challenged the portion "it don't bother me. I'm looking at the Chair But I don't think they will get me on this trip Anyway," which it asserted did not reflect on guilt or innocence, under Evidence Code section 352, arguing it was more prejudicial than probative because it goes to braggadocio-like attitudes of jail inmates, which would require explanation from Criminologist Hickey as to the jockeying for position among inmates and the false fronts that they put up. (X RT 2757-2758.)

The defense similarly challenged the portion "Aint no thing, Brother Before its over I'll tag a Few more got to keep these fools in chek at times" under Evidence Code section 352 because the term "tag" has many meanings, it would require an undue consumption of time, without context it would be irrelevant, and its relevance is marginal compared to its prejudice. (X RT 2759-2760, 2794.) The prosecutor argued that sentence is relevant and understandable as a confession when read in context of the paragraph that starts off mentioning "The vato here was a gava" (i.e., the guy here was a White boy) and appellant's "carnal" (i.e., brother) – as the prosecutor put it, "Dement has introduced the subject of the two people he has killed at the top of . . . that paragraph"and "'tag a few more' . . . means you've done a few before." (X RT 2760-2761, 2768, 2793-2794.) He further argued no expert was needed to tell the jury what "tag" means because it is clear from its context. (X RT 2761.)

The defense challenged the kite's portion "this other trip" as requiring further testimony to explain that refers to the current charges, which impliedly would unduly consume time. (X RT 2756; see X RT 2758, 2791.) It also asserted the jury may surmise it refers to some other crime, which is why it should not come in. (X RT 2791.)

The defense challenged the kite's portions "he was An A.B. a runner," "see, im A half Breed myself so there's more to that story than the paper says," and "Mikio pulled me down for his trial that why i was here" lack context and were irrelevant. (X RT 2759, 2794.) The prosecutor argued those phrases were neutral, replacing them with ellipses may cause the jury to wonder whether the writer is still on the same topic, and it is best to take the writer in the context he puts his thoughts in. (X RT 2789-2790.)

The prosecutor acknowledged the passages had a prejudicial side, but asserted their being "in essence a handwritten confession" (i.e., a roundabout way of saying "I did it") had "very extremely high probative value." (X RT 2761-2762; see X RT 2766-2767.) He noted the court could instruct the jury its use of the prior crime references is limited to putting the statements in context and that it was prohibited from using them to prove his guilt of the charged offense based on past conduct. (X RT 2762; see X RT 2787 [suggesting instruction in area of CALJIC No. 2.09, rather than CALJIC No. 2.50].) He also asserted the jurors were intelligent and fully able to follow such an instruction. (X RT 2763.) The defense still asserted, the jury would use the prejudicial prior offense evidence to show predisposition. (X RT 2764-2765.)

The prosecutor noted *People v. Balcom* (1994) 7 Cal.4th 414, 427 (*Balcom*) and *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*) reason a jury is less likely to improperly use a prior bad act when the person already has been convicted and is doing time. (X RT 2763; see 2 CT 470-471.) The defense argued those cases, which concern Evidence Code section 1101, note prior

criminal act evidence is so prejudicial that admission requires extremely careful analysis. (X RT 2763, 2790.) The defense also asserted *Balcom* looked at whether there was a common plan or feature (i.e., signature acts) and that appellant's shooting of his brother while under the influence of drugs was an impulse killing (which may require expert psychiatric testimony) that lacked commonality to Andrews' ligature strangulation. (X RT 2764, 2792.) However, the prosecutor asserted he was offering the passages simply as a confession, as opposed to proving conduct in conformity with a prior murder under Evidence Code section 1101, subdivision (b). (X RT 2766, 2787.)

In denying the defense's challenges, the court ruled:

> Okay. Status of this case is this, that one of three men could have performed this killing. One of four men could have performed this killing, at least the final touches of it, according to the evidence. [¶] And those who have testified are at least suspect in their testimony. They have been impeached from wall to wall on a variety of subjects. They could also be found to be co-participants as far as that's concerned, whose testimony may require corroboration by the jury. That gives the chief relevance to the statement attributed to Mr. Dement. It is highly relevant. It is very prejudicial, as the Court ruled earlier in this case. And in making a determination as to what if any of this should come in, it seems to me with regard to the first -- first letter, it should be admitted in its entirety.
>
> I tried to read this without the reference to the brother, and it doesn't make sense. It doesn't show that they were talking about a killing when they were talking about trips and tags. If it does, that point is for the jury to decide whether you have varying interpretations. That makes it a jury issue.
>
> With respect to the second offering, I would not intend to admit just, "he was a blank." That would invite speculation. You can either leave out the entire sentence or argue further with respect to leaving it in in its entirety. I think the second sentence, I think the point is well taken, it adds nothing. The rest of it may be admitted when offered at the time in trial when Mr. Ybarra gives his testimony for the jury's benefit.

(X RT 2796-2797.)

As noted in respondent's Argument IV, the parties stipulated, inter alia, that appellant wrote various kites, including the above referenced passages that were drawn from People's Exhibit 32 pages 3 and 4. (X RT 2815-2816; see X RT 2813-2814.) In setting forth that stipulation, the jury was told:

> It is further agreed that Exhibits Number 35 and Number 36 represent typed and prepared paragraphs extracted from two separate kites originally handwritten by [appellant]. The typed Exhibits 35 and 36 use exactly the same words as the original handwritten kites by [appellant]. Some punctuation has been added to agree with the typewritten form.

(X RT 2815-2816.) As part of that stipulation, the jury was informed what the terms "vato," "gava," "carnales," "tu sabes," and "kite" meant. (X RT 2816; see respondent's fn. 66, *ante*.) The prosecutor then read People's Exhibits 35 and 36 to the jury. (X RT 2816.) People's Exhibit 35, which corresponds to People's Exhibit 32 page 3, provides:

> "I'm doing 29 to life for the 1st one, Dude was my brother but was on the other side of the fence. On this other trip, hey shit happens Homme [sic; Homie]. The shit ain't over but I'll say this, Dude had it coming, both of them. I feel no different, it don't bother me. I'm looking at the chair but I don't think they will get me on this trip anyway."

(2 SCT1 379; cf. 2 SCT1 364.) People's Exhibit 36, which corresponds to People's Exhibit 32 page 4, provides:

> "The vato here was a gava. On my carnales. he was a runner. See I'm a half breed myself so there's more to that story than the paper says, tu sabes. Mikio pulled me down for his trial, that why I was here. Ain't no thing brother before it's over I'll tag a few more, got to keep these fools in check at times."

(2 SCT1 380; cf. 2 SCT1 365.) Thus, the latter was sanitized to read "a runner" instead of "an A.B. runner," the term "carnal" was presented to the jury as "carnales," and the word "chek" was spelled "check." (*Ibid.*)

Thereafter, the trial court instructed the jury concerning reference to a crime other than that for which appellant was on trial, stating "[t]he evidence was received and may be considered by you only for the limited purpose of

providing context and meaning to the written statement made by the Defendant." (X RT 2818-2819.) The court later mentioned that limiting instruction, stating "I've given you a cautionary instruction already to indicate -- to make sense of some of these kites that you've heard; that if it does make sense to you, that you may consider for a limited purpose that reference of the killing of the brother, true or false; it doesn't make any difference, but it gives meaning to the statement." (XI RT 2929.)

Subsequently, in his initial closing argument, the prosecutor argued the significance of the kites Ybarra had received from appellant, while reminding the jury it could not misuse the kites' evidence about a prior killing to conclude that appellant had a predisposition to commit such an offense. (XI RT 2996-2999.) The court further reminded the jury of how to evaluate evidence that was admitted for a limited purpose, impliedly including evidence such as the kites. (XI RT 3112-3113.)

C. Applicable Law

This Court aptly summarized the law applicable to *Massiah/Henry claims* in the capital case of *People v. Fairbank* (1997) 16 Cal.4th 1223 (*Fairbank*):

> To prove a violation of the Sixth Amendment, a defendant "must establish that the informant . . . was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage." (*In re Neely* (1993) 6 Cal.4th 901, 915.) If an informant "acts on his own initiative," even if he interrogates the accused, "the government may not be said to have deliberately elicited the statements." (*People v. Whitt* (1984) 36 Cal.3d 724, 742; see also *In re Neely, supra*, 6 Cal.4th at p. 915; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1240.) "[A] preexisting arrangement [with government agents], however, . . . need not be explicit or formal, but may be 'inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct' over a period of time. [Citation.]" (*In re Neely, supra*, 6 Cal.4th at p. 915, quoting *U.S. v. York*

(7th Cir. 1991) 933 F.2d 1343, 1357.) Specific direction from government agents (*In re Neely*, *supra*, 6 Cal.4th at p. 915) or a prior working relationship with government agents (*id.* at pp. 917-918; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1241) can establish an implicit agreement. Once the defendant establishes "a preexisting arrangement," the "defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459.) [¶] Whether to allow an informant's testimony is "an essentially factual question, and we review it on a deferential standard." (*People v. Memro* (1995) 11 Cal.4th 786, 828.)

(*Id.*, 16 Cal.4th at pp. 1247-1248, parallel citations omitted.)

Only relevant evidence (i.e., evidence that has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of the action) is admissible. (Evid. Code, §§ 210, 350.) Even relevant evidence may be excluded if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352; *People v. Pierce* (1979) 24 Cal.3d 199, 211 (*Pierce*).) The determination of the relevancy and the admissibility of evidence is for the trial court to make; its decision will not be disturbed absent a "'showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124 (*Rodrigues*), quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316; accord *People v. Northrop* (1982) 132 Cal.App.3d 1027, 1042.)

D. The Court Properly Admitted Appellant's Written Statements

1. No *Massiah/Henry* Violation Occurred

Here, the trial court reasonably found Ybarra had not acted as a governmental agent when he elicited the incriminating kites from appellant. (X RT 2749.)

With respect to kites appellant gave to Ybarra *before* Ybarra contacted Detective Christian (IX RT 2326-2327, 2329-2330), including the passage from People's Exhibit 32 page 4 (2 SCT1 365) as set forth in People's Exhibit 36 (2 SCT1 380), there was no Sixth Amendment violation. Ybarra testified Appellant "got at" him first and tried to "interrogate" him. Ybarra reversed that, however, and began getting information and names from appellant because Ybarra, who could tell appellant was a gang member or sympathizer, "wanted to know what he was all about, know of my surroundings" to determine whether appellant posed a personal danger. (IX RT 2299, 2344, 2347, 2349.) Thus, Ybarra

> acted wholly on his own initiative, and police did nothing to elicit [appellant's] admissions. "[T]he Sixth Amendment is not violated whenever--by luck or happenstance--the State obtains incriminating statements from the accused after the right to counsel has attached." (*Maine v. Moulton* (1985) 474 U.S. 159, 176; see also *In re Neely*, *supra*, 6 Cal.4th at p. 915; *People v. Gonzalez*, *supra*, 51 Cal.3d at pp. 1240-1241; *People v. Williams* (1988) 44 Cal.3d 1127, 1141; *People v. Whitt*, *supra*, 36 Cal.3d at pp. 742-743.)

(*Fairbank*, *supra*, 16 Cal.4th at p. 1248, parallel citations omitted.)

Likewise, when Ybarra wrote kites to appellant to get names of gang members and sympathizers with the intention of debriefing (IX RT 2299-2300, 2343-2344), Ybarra acted on his own initiative. Although he testified the Corcoran gang coordinator had told him to give everything he knew about his prison gang for as long as he lived (IX RT 2298), Parole Officer Castro, who was a gang institutional coordinator for CDC's Fresno parole unit, did *not* consider debriefing to be a lifetime process (X RT 2606-2608, 2618). Thus, this Court should reject appellant's attempt for a blanket rule that once Ybarra opted to debrief "any information so obtained from an inmate concerning pending charges may not be used in the prosecution of those charges." (AOB 176.)

Still, appellant alleges Ybarra had an "agreement with CDC to receive compensation by way of less onerous prison housing in return for new information about gang activities." (AOB 178.) Yet, no evidence was presented that "less onerous prison housing" was ever offered, let alone given to Ybarra. Regardless, any such agreement was rendered obsolete by his parole from prison. In fact, when Parole Officer Castro subsequently met with Ybarra at Ybarra's request, he questioned why Ybarra came forward to debrief given that Ybarra had already initiated the debriefing process. (X RT 2610-2611, 2615.) He also did not understand Ybarra's motivation to debrief because Ybarra was not in custody or facing parole violations. (X RT 2613-2614.)

Parole Officer Castro's "send-off" to Ybarra was telling him that if he went back into CDC, then he should contact an institutional investigator and make it known he wanted to provide specific and additional information related to his gang activity. (X RT 2614-2615, 2620.) He further told Ybarra that he was doing well on parole so debriefing should not be an issue because he would not go back to prison if he kept up his performance. (X RT 2614, 2620-2621.) Thus, his remark was specific to Ybarra's going back into prison,[74] as opposed to jail, which was the scenario here. Ybarra even testified that his ultimately handing over the kites to Detective Christian was not part of his debriefing. (IX RT 2299.) Moreover, Parole Officer Castro testified "I did not tell him to get any additional information." (X RT 2615.) Thus, the trial court correctly concluded Ybarra "wasn't encouraged by . . . Mr. Castro." (X RT 2749; see *People v. Dominick* (1986) 182 Cal.App.3d 1174, 1198-1199 & fn. 18 [no *Massiah/Henry* violation where defendant, who made incriminatory statements, was place in jail module wherein there was reliable paid informant on street

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74. As appellant notes debriefing "may be well suited to a prison setting, where convictions are generally final." (AOB 176.) It follows, there was nothing improper about Parole Officer Castro sending appellant off with that remark.

narcotics activity (CRI); about a month earlier, CRI had called DA investigator with whom he had previous dealings and "very vaguely" spoke about receiving "some kind of consideration as to sentence" if he came "across something while . . .in . . .jail" and that if he did come across anything, then he would call investigator, who told him to "stay in touch"; investigator at no time instructed him to seek out information from inmates concerning criminal activity and never paid him money to act as "listening post" while jailed; further, no one had instructed CRI to make contact with defendant or any other inmate; noting investigator could have had no connection with defendant's crimes since they had not even occurred at time investigator conversed with CRI].)

With respect to kites appellant gave to Ybarra *after* Ybarra contacted Detective Christian (IX RT 2327, 2329),[75] there also was no Sixth Amendment violation. Ybarra's contact with the detective did not make him a law enforcement agent. (*Fairbank, supra*, 16 Cal.4th at p. 1248, citing *People v. Whitt* (1984) 36 Cal.3d 724, 744.) Just like the informant in *Fairbank* "[o]f course, [Ybarra] may have hoped to receive some benefit in exchange for his ongoing receipt of information, but he nevertheless continued to act on his own initiative." (*Fairbank, supra*, 16 Cal.4th at p. 1248.) Ybarra expressly testified no one told him to report any statements appellant made about Andrews' murder: "No, I did it on my -- that on my own. I was trying to attain that on my own. No one ever told me to do anything" (IX RT 2320) – "Anybody knows that . . . if you know about a murder . . . the law's going to want to know about it" (IX RT 2343). Ybarra testified:

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75. It was unclear which of People's Exhibit 32's other pages Ybarra got after talking to the detective – Ybarra "guess[ed] that [page 3, which corresponds to the excerpt in People's Exhibit 35,] was pretty much after," but he was not positive (IX RT 2327) and he indicated possible uncertainty about others (IX RT 2329).

> I did get at him for debriefing matters to begin with. . . . and then after he told me he was in for 187,[76] then I got the idea of he's giving me all these names, maybe I can work him on confessing, and I knew that if I could get that, I pretty much knew that I'd get a deal from the D.A.

(IX RT 2348.)

Although Detective Christian told Ybarra to retain anything he received from appellant, he did not tell Ybarra to send kites to appellant. (VIII RT 2160.) He specifically told Ybarra: not to elicit information from appellant "on our behalf," not to ask appellant anything specific to this case, that appellant already had invoked his right to counsel, and that Ybarra was not to discuss the case with appellant and then bring those letters to the detective. (VIII RT 2161.) Thus, contrary to appellant's characterization and speculative inference, Detective Christian did not act "with a wink and a nod" (AOB 179) in telling Ybarra not to gather information about this case. In fact, Detective Christian testified he had heard of a case that says that a law enforcement officer cannot request a person who is in custody, who is an informant, to elicit incriminating statements from someone else in custody and "That's exactly why I did not do that." (*Ibid.*)

Additionally, Detective Christian and Ybarra did not operate under an implicit agreement.

> As noted, a court can infer an agreement between police and an informant if "'the parties behaved as though there were an agreement between them, following a particular course of conduct' over a period of time. [Citation.]" (*In re Neely*, *supra*, 6 Cal.4th at p. 915, quoting *U.S. v. York*, *supra*, 933 F.2d at p. 1357.) In addition, an informant's prior working relationship with police may imply an agreement (*In re Neely*, *supra*, 6 Cal.4th at pp. 917-918), particularly when police knew from the circumstances that the informant likely "would take affirmative steps to secure incriminating information." (*United States v. Henry* (1980) 447 U.S. 264, 271.)

(*Fairbank*, *supra*, 16 Cal.4th at p. 1248, parallel citation omitted.) Ybarra told

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76. See respondent's footnote 72, ante.

Detective Christian that, other than debriefing CDC investigators regarding activities in the facilities, he had never worked for law enforcement. (VIII RT 2174.) Thus, Ybarra had no prior working relationship with the sheriff's department, let alone Detective Christian, in helping to solve active cases. Moreover, the detective and Ybarra did not behave as though there were an agreement between them.

Specifically, Detective Christian testified that when Ybarra asked if anything could be done about his present charges, he told Ybarra that was up to Ybarra's attorney and the DA's Office and he could make no promises. (VIII RT 2160.) Ybarra similarly testified the detective said he could not tell Ybarra to collect kites from appellant and if Ybarra did obtain information, the best Ybarra could do was write another request and turn it in and either he or another detective would show them to the D.A. and possibly Ybarra could work out a deal in his case, but he did not promise anything specific and said he could not guarantee Ybarra anything. (IX RT 2302-2303, 2341.) In fact, Ybarra testified that when he handed the packet of kites to Detective Christian, the detective said all he could do was turn them over to the prosecutor and "there was no guarantee he was going to get back at me." (IX RT 2313-2314.)

Here, the trial court specifically found "it was clear that this was not encouraged by Officer Christian. Quite the contrary. [¶] So . . . the claim of compromise of right to counsel because of government activity does not apply." (X RT 2749.) Substantial evidence supports those findings, and thus, this Court must defer to them. (*Fairbank*, *supra*, 16 Cal.4th at pp. 1248-1249.)

> "The police simply made use of [Ybarra's] own motivation to inform on defendant, a technique we found not to be a knowing subversion of the defendant's right to counsel in [*People v.*] *Whitt*, *supra*, 36 Cal.3d at pages 742-743." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.)

(*Fairbank*, *supra*, 16 Cal.4th at pp. 1248-1249, parallel citation omitted.) This is especially so because, unlike in *Fairbank*, where the prosecutor deliberately

intervened to prevent the sheriff's department from moving the defendant away from the jailhouse informant (*id.* at pp. 1247-1248), no such intervention occurred here. Further, unlike the scenario in *Randolph v. People of the State of California* (9th Cir. 2004) 380 F. 3d 1133 (*Randolph*), upon which appellant relies (AOB 180-181), the prosecution did not put Ybarra in appellant's cell. Thus, there is no basis to find that Ybarra acted as an agent of the state. (Cf. *Randolph*, *supra*, 380 F.3d at p. 1144 [held explicit agreement to compensate jailhouse informant is unnecessary to find he acted as agent of State where sufficient undisputed evidence showed State made conscious decision to obtain inmate's cooperation and that inmate consciously decided to provide that cooperation, thereby rendering him an agent of State when he was put back in cell after meeting with prosecutor and detective; accepting as true State's contention that cellmate was told not to expect deal in exchange for testimony, but noting he hoped to receive leniency and that, acting on that hope, he cooperated with State; finding prosecutor and detective either knew or should have known he hoped he would be given leniency if he provided useful testimony against defendant].)

Additionally, appellant claims the trial court's alleged erroneous denial of his *Massiah* motion violated his rights under the state and federal constitutions to due process, to a fair trial by an impartial jury, to a fair and reliable adjudication at all phases of his capital case[77], to be free from cruel and unusual punishment. (AOB 156, 190-191, 193-194, citing Cal. Const., art. I, §§ 1, 7, 15-17; U.S. Const., 5th, 6th, 8th & 14th Amends.) Because the trial court properly denied his *Massiah* motion, his related claims must fail. (*Fairbank*, *supra*, 16 Cal.4th at p. 1249.)

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77. Appellant's challenge to the kites' reference to his brother in regards to the jury's penalty phase determination (AOB 156, 190-191, 193-194) is strange because evidence that he murdered his brother certainly was admissible in the penalty phase.

2. The Kites Were Relevant And The Trial Court Properly Exercised Its Section 352 Discretion In Admitting Them

Appellant also claims the kites' admission violated state law (Evid. Code, §§ 210, 350-352, 1101) because they had little or no probative value in contrast to their prejudicial and inflammatory nature, they contained irrelevant evidence, and they amounted to inadmissible criminal propensity evidence. (AOB 156-157, 182-191, 193.) His claims lack merit.

To reiterate, the trial court ruled, in part:

> [W]ith regard to the first -- first letter, it should be admitted in its entirety. [¶] I tried to read this without the reference to the brother, and it doesn't make sense. It doesn't show that they were talking about a killing when they were talking about trips and tags. If it does, that point is for the jury to decide whether you have varying interpretations. That makes it a jury issue. [¶] With respect to the second offering, I would not intend to admit just, "he was a blank." That would invite speculation. . . .

(X RT 2796-2797.) Appellant assumes the court's second paragraph was talking solely about People's Exhibit 35. (AOB 183-185.) Yet, it appears the court was talking collectively about People's Exhibits 35 and 36, which correspond to People's Exhibit 32 pages 3 and 4, respectively, because the former contains the terms "brother" and "trip" (2 SCT1 379; cf. 2 SCT1 364) and the latter contains the terms "carnales [*sic*; carnal (i.e., brother)]" and "tag" (2 SCT1 380; X RT 2816; cf. 2 SCT1 365).

Nonetheless, appellant asserts the probative value of People's Exhibit 35 was based on two alleged errors that improperly skewed the balancing against its prejudicial effect. (AOB 183-185.) Specifically, he challenges the trial court's findings that without that passage(s)'s reference to the brother: (1) it "doesn't show that they were talking about a killing when they were talking about trips and tags;" and (2) "it doesn't make sense." (*Ibid.*) That passage provided, in pertinent part:

> "I'm doing 29 to life for the 1st one, Dude was my brother . . . On this other trip . . . Dude had it coming, both of them. . . . I'm looking at the chair but I don't think they will get me on this trip anyway."

(2 SCT1 379.) People's Exhibit 36 likewise provided, in part: "The vato here was a gava. On my carnales. he was a runner. . . before it's over I'll tag a few more . . ." (2 SCT1 380.)

As noted in respondent's Argument IV, *ante*, a reasonable interpretation is that "On this other trip" refers to appellant's charges in the instant case (i.e, murder; see XI RT 3025), where he was "looking at the chair" (the proverbial "execution chair") – which is why that latter phrase was relevant because it ties it in with the instant capital case. It also is reasonable to infer "the 1st one" refers to a murder, especially given appellant's remark "Dude had it coming, both of them" which implied the same fate that befell the second "Dude," befell the first "Dude" (his brother).

The foregoing was bolstered by the phrase "before it's over, I'll tag a few more" in the last sentence of People's Exhibit 36. Given that Criminologist Hickey said "tag" can mean, inter alia, "kill" (XI RT 2870), appellant's remark that he will "tag a few more" when considered in conjunction with the references in People's Exhibit 35, collectively indicate the type of "tag" he was referring to was killing (i.e., murder). The relevance of that last sentence is that it amounts to a confession when read in context of the paragraph that starts off mentioning "the white guy here" (i.e., "The vato here was a gava") and appellant's "brother" (i.e., "carnal"). Again, as the prosecutor put it, "Dement has introduced the subject of the two people he has killed at the top of . . . that paragraph"and "'tag a few more' . . . means you've done a few before." (X RT 2760-2761, 2768, 2793-2794.) Even the defense, while arguing the relevance as being marginal, conceded:

> [T]he statements referring to the brother do add a little emphasis. It makes it . . . clearer . . . as to an intent . . . I can't sit here and argue that it doesn't add some meaning and that it doesn't in context make the other

statement clearer. I'd be deceiving the Court if I tried to argue that. (X RT 2790.) Further, although the court and counsel knew appellant had murdered his brother (X RT 2791-2792), his having done so also is a reasonable inference from those passages.

Accordingly, the trial court's findings that without the passage(s)'s reference to the brother it "doesn't show that they were talking about a killing when they were talking about trips and tags" and "it doesn't make sense" (X RT 2796) was sound. Further, as the prosecutor argued, its probative value as a handwritten confession was "very extremely high" (X RT 2762) and outweighed its potential prejudicial effect. Thus, contrary to appellant's claim (AOB 185-186, 190), the court did not abuse its discretion in declining to redact the references to his prior crime against his brother[78] or in admitting the passages.

Appellant makes similar challenges to the passage in People's Exhibit 36. (AOB 186-190.) For the reasons already articulated, that passage was relevant and extremely probative. Hence, the court did not abuse its discretion in admitting it. Rather than repeat that analysis, respondent will merely refute points not previously addressed.

As for the portion ". . . he was a runner" (2 SCT1 380; cf. 2 SCT1 365 ["he was an A.B. runner"]), which refers to his brother, appellant suggests that portion may refer to a different brother and he notes he had a living brother in the A.B. (AOB 187, fn. 103.) Notably, that portion used the past tense "was" as opposed to the present tense "is" such that it was consistent with referencing his brother who had passed on. Still, he argues it "adds nothing probative, and only serves to confuse issues" (AOB 186) such that it invited the jury to

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78. Appellant erroneously refers to the prior crime against his brother as having been "uncharged." (AOB 184-185, 190.) It was a second-degree murder *conviction*. (X RT 2791.)

speculate on its meaning (AOB 189; see AOB 191). The trial court ruled:

> I would not intend to admit just, "he was a blank." That would invite speculation. You can either leave out the entire sentence or argue further with respect to leaving it in in its entirety.

(X RT 2797.) No further discussion of that appears, however, the defense impliedly agreed to leave in that phrase given the stipulation in the record. (X RT 2816; see X RT 2813-2815.) Thus, he should not now be permitted to complain about it.

Also, while he similarly complains People's Exhibit 35's phrase ". . . but was on the other side of the fence" was vague and invited speculation as to its meaning (AOB 189-190; see AOB 191), the prosecutor merely read that portion to the jury, but did not emphasize it (XI RT 2996, 2998). Defense counsel did the same. (XI RT 3025; see XI RT 3026-3027.) Hence, it is unlikely the jury gave it any significance.

As for the portion "See I'm a half breed myself so there's more to that story than the paper says, tu sabes. Mikio pulled me down for his trial, that why I was here" (2 SCT1 380; cf. 2 SCT1 365), appellant argues "[t]he statements regarding [his] ancestry, some unknown reference in 'the paper,'[fn. omitted] and why [he] was housed in . . . Jail add nothing relevant or probative" (AOB 186). Yet, the defense ultimately agreed to their inclusion given the stipulation (X RT 2816; see X RT 2813-2815), so he should not now be permitted to complain about them. Moreover, in arguing that passage to the jury, the prosecutor said those statements were "simply filler" (XI RT 2998), thereby de-emphasizing them and eliminating any potential for harm.

As for the portion "The vato here was a gava. On my carnales. he was a[n] [A.B.] runner" (2 SCT1 380), appellant argues the punctuation may be different such that there may be a comma, rather than a period, between "gava" and "on" (cf. SCT1 365), which he asserts makes it "more likely that the 'AB runner' refers to the 'vato' who 'was a gava'" (AOB 188). He further asserts "if

the AB runner isn't [his] brother . . . then there is no basis for a conclusion that 'the vato' refers to Andrews, or that this kite refers to this case at all." (AOB 188-189.) Again, however, the defense impliedly stipulated to that punctuation (X RT 2816; see X RT 2813-2815), so he should not now be permitted to complain about it. Further, he never objected to the punctuation below. Once again, "[w]hen a party does not raise an argument below, he may not do so on appeal. (*Clark*, *supra*, 5 Cal.4th at p. 988, fn. 13; *Raley*, *supra*, 2 Cal.4th at p. 892.) In any event, the prosecutor's interpretation that "he was a runner" refers to appellant's brother is a reasonable inference which the jury could draw from that passage.

Nonetheless, appellant argues "[t]he strongest import of these two exhibits as used at appellant's trial was an improper and prejudicial suggestion of criminal or homicidal propensity, and future dangerousness." (AOB 190 & fn. 107 referring to Appellant's Arg. IV.) Yet, the trial court gave a limiting instruction to the jury informing them, in part, that references to appellant having committed another crime:

> was not received and may not be considered by you to prove that [appellant] is a person of bad character or that he has a disposition to commit crimes. The evidence was received and may be considered by you only for the limited purpose of providing context and meaning to the written statement made by [appellant].

(X RT 2818-2819.) The court later mentioned that limiting instruction. (XI RT 2929.) Subsequently, the prosecutor argued the significance of the kites, while reminding the jury it could not misuse the kites' evidence about a prior killing to conclude that appellant had a predisposition to commit such an offense. (XI RT 2996-2999.) The court further reminded the jury of how to evaluate evidence that was admitted for a limited purpose, impliedly including evidence such as the kites. (XI RT 3112-3113.) Again, jurors are presumed to adhere to a trial court's instructions absent evidence to contrary. (*Olguin*, 31 Cal.App.4th at p. 1374.) Nothing in the record indicates the jury failed to

comply with the trial court's limiting instructions.

Further, although appellant argues the prosecutor "apparently relied on the stricken testimony of Nelson that appellant had bragged that he had killed his brother" (AOB 191, citing Appellant's Arg. IV), the prosecutor's closing arguments made no mention of Nelson's stricken testimony (see XI RT 2949-3002, 3079-3103).

Appellant also claims that to the extent admission of this evidence violated only state law, his rights to due process, equal protection, a fair trial by an impartial jury and a reliable death judgment were violated by the State arbitrarily withholding a nonconstitutional right provided by its laws. (AOB 193, citing, inter alia, U.S. Const., 5th, 6th, 8th & 14th Amends; Cal. Const., art. I, §§ 1, 7, 15, 16.) Because no state law error occurred, those related claims must fail. Moreover, because he does not explain how he was treated differently than other similarly situated defendants, his equal protection claim should be rejected as insufficiently developed. (*Williams*, *supra*, 16 Cal.4th at pp. 206, 250 [points perfunctorily asserted are deemed to lack foundation if they are not supported by factual and legal argument]; *Rodrigues*, *supra*, 8 Cal.4th at p. 1116, fn. 20 [same].)

E. Even Assuming Arguendo, The Court Erred In Admitting Appellant's Written Statements, Any Error Was Harmless

Appellant argues:

> Given the closely balanced nature of the evidence . . . and the length of the jury deliberations (see Arg. II) the erroneous admission of [his written statements] and the prosecution's use of [them] in argument, was undoubtedly prejudicial.

(AOB 192-193.) Yet, assuming arguendo that the court erred in admitting his written statements, respondent submits its error was harmless. As explained in respondent's Argument II, subheading F *ante*, contrary to appellant's claim (AOB 192), the jury's deliberations did not indicate the case was close.

Moreover, appellant had a motive to attack and kill Andrews based on appellant's animosity towards Andrews' friend Rutledge, who was appellant's enemy and about whom appellant voiced a threat that Rutledge essentially would suffer the same fate. (X RT 2671-2674.) The strength of other evidence aside from appellant's written statements is summarized further in respondent's argument II, subheading F and argument IV, subheading E *ante*, which respondent incorporates by reference. Given that evidence, it is not reasonably probable appellant would have obtained a more favorable result if his written statements had not been admitted. (*Watson*, *supra*, 46 Cal.2d at p. 836.) For the same reasons, any error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

Accordingly, based on the foregoing, appellant's claims should be rejected.

