IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **CARL DEVON POWELL,** Defendant and Appellant.	**CAPITAL CASE** Case No. S043520

Sacramento County Superior Court, Case No. CR113126
Honorable James I. Morris, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
STEPHANIE A. MITCHELL
Deputy Attorney General
PAUL E. O'CONNOR
Deputy Attorney General
State Bar No. 170829
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5290
Fax: (916) 324-2960
E-mail: Paul.OConnor@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

Appellant Carl Devon Powell robbed, shot, and killed his former employer, Keith McDade. The evidence of appellant's guilt was overwhelming. Before the crime, appellant made statements reflecting his intent to rob. After the crime, appellant confessed to the police and to an acquaintance.

Appellant claims that there was substantial evidence that he committed the crimes because he was coerced by his co-perpetrators, Terry and John Hodges. However, the evidence showed that appellant was an active, willing participant in the planning of the robbery. The circumstances of the crime suggested that appellant's purpose was robbery. Finally, appellant's statements after the crime did not support the conclusion that he was coerced.

STATEMENT OF THE CASE

On July 11, 1994, the Sacramento County District Attorney filed amended information number 113126 charging appellant and co-defendants Terry Hodges and John Hodges with the January 19, 1992, murder and robbery of Keith McDade (counts 1-2; Pen. Code, §§ 187, subd. (a), 211; 29CCT 8468-8469; all further undesignated statutory references are to the Penal Code. "CCT" refers to the Clerk's Corrected Transcript.) The prosecution alleged the special circumstance that the defendants murdered McDade during a robbery. (29CCT 8469; § 190.2, subd. (a)(17).) As to both counts, it was alleged that appellant personally used a firearm. (29CCT 8468, 8470; § 12022.5, subd. (a).) Further, as to both counts, it was alleged that Terry Hodges and John Hodges were principals and that at least one principal was armed with a firearm. (29CCT 8469, 8470; § 12022, subd. (a).) The district attorney also alleged that, as to count 1,

Terry Hodges was on bail when he committed the murder. (29CCT 8469; § 12022.1.)

Additionally, appellant was charged with three counts of grand theft. (Counts 3-5; § 487, subd. (1); 29CCT 8470-8471.) The district attorney also alleged that John Hodges had three prior serious felony convictions and had served a prior prison term. (29CCT 8471; §§ 667, subd. (a), 667.5, subd. (b).)

Appellant and his co-defendants entered not guilty pleas and denied the allegations. (29CCT 8466.)

Two juries were sworn: one to hear the case against appellant and the other to hear the case against the Hodgeses. (2CT 396, 422, 435, 447.) The joint guilt phase started on July 12, 1994. (2CT 447.) On August 22, 1994, the People rested and all defendants moved for a mistrial. (2CT 518-519.) The next day, the court denied a mistrial as to appellant, but granted a mistrial as to the Hodgeses. (2CT 520.) Later, the court granted the prosecutor's motion to dismiss the charges against the Hodgeses. (1CCT 30-31.)

On September 1, 1994, the jury found appellant guilty on all counts and found all allegations to be true. (3CT 672-684.) Thus, the jury found appellant guilty of the first-degree murder of Keith McDade, found the robbery-murder special circumstance to be true, found appellant guilty of robbery, found that he personally used a firearm in the murder and robbery, and found appellant guilty of all three counts of grand theft. (3CT 673-684.)

The penalty phase started on September 20, 1994. (3CT 687.) On September 30, 1994, the jury returned a verdict of death. (3CT 785, 819.) On November 10, 1994, appellant was sentenced to death and received an aggregate determinate term of eight years four months. (3CT 879-888.) This appeal is automatic.

STATEMENT OF FACTS

Guilt Phase

People's case

A. Events Before the Murder

Appellant was employed at the Kentucky Fried Chicken (KFC) restaurant on Freeport Boulevard in Sacramento from August 1990 to May 1991. (16RT 6505-6506.) Appellant was aware of the procedures the managers used to make bank deposits. (16RT 6553, 6619.) In May 1991, the KFC managers Keith McDade ("McDade") and his wife Colleen McDade, realized that three cash deposits were missing, (apparently three separate transactions). (16RT 6510-6513.) The managers told the KFC employees (including appellant) that a private investigator would be questioning them about the thefts. (16RT 6513.) The next day, appellant called the managers and told them he had to go to Los Angeles; he stopped showing up for work at that point. (16RT 6514.)[1]

Between May 1991 and January 1992, appellant would periodically go to the KFC and ask to be rehired or visit with the employees. (16RT 6514-6518, 6574-6575, 6612.)

On Halloween 1991, appellant called the KFC and spoke with employee Ruben Martinez. (16RT 6717-6718.) Appellant told Martinez that it was Halloween and there were a lot of "crazies" out so Martinez should watch his back when taking the deposit to the bank because something could happen. (16RT 6718, 6736.) Martinez did not take the deposit to the bank that night. (16RT 6719-6720.)

---

[1] Later, appellant admitted to a friend and the police that he had stolen money from KFC while working there. (18RT 7261-7264; 30CCT 8990-8991.)

Shortly after Halloween 1991, appellant went to the KFC and displayed a gun to some of the employees. (16RT 6570, 6595-6596, 6614, 6617, 6722-6725.) Martinez saw the gun and was sure that it was a revolver. (16RT 6722-6726.)

In November and December of 1991, appellant told a friend (Kim Scott) that he planned to rob the KFC; he said this about nine or ten times. (18RT 7255-7258.) Appellant said he wanted to rob the KFC because he got fired and because he wanted money. (18RT 7256, 7257, 7270.) In addition, about a month before the murder, appellant told Scott he was going to rob Keith McDade; he said this about ten times (apparently appellant's statements about robbing McDade were in addition to his statements about robbing KFC). (18RT 7259-7260.) Appellant said he was going to knock out Keith with a board or rock. (18RT 7271.) Scott claimed that she thought appellant was joking about robbing the KFC, so she did not notify the KFC managers even though she worked there. (18RT 7288-7289, 7327, 7339; but see 24RT 8904-8905 [detective did not get the impression that Scott thought appellant was joking]; see also 18RT 7251-7252 [Scott's employment].) Appellant told Scott that If he robbed KFC he did not want her to be working there at the time of the robbery. (18RT 7336.) Appellant used to call Scott just about every day; but he stopped calling her a few days before the murder. (18RT 7349.)

Around January 12 or 16, 1992, appellant visited a park with Gloria Eversole, Sherry Brogdon, and another person. (17RT 6842, 6917-6918; 22RT 8543.) Appellant had a gun and some bullets; Eversole asked him to throw the bullets away, so appellant threw them in a garbage can. (17RT 6918-6919; see also 17RT 6845-6846; 6848, 6850, 6855, 6862; 22RT 8544; 23RT 8845-8846.)

B. The Night of the Murder

On January 19, 1992, at about 7:30 p.m., the Hodges brothers and appellant were seen at a market near the KFC. (21RT 8182-8188; 22RT 8377, 8421.) Terry Hodges was driving a black Chevy Caprice. (21RT 8183-8184, 8188; 22RT 8411.)

Likewise, between 8:00 p.m. and 9:00 p.m., Charlie Schuyler saw appellant at a liquor store near the KFC; Schuyler was reasonably sure that Terry Hodges was also at the store. (17RT 6970-6973; 18RT 7105, 7109.) Schuyler thought he saw a car at the liquor store, which looked similar to Terry Hodges's car. (17RT 6974, 7061-7062; 29CCT 8649; compare to 29CCT 8648, 8683, 8684.)

Appellant went into the KFC between 9:00 p.m. and 10:00 p.m. (16RT 6564, 6580-6581.) Appellant left the KFC about 9:30 or 9:45 p.m. (16RT 6595, 6634-6635.)

At about 10:10 p.m., Jeanette Fletcher walked past the KFC; she saw a dark-colored (navy blue or black), medium-to-large car; she could see two or three silhouettes in the car. (18RT 7360-7361, 7364, 7369, 7376, 7387-7388; 19RT 7415-7417, 7457.) The car drove very slowly through an alley near the KFC and turned into the darkened parking lot of a nearby liquor store which was closed. (18RT 7372, 7374; 19RT 7442-7444, 7453-7454.) The car Fletcher saw looked similar to Terry Hodges's car. (18RT 7378, 7379; 19RT 7447; 20RT 7770-7771, 7791-7792; Ex. T-32; 23RT 8611; Exs. T-21-B, T-21-C,T-7.) Appellant's apartment manager had seen a similar car near appellant's apartment from November 1991 to January 1992. (19RT 7613-7617; 23RT 8849; Exs. T-5, T-8.)

KFC employee Junell Rodriquez left the restaurant about 10:25 p.m. At that time, only Keith McDade was left in the restaurant. (16RT 6558-

6559, 6562-6563.) McDade planned to bring home a box of chicken for his family. (21RT 8161, 8174.)

A neighbor of the KFC thought she heard a gunshot at about 10:45 p.m. or 11:00 p.m. (19RT 7585, 7588, 7596.)

According to Schuyler, between about 9:55 p.m. and 10:20 p.m., he was working on a car in an alley behind Kragen Auto Supply; the alley also runs behind the KFC. (17RT 6958-6961, 6969.) Schuyler saw appellant come down the alley and drop something which Schuyler thought was a book, but it could have been a bank bag. Appellant picked up the item and kept going. (17RT 6962-6966, 6973.) Appellant was moving fast – he was trotting or jogging northbound. (17RT 6968, 6994, 7039, 7040.)[2]

C. Events After the Murder; Police Investigation

On January 20, at about 1:10 a.m., the police discovered Keith McDade's body in the driver's seat of his car near the KFC. (19RT 7462-7465.) The driver's door was open and McDade had a single gunshot wound to the left temple, which appeared to be a close-range wound. (19RT 7465-7468, 7472-7473, 7476; 23RT 8829.)

The pathologist confirmed that McDade died from a single gunshot wound to the left temple. (27RT 9972-9973, 9984.) The gun was fired at close range – fewer than six inches from McDade's head. (27RT 9979-9980.) The bullet removed from McDade's head was medium caliber: it was in the .38-caliber, nine-millimeter, or .357-caliber range. (27RT 9983, 9989-9990, 9991; Ex. T-56.) The bullet removed from McDade's head was quite similar to the bullet that Eversole gave to the police. (27RT 9993-9994.) About two days after the murder, Eversole went back to the park,

---

[2] Schuyler's credibility issues were fully explored at trial. (17RT 6974-6978, 7019-7049; 18RT 7115-7116, 7188.)

Respondent submits that Schuyler was probably mistaken about the time at which he saw appellant with the book/bank bag.

retrieved a .38 caliber short bullet, and gave it to the police. (17RT 6919-6920; see also 17RT 6846-6847, 6851; 23RT 8839-8840; People's Ex. T-20.)

A friend of appellant's testified that he drank Mickey's beer. (18RT 7265-7267.) The police found a Mickey's beer bottle at the c rime scene. (20RT 7796-7798; 22RT 8539.)

A bank bag (Ex. T-9-B), a KFC chicken box (Ex. T-14-B), a KFC paper bag (Ex. T-13-A), and a First Interstate pen like the type used at KFC (Ex. T-12) (18RT 7138-7142; 19RT 7496-7501, 7507-7510; 20RT 7739, 7752-7753, 7872-7873; see also 16RT 6532, 6536-6538) were discovered near the corner of Golf View and Mangrum, about two or three miles from the KFC. (18RT 7147-7149, 7157, 7162; 19RT 7498-7501; 20RT 7752-7753; 20RT 7872-7873 [pen found in pedestrian's front yard].) The bank bag had been cut open. (16RT 6536.) Torn KFC gift certificates (19RT 7497; 20RT 7737, 7755; Exs. T-11-A, T-11-B; 16RT 6538-6539) and a personal check of the McDades were inside the bank bag. (21RT 8175-8176, 8177.) A razor blade and a bank deposit slip from KFC for $1707 were found in the same area. (16RT 6533;19RT 7498-7501, 7507-7508; 20RT 7754; Exs. T-15, T-30.) Appellant's fingerprints were found on the KFC box and on some of the torn gift certificates. (21RT 8067-8069, 8071-8077, 8078, 8083-8085, 8106-8107, 8158-8160; see also 16RT 6538-6539; 20RT 7935-7936, 7939; 22RT 8498-8499.)

On January 20, the owner of a business near the KFC found a bullet on the ground near his back door: it was a .38-caliber bullet. (19RT 7639-7642, 7648-7649; 20RT 7804-7807.)

On this date (January 20), appellant called the police and told an officer that he understood that the police wanted to talk to him. (17RT 6901.) The officer confirmed this and asked when appellant could come to the station; appellant replied, "[W]hat are you guys going to do – lock me

up?" (17RT 6901-6902.) Appellant said he would come to the station but never turned himself in. (17RT 6902.)

The jury saw a video of Angela Littlejohn's interview with police. (29RT 10499-10501; 31CCT 9253-9292.) Littlejohn was the aunt of one of appellant's friends. (28RT 10390.) Littlejohn claimed that she was drunk when she was interviewed by police; the detective who interviewed her disputed this. (29RT 10457, 10496-10497.) Littlejohn said that about January 23 or 24, 1992, appellant told her that he had shot and killed McDade. (31CCT 9261, 9263, 9271, 9277; 28RT 10410; see also 31CCT 9255, 28RT 10390 [date].) According to Littlejohn, appellant told "everybody" about the murder. (31CCT 9268-9269.) Appellant went to see McDade about getting his job back, but the two of them got into an argument. (31CCT 9277-9278.) Appellant said that he shot McDade because McDade had threatened him. (31CCT 9263.) Appellant kept $700 for himself and gave the Hodges brothers $500 each. (31CCT 9262-9263; 28RT 10413.) Appellant also said that he would not give up without a fight and he would shoot police if he had to. (31CCT 9265-9266.) Littlejohn speculated that the Hodges brothers "forced" appellant to shoot McDade; appellant was weak and stupid. (31CCT 9266, 9270; 28RT 10412.) Littlejohn obtained appellant's gun; appellant asked her to return it because he needed it to get money. (31CCT 9263-9264, 9273, 9285, 9287-9288.) Instead, Littlejohn threw the gun in a dumpster. (31CCT 9276, 9285-9286; 28RT 10403-10404.)

During the week of January 20, Terry Hodges discussed the killing with an acquaintance of five years, Daryl Leisey. (31CCT 9293-32CCT 9322; see also 32CCT 9318-9319, 9322; 25RT 9487-9488 [date of conversation].) The jury heard an audiotape of Leisey's police interview. (29RT 10506-10508; 31CCT 9293-32CCT 9322.) Terry asked Leisey if he had heard about the shooting and he complained that the police were

"jacking" him up. (31CCT 9299; 25RT 9490, 9494.) Terry knew that Leisey had worked as a skip-tracer (bounty hunter) for Terry's stepfather's bail bonds company and he asked Leisey for advice on how to disappear ("stay hidden"). (31CCT 9294-9295, 9300; 32CCT 9308; see also 25RT 9478-9481, 9490-9491.) Terry also said that appellant, who Terry referred to as "the boy," had been talking about robbing McDade, and Terry gave appellant a gun. (32CCT 9303; 25RT 9494 [Terry and appellant went to KFC to rob McDade]; 25RT 9497.) Terry and appellant robbed McDade; Terry instructed appellant to kill McDade and he did so. (32CCT 9307-9308, 9313; 25RT 9494.) They killed McDade to eliminate him as a witness. (32CCT 9305, 9314; 25RT 9494-9495, 9498.) Appellant was a wimp and Terry had to coach him to get him to kill McDade. (32CCT 9315; 25RT 9498.)[3]

On January 27, 1992, the police arrested appellant, who was hiding in an apartment. (19RT 7528, 7534-7535.) On this same date, Detective Lee interviewed appellant. The jury saw an edited videotape of the interview. (23RT 8860-8863, 8889-8894; Ex. T-51 [video]; Ex. T-51-A [transcript]; 30CCT 8973-31CCT 9036.) Appellant told the police several stories – but eventually he admitted that he shot McDade. At first, appellant denied that he was the shooter. (30CCT 8976.) Appellant claimed that he waited in

---

[3] Leisey admitted having a criminal record (e.g., obtaining narcotics by fraud, grand theft auto, writing bad checks). (25RT 9500-9501; 26RT 9725-9736.) Leisey received no consideration for his testimony in this case (other than some travel money). (25RT 9501-9502.) At the time of his January 1992 conversation with Terry, Leisey had a pending criminal case in another county and was on probation. (25RT 9504; 26RT 9803.) Shortly before trial, Leisey was placed in a psychiatric unit for 72 hours. (26RT 9769, 9772-9773.) Leisey acknowledged that – as a skip-tracer – he has to maintain a relationship with law enforcement. (26RT 9795.) Leisey also admitted assisting law enforcement in other cases. (25RT 9503; 26RT 9573-9585.)

the car while another person robbed and killed McDade. (30CCT 8976-8977.) Later, appellant admitted that he robbed and shot McDade; however, he offered at least two explanations for why he shot McDade. (30CCT 8999-31CCT 9004, 9011.) First, appellant claimed that the gun "slipped" and went off accidentally while he was robbing McDade. (31CCT 9001-9002.) Then appellant said that the shooting was not accidental, but he shot McDade because McDade threatened him and he was scared. (31CCT 9003-9004.) According to appellant, McDade threatened to have him killed. (31CCT 9001-9003.)

Appellant also told the detective that John and Terry Hodges were his confederates in the robbery-murder. (31CCT 9011-9014, 9019-9020; 23RT 8894-8895.)

The police interviewed Terry Hodges. (22RT 8547.) A videotape of the interview was played for the jury. (22RT 8550, 8551; 28RT 10339-10342; Ex. T-49.) Terry admitted that he and appellant were at the KFC from 7:30 p.m. to 8:00 p.m. the night of the murder. (30CCT 8970.) Terry denied being at the KFC from 9:45 p.m. to 10:15 p.m. (30CCT 8970.)

On January 28, Littlejohn led the police to a dumpster where they found a gun, which appeared to be a .38-caliber Saturday night special. (19RT 7540, 7542-7545; Ex. T-18A.)

On January 30, appellant made two phone calls from jail that were monitored by law enforcement. (28RT 10269, 10270.) In the first call, appellant implored a female named Sabrina to tell her mother to say that he was at her house on the night of the shooting. (28RT 10282.) In the second call, appellant told a man named Tony Scott to tell his (appellant's) attorney that he (Scott) saw appellant give the gun to Terry two weeks before the shooting. (28RT 10283.) Appellant also told Tony about his conversation with Sabrina. Appellant opined that Sabrina would support his alibi. (28RT 10283.)

In March 1992, John Hodges told a fellow jail inmate (Eric Banks) about the KFC robbery-murder. (25RT 9409, 9413-9466.) Banks had known John Hodges since 1990; they were "associates" and had confided in each other on other occasions. (25RT 9446-9447.) Banks had also served prison time with John Hodges.[4] (25RT 9471, 9472.)