VI.

COUNT TWO'S GUILTY VERDICT FOR VIOLATING SECTION 288A AND THE SECOND SPECIAL CIRCUMSTANCE'S TRUE FINDING WERE PROPERLY FOUND

Appellant's sixth argument claims count two's guilty verdict for violating section 288a, as well as the second special circumstance, must be vacated, and the jury's finding of felony murder must be stricken, as having been based upon an act not prohibited by that statute. (AOB 195-217; see AOB 406.) His claim lacks merit.

A. Procedural Background

Pursuant to a section 995 motion the defense challenged the sufficiency of preliminary hearing evidence to support count two and the second special circumstance, alleging the act of kissing the penis does not constitute the crime of oral copulation under section 288a. (1 CT 203, 209-212.) The prosecution opposed that motion (1 CT 228, 232), which the judge denied (1 CT 237 as amended[79]; Pretrial RT 33 (May 12, 1993)). Later, after the prosecution's case-in-chief, the defense moved for dismissal (§ 1118.1) of the oral copulation special circumstance and its use in the felony murder allegation, asserting the oral copulation was separate and apart from the strangulation. In doing so, the defense retracted from its earlier position and asserted kissing of the penis was sufficient to constitute oral copulation, stating:

> Now, *in terms of an oral copulation, of course we've got the testimony on the part of both Benjamin and Bond that our client made the victim, Greg Andrews, kiss his penis, okay? So, if you're looking at substantial evidence on appeal, I can't really argue that there was no evidence of an oral copulation. There's sufficient on the standard to get past the 1118.1*, but a special circumstance . . . requires [it] be in

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79. A prior minute order erroneously indicated the motion was granted. (1 CT 236; see 2 SCT3 327–328; 1 SCT4 122-124.)

furtherance of the murder, and that they be part and parcel of each other. [¶] Now . . . the oral copulation occurred at a point earlier in time and is detached from any act of murder such that you cannot say [it] was in furtherance of the murder or that the murder was part and parcel of [it] . . . *even if there's substantial evidence for the underlying charge of oral copulation.*

(X RT 2851-2852, emphasis added; accord XI RT 2938-2939 [defense acknowledged there was sufficient evidence to go to the jury on whether there was an oral copulation based on testimony about kissing of the penis, while noting it had fully briefed issue in 995 motion].)

As for the oral copulation charge, the trial court instructed the jury, in pertinent part:

> Oral copulation is the act of copulating the mouth of one person with the sexual organ of another person. Any contact, however slight, between the mouth of one person and the sexual organ of another person constitutes oral copulation. Penetration of the mouth or sexual organ is not required. Proof of ejaculation is not required.

(XI RT 3131; 3 CT 608-609, 686; CALJIC No. 10.14 (1989 [*sic*; 1993] Revision).)

B. Factual Background

Benjamin testified: appellant slapped and punched Andrews about the face and got even more violent; Andrews was on his mattress trying to cover up; appellant began calling Andrews a "punk;" Andrews said he was not a punk and told appellant to leave him alone; appellant pulled his penis out through the hole of his boxer shorts and asked in a commanding fashion for Andrews to kiss it; Andrews at first declined, saying he wasn't "like that"; appellant told Andrews "If you just kiss it, I'll leave you alone;" Andrews kissed appellant's flaccid, circumcised penis as appellant stood over Andrews; the kiss was fast; then appellant backed away from Andrews and told Bond "I told you he was a punk, a piece of shit"; thereafter, appellant ripped off Andrews' boxer shorts and said "I ought to fuck him" (i.e., have anal sex); appellant also asked

Benjamin and Bond if they wanted to "fuck" Andrews, but they declined. (VI RT 1453-1454, 1457-1462, 1474-1478, 1514-1516, 1521; but see VI RT 1618-1622, 1653-1654 [Benjamin was unsure if appellant ripped off Andrews' boxers before or after appellant made Andrews kiss his penis].)

Bond testified: Appellant began talking to Andrews, saying things like he's a "punk" and he was "going to fuck [Andrews]"; appellant took his penis out through the fly of his boxer shorts and said something like "Watch this, the guy's a punk" "Watch him kiss my dick"; appellant told Andrews "Do it"; Andrews was on a mattress on the floor; appellant also was on the floor either on his knees or standing next to Andrews; Andrews kissed the head of appellant's semi-erect, penis; the kiss was fleeting; appellant said "I told you he was a punk"; appellant also asked if anybody else wanted to fuck Andrews or "get their dicks sucked"; Bond and Benjamin both said "no." (IX RT 2385-2388, 2396, 2477-2480, 2482, 2563, 2565.)

Criminologist Hickey testified the term "punk" in prison is

> usually often used, meant to be somebody who is not only on the lower rung of the scale within the system, but *somebody who is used sexually*, he's owned by another inmate, if you will, sometimes shared or sold to other inmates.

(XI RT 2888, emphasis added; see XI RT 2878-2879 [example of inmate becoming a punk].) Martinez told Detective Christian the morning after appellant was released for breakfast, appellant was bragging, saying "I killed the punk." (VII RT 1789-1790.)

C. Standard Of Review

This Court reviews the entire record in a light most favorable to the finding below and presumes the existence of every fact the trier could reasonably deduce from the evidence in support of that finding. (*People v. Johnson* (1980) 26 Cal.3d 557, 575-578; *People v. Redmond* (1969) 71 Cal.2d 745, 755; *In re Khamphouy S.* (1993) 12 Cal.App.4th 1130, 1134; see *Jackson*

v. Virginia (1979) 443 U.S. 307, 318-319.) The finding may not be reversed for insufficient evidence unless it clearly appears that upon no hypothesis whatsoever is there sufficient substantial evidence (i.e., evidence of legal significance, reasonable in nature, credible and of solid value) to support it. (*People v. Samuel* (1981) 29 Cal.3d 489, 505; *People v. Redmond*, *supra*, 71 Cal.2d at p. 755; *In re Khamphouy S.*, *supra*, 12 Cal.App.4th at p. 1134.)

Moreover, so long as the circumstances reasonably justify the trier of fact's finding, the reviewing court's opinion that the circumstances might also be reasonably reconciled with a contrary finding does not warrant reversal. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124; *People v. Redmond*, *supra*, 71 Cal.2d at p. 755; *People v. Nicolaus* (1991) 54 Cal.3d 551, 576; *People v. Jones* (1990) 51 Cal.3d 294, 314 [reviewing court is concerned only with whether record contains evidence which would justify finding by any reasonable trier of fact that all essential elements of particular offense had been established beyond reasonable doubt].)

D. Applicable Rules Of Statutory Interpretation

In construing a statute, a reviewing court's primary task is to determine the lawmakers' intent so as to effectuate the law's purpose. (*People v. Mendoza* (2000) 23 Cal.4th 896, 907; *People v. Overstreet* (1986) 42 Cal.3d 891, 895 (*Overstreet*); *People v. Ramirez* (1995) 33 Cal.App.4th 559, 563 (*Ramirez*); *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1448 (*Catelli*).) In doing so, the reviewing court first considers the words used and accords them their plain, ordinary meanings based on the language used and the statute's evident purpose. (*Ibid.*; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 (*Lungren*); *Catelli*, *supra*, 227 Cal.App.3d at p. 1448.) If the words are clear and unambiguous, then the plain meaning of the language governs and there is no need for judicial construction; this is called the "plain meaning" rule. (*Diamond Multimediasystems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047;

Overstreet, *supra*, 42 Cal.3d at p. 895; *Ramirez*, *supra*, 33 Cal.App.4th at p. 563.)

The "plain meaning" rule, however, is only the starting point in statutory interpretation, not the end-all. It does not prohibit a court from determining whether a statute's literal meaning comports with its purpose. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659 (*Lakin*); *Lungren*, *supra*, 45 Cal.3d at p. 735; *Ramirez*, *supra*, 33 Cal.App.4th at p. 563.) If a literal construction is contrary to the apparent legislative intent, then the statute will, if possible, be read so as to conform with the spirit of the act. (*Lakin*, *supra*, 6 Cal.4th at p. 659; *Lungren*, *supra*, 45 Cal.3d at p. 735; *Ramirez*, *supra*, 33 Cal.App.4th at p. 563; *Catelli*, *supra*, 227 Cal.App.3d at p. 1448; see § 4 [penal provisions are to be construed according to fair import of their terms with view to effect their object and promote justice].) Further, statutory language "should not be given a literal meaning if doing so would result in absurd consequences." (*People v. Pieters* (1991) 52 Cal.3d 894, 898; accord, *People v. Ledesma* (1997) 16 Cal.4th 90, 95; *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276; *Catelli*, *supra*, 227 Cal.App.3d at p. 1448.)

Lastly, if the words used are ambiguous or if the statute is susceptible of more than one construction, then the defendant is entitled to every reasonable doubt as to the true interpretation of the words or the construction of the statute. (*People v. Overstreet*, *supra*, 42 Cal.3d at p. 896; *People v. Smith* (1955) 44 Cal.2d 77, 79.) Yet,

> it must be emphasized that the canon [that ambiguities are to be resolved in a defendant's favor] entitles the defendant only to the benefit of every *realistic* doubt. . . . [it] is not an inexorable command to override common sense and evident statutory purpose.

(*People v. Anderson* (1987) 43 Cal.3d 1104, 1145-1146, citations and internal quotation marks omitted; see *People v. Martin* (1995) 32 Cal.App.4th 656, 662.)

E. Applicable Law

Section 288a, subdivision (e) provides punishment for "Any person who participates in an act of oral copulation while confined . . . in any local detention facility." Section 288a, subdivision (a) defines "Oral copulation" as "the act of copulating the mouth of one person with the sexual organ or anus of another person."

F. Count Two's Guilty Verdict, The Second Special Circumstance, And The Felony Murder Finding Were Properly Found Under Existing Law

Appellant claims evidence he forced Andrews to kiss appellant's penis is insufficient as a matter of law to establish oral copulation under section 288a, which requires "the act of copulating the mouth of one person with the sexual organ . . . of another person." (AOB 195, 197.) He asserts something more than fleeting contact between the mouth and the sexual organ is required (e.g., "penetration, 'substantial contact,' sexual stimulation or gratification or some other construction consistent with the ordinary meaning of 'copulation'"). (AOB 195, 202-203.) Thus, he asserts the evidence was insufficient to sustain the jury's verdicts on count two and on the second special circumstance, as well as the jury's felony murder finding. (AOB 195-196.) He also claims the trial court erroneously instructed the jury "any contact however slight, between the mouth of one person and the sexual organ of another person" constitutes oral copulation. (See AOB 195.) He asserts that instruction misstated the elements of the crime and special circumstance, which violated his rights under the state and federal constitutions because it unconstitutionally lightened the prosecution's burden and deprived him of his rights to a fair and reliable trial, to due process, to reliable guilt and penalty phase determinations, to a determination by a properly-instructed jury, to the benefit of the presumption of innocence, and to the requirement of proof beyond a reasonable doubt.

(AOB 196, 215-216, citing Cal. Const., art. I, §§ 7, 15, 17; U.S. Const. 8th & 14th Amends.) He further claims his death sentence violated his rights under the state and federal constitutions because it was obtained in violation of his rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (AOB 217, citing Cal. Const., art. I, §§ 7, 15-17; U.S. Const. 5th, 6th, 8th, & 14th Amends.) His claims and assertions lack merit.

Consistent with CALJIC No. 10.14 (1989 [*sic*; 1993] Revision), which was given in the instant case (XI RT 3131; 3 CT 608-609, 686), new Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 1022 (Oral Copulation While in Custody) provides, in pertinent part:

> To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant participated in an act of oral copulation with someone else; [¶] AND [¶] 2. At the time of the act, the defendant was confined in a (state prison/local detention facility). [¶] *Oral copulation* is any contact, no matter how slight, between the mouth of one person and the sexual organ or anus of another person. Penetration is not required.

(Uppercase and italics in original, citing *People v. Grim* (1992) 9 Cal.App.4th 1240, 1242-1243 (*Grim*) [oral copulation defined].) In *Grim*, the court considered the appropriateness of a jury instruction concerning the sufficiency of the evidence to find substantial sexual conduct based on oral copulation as defined in section 1203.066, subdivisions (a)(9) and (b).[80] (*Grim*, *supra*, at pp. 1241-1243.) *Grim* upheld an instruction which told the jury that "[a]ny contact, however slight, between the mouth of one person and the sexual organ of another person constitutes 'oral copulation'" and that " penetration of the mouth was not required" for finding "oral copulation" sufficient to constitute

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80. Former section 1203.066 barred probation for "[a] person who occupies a position of special trust and commits an act of substantial sexual conduct" (subd. (a)(9)) and provided "[s]ubstantial sexual conduct" included "oral copulation" (subd. (b)). (*Grim*, *supra*, 9 Cal.App.4th at p.1241.)

substantial sexual conduct under that section. (*Ibid.*) As the *Grim* court observed, the only case ever to mention "substantial contact" in this context ruled that "substantial contact" was not required. (*Grim*, *supra*, 9 Cal.App.4th at p. 1243, citing *People v. Minor* (1980) 104 Cal.App.3d 194, 196-197 (*Minor*).)

Accordingly, the crime of oral copulation does not require penetration of the mouth or sexual organ of the victim, but is complete when "the mouth is . . . placed *upon* the genital organ of another." (*Minor*, *supra*, 104 Cal.App.3d at pp. 196-197, emphasis added; see *Catelli*, *supra*, 227 Cal.App.3d at p. 1450 ["The gravamen of the offense is the revulsion and harm suffered by one who is forced to unwillingly touch his or her mouth to the genitals of another"]; *People v. Carter* (1983) 144 Cal.App.3d 534, 539 & fn. 3 (*Carter*) [while finding defendant had waived challenge to reinstatement of oral copulation charge, appellate court observed that charge was properly reinstated where victim testified she put her mouth on defendant's penis, but that she tried to avoid touching his penis and that she was "faking it" at various times, because completed act does not require penetration of the mouth by the penis]; *People v. Bennett* (1953) 119 Cal.App.2d 224, 227 [rejecting challenge to insufficiency of evidence to establish a violation of § 288a, stating "[t]he argument is based wholly on the assertion that penetration was not shown. It was not necessary," citing *People v. Coleman* (1942) 53 Cal.App.2d 18; *id.* at p. 23 [sufficient evidence for § 288a where defendant said "he was going to French" victim, which meant he was "going to kiss her between the legs," and he put his mouth against her private parts and kept his mouth there for five or ten minutes]; *People v. Harris* (1951) 108 Cal.App.2d 84, 86-88 (*Harris*) [§ 288a is violated when a person places his mouth upon genital organ of another; thus, where prosecutrix testified defendant placed his mouth on "os uteri" of her body and defendant confessed to having kissed her private parts evidence was sufficient

for violation of § 288a, rejecting defendant's reliance on *People v. Angier* (1941) 44 Cal.App.2d 417, 418-419 (*Angier*), which held "mere contact of the mouth with the sexual organ of another, either by a 'kissing' or a 'licking', cannot be construed to mean a copulation" within the meaning of § 288a); cf. *Catelli, supra*, 227 Cal.App.3d at p. 1450, fn. 7 [dicta noting contention that victim's licking of defendant's scrotum did not constitute "copulation" within § 288a would be unavailing]; see also *People v. Wilson* (1971) 20 Cal.App.3d 507, 509-510 [declining to follow *Angier* where victims testified defendant kissed them in vaginal area with his tongue]; *People v. Hunter* (1958) 158 Cal.App.2d 500, 502, 505 [sufficient evidence of forcible oral copulation where victim testified "he licked and rubbed her between her legs," and "told her to lick him between his legs," which she did].)

Nonetheless, appellant asserts a "plain ordinary meaning" of section 288a is that mere contact between the mouth of one person and the penis of another, without more, does not constitute oral copulation. (AOB 197.) He further argues "the ordinary and common sense meaning of 'copulation' involves more than mere contact." (*Ibid.*) For support, he relies on various dictionary definitions of the terms "copulate," "intercourse," and "coitus." (AOB 198-199.) Yet, as this Court has observed:

> "[T]o seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results. Rather, it is to discern the sense of the statute, and therefore its words, in the legal and broader culture. Obviously, a statute has no meaning apart from its words. Similarly, its words have no meaning apart from the world in which they are spoken."

(*State of California v. Altus Finance* (2005) 36 Cal.4th 1284, 1295-1296, quoting *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.) Moreover, as the *Catelli* court observed:

> *Copulation means the act of* coupling *or joining.* (Webster's 3d New Internat. Dict., op. cit. supra, at p. 503.) *The term "mouth" includes "the structures enclosing* or lying within *the mouth cavity* regarded as

> a whole." (*Id.*, at p. 1479.) Under the rules of statutory construction discussed in the body of this opinion [(*Catelli*, *supra*, 227 Cal.App.3d at p. 1448; see respondent's Arg. VI, subheading D, *ante*)], forcing one to lick another's scrotum constitutes the act of copulating the mouth of one person with the sexual organ of another within the meaning of section 288a. A contrary interpretation would be inconsistent with the ordinary meaning of the words of the statute and would result in an absurd construction which would not give effect to the intent of the statute.

(*Catelli*, *supra*, 227 Cal.App.3d at p. 1450, fn. 7, emphasis added.) For the same reasons, forcing one to kiss another's penis constitutes the act of copulating the mouth of one person with the sexual organ of another within the meaning of section 288a. (*Ibid.*; see *Carter*, *supra*, 144 Cal.App.3d at p. 539 [mouth placed "on" genital organ]; *Minor*, *supra*, 104 Cal.App.3d at p. 197 [mouth placed "upon" genital organ]; *Hunter*, *supra*, 158 Cal.App.2d at pp. 502, 505 ["licked" between legs]; *Harris*, *supra*, 108 Cal.App.2d at p. 88 [placed mouth "on" private parts]; *Wilson*, *supra*, 20 Cal.App.3d at p. 510 ["kissed" vaginal area with tongue].) Here, by forcing Andrews to kiss appellant's penis, appellant necessarily made Andrews' lips, which enclose Andrews' mouth cavity, join appellant's sexual organ. (See *People v. Hickok* (1950) 96 Cal.App.2d 621, 628 [although evidence showed penetration beyond lips, court observed "[t]he lips constitute the entrance to, and are part of, the mouth"].) Thus, appellant forced Andrews to engage in an act of oral copulation.

Still, appellant notes Witkin defines oral copulation as "'involv[ing] some kind of sexual stimulation or satisfaction from contact of the mouth and sex organs." (AOB 198, 203, 214, citing 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Sex Crimes, § 32, p. 342.) *Grim*, in analyzing a 1989 revision to CALJIC No. 10.10 (5th ed. pocket pt.), which temporarily changed the definition of oral copulation to require "substantial contact" when there is

no penetration,[81] looked at Witkin as well, albeit 2 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988), § 784, pp. 885-886, which had noted other decisions found substantial contact without penetration sufficient for oral copulation. (*Grim*, *supra*, 9 Cal.App.4th at p. 1242.) After reviewing significant cases dealing with marginal oral copulation evidence, the *Grim* court held, "[w]ith all due respect to Witkin and Epstein," former CALJIC No. 10.10, which had stated that "any contact, however slight," was sufficient for forcible oral copulation, "is a more accurate statement of existing case law than is the 1989 revision." (*Grim*, *supra*, 9 Cal.App.4th at p. 1243.) For those same reasons, appellant's reliance on Witkin and Epstein should be rejected here.

Section 288a originally was added in 1915 to address "sex perversions" and it prohibited "acts technically known as fellatio and cunnilingus." (*Catelli*, *supra*, 227 Cal.App.3d at p. 1450.) In 1919, this Court found its original version was void for uncertainty and unconstitutional in view of a constitutional provision requiring all laws to be published "in no other" than the English language. (*In re Lockett* (1919) 179 Cal. 581, 583-590.) Thereafter, the Legislature repealed that version and enacted a new section 288a "prohibiting sex perversions" and providing punishment for "Any person participating in the act of copulating the mouth of one person with the sexual organ of another." (Stats. 1921, ch. 848, § 2, p. 1633; accord *Catelli*, *supra*, 227 Cal.App.3d at p. 1450.)

Noting the foregoing history, and that the statute has been effectively unchanged since 1921, appellant argues there is no indication the 1921

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81. From 1989 until 1994, CALJIC No. 10.14 (1989 Rev.) (5th ed.) similarly defined oral copulation as requiring substantial contact when there is no penetration. The 1993 revision, however, changed that to provide: "Any contact, however slight, between the mouth of one person and the sexual organ of another person constitutes oral copulation. Penetration of the mouth or sexual organ is not required." As previously noted, the latter version was read to the jury in the instant case. (XI RT 3131; 3 CT 608-609, 686.)

enactment intended to enlarge the scope of activity outlawed by the former statute (i.e., fellatio and cunnilingus). (AOB 199-200.) He asserts that enactment merely used common parlance to describe the prohibited acts. (AOB 199.) He then quotes a definition of "fellatio" as "oral stimulation of the penis," which he asserts requires more than mere contact. Yet, as *Catelli* observed:

> In interpreting section 288a, courts must keep in mind the fact that in outlawing oral copulation with the "sexual organ" of another, the Legislature was "prohibiting sex perversion." Forcing a person to unwillingly lick one's scrotum seems to us to constitute the type of "sex perversion" that the Legislature was seeking to prohibit by enacting section 288a.

(*Catelli*, *supra*, 227 Cal.App.3d at p. 1450.) By the same token, respondent submits forcing a person to unwillingly kiss one's penis constitutes the type of "sex perversion" the Legislature sought to prohibit by enacting section 288a.

Nonetheless, appellant relies on *Angier*, which held mere "kissing" or "licking" of a sexual organ could not be construed to be "copulation" under section 288a. (AOB 208-213, citing *Angier*, *supra*, 44 Cal.App.2d at p. 418-420.) Yet, as *Catelli* observed:

> Initially, in *People v. Angier* (1941) 44 Cal.App.2d 417, the term "copulation" was construed narrowly: "A mere kiss or lick of the private organ, even though lewdly done (Pen. Code, [§] 288), is not a copulation." The court arrived at this conclusion by assessing the meaning of the term copulation, stating "[t]he word copulation has never had the meaning of mere contact. It has always had the significance of the verb, to 'couple', which . . . is derived form the Latin *copulare*, which is translated 'to couple, join, unite, band or tie together.'" (*Id.* at p. 419.) That view was subsequently repudiated even by its own author (*People v. Harris* (1951) 108 Cal.App.2d 84, 88), the court acknowledging the holding of *People v. Angier*, *supra*, did not comport with the legislative intent of section 288, subdivision (a). "[W]e were led into a discussion of the significance of the word 'copulate.' While that discourse was philologically correct it was calculated to lead to the erroneous doctrine that the use of the word in section 288a signifies a legislative intent that an offender of the statute is guilty only when he has committed the

> repulsive act of sex perversion. Such was not the purpose of the lawmakers or the intention of this court. A person is guilty of violating the statute when he has placed his mouth upon the genital organ of another." (*Id.* at p. 88.)

(*Catelli*, *supra*, 227 Cal.App.3d at p. 1454, parallel citations omitted.) Appellant notes "*Harris* acknowledges the 'philological correctness' of *Angier*'s analysis of the language of the statute." (AOB 210.) He also notes dicta in *People v. Cline* (1969) 2 Cal.App.3d 989, 992-993, fn. 2) observed that *Angier* had given the word copulation a literal meaning. (AOB 211.) He asserts "settled rules of statutory construction require the application of the 'literal meaning' of the statutory language." (AOB 212.)

Appellant fails to recognize another principle of statutory construction, namely: If a literal construction is contrary to the apparent legislative intent, then the statute will, if possible, be read so as to conform with the spirit of the act. (*Lakin*, *supra*, 6 Cal.4th at p. 659; *Lungren*, *supra*, 45 Cal.3d at p. 735; *Ramirez*, *supra*, 33 Cal.App.4th at p. 563; *Catelli*, *supra*, 227 Cal.App.3d at p. 1448; see § 4 [penal provisions are to be construed according to fair import of their terms with view to effect their object and promote justice].) He also fails to recognize that statutory language "should not be given a literal meaning if doing so would result in absurd consequences." (*People v. Pieters*, *supra*, 52 Cal.3d at p. 898; accord, *People v. Ledesma*, *supra*, 16 Cal.4th at p. 95; *Horwich v. Superior Court*, *supra*, 21 Cal.4th at p. 276; *Catelli*, *supra*, 227 Cal.App.3d at p. 1448.)

Respondent submits any contact, however slight, between the mouth of one person and the sexual organ of another person constitutes oral copulation. Any contrary holding would abrogate the Legislature's purpose in enacting the statute, the gravamen of which is punishment for the harm or revulsion felt by a victim who is forced to touch his or her mouth to the genitals of another, or to be forcibly touched in the genitals by the mouth of another. (*Catelli*, *supra*,

227 Cal.App.3d at p. 1450.) Because the harm done is equally serious whether the contact is slight or substantial, it is absurd to suggest the Legislature did not intend to punish slight oral-genital contacts like that which occurred in this case.

Still, appellant asserts the term "copulation" means something more than mere contact in that it involves some sexual component (e.g., sexual stimulation or sexual gratification). (AOB 201, 214-215; accord AOB 197-199.) Assuming arguendo, that a sexual component is required, that requirement was met here given appellant's calling Andrews a punk, appellant's penis going into a semi-erect state at the time of the act, and appellant's references to other sexual acts. Further, those same facts establish appellant's act was "lewdly and lasciviously" done – as appellant acknowledges, a lewd and lascivious act "suggests an act more in keeping with the plain meaning of the statute." (AOB 211.)

Specifically, Benjamin testified that prior to appellant's forcing Andrews to kiss appellant's penis, appellant called Andrews a punk; Andrews said he was not a punk and told appellant to leave him alone; appellant pulled his flaccid penis out through the hole of his boxer shorts and asked in a commanding fashion for Andrews to kiss it; Andrews at first declined, saying he wasn't "like that"; appellant told Andrews "If you just kiss it, I'll leave you alone;" Andrews kissed appellant's penis as appellant stood over Andrews; then appellant backed away from Andrews and told Bond "I told you he was a punk . . ." (VI RT 1457-1460.) Bond similarly testified appellant took his penis out through the fly of his boxer shorts and said something like "Watch this, the guy's a punk" "Watch him kiss my dick"; appellant told Andrews "Do it"; Andrews kissed the head of appellant's semi-erect penis; and appellant said "I told you he was a punk." (IX RT 2385-2387, 2396, 2478-2479, 2482; see also VII RT 1789-1790 [Martinez told Detective Christian the morning after appellant was

released for breakfast, appellant was bragging, saying "I killed the *punk*," emphasis added].) Criminologist Hickey testified, in part, the term "punk" in prison refers to "somebody who is used sexually, he's owned by another inmate, if you will, sometimes shared or sold to other inmates." (XI RT 2888.) Thus, appellant's reference to Andrews as a punk creates a reasonable inference that appellant intended the forced kiss to be a sexual assault.

Although Benjamin testified appellant's penis was flaccid when Andrews kissed it (VI RT 1460), Bond testified it was "semi-erect" when Andrews kissed it (IX RT 2479). Appellant notes the former (AOB 18, 196, 203; see AOB 218, 224), but his factual summary and analyses omits the latter. That appellant's penis apparently went from a flaccid to a semi-erect state creates a reasonable inference that the act involved sexual stimulation and sexual gratification (i.e., sexual satisfaction). (But see XI RT 3102 [prosecutor argued sexual assault was not for pleasure but was an act of violence and punishment].)

Further, Benjamin testified that appellant ripped off Andrews boxer shorts and said "I ought to fuck him" (i.e., have anal sex); appellant also asked Benjamin and Bond if they wanted to "fuck" Andrews, but they declined. (VI RT 1474-1476.) Bond similarly testified that after Andrews kissed appellant's penis, appellant said he was "going to fuck [Andrews]"; appellant asked if anybody else wanted to fuck Andrews or "get their dicks sucked" but Bond and Benjamin both said "no." (IX RT 2387-2388, 2563.) Thus, appellant's reference to other sexual acts further adds to a reasonable inference that appellant intended the forced kiss to be a sexual assault.

Accordingly, based on the foregoing, this Court should reject appellant's challenge to the sufficiency of the evidence. For the same reasons, this Court should reject his state and federal constitutional challenges to his death sentence. Likewise, for those same reasons, this Court should reject his state

and federal constitutional challenges to the adequacy of the trial court's instruction. Moreover, contrary to his claim (AOB 216) there is a "basis for a determination that the jury would have returned the verdicts it did had it been instructed that, e.g., . . . contact involving sexual stimulation or satisfaction was required" given evidence that appellant called Andrews a punk, appellant's penis went into a semi-erect state at the time of the act, and appellant's referenced other sexual acts. Thus, even assuming arguendo the trial court's instruction was erroneous, any error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

VII.

SUFFICIENT EVIDENCE SUPPORTS THE SECOND SPECIAL CIRCUMSTANCE FINDING THAT THE MURDER OCCURRED WHILE APPELLANT ATTEMPTED TO COMMIT ORAL COPULATION IN A LOCAL DETENTION FACILITY

Appellant's seventh argument claims the evidence was insufficient to sustain the finding of the truth of the second special circumstance that he committed the murder while engaged in the attempted commission of oral copulation in a local detention facility. (AOB 218-228; see AOB 406.) Specifically, he asserts "[n]o reasonable jury could have determined, beyond a reasonable doubt, that the homicide was committed to carry out or advance the oral copulation." (AOB 218, 223-226.) He also asserts the evidence relevant to the oral copulation special circumstance finding does not rationally distinguish him from other murderers sufficient to justify subjecting him to the death penalty. (AOB 218, see AOB 223, 226-228.) Accordingly, he asserts his death sentence violated his rights to due process, to a fair and reliable penalty determination, and to be free from cruel and unusual punishment. (AOB 228.) His claim and assertions lack merit.

A. Procedural Background

As noted in respondent's Argument VI *ante*, the defense moved to dismiss (§ 1118.1) the oral copulation special circumstance and its use in the felony murder allegation, asserting the oral copulation was separate and apart from the strangulation. (X RT 2851-2852; XI RT 2938-2939.) The matter was put in abeyance while the court and the parties researched appropriate instructions. (XI RT 2940; see VII RT 1832.) Thereafter, although the parties had not finalized instructions, the court said it would explain "the killing and the underlying felony must occur in a continuous transaction" for the felony murder rule. (XI RT 2942-2943; see XI RT 2946-2947.) The court never

struck the oral copulation special circumstance allegation. Instead, it opted to instruct the jury on the germination of the underlying felony and how that affected the second degree murder theory and the special circumstance (XI RT 2983), impliedly finding there was sufficient evidence to submit those issues to the jury.

Meanwhile, Prosecutor Oppliger argued the felony murder theory and for the jury to find the second special circumstance true, stating:

> A killing will occur during the commission or attempted commission of a crime if the killing and . . . the underlying felony, are parts of one continuous transaction. . . . [¶] . . . [¶] . . . [Y]ou have a virtually uninterrupted series, a transactionally-related event where the Defendant beats the wholly living hell out of Greg Andrews. He then commits multiple sexual assaults on Greg Andrews. He then almost immediately thereafter begins a course of three separate strangulations, culminating in . . . the victim's death. [¶] At that point in time these guys in cell number eight stop the continuous transaction and start cleaning up their misdeeds. I submit to you that this killing and the felony are part of one continuous transaction.