John Hodges said that the shooter was a "youngster" who was in custody.[5] (25RT 9419; see also 31CCT 9142-9143, 9150.) John told Banks about how the robbery-murder was planned at a woman's home on G Parkway; John and appellant were present. (25RT 9422-9426; see also 25RT 9452-9453.) They wanted to get more money; someone other than John said he knew where they could "get paid." (25RT 9423.) Appellant (who had worked at the KFC) suggested robbing the KFC; appellant said that he had the "set up"; McDade would have about "two g's" which would

---

[4] Banks was afraid that if he went to state prison he would be killed for being a snitch. (23RT 8723, 8730-8731; 24RT 8931-8932, 8959-8960.) In 1992, the prosecution helped Banks stay out of state prison (i.e., Banks received a county jail sentence for his offense). (23RT 8754-8756, 8762-8763; 24RT 8953-8954.) At the time of the 1994 trial, Banks had an agreement with the prosecution under which he hoped to avoid state prison for a San Bernardino County case. (23RT 8751, 8783; 24RT 8937-8942, 8944, 8957, 8998-8999.) Banks admitted that he had an extensive criminal record and had been to prison three times. (23RT 8753-8754; 24RT 9075-9076.) Banks was questioned at length about matters related to his credibility: e.g., his motive for testifying and his understanding of his agreement with the prosecution. (24RT 9028-9037, 9044-9055, 9062-9069, 9082-9092, 9102-9114, 9134, 9139, 9141.)

In addition to his testimony at trial (23RT 8712-8804; 24RT 8922-8976, 8985-9037, 9044-9142) a videotape of Banks's April 1992 interview with law enforcement was played for the jury. (25RT 9318-9324; Ex. T-55 [video]; Ex. T-55-A; 31CCT 9132-9166 [transcript]) and his preliminary hearing testimony was read to the jury. (25RT 9409-9466, 9471-9475.)

[5] Banks did not refer to appellant by name during his testimony. It is clear, however, that the "youngster" is appellant. Respondent will substitute appellant for "the youngster."

be easy to take. (25RT 9423-9424; 31CCT 9154-9155, 9159.) John told appellant that McDade would have to be killed so there were no witnesses. (25RT 9424-9425.) Appellant did not want to kill anyone; but John told appellant that he had to kill McDade so that he would not be able to identify "none of us." (25RT 9425-9426; see also 25RT 9449, 9463; 31CCT 9146, 9151, 9160.) Banks did not know whether John Hodges was at the murder scene. (31CCT 9151, 9155-9156, 9158.)

Banks testified that John Hodges manipulates young people, and that appellant was easy to manipulate. (31CCT 9144-9145, 9154.)

There was testimony about the pistol and the fatal bullet. The pistol (Ex. T-18A) fired only in double-action mode; the shooter can fire only one shot before having to manually pull the trigger back to home position. (27RT 10143-10145; 28RT 10169.) A 20-pound trigger pull was required to discharge the gun; this was equivalent to lifting 20 pounds with a trigger finger. (27RT 10146-10147.) The gun shoots a .38 short bullet; it cannot shoot a .38 special bullet. (27RT 10147-10148.) The bullet removed from McDade's head had characteristics which were consistent with having been fired from the gun (right-twist rifling, five land-and-groove measurements). (27RT 10148-28RT 10151.) The bullet taken from McDade's head was a nominal .38 caliber bullet; the criminalist could not tell if it was a .38 short or .38 special. (28RT 10151.) Moreover, the pistol could have fired the bullet that Eversole gave to the police. (28RT 10152-10153; Ex. T-20.)

Defense case

A defense investigator testified about various measurements around the KFC. (29RT 10708-10712.)

Appellant's trial counsel questioned Detective Lee about some minor issues (e.g., photos). (29RT 10726-10733.)

KFC employee Martinez reiterated that on Halloween of 1991, appellant called him and said he should not be surprised if the store got

robbed; he should watch his back when taking the deposit to the bank. (30RT 10799-10800.)

Penalty phase

Aggravating Evidence

Victim Impact Statements

The People presented evidence of the murder's impact on Keith McDade's family. Colleen McDade discussed the effect her husband's murder had on her. At first, she lost her will to live; she did not eat and lost a large amount of weight; she did not sleep; and she had nightmares. (32RT 11557.) Colleen also explained the emotional impact of her husband's murder on their two young children. (32RT 11557-11561.) For example, the couple's four-year-old daughter was in counseling; she frequently got angry, sometimes for no reason; and she had nightmares. (32RT 11558, 11561.) Keith's murder also caused a large reduction in the family's income. (32RT 11562.) Colleen stated that she had lost her best friend, it was hard being a single parent, and it was hard to go on. (32RT 11563.)

McDade's mother-in-law (Edwina Pama) also testified about the murder's emotional impact on the family. (32RT 11612, 11617-11623.) In particular, Pama testified about the adverse emotional effects on McDade's widow and young daughter. (32RT 11617, 11622-11623.)

Prior Use of Force or Violence

In 1990, David Hernandez knocked off his bicycle, hit and kicked by a group of people, including appellant and William Akens, and his bicycle was stolen. (32RT 11635-11643, 11648; 33RT 11657, 11782.) As a result of the attack, Hernandez suffered bumps on his head. (32RT 11640.)

A detective testified about a 1991 assault at a Sacramento bowling alley. (33RT 11707-11714.) Harold Rigsby was assaulted by a group of

six men who hit and kicked him. (33RT 11707-11714.) Rigsby viewed a photo lineup and told the detective that appellant's photo looked "pretty much like" like one of the men who hit him. (33RT 11712-11714, 11728.) The assailants said that they were Freeport Crips. (33RT 11727-11728.)

A high school teacher (Robert Visnick) testified about a 1991 incident in which appellant and Akens entered his classroom; appellant told a student (Zeke Moten) that they would do him in. (33RT 11658-11660.)

Akens admitted going into Visnick's classroom and attempting to fight Moten; however, Akens claimed that appellant did not go into the classroom. (33RT 11750-11751.) Akens wanted to fight Moten because he left the Crips gang for another gang. (33RT 11749-11751.)

Within about a week of the classroom confrontation, appellant and his confederates shot at Moten and others who were at a bus stop near the high school. (33RT 11752-11755, 11758.) Akens claimed that Moten's group shot first; Akens's group turned their car around and returned fire; appellant was one of the shooters. (33RT 11754-11755.) Later in his testimony, Akens said he did not see appellant fire a gun. (33RT 11791, 11799.)

During the investigation of the high school shooting, Akens told Detective Ronald Aurich that appellant was the shooter. (33RT 11804-11806.) Detective Aurich (a gang detective) testified that in late 1991 appellant was reputed to be a "main player" in the Freeport Crips. (33RT 11803, 11809-11810.) A "main player" was a more hardcore gang member, a more sophisticated criminal, the kind of gang member that would be a leader. (33RT 11810.)

Circumstances of the Crime

Akens – appellant's friend – opined that appellant was an independent person, capable of making his own decisions. (33RT 11781, 11782.)

Colleen McDade, who had worked with appellant in her capacity as a manager at the KFC, opined that appellant was an intelligent person. He

was a quick learner and mastered detailed procedures. (32RT 11599-11602, 11610.)

Mitigating Evidence

Appellant's Background

Appellant's friends and relatives testified about his tough childhood. Appellant grew up in an area of south-central Los Angeles that was plagued with crime, gangs, and drugs. (33RT 11925-11926; 34RT 12209-12215, 12217-12218.) Appellant's father left the family when appellant was about one or two years old. (35RT 12258-12259; 34RT 12211-12212; but see 33RT 11938-11939 [appellant's brother testified that appellant's father was around off and on until appellant was eight or nine].) Appellant's mother was a single parent trying to raise six children on her own. (35RT 12257-12260.) Appellant's mother worked outside the home as a practical nurse and a medical administrative assistant. (35RT 12260.) Appellant's mother sometimes had two jobs and worked very long hours (e.g., leaving at 3:00 p.m. and returning at 9:00 a.m. the next day). (35RT 12262.) The family did not have much money and was on public assistance for a couple of years. (35RT 12261-12262; 34RT 12216.)

Appellant's family was loving and they were active in a church. (35RT 12268-12269, 12292, 12315-12318, 12322.) Appellant was heavily involved in the church: singing in the choir, playing drums, serving as an usher, and helping with the younger children. (34RT 12206; 35RT 12268, 12316-12318.)

Appellant's family moved him out of Los Angeles to get him away from gang violence and other social problems. (34RT 12209-12210, 12213-12215, 12217-12218; 35RT 12263-12266, 12273-12276.) An incident at appellant's junior high school prompted the move. Appellant

was jumped by gang members and made the mistake of signing a document identifying them. (35RT 12263-12266, 12273-12276.)

Appellant moved in with his older brother (Calvin Williams) in Sacramento. (33RT 11925, 11928-11929.) It appears that appellant might have been under some pressure from Calvin and his live-in girlfriend to get a job and contribute money to meet household expenses. (33RT 11941-11942, 11944, 11945; 34RT 11966; 35RT 12280.)

Appellant's friends and relatives testified to his good, non-violent character and opined that he must have been coerced or manipulated into committing the murder or confessing to it. (33RT 11947-11948, 11950; 34RT 11955-11957, 12202, 12234, 12236-12239; 35RT 12281, 12288, 12290-12291, 12319.) Most of appellant's friends and relatives testified that he had average intelligence. (34RT 12249; 35RT 12293-12294, 12321; but see 34RT 11962 [appellant was a slow student].)

Gang Expert

A defense gang expert (Reverend Robert Lee) testified about gang social structures. For example, higher-ranking gang members ("shot caller[s]") manipulate the weaker and younger members. (33RT 11882.) A young gang member who is not bright is going to be used by older members. For instance, an older, higher-ranking member of the gang might have a younger member commit a violent offense on his behalf. (33RT 11881.)

Reverend Lee also testified that it is unusual for Crips and Bloods (rival gangs) to associate unless they are family members. (33RT 11885.) If an older, more criminally sophisticated Blood were to associate with a younger, less intelligent Crip, then the Blood has an ulterior motive. (33RT 11885-11887.) Older, more sophisticated criminals sometimes "play" younger criminals: taking advantage of them, manipulating them. (33RT 11887-11889.) Older criminals will sometimes "front off" younger

criminals – putting the younger criminals between the older criminals and the police. (33RT 11889.) Older criminals also "prime" (teach) younger criminals not to cooperate with police if arrested. (33RT 11889-11890.) A young criminal who cooperates with police could be killed or sexually abused in prison; his family could also be in danger. (33RT 11890-11892.)

A young gang member could be influenced by a more sophisticated opposing gang member to do something he would not normally do – if he reached a point of no return. (33RT 11895-11896.) A gang member will not squeal on another gang member – even an opposing gang member. (33RT 11896-11897.)

Reverend Lee also testified that a young African-American male, growing up in the ghetto without a proper role model, is very likely to become involved in a gang. (33RT 11908-11910.)

Psychological Testimony

A psychologist (Dr. Larry Nicholas) testified about appellant's intelligence and personality. Appellant's verbal I.Q. was 77; his performance I.Q. was 76; and his overall I.Q. was 75; an I.Q. of 100 is average. (34RT 12005, 12006.) Appellant's overall I.Q. was in the fourth percentile. (34RT 12007.) Appellant's scores were in the borderline mentally retarded range. (34RT 12032.) Appellant took a personality test and received high scores in the areas of paranoia, deviant thought patterns, anxiety, and introversion. (34RT 12027-12031, 12106.) Appellant was not capable of complicated planning; he tended to live his life on a moment-to-moment basis. (34RT 12032.) In a group of more than a few people, appellant's intellectual abilities would be at the bottom – so he would gravitate to a follower position. (34RT 12033.)

Dr. Nicholas opined that appellant could be influenced by others to commit a serious criminal act that he would not do on his own (e.g., the

KFC murder). (34RT 12041, 12042-12043, 12044, 12046, 12085, 12112, 12141.)

Dr. Nicholas (who had worked for the Youth Authority) opined that a gang member would choose the gang's rules over society's rules (e.g., refusing to snitch on someone). (34RT 11997, 12039, 12049-12050.)

Dr. Nicholas acknowledged that abstract planning was not required to carry out a robbery-murder like the one in this case. More specifically, Nicholas agreed that abstract thought was not required to understand that the restaurant manager would have money at closing time or that a victim who knows the robber will be able to identify him unless the victim is killed. (34RT 12108.) Moreover, Dr. Nicholas admitted that appellant lacked remorse for his crime. (34RT 12113-12114.)

Appellant's behavior in jail

Jail officers testified that appellant was a model inmate. Appellant was an "inmate worker" – one of a small number of inmates selected to perform tasks such as food service, delivering toiletries, certain clean-up duties, liaison duties, and messenger duties. (34RT 12161-12162, 12175, 12181.) Appellant had received very few complaints regarding his job performance – which was rare for inmate workers. (34RT 12168-12169; see also 34RT 12183, 12186.) One officer opined that the inmate workers represented the top six percent of the inmates. (34RT 12170-12171.) Moreover, appellant had followed instructions and had not been violent in jail. (34RT 12163-12164, 12187.) The officers rated appellant as having average or above average intelligence compared to other inmates; they did not regard him as borderline retarded. (34RT 12174, 12194.)

People's rebuttal

The People presented a photo showing appellant and Akens holding guns and making gang signs. (35RT 12325-12327, 12330, 12429; 29CCT

8642; Ex. P-3.) The People also presented a video of appellant's arrest in which appellant said he felt "normal" and was still a Crip. (35RT 12429-12430; Ex. P-4.)

ARGUMENT

I. THE PROSECUTOR'S OPENING STATEMENT WAS PROPER AND NON-PREJUDICIAL

Appellant contends that the judgment should be reversed because the prosecutor promised the jury in his opening statement that appellant would testify he did not rob McDade and he killed him under duress – but appellant ultimately declined to testify. (AOB 76-148.)

This contention has been forfeited and is without merit. This Court's decision in *People v. Davenport* (1995) 11 Cal.4th 1171, 1213, abrogated on other grounds, supports this conclusion. Moreover, any error by the prosecutor was non-prejudicial. Among other reasons, the court instructed the jury to disregard any references in the prosecutor's opening statement concerning appellant's expected testimony.

A. Background

1. Proceedings before the opening statement

Before trial, Terry Hodges's attorney moved for separate trials based on *Aranda-Bruton* issues (extrajudicial statements of one defendant implicating a codefendant). (2CCT 433-451; *People v. Aranda* (1965) 63 Cal.2d 518 superseded by statute on other grounds; *Bruton v. United States* (1968) 391 U.S. 123.)

On January 21, 1994, the court (a pretrial motion judge) and the parties discussed severance; the court ultimately ruled that there would be separate juries for appellant and the Hodgeses. (1RT 80-88; 1RT 88 [ruling].) The motion judge left it to the trial judge to determine whether

there would be one trial with separate juries or two separate trials. (1RT 87-88; 2RT 1003.)

On April 18, 1994, before the trial judge, the People moved for a trial by dual juries. (2CCT 498-505.) On this date, appellant's lead trial counsel (Castro) told the court that his client would testify when defense counsel instructed him to, and would testify during the People's case-in-chief. (2RT 1019, 1020, 1021.) Appellant's second trial counsel (Holmes) was more equivocal, stating that there was no guarantee appellant would testify. (2RT 1022.) The court advised counsel that no one should believe that anything was guaranteed in terms of who would waive their privileges against self-incrimination. (2RT 1022.) The prosecutor stated that Castro seemed pretty firm that his client was going to testify. (2RT 1022.) Castro stated that appellant would be testifying for himself. (2RT 1022.)

Later, the prosecutor commented that initially he did not think appellant would testify; but he had changed his mind because Castro had been so consistent on this issue. (2RT 1041.)

The court inquired whether appellant testifying in the People's case would eliminate the concerns that prompted severance. Castro and the prosecutor agreed that it would. (2RT 1061.) The prosecutor noted that no one could know whether appellant would testify unless and until he testified; the court agreed that this was a problem. (2RT 1062.) Castro reiterated his expectation that appellant would testify. (2RT 1063.) In addition, the prosecutor and Castro expressed a preference for one trial with separate juries. (2RT 1063-1064.) The next day, the court reiterated that no one could guarantee that appellant would testify in the People's case in chief. (2RT 1104.)

At a later date, the court and parties agreed that if appellant testified in front of his jury and the Hodgeses' jury, then the *Aranda* issues would be moot. (4RT 1786.) Castro stated that he intended to make appellant

available to the prosecutor, had told the prosecutor this a number of times, and repeated that statement to the court. (4RT 1787.) Castro said that he was interested in a full and fair examination of his client; even if he testified in the People's case. (4RT 1787.) Castro also noted that the prosecutor would have to redact his opening statement to protect himself. (4RT 1788.)

On another occasion, the prosecutor expressed his belief that appellant would testify. (4RT 1888-1889.) Later, Castro reiterated that appellant was willing to testify during the People's case-in-chief. (5RT 1915.)

Subsequently, the trial court reiterated that there would be one trial with two juries. (5RT 2175-2176.)

However, at a later point, the prosecutor stated that he probably would not call appellant to testify. (6RT 2341.) The court also noted that the possibility of appellant testifying in the People's case-in-chief was speculative and improbable. (6RT 2349.)

About a week before the prosecutor's opening statement, the court said that the prosecutor could give an opening statement to both juries detailing everything except appellant's out-of-court confession; the Hodgeses' jury would be excused and the prosecutor could complete his opening statement, detailing the evidence that was inadmissible before the Hodgeses' jury. (14RT 5933.)

Appellant's second counsel (Holmes) commented that the prosecutor was setting himself up for a couple of mistrials if the prosecutor discussed appellant's proposed testimony and appellant did not testify. (14RT 5934.) Terry Hodges's attorney (Sherriff) moved to prevent the prosecutor from referring to appellant's proposed testimony in his opening statement; he remarked that if the prosecutor discussed appellant's proposed testimony before the Hodgeses' jury, and appellant did not testify, there would be a mistrial. (14RT 5938.)

The court ruled that both juries would hear everything except what was inadmissible under *Aranda*. (14RT 5947.) The court declined to prohibit the prosecutor from referring to appellant's proposed testimony in his opening statement; the Hodgeses would only have a viable mistrial motion if the Hodgeses' jury heard about appellant's proposed testimony and then appellant declined to testify. (14RT 5947-5948; see also 14RT 5950.)

The court clarified its ruling, decreeing that the opening statements would be presented to both juries, with the exception of reference to appellant's out-of-court statements. (14RT 5965.) The court stated that the Hodgeses' jury should get the benefit of all relevant opening statements – even though there was a risk of mistrial. (14RT 5965.) The court further clarified that the prosecutor could not refer to appellant's out-of-court statements in the presence of the Hodgeses' jury. (14RT 5975 [referring to opening statements by prosecutor and appellant's counsel].)