(XI RT 2962), "[I]t is a special circumstance if the murder was committed while the defendant was engaged in the commission of the same two crimes" (XI RT 2964), and

> If you were to find the facts to be that Mr. Dement began this evening with the intent to kill and the sex crimes were merely a step, a terrorizing step, in the ultimate original, cold, calculated design intent to kill, then he would not qualify because the rape and the oral copulation were incidental to the original design. [¶] . . . Based on the way that this transpired and what people said, I would submit to you that what the defendant intended to do on this particular evening was he intended to terrorize this man. He beat him, he sexually assaulted him, and then *as the evening progressed he came into this cold, calculated decision to kill.*

(XI RT 2967, emphasis added). Prosecutor Oppliger further argued:

> [T]his guy set out on that evening of April 8th to do the things that Dr. Hickey outlined. *He set out to control, to subjugate, to degrade, and ultimately to punish Greg Andrews because he was weak, he was new, he was vulnerable, and he was an associate of an enemy.* [¶] This

> beating that began this evening was in further -- furtherance of this subjugation and this punishment. *The sex acts were in furtherance of the attack, the initial attack.* And I want you to take something and think about it. This type of sex act, the sexual assault, is not for pleasure. This is an act of violence. This is an act of punishment. The murder was in furtherance of this attack. You know, *the beating facilitated the sex and overcame the will of the victim.* [¶] . . . I'd submit to you that the defendant culminated this terroristic attack with the ultimate act which could further advance what can be described as nothing less than a predatory attack. *After doing all this which had come before and in furtherance thereof, he slowly and cold-bloodedly choked the life out of that poor Greg Andrews.*

(XI RT 3102, emphasis added.)

Thereafter, the jury found appellant guilty of first-degree murder. (3 CT 849; XII RT 3187-3189.) Each juror expressly indicated it was his or her individual decision that the finding of first-degree murder was based both on a murder that was premeditated, deliberated, and willful, and a felony murder based on oral copulation by a prisoner. (XII RT 3191-3192.) The jury also found as true the second special circumstance that he committed the murder while engaged in the "attempted commission" of oral copulation in a local detention facility. (3 CT 849; XII RT 3187.) The jury further found him guilty of oral copulation while confined in a detention facility. (3 CT 851; XII RT 3192-3194.)

B. Standard Of Review

Section 1118.1 provides, in pertinent part:

> In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal. . . .

When reviewing the denial of a motion to acquit for insufficient evidence made at the close of the prosecution's case, the reviewing court considers only

evidence then in the record. (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1464, and cases cited.) The familiar substantial evidence test applies. (*People v. Cuevas* (1995) 12 Cal.4th 252, 261.) The appellate court likewise applies the same test to resolve a claim of insufficiency of the evidence, whether such challenge is made to evidence supporting a criminal conviction or a special circumstance finding. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 496.)

To reiterate, this Court reviews the entire record in a light most favorable to the finding below and presumes the existence of every fact the trier could reasonably deduce from the evidence in support of that finding. (*People v. Johnson*, *supra*, 26 Cal.3d at pp. 575-578; *People v. Redmond*, *supra*, 71 Cal.2d at p. 755; *In re Khamphouy S.*, *supra*, 12 Cal.App.4th at p. 1134; see *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 318-319.) The finding may not be reversed for insufficient evidence unless it clearly appears that upon no hypothesis whatsoever is there sufficient substantial evidence (i.e., evidence of legal significance, reasonable in nature, credible and of solid value) to support it. (*People v. Samuel*, *supra*, 29 Cal.3d at p. 505; *People v. Redmond*, *supra*, 71 Cal.2d at p. 755; *In re Khamphouy S.*, *supra*, 12 Cal.App.4th at p. 1134.) Moreover, so long as the circumstances reasonably justify the trier of fact's finding, the reviewing court's opinion that the circumstances might also be reasonably reconciled with a contrary finding does not warrant reversal. (*People v. Perez*, *supra*, 2 Cal.4th at p. 1124; *People v. Redmond*, *supra*, 71 Cal.2d at p. 755; *People v. Nicolaus*, *supra*, 54 Cal.3d at p. 576; *People v. Jones*, *supra*, 51 Cal.3d at p. 314.)

C. Applicable Law

Section 190.2, subdivision (a)(17) provides that special circumstances shall be found when

> The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing or attempting to commit . . . [¶] . . . [¶] (F) Oral copulation in violation of section 288a.

As this Court held in *People v. Green* (1980) 27 Cal.3d 1:

> The [special circumstances] provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose, e.g. who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnapping, or a rape.

(*Id.* at p. 61; accord *People v. Thompson* (1980) 27 Cal.3d 303, 322 (*Thompson*).) If the underlying felony was merely incidental to the commission of the murder, however, then the special circumstance does not apply. (See *People v. Green*, *supra*, 27 Cal.3d at p. 52 and *Thompson*, *supra*, at pp. 321-325, construing the 1977 law; *People v. Weidert* (1985) 39 Cal.3d 836, 842 (*Weidert*) and *Richards v. Superior Court* (1983) 146 Cal.App.3d 306, 317, fn. 10, construing the 1978 law.) Thus, the simple chronology of the underlying felony preceding the killing is not determinative. (*People v. Green*, *supra*, 27 Cal.3d at pp. 60, 62.)

In practical terms, this requirement means that where the defendant's primary intent is not to commit the underlying felony, but simply to kill, and where the underlying felony is merely incidental to the murder, not the result of an independent purpose to commit the felony, the special circumstance will not lie. Thus, for instance, in *Weidert* the true finding on the kidnapping-murder special circumstance was reversed where the defendant's avowed purpose was to kill the victim to prevent him from testifying, not to kidnap him. (*Id.* 39 Cal.3d at p. 842.) However, when the defendant has an independent purpose for the commission of the felony, and it is not simply incidental to the intended murder, *Thompson* and *People v. Green* are inapplicable and the special circumstance will be found to exist. (*People v. Clark* (1990) 50 Cal.3d 583, 608, reversed and remanded on different grounds in *Clark v. Brown* (9th Cir.

2006) 442 F.3d 708, __ [2006 U.S. App. LEXIS 6611 *1, *47]; *People v. Robertson* (1982) 33 Cal.3d 21, 52 (*Robertson*); see also *People v. Harden* (2003) 110 Cal.App.4th 848, 860-864 (2003) [CALJIC No. 8.81.17's second paragraph (i.e., for special circumstance, murder must have been committed to carry out or advance commission of underlying crime, or facilitate escape therefrom, or avoid detection – in other words, underlying crime cannot be merely incidental to murder) may be omitted if evidence fails to support reasonable inference that committing underlying felony was merely incidental to primary goal of murder].)

D. Sufficient Evidence Supports The Second Special Circumstance Finding

The evidence is sufficient such that a rational trier of fact could find beyond a reasonable doubt that appellant had a purpose for committing the forced oral copulation apart from the murder, such that the oral copulation was not merely incidental to it. Indeed, such a conclusion is even more apparent in light of the trial court's clarification of CALJIC No. 8.81.17 (XI RT 3138-3139; 3 CT 703) following the jury's inquiries (XII RT 3159, 3167), wherein the court explained: for the special circumstance to be found true, a continuous sequence of the crimes is insufficient; instead, the murder also must have been committed to carry out or advance the oral copulation, to facilitate escape therefrom, or to avoid detection – "In other words, the special circumstance[] . . . [is] not established if the unlawful oral copulation by a prisoner . . . was merely incidental to the commission of the murder" (XII RT 3161-3167; see *Raley*, *supra*, 2 Cal.4th at p. 902 ["We believe the evidence is sufficient to support the jury's finding. We are the more confident of our conclusion because the court instructed the jury in the terms of [*People v.*] *Green*, *supra*, 27 Cal.3d 1."]).

Here, appellant's apparent motive to attack, sexually assault, and ultimately kill Andrews was based on appellant's animosity towards Andrews'

friend Rutledge, who was an associate or friend of appellant's wife. (X RT 2671-2674.) As Benjamin and Bond testified, it began with appellant waking Andrews and questioning him about a female (i.e., appellant's wife) and when appellant apparently got the "wrong answers," he slapped and punched Andrews in the face. (VI RT 1449-1455, 1657, 1659; IX RT 2376-2379, 2473-2474.)

Appellant then got more violent and began calling Andrews a "punk." (VI RT 1457; IX RT 2381-2382, 2385.) Thereafter, he forced Andrews to kiss his penis after which he said "I told you he was a punk." (VI RT 1460; IX RT 2386, 2482.) Although Benjamin testified appellant's penis was flaccid (VI RT 1460), Bond testified it was "semi-erect" (IX RT 2479). Again appellant notes the former (AOB 218, 224; see AOB 18, 196, 203), but omits the latter. That his penis apparently went from a flaccid to a semi-erect state creates a reasonable inference that the act involved sexual stimulation and sexual gratification (i.e., sexual satisfaction). The act also served the dual purpose of degrading Andrews to establish appellant's superiority over Andrews, and vicariously over Andrews' friend Rutledge.

Additionally, while Williams testified appellant had said something like "They move him in my cell, I'm going to do him. I'm going to kill him," "I'm going to do his ass" (VI RT 1375-1376, 1411, 1413, 1419-1420) in advance of his attack on Andrews, Benjamin testified it was after appellant forced Andrews to kiss appellant's penis that appellant began saying "I ought to kill you" (VI RT 1463). Bond similarly testified that shortly after the sexual assault, appellant started choking Andrews, during which he said he was going to kill Andrews. (IX RT 2388-2390, 2394, 2522.) Bond also testified appellant said he was choking Andrews because Andrews "was a punk, and . . . couldn't handle business being here." (IX RT 2396.) As appellant's kite stated: "before it's over I'll tag a few more, got to keep these fools in check at times." (2 SCT1

380; X RT 2816.) Thus, there was evidence from which a reasonable trier of fact could find appellant decided to kill Andrews only after Andrews had succumbed to the forced oral copulation, that the strangling was the coup de grâce that capped off his plan to terrorize and sexually assault Andrews, and that it was done to silence Andrews so as to avoid detection of his sexual assault by "keep[ing] [him] in check." (See *ibid.*) Regardless of when the intent to kill arose, the special circumstance does not require that intent to arise after the underlying felony, it just requires that the underlying felony not be merely incidental to the murder. (*Carpenter*, *supra*, 15 Cal.4th at p. 388.)

Appellant's act of forced oral copulation established an independent purpose because that act was not intended to kill Andrews. That underlying felony was not simply incidental to appellant's intended murder of Andrews, which was committed by another means (i.e., strangulation by ligature) independent of the forced sex act. Moreover, appellant's intent to commit the forced sex act and his intent to kill did not invoke the rule set forth in *People v. Green*, as urged by appellant (AOB 222, 225-226), because appellant "had independent albeit concurrent, goals" (*People v. Clark*, *supra*, 50 Cal.3d at pp. 608-609). Incidentally, although the Ninth Circuit recently held the latter case's "retroactive application of its unforeseeable new interpretation of [*People v.*] *Green*" violated due process under *Bouie v. City of Columbia* (1964), 378 U.S. 347 because the defendant lacked fair warning of what constitutes criminal conduct, (*Clark v. Brown*, *supra*, 442 F.3d at pp. 711, 721-726) no such violation occurred here because *People v. Clark* was decided on April 5, 1990, which was two years before the instant offenses, thereby giving appellant fair warning. "Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*Raley*, *supra*, 2 Cal.4th at p. 903, citing *People v. Clark*, *supra*, 50 Cal.3d at pp. 609-609; accord *Robertson*, *supra*, 33 Cal.3d at p. 32, 52 [where defendant raped and killed two

women, and stole their underwear for his "collection," jury could reasonably have concluded he harbored intent to steal from outset, as well as intent to assault them sexually, and that he killed them when he became afraid they would report his intended crimes; thus, unlike in *People v. Green* intent to steal was entirely independent of murders and was not planned simply as means of concealing killings].)

Further, although appellant labels the act of forcing Andrews to kiss his penis as being "marginal" which "technically" may have constituted an oral copulation (AOB 226-228; see AOB 406), any contact, however slight, between the mouth of one person and the sexual organ of another constitutes oral copulation because the gravamen of the offense is the harm or revulsion felt by a victim who is forced to touch his or her mouth to the genitals of another (or to be forcibly touched in the genitals by the mouth of another). (*Catelli*, *supra*, 227 Cal.App.3d at p. 1450.) Thus, contrary to his claim (AOB 218), the oral copulation special circumstance finding rationally distinguishes him from other murderers so as to justify subjecting him to the death penalty.

Accordingly, the felony-murder special circumstance was properly found to be true. (Cf. *People v. Guerra* (2006) 37 Cal.4th 1067, 1133-1134 [upheld attempted-rape special circumstance because evidence that defendant desired to have sexual intercourse with victim, attempted to kiss her, and entered her home without permission strongly suggested primary motive was rape or at least that attempted rape was independent purpose]; see also *People v. Payton* (1992) 3 Cal.4th 1050, 1062 [for felony-murder-rape special circumstance, it is not necessary that defendant commit murder and rape virtually simultaneously].) Thus, contrary to appellant's claim (AOB 228), his death sentence did not violate his rights to due process, to a fair and reliable penalty determination, and to be free from cruel and unusual punishment. (AOB 220.) Hence, his claim should be rejected.

VIII.

THE INSTRUCTIONS DEFINING WHEN A MURDER IS COMMITTED "WHILE ENGAGED IN THE COMMISSION OF" AN ORAL COPULATION BY A PERSON CONFINED IN A LOCAL DETENTION FACILITY WERE NOT DEFECTIVE; EVEN ASSUMING ARGUENDO, THE COURT ERRED, ITS ERROR WAS HARMLESS

Appellant's eighth argument claims the instructions defining when a murder is committed "while engaged in the commission of" an oral copulation by a person confined in a local detention facility were defective such that they violated his rights under the state and federal constitutions to trial by a properly instructed and impartial jury, to due process including the benefits of the presumption of innocence and proof beyond a reasonable doubt, to equal protection, to a fair and reliable capital guilt and penalty trial, and to be free from cruel and unusual punishment, and thus, reversal of the oral copulation special circumstance is required. (AOB 229-230, 237-247, 249-250, citing Cal. Const., art. I, §§ 1, 7, 15-17; U.S. Const., 5th, 6th, 8th & 14th Amends.; see AOB 406.) His claim lacks merit. Further, even assuming arguendo, the court erred, its error was harmless.

A. Procedural Background

Pursuant to the mutual request of both parties (2 CT 550-551, 555-556; 3 CT 625), the trial court instructed the jury with CALJIC No. 8.81.17 (1991 Revision), in pertinent part:

> To find that the special circumstances referred to in these instructions as murder in the commission of the crime of unlawful oral copulation by a prisoner . . . is true, it must be proved: [¶] 1. That the murder was committed while the Defendant was engaged in the commission or attempted commission of an unlawful oral copulation by a prisoner or an unlawful sodomy by a prisoner; and, [¶] 2. The murder was committed in order to carry out or advance the commission of the crime of unlawful oral copulation by a prisoner or attempted unlawful sodomy

by a prisoner, or to facilitate the escape therefrom or to avoid detection. [¶] In other words, the special circumstances referred to in these instructions are not established if the unlawful oral copulation by a prisoner . . . was merely incidental to the commission of the murder.

(XI RT 3138-3139; accord 3 CT 703). The court's instruction was preceded by Defense Counsel Hart's argument which referenced that instruction, but inverted and convoluted its requirements, arguing "there is not special circumstance murder because we do not have an oral copulation and an attempted sodomy that were to try to advance and further the murder." (XI RT 3046-3047.) The jury later sent a note seeking clarification, inquiring:

Can you explain advancing the crime of oral copulation in the special circumstance portion of first degree murder? Does oral sex or sodomy have to be the primary objective or can it be part of the crime or is the continuous sequence of the crime enough to warrant special circumstances?

(XI RT 3159, 3162; 2 SCT1 497.) After the court and counsel discussed the jury's inquiry and the court's proposed response (XI RT 3159-3161), the court addressed the jury, stating in pertinent part:

[T]he instruction that you're concerned with . . . is numbered at the top 8.81.17 . . . [¶] . . . [¶] Generally, read the words . . . in the context in an ordinary and usual way.

I'm going to answer your last question first and most directly: "Is the continuous sequence of the crime enough to warrant special circumstances?" [¶] The answer to that is no. There are two paragraphs that are numbered in this -- in this instruction, and I'm going to go over them with you shortly and explain the distinction between the two. But the most direct answer is no, that is not enough.

Now I'm going to go back and answer as directly as I can the middle paragraph. You've asked me to discuss this in the context of the special circumstances. [¶] "Does oral sex or sodomy have to be the primary objective or can it be part of the crime?" [¶] You asked me a question that I don't take. It's like: When did you stop beating your wife? "Does oral sex or sodomy have to be the primary objective?" [¶] You've heard me make no reference to a primary objective. I'm at a loss to see where you got that quotation. [¶] You might be concerned with it and thought there might be an easy answer, but there's no requirement that it be the

primary objective. [¶] The rest of it is: "Or can it be part of the crime?" And the answer in part is if it's merely incidental to the commission of the crime of murder and that's contained in this instruction, it does not fulfill the second paragraph. Let me go over and put these in context for you.

You'll recall that we got this language of the continuous sequence from an instruction in furtherance of this which talked about engaged in the commission or attempted commission of the crime. Let me start over, and we'll just sort of read through this and discuss it. [¶] . . . [¶]

A murder was committed while the defendant was engaged in the commission or attempted commission of a felony if the murder and the felony are part of a continuous transaction. [¶] So that pertains to the first element, the first part of the special circumstance. So you have sort of mixed up the two concepts. That's why I tell you that it is not enough . . . there is a continuous sequence. . . .

Now, so far that's a lot like the felony murder rule that I discussed with you. To be a special circumstance, then you have to go further. [¶] Number two, the murder was committed in order to carry out or advance the commission of the crime of oral copulation by a prisoner or attempted unlawful sodomy by a prisoner or to facilitate escape therefrom or avoid detection. [¶] In other words, the special circumstances referred to in these instructions are not established if the unlawful oral copulation by a prisoner or attempted unlawful sodomy by a prisoner was merely incidental to the commission of the murder.

Now, that's for your determination, of course, depending on the circumstances of the case you have before you. I've heard counsel give some examples on both sides on this. I've thought about it, but I'm declining to do that because this case has its own peculiar particular circumstances. And this is one of the issues that will be for your decision.

Now, again, then, to answer your question, the last paragraph: "Is the continuous sequence of the crime enough to warrant special circumstances?" Answer: No. That only goes to the first part of this. [¶] Middle part: "Does oral sex or sodomy have to be the primary objective?" You've heard me say nothing about primary objective. "Or can it be part of the crime?" Not if it's just incidental to it. So that's not a complete question. [¶] Okay? [Juror L. A.], has that been helpful?

(XII RT 3161-3166.) Juror L. A. responded "Yeah." (XII RT 3166.)

Following a hallway conference with counsel and the bailiff's indication that Juror L. A. sought further clarification (XII RT 3166; see XII RT 3168-3169), the trial court and defense counsel further remarked:

> THE COURT: I understand while we were conferring, [Juror L. A.], you had a further issue on your question, also. And counsel properly suggested that perhaps when I use the term "two elements," that maybe I ought to be more particular in that regard.
>
> There are two numbered paragraphs. That means there are two parts to be satisfied to find the special circumstances to get -- to obtain. That means two separate requirements, both of which must exist before you find special circumstances. If you have a reasonable doubt as to whether either one of them exists, of course that means the People have not met their burden of proof, and you must find they did not exist or either of them.
>
> [Juror L. A.] wanted me to explain further what advancing the crime of oral copulation in special circumstances mean. Again, using that in its most plain and ordinary meaning, that would mean furthering that crime or facilitating that crime, advancing the crime. Again, that has to be viewed in the context of this case as you folks see it.
>
> Counsel, are you satisfied with the Court's explanation?
>
> MS. HART: Yes. I think we also suggested a synonym: enable, further facilitate, make more likely, enable.
>
> THE COURT: All right. All of which are close synonyms, closely mean the same thing as "advancing." [¶] Okay. Anything else? Does that -- does that clear up some of your confusion on that? I hope it makes it perfectly clear. Of course you have to determine the facts. [¶] All right. Are you ready to resume your deliberations?

(XII RT 3166-3167). No response by the Juror L. A. or the jury appears in the record, however, the court thereafter ordered the jury to resume its deliberations (XII RT 3167-3168), which impliedly indicates the jury's confusion was cleared and it was ready to resume deliberations. The court subsequently remarked:

> I saw three jurors nod their head yes -- four jurors nod their head yes. They are [Suzanne C.], [T. H.], [Joe P.] -- and who was the other one? [Christopher F.], I believe -- I'm not sure of the fourth one -- who all appeared to be saying, "Yes, I get it now." There were two, "See what we told them?" That was the body language I got, particularly as

> [Suzanne C.] and [T. H.] looked at each other, "Uh-huh, that's what we told them; two elements or two parts."

(XII RT 3172.)

Nonetheless, Prosecutor Oppliger remarked:

> my observation of the jury were [*sic*] that they did not appear to me to be fully satisfied with the Court's answer, and we may need further tomorrow to meet and discuss any potential further answers.

(XII RT 3170.) Thereafter, the parties said they would try to come up with something better to amplify the subject if possible. The court said it would welcome further suggestions and study in that regard. (XII RT 3170-3172.) Defense Counsel Hart, while acknowledging the court and counsel had done their best to respond to the jury's inquiries, also noted the defense was not waiving a future appellate argument as to the sufficiency of the instructions. (XII RT 3169-3170.)

The next day, Prosecutor Oppliger proposed the trial court call the jury in and inquire whether it unanimously had agreed on count one; if yes, whether it unanimously had agreed as to the degree; and if yes, whether it could render a verdict if given a new verdict form; if yes, then the court would provide the jury with a form omitting the special circumstances; and if the jury returned a first-degree murder verdict, then the prosecution would move to strike the two special circumstances. (XII RT 3173-3174.) Prosecutor Oppliger made that proposal because he was uncomfortable with the court's explanations regarding the special circumstances and its "*Green*" instruction (*People v. Green*, *supra*, 27 Cal.3d at p. 1) as set forth in CALJIC No. 8.81.17's second paragraph, which he felt did not correctly state the law, and because he contended the issue was confusing. (XII RT 3176-3177.) Prosecutor Oppliger also observed factually, as he already had argued to the jury (XI RT 2966-2967), if the murder was preplanned and premeditated, then one could argue the felony murder special circumstances were impossible to commit because they would be incidental to

it (XII RT 3177). From a practical standpoint, his proposal recognized the case could proceed onto the second stage of the three-stage trial, i.e., the special circumstance as to whether appellant had a prior second degree murder conviction. (XII RT 3174, 3178.)

The defense, which noted the complexity of the law and its own confusion, initially had agreed to the proposal, but it withdrew that agreement believing defense counsel would be faulted by appellate counsel if jury deliberations were interrupted for such an inquiry, likening it to an "*Allen* charge" (*Allen v. United States* (1896) 164 U.S. 492). (XII RT 3174-3175, 3179-3180; see *People v. Gainer* (1977) 19 Cal.3d 835, 845, 848 [disapproving two elements of typical "*Allen* charge"].) Although the prosecutor said he did not want to give up his right to have the jury ultimately decide this case on the other special circumstances, he said he would consider moving to strike them outright. (XII RT 3179.) Nothing further was said on the subject and the jury returned its verdicts the next afternoon. (XII RT 3182.)

B. Applicable Law

The trial court has a sua sponte duty to instruct the jury on general legal principles that are closely and openly connected with the evidence and necessary for the jury's understanding of the case. (*People v. Flannel* (1979) 25 Cal.3d 668, 680-681 (*Flannel*); *People v. Sedeno* (1974) 10 Cal.3d 703, 715-716 (*Sedeno*) overruled on other grounds in *Flannel, supra*, 25 Cal.3d at p. 684, fn. 12.) If a jury expresses confusion regarding the meaning or application of instructions, it is the court's duty to clear up that confusion. (*Bollenbach v. United States* (1946) 326 U.S. 607, 612-613; *Gonzalez, supra*, 51 Cal.3d at p. 1212.) Consistent with that requirement, section 1138 provides, in pertinent part:

> After the jury [*sic*; jurors] have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must

require the officer to conduct them into court. Upon being brought into court, the information required must be given . . .

Under section 1138, a trial court must consider as to each jury question whether further explanation is desirable or whether it should merely repeat the instructions already given. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 (*Beardslee*); see *People v. Moore* (1996) 44 Cal.App.4th 1323, 1331 (*Moore*); *People v. Hill* (1992) 3 Cal.App.4th 16, 25 (*Hill*), overruled on other grounds by *People v. Nesler* (1997) 16 Cal.4th 561, 582.) As this Court observed in *Beardslee*:

> The court has a primary duty to help the jury understand the legal principles it is asked to apply. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250-251.) *This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information.* (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1213.) Indeed, comments diverging from the standard are often risky. (E.g., *People v. Lee* (1979) 92 Cal.App.3d 707, 716.)

(*Id.* 53 Cal.3d at p. 97, emphasis added, parallel citations omitted.)

The adequacy of the jury charge is determined by whether the court fully and fairly instructed on the applicable law. (*People v. Partlow* (1978) 84 Cal.App.3d 540, 558; *People v. Jenkins* (1973) 34 Cal.App.3d 893, 899.) A reviewing court should interpret instructions to support the judgment if they are reasonably susceptible to such an interpretation. (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258; *People v. Rhodes* (1971) 21 Cal.App.3d 10, 21-22.) The reviewing court must consider the entire charge of the court; in doing so, it assumes jurors are intelligent people capable of understanding and correlating all instructions given. (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338 (*Yoder*); see *People v. Mardian* (1975) 47 Cal.App.3d 16, 46, disapproved on another ground in *People v. Anderson*, *supra*, 43 Cal.3d at p. 1123; *People v. Rhodes*, *supra*, 21 Cal.App.3d at p. 21.)

C. The Instructions Defining When A Murder Is Committed "While Engaged In The Commission Of" An Oral Copulation By A Person Confined In A Local Detention Facility Were Proper

Appellant claims that when the jury indicated confusion concerning the meaning of CALJIC No. 8.81.17 and sought clarification, the trial court's response was inadequate, erroneous, and misleading. (AOB 229.) In making this claim, he reiterates the claim from his seventh argument, asserting the difficulty in applying the instruction arises from the insufficiency of the evidence to support the special circumstance. (AOB 238, 247-248.) For the reasons expressed in respondent's Argument VII *ante*, his challenge to the sufficiency of the evidence lacks merit. Respondent submits the jury's confusion arose from Defense Counsel Hart's argument, which inverted and convoluted CALJIC No. 8.81.17's requirements by arguing for there to have been special circumstance murder, the oral copulation would have to have had to advance and further the murder. (XI RT 3046-3047.) Regardless of what led to the jury's confusion, the court properly exercised its discretion in responding to the jury's inquiries by repeating already given instructions, which were full and complete, and by giving further explanation where needed. (XII RT 3161-3167.)

Appellant complains, however, "the trial court's supplemental instruction for the most part simply re-stated CALJIC No. 8.81.17, which had already proved itself insufficient." (AOB 239.) Yet, the court's instructions were full and complete and thus, it appropriately re-stated them to the jury. (*Beardslee*, *supra*, 53 Cal.3d at p. 97; *Gonzalez*, *supra,* 51 Cal.3d at p. 1213; *Hill*, *supra*, 3 Cal.App.4th at p. 25.) In *Gonzalez*, where the defendant claimed the trial court's refusal to give additional instructions on malice violated section 1138, this Court found the trial court had acted within its discretion by advising the jury to reread already provided instructions, which were full and complete. (*Id.* 51 Cal.3d at pp. 1212-1213.) Similarly in *Hill*, the appellate court held the

trial court did not abuse its discretion by refusing to elaborate on the standard instructions:

> After consulting counsel and considering the matter, the trial court in its discretion decided a direction to the jury to reread certain instructions was the appropriate response. Although the court did not directly address the issue of abandonment of the conspiracy implied in the example given in the jury's inquiry, its response was adequate to the occasion. [Citation.] There was no error.

(*Id.* 3 Cal.App.4th at pp. 24-25.) Likewise in *Moore*, where the trial court already had read the standard jury instruction on cohabitation (CALJIC No. 9.35) and the jury subsequently sent a note asking for a legal definition of cohabitation and "Can there be simultaneous co-habitation at more than one residence?" and in response, the court replied "See the definition in the jury instructions. It is a question for you to decide re whether there can be simultaneous cohabitation," the appellate court held that by advising the jury to reread the instructions which were full and complete for purposes of the facts before it, the trial court fulfilled it duty under section 1138. (*Id.* 44 Cal.App.4th at pp. 1330-1331 (*Moore*) *Id.* at p. 1331.) Thus, the trial court's rereading of CALJIC No. 8.81.17 was appropriate here.

Still, appellant argues where the trial court deviated from CALJIC No. 8.81.17 in addressing the jury's question about "primary objective," it distorted the jury's understanding of applicable law and deflected the jury from considering relevant circumstances. (AOB 239, 243.) Not so; the court's deviation was responsive to the jury's inquiry and was meant to keep the jury on the right track. Specifically, the court responded to that part as follows:

> "Does oral sex or sodomy have to be the primary objective or can it be part of the crime?" [¶] You asked me a question that I don't take. It's like: When did you stop beating your wife? "Does oral sex or sodomy have to be the primary objective?" [¶] You've heard me make no reference to a primary objective. I'm at a loss to see where you got that quotation. [¶] You might be concerned with it and thought there might be an easy answer, but there's no requirement that it be the primary

objective.

(XII RT 3163.) In recap, the court again remarked: "'Does oral sex or sodomy have to be the primary objective?' You've heard me say nothing about primary objective." (XII RT 3165-3166.) The court's analogy to the question "When did you stop beating your wife?" which presumes the person being asked had beaten his wife, was proper. The court did not want the jury to presume it was indicating oral sex or sodomy had occurred. Although appellant complains the court "essentially derided the jurors for considering the concept" (AOB 244; see AOB 246), the court was merely protecting appellant's interests by taking issue with that presumption. Further, while appellant contends the court's alleged "derisive tone" (and instruction that the issue was for the jury's determination) effectively dissuaded the jury from pursuing further clarification, foreperson Juror L.A. obviously was not dissuaded because he indeed sought further clarification. (XII RT 3166-3169.)

Nonetheless, appellant asserts the court's remark regarding "primary objective" diverted the jury from that analysis, effectively telling them it was an "irrelevant or erroneous consideration." (AOB 243-244, see AOB 239.) On the contrary, the court merely told them there was no requirement that the crime of oral sex or sodomy had to be the primary objective. As this Court observed in *People v. Bolden* (2002) 29 Cal.4th 515:

> a jury deciding the truth of the special circumstance allegation is not required to assign a hierarchy to the defendant's motives in order to determine which of multiple concurrent intents was "primary," but instead the jury need only determine whether commission of the underlying felony was or was not merely incidental to the murder.

(*Id.* at p. 558.) Further, its response was proper given that the felony-murder special circumstance is supported where there are dual objectives, i.e., concurrent intents to kill and to commit an independent felony. (*Raley*, *supra*, 2 Cal.4th at p. 903; *People v. Clark*, *supra*, 50 Cal.3d at pp. 608-609.)

Appellant cites cases that discussed the applicability of the special circumstance allegation where the "primary" criminal goal or purpose was to kill and the other felony was merely incidental to the killing. (AOB 240-241, citing *inter alia Thompson*, *supra*, 27 Cal.3d at p. 322 and *People v. Navarette* (2003) 30 Cal.4th 458, 505 (*Navarette*).) He notes:

> Another phrasing of the requirement has focused, as in *Navarette*, *supra*, on the question of whether the defendant had an "independent purpose" for the commission of the felony.

(AOB 241.) He argues:

> There were, therefore, concepts and descriptions relevant to the jury's determination of the applicability of the special circumstance other than those in CALJIC No. 8.81.17 which were available to the trial court in an attempt to clarify the issue for the jury when CALJIC No. 8.81.17 proved too confusing for the jury to apply. None of the alternative phrasings which this Court has used was provided to the jury, *despite their availability from the case law*. For instance, the trial court could have instructed the jury in terms such as used in *Navarette, supra,* e.g., "if the oral copulation was incidental to the murder, the murder being the primary purpose, the special circumstance must be found not true. If defendant's primary purpose was to commit the oral copulation and that purpose was independent of the murder, and the murder was committed to further or advance the commission of the oral copulation, or to facilitate the escape therefrom or to avoid detection, the special circumstance may be found true."

(AOB 241-242, emphasis added.) His reliance on *Navarette's* 2003 decision is misplaced because that case was decided nine years *after* his trial. Nonetheless, respondent submits the court's clarifying response adequately addressed *Navarette*'s concepts, albeit in a different form, by reiterating that for the special circumstance to be found true the murder must have been

> committed in order to carry out or advance the commission of the crime of oral copulation by a prisoner or attempted unlawful sodomy by a prisoner or to facilitate escape therefrom or avoid detection. [¶] In other words, the special circumstances referred to in these instructions are not established if the unlawful oral copulation by a prisoner or attempted unlawful sodomy by a prisoner was merely incidental to the commission of the murder.