The day before the prosecutor's opening statement, the prosecutor expressed his understanding that appellant would testify. (14RT 6095, 6108.) The prosecutor said that he intended to make a statement about what appellant would testify to, and he intended to bring in appellant's statement to police as a prior inconsistent statement. (14RT 6108.) The prosecutor also believed that appellant's statement could be read to the jury. (14RT 6108.) Further, the prosecutor mentioned appellant's jail conversations. (14RT 6108.)

2. The day of the opening statement

On July 12, 1994, the prosecutor again expressed his desire to refer to appellant's proposed testimony and pretrial statements in his opening statement and reiterated his belief that appellant would testify. (15RT 6263-6266.) The court ruled that it would allow the prosecutor to refer to appellant's proposed testimony and pretrial statements in his opening

statement with the understanding that the prosecutor had an assurance that appellant would testify. (15RT 6266.) The prosecutor stated that he had such an assurance: Castro had assured him several times that appellant was going to testify in the People's case-in-chief. (15RT 6266.) Castro did not contradict this. (15RT 6266-6267.) Appellant was present (15RT 6230-6231, 6269-6270) but did not say anything. Immediately thereafter, in response to the court's inquiry, appellant stated that he understood he had the right to testify or to decline to testify. (15RT 6269-6270.)

Terry Hodges's attorney (Sherriff) argued that the prosecutor should not be allowed to refer to appellant's proposed testimony in his opening statement. For example, no one could know whether appellant would testify. (15RT 6272.) The court clarified that it was allowing the prosecutor to refer to appellant's statements and confession because appellant would be testifying in the People's case-in-chief. (15RT 6280-6281.)

Before the prosecutor's opening statement, the court instructed the jury that the opening statements were not evidence. (15RT 6297.)[6]

In his opening statement, the prosecutor outlined appellant's expected testimony and read or summarized appellant's pretrial statements. (15RT 6343 [prosecutor says he expects appellant to testify].) Appellant's expected testimony was that the Hodges brothers forced appellant – at

---

[6] In his Opening Brief, appellant discusses the prosecutor's comments during a break in his opening statement. (AOB 86.) Appellant, however, omits a statement by the trial court which is helpful in understanding the concern shared by the prosecutor and the court. During a break in his opening statement, outside the jury's presence, the prosecutor expressed his concern that if the Hodgeses pleaded guilty that might cause a mistrial as to appellant. (15RT 6330.) The court echoed this concern, noting that there would be a problem if the Hodgeses' attorneys gave opening statements in front of appellant's jury, and then the Hodgeses pleaded out of the case. (15RT 6330-6331.)

gunpoint – to shoot McDade. (15RT 6344-6345.) The prosecutor also recited the transcript of appellant's January 27, 1992, interview with Detective Lee. (15RT 6346-6410.) At first, appellant told Lee that he was waiting in the car when one of his confederates committed the robbery-murder. (15RT 6350.) Next, appellant admitted shooting McDade, but said it was an accident (the gun slipped). (15RT 6374, 6378.) Finally, appellant said he shot McDade because McDade threatened to have him killed. (15RT 6376-6381.)

Terry Hodges moved for severance and for a mistrial. (15RT 6418.) Terry's mistrial motion was based on the prosecutor reading Detective Lee's interview with appellant to the jury. (15RT 6421-6422.) John Hodges moved for a separate jury and a separate trial for himself. (15RT 6420.) Appellant's counsel expressly declined to join in the motions. (15RT 6424.) The court denied the motions. (15RT 6420-6421, 6426-6428.)

3. Proceedings after the prosecutor's opening statement

During the People's case-in-chief, the Hodgeses made several motions related to appellant's proposed testimony. For example, early in the People's case, John moved to require appellant to testify immediately, or, alternatively, to exclude all statements relating to the Hodgeses until appellant did testify. (16RT 6666-6668.) The court denied the motion, stating it would exclude the Hodgeses' jury from hearing statements attributed to appellant which incriminated the Hodgeses and were put on before appellant testified. (16RT 6671.)

Later in the People's case the Hodgeses moved to dismiss, arguing that the prosecutor could not represent that appellant would testify. (17RT 6805-6806, 6813, 6832, 6879; 20RT 7725.) The Hodgeses accused the prosecutor and appellant's counsel of colluding, and that appellant had not

been fully apprised of the consequences of testifying or declining to do so. (17RT 6807, 6808.) The court denied these motions. (17RT 6812, 6832-6833, 6879; 20RT 7726-7727.)

Subsequently, the prosecutor acknowledged that it did not appear likely that appellant would testify in the People's case. (22RT 8329.)

Near the end of the People's case, the Hodgeses moved for a mistrial or severance because the prosecutor referred to appellant's statements in his opening statement but did not call appellant as a witness in his case-in-chief. (29RT 10585, 10600-10603, 10605-10606.) Appellant's counsel expressly declined to join in the Hodgeses' motion. (29RT 10597.) The court denied the motions. (29RT 10596-10597, 10606.)

At a confidential *Marsden* hearing, appellant confirmed that he would decide whether he was going to testify. (29RT 10635; *People v. Marsden* (1970) 2 Cal.3d 118 [motion for substitution of counsel] (*Marsden*).)

At the end of the People's case, the Hodgeses moved to dismiss and for a mistrial; their motions were denied. (29RT 10693-10698.)

Ultimately, appellant did not testify in either the People's case or his own.

After the close of evidence (30RT 10816), appellant moved for a mistrial. (30RT 10818-10824.) Appellant's motion was based on alleged *Griffin* error: the prosecutor's opening statement referred to appellant's statement to police and his expected testimony; the comment on appellant's expected testimony became *Griffin* error (comment on defendant's failure to testify) because appellant did not testify. (30RT 10818; *Griffin v. California* (1965) 380 U.S. 609.) The prosecutor's opening statement in effect emphasized appellant's failure to testify. (30RT 10821.) The court asked why it should not find forfeiture; the court noted that appellant's counsel gave the prosecutor the contents of appellant's proposed testimony. (30RT 10818-10819.) Appellant's counsel replied that they did not object

before because they believed that appellant would testify. (30RT 10819.) Appellant only decided not to testify that morning. (30RT 10820.) The court replied that defense counsel knew all along that appellant could change his mind. (30RT 10822-10823.)

The prosecutor opposed appellant's mistrial motion: appellant had forfeited the issue; further, appellant had suffered no prejudice; finally, the opening statement was not evidence. (30RT 10824-10825.)

In response to the court's inquiry, appellant confirmed that he had declined to testify. (30RT 10826.)

The Hodgeses moved for mistrial based on the prosecutor's opening statement regarding appellant's expected testimony; Terry Hodges also cited cumulative prosecutorial misconduct. (30RT 10829-10830.) The prosecutor opposed the Hodgeses' mistrial motion on the basis that his opening statement was not evidence. (30RT 10831.)

The next day, the parties presented further argument on the mistrial motions. (30RT 10834-10837.) The court reiterated that appellant's counsel gave the prosecutor the contents of appellant's proposed testimony. (30RT 10835.) Notably, appellant argued that the prosecutor knew there was no guarantee appellant would testify, but took his chances anyway. (30RT 10835.) The prosecutor argued that appellant had invited the error (induced the error) and should be estopped. (30RT 10836.)

The court denied appellant's mistrial motion. (30RT 10837-10838.) The court found that the prosecutor had acted in good faith on the representations that appellant would testify either in the People's case or his own case; any error was invited; any error could be corrected by an admonition; any error was harmless in light of the significant evidence of guilt -- including appellant's statement to police; finally, if anything, appellant's expected testimony mitigated his involvement. (30RT 10837-10838.)

The court granted mistrials as to the Hodgeses, noting that when the prosecutor made his opening statement, he was warned that the Hodgeses might obtain mistrials if appellant did not testify. (30RT 10840.)

At a confidential *Marsden* hearing, defense counsel confirmed that appellant had indicated to counsel that he was going to testify; on this basis, they did not object to the prosecutor's opening statement. (30RT 10886-10887.) Appellant did not deny this.

Before the parties' arguments, the court gave the jury some instructions relevant to this issue. The court instructed the jury that statements made by the attorneys were not evidence. (31RT 11101.) The court also instructed the jury that a defendant has the right not to be compelled to testify; that the jury should not draw any inference from the fact that the defendant did not testify; and that they must not discuss this matter or let it affect their deliberations. (31RT 11112.) In addition, the court instructed the jury that any reference in the prosecutor's opening statement concerning the expected testimony of the defendant was to be disregarded and should not influence their deliberations. The fact that the defendant elected to exercise his right not to testify should not in any way be held against him nor should it affect the verdict. (31RT 11112.)

B. Appellant's Claim Has Been Forfeited; Appellant Invited any Error and Should Be Estopped from Complaining About the Alleged "Error"

A defendant's failure to object to the prosecutor's opening statement forfeits an appellate challenge to the statement. (*People v. Dykes* (2009) 46 Cal.4th 731, 761; *People v. Dennis* (1998) 17 Cal.4th 468, 518-519.) This Court has found that the defendant forfeited a similar argument by failing to object. (See *People v. Davenport, supra*, 11 Cal.4th at p. 1213.)

This Court has explained the principles underlying the forfeiture doctrine:

> "'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court by some appropriate method. . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver. . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.'" [Citation; italics in original.] "'The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . .'" [Citation.] "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' [Citation.]" (*United States v. Olano* (1993) ___ U.S. ___, ___, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508.)

(*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.)

In the present case, appellant did not make a timely objection to the prosecutor's opening statement. For example, at the time of the prosecutor's opening statement, appellant declined to join in the Hodgeses' motions for mistrial and/or severance. (15RT 6424.) Moreover, appellant's counsel repeatedly assured the prosecutor and the court that appellant would testify. (2RT 1019-1022, 1041, 1063; 4RT 1787; 5RT 1915; see also 14RT 6095, 6108 [prosecutor's expectation].) Notably, on the day of the opening statement (July 12), the prosecutor again expressed his preference to refer to appellant's proposed testimony and pretrial statements in his opening statement and reiterated his belief that appellant would testify. (15RT 6263-6266.) The court ruled that it would allow the prosecutor to reference appellant's proposed testimony and pretrial statements in his opening statement with the understanding that he had an assurance that appellant would testify. (15RT 6266.) The prosecutor

confirmed that he had such an assurance: Castro had assured him several times that appellant was going to testify in the People's case-in-chief. (15RT 6266.) Neither Castro nor appellant contradicted this. (15RT 6266-6267.) Indeed, appellant's counsel gave the prosecutor the contents of appellant's proposed testimony. (30RT 10818-10819, 10835.) Accordingly, appellant has forfeited an appellate challenge to the alleged error.

Further, appellant invited the "error," and should be estopped from complaining about it on appeal. The doctrine of invited error estops a party from asserting an error when his own conduct induces the error. (*People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) This Court has explained the invited error doctrine in the following terms:

> "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. . . . [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake." In cases involving an action affirmatively taken by defense counsel, we have found a clearly implied tactical purpose to be sufficient to invoke the invited error rule.

(*People v. Coffman* (2004) 34 Cal.4th 1, 49 (*Coffman*).)

In the present case, appellant invited the "error" and should be estopped from asserting it on appeal. As explained above, appellant's counsel induced the alleged error: they repeatedly assured the prosecutor and the court that appellant would testify and they gave appellant's proposed testimony to the prosecutor. Appellant's counsel's decision to have appellant testify in the People's case was tactical. Thus, the doctrines of estoppel and invited error should preclude review of this issue.

Appellant claims that this issue has been preserved. (AOB 121-126.) Appellant asserts that he did not because the court to act or refrain from

acting in any particular manner in connection with the prosecutor's opening statement. (AOB 122.) Further, appellant argues that defense counsel explicitly discouraged the prosecutor from mentioning appellant's anticipated testimony in his opening statement. (AOB 123.)

In fact, appellant's trial counsel's repeated assurances that appellant would testify induced the court to refrain from prohibiting the prosecutor from mentioning appellant's anticipated testimony. On balance, appellant's counsel's comments encouraged the prosecutor to mention appellant's anticipated testimony. In particular, appellant's counsel repeatedly stated that appellant would testify in the People's case-in-chief. (2RT 1019-1021; 5RT 1915; see also 4RT 1787; 15RT 6266-6267.) Further, appellant's counsel gave appellant's proposed testimony to the prosecutor. (30RT 10818-10819, 10835.) Because appellant's counsel had assured the prosecutor that appellant would testify in the prosecutor's case (and supplied the proposed testimony), it was appropriate for the prosecutor to refer to appellant's anticipated testimony in his opening statement. The prosecutor was merely referring to a portion of his own anticipated evidence.

It is true that Castro noted that the prosecutor would have to redact his opening statement to protect himself. (4RT 1788.) Likewise, Holmes commented that the prosecutor was setting himself up for a "couple" of mistrials if appellant did not testify. (14RT 5934.) However, viewing these comments in context, it appears that appellant's counsel were referring to the possibility of mistrials for the Hodgeses. Notably, Holmes's reference to a "couple" of mistrials seems to refer to mistrials for the two Hodges brothers.

Appellant also claims that the prosecutor took his chances by promising that appellant would testify and setting forth his expected testimony. (AOB 124.) But the prosecutor's decision was reasonable in

light of appellant's counsel's repeated assurances that appellant would testify in the People's case-in-chief and the fact that they supplied appellant's proposed testimony.

Moreover, appellant asserts that objecting when the prosecutor made his opening statement would have been premature. (AOB 125.) According to appellant, as soon as both sides rested, and it was clear that the promise of appellant's testimony would not be fulfilled, defense counsel promptly moved for a mistrial. (AOB 125.) But if appellant's counsel was concerned about possible harm from the prosecutor's reference to appellant's testimony, then they should have behaved like the Hodgeses' attorneys. The Hodgeses' counsel repeatedly objected to the prosecutor's reference to appellant's anticipated testimony in his opening statement. They objected before the opening statement, immediately afterwards, and during the People's case. (14RT 5938; 15RT 6272, 6418, 6420, see e.g., 17RT 6805-6806; 29RT 10585.) Unlike the Hodgeses' counsel, appellant's counsel failed to object in a timely manner and thus forfeited the issue.

Appellant claims that an earlier objection would have been futile. (AOB 125.) But the actions of appellant's counsel went beyond mere failure to object. They repeatedly assured the prosecutor that appellant would testify in the People's case and they gave appellant's proposed testimony to the prosecutor. These actions induced the court to permit the prosecutor to refer to appellant's proposed testimony. Thus, appellant's claim has been forfeited, he is estopped from raising it, and any error was invited.

C. Legal Standards

"'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.'"" [Citations.] 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."'" [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Prosecutorial misconduct requires reversal only if it prejudices the defendant. (*People v. Fields* (1983) 35 Cal.3d 329, 363.) Where it infringes upon the defendant's constitutional rights, reversal is required unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Harris* (1989) 47 Cal.3d 1047, 1083, overruled on other grounds.) Prosecutorial misconduct that violates only state law is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the objectionable conduct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

A prosecutor may unquestionably refer to evidence in opening statement that he or she believes will be produced. (*People v. Barajas* (1983) 145 Cal.App.3d 804, 809.) "[R]emarks made in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor 'was "so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted."'" (*People v. Wrest* (1992) 3 Cal.4th 1088, 1108; see also *People v. Dykes, supra*, 46 Cal.4th at p. 762.)

"'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. [Citations.] In conducting this inquiry, this Court "do[es] not lightly infer" that the jury drew the most damaging rather than

the least damaging meaning from the prosecutor's statements.'" (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.)

D. The Prosecutor's Opening Statement Was Permissible[7]

As noted, a prosecutor may refer to evidence in opening statement that he/she believes will be produced. (*People v. Barajas, supra*, 145 Cal.App.3d at p. 809.) Comments in a prosecutor's opening statement are not misconduct unless the evidence referred to was patently inadmissible. (*People v. Wrest, supra*, 3 Cal.4th at p. 1108; see also *People v. Dykes, supra*, 46 Cal.4th at p. 762.) In the case at bar, the prosecutor's opening statement was permissible because the prosecutor believed that appellant would testify and this evidence was admissible.

In the present case, the prosecutor believed that appellant would testify in the manner described in the prosecutor's opening statement. As noted, appellant's counsel repeatedly assured the prosecutor and the court that appellant would testify and they gave the prosecutor the contents of appellant's proposed testimony. (2RT 1019-1022, 1041, 1063; 4RT 1787; 5RT 1915; see also 14RT 6095, 6108; 15RT 6263-6267; 30RT 10818-10819, 10835.) Clearly, appellant's anticipated testimony was not patently inadmissible. Accordingly, the prosecutor's opening statement was permissible.

This Court rejected an argument similar to appellant's in *People v. Davenport, supra*, 11 Cal.4th at page 1213. *In Davenport*, the defendant claimed that in the prosecutor's opening statement he improperly predicted that the defendant would testify and what defense the defendant would present. The defendant argued that these comments violated his privilege

---

[7] In this section, respondent addresses the issue of whether the prosecutor's opening statement was permissible. In a subsequent section (section E, *post*), respondent will address the issue of prejudice.

against self-incrimination, due process, and other constitutional rights. This Court rejected this contention, noting that the prosecutor's remarks were fair comment on anticipated defense strategy and evidence. Further, this Court concluded that there was no reasonable likelihood that jurors would have construed the remarks as a comment on defendant's failure to testify. As this Court stated:

> Defendant contends that the prosecutor improperly predicted both that defendant would testify, "thereby setting the stage for a negative inference if [defendant] exercised his constitutional right to refrain from testifying," and the defense defendant would present, in violation of his Fifth Amendment privilege to remain silent, and his right to due process, a fair trial, the assistance of counsel, and a reliable and nonarbitrary penalty determination. Defendant waived this argument by failing to object. [Citation.]
>
> It is also meritless. The prosecutor's statements were no more than fair comment on what he anticipated would be defense strategy and the evidence adduced at trial; there is no reasonable likelihood that the jurors would have construed the statements as impermissible comment on defendant's failure to testify. (*People v. Clair*, [(1992)] supra, 2 Cal.4th [629] at pp. 662–663, 7 Cal.Rptr.2d 564, 828 P.2d 705; *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106.) Moreover, the challenged statements by defendant that the prosecutor referred to in his opening statement were introduced through the testimony of the police officer who interrogated defendant. Nor, contrary to defendant's assertion, did the prosecutor's statements shift any burden of proof to the defense, or present the prosecutor as having knowledge of special facts, thus improperly inviting reliance on his views instead of on the evidence.

(*People v. Davenport, supra*, 11 Cal.4th at p. 1213, first bracket in original.)

In light of *Davenport*, this Court should reject appellant's contention that the prosecutor's "false promise" of appellant's testimony invited jurors to draw an adverse inference from his silence and burdened his exercise of his privilege against self-incrimination. (AOB 102-113.)

In the present case, the prosecutor's remarks were merely fair comment on what he anticipated would be evidence adduced at trial (appellant's testimony). As in *Davenport*, there is no reasonable likelihood that the jurors would have construed the prosecutor's statements as impermissible comment on appellant's failure to testify. In the first place, the prosecutor did not actually comment on appellant's failure to testify. Instead, the prosecutor summarized appellant's proposed testimony as provided to him by appellant's counsel. (15RT 6343-6345.) Moreover, as noted, "'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. [Citations.] In conducting this inquiry, this Court "do[es] not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*People v. Brown, supra,* 31 Cal.4th at p. 553-554.) Appellant would have this Court assume that the jury drew the most damaging meaning from the prosecutor's comments.

Appellant argues that the jury must have believed that the prosecutor did not present appellant's testimony because it was untrue. (AOB 139.) However, for the jury to reach that conclusion, the jury would have had to ignore several of the trial court's instructions. For example, the court instructed the jury that a defendant had the right not to be compelled to testify; that the jury should not draw any inference from the fact that the defendant did not testify; and that they must not discuss this matter or let it affect their deliberations. (31RT 11112; 2CT 586; CALJIC No. 2.60.) Further, using a special instruction, the court instructed the jury that any reference in the prosecutor's opening statement concerning the expected testimony of the defendant was to be disregarded and should not influence their deliberations. The fact that the defendant elected to exercise his right

not to testify should not in any way be held against him nor should it affect the verdict. (31RT 11112; 2CT 587; special instruction—"2.60 addendum.") It is mere speculation to assume the jurors interpreted the absence of appellant's testimony to mean that it was false.

Appellant may claim that *Davenport* is distinguishable. For example, appellant may note that *Davenport* involved a penalty phase retrial. (*People v. Davenport, supra*, 11 Cal.4th at p. 1188.) This is a distinction without a difference. In *Davenport* and in this case the appellants have claimed that the prosecutors' opening statements violated, inter alia, their privilege against self-incrimination. In both cases the prosecutors' remarks were merely fair comment on the anticipated evidence. Appellant may also attempt to distinguish *Davenport* by pointing out that Davenport gave some limited testimony. (*People v. Davenport, supra,* at p. 1192.) Although this is true, the bottom line is that Davenport claimed that the prosecutor's "prediction" of the defendant's testimony violated, inter alia, his privilege against self-incrimination. The *Davenport* court rejected this claim, concluding that the prosecutor's remarks were fair comment on expected evidence. Thus, *Davenport* rejected a similar claim on grounds applicable to this case.

Appellant may also point to the following statement in *Davenport*: "Moreover, the challenged statements by defendant that the prosecutor referred to in his opening statement were introduced through the testimony of the police officer who interrogated defendant." (*People v. Davenport, supra,* 11 Cal.4th at p. 1213.) Of course, this sentence addresses the issue of whether the prosecutor's alleged misconduct was prejudicial. It is the preceding sentence that addresses the issue of whether the prosecutor's opening statement was permissible: "The prosecutor's statements were no more than fair comment on what he anticipated would be defense strategy and the evidence adduced at trial; there is no reasonable likelihood that the

jurors would have construed the statements as impermissible comment on defendant's failure to testify." (*Ibid.*) In *Davenport,* the prosecutor predicted that the defendant would testify and predicted the defense that the defendant would present. (*Ibid.*) The *Davenport* court concluded that these remarks were "fair comment" and that there was no reasonable likelihood that the jurors would have interpreted them as impermissible comment on the defendant's exercise of his privilege against self-incrimination. (*Ibid.*) In other words, the *Davenport* court determined that the prosecutor's remarks were permissible. *Davenport* then examined the issue of prejudice, implicitly holding that the remarks were non-prejudicial because the defendant's statements came in through the testimony of another witness. (*Ibid.*) But *Davenport's* conclusion that the prosecutor's comments were permissible was based on the remarks being "fair comment" on anticipated evidence and that there was no reasonable likelihood that the jury would have interpreted the statements as an impermissible comment on the defendant's privilege against self-incrimination.

Appellant cites several out-of-state cases in support of his argument (AOB 105-108); this Court should decline to follow them. Notably, all of the cases are distinguishable because they involved ineffective assistance by trial defense counsel. They discuss issues of deficient performance by defense counsel and the prejudice caused by defense counsel's actions. (*Anderson v. Butler* (1st Cir. 1988) 858 F.2d 16, 17, 18-19 [defense attorney promised testimony by doctors but failed to deliver]; *Harris v. Reed* (7th Cir. 1990) 894 F.2d 871, 873-874, 878-879 [defense attorney promised eyewitness testimony but did not deliver]; *State v. Moorman* (1987) 358 S.E.2d 502, 506, 507-511 [defense attorney promised evidence that defendant was physically and psychologically incapable of rape, but did not put on such evidence]; *Ouber v. Guarino* (1st Cir. 2002) 293 F.3d

19, 22-23, 27-36 [defense attorney promised that defendant would testify, but she did not].)

Moreover, the cases cited by appellant are distinguishable for several reasons discussed above. These reasons also demonstrate that the prosecutor's comments did not rise to the level of *Griffin* error. As noted, the prosecutor's remarks were fair comment on anticipated evidence. The prosecutor did not actually comment on appellant's failure to testify. Further, respondent reiterates that, "'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. [Citations.] In conducting this inquiry, this Court "do[es] not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*People v. Brown, supra,* 31 Cal.4th at p. 553-554.) Appellant would have this Court assume that the jury drew the most damaging meaning from the prosecutor's comments. In view of this Court's case law (e.g., *Brown*) this Court should decline to do so.

If the jury disregarded the court's instructions and drew an inference from the prosecutor's remarks, it might have drawn an inference against the prosecution's interest. For example, the jury might have held it against the prosecutor that he "failed" to deliver something which the jury felt he had promised them.

Additionally, as explained in a subsequent section, any prejudice was cured by the trial court's instructions and admonitions; e.g., the instruction that the jurors were to disregard any reference in the prosecutor's opening statement concerning appellant's expected testimony. For all of these reasons, the prosecutor's remarks cannot be construed as *Griffin* error.

Appellant also relies on some very general United States Supreme Court authority which does not compel reversal under the facts of the

present case. (AOB 109-111.) For example, appellant argues that *Lockett v. Ohio* (1978) 438 U.S. 586 is consistent with the high court's recognition that, under certain circumstances, the assertion of the right to remain silent can be as damaging as substantive evidence. (AOB 109-110.) In *Lockett*, the defendant contended that the prosecutor's references in his closing remarks to the State's evidence as "unrefuted" constituted a comment on her failure to testify. The Supreme Court concluded that the prosecutor's closing comments did not violate constitutional prohibitions. Lockett's own counsel had focused the jury's attention on her silence, e.g., by outlining her contemplated defense in his opening statement. (*Lockett v. Ohio, supra*, 438 U.S. at 595.)

Appellant also cites *Brooks v. Tennessee* (1972) 406 U.S. 605, arguing that *Brooks* is instructive in denouncing state pressure on a defendant to testify. (AOB 110-111.) *Brooks* struck down a state statute requiring a defendant to testify as the first defense witness or forfeit his right to testify. (*Brooks, supra*, at pp. 612-613.) Clearly, these cases are too general to mandate reversal in this case.

Moreover, *Davenport* was decided in 1995, after both *Lockett* and *Brooks*. Presumably, this Court was aware of *Lockett* and *Brooks*. In any event, *Davenport* is consistent with *Lockett* and *Brooks*. *Lockett* – which found the prosecutor's comments acceptable – does not compel the conclusion that *Davenport* was wrongly decided or that this case must be reversed. In *Brooks* the statute at issue burdened the defendant's right to testify to a far greater degree than the prosecutor's remarks in the present case. *Lockett* and *Brooks* do not require a reversal here.

Appellant cites *People v. Tolbert* (1969) 70 Cal.2d 790, 802, and *People v. Barajas, supra*, 145 Cal.App.3d at page 809, for the proposition that it is error or misconduct for a prosecutor to make assertions in opening statement that he never proves. (AOB 113.) *Tolbert* and *Barajas*, however,

say no such thing. Indeed, *Barajas* assists respondent in that it states, "Unquestionably, the prosecution may in its opening statement refer to evidence which it believes will be produced." (*People v. Barajas, supra*, 145 Cal.App.3d at p. 809.)

Appellant claims that the asserted misconduct violated his right to counsel because counsel could not defend against matters extraneous to the evidence. (AOB 117.) It is important to note that *Davenport* rejected the claim that the prosecutor's opening statement violated the defendant's right to the assistance of counsel. (*People v. Davenport, supra*, 11 Cal.4th at p. 1213.)

The *Davenport* court did not expressly state its reasons for rejecting the assistance-of-counsel claim, but the reasons may be inferred. Inferentially, *Davenport* rejected the assistance-of-counsel claim for the same reasons it rejected the rest of appellant's claim: the prosecutor's remarks were fair comment and there was no reasonable likelihood that the jury would have construed the remarks as impermissible comment on defendant's failure to testify. In other words, appellant's rights were not violated and he suffered no prejudice.

Appellant claims that the prosecutor's opening statement deprived him of a fair trial. (AOB 118-121.) Appellant relies on another out-of-state case, *United States v. Gonzalez-Maldonado* (1st Cir. 1997) 115 F.3d 9. (AOB 119.) In *Gonzalez-Maldonado*, the trial court ruled pretrial that the defense could present psychiatric testimony; in opening statements, defense counsel told the jury to expect the testimony; later, the court reversed itself and precluded the testimony. The First Circuit reversed the conviction: regardless of who was to blame for the promised but undelivered testimony, the prejudicial effect was the same. (*Gonzalez-Maldonado, supra*, at pp. 14-15.) Respondent submits that *Gonzalez-Maldonado* is distinguishable because it did not involve the prosecutor's opening statement. As

explained above, the prosecutor had the right to say what he thought the evidence would be when he gave his opening statement. In other words, the prosecutor's remarks were fair comment on the anticipated evidence. Further, as explained below, any error was non-prejudicial.

For all of these reasons, the prosecutor's opening statement was proper.

E. Any error was non-prejudicial

This Court's decision in *Davenport* is analogous and indicates that any error was non-prejudicial. Further, the court's instructions negated any prejudice (notably the instruction to disregard the prosecutor's reference to appellant's anticipated testimony). Moreover, there was overwhelming evidence of appellant's guilt.

As noted, prosecutorial misconduct requires reversal only if it prejudices the defendant. (*People v. Fields, supra*, 35 Cal.3d at p. 363.) Where it infringes upon the defendant's constitutional rights, reversal is required unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Harris, supra*, 47 Cal.3d at p. 1083.) Prosecutorial misconduct that violates only state law is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the objectionable conduct. (*People v. Barnett, supra*, 17 Cal.4th at p. 1133.)

Again, "'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. [Citations.] In conducting this inquiry, this Court "do[es] not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.'" (*People v. Brown, supra*, 31 Cal.4th at p. 553-554.)

Respondent submits that the "reasonable likelihood" or "reasonable probability" standard is applicable to this claim. "Reasonable likelihood" is the standard that *Davenport* used in rejecting a similar argument. *Davenport* held that there was no reasonable likelihood that the jurors would have construed the prosecutor's remarks as a comment on the defendant's failure to testify. (*People v. Davenport, supra*, 11 Cal.4th at p. 1213.) *Davenport* denied a similar claim, finding no prejudice. *Davenport's* "reasonable likelihood" standard is similar to the "reasonable probability" test for prejudice. (*People v. Barnett, supra*, 17 Cal.4th at p. 1133.) This Court should follow *Davenport* and conclude that the purported error was non-prejudicial.

As in *Davenport,* there is no reasonable likelihood or probability that the jurors would have construed the prosecutor's remarks as a comment on appellant's failure to testify. More likely, they would have viewed the prosecutor's opening statement as a preview of what the prosecutor expected the evidence to show. Before the opening statements, the court instructed the jury that the opening statements were not evidence; instead, they were only outlines of what the attorneys believed the evidence would show. (15RT 6297.) At the outset of his opening statement, the prosecutor called his opening statement a "preview of the evidence that I intend to introduce[.]" (15RT 6304.) Immediately before describing appellant's expected testimony, the prosecutor stated that it was his understanding that appellant was going to testify and "[h]ere is what I expect him to testify to." (15RT 6343.) Based on all of these instructions and statements, the jury would have believed that the prosecutor's opening statement was simply his prediction of what the evidence would show. Like any prediction, it was not infallible. Moreover, in light of the trial court's instruction, the jury would not have accorded evidentiary weight to the opening statement. For all these reasons, as in *Davenport,* it is not reasonably likely (or reasonably

probable) that the jurors would have interpreted the prosecutor's opening statement as a comment on appellant's exercise of his privilege against self-incrimination.

1. The instructions and admonitions cured any prejudice

In addition, when the trial court has given an admonition to disregard the prosecutor's improper statement, the reviewing court presumes that the jury followed it. (*People v. Osband* (1996) 13 Cal.4th 622, 718.) Prosecutorial misconduct is rarely of such a nature that it cannot be cured by a proper admonition. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 692; *People v. Allen* (1978) 77 Cal.App.3d 924, 935.) The general rule is that on appeal the reviewing court must assume the jury followed the trial court's instructions and admonitions. (*People v. Frank* (1990) 51 Cal.3d 718, 728.)

In the present case, before the prosecutor's opening statement, the court instructed the jury that the opening statements were not evidence. (15RT 6297.) After the close of evidence, the court again instructed the jury that statements made by the attorneys were not evidence. (31RT 11101; 2CT 560.) The court also instructed the jury that a defendant had the right not to be compelled to testify; that the jury should not draw any inference from the fact that the defendant did not testify; and that they must not discuss this matter or let it affect their deliberations. (31RT 11112; 2CT 586; CALJIC No. 2.60.) Further, using a special instruction, the court instructed the jury that any reference in the prosecutor's opening statement concerning the expected testimony of the defendant was to be disregarded and should not influence their deliberations. The fact that the defendant elected to exercise his right not to testify should not in any way be held against him nor should it affect the verdict. (31RT 11112; 2CT 587; special instruction—"2.60 addendum.")

Appellant claims that the prejudice was not dissipated by the instruction to disregard the prosecutor's reference to appellant's anticipated testimony. (AOB 140-147.) Appellant argues that one of the instructions (CALJIC No. 2.60 [CT 586]) was not designed to cure *Griffin* error, but to preempt the jurors' tendency to draw adverse inferences from defendant's silence. (AOB 141.) This argument must be rejected. The second sentence of CALJIC No. 2.60 told the jury it must not draw any inference from the defendant's failure to testify. (2CT 586.) This instruction was broad enough to prevent the jury from drawing any inference from appellant's failure to testify. Further, the first sentence of the special instruction (the "2.60 addendum") was sufficiently broad to protect appellant from any prejudice. That sentence stated: "You are further instructed that any references in the prosecutor's opening statement concerning the expected content of the testimony of the defendant is to be disregarded and not enter into your deliberations in any way." (2CT 587.)

Appellant notes that the special instruction was given about two and one-half days after both sides rested. (AOB 142.) However, before the prosecutor's opening statement, the court instructed the jury that the opening statements were not evidence. (15RT 6297.) Further, consistent with the above-cited authority, this Court should presume that the jury followed the instructions that they were given after the close of evidence.

Next, appellant argues that his expected testimony was dramatic and highly relevant; the jurors heard evidence that raised questions only appellant could answer; and the jurors would have been constantly reminded of his promised testimony when evaluating his mental state defense. (AOB 142-146.) Again, this Court should presume that the jurors followed their instructions. Moreover, these issues will be discussed more fully below in the context of the overwhelming evidence of appellant's guilt.

2. There was overwhelming evidence of guilt

There was overwhelming evidence that appellant was the shooter and that he had the required mental states (i.e., that he intended to rob and kill McDade; that it was a premeditated murder). The evidence that appellant was the shooter included the testimony and statements of various witnesses (Martinez, Schuyler, Littlejohn, Leisey, Banks, and appellant's statement to Detective Lee); it also included evidence indicating that appellant's gun was the murder weapon. The evidence of appellant's mental state included appellant's statements before and after the murder and the testimony concerning statements by the Hodges brothers.

a. Evidence that appellant was the shooter and related mental-state evidence

The strongest evidence that appellant was the shooter was his own admission to police. Appellant's admissions also shed light on his mental state at the time of the crime and belie his claim that the Hodges brothers coerced him into killing McDade. Appellant gave the police several stories – but eventually he admitted that he shot McDade. At first, appellant denied that he was the shooter. (30CCT 8976.) Appellant claimed that he waited in the car while another person robbed and killed McDade. (30CCT 8976-8977.) Later, appellant admitted that he robbed and shot McDade; however, he offered at least two explanations for why he shot McDade. (30CCT 8999-31CCT 9004, 9011.) First, appellant claimed that the gun "slipped" and went off accidentally while he was robbing McDade. (31CCT 9001-9002.) Then appellant said that the shooting was not accidental, but he shot McDade because McDade threatened him and he was scared. (31CCT 9003-9004.) According to appellant, McDade threatened to have him killed. (31CCT 9001-9003.) Appellant did not say that the Hodgeses coerced him, which cuts against his claim to this effect.

Appellant also displayed an obvious willingness to lie to the police, which harms his overall credibility.

About January 23-24, appellant told Littlejohn that he had shot and killed the KFC manager. (31CCT 9261, 9263, 9271, 9277; 28RT 10410; see also 31CCT 9255, 28RT 10390 [date].) Appellant told "everybody" about the murder. (31CCT 9268-9269.) Appellant went to see McDade about getting his job back, but the two of them got into an argument. (31CCT 9277-9278.) Appellant said that he shot McDade because McDade had threatened him. (31CCT 9263.) This belies appellant's claim that the Hodgeses coerced him. It is important to note that Littlejohn's statement was very credible; she had no self-serving reason to cooperate with police.

Leisey's testimony also indicated that appellant was the shooter and shed some light on appellant's mental state at the time of the crime. According to Leisey, Terry Hodges said that his young confederate (appellant) had been talking about robbing McDade, and Terry gave appellant a gun. (32CCT 9303; 25RT 9494 [Terry and appellant went to KFC to rob McDade]; 25RT 9497.) Terry and appellant robbed McDade; Terry instructed appellant to kill McDade and he did so. (32CCT 9307-9308, 9313; 25RT 9494.) They killed McDade to eliminate him as a witness. (32CCT 9305, 9314; 25RT 9494-9495, 9498.) Appellant was a wimp and Terry had to coach him to get him to kill McDade. (32CCT 9315; 25RT 9498.) Based on Leisey's testimony, it is clear that appellant helped to plan the robbery. Further, although Terry "coach[ed]" appellant to kill McDade, he did not coerce appellant to do so.