(XII RT 3165; see XII RT 3139.)

Citing *People v. Green*, *supra*, 27 Cal.3d at pages 60-61, which would have been available to the trial court, appellant also asserts the court "could have informed the jury that the chronological sequence of offenses . . . i.e., that the homicide followed the commission of the oral copulation is not determinative." (AOB 242.) He contends:

> Such a clarification could have aided the jury's evaluation of the prosecution's suggested analysis, that if the intent to kill arose after the oral copulation then the special circumstance was true, whereas if the intent to kill arose before the oral copulation, the special circumstance was not true.

(*Ibid.*) However, respondent submits the prosecutor's argument (XI RT 2966-2967) needed no such amplification.

Appellant also contends the trial court "left to the jury the ultimate determination of what 'advancing the crime of oral copulation' and 'incidental to the commission of the murder' means." (AOB 245.) He notes after rereading the second paragraph of CALJIC No. 8.81.17, the court remarked "Now, that's for your determination, of course, depending on the circumstances of the case you have before you. . . . [T]his is one of the issues that will be for your decision." (AOB 245, quoting XII RT 3165.) He further notes that after Juror L. A. sought further clarification what "advancing the crime of oral copulation" in the special circumstance instructions meant, the court remarked:

> "Again, using that in its most plain and ordinary meaning, that would mean furthering that crime or facilitating that crime, advancing the crime. Again, that has to be viewed in the context of this case as you folks see it."

(AOB 245, quoting XII RT 3167.) He contends "[t]hese statements . . . effectively told the jury that it was up to them to determine what the instructions meant." Not so. The court remarks merely reminded the jurors that it was up to them to make a determination as to whether the murder advanced the crime of oral copulation or whether the oral copulation was merely incidental to the

murder, and was consistent with the court's parting remarks to the jury, which stated "Of course you have to determine the facts." (XII RT 3167.) Thus, contrary to appellant's claim (AOB 245), the jury was not left with the responsibility of deciding questions of law.

In sum, the trial court properly exercised its discretion in responding to the jury's inquiries by repeating already given instructions, which were full and complete, and by giving further explanation where needed. Moreover, the defense further helped the court explain the instructions by providing synonyms "enable, further facilitate, make more likely" for the term "advancing," which the court adopted as "close synonyms." (XII RT 3167.) Hence, contrary to appellant's claim, the instructions defining when a murder is committed "while engaged in the commission of" an oral copulation by a person confined in a local detention facility were not defective.

Accordingly, appellant's state and federal constitutional challenges (229-230, 250) should be rejected. Further, contrary to his claim that state law was violated wherein the State arbitrarily withheld a non-constitutional right (AOB 249), no state law error occurred. Thus, his related claims must fail. Moreover, because he does not explain how he was treated differently than other similarly situated defendants, his equal protection claim (*ibid.*) should be rejected as insufficiently developed. (*Williams*, *supra*, 16 Cal.4th at pp. 206, 250; *Rodrigues*, *supra*, 8 Cal.4th at p. 1116, fn. 20.)

D. Even Assuming Arguendo, The Trial Court Erred In Instructing The Jury, Its Error Was Harmless

In asserting prejudice, appellant contends the evidence on the special circumstance finding was not strong or compelling. (AOB 248.) Respondent disagrees. Respondent's Argument VII, which is incorporated by reference, fully sets forth the evidence that supports the special circumstance finding and refutes his contention. Appellant also cites "the prosecution's willingness to

drop the special circumstance allegation when the jury's confusion became apparent" as also demonstrating the evidence was not strong or compelling. (AOB 248.) Again, Prosecutor Oppliger's offer was a reflection of the complexity of the legal issues involved, not the closeness of the facts. (XII RT 3176-3177.)

Additionally, in arguing the evidence was not strong or compelling, appellant erroneously asserts it took the jury nine hours to reach a verdict after the trial court's supplemental instructions on the special circumstance issue. (AOB 248, fn. 121.) It actually took the jury only six hours and 35 minutes. (2 CT 511-513; see XII RT 3168, 3182.) Again, "[r]ather than proving the case was close, the length of the deliberations suggests the jury conscientiously performed its duty." (*Carpenter*, *supra*, 15 Cal.4th at p. 422; *Walker*, *supra*, 31 Cal.App.4th at pp. 438-439.) Further, each juror expressly indicated it was his or her individual decision that the finding of first-degree murder was based both on a murder that was premeditated, deliberated, and willful, *and a felony murder based on oral copulation by a prisoner.* (XII RT 3191-3192.) Thus, the jury necessarily found appellant had committed the murder during commission of the oral copulation.

Moreover, as already noted, the defense amplified the court's instructions by providing synonyms for the term "advancing." (XII RT 3167.) Thus, that concept was sufficiently clarified for the jury's understanding.

Accordingly, even assuming arguendo the trial court erred in instructing the jury, its error was harmless because it is not reasonably probable appellant would have obtained a more favorable result if different instructions had been given. (*Watson*, *supra*, 46 Cal.2d at p. 836; see also *People v. Raley*, *supra*, 2 Cal.4th at pp. 903-904 [although court used word "crime" rather than "murder" and erred in giving part of *People v. Green* instruction in disjunctive, other instructions cured error so it was "not reasonably likely" jury misunderstood

instruction]; *People v. Roberts* (1992) 2 Cal.4th 271, 326 [errors under § 1138 are subject to *Watson* harmless error analysis].) For the same reasons, any error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1988) 44 Cal.3d 883, 929 [omitting independent felonious purpose instruction was harmless beyond a reasonable doubt because no rational jury could have failed to find that purpose other than and in addition to killing precipitated the kidnapping].) Hence, appellant's claim should be rejected.

IX.

THE PROSECUTION'S ARGUMENT WAS PROPER AND DID NOT MISLEAD THE JURY; EVEN ASSUMING ARGUENDO, THE PROSECUTOR ERRED, IT WAS HARMLESS

Appellant's ninth argument claims reversal is required due to the prosecution's alleged improper and misleading argument to the jury, which violated his rights under the state and federal constitutions to confront and cross-examine witnesses, to a fair jury trial, to the presumption of innocence, to due process, to equal protection, to fair and reliable determinations of guilt and penalty, and to be free from cruel and unusual punishment. (AOB 251, 263, 267, 269-271, citing Cal. Const., art. I, §§ 1, 7, 15-17; U.S. Const., 5th, 6th, 8th & 14th Amends.; see AOB 405.) Specifically, he challenges the prosecutor's remarks that neither Bond nor Benjamin were required to give a statement to detectives or testify, but that they opted to do so. (AOB 251-252.) He asserts those remarks misstated evidence, improperly used limited-purpose evidence, misrepresented evidence outside the record, and improperly commented upon his decision not to testify. (AOB 251, 260-263, 265-267.) His claim and assertions lack merit. The prosecutor's remarks were fair comments based on evidence elicited and alluded to by the defense. Even assuming arguendo, the prosecutor's argument indirectly highlighted appellant's having invoked his Fifth Amendment rights, the error was harmless.

A. Facts, Arguments, Mistrial Motion, And Denial Of Motion

1. Factual Background

Benjamin testified that while he was incarcerated in San Quentin he changed his life and explained:

> you do time by a code of silence. If you see something, you turn your head the other way, even if you seen it, just to survive. Well, I found myself getting a lot of incident reports, and it made me take a long look

at myself. If I was to even attempt to get out, I had to change. And I started changing. I didn't start doing some of the things I used to do.

(VI RT 1508-1509.) Bond similarly testified there is a "code of silence" among prisoners about giving information to law enforcement, where "You don't see nothing, hear nothing, say anything" for their own preservation – the fear is not fear of police, but fear of fellow inmates and gaining a reputation from cooperating with law enforcement. (IX RT 2560-2561, 2567; see IX RT 2567 [Bond testified there also is a code that an inmate looks out for himself first, which can be getting the best possible deal].) Detective Christian testified he has not had much success in getting statements from inmates regarding jail incidents on prior cases. (X RT 2675.)

Bond initially did not recall his preliminary hearing testimony that he had never touched Andrews; he testified "I think I pled the Fifth then." (IX RT 2413-2417.) Later, during Defense Counsel Hart's cross-examination of Bond concerning his interview with detectives, the following colloquy occurred:

Q. Now, the detectives then advised you of your rights, is that correct?

A. Uh-huh. (Affirmative response.)

Q. They read you the standard Miranda warnings that you had a right to remain silent, is that correct?

A. Yes, ma'am.

Q. And after they read you that, you then, having those rights in mind, *you waived your right to remain silent and did give information to the detectives*, is that correct?

A. *That's correct.*

(IX RT 2453-2454, emphasis added.) Similarly, during Defense Counsel Pedowitz's cross-examination of Detective Christian, the following colloquy occurred:

Q. Now, Bond's interview starts at 9:36, correct?

A. That's correct.

Q. And as a matter of fact, *his interview starts with the reading of Miranda admonition, correct*?

A. That's correct.

Q. "*You got the right to remain silent*," right?

A. *Yes.*

(X RT 2705, emphasis added; see also X RT 2706-2707 [Defense Counsel Pedowitz gratuitously remarked "With the *Miranda* admonition" when Detective Christian confirmed he began Bond's interview 33 minutes after Benjamin's interview].) Likewise, during Defense Counsel Pedowitz's cross-examination of Detective Christian, the following colloquy occurred:

Q. Well, *let's explore Mr. Benjamin's options*, shall we? [¶] Let's assume hypothetically that he did everything he said. He was too scared to call the police while the thing was going on. He waited 45 minutes or 30 minutes or whatever to have breakfast first, and now he's with you couple of hours after the situation. He can talk to you, which is what he did, correct?

A. Correct.

Q. He can lie to you, which, as far as we're concerned, he did, correct? [¶] Well, I'll take –

A. As far as you're concerned, yes.

Q. Right. *He can plead the Fifth Amendment, correct?*

A. *Correct.*

Q. *He doesn't even have to say "the Fifth Amendment," he can just say, "I don't want to talk to you. Go fly a kite," correct?*

A. *Correct.*

(X RT 2696-2697, emphasis added.) Additionally, during Defense Counsel Hart's cross-examination of Williams, the following colloquy occurred:

Q. So, then you're just doing this out of what, civic conscience, that sort of thing?

A. Yeah. . . . [¶] . . . [¶]

Q. Well, your reason for coming here is you want to do what's right; is that correct?

A. I was subpoenaed to come here. If I wasn't subpoenaed to come here, I wouldn't come at all.

Q. But you haven't refused to testify. You have testified; is that correct?

A. I'm testifying now.

Q. Right. And you certainly know that even if you're subpoenaed that you could decide you just weren't going to say anything; is that right?

A. No, I don't know that. (VI RT 1404-1405.)

2. Counsel's Argument

In his initial closing argument, Prosecutor Oppliger argued, inter alia:

And I want you to picture the Defendant. Everyone else is in the cells. The dead man is lying in cell number eight. . . . Who is this man, this man pathetically sweeping away alone in the day[ ]room? . . . that man is a fool. It's the man who believes in and trusts the code of silence.

(XI RT 2950-2951) and

[W]hat really is an almost amazing fact [is] that six and even seven, if you count Trinidad, . . . come in and testify. And this is out of . . . a pod . . . inhabited by robbers, murderers and rapists, . . . who . . . live by a code of silence that is enforced by the fear of death. [¶] What occasions the good fortune to present the statements of six men? This is a multi-racial, ethnic group . . . many of them have told you what the penalty, whether it be poor housing, isolation, fear, cause them, and most often in a case such as this . . . when asked, "What if anything did you hear or see?" to say, "I didn't hear nothing. I didn't see nothing."

Well, with these six or seven, there's no simple answer. Now, a lot of times . . . being a witness in a case, even if you're just a civilian, is no easy matter. . . . but a lot of people do it out of a sense of civic duty. Same sense that brings you here . . . [¶] [T]his wasn't a group of model citizens . . . but there was a theme . . . of civic duty, even on the part of these men. There was this concept that right is right and wrong is wrong. Now, I wouldn't say that was the dominant motive . . . but that did spark up and show from time to time. . . . The inmate way, one of the senses is a sense of survival. That played a part . . . [¶] Now, even though their first instinct is to say, "I didn't hear or see nothing," sometimes survival causes you to come forward, and sometimes a sense

of survival can only be fulfilled by telling what you saw and heard. [¶] . . . [¶]

But as you heard from what they've said about how they ended up here, some ended up here because of threats. You know, you've got a subpoena, don't show, you've violated the law by not showing. [¶] Others, there was friendship, loyalty. Offer a guy a job. I guess one of them got offered a cigarette or something. . . . [¶] These men who were murderers and rapists and robbers and burglars and receiving stolen property guys, they respond when somebody sometimes treats them just like a human being. . . .

And a real big part of this is that this went down on those days and these interviews really occurred between the 9th and the 13th. . . . It was just getting caught up in the circumstances. [¶] What motivated Albert Martinez to call the detectives and voluntarily come in on the 13th and give a devastating statement? No deals, no threats, no promises. You know, right is right sometimes . . . no matter where you live or what your social or economic strata is. Even in convicts, there's some things that are wrong. I hope that's what initially motivated Mr. Martinez. I hope that's what his -- why he came forward.

(XI RT 2986-2989).

In closing argument, Defense Counsel Hart argued, inter alia:

Mr. Oppliger has talked to you about the code of silence within the prison and jail system. I will not argue that there is not a code of silence among prisoners; we've had evidence of that. But I will also argue to you that besides this code of silence there is also a code which is "Look out for myself" and "I come first," and you heard that out of the mouth of Anthony Williams approximately a month ago when he testified in June when he said practically at the close of his cross-examination with me, "I'm always looking for a deal." [¶] And you heard that same type of testimony expressed from Mr. Bond on self-preservation and looking out for myself, and you heard it in the interview that Detective Christian had with Mr. Bond in which Detective Christian said, "Look out for yourself. Look out for yourself."

So juxtaposed against the code of silence is the code of every inmate looking out for himself. You heard that reinforced yesterday by Dr. Hickey when he talked about inmates jockeying for power and position and authority and being maybe the toughest guy or the worst guy or somebody who threatens other people, and that is a way of achieving power within the prison system. [¶] So it is not some code of silence that

makes the prosecution witnesses to be believed. You have to look -- and I'm going to take each one of their testimony and I'm going to try and tear it down for you. You have to look at what they gain, what they lose, and what their motives are for testifying.

(XI RT 3004-3005),

> [T]hat morning, when the body is in the cell . . . [¶] . . . I'm asking you to substitute an image of Bond and of Benjamin discussing how they are going to plot and how they are going to throw the weight of suspicion off them and put it onto Mr. Dement, and rather than having you entertain an image that Mr. Dement is sweeping and acting like he's innocent when he's committed some horrendous crime, I'm asking you to substitute the image of Bond and Benjamin as they have craftily gotten together and by their own admission discussed how they were going to handle this case and what they were going to say to authorities about what happened that night.

(XI RT 3007-3008; accord XI RT 3047),

> Bond got the best deal of all because he got a grant of immunity without there being a formal written guarantee. He has never been prosecuted for assault, attempted murder, murder, sodomy, he has not been prosecuted for anything at all, and he was told from the very beginning by the detectives, "You're not the one we want. You are not under arrest," and he was also told and he was told before testimony in this trial not to worry, not to worry about himself. So of course is he going to cooperate and is he going to testify? You bet. He's going to testify and he's going to label my client and he's going to blame things on my client because he has gotten a type of immunity because he's never ever been prosecuted for murder.
>
> So is it some civic conscience that has motivated Mr. Bond to come in this courtroom and testify against Mr. Dement? No, it's because he is out for himself and he is out to protect himself. Is he getting a snitch jacket, as Mr. Oppliger would argue, that he's going to get a snitch jacket? He's been saved. Benjamin's been saved. They're going to be in administrative segregation. He's got the best deal of all. He was not prosecuted for murder. . . .

(XI RT 3021), and

> [T]he defense is arguing in this case that Mr. Dement is not the one who committed this crime, and that Johnny Benjamin and Jimmy Lee Bond are the ones who framed Mr. Dement with this murder.

(XI RT 3037).

During rebuttal argument, Prosecutor Oppliger argued, inter alia:

> Ms. Hart says that the premise of this case is that there were four guys went into the cell and only three came out, and that it was Benjamin and Bond who did it. It must have been. [¶] . . . [¶] I'd like to go through some of the testimony -- some of the statements that were made by the defense attorneys in this case. [¶] I'd like you to recall something with respect to the Bond and Benjamin conspiracy. Remember, right here in these United States, there's a Fifth Amendment right. You don't have to be interviewed by a police officer. You don't have to testify. [¶] At any time, anywhere along from the first morning, neither Bond nor Benjamin didn't have to say a thing, but they did. I want you to bear that in mind. [¶] Now, both lawyers in this case –

(X RT 3080-3081.) Defense Counsel Pedowitz objected and asked for a conference, but then acceded to the court's preference to reserve the objection and allow the prosecutor's argument to continue. (X RT 3081.) Later, Prosecutor Oppliger argued:

> And you could convict this man based on simply the testimony of Benjamin and Bond. And when you look at their testimony, I submit to you that most of what they told you was the truth. They pretty much at this point in time had to. You could ignore that testimony completely. Say they didn't come forward. Say they decided to sit here and take the Fifth, and we provided to you the testimony instead of Anthony Williams, Brad Nelson, Albert Martinez, Eric Johnson. [¶] . . . [¶] . . . So those men, that testimony, is sufficient to convict the defendant.

(XI RT 3099-3100.)

3. Defense's Mistrial Motion Asserting Prosecutorial Misconduct And The Court's Denial Of Motion

After argument and outside the jury's presence, the defense moved for a mistrial, claiming it was misconduct for the prosecutor to note that Benjamin and Bond did not assert their Fifth Amendment rights because (1) Bond had asserted his Fifth Amendment rights at the preliminary examination at particular points, and (2) it "spotlight[ed]" that appellant has availed himself of the Fifth Amendment rights. (XI RT 3103-3104.) The trial court queried whether it was

in the record that Bond asserted his Fifth Amendment rights in the preliminary hearing. Defense Counsel Pedowitz answered affirmatively and asked the court to take judicial notice of the preliminary hearing transcript and court file, but the court noted the evidence was closed. The court then clarified its inquiry, asking whether the jury had heard evidence in that regard. The defense at first responded no, but then recalled that on cross-examination Bond had mentioned invoking the Fifth Amendment in the preliminary hearing. (XI RT 3104-3105.)

Prosecutor Oppliger said he had expected an objection, but that he had researched the matter and decided to make his argument because the defense had accused the witnesses of committing the murder and he felt it was fair comment. (XI RT 3105-3106.) Relying upon *United States v. Robinson* (1988) 485 U.S. 25 [108 S. Ct.864] (*Robinson*), he observed:

> [T]hat is a case where the U.S. attorney directly commented on the defendant's rights by stating, quote, "He could have taken the stand and explained it to you, anything he wanted. The United States government has given him throughout the opportunity to explain." [¶] That comment seemingly would violate *Griffin*, was made in what the Court has referred to or I've referred to as the fair-comment doctrine. It was made in response to a defense argument where the defense has accused the men of having committed the murder. It is a fair comment to say that they did not exercise any rights, that they freely and voluntarily spoke of their participation or lack thereof; and obviously a stronger argument is that this does not constitute any comment whatsoever on the defendant's particular rights. And, therefore, the comment was knowingly made, researched, and I believe done in compliance with good ethics and the law.

(XI RT 3105-3106.) The defense suggested the prosecutor acted unethically and immorally, noting the prosecutor had told the defense that Bond had asserted his Fifth Amendment rights in the federal case (presumably the wrongful death civil trial involving the same subject matter; see IX RT 2565-2567) and noting Bond had invoked those rights at his deposition (see *ibid.*) and at the preliminary hearing (XI RT 3106). The prosecutor responded, "He did and he didn't." (*Ibid.*)

Thereafter, the trial court denied the mistrial motion, stating:

> Was it in furtherance of an explanation with respect to their speaking and how they spoke? That is the key issue in this case. If there may have been some information known to the district attorney that's not in our file, that would constitution [*sic*] prosecutorial misconduct. I need to leave that to some other Court, as you may report it. [¶] It may be worth commenting, in this case there's been no reference to Mr. Dement having asserted Fifth Amendment rights, and the impression to the jury is probably quite to the contrary because of detectives' discussions with him that were received in the record, so I don't know how that could reflect on the defendant in this case.

(XI RT 3107.)

B. Applicable Law

The applicable federal and state standards regarding prosecutorial misconduct are well established:

> "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the "use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."

(*People v. Samayoa* (1997) 15 Cal.4th 795, 841, citations and internal quotations marks omitted; see also *People v. Morales* (2001) 25 Cal.4th 34, 43-44; *People v. Hill, supra*, 17 Cal.4th at p. 819.)

> [T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine. The prosecutor may not, however, argue facts or inferences not based on the evidence presented.

(*People v. Lewis* (1990) 50 Cal.3d 262, 283, citations omitted.) There is an exception:

> Counsel may argue to the jury matters which are not in evidence, but which are common knowledge or illustrations drawn from common experience, history, or literature.

(*People v. Pitts* (1990) 223 Cal.App.3d 606, 704 (*Pitts*); accord *Williams*, *supra*, 16 Cal.4th at p. 221; *Wharton*, *supra*, 53 Cal.3d at p. 567.)

> To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.

(*People v. Frye* (1998) 18 Cal.4th 894, 970, citations omitted.) Further, "remarks by defense counsel must be considered in assessing the prejudicial effect of the prosecutorial misconduct." (*Pitts*, *supra*, 223 Cal.App.3d at p. 704.)

Additionally, *Griffin* error occurs "whenever the prosecutor or court comments, either directly or indirectly, upon defendant's failure to testify" as being substantive evidence of the defendant's guilt. (*Robinson*, *supra*, 485 U.S. at p. 34; *People v. Morris* (1988) 46 Cal.3d 1, 35, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn, 5, 545, fn. 6, 5; see *Griffin v. California* (1965) 380 U.S. 609, 611-615.) *Griffin* error "'does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses.'" (*People v. Morris*, *supra*, 46 Cal.3d at p. 35, quoting *People v. Szeto* (1981) 29 Cal.3d 20, 34 (*Szeto*).) Likewise, *Griffin* error does not extend to situations where the prosecutor references the defendant's opportunity to testify and/or silence in fair response to defense counsel's argument. (*Robinson*, *supra*, 485 U.S. at p. 26-34.)

The reviewing court should scrutinize allegedly improper comments to determine if there is a reasonable likelihood the jury could have interpreted them in the manner urged by appellant. (*People v. Johnson* (1992) 3 Cal.4th

1183, 1228, citing *People v. Clair* (1992) 2 Cal.4th 629, 663 (*Clair*).) If the reviewing court finds the remarks amounted to improper comment on the defendant's silence, it must reverse the judgment unless it concludes the error was harmless beyond a reasonable doubt. (*People v. Hardy* (1992) 2 Cal.4th 86, 157 (*Hardy*), citing *United States v. Hasting* (1983) 461 U.S. 499, 507-509; see *Hardy* at p. 154; *People v. Hovey* (1988) 44 Cal.3d 543, 572 (*Hovey*); see also *Chapman*, *supra*, 386 U.S. at p. 24.) Further, the reviewing court must consider the entire charge of the court; in doing so, it assumes jurors are intelligent people capable of understanding, correlating and following all instructions that were given. (*Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9; *People v. Mills* (1991) 1 Cal.App.4th 898, 918; *Yoder*, *supra*, 100 Cal.App.3d at p. 338.)

Lastly, as noted in respondent's Argument IV, subheading B *ante*, a mistrial motion may be granted only if there is error plus incurable prejudice, i.e., prejudice that cannot be cured by an admonition or instruction. (*Hines*, *supra*, 15 Cal.4th at p. 1038 (*Hines*); *Price*, *supra*, 1 Cal.4th at p. 431; *Wharton*, *supra*, 53 Cal.3d at p. 565; *Eckstrom*, *supra*, 187 Cal.App.3d at p. 330.) The trial court is vested with "considerable discretion" in ruling on mistrial motions and its ruling is reviewed under the deferential abuse-of-discretion standard. (*Hines*, *supra*, 15 Cal.4th at p. 1038; *Price*, *supra*, 1 Cal.4th at pp. 428, 430; *Cooper*, *supra*, 53 Cal.3d at pp. 838-839; *Wharton*, *supra*, 53 Cal.3d at p. 565; *Eckstrom*, *supra*, 187 Cal.App.3d at p. 330.)

C. The Court Did Not Err In Failing To Grant Judicial Notice

In asserting the trial court improperly denied his mistrial motion, appellant contends the court erred in failing to grant the defense's request for judicial notice of its court file, which would have shown Bond had asserted his Fifth Amendment privilege at the preliminary hearing. (AOB 263-265, citing inter alia Evid. Code, §§ 452 & 453; see AOB 260, fns. 125 & 126.) Yet, the

court was well aware that Bond had asserted that privilege at times. Specifically, outside the jury's presence, the parties and the court discussed the uncertainty as to whether Bond would assert that privilege now that he was back in custody. (VIII RT 2183-2187; 2268-2275.) The prosecutor explained Bond had said he would testify if he was out of custody, but "when Mr. Bond is in custody, because of concerns for his safety, he has exercised a very . . . specific-area or intermittent Fifth Amendment privilege." (VIII RT 2183, 2185-2186, 2269.) Defense Counsel Hart agreed Bond had intermittently asserted that privilege, noting he had invoked it at several points in his deposition, but "adroit attorneys . . . chip[ped] away at his invocation of the Fifth so . . . he did give some answers to things," and noting he also had invoked it at the preliminary hearing, although he still testified briefly on a few points. (VIII 2184-2186, 2269-2270.) Defense Counsel Pedowitz asserted Bond had answered questions that were consistent with his self-serving statements, but he either denied involvement or invoked the privilege when asked directly about his involvement in the crime. (VIII RT 2273-2274.) Thus, the court was quite familiar with Bond's prior intermittent invocation of that privilege.

The defense's request for judicial notice arose from a mis-perception of the court's inquiry concerning what evidence was before the jury as opposed to what evidence was in the record itself. Specifically, the following colloquy occurred:

> THE COURT: Don't we have in our record, is it in or not, that Mr. Bond did assert his rights in the preliminary hearing?
>
> MR. PEDOWITZ: Yes. I'm asking the Court to take judicial notice of the transcript, the preliminary transcript.
>
> THE COURT: Evidence is closed.
>
> MR. PEDOWITZ: I'm sorry. The Court file, also the Court file.
>
> THE COURT: *What I want to know, sir* --

MR. PEDOWITZ: Okay.

THE COURT: -- *in our trial do we have evidence for the jury that Mr. Bond asserted his Fifth Amendment rights?*

MR. PEDOWITZ: No.

MS. HART: Well, Mr. Bond --

MR. PEDOWITZ: I'm sorry.

MS. HART: -- *when I cross-examined him and asked about his testifying in the preliminary hearing, I think he said something to the effect of, "I thought I didn't testify or I thought I took the Fifth."* [¶] He did take the Fifth, but he also testified in a limited respect. Mr. Oppliger called him in the prelim, he took the Fifth, I cross-examined him and asked him the questions. *I think there's something in the record that says Mr. Bond took the Fifth in the prelim.* I think he did because I think I've heard it before.

(XI RT 3104-3105, emphasis added.) Thus, apparently in assessing whether the jury would have been misled by the prosecutor's remarks, the court was concerned with what evidence was before the jury, as opposed to what evidence was in its files. Notably, once the court clarified its inquiry and Defense Counsel Hart noted there was evidence before the jury that Bond had invoked that privilege at the preliminary hearing, the defense no longer pursued its request for judicial notice. Under these circumstances, the trial court's failure to grant judicial notice was not error. (See generally, *People v. Brown* (2003) 31 Cal.4th 518, 563 [court not required to take judicial notice of irrelevant matters].)

D. The Prosecution's Argument Was Proper And Did Not Mislead The Jury

Among other things, appellant asserts the prosecutor "us[ed] for improper purposes evidence which was admitted for a limited purpose." (AOB 251.) Yet, his argument fails to identify the limited-purpose evidence and fails to explain how such evidence was improperly used. Likewise, in asserting a state law violation, he contends his right to equal protection was violated.

(AOB 269-270.) Yet, he does not explain how he was treated differently than other similarly situated defendants. Thus, his assertion that the prosecutor improperly used limited-purpose evidence and his equal protection claim should be rejected as insufficiently developed. (*Williams*, *supra*, 16 Cal.4th at pp. 206, 250; *Rodrigues*, *supra*, 8 Cal.4th at p. 1116, fn. 20.)

Appellant also mistakenly asserts:

> There was no evidence before the jury that either Bond or Benjamin had or had not invoked the Fifth Amendment privilege concerning the events of April 8-9, 1992, prior to their testimony before this jury, except that Bond had admitted during cross-examination having done so at the preliminary examination in this case.

(AOB 261, citing IX RT 2413; see also 1 CT 37.) Respondent's Factual Background set forth in subheading A-1 *ante*, belies his assertion. Specifically, the defense elicited testimony from Bond and Detective Christian that Bond waived his right to remain silent per *Miranda* and instead gave information to the detectives. (IX RT 2453-2454; X RT 2705; see also X RT 2706-2707.) Likewise, the defense elicited testimony from Detective Christian, that Benjamin had the "options," which he obviously did not exercise, of "plead[ing] the Fifth Amendment" or "just say[ing], 'I don't want to talk to you. Go fly a kite.'" (X RT 2696-2697.) Thus, the defense put before the jury evidence of Bond's waiver of his right to remain silent and Benjamin's non-invocation of his Fifth Amendment privilege. Further although statements of counsel are not evidence, Defense Counsel Hart's inquiries to Williams concerning his decision to testify and his responses (VI RT 1404-1405) certainly would have given the jury the impression that a witness could refuse to testify.

Accordingly, the prosecutor's remarks were a fair comment on the evidence and based on reasonable inferences therefrom. (*People v. Lewis*, *supra*, 50 Cal.3d at p. 283.) Bond's and Benjamin's willingness to come forward and break the "code of silence" (VI RT 1508; IX RT 2560, 2567),

directly went to a factor the jury was told to consider "[i]n determining the believability of a witness," i.e., "the attitude of the witness toward this action or toward the giving of testimony." (XI RT 3113-3114; see II RT 447-448 [pre-instructions during voir dire]; IV RT 1037-1038 [same].)

E. No *Griffin* Error Occurred

Contrary to appellant's claim (AOB 265-267), no *Griffin* error occurred. *Griffin* error "'does not extend to comments on the state of the evidence . . . .'" (*People v. Morris*, *supra*, 46 Cal.3d at p. 35, quoting *Szeto*, *supra*, 29 Cal.3d at p. 34.) As explained in subheading D *ante*, Prosecutor Oppliger's remarks – that neither Bond nor Benjamin were required to give a statement to detectives or testify, but that they had opted to do so – were based upon evidence the defense had put before the jury. Thus, his remarks clearly referred to the state of the evidence. Moreover, they contained no reference – express or implied – to appellant's silence, and thus, they were not objectionable. (*People v. Johnson*, *supra*, 3 Cal.4th at pp. 1228-1229; *People v. Morris*, *supra*, 46 Cal.3d at p. 35.) For the same reasons, there is no reasonable likelihood the jury could have interpreted the prosecutor's remarks in the manner urged by appellant. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1228; *Clair*, *supra*, 2 Cal.4th at p. 663.)