Likewise, Banks's testimony supported the conclusion that appellant was the shooter and was probative of appellant's mental state at the time of the robbery-murder. According to Banks, John Hodges said that the shooter was a "youngster" who was in custody (presumably appellant). (25RT 9419; see also 31CCT 9142-9143, 9150.) John told Banks about

how the robbery-murder was planned. (25RT 9422-9426.) The robbery-murder was planned at a woman's home on G Parkway; John and appellant were present. (25RT 9422-9426; see also 25RT 9452-9453.) They wanted to get more money; someone other than John (presumably appellant) said he knew where they could "get paid." (25RT 9423.) Appellant (who had worked at the KFC) suggested robbing the KFC; appellant said that he had the "set up"; McDade would have about "two g's" which would be easy to take. (25RT 9423-9424; 31CCT 9154-9155, 9159.) John told appellant that McDade would have to be killed so there were no witnesses. (25RT 9424-9425.) Appellant did not want to kill anyone; but John told appellant that he had to kill McDade so that he would not be able to identify "none of us." (25RT 9425-9426; see also 25RT 9449, 9463; 31CCT 9146, 9151, 9160.) This evidence indicates that appellant had a critical role in planning the robbery. Further, although John instructed appellant to kill McDade, there is no evidence that he coerced appellant to do so.

Schuyler's testimony supported the inference that appellant was the shooter and it contradicted the theory that appellant merely waited in the car while someone else robbed and shot McDade. On the night of the murder, Schuyler saw appellant come down the alley and drop something which Schuyler thought was a book; appellant picked it up and kept going. (17RT 6962-6966.) Appellant was moving fast – he was trotting or jogging northbound. (17RT 6968, 6994, 7039, 7040.) It was possible that the bank bag (Ex. T-9) was the object that was in appellant's hands. (17RT 6973.)

Strong evidence indicated that appellant's gun and ammunition were used to kill McDade – which supported the inference that appellant was the shooter. Shortly after Halloween 1991, appellant came to the KFC and displayed a gun to some of the employees. (16RT 6570, 6595-6596, 6614, 6617, 6722-6725.) Martinez saw the gun and was sure that it was a revolver. (16RT 6722-6726.)

Eversole and Brogdon's statements and testimony also supported the conclusion that appellant's gun and bullets were used in the crime. Several days before the murder, appellant visited a park with Eversole and Brogdon. (17RT 6842, 6917-6918; 22RT 8543.) Appellant had some bullets, which he threw away. (17RT 6918-6919; see also 17RT 6845-6846.) About two days after the murder, Eversole went back to the park, retrieved a .38-short bullet, and gave it to the police. (17RT 6919-6920; see also 17RT 6846-6847, 6851; 23RT 8839-8840; People's Ex. T-20.) The bullet removed from McDade's head was quite similar to the bullet that Eversole gave to the police. (27RT 9993-9994.) The day after the murder, the owner of a business near the KFC found a bullet on the ground near his back door: it was a .38-caliber bullet. (19RT 7639-7642, 7648-7649; 20RT 7804-7807.)

Moreover, Eversole told police that appellant had a gun on the day they went to the park. (23RT 8845-8846.) Likewise, Brogdon briefly saw appellant with a gun. (17RT 6845, 6855.) The gun was small and silver like Exhibit T-18A (appellant's gun). (17RT 6848.) (As explained below, Ex. T-18A was the gun that the police retrieved with Littlejohn's assistance.) Brogdon "believe[d]" that the gun had a black handle; Exhibit T-18A's handle also appeared to be black. (17RT 6848.) Exhibit T-18A could possibly be the gun that appellant had. (17RT 6850, 6855, 6862.) Brogdon gave a statement to police a few days after the murder. (22RT 8543.) At that time, Brogdon's description of the gun was more definite: the gun was a small, silver revolver with a black handle. (22RT 8544.)

Littlejohn obtained appellant's gun and threw it in a dumpster. (31CCT 9263-9264, 9273, 9276, 9285-9288; 28RT 10403-10404.) Later, Littlejohn led the police to the dumpster where they found the gun. (19RT 7540, 7542-7545; Ex. T-18A.)

The pistol (Ex. T-18A) fired only in double-action mode; the shooter can fire only one shot before having to manually pull the trigger back to home position. (27RT 10143-10145; 28RT 10169.) This helps to explain why the shooter shot McDade only once.

A 20-pound trigger pull was required to discharge the gun; this was equivalent to lifting 20 pounds with a trigger finger. (27RT 10146-10147.) This negated any possibility that the shooter fired the gun accidentally; it undermined appellant's statement to that effect and damaged his credibility.

The bullet removed from McDade's head was consistent with having been fired from appellant's gun that was recovered from the dumpster. (27 RT 10147-28RT 10153; Ex. T-20.) All of this physical evidence supports the inference that appellant was the shooter.

Moreover, during argument appellant's trial counsel conceded that appellant shot McDade. (31RT 11249-11250, 11334, 11338-11339.)

b. Further evidence of appellant's mental state

Some of the evidence of appellant's mental state has been discussed above (appellant's statement to Detective Lee, his incriminating statement to Littlejohn, Leisey's testimony, and Banks's testimony). Further evidence supports the conclusion that appellant had the intent to rob, the intent to kill, and killed with premeditation. Notably, the fact that appellant approached McDade at closing time, after 10:00 p.m., when he knew McDade would have the bank bag and there would be few people around, strongly supports the inference that appellant intended to rob McDade (as opposed to asking to be rehired). (16RT 6553, 6558-6559, 6562-6563, 6619; 17RT 6962-6966.)

Appellant was aware of the procedures the managers used to make bank deposits. (16RT 6553, 6619.) This supports the conclusion that appellant approached McDade at closing time – when he knew McDade

would have the bank deposit – with the intent to rob McDade. Also, the execution-style killing is strong evidence of intent to kill.

There was considerable evidence that appellant formed the intent to rob well before the murder. On Halloween 1991, appellant told Martinez that he should watch his back when taking the deposit to the bank because something could happen. (16RT 6718, 6736.) This supports the conclusion that appellant was contemplating stealing the bank deposit while it was being transported to the bank.

In November and December of 1991, appellant told a friend (Kim Scott) that he planned to rob the KFC; he said this about nine or ten times. (18RT 7255-7258.) Appellant said he wanted to rob the KFC because he got fired and because he wanted money. (18RT 7256, 7257, 7270.) About a month before the murder, appellant told Scott he was going to rob Keith McDade; he said this about ten times (apparently these statements were in addition to his statements about robbing KFC). (18RT 7259-7260.) Appellant said he was going to knock out Keith with a board or rock. (18RT 7271.) Appellant told Scott that if he robbed KFC he did not want her to be working there at the time of the robbery. (18RT 7336.) This is crystal-clear evidence of appellant's intent to rob McDade.

In his interview with Detective Lee, appellant said that he had met Terry two weeks before the interview (approximately January 13). (31CCT 9012.) Therefore, appellant had been contemplating the robbery even before he met Terry. Appellant also told Lee that he had been thinking about the crime for about two weeks before it occurred; but he only discussed it with Terry about a day or two before. (31CCT 9014-9015.)

Appellant used to call Scott just about every day; but he stopped calling her a few days before the murder. (18RT 7349.) It is reasonable to infer that appellant broke off contact with Scott because he was planning to rob the KFC (Scott's workplace) in the near future.

After the robbery-murder, appellant asked Littlejohn to return his gun because he needed it to get money. (31CCT 9273, 9285.) In other words, appellant needed the gun to commit robbery. In light of all of the other evidence, this supports the inference that appellant had previously used the gun in a robbery.

Appellant's phone calls from the jail also show that he was willing to manufacture evidence – which shows consciousness of guilt. (28RT 10282-10283.)

Thus, the evidence was overwhelming that appellant was the shooter and that he had the intent to rob, the intent to kill, and acted with premeditation.

Additionally, appellant's proposed testimony was basically self-serving: appellant portrayed himself as under duress from the Hodgeses. Appellant's expected testimony was that the Hodges brothers forced him – at gunpoint – to shoot McDade. (15RT 6344-6345.) Moreover, there was evidence supporting the inference that appellant was a patsy for the Hodgeses. There was evidence that the Hodgeses coached, instructed, and/or manipulated appellant into shooting McDade. (31CCT 9144-9146, 9151, 9160; 32CCT 9307-9308, 9315; 25RT 9424-9426, 9449, 9463, 9498.) Accordingly, the theory that appellant was a pawn of the Hodgeses was supported by some evidence. However, as explained in this Argument and Argument VI *post*, this evidence did not constitute substantial evidence of duress.

3. Appellant's counter-arguments must be rejected

Appellant notes that he first told Detective Lee that he waited in the car while his confederate robbed and killed McDade, after which he got a share of the loot. (AOB 128.) Appellant argues that under this version of events, the jurors could have rejected his liability for murder and robbery and convicted him of only receiving stolen property. (AOB 129-130.)

However, in light of the evidence described above, no reasonable juror would have convicted appellant of only receiving stolen property. The evidence of robbery-murder is simply overwhelming. Indeed, in his argument, defense counsel conceded that appellant was guilty of second degree murder. (31RT 11339.) Defense counsel argued that appellant lacked the intent to rob and was merely guilty of receiving stolen property with regard to taking the money. (31RT 11338.) But defense counsel never suggested that appellant was *only* guilty of receiving stolen property (i.e., was not guilty of any form of murder). The evidence that appellant was guilty of at least second-degree murder was too strong to be denied by anyone – even defense counsel.

Appellant also claims that the jury had reason to doubt his self-incriminating statements to Detective Lee. Appellant withheld information from Lee because he was afraid the Hodgeses would harm his family. (AOB 130.) But, as noted above, the evidence that appellant was the shooter, and that he had the intent to rob and kill, and acted with premeditation, came from a variety of sources, not just appellant. Moreover, during his interview with Detective Lee, appellant implicated the Hodgeses in the crimes. (31CCT 9011, 9013, 9015, 9016, 9018-9020.) In fact, appellant claimed that the Hodgeses were the ones who suggested killing McDade. (31CCT 9015, 9016, 9018.) This belies the argument that appellant was afraid to implicate the Hodgeses.

According to appellant, the evidence indicated that about 30 minutes elapsed between when McDade left the KFC and when he was shot. (AOB 130.) If appellant confronted McDade simply to rob and kill him, he could have done so in mere moments. (AOB 131.) This argument is not persuasive. To begin with, the time that McDade left the KFC and the time of the shooting were only approximations. (16RT 6558-6559, 6562-6563; 19RT 7585, 7588, 7596.) Further, the time between McDade's departure

from the KFC and the shooting could have been significantly less than 30 minutes. KFC employee Rodriquez left the restaurant about 10:25 p.m. At that time, only McDade was in the restaurant. (16RT 6558-6559, 6562-6563.) A neighbor heard a gunshot at about 10:45 p.m. or 11:00 p.m. (19RT 7585, 7588, 7596.) McDade could have left the KFC sometime after 10:25 p.m. and the shooting could have occurred slightly before 10:45 p.m., and the neighbor could have been mistaken about the time of the shooting. Additionally, there may have been some type of conversation between appellant and McDade before appellant shot him, even if appellant always planned on robbing and killing him. For example, appellant may have engaged McDade in a conversation as a ruse to approach him and shoot him at an opportune moment. Thus, the timing of the shooting does not support a duress theory.

Moreover, appellant contends that he acted under duress from the Hodgeses. (AOB 131-137.) As explained above, the evidence of appellant's mental state undermines this argument. Appellant claims that the testimony of Banks, Leisey, and Littlejohn supported the conclusion that appellant did not form the mental state for the offenses. (AOB 134-136.)

Littlejohn speculated that the brothers "forced" appellant to shoot McDade; appellant was weak and stupid. (31CCT 9266, 9270; 28RT 10412.) But Littlejohn's comment about the brothers forcing appellant to commit the crime was pure conjecture. (31CCT 9270.) Littlejohn related that appellant said he was "under pressure" but it is not clear who the pressure was coming from (e.g., the Hodgeses or McDade). (31CCT 9269.)

As noted, based on Leisey's testimony, it is clear that appellant helped to plan the robbery. Further, although Terry "coach[ed]" appellant to kill McDade, he did not coerce appellant to do so.

As explained above, based on Banks's testimony, it is clear that appellant had a major role in the robbery-murder. Additionally, although John instructed appellant to kill McDade, there is no evidence that he forced appellant to kill. It is true that Banks opined that John manipulates young people and that appellant was easy to manipulate. (31CCT 9144-9145, 9154.) But again, that does not mean that John coerced appellant into shooting McDade. Moreover, Banks did not know whether John was at the murder scene. (31CCT 9151, 9155-9156, 9158.) Thus, Littlejohn, Leisey, and Banks did not support a duress defense.

Appellant next argues that the prosecutor's unfulfilled promise that appellant would testify he acted under duress prejudiced him because it caused the jury to doubt his mental state defense, which closely resembled his expected testimony. (AOB 137-140.) Appellant claims that the jurors would have concluded that appellant did not testify as indicated because the promised testimony was untrue and that would have carried over to undermine his defense. (AOB 137.) Appellant's promised testimony was only one step removed from the mental state defense of fear and pressure that he actually presented. (AOB 137.)

This argument should be rejected. In light of the trial court's instructions, it must be presumed that the jury disregarded the prosecutor's opening-statement reference to appellant's expected testimony. Further, appellant was not prejudiced because the evidence of guilt presented at trial was so overwhelming.

For the foregoing reasons, appellant's Argument I has been forfeited; further, the prosecutor's opening statement was proper and any error was non-prejudicial.

II. THE TRIAL COURT CONDUCTED A SUFFICIENT *MARSDEN* INQUIRY

Appellant contends that the judgment should be reversed because the trial court conducted an inadequate inquiry into the existence of an irreconcilable conflict between appellant and his trial counsel. (AOB 149-167.) This contention must be rejected. The trial court conducted an adequate inquiry into the alleged conflict between appellant and defense counsel. It is clear that the "conflict" between appellant and defense counsel was really just a dispute over trial tactics.

A. Background

On August 15, 1994 during the People's case-in-chief, the court received a note from appellant in which he requested a mistrial and complained about his lead attorney, Mr. Castro. (27RT 10124-10125.) Appellant claimed, inter alia, that Castro was siding with the prosecutor, and requested new counsel. (27RT 10125.) The court ordered defense counsel to discuss these issues with appellant. (27RT 10125.)

Shortly thereafter, the trial court held a confidential, in-chambers conference with appellant and his counsel (other parties and attorneys were excluded). (27RT 10130, 10132-10137.) Appellant complained about Castro's personal relationship with the prosecutor but said he (appellant) did not want to fire Castro. (27RT 10134.) Appellant requested a mistrial so the case could be retried and defense counsel could file more motions. (27RT 10134.) Defense counsel denied having a personal relationship with the prosecutor; however, defense counsel stated that he tries to maintain a cordial, professional relationship with opposing counsel because he finds it advantageous. (27RT 10134-10135.) In response to the trial court's question, appellant stated that he did not want a new attorney, but wanted a mistrial (a new trial); he felt that Castro had "thr[own] the case" by not

filing motions. (27RT 10135-10136.) The court denied the mistrial motion and noted that appellant was not requesting new counsel. (27RT 10136.)

On August 17, during the People's case-in-chief, the trial court held a confidential *Marsden* hearing (everyone was excluded except for appellant and his counsel). (29RT 10627-10638; *Marsden, supra*, 2 Cal.3d 118 [motion for substitution of counsel].) Appellant claimed that defense counsel were not doing their job; they were acting like prosecutors – stipulating and agreeing with the prosecutor. (29RT 10628.) The court responded that defense counsel were not stipulating to everything the prosecutor said; defense counsel were attempting to minimize appellant's culpability; defense counsel had a difficult hand to play because of appellant's confession and his statements to Littlejohn. (29RT 10628.) The court understood that appellant was unhappy because of the evidence against him; but the evidence would have come in regardless of who was representing appellant. (29RT 10630.) Appellant suggested that defense counsel should have tried to attack his confession. (29RT 10631.) Defense counsel replied that they did not see a basis for excluding the confession. (29RT 10631.) Defense counsel also stated that they did not join in the Hodgeses' mistrial motion because they believed that appellant was in a better state than if they had to retry the case. (29RT 10632.) Moreover, defense counsel opined that no new attorney could get up to speed in this case in less than three months. (29RT 10634.)

The court explained to appellant that his attorneys were going to use the evidence to minimize his culpability; e.g., evidence that appellant was slow and easy to manipulate. (29RT 10633.)

The court also addressed the issue of appellant's right to testify. In response to the court's questions, appellant confirmed that he would decide whether he was going to testify. (29RT 10635.) Appellant understood that the Hodgeses could not force him to testify or prevent him from doing so.

(29RT 10635.) The court advised appellant that if anyone was threatening him, he should not allow those threats to force him to testify or prevent him from doing so. (29RT 10635.) Appellant said he understood. (29RT 10636.) Appellant denied that anyone had threatened him in order to force him to testify or not testify. (29RT 10636.)

On August 23, after the court granted the Hodgeses' mistrial motion, appellant had another confidential *Marsden* hearing. (30RT 10885-10889.) Appellant complained that the only reason he was not getting a mistrial was because defense counsel did not seek one earlier. (30RT 10886.) Defense counsel opined that appellant was referring to a discussion of the defense's *Griffin*-error motion where the trial court asked why defense counsel did not object when the prosecutor made his opening statement (the trial court had suggested that defense counsel might have forfeited the argument). (30RT 10886.) Defense counsel confirmed that appellant had indicated to counsel that he was going to testify; on this basis, they did not object to the prosecutor's opening statement. (30RT 10886-10887.) The defense was structured on an understanding between defense counsel and appellant that he would testify. (30RT 10887.) Appellant had vacillated on this issue over the preceding five days. (30RT 10887.) On the preceding day, at about 10:30 a.m. or 11:00 a.m., appellant was going to testify; then at about 1:30 p.m., appellant told defense counsel that he could not testify. (30RT 10887-10888.) Defense counsel had explained to appellant, and reiterated at the hearing, that the facts of the defense were like a "handful of beads"; appellant's testimony was necessary to turn that handful of beads into a necklace. (30RT 10888.) Without appellant's testimony, many facts that defense counsel had elicited from witnesses in order to corroborate appellant were now meaningless. (30RT 10888.) Based on the foregoing, the court denied the *Marsden* motion. (30RT 10889.)

B. The Trial Court Conducted an Adequate *Marsden* Inquiry

The rules governing this Court's inquiry into alleged *Marsden* error are well settled. "When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. [Citation.] The decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would substantially impair the defendant's right to effective assistance of counsel." (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488 (*Abilez*), internal quotation marks omitted.)

The denial of a defendant's motion to substitute counsel implicates the Sixth Amendment. "On direct review of the refusal to substitute counsel, the Ninth Circuit Court of Appeals considers the following three factors: (1) timeliness of the motion; (2) adequacy of the court's inquiry into the defendant's complaint; and (3) whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense. [Citations.] It found, and we agree, that these elements are consistent with California law under *People v. Marsden, supra*, 2 Cal.3d 118, and its progeny." (*Abilez, supra*, 41 Cal.4th at pp. 490-491, internal quotation marks omitted.)

Under *Marsden,* the trial court must listen to a defendant's reasons for requesting a change of attorneys. (*People v. Gutierrez* (2009) 45 Cal.4th

789, 804.) In *Gutierrez,* the defendant listed his concerns; the attorney responded; and the defendant had the opportunity to respond to counsel's remarks. This Court concluded that this was an adequate inquiry. (*Ibid.*) This Court has stated that the trial court conducts an adequate inquiry by allowing the defendant to explain his dissatisfaction and then permitting the attorney to respond:

> Defendant similarly fails to establish that the trial court's inquiry into his complaint was deficient. The record demonstrates the court allowed defendant to explain the reasons for his dissatisfaction with counsel and permitted counsel to respond. Nor has defendant demonstrated an irreconcilable conflict had developed. Counsel had adequate explanations for all of defendant's complaints, and "'[t]o the extent there was a credibility question between defendant and counsel at the hearing, the court was "entitled to accept counsel's explanation."'" [Citation.] Defendant was given "full opportunity to air all of his complaints, and counsel to respond to them." [Citation.] We perceive no abuse of discretion.

(*Abilez, supra,* 41 Cal.4th at p. 488.)

In the present case, the trial court conducted a sufficient inquiry into the existence of an alleged conflict between appellant and trial counsel. The court allowed appellant to state his complaints and allowed counsel to reply to the complaints. Nothing in the record suggests that the trial court deprived appellant of the opportunity to speak out regarding his dissatisfaction. For example, at the August 15 in-chambers conference, appellant was able to complain about Castro's relationship with the prosecutor and that Castro had thrown the case by failing to file motions. (27RT 10134-10136.) Defense counsel denied having a personal relationship with the prosecutor. (27 RT 10134-10135.) The trial court permitted appellant to assert these complaints even though appellant did not want a new attorney, i.e., he was not actually making a *Marsden* motion. (27RT 10134-10136.)

At the August 17 *Marsden* hearing, appellant was allowed to voice his complaint that defense counsel were acting like prosecutors, i.e., agreeing with the prosecutor. (29RT 10628.) Appellant also had the opportunity to assert that defense counsel should have attacked his confession. (29RT 10631.) Defense counsel replied that they did not see a basis for excluding the confession. (29 RT 10631.) At the August 23 *Marsden* hearing, appellant argued that he was not getting a mistrial because defense counsel failed to request one in a timely manner. (30RT 10886.) Defense counsel opined that appellant was referring to a discussion of the defense's *Griffin*-error motion where the trial court asked why defense counsel did not object when the prosecutor made his opening statement (the trial court had suggested that defense counsel might have forfeited the argument). (30RT 10886.) Defense counsel confirmed that appellant had indicated to counsel that he was going to testify; on this basis, they did not object to the prosecutor's opening statement. (30RT 10886-10887.) The defense was structured on an understanding between defense counsel and appellant that he would testify. (30RT 10887; see also 30RT 10888.)

Moreover, the record does not support appellant's assertion that he and his counsel were embroiled in an irreconcilable conflict that represented a fundamental breakdown in the attorney-client relationship. (See e.g., *People v. Earp* (1999) 20 Cal.4th 826, 876-877 [record shows only tactical disagreements].) Case law is clear that such an irreconcilable conflict is rarely established:

> "'[I]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law.'"

(*People v. Jackson* (2009) 45 Cal.4th 662, 688.)

Tactical disagreements are not equivalent to an irreconcilable conflict:

> "A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.' '. . . [C]ounsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.' [Citation.]"

(*People v. Jackson, supra*, 45 Cal.4th at p. 688.)

The record -- discussed above -- makes it clear that appellant was dissatisfied with counsel's trial tactics. Appellant's complaints at the in-chambers hearing and the *Marsden* hearings merely reflect a difference of opinion over trial tactics, i.e., Castro's manner of dealing with the prosecutor, counsel's stipulations with the prosecutor, whether to attack his confession, and when counsel should have moved for a mistrial.

Accordingly, it is plain that the trial court conducted an adequate inquiry into whether an irreconcilable conflict existed between appellant and his trial counsel. The trial court's inquiry supported the conclusion that there was no irreconcilable conflict – only tactical disputes between appellant and trial counsel. Appellant contends that the trial court abdicated its duty to inquire into the existence of an irreconcilable conflict. (AOB 162-164.) But based on the foregoing discussion of the record this argument must be rejected.

C. Appellant's Counter-Arguments Should Be Rejected

Appellant claims that various facts support the conclusion that he had an irreconcilable conflict with trial counsel that the trial court failed to inquire about. Appellant says it is unheard of for a defendant to testify at his own criminal trial for the prosecution without any consideration in exchange. (AOB 158.) Appellant also faults trial counsel for allegedly giving the prosecutor statements protected by attorney-client privilege.

(AOB 158-159.) Further, appellant asserts that there was a conflict between him and his attorneys about whether he would testify. (AOB 160.) Appellant cites a statement by John Hodges's attorney that appellant's attorneys were trying to bully him into taking the stand. (AOB 161.) Additionally, appellant argues that his vacillation on whether he would testify, and his ultimate refusal to do so, show a lack of cooperation and understanding between appellant and trial counsel. (AOB 164.)

It is important to note that a defendant cannot compel substitution of counsel through his own "intransigence and failure to cooperate." (*People v. Kaiser* (1980) 113 Cal.App.3d 754, 761.) Moreover, "a defendant may not force the substitution of counsel by his own conduct that manufactures a conflict." (*People v. Smith* (1993) 6 Cal.4th 684, 697.)

In the present case, the record shows that appellant and defense counsel had an understanding that appellant would testify. (30RT 10886-10888.) Defense counsel declined to object to the prosecutor's opening statement because of their understanding with appellant that he would testify. (30RT 10886-10887.) Appellant had indicated to defense counsel that he was going to testify. (30RT 10886.) The entire defense was structured on the understanding between defense counsel and appellant that he would testify. (30RT 10887.) Clearly, this understanding was based on appellant's conduct: appellant's agreement.

This agreement (appellant's agreement to testify) explains why defense counsel would have promised that appellant would testify. This agreement also explains why defense counsel might have turned over potentially privileged information. This agreement also means that there was no "conflict" between appellant and his trial counsel about whether he would testify – until appellant decided to breach the agreement at the last minute. Defense counsel were not attempting to "bully" appellant into taking the stand – appellant had promised to do so.

Between August 18 and 23, around the time when appellant made his two *Marsden* motions, defense counsel and appellant had numerous discussions. (30RT 10887.) This alone suggests that there was no communication breakdown. It appears, however, that during this five-day period appellant vacillated between testifying and declining to do so. (30RT 10887.) Nothing in the record suggests that this vacillation was the fault of defense counsel. Instead, appellant's vacillation appears to be nothing more than his own indecision. Based on the record, it appears that appellant's indecision was a fairly recent development. It is reasonable to infer that appellant's vacillation was the product of the fast-approaching prospect of actually testifying. As of the morning of August 22, appellant was going to testify. (30RT 10887-10888.) It was only at 1:30 p.m., in trial, when appellant finally decided he would not testify. (30RT 10888.) On this date (August 22) the People rested their case against appellant. (29RT 10680 [date]; 29RT 10702 [People rest]. Thus, any "conflict" between appellant and defense counsel was manufactured by appellant's own conduct. Plainly, appellant had agreed to testify and defense counsel reasonably relied on this agreement to plan the defense case. It appears that shortly before he would have testified, appellant started vacillating, despite defense counsel's frequent communications with him during this period. Finally, at the last possible moment, appellant decided not to testify.

The cases appellant cites are distinguishable. *People v. Eastman* (2007) 146 Cal.App.4th 688 (*Eastman*) (AOB 157, 165) (overruled on other grounds) is distinguishable because in that case the trial court failed to allow the defendant to air his complaints and failed to consider them. (*Eastman, supra*, at pp. 696-697.) In the present case, as explained in the Background section, *ante*, the trial court allowed appellant to voice his complaints and it carefully considered them. Likewise, in *People v. Munoz* (1974) 41 Cal.App.3d 62, 64-65 (AOB 165), the trial court failed to inquire

into the specific reasons why defendant was dissatisfied with his attorney. In the present case, however, appellant was able to express specific complaints about trial counsel.

United States v. Adelzo-Gonzalez (9th Cir. 2001) 268 F.3d 772 (*Adelzo-Gonzalez*) (AOB 165-166), is a federal circuit case which is obviously not binding. Further, *Adelzo-Gonzalez* is a federal criminal prosecution. (*Adelzo-Gonzalez, supra*, at pp. 773-774.) This means that the Ninth Circuit was exercising its supervisory powers over the federal district courts, not stating a rule of constitutional law.[8] Moreover, the evidence of a breakdown in the attorney-client relationship in *Adelzo-Gonzalez* was significant. For example, the defendant said the attorney threatened to "sink him for 105 years" and to testify against him. The defendant said he would rather represent himself. Additionally, the attorney called the defendant a liar. (*Id.* at pp. 778-779.) Here, as explained above, the trial court adequately inquired into the alleged breakdown and there was insufficient evidence of a breakdown. Counsel and appellant continued to communicate. There is no evidence that counsel threatened appellant in any way or failed to competently represent him.

United States v. Walker (9th Cir. 1990) 915 F.2d 480 (*Walker*) (overruled on other grounds) (AOB 166) is another non-binding federal circuit case involving a federal prosecution; again, the Ninth Circuit was exercising its supervisory power. *Walker* is also distinguishable. In *Walker*, the district court did not inquire into the specific reasons for Walker's dissatisfaction with counsel – or was unable to elicit the reasons

---

[8] Federal cases involving higher federal courts' supervisory powers over lower federal courts do not set forth rules applicable to state-court proceedings. Such cases involve federal prosecutions, do not purport to interpret the federal Constitution, but instead rely on other sources of federal law. (See e.g., *Early v. Packer* (2002) 537 U.S. 3, 9-10.)

from Walker. (*Walker, supra*, at p. 483.) Also, the district court's inquiry focused on the attorney's competence, not the attorney-client conflict. (*Id.* at pp. 482, 483.) By contrast, in the present case, as explained, the trial court adequately inquired into the alleged attorney-client conflict. Moreover, in *Walker* there was stronger evidence of attorney-client conflict. The attorney said she and Walker were having irreconcilable differences and moved to withdraw. (*Id.* at p. 482.) The attorney stated that Walker refused to speak with her after deciding he wanted a new attorney. (*Id.* at p. 483.) In this case, counsel did not seek to withdraw or state they had a conflict with appellant. Counsel and appellant continued to communicate about the case. Thus, *Walker* does not compel the relief appellant seeks.

D. Any Error Was Harmless

Finally, any error under *Marsden* was harmless beyond a reasonable doubt. (*Marsden, supra*, 2 Cal.3d at p. 126; *Eastman, supra*, 146 Cal.App.4th at p. 697.) Even assuming arguendo that the trial court should have conducted a more thorough inquiry, it is very unlikely that such an inquiry would produce any additional complaints of any significance. Appellant had multiple opportunities to voice his concerns. Counsel responded and the trial court listened.

For all these reasons, appellant's argument should be rejected. Appellant is not entitled to reversal of either trial phase or to a remand for yet another *Marsden* hearing.

III. THE USE OF DUAL JURIES WAS PROPER AND NON-PREJUDICIAL

Appellant contends that his trial with the Hodges brothers using dual juries resulted in identifiable prejudice and gross unfairness. (AOB 168-201.) Appellant has forfeited this argument. Moreover, the use of dual juries was proper; in fact, because this case involved multiple defendants involved in one crime, it was a classic case for a joint trial. Finally,

appellant was not prejudiced: his trial was not grossly unfair. Among other reasons, the trial court's admonitions cured any prejudice.

A. Background

Some of the relevant background information was discussed in Argument I.A., *ante*. As noted, before trial, Terry Hodges moved for separate trials based on *Aranda-Bruton* issues. (2CCT 433-451.) A pretrial motion judge and the parties discussed severance; the court ultimately ruled that there would be separate juries for appellant and the Hodgeses. (1RT 80-88; 1RT 88 [ruling].) During this discussion, Castro said that he wanted to go to trial with the Hodgeses. (1RT 81.) Castro also joined in a request for one trial with two juries. (1RT 84, 85.) The motion judge left it to the trial judge to determine whether there would be one trial with separate juries or two separate trials. (1RT 87-88; 2RT 1003.)

Later, before the trial judge, the People moved for a trial by dual juries. (2CCT 498-505.) The trial judge and the parties discussed the issue; Castro repeated his preference for one trial with two juries. (2RT 1003, 1049-1051, 1060-1064; see especially 2RT 1064.)

At a later date, Castro reiterated his desire for a joint trial, and "hopefully" one jury. (5RT 1915.) Castro noted that defendants having mutually exclusive or antagonistic defenses was not, in and of itself, a ground for severance. (5RT 1915.) Castro stated that in some respects his position was closer to the prosecution than to the Hodgeses; thus, it seemed to Castro that the Hodgeses were trying to collude and engineer a situation where one of the brothers could escape from a joint trial. (5RT 1915.)

Holmes stated appellant's preference for one trial with one jury. In the alternative, appellant would opt for one trial with one jury for appellant and one for the Hodgeses. (5RT 2020.)

Two days later, the prosecutor said that he wanted one trial with two juries; Castro replied that that sounded reasonable. (5RT 2077.) A few

days after that, the court stated that there would be one trial with two juries. (5RT 2175-2176.)

About a month later, Castro reminded the court that it was not his desire to sever anything. (13RT 4533; see also 13RT 4534.) Castro expressed neutrality on whether the Hodgeses should be severed from one another. (13RT 4534; see also 13RT 4525 [issue is severance of John and Terry].)

After the juries were sworn, the court gave the jurors some instructions concerning the dual-jury procedure. The court noted that each jury had different color badges and it told the juries to avoid mingling with each other so as to maintain separateness between the two juries. (15RT 6298.) The court ordered the two juries to avoid developing any rapport or relationship and to avoid discussions with the other jury. (15RT 6298.) Further, the court told the juries that there would be some periods where only one jury would hear evidence; the other jury would be ordered out of the courtroom. (15RT 6303.) The absent jury would be admonished not to speculate as to what was being discussed or what evidence was being taken. (15RT 6303.)

Both juries were generally present during the evidentiary portion of the trial. Appellant's jury was excused for the playing of certain tapes of Banks's and Leisey's statements to Detective Lee. (26RT 9829, 9835-9836, 9839-9842; Ex. T-58; 29RT 10683-10688; Ex. T-62.) The jury was told to remember the admonition. (26RT 9829; 29RT 10508.)

Near the close of evidence, the trial court reminded all the jurors that they were not to speculate as to what might be occurring in the courtroom when one jury was absent and the other one was present. The absent jury was directed not to speculate as to what might be occurring in the other jury's presence. The court told the jurors to limit their consideration of the

evidence to what was presented to them when they were in the courtroom. (30RT 10792.)

When instructing the jury on the law, the court told the jury that it must determine the facts from the evidence received in the trial and not from any other source. (2CT 553; 31RT 11096.)

B. Appellant Has Forfeited This Claim; Any Error Was Invited

Respondent has set forth the general principles underlying the doctrines of forfeiture and invited error. (Argument I.B., *ante*; *People v. Saunders, supra*, 5 Cal.4th at pp. 589-590; *Coffman, supra*, 34 Cal.4th at p. 49.)

Appellant's counsel repeatedly expressed their preference for one trial with one or two juries. They made it clear that they wanted to go to trial with the Hodgeses. (1RT 81, 84, 85; 2RT 1064; 5RT 1915, 2020, 2077; 13RT 4533-4534.) Castro argued that a joint trial for all defendants would maximize his chances of getting the Banks and Leisey statements before the jury. (13RT 4532-4534.) Thus, appellant's trial counsel's failure to object forfeits the issue on appeal. Indeed, appellant's trial counsel had a tactical reason for favoring a joint trial with the Hodges brothers: maximizing their chances of getting Banks and Leisey's statements before the jury. Thus, appellant's trial counsel invited the "error."

Appellant's counter-arguments should be rejected. Appellant claims that when an error violates due process, the reviewing court should excuse the lack of objection and reach the merits. (AOB 175.) However, as noted in *People v. Saunders, supra*, 5 Cal.4th at page 590, a constitutional right may be forfeited in criminal cases by the failure to make a timely assertion of the right. Moreover, appellant's argument relies on two old appellate court cases which predate *Saunders*, which was decided in 1993. (AOB

175, citing *People v. Mills* (1978) 81 Cal.App.3d 171 (abrogated on other grounds) and *People v. Chambers* (1964) 231 Cal.App.2d 23.)

Appellant also contends that an objection would have been futile. (AOB 175-176.) Appellant points to this Court's approval of dual juries in *People v. Harris, supra*, 47 Cal.3d at pp. 1075-1076. Appellant's claim fails. Although *Harris* approved of the use of dual juries in general, it did not excuse a defendant from objecting to dual juries in a specific case (e.g., where there is identifiable prejudice). Further, appellant asserts that the prejudice assessment could not have been made pretrial. (AOB 176.) However, appellant's trial counsel made precisely that assessment; in his view, a joint trial would be best for his client. Having made that decision, appellant cannot now complain about the use of dual juries (i.e., the lack of complete severance).

Appellant contends that his objection to full severance encompassed an objection to partial severance (e.g., dual juries). (AOB 176.) This contention must be rejected. As noted, appellant's counsel repeatedly expressed their preference for one trial with one or two juries; they made it clear that they wanted to go to trial with the Hodgeses. Accordingly, appellant's objection to full severance (two separate trials for appellant and the Hodgeses) did not encompass an objection to one trial with separate juries for appellant and the Hodgeses.

Appellant also claims that his attorneys' expression of approval for the dual jury procedure was merely a defensive move to make the best of the situation. (AOB 176-177.) Not so. Appellant's trial counsel made it clear that they wanted a trial with the Hodgeses.

C. The Use of Dual Juries Was Proper; There Was No Gross Unfairness

"'Section 1098 provides in pertinent part: "When two or more defendants are jointly charged with any public offense, whether felony or

misdemeanor, they must be tried jointly, unless the court order[s] separate trials." Our Legislature has thus "expressed a preference for joint trials." [Citation.] But the court may, in its discretion, order separate trials "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." [Citations.] [¶] We review a trial court's denial of a severance motion for abuse of discretion based on the facts as they appeared at the time the court ruled on the motion. [Citation.] If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder "'resulted in "gross unfairness" amounting to a denial of due process.'"" [Citation.]" (*People v. Letner* (2010) 50 Cal.4th 99, 149-150 (*Letner*).)

Initially, it is important to note that appellant and his co-defendants were charged with having committed "'common crimes involving common events and victims.' [Citation.] The court accordingly was presented with a ""classic case"" for a joint trial. [Citations.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 452-453.) In this case, a "joint trial" means one trial with two juries.

The United States Supreme Court has noted the many virtues of joint trials, both in terms of efficiency and justice. Notably, joint trials may enhance the accurate assessment of relative culpability:

> Joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years. [Citation.] Many joint trials--for example, those involving large conspiracies to import and distribute illegal drugs--involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace--and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected by his own silence. It would impair both the efficiency and the fairness of the criminal justice system to require, in all

> these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability--advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

(*Richardson v. Marsh* (1987) 481 U.S. 200, 209-210.)