Furthermore, *Griffin* error does not extend to situations where the prosecutor references the defendant's opportunity to testify and/or silence in fair response to defense counsel's argument. (*Robinson*, *supra*, 485 U.S. at p. 26-34 [prosecutor's comment that insurance claimant charged with mail fraud could have taken stand to explain his actions did not violate privilege against self-incrimination because it was fair response to argument by defense counsel, who had accused government of unfairly denying claimant opportunity to explain his actions; prosecutor merely rebutted that accusation by referring to possibility of claimant's testifying as one of several opportunities he was

afforded to explain his actions; prosecutor did not treat claimant's silence as substantive evidence of guilt in violation of 5th Amend.].) Here, the prosecutor's remarks were in fair response to defense counsel's argument which accused Bond and Benjamin of having committed the murder and "plot[ted] . . . to throw the weight of suspicion off them and put it onto [appellant]" under the "code which is 'Look out for myself,'" as opposed to having been motivated by "some civic conscience." (XI RT 3004-3005, 3007-3008, 3021, 3037, 3047.)

Essentially, the prosecutor was telling the jury that in assessing Bond and Benjamin's credibility, it should bear in mind that they had come forward when they otherwise could have stood mute and adhered to the "code of silence" among inmates (X RT 3080-3081) and that even if they had not come forward, there was sufficient evidence from other witnesses to convict appellant (XI RT 3099-3100). Those circumstances differ substantially from those in *People v. Medina* (1974) 41 Cal.App.3d 438 (*Medina*), upon which appellant relies (AOB 259, 265), wherein the effect of the prosecutor's remarks was to urge the jury to believe the testimony of the three accomplice witnesses because the defendants, who were the only ones who could have refuted their testimony, did not testify and subject themselves to cross-examination and to prosecution for perjury (*Medina*, *supra*, 41 Cal.App.3d at p. 457). Thus, unlike the circumstance is *Medina* which amounted to *Griffin* error (*id.* pp. 457-460), the circumstances here did not violate *Griffin* because the prosecutor's remarks did not amount to a comment upon appellant's failure to testify and refute the testimony of Bond and Benjamin.

F. Even Assuming Arguendo, The Prosecutor's Argument Indirectly Highlighted Appellant's Having Invoked His Fifth Amendment Rights, The Error Was Harmless

Here, even assuming arguendo, the prosecutor's argument indirectly

highlighted appellant's having invoked his Fifth Amendment Rights, the error was harmless given the state of the evidence, the court's and defense counsel's remarks during voir dire, and the court's instructions.

Here, as the trial court observed, the prosecutor's remarks would not really reflect on appellant because:

> there's been no reference to Mr. Dement having asserted Fifth Amendment rights, and the impression to the jury is probably quite to the contrary because of detectives' discussions with him that were received in the record.

(XI RT 3107.) Specifically, the jury had before it evidence that appellant made incriminatory remarks while engaged in small talk with Detective Christian. (X RT 2671-2674.) Thus, as far as the jury was concerned, appellant opted to forgo his right to silence.

Further, during voir dire the court informed the prospective jurors that they were not to draw any inference if appellant decided not to testify. Specifically, the court remarked:

> THE COURT: [Y]our role is really going to be to determine whether the District Attorney proves his case beyond a reasonable doubt. Because the defense has no burden whatsoever. None. They don't do a thing in this case and if you aren't satisfied, that's fine. Now, suppose you have a suspicion, "Maybe there's a lot to this charge at the end of the trial. Maybe there's something really to this and I'm convinced to a large degree that Mr. Dement is probably guilty. Probably is. And I'd like to hear what he has to say about this." *His lawyer gets up and says, "We rest. Mr. Dement isn't going to say a word."* How do you deal with that? Anybody have an idea?
>
> [¶] . . . [¶]
>
> *That's his right.* How do you deal with it, though? Wouldn't you like to hear what the other side is? [¶] *There's a place where you have to follow the law that's built into the Constitution for all of us. And that is a person who's charged with a crime has the constitutional right not to be required to testify. And so in consultation with his attorney, they decide, "Well, we're going to rely on the People's evidence." And in our evaluation, no deficiency in that side of the evidence is going to be made up by Mr. Dement's lack of testimony. You can't just -- you can't*

assume anything from that. It's like playing cards. You play the cards you have, not the ones you don't have. And that's an oversimplification of course, but then you examine, here's the evidence I have before me. Is there enough there or not? Is it proved or not proved?

(II RT 451-452, emphasis added.) The court later reiterated its remarks, stating:

> The burden of proof is on the district attorney. The defendant has no burden at all, no burden whatsoever to prove anything. So, for example, should the defense just when the People's case gets through, they say, "We rest, too. They rested, we rest," *defense is not obligated to put on any evidence whatsoever.* They may rely on the state of the evidence, and if the evidence isn't there, you can't guess what the defense might have been, there just won't be any. [¶] *How does that make you feel with respect to, for example, you won't hear the defendant testifying?* I want you to tell me when you get up into the jury box if you have any reservations in that regard because again *he's entitled, Mr. Dement, just like any of us would be, not to testify under the Constitution if he chooses not to do that. If he talks with his attorney and they say, "We rely on the state of the evidence," you evaluate the evidence you have, not what you guess the evidence might have been.* I want you to weigh how that might affect each of you if we were at that situation in this case.

(IV RT 1040, emphasis added.)

Likewise, during voir dire the defense informed the prospective jurors that it had no burden to prove anything. Specifically, Defense Counsel Hart stated:

> Now, the prosecution is going to call witnesses, defense is going to call witnesses. The prosecution has the burden of proof in this case, and so the defense doesn't really have any burden at all. Mr. Pedowitz and I don't need to, if we don't want to, *we don't have to call any witnesses* at all and can rely simply on the prosecution's case. We could put our feet up on the table and sleep. We're not going to do that, I can guarantee that, but under the law *we don't have a burden to prove anything*, and the prosecution has the full burden of proof.

(II RT 480-481, emphasis added.)

Additionally, following Defense Counsel Hart's objection to rebuttal argument, wherein the prosecutor rhetorically asked "Does the defense put on anybody to suggest that there was anybody in that tank with a motive? Have

they put on any evidence that there was a sighting of a person by cell number eight?," the court told the jury:

> The burden of proof is not on the defense, as I've explained to you before. The comment about the evidence, of course the evidence is what the evidence is, whatever you've heard, ladies and gentlemen; not from the attorneys . . .

(XI RT 3097-3098.)

Moreover, the trial court instructed the jury not to draw any inference from appellant's not testifying:

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

(XI RT 3117; accord 2 CT 581; 3 CT 659; CALJIC No. 2.60.) It further instructed the jury that appellant could rely on the state of the evidence:

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

(XI RT 3117; accord 2 CT 582; 3 CT 660; CALJIC No. 2.61.) It also instructed the jury that "Statements made by the attorneys during the trial are not evidence." (XI RT 3109; 2 CT 563; 3 CT 641; CALJIC No. 1.02.) This court must assume the jury understood, correlated, and followed those instructions. (*Francis v. Franklin*, *supra*, 471 U.S. at p. 324, fn. 9; *People v. Mills*, *supra*, 1 Cal.App.4th p. 918; *Yoder*, *supra*, 100 Cal.App.3d at p. 338.)

Also, contrary to appellant's claim (AOB 267-268), as explained in respondent's argument II, subheading F and argument VIII, subheading D, neither the length of deliberations nor the prosecutor's proposal of striking two of the special circumstances due to the complexity of the legal issues involved, indicate the case was close. Further, the evidence of appellant's guilt is strong

as summarized in respondent's argument II, subheading F and argument IV, subheading E *ante*, which respondent incorporates by reference. In short, he had the means, motive, and opportunity, and he confessed to doing it.

In sum, given the state of the evidence, which implied appellant opted to forgo his right to silence, and given the trial court's and defense counsel's remarks during voir dire, the court's instructions, the presumption that the jury followed those instructions, and the strength of the evidence of appellant's guilt – including his confession in the kites and his motive based on his animosity towards Andrews' friend Rutledge – any error in the prosecutor's remarks was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24; *Hardy*, *supra*, 2 Cal.4th at p. 154; see *Hovey*, *supra*, 44 Cal.3d at p. 572 ["indirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error"].) For the same reasons, the court's refusal to grant a mistrial did not amount to prejudicial error under the tests enunciated in *Watson*, *supra*, 46 Cal.2d at page 836, or *Chapman*, *supra*, 386 U.S. at page 24.

Accordingly, appellant's state and federal constitutional challenges (251, 263, 267, 270-271) should be rejected. Further, contrary to his claim that state law was violated wherein the State arbitrarily withheld a non-constitutional right (AOB 269-270), no state law error occurred. Thus, his related claims must fail.

X.

THE COURT PROPERLY RESTRICTED CROSS-EXAMINATION OF BENJAMIN; EVEN ASSUMING ARGUENDO, THE COURT ERRED, ITS ERROR WAS HARMLESS

Appellant's tenth argument claims reversal is required because the trial court prohibited the defense from cross-examining Benjamin about perjury Benjamin allegedly had committed in Benjamin's prior murder trial. Appellant asserts that violated his rights under the state and federal constitutions to confront and cross-examine witnesses, to a fair jury trial, to due process, to present a defense, to equal protection, to fair and reliable determinations of guilt and penalty, and to be free from cruel and unusual punishment. (AOB 272, 279-281, citing Cal. Const., art. I, §§ 1, 7, 15-17; U.S. Const., 5th, 6th, 8th & 14th Amends.; see AOB 405.) His claim and assertions lack merit because the court properly exercised its discretion in excluding impeachment on that collateral matter. Even assuming arguendo, the court erred, its error was harmless because such cross-examination would not have produced a significantly different impression of Benjamin's credibility given the extent of cross-examination otherwise permitted, the presence of other impeachment evidence, the existence of evidence corroborating Benjamin, and the overall strength of the prosecution's case.

A. Factual And Procedural Background

Outside the jury's presence, the trial court and the parties discussed potential impeachment the defense sought to pursue concerning Benjamin's history of blackouts associated with alcohol intoxication and allegedly with drug intoxication and emotional upheavals. (VI RT 1545-1555; see VI RT 1509, 1544-1545, 1556-1557.) Inter alia, the defense sought to impeach Benjamin with allegedly perjured testimony he had offered during his trial on

a 1974 murder, wherein Benjamin, who purportedly experienced a blackout the night of that offense, offered testimony that "some other dude did it" but then, after being convicted, accepted full responsibility for the shooting despite his blackout. (VI RT 1547-1548, 1551-1554.)

Prosecutor Oppliger objected, asserting: the impeachment was improper, it was on a collateral matter, it was remote in time, and it was a defense ruse to harass Benjamin by delving into specifics of his background and putting improper character evidence before the jury. (VI RT 1552.) Defense Counsel Pedowitz responded:

> I'm not really interested in getting into that case. . . [¶] . . . [¶] What I'm interested in getting into is this man 20 years back in another homicide pointed the finger of responsibility toward another party -- [¶] . . . [¶] -- much as he's doing now. [¶] . . . [¶] This is for third-party motive.

(VI RT 1553-1554.) The court sustained the objection, ruling:

> Mr. Oppliger, I don't even need to hear you on that subject. Your objection is sustained. *There may be no reference to what occurred in that other case with respect to this witness denying it, blaming it on another dude and then later admitting that he was the one that did it. That is strictly collateral.* . . . [¶] . . . To the extent that there is a history of blackouts attributed to use of alcohol or otherwise, you may explore it further with this witness, *being cautious not to get into facts of other cases at remote times.* [¶] . . . [¶] In other words, to explore the condition that he reported, whether it's true or not, and for both the purposes of impeachment and for getting the account of his report so that it may be fairly argued, if it can, that he has a condition of blackouts that somehow impaired his memory and ability to think.

(VI RT 1554, emphasis added.)

B. Applicable Law

Section 1044 provides:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

Similarly, Evidence Code section 765, subdivision (a), provides:

> The court shall exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment . . ."

Further, under Evidence Code section 352, relevant evidence may be excluded if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (§ 352; *Pierce*, *supra*, 24 Cal.3d at p. 211.) Evidence Code section 352 gives trial courts "discretion to admit or exclude evidence offered for impeachment on a collateral matter." (*People v. Mayfield* (1997) 14 Cal.4th 668, 748; *People v. Gurule* (2002) 28 Cal.4th 557, 619 (*Gurule*); *People v. Morse* (1992) 2 Cal.App.4th 620, 642 (*Morse*); Witkin, Cal. Evidence (3d ed., 1986) § 1983, pp. 1939-1940.) The determination of the relevancy and the admissibility of evidence is for the trial court to make; its decision will not be disturbed absent a manifest abuse of discretion or clear error of law. (*People v. Northrop* (1982) 132 Cal.App.3d 1027, 1042; *People v. Alfaro* (1976) 61 Cal.App.3d 414, 423; see also *People v. Love* (1977) 75 Cal.App.3d 928, 941, criticized on different ground in *Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1012-1013.)

Moreover,

> As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. (*People v. Hall* (1986) 41 Cal.3d 826, 834.)

(*People v. Jones* (1998) 17 Cal.4th 279, 305, parallel citation omitted; accord *Gurule*, *supra*, 28 Cal.4th at p. 620; *Morse*, *supra*, 2 Cal.App.4th at pp. 641-642.) Thus, trial courts retain wide latitude insofar as the confrontation

clause is concerned to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion of the issues or interrogation that is only marginally relevant. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 (*Van Arsdall*); *People v. Harris* (1989) 47 Cal.3d 1047, 1091; *Morse*, *supra*, 2 Cal.App.4th at p. 642.) "[T]he 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." (*People v. Harris*, *supra*, 47 Cal.3d at p. 1091, original italics, quoting *Van Arsdall*, *supra*, 475 U.S. at p. 679; accord *Morse*, *supra*, 2 Cal.App.4th at p. 642.) "There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced 'a significantly different impression of [the witness's] credibility. . . .'" (*People v. Rodriguez* (1986) 42 Cal.3d 730, 751 (*Rodriguez*), quoting *Van Arsdall*, *supra*, 475 U.S. at p. 680.)

The standard for determining if a Confrontation Clause violation has occurred is whether a reasonable jury might have received a significantly different impression of the witness' credibility if the defendant had been allowed to pursue his proposed cross-examination. (*Van Arsdall*, *supra*, 475 U.S. at p. 680; *Rodriguez*, *supra*, 42 Cal.3d at pp. 750-751 & fn.2; *People v. Belmontes* (1988) 45 Cal.3d 744, 780-781 (*Belmontes*).) If it is determined that the defendant's right of confrontation was violated, the error is subject to harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, including the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of

course, the overall strength of the prosecution's case. (*Ibid.*)

C. The Court Properly Restricted Cross-Examination Of Benjamin

The instant case is similar to *Jennings*, *supra*, 53 Cal.3d at page 334, where the defense sought to impeach prosecution witnesses with actions allegedly constituting perjury. There the defense sought to introduce evidence that the witnesses had failed to reveal their income as prostitutes when applying for county welfare benefits. Because their averments were under oath, the defense characterized the false averments as felonious perjury that was relevant to their veracity. The prosecutor objected and the trial court excluded the evidence under Evidence Code section 352. (*Id.* 53 Cal.3d at pp. 371-372.) This Court held exclusion of that evidence did not infringe upon the defendant's constitutional right to confront witnesses against him because that evidence would have impeached the witnesses on collateral matters and was only slightly probative of their veracity. (*Id.* at p. 372.) That same rationale applies here. (See also *Gurule*, *supra*, 28 Cal.4th at p. 619 [defendant failed to demonstrate trial court abused its broad discretion when it precluded impeachment with evidence witness had beaten child with belt because that was collateral matter].)

Here, the evidence proffered concerned CDC psychiatric interviews wherein

> "Benjamin volunteered a history of blackouts meaning periods of loss of awareness during which he could continue driving his car, talking with others or otherwise continuing ordinary behavior . . . Such an episode occurred on the night of the instant offense."

(VI RT 1547-1548.) Apparently following his conviction, Benjamin came to terms with his responsibility for that crime despite his blackout:

> Benjamin does not seek to suggest that the blackout diminished his responsibility for the latter shooting. He remembers the shooting but does attribute his poor judgment and inaccurate aim to his intoxication at the time.

(VI RT 1553.) Accordingly, even assuming the accuracy of the defense characterization that Benjamin had pointed the finger of blame towards someone else at his previous trial (VI RT 1552-1553), his having done so arguably was attributable to his having experienced a blackout. Notably, there was no evidence that Benjamin had a blackout during the instant offense. (See VI RT 1544-1545, 1556 [Benjamin last had a blackout in 1988 or 1989].) Thus, it was impeachment on a collateral matter that was only slightly probative of his veracity.

Additionally, in *Jennings* this Court also held the trial court did not abuse its discretion in finding the probative value of the collateral evidence was outweighed by the probability that it would necessitate an undue consumption of time. (*Id.* 53 Cal.3d at p. 372.) Although the trial court here did not expressly invoke that rationale, it impliedly did so. Specifically, Prosecutor Oppliger asserted an Evidence Code section 352 objection to other aspects of that collateral evidence, stating "due to its remoteness, its lack full [*sic*] probative value, it would be -- it would consume an undue amount of time and . . . be objectionable under 352." (VI RT 1549.) Notably, in sustaining the objection to evidence of Benjamin's alleged perjury, the court remarked "Mr. Oppliger, I don't even need to hear you on that subject. Your objection is sustained." (VI RT 1554.) Thus, in making its ruling, the court impliedly took into account and agreed with Prosecutor Oppliger's earlier remarks concerning Evidence Code section 352. (VI RT 1554.) Its ruling in that regard was sound. (*Id.* 53 Cal.3d at p. 372; *Morse, supra*, 2 Cal.App.4th at pp. 641-642 [trial court acted within its discretion in excluding evidence that prosecution witness had violated court order by taking his children out of state because it involved impeachment on a collateral issue, it was marginally probative if probative at all, and it would have consumed undue time; further, exclusion of that impeachment did not violate defendant's rights to confrontation and to put on

defense].)

Although Defense Counsel Pedowitz said "I'm not really interested in getting into that case" (VI RT 1553) his desire to show Benjamin offered testimony that "some other dude did it" but then, after being convicted, accepted full responsibility for the shooting despite his blackout (VI RT 1547-1548, 1551-1554) necessarily would have involved a mini-trial within appellant's trial. (See *Morse*, *supra*, 2 Cal.App.4th at p. 641.) Thus, even assuming arguendo, the court's ruling did not encompass a finding that its probative value was outweighed by the probability that it would necessitate an undue consumption of time, it should have. Thus, its ruling should still be upheld. (*Zapien*, *supra*, 4 Cal.4th at p. 976 [proper decision will stand despite wrong reasoning].)

Moreover, the instant case is similar to *Gurule*, *supra*, 28 Cal.4th at page 557. In that case, the defense sought to show witness Garrison, who admitted participating in the robbery but denied participating in the robbery victim's murder, had admitted culpability in prior crimes wherein he had attempted to shift the majority of the blame elsewhere. The defense contended such evidence would bolster its position that Garrison, not defendant, actually killed the robbery victim. (*Id.* at p. 618.) In upholding the trial court's exclusion of cross-examination on that issue, this Court held:

> Defendant also argues the trial court erred in prohibiting him from introducing evidence of other crimes whose circumstances indicated that Garrison employed a habit of admitting some blame but then shifting the bulk of the blame elsewhere. It seems doubtful the proffered instances . . . demonstrate . . . a habit or custom . . ., as distinct from the common tendency of criminal offenders generally to minimize their culpability . . . In any event, it does not appear the trial court abused its wide discretion in this matter. As we explained in an analogous situation, defendant merely "was precluded from proving [his point] with time-consuming hearsay and character evidence that was not particularly probative on the question." (*People v. Jones* (1998) 17 Cal.4th 279, 305.)

> To the extent defendant contends the alleged restrictions on his cross-examination of Garrison, addressed above, violated his rights to confrontation, due process, a fair trial, and a reliable penalty, we reject those claims as well: "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.' (*People v. Hall* (1986) 41 Cal.3d 826, 834." (*People v. Jones*, *supra*, 17 Cal.4th at p. 305.) Defendant does not explain why the routine evidentiary rulings of which he complains rise to the level of a constitutional violation.

(*Gurule*, *supra*, 28 Cal.4th at p. 620, parallel citations omitted.) Those same rationales should apply here.

Accordingly, based on the foregoing, the trial court properly exercised its discretion in excluding impeachment on that collateral matter. Hence, appellant's state and federal constitutional challenges (AOB 272, 279-281) should be rejected. Further, because no state law error occurred, his related claim that the State arbitrarily withheld a nonconstitutional right provided by its laws (AOB 280, citing, inter alia, U.S. Const., 5th, 6th, 8th & 14th Amends; Cal. Const., art. I, §§ 1, 7, 15, 16) must fail. Moreover, because he does not explain how he was treated differently than other similarly situated defendants, his equal protection claim should be rejected as insufficiently developed. (*Williams*, *supra*, 16 Cal.4th at pp. 206, 250; *Rodrigues*, *supra*, 8 Cal.4th at p. 1116, fn. 20.) Hence, appellant's claims should be rejected.

D. Even Assuming Arguendo, The Court Erred, Its Error Was Harmless

Even assuming arguendo, the court erred, its error was harmless because such cross-examination would not have produced a significantly different impression of Benjamin's credibility given the extent of cross-examination otherwise permitted, the presence of other impeachment evidence, the existence of evidence corroborating Benjamin, and the overall strength of the

prosecution's case.

Here the trial court permitted the defense to otherwise cross-examine Benjamin on his history of blackouts and to explore whether he truthfully reported them for purposes of impeachment and for developing evidence to possibly argue blackouts somehow impaired his memory and ability to think. (VI RT 1554; see VI RT 1544-1545, 1555-1559; see also XI RT 3059-3060 [Defense Counsel Hart's closing argument suggesting Benjamin lied about his pruno consumption so as to stick to his testimony that he had not had a blackout since 1988 or 1989].) Further, the defense extensively cross-examined Benjamin on the circumstances surrounding the events in question and his motives for testifying. (See generally, VI RT 1493-1526, 1539-1544, 1559-1602, 1604-1638, 1649-1674, 2728-2735, 2777-2786.)

As a result of the defense's cross-examination, as well as the prosecution's direct examination, the jury knew Benjamin had felony convictions for murder, drunk driving, sexual assault, drugs in a custodial facility, and bank robbery. (VI RT 1432, 1485, 1489-1490.) The jury also was aware that he was in federal custody serving 11 years, eight months on the latter and that he was hoping to get his sentence reduced for cooperating, although he had heard the U.S. Attorney was not going to recommend a reduction. (VI RT 1432, 1490-1492, 1596-1597; X RT 2771-2775, 2779.) Thus, the jury necessarily would have factored his criminal history and motive for testifying into assessing his credibility.

Further, the jury heard evidence that Martinez (VII RT 1787-1789, 1801, 1811), Johnson (X RT 2721), and Nelson (VIII RT 2083-2089, 2114-2115, 2117-2120, 2131, 2134-2137, 2140) had indicated overhearing the attacks on Andrews, which occurred predominantly, if not exclusively, during lock-down. Because Benjamin was locked in the cell with Andrews during that period, the jury necessarily would have considered the possibility that he may have been

involved in the attacks and therefore, carefully scrutinized his testimony. Additionally, Defense Counsel Hart's closing arguments, which suggested that Benjamin and Bond plotted to frame appellant (XI RT 3007-3008, 3021, 3037, 3047) amply challenged Benjamin's credibility. Her argument likewise gave the jury reason to scrutinize Benjamin's testimony.

Furthermore, Benjamin's testimony was corroborated in various respects by Bond's testimony, which throughout identified appellant as the perpetrator. Notably, neither Benjamin nor Bond had an identifiable motive to attack and kill Andrews and neither of them confessed to murdering him. As Detective Christian testified: Benjamin's and Bond's statements are consistent with Andrews' injuries, activities they described are consistent with things other inmates said appellant had said after exiting the cell, and their stories are close enough to where it does not lend a lot of suspicion. (X RT 2711.) More specifically, the forensic evidence indicates Andrews was attacked and killed in the manner in which Benjamin and Bond described: his head and face had blunt-trauma injuries consistent with multiple blows; he had bruises on his shoulder, upper back, forearms and legs; he had multiple rib fractures consistent with being kicked; his external injuries had deep internal hemorrhages indicating significant force was used; and his death was caused by ligature strangulation. (V RT 1255, 1263-1263, 1265-1274, 1277, 1285, 1321, 1331, 1353-1356.)

Also, Benjamin's and Bond's testimony was corroborated by evidence of appellant's physical injuries and complaint of pain: his right hand was sprained with a 1½ inch circular reddened and swollen area on back of his middle knuckle, a scrape and a ¼ inch cut on back of his right thumb web, a small abrasion on back of his left thumb web, an abrasion on back of his upper right arm, a small bruise on his left shin about six inches below his knee, a bruise on the outside edge of his right big toe, and a complaint of pain to his

right foot. (VIII RT 2205-2208, 2228-2232, 2670-2671.) As Detective Christian testified, appellant's injuries to his knuckle were consistent with someone who beats another person. (X RT 2693-2694.)

Still, appellant asserts "an examination of [Bond's and Benjamin's] bodies revealed blood spatters, smears, abrasions, a scratch, and discoloration like a bruise." (AOB 277.) Yet, Benjamin had virtually no injuries and Bond offered feasible explanations for his injuries as having occurred other than from attacking Andrews. Specifically, Benjamin had no injuries except for a discoloration similar to a bruise on the top of his right foot. (VIII RT 2209, 2232, 2235.) While he had light smears of possible blood across the top of all his left toes, there was no way to tell whether the smears arose from beating the victim or from merely walking through the bloody cell. (VIII RT 2226-2227.) Further, Bond explained that he got the scratch on his right shoulder while working out in the gym, that the mark on his temple was a scar, and that the abrasion on his knee occurred when he wrestled appellant and Benjamin. (VIII RT 2209-2211, 2214-2218, 2223; IX RT 2548-2553.)

Nonetheless, appellant asserts "there were substantial weaknesses in the prosecution's case centered on Bond and Benjamin." (AOB 277.) For example, he claims their testimony provided the only evidence of oral copulation and that there was no physical or other corroboration concerning it. (AOB 276-277.) Yet, their testimony corroborated each other. Further, in describing the forced oral copulation both Bond and Benjamin testified appellant referred to Andrews as a punk. (VI RT 1457-1460; IX RT 2385-2387, 2396, 2478-2479, 2482.) Notably, Martinez told Detective Christian the morning after appellant was released for breakfast, appellant was bragging, saying "I killed the punk." (VII RT 1789-1790.) Criminologist Hickey testified, in part, the term "punk" in prison refers to "somebody who is used sexually, he's owned by another inmate, if you will, sometimes shared or

sold to other inmates." (XI RT 2888.) Thus, appellant's use of the term that morning provided corroborative, circumstantial evidence that he had sexually assaulted Andrews earlier.

Appellant also argues Benjamin and Bond provided the primary evidence of premeditation and deliberation. (AOB 276.) Yet, appellant's attack on Andrews was foreshadowed in Williams' and Nelson's testimony. Specifically, Williams testified as Andrews came in, appellant and the other inmate said they hoped Andrews would not be put into their cell and appellant said something like "They move him in my cell, I'm going to do him. I'm going to kill him," "I'm going to do his ass." (VI RT 1375-1376, 1411, 1413, 1419-1420.) Nelson similarly testified as Andrews went up to his cell, Nelson saw appellant look at Bond and begin hitting his fist into his hand while smiling and laughing with Bond. (VIII RT 2082-2083, 2135.) Those corroboratory circumstances were consistent with premeditation and deliberation.

Appellant further asserts there was substantial evidence he was not the person who tied the towel around Andrews' neck. (AOB 277; see AOB 404.) In doing so, he asserts "Benjamin and Bond both testified that the towel that appellant had allegedly used to choke Andrews had been flushed down the toilet." (*Ibid.*) Yet, when appellant and Benjamin put Andrews under the bottom bunk, Andrews was covered with a blanket from the neck down. (VI RT 1642.) Bond did not recall seeing anything around Andrews' neck at the time. Bond thought the towel that appellant had used to choke Andrews was one of the towels that was used to clean up and then was flushed, *but he was unsure* – "I ain't positive if it was the towel that was used to strangle or not." (IX RT 2397-2398, 2400, 2423, 2428-2429, 2519-2520.) Benjamin did not recall the towel being around Andrew's neck when he and appellant put Andrews on the mattress and scooted the mattress under the bottom bunk, *let alone where the towel was*. (VI RT 1578-1579; but see VI RT 1565 [Benjamin

testified it was flushed down the toilet].) Detective Christian did not believe anyone returned to the cell and tied the towel around Andrews' neck after appellant, Bond, and Benjamin had left. Bond's and Benjamin's physical reactions and verbal responses to questions did not cause him to believe otherwise, so he did not ask them about having done so. (X RT 2688, 2691.) He also thought Bond and Benjamin did not pay attention to details like whether a towel was tied around Andrews' neck (X RT 2713), which is an explanation that a reasonable trier of fact would have found to have been credible given the traumatic situation involved and the likelihood that the blanket covering Andrews obscured the towel's visibility (VII RT 1898, 1911-1912, 1978-1980 [medical personnel did not notice the towel tied around Andrews' neck until the blanket was pulled back and he was turned over so they could attempt to take his vital signs]; see VI RT 1642 [blanket covered body from the neck down]; see also IX RT 2400 ["His head wasn't covered up . . . just up to his shoulders"].)

Appellant also asserts that Bond was heard to tell another inmate, around the time of his testimony in this trial, that he was incarcerated for killing his cellmate. (AOB 278.) Yet, as the prosecutor argued:

> Survival. Mr. Bond in court holding and he's surrounded by prisoners and he's asked by a prisoner, "What are you doing here?" I ask you, can you picture him in this surrounding saying, "I'm here to testify on behalf of the prosecution"? "What are you doing here?" You can't -- it cannot be said.

(XI RT 3083.) That Bond made that remark out of personal concern for his safety is an explanation that a reasonable trier of fact would have found to have been credible under the circumstances.

Still, appellant asserts that before going back to the cell and informing the guards about Andrews, Bond and Benjamin got their stories straight. (AOB 278, citing IX RT 2426.) Yet, Bond testified they did not collaborate nor try to figure out what they were going to tell law enforcement; instead, they just

talked about what had happened. (IX RT 2545-2546.) Likewise, while appellant asserts Bond and Benjamin had further discussions about the incident during their transport in advance of the preliminary hearing (AOB 278), Detective Christian was not concerned about that because they already had given their statements to detectives and because points where they differed when interviewed still existed when they testified at trial (X RT 2713). While appellant argues those inconsistencies suggest that their corroboration of each other was subject to substantial skepticism (AOB 278), Detective Christian testified the saying that two people who witness an exciting event will often see and hear it differently holds true for the high percentage of cases for which he has conducted interviews (X RT 2714-2715).

Also, contrary to appellant's claim (AOB 278-279; see AOB 276), as explained in respondent's argument II, subheading F and argument VIII, subheading D, the length of deliberations do not indicate the jury saw the case as close. Further, the evidence of appellant's guilt is strong as summarized in respondent's argument II, subheading F and argument IV, subheading E *ante*. Respondent incorporates those explanations and summaries by reference. In short, he had the means, motive, and opportunity, and he confessed to doing it.

In sum, even assuming the damaging potential of cross-examination had been fully realized such that it showed Benjamin had perjured himself in his prior murder trial, that would not have produced a significantly different impression of his credibility given the extent of cross-examination otherwise permitted, the presence of other impeachment evidence, the existence of evidence corroborating Benjamin, and the overall strength of the prosecution's case. Thus, any error was harmless beyond a reasonable doubt because it is not conceivable that appellant's proposed cross-examination would have changed the result in this case. (*Van Arsdall*, *supra*, 475 U.S. at p. 680; *Rodriguez*, *supra*, 42 Cal.3d at pp. 750-751 & fn.2; *Belmontes*, *supra*, 45 Cal.3d at pp.

780-781; see *People v. Mincey* (1992) 2 Cal.4th 408, 463 [confrontation clause violation harmless where jury had ample information as to witness' potential bias, including defense counsel's closing argument explicitly arguing bias]; *People v. Rodriguez, supra*, 42 Cal.3d at pp. 750-751 & fn.2 [because proposed examination would not have significantly impacted jury's assessment of credibility, any confrontation clause error was harmless beyond reasonable doubt despite fact that it was allegedly a close case]; *People v. Adames* (1997) 54 Cal.App.4th 198, 209 [although proposed cross-examination arguably bore on witness' credibility, inquiry was marginally relevant and would have had minimal impact on real issues in case; disallowing pursuit of that inquiry was therefore non-prejudicial].) For the same reasons, any error was harmless under *Watson* because it is not reasonably probable he would have achieved a more favorable result if the alleged misconduct had not occurred. (*Watson, supra*, 46 Cal.2d at p. 836.) Hence, appellant's claim should be rejected.

XI.

APPELLANT'S CHALLENGES TO CALJIC NO. 2.06 ARE NOT COGNIZABLE; IN ANY EVENT, THE COURT PROPERLY INSTRUCTED THE JURY IT COULD CONSIDER HIS ALLEGED ACTS AS EVIDENCING A CONSCIOUSNESS OF GUILT; EVEN ASSUMING ARGUENDO, THE COURT ERRED, ITS ERROR WAS HARMLESS

Appellant's eleventh argument claims reversal is required because the trial court erroneously directed the jury to focus on his alleged acts as evidencing a consciousness of guilt which violated his rights under the state and federal constitutions to due process, to a fair trial by an impartial and properly-instructed jury, to equal protection, to a fair and reliable adjudication at all phases of his capital case, to acquittal unless guilt is found beyond a reasonable doubt, and to be free from cruel and unusual punishment. (AOB 282-284, 289, 295-297, citing Cal. Const., art. I, §§ 1, 7, 15-17; U.S. Const., 5th, 6th, 8th & 14th Amends.; see AOB 405.) Specifically, he challenges the consciousness of guilt instruction, asserting: it improperly duplicated the circumstantial evidence instructions (AOB 282-284), it was unfairly partisan and argumentative (AOB 282, 284-289), it permitted the jury to draw two irrational permissive inferences about his guilt (AOB 282, 289-296), and it was not harmless beyond a reasonable doubt (AOB 296-297). Yet, his challenges are not cognizable because he failed to raise them below. In any event, his claim and assertions lack merit. Further, even assuming arguendo, the court erred in giving the instruction, its error was harmless.

A. Procedural Background

The prosecutor argued the concept of consciousness of guilt to the jury. (XI RT 2967-2969; see XI RT 3001.) In particular, he argued:

> In this case numerous threats that we've heard from Martinez overhearing threats, Brad Nelson overhearing threats, Bond and

> Benjamin being threatened, what does a person who threatens another person, what does that mean? It's called consciousness of guilt evidence. It shows that only somebody that's committed the crime for which he is accused will allegedly make a threat on the person because he understands his own guilt. [¶] The Court will point out to you because you have that type of evidence, it lends itself, it's one factor that proves guilt. But of course in and of itself that is not alone enough to prove guilt. It's something you should consider with all the other evidence.

(XI RT 2968.) Thereafter, pursuant to the People's request (2 CT 550, 568), the trial court instructed the jury with CALJIC No. 2.06 concerning efforts to suppress evidence, stating:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness or by destroying evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(XI RT 3112; accord 3 CT 646).

B. Appellant's Challenges To CALJIC No. 2.06 Are Not Cognizable

Nothing in the record indicates the defense objected to the trial court's giving of CALJIC No. 2.06 below. (See 1 SCT4 147-183 [Settled Statement Regarding Jury Instruction Conferences].) To preserve an issue for appellate review, timely objection must be interposed below. Constitutional issues are not per se exempt from this rule. (*Williams*, *supra*, 16 Cal.4th at p. 250; *Rodrigues*, 8 Cal.4th at p. 1116, fn. 20.) When a party does not raise an argument below, he may not do so on appeal. (*Clark*, *supra*, 5 Cal.4th at p. 988, fn. 13; *Raley*, *supra*, 2 Cal.4th at p. 892; see also *Gordon*, *supra*, 50 Cal.3d at pp. 1251-1252.) Because appellant did not challenge CALJIC No. 2.06 below, he should not be permitted to do so here. Still, section 1259 permits review of instructional error claims even though no objection was made

"if the substantial rights of the defendant were affected thereby."[82/] Thus, assuming arguendo this Court finds section 1259 permits his claim to be raised, then respondent submits it lacks merit for the reasons that follow.

C. The Court Properly Instructed The Jury That It Could Consider Appellant's Alleged Acts As Evidence Of His Consciousness Of Guilt

1. CALJIC No. 2.06 Was Proper

When evidence exists from which the jury reasonably could conclude the defendant attempted to intimidate a witness or suppress evidence, the trial court has a sufficient basis to give CALJIC No. 2.06. (*People v. Crandell* (1988) 46 Cal.3d 833, 870 (*Crandell*); *People v. Williams* (1996) 46 Cal.App.4th 1767, 1780.) Here, a reasonable trier of fact could find appellant demonstrated a consciousness of guilt concerning the forced oral copulation given his expressed intent to kill Andrews *after* the sexual assault. Specifically, Benjamin testified it was after appellant forced Andrews to kiss appellant's penis that appellant began saying "I ought to kill you." (VI RT 1463.) Bond similarly testified that shortly after the sexual assault, appellant started choking Andrews, during which he said he was going to kill Andrews. (IX RT 2388-2390, 2394, 2522.) Bond also testified appellant said he was choking Andrews because Andrews "was a punk, and . . . couldn't handle business being here." (IX RT 2396.) That evidence, as well as evidence that appellant strangled Andrews, reasonably could be viewed as having been done to suppress evidence because killing Andrews would silence him and thereby "keep [him] in check" (2 SCT1 380; X RT 2816; see XI RT 2884), so as to avoid detection of the sexual assault.

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82. Appellant relies upon section 1259, as well as section 1469 (AOB 283, fn. 134; see AOB 301, fn. 142), however, the latter is inapplicable as it concerns appeals in misdemeanor and infraction cases.

Further, there was evidence from which a reasonable trier of fact could find appellant demonstrated a continuing consciousness of guilt manifested in his desire to cover up his murder (and preceding sexual assault): by moving Andrews' body under the bottom bunk with Benjamin's help (VI RT 1480, 1570, 1578, 1642-1643; IX RT 2397-2400, 2428); by cleaning blood from the cell and disposing of the towels and boxer shorts used to wipe up the blood with Benjamin's and Bond's help (VI RT 1480-1481, 1487, 1565, 1627, 1643; IX RT 2397-2398, 2400, 2423, 2428-2429, 2519-2520, 2537-2538); by telling Benjamin and Bond to lie to police and say they did not know what happened (VI RT 1482-1483, 1646); by threatening Benjamin and Bond to keep their mouths shut (VI RT 1484; IX RT 2401, 2526-2528); by telling Martinez that if appellant got rolled up (i.e., moved from his cell) then something needed to be done to appellant's two cellmates, who knew what had happened (VII RT 1791); by attempting to have Martinez, some Black inmates, and Nelson remove Andrews' body from the cell (VII RT 1790, 1797; VIII RT 2094); and by threatening Nelson to not say anything about the night's previous activities (VIII RT 2094-2095, 2107-2108, 2140, 2144; IX RT 2404-2405 2561-2562, 2564). Hence, the trial court properly instructed the jury with CALJIC No. 2.06. (See *People v. Wong* (1973) 35 Cal.App.3d 812, 831 [any act proving or tending to prove effort or desire on defendant's part to obliterate or remove evidence of crime, if unexplained, warrants inference of consciousness of guilt].)

Nonetheless, appellant asserts CALJIC No. 2.06 improperly duplicated the circumstantial evidence instructions (AOB 282-284), it was unfairly partisan and argumentative (AOB 282, 284-289), and it permitted the jury to draw two irrational permissive inferences about his guilt (AOB 282, 289-296). Those assertions lack merit.

2. CALJIC No. 2.06 Did Not Improperly Duplicate The Circumstantial Evidence Instructions

CALJIC No. 2.06 augmented the standard circumstantial evidence instructions, which told the jury it could infer facts tending to show appellant's guilt from circumstances of the alleged crimes (CALJIC Nos. 2.00, 2.01 & 2.02; 3 CT 644-645, 695; XI 3110-3112, 3135), because CALJIC No. 2.06 includes a cautionary phrase that a defendant's attempt to suppress evidence against himself "is not sufficient by itself to prove guilt" (3 CT 646; XI RT 3112). That additional phrasing actually benefits the defense by "admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224 (*Jackson*), see *People v. Johnson*, *supra*, 3 Cal.4th at p. 1235 [CALJIC No. 2.06 is of benefit to defense and not improper]; but see *People v. Seaton* (2001) 26 Cal.4th 598, 673 [court's failure to give consciousness-of-guilt instruction was harmless because it "would have benefitted the prosecution, not the defense"].) Further, because CALJIC No. 2.06 states a principle of law that is not "additional and cumulative," it is not an improper pinpoint instruction. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1297.)

Still, appellant complains the "court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt, nor of permissive inferences of guilt of prosecution witnesses." (AOB 283.) Yet, when a defendant feels a jury instruction needs amplification or explanation, it is his burden to so request. (*People v. Earnest* (1975) 53 Cal.App.3d 734, 744.) Absent a defense request, the court is under no obligation to amplify a jury instruction. (*Bonin*, *supra*, 46 Cal.3d at p. 708.) Because appellant did not request such amplification, he should not be heard to complain here. Also, although the defense argued some prosecution witnesses were actually the perpetrators, appellant was not similarly situated to them because the jury was

merely required to assess their credibility as opposed to whether they were guilty of the offenses. Further, appellant was not similarly situated to the prosecution because the prosecution had the burden of proof. Hence, appellant's equal protection claims (AOB 283-284, 285-286) must fail. (*People v. Guzman* (2005) 35 Cal.4th 577, 584 [basic requirement of equal protection claim is that similarly situated individuals or groups are accorded disparate treatment].)

3. CALJIC No. 2.06 Was Not Unfairly Partisan And Argumentative

Appellant contends CALJIC No. 2.06 directed the jury's attention to actions allegedly taken by Benjamin and Bond as well as him (i.e., cleaning the cell and disposing of items), but it allowed for a consciousness of guilt inference only as to him. (AOB 284; see AOB 404.) Again, however, appellant was not similarly situated to Benjamin and Bond. Moreover, the evidence indicated they "helped" do those things at appellant's request and direction because they were "scared" of him. (VI RT 1578, 1627, 1643; IX RT 2397, 2430; but see IX RT 2423, 2537-2538 [Bond testified idea to clean up cell was mutual, appellant and Benjamin told him to clean it up, and Bond did not want to do it, but he more or less had to do it].) Further, to the extent appellant asserts it is an argumentative pinpoint instruction (AOB 285-286), this Court rejected that claim in *Jackson*, *supra*, 13 Cal.4th at pages 1223-1224 and it found there is "no reason to reconsider the point" in *Yeoman*, *supra*, 31 Cal.4th at p. 131; accord *People v. Nakahara* (2003) 30 Cal.4th 705, 713. Thus, appellant's request for this Court to reconsider that issue (AOB 285) should be rejected.

Additionally, appellant contends the instructions

> permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only disputed element of the crime, and use that *in combination* with the consciousness-of-guilt

evidence to conclude that the defendant is guilty.

(AOB 287, emphasis in original.) Yet, this Court has rejected similar arguments. (*People v. Holloway* (2004) 33 Cal.4th 96, 142 [rejecting contention that consciousness-of-guilt-instructions (CALJIC Nos. 2.03, 2.04 & 2.06) single out isolated bits of evidence against defendant and magnify them]; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 127-128 [rejecting contention that CALJIC Nos. 2.03 [false statements] and 2.52 [flight] invited the jury to draw biased inferences from isolated items of evidence].)

Appellant further notes various sister-state courts have found flight instructions unduly emphasize a single piece of circumstantial evidence. (AOB 287-289.) While he obviously uses those flight instruction cases to make an analogy to consciousness-of-guilt instructions in general, no flight instructions were involved here. Further, this Court is not bound by the decisions of its sister states, which merely provide persuasive authority. (*In re Walton* (2002) 99 Cal.App.4th 934, 946; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, this Court has upheld the giving instructions on flight (CALJIC No. 2.52) and efforts to suppress evidence (CALJIC No. 2.06), finding those instructions

> "made it clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]" [Citation.]

(*Bolin*, *supra*, 18 Cal.4th at p. 327.) Hence, this Court should decline appellant's invitation to find error based on those out-of-state decisions.

4. CALJIC No. 2.06 Did Not Permit The Jury To Draw Two Irrational Permissive Inferences About Appellant's Guilt

A permissive inference allows, but does not require, the trier of fact to infer an elemental fact from the prosecution's proof of a basic fact. (*County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 157.) A permissive inference is justified only if the evidence is "sufficient for a rational juror to find the inferred fact beyond a reasonable doubt . . ." (*Barnes v. United States* (1973) 412 U.S. 837, 843; accord *County Court of Ulster County v. Allen*, *supra*, 442 U.S. at p. 157.) Thus, a permissive inference violates due process if the suggested conclusion is not one that reason and common sense justify in light of proven facts before the jury. (*Francis v. Franklin, supra*, 471 U.S. 307 at pp. 314-315.) In challenging a permissive inference, it is appellant's burden to establish the inference was invalid as applied to him. To prevail, he must show there was no rational way the trier of fact could make the connection permitted by the inference. (*County Court of Ulster County v. Allen*, *supra*, 442 U.S. at p. 157.) He has not met his burden for the reasons already explained.

Appellant asserts the first irrational permissive inference concerned his mental state at the time of the alleged crimes in that the instruction permitted the jury to use the consciousness-of-guilt evidence to infer, not only that he killed Andrews, but also that he had done so while harboring intents or mental states required for first degree murder and oral copulation. (AOB 289.) Yet, as this Court observed, CALJIC Nos. 2.03 [Consciousness Of Guilt–Falsehood] and 2.06 [Efforts To Suppress Evidence] "do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto." (*Crandell*, *supra*, 46 Cal.3d at p. 871.)

Appellant asserts the second irrational permissive inference permitted the jury to infer that he:

> was guilty not only of unlawfully killing Andrews, but also of engaging in, or attempting to engage in, an act of oral copulation with him, and killing him "in order to carry out or advance the commission of the oral copulation."

(AOB 294.) Yet, as already explained, the inferences that he was guilty of engaging in the oral copulation and that he killed Andrews to avoid detection of his purported sexual assault were rational inferences given his expressed intent to kill Andrews *after* the sexual assault, his strangling of Andrews to carry out that intent, and his subsequent efforts to suppress evidence by enlisting Benjamin and Bond's help to clean the cell and then by threatening them, as well as Nelson, to keep quiet. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 666-667 [CALJIC Nos. 2.03 and 2.06 were proper because a rational juror could permissibly infer consciousness of guilt from defendant's own statement]; see *People v. Hughes* (2002) 27 Cal.4th 287, 348 (*Hughes*) [rejecting claim that CALJIC No. 2.03 and 2.06 were impermissibly argumentative and improperly permitted the jury to draw irrational inferences].)

In short, reason and common sense amply justified the suggested conclusion that appellant's efforts to suppress evidence showed his consciousness of guilt. (*Yeoman, supra*, 31 Cal.4th at pp. 131-132.) Hence, his claim and assertions should be rejected.

D. Even Assuming Arguendo, The Court Erred In Giving The Instruction, Its Error Was Harmless

Even assuming that the trial court erred in giving CALJIC No. 2.06, appellant suffered no prejudice as a result. Again, the evidence of his guilt is strong as summarized in respondent's argument II, subheading F and argument IV, subheading E *ante*, which respondent incorporates by reference. In short, he had the means, motive, and opportunity, and he confessed to doing it. Given that evidence "The impact of an inference of consciousness of guilt could not have resulted in a miscarriage of justice." (*People v. Mattson, supra*, 50 Cal.3d

at p. 872 [concerning CALJIC No. 2.03], citing *Watson*, *supra*, 46 Cal.2d at p. 836; accord *San Nicolas*, *supra*, 34 Cal.4th at p. 667.) For the same reasons, any error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

XII.

APPELLANT'S CHALLENGES TO CALJIC NOS. 1.00, 1.02 SUPP., 2.01, 2.02, 2.21.2, 2.22, 2.27, 2.50 MOD., 2.51, 8.20 AND 8.67 ARE NOT COGNIZABLE; IN ANY EVENT, THOSE INSTRUCTIONS DID NOT UNDERMINE AND DILUTE THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT; EVEN ASSUMING ARGUENDO, THE COURT ERRED, ANY ERRORS WERE HARMLESS

Appellant's twelfth argument claims the trial court's instructions impermissibly undermined and diluted the requirement of proof beyond a reasonable doubt in violation of his rights to due process, fundamental fairness, jury trial, and a reliable capital trial. (AOB 298-301, 309, citing Cal. Const., art. I, §§ 7, 15-17; U.S. Const., 6th, 8th & 14th Amends.; see AOB 405.) Specifically, he asserts the circumstantial evidence instructions (CALJIC Nos. 2.01 & 2.02) undermined the requirement of proof beyond a reasonable doubt (CALJIC No. 2.90). (AOB 299-305.) He further asserts other instructions (CALJIC Nos. 1.00, 1.02 Supp.[83], 2.21.2, 2.22, 2.27, 2.50 Mod., 2.51, 8.20 & 8.67) magnified the alleged harm and individually and collectively diluted the reasonable doubt standard. (AOB 305-312.)[84] Noting that this Court repeatedly has rejected constitutional challenges to many of those instructions,

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83. Although appellant's argument XII, subheading B challenges CALJIC No. 1.02 (AOB 305), its text actually challenges CALJIC No. 1.02 Supp. (AOB 305-306, 308 & fn. 143).

84. Although appellant's argument XII challenges the giving of CALJIC No. 2.21 (AOB 305, 309-310), he fails to cite to the record where that instruction was given. (See, generally *Wallace v. Thompson* (1954) 129 Cal.App.2d 21, 22 [appellate court is not required to sift through record to set forth material facts necessary for proper consideration of issue].) Further, long before his trial, CALJIC No. 2.21 was divided into CALJIC Nos. 2.21.1 (5th ed. 1988) and 2.21.2 (5th ed. 1988). (*People v. Turner* (1990) 50 Cal.3d 668, 698, fn. 15.)

he asserts it should reconsider its prior rulings. (AOB 312-314.) Yet, his challenges are not cognizable because he requested most of those instructions, thereby inviting any alleged error, and because he failed to object to the others. In any event, his claim and assertions lack merit. Even assuming arguendo, the court erred, any errors were harmless.

A. Procedural Background

A detailed Settled Statement Regarding Jury Instruction Conferences appears in the record. (1 SCT4 147-193.) That statement provides, in pertinent part:

> Conferences concerning jury instructions for both guilt and penalty were held in the courtroom, off the record, between [the court, the prosecutor and both defense counsel]. [Appellant] was not present . . . [V]arious matters concerning the guilt phase instructions were put on the record, and are reported at [XI] RT 2941-2947. (See [XX] RT 4313-4317.) [¶] . . . [¶]
>
> Each instruction given . . . was marked in the appropriate box at the top of the form to indicate who requested the instruction. . . .
>
> [T]he Court and counsel went through the proposed instructions to see what disputes or problems there were, and then tried to focus on those that counsel wanted to argue or modify. Proposed instructions for which the parties had a disagreement, question or modification were discussed and were resolved, either by agreement or by the Court's ruling, except as to certain instructions which were initially put over for further discussion. When results of the discussions were later placed on-record, the parties were given an opportunity to make a full record, as reflected at [XI] RT 2941-2947. Instructions that were ultimately given to the jury, refused, or modified by the Court, or withdrawn by the parties were the product of these off-record instruction conferences. (See [XX] RT 4318-4321, 4438-4445.) . . . [¶] . . . [¶]
>
> The bulk of [the prosecutor's] requested instructions were requested by a five-page checklist form noting by CALJIC number the form instructions requested. The checklist is found at [2] CT 550-554. . . . [¶] . . . [¶] During the conferences, [the prosecutor] requested CALJIC Nos. 2.50 (Evidence Of Other Crimes – Modified) ([2] CT 579) . . . and 8.67 (Attempt To Commit Murder – Willful, Deliberate And Premeditated)

([3] CT 604-605), . . . which were eventually given to the jury. [¶]. . .[¶]

> Defense counsel submitted a two-page list of CALJIC form instructions, denominating the requested instructions by CALJIC number. This two-page list is found at [2] CT 555-556. [¶] . . . [¶] During the conference, defense counsel requested additional instructions, including CALJIC No. 2.01(Sufficiency Of Circumstantial Evidence-Generally) ([2] CT 567[; 3 CT] 645) . . .

(1 SCT4 147-153.) The defense's list of CALJIC form instructions and the box at the top of the forms collectively indicate the defense requested, inter alia, CALJIC Nos. 1.00, 1.02 Supp., 2.01, 2.02, 2.21.2, 2.22, and 2.27. (2 CT 555, 560-561, 564, 567, 574, 575, 578; 3 CT 617.) The defense did not object to CALJIC Nos. 2.50 Mod., 2.51, 8.20 and 8.67. (See XI RT 2941-2947.)

The trial court instructed the jury, inter alia, with: CALJIC Nos. 1.00 [Respective Duties Of Judge And Jury] (2 CT 560-561; 3 CT 638-639; XI RT 3107-3109), 1.02 Supp. (2 CT 564; 3 CT 642; XI RT 3110)[85], 2.01 [Sufficiency Of Circumstantial Evidence–Generally] (2 CT 567; 3 CT 645; XI RT 3111-3112), 2.02 [Sufficiency Of Circumstantial Evidence To Prove Specific Intent Or Mental State)] (3 CT 617, 695; XI RT 3135; see XI RT 3133:14-16 ["Next series of instructions have to do with the mental *element* with respect to the various crimes, specific intent and mental states" (emphasis added)]), 2.21.2 [Witness Willfully False] (2 CT 574; 3 CT 652; XI RT 3114-3115), 2.22 [Weighing Conflicting Testimony] (2 CT 575; 3 CT 653; XI

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85. CALJIC No. 1.02 Supp. provided:

> The witness Brad Nelson testified that the defendant had bragged about committing a crime other than the crime for which defendant is on trial in the current case. Mr. Nelson's testimony on a separate crime is hereby stricken and you are hereby instructed to disregard such testimony. Do not allow Mr. Nelson's testimony on an uncharged, alleged crime to enter into your deliberations. Mr. Dement's guilt or innocence must be determined without regard to any alleged prior conduct.

RT 3115), 2.27 [Sufficiency Of Testimony Of One Witness] (2 CT 578; 3 CT 656; XI RT 3116), 2.50 Mod. (2 CT 579; 3 CT 657; XI RT 3116-3117)[86], 2.51 [Motive] (2 CT 580; 3 CT 658; XI RT 3117), 2.90 [Presumption Of Innocence–Reasonable Doubt–Burden Of Proof] (2 CT 588; 3 CT 666; XI RT 3120), 8.20 [Deliberate And Premeditated Murder] (2 CT 592; 3 CT670-671; XI RT 3123-3124) & 8.67 [Attempt To Commit Murder–Willful, Deliberate, And Premeditated] (2 CT 604; 3 CT 682-683; XI RT 3128-3129). Pursuant to the request of both parties, the court also instructed the jury with CALJIC No. 1.01 [Instructions To Be Considered As A Whole]. (2 CT 562; 3 CT 640; XI RT 3109.)

B. Appellant's Challenge To The Instructions Are Not Cognizable

As for the instructions that appellant now challenges, the defense requested CALJIC Nos. 1.00, 1.02 Supp., 2.01, 2.02, 2.21.2, 2.22, and 2.27. (2 CT 555, 560-561, 564, 567, 574, 575, 578; 3 CT 617.) Thus, any alleged error in giving them must be deemed invited error because it cannot be said that counsel lacked a rational tactical purpose in requesting them. (*People v.*

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86. CALJIC No. 2.50 Mod. provided:

> Evidence has been introduced which includes a reference showing that the defendant committed a crime other than that for which he is on trial. Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. This evidence was received and may be considered by you only for the limited purpose of providing context and meaning in the written statements made by the defendant. [¶] A defendant in a criminal action has the right to expect that his guilt or innocence will be decided by the evidence brought before the jury and without regard to any alleged prior conduct. Therefore, you must only consider this evidence for the limited purpose for which it was introduced.

(3 CT 657; XI RT 3116-3117; accord 3 CT 657.)

Medina (1995) 11 Cal.4th 694, 764; *Wader*, *supra*, 5 Cal.4th at pp. 657-658.)

Further, as to the other instructions appellant now challenges (CALJIC Nos. 2.50 Mod., 2.51, 8.20 and 8.67), his claim should be deemed waived because he failed to object to those instructions below. (See XI RT 2941-2947.) Again, to preserve an issue for appellate review, timely objection must be interposed below. Constitutional issues are not per se exempt from this rule. (*Williams*, *supra*, 16 Cal.4th at p. 250; *Rodrigues*, *supra*, 8 Cal.4th at p. 1116, fn. 20.) When a party does not raise an argument below, he may not do so on appeal. (*Clark*, *supra*, 5 Cal.4th at p. 988, fn. 13; *Raley*, *supra*, 2 Cal.4th at p. 892; see also *Gordon*, *supra*, 50 Cal.3d at pp. 1251-1252.) Because he did not challenge those instructions below, he should not be permitted to do so here.

Still, section 1259 permits review of instructional error claims even though no objection was made "if the substantial rights of the defendant were affected thereby."[87/] Thus, assuming arguendo, this Court finds section 1259 permits his challenges to be raised, then respondent submits they lack merit for the reasons that follow.

C. The Circumstantial Evidence (CALJIC Nos. 2.01 & 2.02) Instructions Did Not Undermine The Requirement Of Proof Beyond A Reasonable Doubt

Appellant's assertion that the circumstantial evidence instructions (CALJIC Nos. 2.01 & 2.02) undermined the requirement of proof beyond a reasonable doubt lacks merit. In *People v. Kipp* (1998) 18 Cal.4th 349, 375 (*Kipp*), where the defendant argued CALJIC Nos. 2.01 & 2.02 "undermine[d] the prosecution's burden of proving guilt beyond a reasonable doubt and amount[ed] to an impermissible mandatory presumption of guilt," this Court observed:

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87. See respondent's footnote 82, *ante*.

> As this court has explained in prior decisions, these instructions properly direct the jury to accept an interpretation of the evidence favorable to the prosecution and unfavorable to the defense only if no other "reasonable" interpretation can be drawn. Particularly *when viewed in conjunction with other instructions correctly stating the prosecution's burden to prove defendant's guilt beyond a reasonable doubt*, these circumstantial evidence instructions do not reduce or weaken the prosecution's constitutionally mandated burden of proof or amount to an improper mandatory presumption of guilt. (*People v. Holt* [(1997)] 15 Cal.4th 619, 679; *People v. Crittenden* (1994) 9 Cal.4th 83, 144; *People v. Wilson* (1992) 3 Cal.4th 926, 942-943.)

(Emphasis added, parallel citations omitted.) In *People v. Samuels* (2005) 36 Cal.4th 96, 131 this Court relied on *Kipp* in rejecting the defendant's constitutional challenges (U.S. Const., 5th, 6th & 14th Amends.) to CALJIC No. 2.01, finding "no reason to revisit the question." Likewise, there is no reason to revisit his challenges to the circumstantial evidence instructions here.

In any event, if this Court revisits the issue, it must consider the entire charge of the court; in doing so, it assumes jurors are intelligent people capable of understanding, correlating and following all instructions that were given. (*Francis v. Franklin*, *supra*, 471 U.S. at p. 324, fn. 9; *Mills*, *supra*, 1 Cal.App.4th at p. 918; *Yoder*, *supra*, 100 Cal.App.3d at p. 338.) Notably, the trial court told the jurors: "Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others." (3 CT 640; XI RT 3109.) The court also repeatedly informed the jury: the prosecution has the burden to prove its case and all its elements by proof beyond a reasonable doubt, the defense has no burden whatsoever, appellant is presumed innocent, that presumption will prevail until and unless he is proved to be guilty by proof beyond a reasonable doubt by the prosecutor, and the jury's obligation would be to find him not guilty if the proof does not rise to that level. (XI RT 3097, 3111-3112, 3117, 3120, 3124-3125, 3127, 3129, 3137-3138; XII RT 3166-3167; see II RT 441-442, 451 [voir dire] ; III RT 635, 723, 774, 785 [same]; IV 963, 967,

1038-1042, 1056 [same].) Given those instructions, the jury would not have interpreted the circumstantial evidence instructions to have lessened the requirement of proof beyond a reasonable doubt, let alone to have set forth a mandatory presumption of guilt. Hence, his challenges to CALJIC Nos. 2.01 and 2.02 should be rejected.

Nonetheless, appellant recites CALJIC No. 2.90's definition of "reasonable doubt"[88] and contends:

The terms "moral evidence" and "moral certainty" as used in the reasonable doubt instruction are not commonly understood terms. . . . [I]n combination with the other instructions . . . it was reasonably likely to have led the jury to convict appellant on proof less than beyond a reasonable doubt . . .

(AOB 299.) Yet, this Court rejected such a claim in *People v. Snow* (2003) 30 Cal.4th 43 (*Snow*), stating:

> Defendant contends that CALJIC No. 2.90, as given, unconstitutionally lessened the standard of proof beyond a reasonable doubt because it used the phrases "moral certainty," "moral evidence," and "abiding conviction." We have repeatedly rejected this contention (see, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 668 ; *People v. Hines*, supra, 15 Cal.4th at p. 1051; *People v. Ray* (1996) 13 Cal.4th 313, 347; *People v. Freeman* (1994) 8 Cal.4th 450, 501-505) and have been given no reason to reconsider those decisions here.

(*Id.* at pp. 98-99, parallel citations omitted.) Likewise, there is no reason to reconsider that issue here.

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88. The version of CALJIC No. 2.90 the trial court gave defined "reasonable doubt" as:

> It is not a mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and considering of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

(3 CT 666; XI RT 3120.)

Still, appellant also asserts the prosecution attempted to place the burden upon the defense to explain incriminatory evidence put forward by the prosecution. (AOB 304, citing XI RT 3097-3098.) The prosecutor did no such thing. Instead, he merely argued to the jury that the defense theory of a "copycat murder" was speculation because the record lacked evidence to support it. (XI RT 3097-3098.) Specifically, the following colloquy took place:

> [MR. OPPLIGER:] Now, out of this tank, the people I explained to you, everyone knows; I mean, everyone knows their names. Does the defense put on anybody to suggest that there was anybody in that tank with a motive? Have they put on any evidence that there was a sighting of a person by cell number eight?
>
> MS. HART: I'd make an objection that the burden of proof is not on the defense.
>
> THE COURT: The burden of proof is not on the defense, as I've explained to you before. The comment about the evidence, of course the evidence is what the evidence is, whatever you've heard, ladies and gentlemen; not from the attorneys, not what you've heard from the Court.
>
> MR. OPPLIGER: [¶] Miss Hart is absolutely right. The burden is not on the defense, but the Court will read -- the Court will read to you that you're to decide this case based on law and fact and not on speculation. And they're asking you to speculate about the copycat murder. And whereas the burden is not on the defense, if there is evidence such as Mr. Basquez or Dr. Hickey, they're free to put it on, if there is any; if there's evidence instead of speculation. They don't have to put any on, but they can. And I ask you: Did you hear any? But the most important thing: Was there a copycat murder?

(XI RT 3097-3098.) A "prosecutor may comment 'on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses.'" (*People v. Turner* (2004) 34 Cal.4th 406, 419, quoting *People v. Medina, supra*, 11 Cal.4th at p. 755.) Thus, Prosecutor Oppliger's remarks were proper. Moreover, the scenario served to remind the jury that the defense had no burden of proof.

Further, the prosecution reminded the jury at other junctures of its burden to prove its case beyond a reasonable doubt. (XI RT 2964, 3001, 3099.) During closing argument, the defense repeatedly reminded the jury of that standard as well. (XI RT 3008, 3011, 3024, 3043, 3056- 3057, 3066, 3069-3072, 3075-3077.) Hence, the jury would not have been misled by the challenged instructions.