In addition, a joint trial at which defendants present "different and possibly conflicting defenses" is "not necessarily unfair." (*People v. Hardy* (1992) 2 Cal.4th 86, 168 (*Hardy*).) "If the fact of conflicting or antagonistic defenses alone required separate trials, it would negate the legislative preference for joint trials and separate trials 'would appear to be mandatory in almost every case.' [Citation.]" (*Ibid.*) Indeed, courts have observed: "'"That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than against a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together."' [Citations.]" (*People v. Morganti* (1996) 43 Cal.App.4th 643, 674-675, quoting *Hardy*, at p. 169, fn. 19 [italics deleted]; see also *Zafiro v. United States* (1993) 506 U.S. 534, 538, 540 [mutually antagonistic defenses are not prejudicial per se; indeed, "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials"].)

"Accordingly, [our Supreme Court has] concluded that a trial court, in denying severance, abuses its discretion only when the conflict between the defendants *alone* will demonstrate to the jury that they are guilty. If,

instead, 'there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance.' [Citations.]" (*Letner, supra*, 50 Cal.4th at p. 150.) Presumably, the same reasoning applies in determining whether joinder resulted in gross unfairness.

In the present case, the circumstance that appellant and the Hodgeses had different – sometimes conflicting – theories and tactics does not mean that appellant's trial was grossly unfair. "[N]o denial of a fair trial results from the mere fact that two defendants who are jointly tried have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus helpful to the prosecution." (*People v. Turner* (1984) 37 Cal.3d 302, 313, overruled on other grounds; *People v. Cummings* (1993) 4 Cal.4th 1233, 1287 ["That defendants have inconsistent defenses and may attempt to shift responsibility to each other does not compel severance of their trials"]; *People v. Boyde* (1988) 46 Cal.3d 212, 232, overruled on other grounds [as of 1988, "Although several California decisions have stated that the existence of conflicting defenses may compel severance of codefendants' trials, none has found an abuse of discretion or reversed a conviction on this basis"].)

The California Supreme Court has consistently held that a defendant attempting to exonerate himself by casting blame on a codefendant does not, by itself, create the kind of "'gross unfairness'" that will require reversal. (*People v. Boyde, supra*, 46 Cal.3d at pp. 228-229, 233-234 [reversal not warranted where codefendant in a joint trial testified that he participated in robbery, kidnapping and murder of store clerk only because he was under duress]; *People v. Cummings, supra*, 4 Cal.4th at pp. 1287-1288 [reversal not warranted where codefendants defending against murder charge presented evidence that the other was the shooter where it was undisputed that each defendant was involved in the incident, "and the

prosecution had offered evidence sufficient to support verdicts convicting both defendants"]; see also *People v. Simms* (1970) 10 Cal.App.3d 299, 305, 316-317 [no gross unfairness where codefendant testified in joint trial that defendant had committed the crimes but he had not participated].) This case law demonstrates that there was no gross unfairness in this case.

It is also important to note that in this case the Hodgeses put on very little evidence and they did not testify against appellant. (29RT 10736 et seq.; 30RT 10794 et seq. [Hodgeses' counsel examine Detective Lee].) This is another factor indicating that there was no gross unfairness.

As noted in the Statement of Facts, appellant presented a defense case (i.e., the defense put on some witnesses). A defense investigator testified about various measurements around the KFC. (29RT 10708-10712.) Appellant's trial counsel questioned Detective Lee about some minor issues (e.g., photos). (29RT 10726-10733.) KFC employee Martinez reiterated that on Halloween of 1991, appellant called him and said he should not be surprised if the store got robbed; he should watch his back when taking the deposit to the bank. (30RT 10799-10800.) That appellant presented a defense also weighs against his claim that he was prejudiced by the use of dual juries.

D. Appellant's Counter-Arguments Are Meritless

Appellant proffers several arguments in support of his position that a unitary trial with dual juries resulted in gross unfairness. These contentions must be rejected.

First, appellant asserts that had his case been fully severed from the Hodgeses' case, his jury would never had heard the prosecutor's opening-statement promise that appellant would testify. (AOB 180-183.) This contention must be rejected for the reasons stated in Argument I, *ante*. It is also a very speculative argument.

1. "Second Prosecutor"/conflicting defenses

Appellant claims that the Hodgeses' counsel functioned as additional prosecutors against him. (AOB 183-189.) This Court recently rejected a similar "second prosecutor" argument in *Letner, supra*, 50 Cal.4th at page 153. The *Letner* court concluded that this was a variant of the conflicting-defenses argument and the co-defendant's evidence did not result in gross unfairness:

> Letner also asserts that severance was required because [co-defendant] Tobin acted as a "second prosecutor," thereby reducing the prosecution's burden to prove its case against Letner, as well as adversely affecting Letner's ability to present his own defense. For the most part, this claim appears to be a variation of the claim we already have rejected, concerning the necessity for severance because of defendants' allegedly conflicting defenses. Tobin's presentation of evidence tending to incriminate Letner did not lessen the prosecution's burden, or result in gross unfairness amounting to a denial of due process. As we have explained, because there was sufficient independent evidence of guilt, the conflict between defendants did not lead by itself to Letner's conviction, and therefore severance was not required.

(*Letner, supra*, 50 Cal.4th at p. 153.)

As explained above, the so-called "conflicting defenses" of appellant and the Hodgeses did not rise to the level of gross unfairness violating due process. That a co-defendant attempts to blame the defendant does not constitute gross unfairness. Further, as noted in Argument I.E.2., *ante*, there was overwhelming evidence of appellant's guilt (including evidence of his culpable mental state). Any conflict between appellant and the Hodgeses did not lead by itself to appellant's conviction. For all these reasons, there was no gross unfairness.

Appellant notes that the Hodgeses' defense was lack of involvement in the robbery-murder and that they vehemently attacked prosecution witnesses Banks and Leisey. (AOB 185-186.) But again, the Hodgeses'

attempt to exonerate themselves did not create gross unfairness. Appellant is correct that the Hodgeses' attorneys vigorously cross-examined Banks and Leisey. (AOB 186.) As detailed in the Statement of Facts, *ante*, Banks and Leisey had credibility issues that were fully developed at trial. This was good for the fact-finding process, even if it was bad for appellant. Appellant's complaint about the Hodgeses' treatment of Banks and Leisey seems to boil down to a contention that too much of the truth emerged about Banks and Leisey. An appellate court rejected a similar claim:

> In other words, while joint trial of defendants who each accuse the other does pose problems, the complaint is that too much rather than too little truth might emerge in the process. While joint defendants might prefer otherwise, this dilemma may serve the public interest in accurate ascertainment of guilt or innocence, as the trial court recognized.

(*People v. Wallace* (1992) 9 Cal.App.4th 1515, 1520, fn. 4.)

Because of the joint trial, the jury had the benefit of a very thorough exploration of every possible credibility issue regarding Banks and Leisey. This weighs in favor of the joint trial, not against it.

Moreover, it is important to recall that the Hodgeses' attorneys' questions were not evidence and the jury was so instructed. (31RT 11101; 2CT 560.) The court also instructed the jury that they should not assume to be true any insinuation suggested by a question; a question was not evidence and could be considered only as it enabled the jury to understand the answer. (31RT 11101; 2CT 560.) This Court cited similar instructions in rejecting a similar claim:

> On appeal, defendant complains that the prosecutor's questions conveyed to the jury that defendant had said that he was looking for money. The trial court, however, instructed the jury that questions by counsel were not evidence, that no fact implied by a question could be assumed to be true, and to disregard any question to which an objection was sustained. We assume the jury followed these instructions.

(*People v. Tafoya* (2007) 42 Cal.4th 147, 161, fn. 4. (*Tafoya*).)

Appellant cites an Illinois case, but this Court should decline to follow this case because Illinois law is clearly different from California law in this area. (AOB 188, citing *People v. Rodriguez* (1997) 680 N.E.2d 757.) As the *Rodriguez* court stated:

> According to our supreme court, the "fountainhead of this State's jurisprudence in this area" is *People v. Braune*, 363 Ill. 551, 2 N.E.2d 839 (1936). [Citation.] In *Braune*, each defendant "was protesting his innocence and condemning the other" by subjecting witnesses "to searching and critical cross-examinations by counsel for the antagonistic co-defendant." [Citation.] The supreme court held that defendant's trial "was in many respects more of a contest between the defendants than between the People and the defendants. It produced a spectacle where the People frequently stood by and witnessed a combat in which the defendants attempted to destroy each other."

(*People v. Rodriguez, supra*, 680 N.E.2d at p. 766.)

Braune reversed the conviction under these circumstances. (*People v. Braune* (1936) 2 N.E.2d 839, 842.) California courts are far more tolerant of antagonistic defenses, as explained above. Accordingly, the Illinois cases should not be followed.

Appellant also cites a Ninth Circuit case, but again this Court should decline to follow it because Ninth Circuit law in this area is clearly different from California law. (AOB 188-189, citing *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078. (*Tootick*).) As *Tootick* explained:

> The probability of reversible prejudice increases as the defenses move beyond the merely inconsistent to the antagonistic. ¶ Mutually exclusive defenses are said to exist when acquittal of one codefendant would necessarily call for the conviction of the other.

California law concerning antagonistic defenses has been discussed above. Clearly, the Ninth Circuit jurisprudence is less tolerant of joinder. (*Tootick, supra*, 952 F.2d at p. 1081.)

Appellant also complains about the contentiousness between counsel, especially the animosity between Terry Hodges's lead attorney (Sherriff) on the one hand, and Castro and the prosecutor on the other. (AOB 193-196.) There was a great deal of contentiousness between counsel, especially Sherriff and the prosecutor. (See AOB 194-195.) However, appellant has not shown that any of this contentiousness violated his right to a fair trial. In particular, appellant has not demonstrated that the contentiousness between Sherriff and Castro impaired Castro's ability to represent appellant. Moreover, much of the behavior cited by appellant occurred outside the presence of the jury

People v. Hill (1998) 17 Cal.4th 800 provides an instructive contrast to this case. In *Hill*, the defense attorney (Blum) was subjected to a constant barrage of prosecutorial misconduct, including rude behavior and comments demeaning the defense attorney. The trial court failed to rein in the prosecutor which created a poisonous atmosphere. (*Id.* at pp. 821-822, 838-839.) This Court reversed based on the cumulative prejudice from the combination of prosecutorial misconduct and other errors. The prosecutorial misconduct included much more than rude behavior towards the defense attorney. (*Id.* at pp. 815, 818-821.) In the present case, the contentiousness directed at Castro was not nearly as egregious as the contentiousness directed at the defense attorney in *Hill*. Indeed, most of Sherriff's unprofessional conduct was directed at the prosecutor. (See e.g., AOB 194-195.) Moreover, Sherriff's conduct did not deprive appellant of a fair trial and it did not combine with other errors to prejudice appellant.

2. The granting of the Hodgeses' mistrial motion

Appellant also contends that the Hodgeses' "disappearance" from the trial at the close of evidence put pressure on appellant's jury to convict him of the harshest possible offense. (AOB 189-193.) This contention must be rejected.

After the court granted the Hodgeses' mistrial motion, it gave the jury an instruction which cured any possible harm. The court referred to the Hodgeses' absence and said that regarding the status of their cases, it would not advise the jury any further. (30RT 10867-10868.) The court instructed the jury not to speculate as to the status of the Hodgeses' cases. (30RT 10868.) The court reminded the jury that it was selected to hear the case against appellant and it would be hearing argument related to appellant based on the evidence admitted concerning appellant. (30RT 10868.) Later, when instructing the jury on the law, the court told the jury that it must determine the facts from the evidence received in the trial and not from any other source. (2CT 553; 31RT 11096.) The court also instructed the jury on unjoined perpetrators. The court noted that there was evidence that others may have been involved in the crime. The court told the jury not to discuss or consider why the other persons were not still being prosecuted or whether they would be prosecuted further. The jury's duty was to decide whether the People had proved appellant's guilt. (2CT 568; 31RT 11105.) Contrary to appellant's argument (AOB 192), these instructions were sufficient to remedy any prejudice. (See e.g., *Coffman, supra*, 34 Cal.4th at pp. 43-44 [this Court rejected claim that joint trial violated defendants' constitutional rights, citing, inter alia, limiting instructions].)

Appellant further contends that the Hodgeses' disappearance from the case under circumstances suggesting a favorable disposition prejudiced him because it implied that the Hodgeses were less culpable than appellant. (AOB 193.) This contention must be rejected. Appellant's argument is pure speculation. Nothing about the Hodgeses' absence suggested less culpability. Further, the trial court's admonitions cured any possible harm.

3. Logistical issues; possible speculation by absent jury

Appellant also complains about logistical difficulties related to the joint trial with dual juries, i.e., alleged difficulties seeing witnesses, hearing testimony, and remembering which evidence had been heard by which jury. (AOB 197-201.) Further, appellant argues that restrictions on counsel's movements (e.g., confinement to counsel table) undermined his right to effective assistance. (AOB 199-201.) Moreover, appellant contends that when one jury was absent, the excused jury would have speculated about what it was missing. (AOB 198.)

These contentions must be rejected. This Court has denied similar claims:

> Defendant claims the use of two juries was distracting, disruptive, and necessarily prejudicial because the jury that convicted him inevitably became aware that during periods when it was not present in the courtroom the jury trying Davison heard evidence inadmissible, but damaging, as to him. We conclude that defendant has failed to establish that the procedure was prejudicial to him. Although no statute sanctions the use of two juries, the procedure affords a practical and reasonable means by which to minimize the inconvenience and not inconsiderable burden on those witnesses who would otherwise have to testify in separate trials, and to conserve judicial resources.

(*People v. Harris, supra*, 47 Cal.3d at p. 1056.)

Moreover, appellant's jury was instructed at least twice not to speculate about what evidence the Hodgeses jury was hearing when appellant's jury was absent. At the start of the evidentiary phase, the court told the juries that there would be some periods where only one jury would hear evidence; the other jury would be ordered out of the courtroom. (15RT 6303.) The absent jury would be admonished not to speculate as to what was being discussed or what evidence was being taken. (15RT 6303.)

Appellant's jury was excused for the playing of certain tapes of Banks's and Leisey's statements to Detective Lee. (26RT 9829, 9835-9836, 9839-9842; Ex. T-58; 29RT 10683-10688; Ex. T-62.) The jury was told to remember the admonition. (26RT 9829; 29RT 10508.) Presumably, this was a reference to the instructions that the court previously gave to the jury.

Before the close of evidence, the trial court reminded all the jurors that they were not to speculate as to what might be occurring in the courtroom when one jury was absent and the other one was present. The absent jury was directed not to speculate as to what might be occurring in the other jury's presence. The court told the jurors to limit their consideration of the evidence to what was presented to them when they were in the courtroom. (30RT 10792.) Despite appellant's speculation to the contrary (AOB 198), there is no reason to believe that the jury refused to follow these instructions.

It is true that at times the court, counsel, or a juror had difficulty hearing a witness. (AOB 197.) Of course, such problems are common in lengthy trials. When these problems occurred, the court, counsel, and the jurors spoke up. (See e.g., 16RT 6734, 6749, 6773; 23RT 8666-8667, 8718, 8772; 25RT 9495-9496.) Moreover, the court dealt with these problems by, among other things, advising the witnesses at the start of their testimony that they should speak up or use the amplifier. (See e.g., 16RT 6502; 22RT 8536; 23RT 8638; 24RT 9143; 25RT 9477; 28RT 10385.) And indeed, some of the witnesses used the amplifier. (See e.g., 16RT 6749; 23RT 8718-8719; 24RT 9192-9193; 25RT 9477-9478, 9496; 29RT 10454-10455.) Moreover, the jury was instructed that it could request a readback of testimony. (3CT 643; 32RT 11370.) On this record, appellant has not shown that the jury missed any important evidence.

It appears that, at times, it may have been difficult for some jurors to see certain exhibits. However, the court and counsel took measures which appeared to remedy the situation. (See, e.g., 22RT 8548-8551 [video played twice for benefit of both juries]; 29RT 10701 [court makes accommodations for appellant's jury]; 29RT 10718-10719 [accommodations so that jurors can see exhibits].) For example, when a videotape was played, the court mentioned that the jury could watch the videotape during deliberations. (22RT 8548.) Again, on this record, appellant has not shown that the jury missed any important evidence.

In addition, appellant complains that counsel's movements and communications were restricted. (AOB 199-200.) On this record, appellant has not shown that appellant's counsel's movements or communications were unduly restricted. Nor has appellant shown that he was prejudiced. (*Strickland v. Washington* (1984) 466 U.S. 668, 694-695 [stating prejudice standard for ineffective assistance of counsel].) Indeed, appellant's attorneys were vigorous advocates who did not appear to be impaired in any way.

Appellant also claims that counsel had difficulty keeping track of which witnesses and evidence should be presented in front of which jury. (AOB 200.) Some of these instances were the Hodgeses' attorneys complaining about the prosecutor's conduct. (AOB 200.) Other instances were simply examples of Castro being cautious and attempting to avoid mistakes. (AOB 200.)

Finally, it is important to recall that there was overwhelming evidence of appellant's guilt -- including evidence of his culpable mental state. (Argument I.E.2., *ante*.)

For all of these reasons, appellant has not shown prejudice or gross unfairness due to the use of dual juries in this case.

IV. THE TRIAL COURT PROPERLY DECLINED TO EXCUSE PROSPECTIVE JURORS GONZALEZ AND PERELLA FOR CAUSE

Appellant claims that the trial court committed reversible error by refusing to excuse prospective jurors Leslie Gonzalez and Judith Perella for cause. (AOB 202-223.) Appellant's claim has been forfeited; moreover, the trial court did not abuse its discretion and any error was harmless.

A. Appellant Has Forfeited This Claim

Appellant has forfeited this claim because he did not express dissatisfaction with the jury as selected. (*People v. Raley* (1992) 2 Cal.4th 870, 904-905; *People v. Morris* (1991) 53 Cal.3d 152, 184, overruled on other grounds.

Appellant cites *People v. Wallace* (2008) 44 Cal.4th 1032, 1055, which states that *People v. Crittenden* (1994) 9 Cal.4th 83, 121, footnote 4, made it clear that to preserve this issue the defendant had to express dissatisfaction with the jury before it was sworn. (AOB 204.) In this case, jury selection occurred in 1994 but before *Crittenden* was decided. However, as noted, cases like *Raley* and *Morris* made this clear before *Crittenden* and before jury selection in this case. Accordingly, appellant's argument has been forfeited.

B. The Trial Court Did Not Abuse Its Discretion by Denying the Challenges for Cause

A prospective juror is subject to a challenge for cause based on actual bias when he or she demonstrates "a state of mind . . . in reference to the case, or to any of the parties[ ] which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C).)