D. The Other Instructions (CALJIC Nos. 1.00, 1.02 Supp., 2.21.2, 2.22, 2.27, 2.50 Mod., 2.51, 8.20 & 8.67) Did Not Vitiate The Reasonable Doubt Standard

Appellant's assertion that the other instructions (CALJIC Nos. 1.00, 1.02 Supp., 2.21.2, 2.22, 2.27, 2.50 Mod., 2.51, 8.20 & 8.67) vitiated the reasonable doubt standard lacks merit. This Court has already rejected similar challenges to most of the challenged instructions. See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [rejecting challenges to CALJIC Nos 2.21.2, 2.22 and 2.51, and to instructions containing the word "innocence" or "innocent"]; *People v. Crew* (2003) 31 Cal.4th 822, 847-848 [finding it is not reasonably likely jury would have misapplied or misconstrued CALJIC Nos. 1.00, 2.01, 2.51, and 2.52 and thereby rejecting defendant's claim that those instructions relieved prosecution of its burden of proof by implying issue was one of "guilt or innocence," instead of whether there was or was not reasonable doubt about defendant's guilt]; *id.* at p. 848 [rejecting challenges that CALJIC Nos. 2.21.2, 2.22, and 8.20 improperly lessened prosecution's burden of proof]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [rejecting challenges that standard instructions on false testimony and circumstantial evidence lessened prosecution's burden of proof]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [rejecting challenges to CALJIC Nos. 2.01, 2.02, 2.21, 2.27]; *Hardy* (1992) 2 Cal.4th 86, 215 [finding as meritless claim that interplay between CALJIC Nos. 2.21 and 2.27 undermined jury's understanding of reasonable

doubt].) Thus, there is no reason to revisit his challenges to CALJIC Nos. 1.00, 2.21.2, 2.22, 2.27, 2.51, and 8.20. Further, this Court also should reject his challenges to CALJIC Nos. 1.02 Supp., 2.50, and 8.67 by analogy to those cases.

In any event, there is no conceivable way the jury could have misconstrued those instructions to lessen the burden of proof. Again, this Court must consider the entire charge of the court; in doing so, it assumes jurors are intelligent people capable of understanding, correlating and following all instructions that were given. (*Francis v. Franklin*, *supra*, 471 U.S. at p. 324, fn. 9; *Mills*, *supra*, 1 Cal.App.4th at p. 918; *Yoder*, *supra*, 100 Cal.App.3d at p. 338.) As previously noted, the trial court told the jurors: "Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others." (3 CT 640; XI RT 3109.) Again, the court repeatedly informed the jury: the prosecution has the burden to prove its case and all its elements by proof beyond a reasonable doubt, the defense has no burden whatsoever, appellant is presumed innocent, that presumption will prevail until and unless he is proved to be guilty by proof beyond a reasonable doubt by the prosecutor, and the jury's obligation would be to find him not guilty if the proof does not rise to that level. (XI RT 3097, 3111-3112, 3117, 3120, 3124-3125, 3127, 3129, 3137-3138; XII RT 3166-3167; see II RT 441-442, 451 [voir dire] ; III RT 635, 723, 774, 785 [same]; IV 963, 967, 1038-1042, 1056 [same].)

Further, the prosecution reminded the jury of the burden to prove its case beyond a reasonable doubt. (XI RT 2964, 3001, 3099.) During closing argument, the defense repeatedly reminded the jury of that standard as well. (XI RT 3008, 3011, 3024, 3043, 3056- 3057, 3066, 3069-3072, 3075-3077.)

Given those instructions and the arguments of counsel, there was no reasonable likelihood of jury confusion or that the jury applied the challenged

instructions in a way that violated the state or federal constitutions. (*Clair*, *supra*, 2 Cal.4th at p. 663.) Appellant's suggestion to the contrary (see AOB 313) lacks merit. (See *Boyde v. California* (1990) 494 U.S. 370, 380.)

Accordingly, this Court should reject appellant's assertions: that the challenged instructions "implicitly replaced the 'reasonable doubt' standard with the 'preponderance of the evidence' test (AOB 307); that CALJIC Nos. 1.00, 1.02 supp., 2.01, and 2.51 "misinform[ed] the jurors that their duty was to decide whether [he] was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt" (AOB 307-308); that CALJIC No. 2.51 "effectively placed the burden of proof on [him] to show an alternative motive to that advanced by the prosecutor" (AOB 308); that CALJIC No. 2.21.2 "lightened the prosecution's burden of proof . . . by allowing the jury to credit prosecution witnesses by finding only a 'mere probability of truth' in their testimony" (AOB 309-310); that CALJIC No. 2.22's direction for the jury to determine each factual issue by deciding which witnesses, or which version, is more credible or convincing "replaced the constitutionally-mandated standard of 'proof beyond a reasonable doubt' with something that is indistinguishable from the lesser 'preponderance of the evidence standard'" (AOB 310-311); that CALJIC No. 2.27 "regarding the sufficiency of the testimony of a single witness to prove a fact . . . suggest[ed] the defense, as well as the prosecution, had the burden of proving facts" (AOB 311); and that CALJIC Nos. 8.20's and 8.67's use of the word "precluding" wherein they state "deliberation and premeditation 'must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation" "could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation – as opposed to raising a reasonable doubt" (AOB 311-312).

E. Even Assuming Arguendo, The Court Erred, Any Errors Were Harmless

Even assuming the trial court erred in giving any of the challenged instructions, its errors were harmless. Contrary to appellant's claim (AOB 315; see AOB 309),[89] the evidence of his guilt is strong as summarized in respondent's argument II, subheading F and argument IV, subheading E *ante*, which respondent incorporates by reference. Once again, he had the means, motive, and opportunity, and he confessed to doing it. Given that evidence, the trial court's other instructions, and the arguments of counsel, any errors were harmless under any standard of reversible error. (*Chapman, supra*, 386 U.S. at p. 22; *Watson, supra*, 46 Cal.2d at p. 836; see also *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335-1336 [constitutional error in giving instructions is not necessarily "structural error" that requires reversal per se].)

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89. Appellant claims "the evidence of motive was insubstantial" and asserts the prosecutor combined Detective Christian's testimony regarding appellant's statements at the hospital "with his own speculation about appellant's wife to suggest motive." (AOB 309, citing XI RT 2976.) In making that assertion, appellant fails to consider Bond's testimony that: appellant said Andrews was going to talk whether he wanted or not and then said stuff about appellant's "wife, the guy knowing him – knowing her or seeing her or something"; Andrews said "he met them or seen them or something"; and appellant, who had knelt down, got angry and began slapping Andrews, who was covering up trying to avoid being hit and saying something like he was sorry. (IX RT 2376-2380, 2473-2474.)

XIII.

CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE NOT UNCONSTITUTIONAL FOR FAILING TO SET OUT A BURDEN OF PROOF

Appellant's thirteenth argument claims California's death penalty statute and instructions are unconstitutional because they fail to set out the appropriate burden of proof. (AOB 316, citing U.S. Const. 5th, 6th, 8th & 14th Amends.; see AOB 406.) Specifically, he asserts they fail to assign to the state the burden of proving beyond a reasonable doubt that an aggravating factor exists, that aggravating factors outweigh mitigating factors, and that death is the appropriate penalty. (AOB 316-330, citing, inter alia, *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), *Ring v. Arizona* (2002) 536 U.S. 584 (*Ring*) & *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*).) He also asserts the federal constitution requires the jury be instructed it may impose a death sentence only if persuaded beyond a reasonable doubt that aggravating factors outweigh mitigating factors and that death is the appropriate penalty. (AOB 330-335.)[90/] He further asserts the Sixth, Eighth, and Fourteenth Amendments require the state bear some burden of persuasion at the penalty phase. (XI RT 335-340.) Additionally, he asserts the instructions violated those amendments by failing to require juror unanimity on aggravating factors (AOB 340-345) and by failing to inform the jury about the standard of proof and lack of need for unanimity as to mitigating circumstances (AOB 345-347), the latter of which he claims also violated the state constitution (AOB 347, citing Cal. Const., art I, §§ 7, 17 & 24). Lastly, he asserts the penalty jury should have been

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90. Although appellant's argument XIII, subheading B asserts the state constitution requires this as well (AOB 330), the text of his argument fails to cite any state constitutional authority to support that assertion (AOB 330-335). Hence, it should be deemed to lack foundation. (*Williams*, *supra*, 16 Cal.4th at pp. 206, 250; *Rodrigues*, *supra*, 8 Cal.4th at p. 1116, fn. 20.)

instructed on the presumption of life and the failure to do so violated his state and federal constitutional rights. (AOB 347-348, citing Cal. Const., art. I, §§ 7, 15 & 17; U.S. Const., 8th & 14th Amends.) His claim and assertions lack merit.

The trial court gave a series of instructions for the penalty phase. (XIV RT 3798-3819; 3 CT 757-796.) Pursuant to the People's request (3 CT 755-756), the court gave CALJIC No. 8.88 (1989 Revision) [Penalty Trial-Concluding Instruction], which told the jury, in pertinent part:

> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of any weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. [¶] To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(XIV RT 3819; 3 CT 795-796). Thus, the jury was not told any burden of proof was required in determining penalty. Appellant claims that was error and he makes numerous assertions in that regard, including asserting the error violated his constitutional rights to jury trial, to enhanced reliability in capital cases, to full consideration of mitigating evidence, to due process, to equal protection, and to be free from cruel and unusual punishment. (AOB 316-348.) This Court repeatedly has considered and rejected his claim and assertions in prior capital cases. Thus, an extensive exploration and discussion of those matters is unnecessary. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304.)

A. California's Death Penalty Statute And Instructions Are Not Unconstitutional For Failing To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt That An Aggravating Factor Exists, That Aggravating Factors Outweigh Mitigating Factors, And That Death Is The Appropriate Penalty

As this Court observed in *People v. Stitely* (2005) 35 Cal.4th 514 (*Stitely*):

> [T]he death penalty scheme does not violate either constitutional or statutory law insofar as it fails to allocate a burden of proof, or establish a standard of proof, for finding aggravating and mitigating circumstances and for selecting the appropriate penalty.

(*Id.* at p. 573, citing *People v. Welch* (1999) 20 Cal.4th 701, 767-768; accord *People v. Brown* (2004) 33 Cal.4th 382, 401.) Moreover,

> Recent high court decisions, such as *Blakely* [citation], *Ring* [citation], and *Apprendi* [citation], do not require reconsideration or modification of our long-standing conclusions in this regard. (*People v. Morrison* (2004) 34 Cal.4th 698, 731; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 275.)

(*Stitely*, *supra*, 35 Cal.4th at p. 573, parallel citations omitted; accord *People v. Huggins* (2006) 38 Cal.4th 175, 250 (*Huggins*) [neither *Apprendi* nor *Ring* has changed prior conclusions regarding burden of proof].)

B. It Is Not Constitutionally Required For The Jury To Be Instructed That It May Impose A Sentence Of Death Only If Persuaded Beyond Reasonable Doubt That Aggravating Factors Outweigh Mitigating Factors And That Death Is The Appropriate Penalty

The federal constitution does not require the jury to be instructed it may impose a death sentence only if persuaded beyond a reasonable doubt that aggravating factors outweigh mitigating factors and that death is the appropriate penalty. (*People v. Perry* (*Perry*) (2006) _ Cal.4th _, _ [2006 Cal. LEXIS 4952, *1, *35].) Thus, California's death penalty statute is not invalid for failing to require an instruction on the burden of proof because no burden of proof is required at penalty phase. (*Id.* _ at p. _ [*Id.* at pp. *35-*36].)

C. The Sixth, Eighth, And Fourteenth Amendments Do Not Require The State To Bear Some Burden Of Persuasion At The Penalty Phase

The Sixth, Eighth, and Fourteenth Amendments do not require the state to bear some burden of persuasion at the penalty phase because such a burden is inappropriate given the normative nature of the determinations to be made. (*People v. Steele* (2002) 27 Cal.4th 1230, 1259 [trial court need not impose burden of persuasion on prosecution]; *Carpenter*, *supra*, 15 Cal.4th at pp. 417-418 [sentencing function "is inherently moral and normative, not factual," so instructions associated with usual fact-finding process are unnecessary (quoting *Rodriguez*, *supra*, 42 Cal.3d at p. 779)]; *People v. Hayes* (1990) 52 Cal.3d 577, 643 [because penalty determination is essentially moral and normative, and therefore different in kind from guilt determination, there is no burden of proof or persuasion]; see *People v. Daniels* (1991) 52 Cal.3d 815, 890 [although to return death verdict, jury must be persuaded that aggravation so outweighs mitigation that death verdict is warranted, neither prosecution nor defense has burden of proof on that issue].)

D. The Sixth, Eighth, And Fourteenth Amendments Do Not Require Juror Unanimity On Aggravating Factors

The instructions did not violate the Sixth, Eighth, and Fourteenth Amendments by failing to require juror unanimity on aggravating factors. (*People v. Danks* (2004) 32 Cal.4th 269, 316 ["Nothing in *Ring* . . . affects our conclusions in this regard"]; *People v. Prieto* (2003) 30 Cal.4th 226, 265 (*Prieto*) ["*Ring* does not require the jury to unanimously make such a finding beyond a reasonable doubt"]; *Kipp*, *supra*, 18 Cal.4th at p. 381; *People v. Medina*, *supra*, 11 Cal.4th at p. 782; *People v. Pride* (1992) 3 Cal.4th 195, 268.)

E. Neither The Sixth, Eighth, And Fourteenth Amendments Nor The California Constitution Require The Jury To Be Informed About The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The court's instructions also did not violate the Sixth, Eighth, and Fourteenth Amendments let alone California Constitution article I sections 7, 17, and 24 by failing to inform the jury about the standard of proof and lack of need for unanimity as to mitigating circumstances.[91] (*Stitely*, *supra*, 35 Cal.4th at p. 573 [death penalty scheme does not violate constitutional or statutory law in failing to establish standard of proof for mitigating circumstances]; *People v. Coddington* (2000) 23 Cal.4th 529, 641 [court was not required to instruct jury that unanimity is not required before juror may consider evidence to be mitigating; *People v. Phillips* (2000) 22 Cal.4th 226, 238 [court had no sua sponte duty to instruct jury that "unanimity is not required for consideration of mitigating factors"]; see *People v. Breaux* (1991) 1 Cal.4th 281, 314-315 [upheld trial court's rejection of proposed instruction – that unanimity was not requisite to considering mitigating evidence – because instructions given unmistakably told jury each member must individually decide each question involved in penalty decision and jurors were told to consider all evidence, specifically including any circumstance in mitigation offered by defendant; while unanimity requirement improperly limits consideration of mitigating evidence, there was nothing in instructions to limit consideration of mitigating evidence and nothing to suggest any particular number of jurors was required

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91. Appellant contends the trial court rejected a defense request to instruct the jury that it was not required to unanimously agree on the existence of mitigation (AOB 345, citing XIV RT 3721-3722; 3 CT 833-834 [Defense Requested Instructions B & C].) Yet, no non-unanimity language was contained in the requested defense instructions, although they did contain language, inter alia, that a mitigating circumstances does not have to be proved beyond a reasonable doubt. (3 CT 833-834.)

to find mitigating circumstance, only unanimity requirement was for verdict itself].)

F. The Penalty Jury Was Not Required To Have Been Instructed On The Presumption Of Life

The penalty jury was not required, under the state and federal constitutions, to have been instructed on the "presumption of life" analogous to the presumption of innocence at the guilt trial. (*Perry*, *supra*, __ Cal.4th at p. __ [2006 Cal. LEXIS 4952 at p. *36]; *Kipp*, *supra*, 26 Cal.4th at p. 1137.)

XIV.

THE INSTRUCTIONS PROPERLY DEFINED THE NATURE AND SCOPE OF THE JURY'S SENTENCING DECISION AND DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS

Appellant's fourteenth argument claims the instructions defining the nature and scope of the jury's sentencing decision violated his constitutional rights. (AOB 349-360.) Specifically, he asserts the instruction caused the jury's penalty choice to turn on an impermissibly vague and ambiguous standard that failed to provide adequate guidance and direction. (AOB 350-353.) He also asserts the instruction failed to inform the jurors that the central determination is whether the death penalty is the appropriate punishment. (AOB 353-355.) He further asserts the instruction failed to inform the jurors that if they determined that mitigation outweighed aggravation, then they were required to return a sentence of LWOP. (AOB 356-359.) His claim and assertions lack merit.

As previously noted, pursuant to the People's request (3 CT 755-756), the trial court gave CALJIC No. 8.88 (1989 Revision) [Penalty Trial-Concluding Instruction],[92/] which told the jury in full:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the Defendant.
>
> After having heard all of the evidence and having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [¶] An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of

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92. Although appellant asserts the trial court gave a "modified version" of CALJIC No. 8.88, its "Given as Modified" box is not checked. (3 CT 755-756.)

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

The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of any weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. [¶] To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

You shall now retire and your foreman will preside over your deliberations. [¶] In order to make a determination as to the penalty, all 12 jurors must agree. [¶] Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and you then shall return with it to this courtroom.

(XIV RT 3818-3819; 3 CT 795-796.) Appellant claims that instruction was constitutionally flawed because it failed to adequately convey several critical deliberative principles and it was misleading and vague in crucial respects. (AOB 350.) Thus, he asserts it violated his constitutional rights to due process, to equal protection,[93] to a fair jury trial, to a reliable penalty determination, and to be free from cruel and unusual punishment. (*Id.*, citing U.S. Const. 6th, 8th & 14th Amends.) (AOB 350-351, 353, 355, 359-360.) This Court repeatedly

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93. Appellant asserts CALJIC No. 8.88 is not saved by its being a sentencing instruction as opposed to one guiding the determination of guilt or innocence because such a distinction would violate equal protection. (AOB 359.) Although respondent does not rely on that distinction, "capital and noncapital defendants are not similarly situated for purposes of the choice among sentencing options." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 123 [rejecting equal protection challenge to failure to explicitly designate aggravating and mitigating factors].)

has considered and rejected his claim and assertions in prior capital cases. Thus, an extensive exploration and discussion of those matters is unnecessary. (See *Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

A. CALJIC No. 8.88 Did Not Cause The Jury's Penalty Choice To Turn On An Impermissible Vague And Ambiguous Standard

CALJIC No. 8.88 told the jury that to return a death judgment each juror "must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of [LWOP]." Appellant asserts the phrase "so substantial" is impermissibly vague and directionless such that it gave the jury intolerably broad discretion. (AOB 350-353.) In *Jackson*, this Court rejected that assertion, stating:

> As we explained in *People v. McPeters* (1992) 2 Cal.4th 1148, 1194, these words "plainly convey the importance of the jury's decision and emphasize that a high degree of certainty is required for a death verdict. Far from undermining defendant's cause at the penalty phase, they assisted defense counsel in emphasizing the gravity of the jury's task, which included the choice of death as a penalty."

(13 Cal.4th at p. 1243, parallel citation omitted; see also *Perry*, *supra*, _ Cal.4th at p. _ [2006 Cal. LEXIS 4952 at p. *33] ["words used in CALJIC No. 8.88, or words of similar breadth, are essential to avoid reducing the penalty decision to a mere mechanical calculation"]; *People v. Millwee* (1998) 18 Cal.4th 96, 162-163 (*Millwee*) [CALJIC No. 8.88 adequately describes "when the balance of factors warrants the more serious penalty"].) Hence, CALJIC No. 8.88 is not impermissibly vague and ambiguous.

B. CALJIC No. 8.88 Did Not Fail To Inform The Jurors The Central Determination Is Whether Death Is The Appropriate Punishment

Appellant also challenge's CALJIC No. 8.88's use of the word "warrants" in CALJIC No. 8.88, which provides the jury "must be persuaded that the aggravating circumstances are so substantial in comparison with the

mitigating circumstances that it warrants death instead of [LWOP]." (AOB 353-355.) He asserts that phrase did not make clear the standard of appropriateness (i.e., whether death was appropriate). This Court likewise rejected that assertion in *Jackson*, stating:

> Defendant also contends that the word "warrants" is too broad and permissive and misleads the jury into believing that it may impose death even when not the "appropriate" penalty. We have rejected that argument. (See *People v. Breaux*, *supra*, 1 Cal.4th at p. 316 ["The contention is spurious"].)

(*Jackson*, *supra*, 13 Cal.4th at p. 1243; accord *Perry*, *supra*, __ Cal.4th at p. _ [2006 Cal. LEXIS 4952 at p. *33-*34].) Thus, use of the word "warrants" was not error.

Appellant further asserts CALJIC No. 8.88 was "defective because it implied that death was the *only* available sentence if the aggravating evidence was 'so substantial in comparison with the mitigating circumstances.'" (AOB 355, italics in original.) Again, this Court in *Jackson* rejected that assertion, stating:

> [T]he instruction makes clear that the jury was "free to assign whatever moral or sympathetic value" it deemed appropriate to each of the various factors enumerated in the sentencing instruction. The instruction as a whole conveyed that the weighing process is "merely a metaphor for the juror's personal determination that death is the appropriate penalty under all of the circumstances." (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1250.) "There is no reasonable likelihood that the jury would have thought it could return a verdict of death if it did not believe that penalty was appropriate." (*Ibid.*)

(*Jackson*, *supra*, 13 Cal.4th at pp. 1243-1244.) Hence, CALJIC No. 8.88 was not defective.

C. CALJIC No. 8.88 Is Not Flawed For Failing To Inform Jurors They Were Required To Return An LWOP Sentence If They Determined Mitigation Outweighed Aggravation

Appellant also asserts CALJIC No. 8.88 failed to inform jurors they

were required to return an LWOP sentence if they determined mitigation outweighed aggravation such that it reduced the prosecution's burden of proof required by section 190.3. (AOB 356-359.) A similar assertion was rejected in *Jackson*, wherein this Court said:

> Defendant contends that CALJIC No. 8.88 is flawed because it does not inform the jury that it is required to return a verdict of life imprisonment without possibility of parole if it finds the aggravating factors do not outweigh the mitigating factors. It is not. As we stated in *People v. Duncan* (1990) 53 Cal.3d 955, 978: "The instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed mitigating. There was no need to additionally advise the jury of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty)."

(*Jackson*, *supra*, 13 Cal.4th at p. 1243, parallel citation omitted; accord *Millwee*, *supra*, 18 Cal.4th at p. 163; *People v. Ray* (1996) 13 Cal.4th 313, 355-356; see *Stitely*, *supra*, 35 Cal.4th at p. 574 [standard instructions in CALJIC No. 8.88 (1989 rev.) adequately advised jurors on scope of their discretion to reject death and to return LWOP verdict]; *Hughes*, *supra*, 27 Cal.4th at p. 405; *People v. Taylor* (2001) 26 Cal.4th 1155, 1181 [rejecting this claim in light of CALJIC No. 8.88's language allowing death verdict only if aggravating circumstances outweighed mitigating ones].) Here, because the instruction's language allowed a death verdict only if aggravating circumstances outweighed mitigating ones, there is no reasonable likelihood jurors would have been unable to embrace the concept that LWOP was appropriate if mitigation outweighed aggravation.

Accordingly, based upon the foregoing, appellant's claim and assertions lack merit. Hence, his constitutional challenges to CALJIC No. 8.88 should be rejected.

XV.

THE INSTRUCTIONS REGARDING THE MEANING OF MITIGATING AND AGGRAVATING FACTORS AND THEIR APPLICATION IN APPELLANT'S CASE DID NOT RESULT IN AN UNCONSTITUTIONAL DEATH SENTENCE

Appellant's fifteenth argument claims the instructions regarding the meaning of mitigating and aggravating factors and their application in his case resulted in an unconstitutional death sentence. (AOB 361-386.) Specifically, he asserts the instruction regarding section 190.3, subdivision (a) ("factor (a)") and its application violated his constitutional rights. (AOB 361-365.) He likewise asserts the instruction regarding section 190.3, subdivision (b) ("factor (b)") and its application violated his constitutional rights. (AOB 365-372.) More specifically, he asserts admission of evidence under factor (b) violated his constitutional rights (AOB 365-370) and that absent a requirement of jury unanimity on the unadjudicated acts of violence, the instructions allowed jurors to impose the death penalty based on unreliable factual findings that were never deliberated, debated, or discussed (AOB 370-372). He also asserts the failure to delete (allegedly) inapplicable sentencing factors violated his constitutional rights. (AOB 373-374.) He further asserts failing to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. (AOB 374-376.) Additionally, he asserts restrictive adjectives used in the list of potential mitigating factors impermissibly impeded the jurors' consideration of mitigation. (AOB 376.) Further, he asserts the failure to require the jury to base a death sentence on written findings regarding the aggravating factors violates his constitutional rights. (AOB 377-380.) Lastly, he asserts even if the absence of procedural safeguards does not render California's death penalty scheme inadequate to ensure reliable capital sentencing, denying them to capital

defendants like him violates equal protection. (AOB 380-386.) His claim and assertions lack merit.

Appellant filed a motion to preclude the prosecutor from seeking the death penalty asserting the factors set forth in section 190.3 are unconstitutionally void for vagueness and that subsections (a), (b), and (i) preclude a meaningful and guided distinction between murders that require or warrant the death penalty and those that do not. (2 CT 314-317, citing, inter alia, U.S. Const. 8th Amend; I RT 82-84.) The prosecution submitted the matter on the People's points and authorities. (I RT 84-84; 2 CT 351.) The trial court denied the motion. (I RT 85; 2 CT 365.)

Among the penalty phase instructions, pursuant to the request of both parties (3 CT 732-733) the trial court gave CALJIC No. 8.85 [Penalty Trial–Factors For Consideration], which told the jury:

> In determining which penalty is to be imposed on the Defendant, you shall consider all of the evidence which has been received during any part of the trial in this case. You shall consider, take into account and be guided by the following factors, *if applicable*:
>
> A. The circumstances of the crime of which the Defendant was convicted in the present proceeding and the existence of any special circumstances found to be true;
>
> B. The presence or absence of criminal activity by the Defendant other than the crimes for which the Defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;
>
> C. The presence or absence of any prior felony conviction, other than the crimes for which the Defendant has been tried in the present proceedings;
>
> D. Whether or not the offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance;
>
> E. Whether or not the victim was a participant in the Defendant's homicidal conduct or consented to the homicidal act;
>
> F. Whether or not the offense was committed under circumstances which the Defendant reasonably believed to be a moral justification or

extenuation for his conduct;

G. Whether or not the Defendant acted under extreme duress or under the substantial domination of another person;

H. Whether or not at the time of the offense, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication;

I. The age of the Defendant at the time of the crime;

J. Whether or not the Defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor;

K. Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, and any sympathetic or other aspect of the Defendant's character or record that the Defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in this -- in the guilt or innocence phase of this trial which conflicts with this principle.[94/]

(XIV RT 3806-3807; accord 3 CT 772-773, emphasis added). Appellant claims CALJIC Nos. 8.85 and 8.88 (3 CT 755-756, 795-796; XIV RT 3818-3819; see respondent's Arg. XIV, *ante*), together with the application of statutory sentencing factors, violated state law and rendered his death sentence unconstitutional. (AOB 361, 375.)

In particular, appellant asserts those instructions and their application artificially inflated the weight of aggravating factors, acted as a barrier to consideration of mitigation, and violated his constitutional rights to be free from to due process, to fair and reliable sentencing, to fair and speedy trial by an impartial and unanimous jury, to the presumption of innocence, to effective confrontation of witnesses, to effective assistance of counsel, to equal

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94. Defense counsel had requested a modification of CALJIC No. 8.85, expanding the description of mitigation under paragraph (k), but the details of the requested modification, which the trial court refused, are unknown. (1 SCT4 156; see XX RT 4431-4438, 4444, 4447, 4458.)

protection, to the guarantee against double jeopardy, to a reliable, individualized, non-arbitrary and capricious penalty determination, and to meaningful appellate review. (AOB 361-386, citing, inter alia, U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const. Art. I, § 7.) Yet, when making his challenge to section 190.3 below, the sole constitutional provision he relied upon was the Eighth Amendment of the United States Constitution. (2 CT 314-317; see I RT 82-84.) Thus, his new challenge under other constitutional provisions (U.S. Const., 5th, 6th & 14th Amends. & Cal. Const. Art. I, § 7) is waived. (*Jackson*, *supra*, 13 Cal.4th at p. 1242.) Moreover, the defense requested CALJIC No. 8.85 below. (3 CT 732-733.) Thus, "any objection to it is waived on appeal." (*Jackson*, *supra*, 13 Cal.4th at p. 1225.)

In any event, this Court repeatedly has considered and rejected his claim and assertions in prior capital cases. Thus, an extensive exploration and discussion of those matters is unnecessary. (See *Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

A. The Instruction Regarding Factor (a) And Its Application Did Not Violate Appellant's Constitutional Rights

In *Tuilaepa v. California* (1994) 512 U.S. 967, 976 (*Tuilaepa*), the United States Supreme Court held the section 190.3, subdivision (a), was neither vague, nor violative of the Eighth Amendment. Because a capital jury should always consider circumstances of the crime in determining the appropriate penalty, the *Tuilaepa* court observed: "We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires." (*Ibid.*) In *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1052 (*Jenkins*), this Court rejected the defendant's assertions that: section 190.3, factor (a), has been applied "in such a wanton and freakish manner," without the application of reasonable limiting construction by this Court, that it violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States

Constitution; that it is unconstitutionally vague as applied because it has permitted prosecutors to argue that any conceivable circumstance of a charged crime should be considered in aggravation; and that it is applied in an arbitrary and capricious manner so as to violate due process. Also, in *People v. Maury supra*, 30 Cal.4th at p. 439 (*Maury*), this Court held a jury's "finding of aggravation based on the circumstances of a crime under section 190.3, factor (a), does not impermissibly permit consideration of a factor that is vague and overbroad." (Accord *Prieto*, *supra*, 30 Cal.4th at p. 276; *Jackson*, *supra*, 13 Cal.4th at pp. 1245-1246.) Likewise, in *Schmeck*, *supra*, 37 Cal.4th at pages 304-305, this Court held "section 190.3, factor (a), as applied, does not fail to sufficiently minimize the risk of wholly arbitrary and capricious action prohibited by the Eighth Amendment. [Citations]." Thus, appellant's contrary assertions (AOB 361-365) fail.

B. The Instruction Regarding Factor (b) And Its Application Did Not Violate Appellant's Constitutional Rights

Appellant asserts factor (b) and its application violated his constitutional rights because it improperly permitted admission of unadjudicated criminal activity (AOB 365-370) and because the jury was not required to unanimously find the unadjudicated acts were proven beyond a reasonable doubt (AOB 370-372). His assertions lack merit.

Initially, appellant fails to support his assertions that admission of the unadjudicated prior criminal activity deprived him of his rights to the effective confrontation of witnesses (AOB 365-366), the effective assistance of counsel (AOB 365), and the guarantee against double jeopardy (*ibid.*). Thus, those assertions should be deemed to lack foundation. (*Williams*, *supra*, 16 Cal.4th at pp. 206, 250; *Rodrigues*, *supra*, 8 Cal.4th at p. 1116, fn. 20.)

Moreover, this Court repeatedly has rejected assertions that the sentencing jury may not consider unadjudicated prior criminal activity. (*Prieto*,

supra, 30 Cal.4th at p. 276; *Jenkins, supra,* 22 Cal.4th at p. 1054; *People v. Carpenter*, *supra*, 21 Cal.4th at p. 1061; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1178.) Likewise, it has rejected assertions that adjudicating other crimes evidence at the penalty phase by the same jury that has found the defendant guilty of first degree, special circumstance murder deprived the defendant of an impartial decision maker. (*People v. Stanley* (1995) 10 Cal.4th 764, 821-822 (*Stanley*); *People v. Allen* (1986) 42 Cal.3d 1222, 1284; *People v. Balderas* (1985) 41 Cal.3d 144, 204.) Also, it has rejected challenges that admission of unadjudicated prior criminal activity denies a defendant his right to a fair and speedy trial. (*Huggins*, *supra*, 38 Cal.4th at pp. 245-246; *Stanley*, *supra*, 10 Cal.4th at p. 822-823.) Further, while recognizing a juror must find the existence of unadjudicated violent criminal activity beyond a reasonable doubt before considering such evidence in aggravation, this Court has held:

> "There is no requirement, however, that the jury as a whole unanimously find the existence of other violent criminal activity beyond a reasonable doubt before an individual juror may consider such evidence in aggravation."

(*Huggins*, *supra*, 38 Cal.4th at p. 239, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 585; see 3 CT 744, 784; XIV RT 3812-3813; CALJIC No. 8.87 [Penalty Trial–Other Criminal Activity–Proof Beyond A Reasonable Doubt].) Furthermore, in *People v. Danielson* (1992) 3 Cal.4th 691, 719-720, this Court held allowing consideration of evidence of unadjudicated offenses and the circumstances of prior offenses involving force or violence does not violate equal protection. (Overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Also in *People v. Cain* (1995) 10 Cal.4th 1, 69, this Court said:

> Nor does defendant provide any compelling reason to reexamine our holdings that introduction in the penalty phase of prior unadjudicated crimes does not violate due process, equal protection or the right to a reliable sentencing procedure.

Appellant likewise presents no compelling reason to do so. Thus, his assertions (AOB 365-372) should be rejected.

C. The Failure To Delete (Allegedly) Inapplicable Sentencing Factors Did Not Violate Appellant's Constitutional Rights

In *Perry*, *supra*, _ Cal.4th at page _ [2006 Cal. LEXIS 4952 at p. *31], this Court rejected a challenge to the trial court's failure to exclude inapplicable factors from CALJIC No. 8.85, stating:

> Defendant contends that the trial court should have deleted those factors inapplicable to this case. We rejected that contention in *People v. Smith* (2005) 35 Cal.4th 334, 368-369 (*Smith*); *People v. Sapp* (2003) 31 Cal.4th 240, 315; *People v. Yeoman* (2003) 31 Cal.4th 93, 164-165; *People v. Carpenter* (1997) 15 Cal.4th 312, 421; *People v. Ghent* (1987) 43 Cal.3d 739, 776-777; and in many other cases.

(Parallel citations omitted; see *Schmeck*, *supra*, 37 Cal.4th at p. 305; *People v. Sapp* (2003) 31 Cal.4th 240, 315-316 (*Sapp*) [rejecting claim that CALJIC No. 8.85's "whether or not" formulation suggested jury could consider inapplicable factors for or against defendant].) Appellant presents no compelling reason to reexamine those holdings.

D. Failing To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Did Not Preclude The Fair, Reliable, And Evenhanded Application Of The Death Penalty

Appellant complains the trial court did not instruct the jury which sentencing factors were aggravating and/or mitigating. In doing so, he notes factors (d), (e), (f), (g), (h) and (j), which had prefatory "whether or not" language were mitigators, but the jury was left free to conclude a "not' answer could establish aggravation and thus, the jury could aggravate his sentence based on nonexistent and/or irrational aggravating factors. (AOB 374-375.) Again, however, this Court rejected a similar challenge in *Sapp*, *supra*, 31 Cal.4th at pages 315-316, stating:

> With respect to the "whether or not" formulation mentioned earlier, defendant contends it invited the jurors to consider "whichever" of two possibilities was shown by the evidence, and thus that a juror who found a factor not proven could use that as a factor favoring imposition of the death penalty. This is simply a variation of the arguments we rejected in *People v. Dennis* [(1998)] 17 Cal.4th 468, 552 and *People v. Benson* [(1990)] 52 Cal.4th 754, 802-803, and we likewise reject it.

Further, in *Schmeck*, *supra*, 37 Cal.4th at page 305, this Court held CALJIC No. 8.85 does not violate the Eighth and Fourteenth Amendments by failing to delineate between aggravating and mitigating circumstances. Appellant presents no compelling reason to reexamine those holdings

E. Use Of Restrictive Adjectives In The List Of Potential Mitigating Factors Did Not Impermissibly Impede The Jurors' Consideration Of Mitigation

Appellant asserts including adjectives such as "extreme" (factors (d) & (g)) and "substantial" (factor (g)) in the list of potential mitigating factors impermissibly impeded the juror's consideration of mitigation. (AOB 376.) In *Schmeck*, *supra*, 37 Cal.4th at page 305, this Court held:

> Nor are potentially mitigating factors unconstitutionally limited by the adjectives "extreme" and "substantial," because section 190.3, factor (k) . . . allows consideration of "'any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime' and any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" [Citations.]

Appellant presents no compelling reason to reexamine that holding.

F. The Failure To Require The Jury To Base A Death Sentence On Written Findings Regarding The Aggravating Factors Did Not Violate His Constitutional Rights

Appellant asserts the instructions' failure to require the jury to make unanimous written findings as to which factors in aggravation it found and considered in imposing a death sentence deprived him of due process,

meaningful appellate review, and equal protection. (AOB 377-380, citing U.S. Const. 8th & 14th Amends.) Yet, this Court repeatedly has rejected the claim that unanimous written findings regarding aggravating factors are constitutionally required. (*Perry, supra*, __ Cal.4th at p. __ [2006 Cal. LEXIS 4952 at p. *35]; *Snow, supra*, 30 Cal.4th at p. 126; *Maury, supra*, 30 Cal.4th at p. 440.) Although appellant relies on *Ring* (AOB 380), *Ring* does not undermine this Court's previous rulings that written findings are not required. (*Prieto, supra*, 30 Cal.4th at p. 275.) Appellant presents no compelling reason to reexamine those holdings.

G. The Absence Of Procedural Safeguards Does Not Deny Capital Defendants Equal Protection

Appellant contends California's death penalty scheme affords significantly fewer procedural protections to capital defendants than non-capital defendants and thereby violates equal protection. (AOB 380-386.) Yet, as this Court observed in *People v. Blair* (2005) 36 Cal.4th 686, 754:

> [W]e have rejected the notion that in view of the availability of certain procedural safeguards such as intercase proportionality review in noncapital cases, the denial of those same protections in capital cases violates equal protection principles under the Fourteenth Amendment. (See *People v. Ramos* (1997) 15 Cal.4th 1133, 1182; *People v. Cox* [(1991)] 53 Cal.3d at p. 691; *People v. Allen* (1986) 42 Cal.3d 1222, 1287-1288.) As we have observed, capital case sentencing involves considerations wholly different from those involved in ordinary criminal sentencing. (*People v. Danielson* (1992) 3 Cal.4th 691, 719-720, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) By parity of reasoning, the availability of procedural protections such as jury unanimity or written factual findings in noncapital cases does not signify that California's death penalty statute violates equal protection principles.

(Parallel citations omitted; see *People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 123 [rejecting equal protection challenge to failure to explicitly designate aggravating and mitigating factors].) Appellant presents no

compelling reason to reexamine those holdings.

Accordingly, based on the foregoing, the instructions regarding the meaning of mitigating and aggravating factors and their application did not result in an unconstitutional death sentence. Hence, appellant's claim and his underlying assertions should be rejected.

XVI.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW DID NOT VIOLATE APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Appellant's sixteenth argument claims the failure to provide intercase proportionality review violates his Eighth and Fourteenth Amendment rights. (AOB 387-394.) Specifically, he asserts the lack of intercase proportionality review violates: the protection against arbitrary and capricious imposition of the death penalty (AOB 387-391, citing U.S. Const. 8th & 14th Amends.) and his right to equal protection of the law (AOB 387, 391-394, citing U.S. Const. 14th Amend.), with the latter reasserting a virtually identical assertion he raised in Argument XV, subheading G (AOB 380-385). This Court repeatedly has considered and rejected his claim and assertions in prior capital cases. Thus, an extensive exploration and discussion of those matters is unnecessary. (See *Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.)

Based on the reasons and holdings noted in respondent's Argument XV, subheading G *ante*, which respondent incorporates by reference, the lack of intercase proportionality review does not violate appellant's right to equal protection of the law. Moreover, intercase proportionality review is not constitutionally required. (*People v. Marniquez* (2005) 37 Cal.4th 547, 590; *People v. Cornwell* (2005) 37 Cal.4th 50, 105; *People v. Cox* (2003) 30 Cal.4th 916, 969-970; *People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Snow*, *supra*, 30 Cal.4th at pp. 126-127.) He presents no compelling reason to reexamine those holdings.

XVII.

APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW

Appellant's seventeenth argument claims his death sentence violates international law. (AOB 395-399.) Specifically, he asserts California's death penalty scheme violates provisions of international treaties and fundamental precepts of international human rights. (AOB 395-397, citing, inter alia, the International Covenant of Civil and Political Rights (ICCPR).) He also asserts to the extent international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, the use of death as a "regular" punishment violates the Eighth and Fourteenth Amendments. (AOB 395-399.) This Court repeatedly has considered and rejected his claim and assertions in prior capital cases. Thus, an extensive exploration and discussion of those matters is unnecessary. (See *Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.) Most recently in *Perry*, this court held:

> [D]efendant contends that California's death penalty law violates international law. He first asserts that it violates the [ICCPR], which prohibits the "arbitrary" deprivation of life (art. VI, § 1) and bars "cruel, inhuman or degrading treatment or punishment" (art. VII). The covenant, however, specifically permits the use of the death penalty if "imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime." (Art. VI, § 2; see *People v. Cornwell* (2005) 37 Cal.4th 50, 106.) And when the United States ratified the treaty, it specially reserved the right to impose the death penalty on any person, except a pregnant woman, duly convicted under laws permitting the imposition of capital punishment. (See 138 Cong. Rec. S-4718-01, S4783 (1992); *People v. Brown* (2004) 33 Cal.4th 382, 403-404.)
>
> Defendant also argues that the "regular" imposition of capital punishment in California violates international norms, and hence constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the federal Constitution. This is a variation on the familiar argument that California's death penalty law does not sufficiently narrow the class of death-eligible defendants to limit that

> class to the most serious offenders, a contention we have rejected in numerous decisions. (See *People v. Jones*, *supra*, 30 Cal.4th at pp. 1127-1128; *People v. Wader* (1993) 5 Cal.4th 610, 66.)

(*Id.* __ Cal.4th at p. __ [2006 Cal. LEXIS 4952 at *38-*40], parallel citations omitted; see *Schmeck*, *supra*, 37 Cal.4th at p. 305.) He presents no compelling reason to reexamine those holdings.

XVIII.

EVEN ASSUMING ARGUENDO, THE SECOND SPECIAL CIRCUMSTANCE FINDING SHOULD BE REVERSED, APPELLANT'S DEATH JUDGMENT SHOULD STAND

Appellant's eighteenth argument claims if the second special circumstance finding – he committed the murder while engaged in the attempted commission of oral copulation in a local detention facility (§§ 190.2, subd. (a)(17), 288a, subd. (e)) – is reversed, then the death judgment also must be reversed. (AOB 400-402.) His claim lacks merit because, even assuming arguendo that second special circumstance finding is invalidated, it did not an add an improper element to the aggravation scale because another sentencing factor enabled the jury to give aggravating weight to the same facts and circumstances.

Recently in *Brown v. Sanders* (2006) __ U.S. __, [126 S.Ct. 884, 892] (*Sanders*), the United States Supreme Court described the method for assessing the impact of an invalid special circumstances on a death penalty sentence:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

As *Sanders* observed:

> In California, a defendant convicted of first-degree murder is eligible for the death penalty if the jury finds one of the "special circumstances" listed in . . . § 190.2 (West Supp. 2005) to be true. These are the eligibility factors designed to satisfy *Furman*. [Citation.] If the jury finds the existence of one of the special circumstances, it is instructed to "take into account" a separate list of sentencing factors describing aspects of the defendant and the crime. . . . § 190.3 (West 1999). *These sentencing factors include*, as we have said, *"the circumstances of the crime of which the defendant was convicted in the present proceeding."*

> [L]eaving aside the weighing/non-weighing dichotomy and proceeding to the more direct analysis set forth earlier in this opinion: *All of the aggravating facts and circumstances that the invalidated factor permitted the jury to consider were also open to their proper consideration under one of the other factors. The erroneous factor could not have "skewed" the sentence, and no constitutional violation occurred.*

(*Sanders*, *supra*, __ U.S. at p. __ [126 S.Ct. at pp. 892-893], emphasis added, parallel citation omitted.)

Specifically, in *Sanders* two special circumstances (i.e., burglary-murder and heinous, atrocious, and cruel) were invalidated, but two other special circumstances (i.e., robbery-murder and witness-killing) were properly found. The latter were sufficient to satisfy the narrowing requirement of *Furman v. Georgia* (1972) 408 U.S. 238 (*Furman*) and alone rendered the defendant eligible for the death penalty. Moreover, the jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish them were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. As such, they were properly considered regardless of whether they bore upon the invalidated eligibility factors. (*Sanders*, *supra*, _ U.S. at p. __ [126 S.Ct. at pp. 893-894].)

Likewise here, assuming arguendo the second special circumstance finding that appellant committed the murder while engaged in the attempted commission of oral copulation in a local detention facility is reversed, the other special circumstance finding that he had a prior second degree murder conviction was properly found. (§§ 187, 190.2, subd. (a)(2); 2 CT 529; 3 CT 854.) Accordingly, the latter was sufficient to satisfy *Furman*'s narrowing requirement and alone rendered appellant eligible for the death penalty. (*Sanders*, *supra*, _ U.S. at p. _ [126 S.Ct. at p. 894]; see *Tuilaepa*, *supra*, 512 U.S. at pp. 971-972 [to render defendant eligible for death penalty, trier of fact

must convict defendant of murder and find one "aggravating circumstance" (or equivalent) at either guilt or penalty phase].) Moreover, the jury's consideration of the second special circumstance in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish it were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. (§ 190.3, subd. (a).) As such, they were properly considered regardless of whether they bore upon the invalidated eligibility factor. (*Sanders*, *supra*, _ U.S. at p. _ [126 S.Ct. at pp. 894].) Hence, appellant's claim should be rejected.

XIX.

APPELLANT'S CUMULATIVE ERROR CLAIM RESTS UPON THE FALSE PREMISE THAT PREJUDICIAL ERRORS OCCURRED AND THUS, LACKS MERIT

Appellant's nineteenth argument claims reversal is required based on the cumulative effect of errors that undermined the fundamental fairness of the trial and the reliability of the death judgment such that it violated his state and federal constitutional rights to a fair trial, to due process, and to reliable guilt and penalty determinations. (AOB 403-409, citing Cal. Const. Art. I, §§ 7, 15-17; U.S. Const., 5th, 6th, 8th & 14th Amends.; see AOB 140-141, 152-153, 192-193.) Yet, his cumulative error claim lacks merit because it is based upon the false premise that prejudicial errors occurred.

In a close case, the cumulative effect of multiple errors may constitute a miscarriage of justice. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1236; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) Theoretically, the "cumulative errors doctrine" is always applicable in criminal cases. The litmus test is whether the defendant received due process and a fair trial. Generally speaking, an appellate court: (1) reviews each allegation; (2) assesses the cumulative effect of any error; and (3) determines whether it is reasonably probable the jury would have reached a result more favorable to the defendant in their absence. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 319.)

For the reasons articulated in respondent's Argument II, subheading F, Argument IV, subheading E, Argument V, subheading E, Argument XVIII, subheadings C and D, Argument IX, subheading F, Argument X, subheading D, Argument XI, subheading D, and Argument XII, subheading E, contrary to appellant's claims, this was not a close case; the evidence of his guilt was quite strong. Additionally for the reasons articulated in Arguments I through XVIII, *ante*, respondent submits either no errors occurred or any errors were harmless. As the court in *United States v. Haili* (9th Cir. 1971) 443 F.2d 1295, observed,

"[a]ny number of 'almost errors,' if not 'errors,' cannot constitute error." (*Id.* at p. 1299, brackets in original, quoting *Hammond v. United States* (9th Cir. 1966) 356 F.2d 931, 933.) Because the premise upon which appellant's argument rests is false (i.e., that *prejudicial* errors occurred), his cumulative impact argument lacks merit. Simply put, 18 times zero still equals zero. (*People v. Beeler* (1995) 9 Cal.4th 953, 954 [where none of claimed errors constitute individual errors, they cannot constitute cumulative error]. Hence, his cumulative error claim should be rejected. (*People v. Chatman* (2006) _ Cal.4th _, _ [2006 Cal. LEXIS 5392 *1, *134]; *Huggins*, *supra*, 38 Cal.4th at p. 254; *People v. Bloom* (1989) 48 Cal.3d 1194, 1232.)

CONCLUSION

Accordingly, respondent respectfully requests the judgment be affirmed. In seeking affirmance, respondent requests this Court rule on the application of all procedural bars. Such bars prevent unfairness to the trial judge and the prosecution. (See *People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) They also protect the integrity of our state appellate process. (*In re Robbins* (1998) 18 Cal.4th 770, 778, fn. 1.) Moreover, interests of comity and federalism lead federal courts to recognize adequate and independent state bars as a component of the independent state rule doctrine which prohibits federal court consideration of a federal issue presented in violation of state rules. (See *ibid.*) Further, a state court need not fear reaching the merits of a federal claim as an alternative holding so long as the bar is explicitly invoked as an independent basis for decision. (*Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 10.)

Dated: June 15, 2006

Respectfully submitted,

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ATTACHMENT

ATTACHMENTS - TABLE OF CONTENTS

Seating Of Prospective Jurors - TABLES A, B, C, D & E

TABLE A - Before Peremptories 5:7 female [♀] to male [♂] ratio; i.e., 42% females

Seat	Prospect	Page Seated	Seat	Prospect	Page Seated
1	Jimmie C. ♂	II RT 426	7	H. K. ♂	III RT 542
2	Kimi T. ♀	II RT 426	8	Coppock ♂	II RT 427
3	Satterberg ♀	II RT 426-427	9	Casey ♀	III RT 631
4	S. Martin ♀	II RT 427	10	Joe P. ♂	II RT 427
5	M. P. Smith ♂	II RT 427	11	Combs ♂	II RT 427-428
6	Mohler ♀	II RT 427	12	R. Martin ♂	II RT 428

TABLE B - After Peremptories 6:6 female [♀] to male [♂] ratio; i.e., 50% females*

Seat	Prospect	Page Seated	Seat	Prospect	Page Seated
1	Jimmie C. ♂	II RT 426	7	H. K. ♂	III RT 542
2	Kimi T. ♀	II RT 426	8	L. R. ♀	III RT 840
3	E. A. ♀	III RT 633	9	Christopher F. ♂	IV RT 883
4	T. R. ♀	IV RT 883	10	Joe P. ♂	II RT 427
5	T. H. ♀	III RT 876	11	R. V. ♂	IV RT 942
6	Suzanne C. ♀	III RT 781	12	L. A. ♂	III RT 781

*At the time of the *Wheeler* motion, assuming the next female prospect would be seated, the panel had a 7:5 female [♀] to male [♂] ratio; i.e., 58% females.

TABLE C - Peremptory Sequence, Gender Ratio, & Female Percentage**

Peremptory Party and #	Seat No.	Excused Prospect	Replacement Prospect	Ratio ♀:♂	Percent Female	Page
–	–	–	–	5:7	42%	
People's #1	6	Mohler ♀	Shumaker ♂	4:8	33%	III RT 633
Defense's #1	3	Satterberg ♀	E. A. ♀	4:8	33%	III RT 633
People pass	–	–	–	4:8	33%	III RT 633
Defense's #2	8	Coppock ♂	Hutcheson ♂	4:8	33%	III RT 634
stipulation	9	Casey ♀	Steenburg ♂	3:9	25%	III RT 712-713
People's #2	4	S. Martin ♀	Hardaway ♀	3:9	25%	III RT 719-720
Defense's #3	5	M. P. Smith ♂	McDermott ♀	4:8	33%	III RT 720
People's #3	5	McDermott ♀	Holik ♀	4:8	33%	III RT 779
Defense's #4	8	Hutcheson ♂	Zarasua ♂	4:8	33%	III RT 779
People's #4	5	Holik ♀	M. Jones ♀	4:8	33%	III RT 779
Defense's #5	9	Steenburgh ♂	Powers ♂	4:8	33%	III RT 779-780
People pass	–	–	–	4:8	33%	III RT 781
Defense's #6	12	R. Martin ♂	L. A. ♂	4:8	33%	III RT 781
People pass	–	–	–	4:8	33%	III RT 781
Defense's #7	6	Shumaker ♂	Suzanne C. ♀	5:7	42%	III RT 781
People pass	–	–	–	5:7	42%	III RT 838
Defense's #8	5	M. Jones ♀	Rodat ♂	4:8	33%	III RT 839
People pass	–	–	–	4:8	33%	III RT 839

TABLE C - Peremptory Sequence, Gender Ratio, & Female Percentage** (continued)

Peremptory Party and #	Seat No.	Excused Prospect	Replacement Prospect	Ratio ♀:♂	Percent Female	Page
Defense's #9	5	Rodat ♂	Horn ♀	5:7	42%	III RT 839
People's #5	5	Horn ♀	Ourlian ♀	5:7	42%	III RT 839
Defense's #10	9	Powers ♂	Shepard ♀	6:6	50%	III RT 839-840
People's #6	5	Ourlian ♀	Nokes ♂	5:7	42%	III RT 840
Defense's #11	8	Zarasua ♂	L. R. ♀	6:6	50%	III RT 840
People's #7	5	Nokes ♂	Gilmour ♂	6:6	50%	III RT 875
Defense's #12	5	Gilmour ♂	T. H. ♀	7:5	58%	III RT 875-876
People's #8	9	Shephard ♀	Gillitzer ♀	7:5	58%	IV RT 881
Defense's #13	4	Hardaway ♀	T. R. ♀	7:5	58%	IV RT 882-883
People's #9	9	Gillitzer ♀	Chris F. ♂	6:6	50%	IV RT 883
Defense pass	–	–	–	6:6	50%	IV RT 883
People's #10	11	Combs ♂	Sanders ♀	7:5	58%	IV RT 883
Defense pass	–	–	–	7:5	58%	IV RT 884
People's #11	11	Sanders ♀	Moll ♀	7:5	58%	IV RT 884
for cause	11	Moll ♀	Kelly ♂	6:6	50%	IV RT 889-890
Defense pass	–	–	–	6:6	50%	IV RT 940
People's #12	11	Kelly ♂	Taylor ♀	7:5	58%	IV RT 940
Defense pass	–	–	–	7:5	58%	IV RT 940
People's #13	11	Taylor ♀***	Davids ♀	7:5	58%	IV RT 941

TABLE C - Peremptory Sequence, Gender Ratio, & Female Percentage** (continued)

Peremptory Party and #	Seat No.	Excused Prospect	Replacement Prospect	Ratio ♀:♂	Percent Female	Page
Defense's #14	11	Davids ♀	Ulrich ♂	6:6	50%	IV RT 941
People pass	–	–	–	6:6	50%	IV RT 941
Defense's #15	11	Ulrich ♂	R. V. ♂	6:6	50%	IV RT 941-942
People pass	–	–	–	6:6	50%	IV RT 942
Defense pass	–	–	–	6:6	50%	IV RT 942

**TABLE A's 5:7 female [♀] to male [♂] ratio; i.e., 42% females, initially is used because that is the ratio and percentage before any peremptories. Also, the following prospective jurors were excused for cause and/or by stipulation during peremptories, but that did not alter the gender ratio and percentage because they were not seated in the jury box at the time: Cardot (III RT 656), Blumer (III RT 662), Gomez (III RT 697-698, 708-709), Simon (*ibid.*), Adams (III RT 719), Ezell (III RT 730), Collister (III RT 777), Martina (III RT 786), Rodriguez (III RT 788), Delgado (III RT 791), Shwiyhat (III RT 793) Castillo (III RT 837-838), Thompson (III RT 842), and Lanier (IV RT 938).

***Defense raised and preserved *Wheeler* issue (IV RT 940-942, 946-947)

TABLE D - Peremptory Sequence - Questionnaire &Voir Dire****

Peremptory Challenge (Page)	Questionnaire Pages	Voir Dire Pages
P #1 Mohler ♀ (III RT 633)	7 SCT2 1818-1838	II RT 441-443, 447-450, 452-453, 457-459, 469-471, 474-475, 478-483; III RT 526-533, 595, 604, 606-609, 618
D #1 Satterberg ♀ (III RT 633)	9 SCT2 2448-2468	II RT 437, 441-443, 447-453, 455-456, 469-471, 474-475, 478-483, 492-499; III RT 595, 598-599, 604-609, 616-617; see II RT 366-369, 388 [hardship]
P pass (III RT 633)		
D #2 Coppock ♂ (III RT 633)	3 SCT2 811-831	II RT 436-437, 441-443, 447-450, 452-453, 461-463, 466, 469-471, 474-475, 478-483; III RT 546-558, 597, 606-609, 611, 618-619
P #2 S. Martin ♀ (III RT 719)	6 SCT2 1734-1754	II RT 441-443, 447-450, 452-453, 469-471, 474-475, 478-483, 500-506; III RT 595, 603-604, 606-609, 615, 617-618
D #3 Smith ♂ (III RT 720)	9 SCT2 2574-2594	II RT 441-443, 447-450, 452-453, 469-471, 474-475, 478-483, 506-509; III RT 595, 604, 606-609, 617-618
P #3 McDermott ♀ (III RT 779)	6 SCT2 1608-1628	III RT 721-723, 732-734, 768; see III RT 771
D #4 Hutcheson ♂ (III RT 779)	5 SCT2 1398-1418	III RT 636-639, 664-668, 678, 686-694, 701-703, 716-717; see II RT 308-309, 316-318 [hardship]
P #4 Holik ♀ (III RT 779)	5 SCT2 1335-1355	III RT 721-723, 734-740, 768; see III RT 771, 773-774, 777

TABLE D - Peremptory Sequence - Questionnaire &Voir Dire** (continued)

Peremptory Challenge (Page)	Questionnaire Pages	Voir Dire Pages
D #5 Steenburgh ♂ (III RT 779)	9 SCT2 2615-2635	II RT 510-511; III RT 635-636, 672-674, 716-717
P pass (III RT 781)		
D #6 R. Martin ♂ (III RT 781)	6 SCT2 1713-1733	II RT 441-443, 447-450, 452-453, 469-471, 474-475, 478-483; III RT 573-576, 597, 606-609, 611, 618-619
P pass (III RT 781)		
D #7 Shumaker ♂ (III RT 781)	9 SCT2 2490-2510	II RT 441-443, 447-450, 452-453, 469-471, 474-475, 478-483; III RT 584-586, 597, 606-609, 618, 620
P pass (III RT 838)		
D #8 M. Jones ♀ (III RT 839)	5 SCT2 1419-1439	III RT 721-723, 741-747, 753-757, 768-771
P pass (III RT 839)		
D #9 Rodat ♂ (III RT 839)	8 SCT2 2301-2321	III RT 783-785, 797-801, 803-807, 830-831
P #5 Horn ♀ (III RT 839)	5 SCT2 1377-1397	III RT 783-785, 794, 797-801, 807-811, 826-831, 833-834
D #10 Powers ♂ (III RT 839)	8 SCT2 2154-2174	III RT 721-723, 757-760, 768, 770-772, 778
P #6 Ourlian ♀ (III RT 840)	7 SCT2 1965-1985	III RT 783-785, 794-801, 811-814, 823-824, 827-828, 830-832; see II RT 342-345, 354, 358 [hardship]
D #11 Zarasua ♂ (III RT 840)	10 SCT2 2972-2992	III RT 721-723, 750-752, 768, 770-771

TABLE D - Peremptory Sequence - Questionnaire &Voir Dire** (continued)

Peremptory Challenge (Page)	Questionnaire Pages	Voir Dire Pages
P #7 Nokes ♂ (III RT 875)	7 SCT2 1944-1964	III RT 783-785, 796-801, 817-819, 828, 830-831
D #12 Gilmour ♂ (III RT 876)	4 SCT2 1188-1208	III RT 841-842, 844, 851, 854-858, 863-864, 868-869
P #8 Shephard ♀ (IV RT 881)	10 SCT2 2825-2845	III RT 783-785, 797-801, 814-817, 824, 828, 830-831
D #13 Hardaway ♀ (IV RT 882)	5 SCT2 1272-1292	III RT 662-663, 674-676, 715-717; see II RT 290-292, 301-302 [hardship]
P #9 Gillitzer ♀ (IV RT 883)	4 SCT2 1167-1187	III RT 841-842, 845-847, 851, 854-855, 859-860, 863-864, 868-870
D pass (IV RT 883)		
P #10 Combs ♂ (IV RT 883)	3 SCT2 790-810	II RT 441-443, 447-450, 452-453, 469-471, 474-475, 478-483; III RT 570-573, 597, 606-609, 611, 613-614, 618-619
D pass (IV RT 884)		
P #11 Sanders ♀ (IV RT 884)	9 SCT2 2427-2447	III RT 853-854, 863-864, 868-869, 872, 874; see III RT 843 [seems to mistakenly refer to Thomas]
D pass (IV RT 940)		
P #12 Kelly ♂ (IV RT 940)	5 SCT2 1461-1481	IV RT 886-887, 891-893, 901-903, 930-933
D pass (IV RT 940)		

TABLE D - Peremptory Sequence - Questionnaire &Voir Dire** (continued)

Peremptory Challenge (Page)	Questionnaire Pages	Voir Dire Pages
P #13 Taylor ♀ (IV RT 940) *****	10 SCT2 2741-2761	IV RT 886-887, 901, 905-908, 930-931, 934; see II RT 374 [hardship]
D #14 Davids ♀ (IV RT 941)	3 SCT2 874-894	IV RT 886-887, 899, 901, 908-913, 930-931, 934, 938-939
P pass (IV RT 941)		
D #15 Ulrich ♂ (IV RT 941)	10 SCT2 2888-2908	IV RT 886-887, 889-901, 913-917, 922-927, 930-931, 934; see II RT 374-377, 392 [hardship]
P pass (IV RT 942)		
D pass (IV RT 942)		

****"P" refers to the People, "D" refers to the defense, "#" refers to the numeric sequence of the peremptory challenge, "♀" refers to female, and "♂" refers to male; voir dire cites include group questioning and incorporate some questions asked of other prospects

*****Defense raised and preserved *Wheeler* issue (IV RT 940-942, 946-947)

TABLE E - Jury Makeup At Close Of Voir Dire - Questionnaire & Voir Dire****

Juror	Questionnaire Pages	Voir Dire Pages
1. Jimmie C. ♂	3 SCT2 853-873	II RT 441-443, 447-450, 452-453, 469-475, 478-492; III RT 595, 604, 606-609, 616-617, 677-678
2. Kimi T. ♀	9 SCT2 2699-2700; 10 SCT2 2701-2719	II RT 441-443, 447-450, 452-455, 469-471, 474-475, 478-483, 492, 511-512, 514-515; III RT 525, 595, 604, 606-609, 611, 617, 713-714
3. E. A. ♀	1 SCT2 224-244	II RT 441-443, 446-450, 452-453, 466-467, 469-471, 474-475, 478-483; III RT 524, 586-589, 597, 606-609, 622, 632
4. T. R. ♀	8 SCT2 2280-2300	III RT 841-842, 847-848, 851, 854-855, 860-861, 863-864, 868-870
5. T. H. ♀	5 SCT2 1314-1334	III RT 841-842, 844-845, 851, 854-855, 858-859, 863-870
6. Suzanne C. ♀	2 SCT2 517-537	III RT 783-785, 797-803, 824-826, 830-831
7. H. K. ♂	6 SCT2 1524-1544	II RT 441-443, 447-450, 452-453, 465, 469-471, 474-483; III RT 542-546, 595-597, 606-611, 618
8. L. R. ♀	8 SCT2 2238-2258	III RT 841-844, 851-854, 863-864, 868-869, 874-875
9. Christopher F. ♂	4 SCT2 1041-1061	III RT 695-696, 841-842, 848-851, 854-855, 861-864, 867-872
10. Joe P. ♂	7 SCT2 2050-2069	II RT 440-443, 446-450, 452-453, 469-471, 474-475, 478-483; III RT 561-566, 597, 606-609, 611-613, 618-619
11. R. V. ♂	10 SCT2 2930-2950	IV RT 888, 901, 917-919, 930-931, 934
12. L. A. ♂	1 SCT2 161-181	III RT 731-732, 762-764, 768, 770-773

****** "♀" refers to female and "♂" refers to male; voir dire cites include group questioning and incorporate some questions asked of other prospects

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 110566 words.

Dated: June 15, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

JEFFREY D. FIRESTONE

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Dement*** No.: **S042660**

I declare:

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

On June 15, 2006, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, 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 June 15, 2006, at Sacramento, California.

_____
Declarant