In its determination of the qualifications of a prospective juror challenged for cause, the trial court has a wide discretion seldom disturbed

on appeal. (*People v. Holt* (1997) 15 Cal.4th 619, 655-656.) Whereas the reviewing court is limited to a reading of the prospective juror's statements as they appear in an appellate transcript, the lower court has an opportunity to assess in addition the juror's sincerity, credibility, and demeanor, and it is in a better position by far to evaluate the existence of a mental state that would prevent that prospective juror from acting with impartiality and without prejudice to the parties. (*People v. Williams* (1988) 199 Cal.App.3d 469, 477-478.) In reviewing a trial court's denial of a challenge for cause, the reviewing court considers the trial court's ruling in context, to determine if it is fairly supported by the record. (*People v. Mendoza* (2000) 24 Cal.4th 130, 169.) The reviewing court is bound by that ruling in the absence of a clear factual basis for doubting its correctness. (*People v. Williams, supra*, at pp. 477-478.) When a prospective juror's responses to voir dire questions are halting, equivocal, or conflicting, the reviewing court is bound by the ruling. (*People v. Mendoza, supra*, at p. 169.)

Moreover, it is well-settled that the Sixth and Fourteenth Amendments guarantee a capital defendant the right to an impartial jury. (*Ross v. Oklahoma* (1988) 487 U.S. 81, 85.) Further, a prospective juror may be excluded for cause because of his or her views on capital punishment if the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwright v. Witt* (1985) 469 U.S. 412, 424.)

In the present case, the trial court's denial of the challenges for cause was fairly supported by the record. Although at times the prospective jurors' responses were equivocal or conflicting, that is not a sufficient basis for reversing the trial court's ruling.

1. Gonzalez

Prospective juror Leslie Gonzalez indicated in her questionnaire that her husband was a police officer and that the testimony of a police officer

would be as truthful as that of a lay witness because police officers were "human." (58CT4A 17222, 17224; "CT4A" stands for Clerk's Transcript, Fourth Augment.) Gonzalez also opined that too many criminals merely get their hands slapped and prison inmates had it pretty good. (58CT4A 17232, 17234.) On the other hand, Gonzalez acknowledged that prosecutors sometimes prosecute the wrong person. (58CT4A 17233.) Gonzalez also said that she believed in the death penalty. (58CT4A 17246.) However, Gonzalez stated that her attitude about the death penalty would not prevent or substantially impair her ability to vote for life without parole or her ability to be fair to both sides. (58CT4A 17250.)

At voir dire, Gonzalez responded to questions about police officers' credibility and the death penalty. She stated that she believed she could be an impartial juror; when Castro asked her if, at the penalty phase, she would listen to both sides, she said she would; however, when Castro asked her if she would listen impartially she said, "Honestly, probably not." (11RT 3750, 3752.) The court gave Gonzalez instructions on the law concerning penalty phase evidence (e.g., that the death penalty could only be imposed if aggravating factors substantially outweighed mitigating factors). (11RT 3752-3755.) After the court provided these instructions, making it clear that the prosecutor had to prove that the aggravating factors substantially outweighed the mitigating factors before the jury could vote for death, Gonzalez repeatedly affirmed that she could follow the law. (11RT 3755.)

On the subject of police officers, in response to defense questions, Gonzalez gave varying answers. On the one hand, Gonzalez said that she felt that police officers were truthful and were trained to look for specific things. (11RT 3756-3757.) On the other hand, Gonzalez also stated that she could judge all witnesses by the same standards. (11RT 3758.) In response to a question from the prosecutor, Gonzalez said that she would

not accept an officer's testimony at face value. (11RT 3763-3764.) The court instructed Gonzalez on the law concerning evaluation of witness testimony, explaining that police officer witnesses and lay witnesses were to be evaluated in the same manner. (11RT 3767-3768.) After these instructions, Gonzalez affirmed that she could evaluate police officer witnesses in this manner. (11RT 3768.) However, Gonzalez stated that she could believe an officer over a lay witness because of the officer's training and experience. (11RT 3768.)

The trial court denied the challenge for cause based on the juror's "clarification" of her answers. (11RT 3770.) The court acted within its discretion and its ruling was fairly supported by the record. Although at times Gonzalez's answers were conflicting or equivocal, this is not an adequate basis for reversing the trial court's ruling. Further, after the court instructed Gonzalez on the law, she indicated her willingness to follow it.

People v. Merced (2001) 94 Cal.App.4th 1024 (AOB 207-208) is distinguishable from the present case. In *Merced*, a prospective juror stated in his questionnaire that he believed in jury nullification. On voir dire, the prospective juror said that he would refuse to follow the court's instructions if they conflicted with his conscience; accordingly, the trial court excused him. The appellate court upheld the trial court's decision. (*People v. Merced, supra*, at pp. 1027-1028, 1030.) By contrast, in the present case, Gonzalez gave answers which were, at worst, conflicting or equivocal. But after the law was explained to her, Gonzalez stated that she was willing to follow it. When a juror's responses are conflicting or equivocal, the reviewing court is bound by the trial court's ruling. (*People v. Mendoza, supra*, at p. 169.)

Appellant misplaces reliance on several cases involving prospective jurors with uncertain, unclear, or equivocal answers concerning their willingness to apply the death penalty. (*People v. Wash* (1993) 6 Cal.4th

215, 255-256 [prospective juror Revak uncertain re death penalty; this Court upheld decision to excuse]; *People v. Holt, supra*, 15 Cal.4th at pp. 652-654 [prospective juror Jones never said she would consider death penalty; this Court upheld excusal]; *People v. Welch* (1999) 20 Cal.4th 701, 747 [prospective juror Gilens gave equivocal answers on willingness to apply death penalty; excusal upheld]; AOB 214.)

This Court reviewed these excusals for abuse of discretion; this Court deferred to the trial court's observations. Thus, this Court should accord the same deference to the trial court's determination of Gonzalez's credibility on the issues.

Appellant argues that Gonzalez never expressed uncertainty about her ability to vote for one of the penalty alternatives. Instead, her voir dire left the impression that she did not consider life-without-parole a realistic option. (AOB 214.) Respondent disagrees. After the court provided instructions making clear that the prosecutor had to prove that the aggravating factors substantially outweighed the mitigating factors before the jury could vote for death, Gonzalez repeatedly confirmed that she could follow the law. (11RT 3755.)

2. Perella

Next, appellant claims that prospective juror Judith Perella strongly favored the death penalty and should have been excused for cause. (AOB 215-220.) Again appellant is mistaken.

In her questionnaire, Perella stated that her attitude about the death penalty was one that would substantially impair her ability to vote for life without parole. (55CT4A 16175 [question 104, Perella underlined "substantially impair"].) However, Perella also said that her attitude about the death penalty would not prevent or substantially impair her ability to be fair to both sides or follow the court's instructions. (55CT4A 16175.) Further, Perella affirmed that she could set aside her feelings and follow the

law as the court explained it. (55CT4A 16178.) On the other hand, Perella expressed skepticism that she could be impartial. (55CT4A 16179.)

During voir dire, Perella was questioned at length concerning her views on the death penalty. During this examination, Perella expressed her support for the death penalty but also expressed her willingness to follow the law. (9RT 3317-3322.) Early in the questioning, Perella expressed support for the death penalty under broad circumstances (e.g., generally for intentional killings). (9RT 3317, 3319.) While being questioned by defense counsel, Perella stated that she was uncertain whether she could be impartial; however, she also expressed reluctance to impose the death penalty. (9RT 3327-3328.) For example, Perella said that voting for death would be a "real hard decision[.]" (9RT 3328.) After the prosecutor explained the death-penalty trial process in greater detail, Perella affirmed that she could go through that process. (9RT 3328-3330, 3331.) The court also educated Perella about the law after which Perella stated that she could follow the law. (9RT 3331-3332.)

Defense counsel asked further questions of Perella, focusing on her questionnaire answers which caused him to doubt her ability to be fair at either phase of the trial. (9RT 3332-3335.) Perella gave equivocal answers to these questions. (See e.g., 9RT 3334-3335.) The court then confirmed with Perella that she now understood based on the questioning that some of the law's requirements were different from the opinions that she brought into the courtroom. (9RT 3335.) The court pointed out that there was not to be an automatic decision for the death penalty or life without parole; the penalty was to be decided based on the law and the facts. (9RT 3336.) Perella thought she could do this; she said it was "contradictory" but she thought she could. (9RT 3336.) The court denied the challenge for cause as to Perella's death-penalty views. (9RT 3336.) Later, the defense again

challenged Perella for cause and the court denied the challenge. (9RT 3348.)

On appeal, appellant argues that Perella's answers indicated that she could not be fair at either the guilt or penalty phases. (AOB 215-220.) Appellant's contention must be rejected. The trial court did not abuse its discretion; its decision is fairly supported by the record. At worst, Perella's responses at voir dire were equivocal or conflicting. It is clear that at the time she completed her questionnaire, and at the outset of voir dire, Perella knew very little about the law concerning the death penalty. The prosecutor and the trial court educated Perella about the law during the voir dire process. Perella indicated her willingness to obey the law, despite some of the views she had expressed earlier in the process. Thus, the trial court's denial of the challenge for cause was within its broad discretion. And because she gave conflicting and equivocal answers, this Court is bound by the trial court's determination on credibility. (*People v. Mendoza, supra*, at p. 169.)

C. There Was No Prejudice

This Court has explained the concept of prejudice in the context of excusing a prospective juror:

> In any event, defendant fails to show prejudice. "'To prevail on such a claim, defendant must demonstrate that the court's rulings affected his right to a fair and impartial jury.' [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1099, 40 Cal.Rptr.3d 118, 129 P.3d 321.) Here, none of the seven purportedly "pro-death" jurors served on defendant's jury. Thus, the trial court's failure to excuse these prospective jurors could not possibly have affected the fairness of the jury that decided defendant's case. (*People v. Weaver* (2001) 26 Cal.4th 876, 913, 111 Cal.Rptr.2d 2, 29 P.3d 103; *Ross v. Oklahoma* (1988) 487 U.S. 81, 86, 108 S.Ct. 2273, 101 L.Ed.2d 80.)
>
> Nor, contrary to defendant, did the trial court's refusal to excuse the seven prospective jurors "pollute the jury pool," "alter the random order," or "force" the defense "to make further challenges for cause

> or exercise peremptory challenges which could have been saved for more productive use." (See *People v. Yeoman* (2003) 31 Cal.4th 93, 114, 2 Cal.Rptr.3d 186, 72 P.3d 1166 [loss of a peremptory challenge is a ground for relief """only if the defendant exhausts all peremptory challenges *and an incompetent juror is forced upon him* """]; see also *Ross v. Oklahoma, supra,* 487 U.S. at p. 88, 108 S.Ct. 2273 [rejecting the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury].)

(*People v. Wallace, supra,* 44 Cal.4th at p. 1056, italics in original.)

1. Jurors 1 and 5

Appellant used peremptory challenges to remove Gonzalez and Perella from the jury. (13RT 4489, 4493.) Appellant exhausted all of his peremptory challenges. (13RT 4495.)

Appellant claims that if he had not been forced to use two of his peremptories to remove Gonzalez and Perella, he could have struck two of the jurors that were ultimately seated (Jurors 1 and 5). (AOB 220-221 & fn. 74.)

With respect to Juror No. 1, appellant cites various questionnaire answers which he argues indicate, inter alia, that she had prejudged appellant's guilt and would punish a defendant for exercising his constitutional rights. (AOB 220-221 & fn. 74.) Juror No. 1's questionnaire contained some answers which would cause concern for the defense: e.g., her first reaction when reading about crimes is that she has no question about guilt, she leans toward the prosecution, and a defendant should be required to prove his innocence. (47CT4A 13701, 13706, 13711.) However, Juror No. 1 also stated that the defendant's guilt should have to be proven. (47CT4A 13713.) Moreover, Juror No. 1 expressed ambivalence about the death penalty. (*Id.* at p. 13724, 13732.)

At voir dire, Juror No. 1 explained that she did not remember news reports about this case vividly enough that they would have any effect on

her. (10RT 3694-3695.) Moreover Juror No. 1 said she could listen to penalty phase evidence from both sides. (10RT 3692.) Juror No. 1 also confirmed that she would follow the court's instructions. (10RT 3699.) The defense passed for cause on Juror No. 1. (10RT 3700.)

Overall, Juror No. 1's voir dire seemed unremarkable; it raised no red flags from a defense standpoint. Indeed, Juror No. 1's voir dire clarified that she had not prejudged the case. Thus, it is speculation to suggest that if the defense had had another peremptory they would have struck Juror No. 1.

In his questionnaire, Juror No. 5 made some statements which could have been sources of concern for the defense: e.g., a defendant should have to prove his innocence, mental defenses are used to escape individual responsibility, and killers should get the death penalty. (47CT4A 13871, 13878, 13884.) On the other hand, Juror No. 5 stated that he was neutral in relation to the prosecution and defense, he had once been accused of a crime, and he had no quarrel with the reasonable-doubt standard. (47CT4A 13866, 13867, 13873.)

During voir dire, the defense questioned Juror No. 5 extensively about his knowledge of the case and his attitude toward the death penalty. (9RT 3183-3192.) Juror No. 5 said he presumed appellant was innocent and would listen to background evidence at the penalty phase. (9RT 3185, 3191-3192.) The defense passed for cause. (9RT 3198.) On voir dire, Juror No. 5 came across as a thoughtful and neutral juror. Again, it is speculation to assert that if the defense had another peremptory they would have struck Juror No. 5.

2. *Ross v. Oklahoma*

Ross v. Oklahoma, supra, 487 U.S. 81, also supports the conclusion that there was no prejudice. In *Ross*, the defense removed the challenged juror (Huling) with a peremptory and used all of its peremptory challenges.

(*Id.* at p. 84.) Ross failed to establish that his jury was not impartial. As the Supreme Court stated:

> Any claim that the jury was not impartial, therefore, must focus not on Huling, but on the jurors who ultimately sat. None of those 12 jurors, however, was challenged for cause by petitioner, and he has never suggested that any of the 12 was not impartial. "[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case."

(*Ross v. Oklahoma, supra*, 487 U.S. at p. 86.)

Likewise, in the present case, any claim that appellant's jury was not impartial should focus not on Gonzalez and Perella, but on the jurors who ultimately sat. As noted, appellant has not shown that Jurors 1 and 5 were not impartial.

Ross also limits *Gray v. Mississippi* (1987) 481 U.S. 648 to the "*Witherspoon*" exclusion of a qualified juror in a capital case (exclusion due to views on the death penalty). (*Ross v. Oklahoma, supra*, 487 U.S. at pp. 87-88.) In *Gray*, the trial court excused the juror. (*Gray v. Mississippi, supra*, at p. 655.) In the present case, as in *Ross*, the defense removed the jurors at issue. This case is closer to *Ross* than to *Gray*. Thus, *Gray's* broad language, that the nature of the jury selection process defies any attempt to establish harmlessness, should not be followed. (*Id.* at p. 665.)

The *Ross* court also points out that peremptory challenges are not of constitutional dimension. (*Ross v. Oklahoma, supra*, 487 U.S. at p. 88.) Further, *Ross* says that the right to peremptories is only denied or impaired if the defendant does not get what state law provides. (*Id.* at p. 89.)

Appellant complains that *Gray* and *Ross* are incongruent, *Ross*'s attempt to limit *Gray* is unpersuasive, and *Ross* is based on a myopic view of peremptory challenges. (AOB 223.) The short answer is that *Ross* is a

decision of the United States Supreme Court which is binding on this Court. Moreover, *Gray* should not be extended to cover a situation where the defense successfully excludes an allegedly biased juror.

Accordingly, appellant's claim must be rejected.

V. THE TRIAL COURT ACTED WITHIN ITS DISCRETION BY EXCUSING JUROR NO. 11; ANY ERROR WAS NON-PREJUDICIAL

Appellant contends that the trial court erroneously removed Juror No. 11 without sufficient cause and this requires reversal. (AOB 224-240.) This contention must be rejected. Juror No. 11 was experiencing physical and emotional problems which warranted her removal. Further, the record does not show that Juror No. 11 would have been favorable to the defense.

A. Legal Standards

"A sitting juror can be removed only for illness or other good cause. (§ 1089.)" (*People v. Price* (1991) 1 Cal.4th 324, 400, superseded by statute on other grounds. "Removing a juror is, of course, a serious matter, implicating the constitutional protections defendant invokes. While a trial court has broad discretion to remove a juror for cause, it should exercise that discretion with great care." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052, fn. omitted (*Barnwell*).)

"Removal of a juror under section 1089 is committed to the discretion of the trial court, and we review such decisions by asking whether the grounds for such removal appear in the record as a demonstrable reality. [Citation.]" (*People v. Thompson* (2010) 49 Cal.4th 79, 137 (*Thompson*).) This standard differs from the substantial evidence standard of review in that it "entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion. . . . It is important to make clear that a reviewing court does not reweigh the evidence under

either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied." (*Barnwell, supra*, 41 Cal.4th at pp. 1052-1053.) In making our determination, "we defer to the trial court's judgment on [the juror's] credibility." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 646; see also *People v. Beeler* (1995) 9 Cal.4th 953, 989 [recognizing the importance of a court's observation of a juror's demeanor in reviewing a decision to discharge]; *People v. Lucas* (1995) 12 Cal.4th 415, 489 (*Lucas*) [same].)

"The most common application of [section 1089] permits the removal of a juror who becomes physically or emotionally unable to continue to serve as a juror due to illness or other circumstances. [Citations.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.) "We have recognized that both trial-related and non-trial-related stress can provide good cause for discharging a juror. [Citations.]" (*Thompson, supra*, 49 Cal.4th at p. 138.)

B. The Hearing on Juror No. 11

On August 15, 1994 (during the guilt phase), the trial court held a hearing on whether to discharge Juror No. 11. (27RT 10093-10124.) The court had received a phone message from the juror stating that she had not been able to sleep for five days and wanted counseling. (27RT 10093.) This message prompted the court to hold the hearing. (27RT 10094.)

At the hearing, Juror No. 11 stated that she was suffering from several emotional or physical problems. For example, Juror No. 11 said that about five years before she had received harassing phone calls; thus, she identified with Daryl Leisey who said he had been threatened. (27RT 10109, 10114.) She had never received counseling for the phone calls. (27RT 10114.) Juror No. 11 said that she needed counseling. (27RT 10110.) The juror stated that she identified with all parties and identified issues with herself; she thought this was because of sleep deprivation.

(27RT 10110.) The juror said that she thought a break in the trial would help. (27RT 10111.) The court asked whether the juror could continue to participate without emotional distress if they did not take a break. (27RT 10111.) The juror replied that the reason she called the day before was because she felt she had come to the end of her rope. (27RT 10111-10112.) Juror No. 11 added that she felt better on the day of the hearing because she had taken some sleep medication the night before; but she was still very tired. (27RT 10112.)

Juror No. 11 said she identified with the defendants but was afraid of the defendants. (27RT 10113-10114.) Later, she decided she was not afraid of the defendants but was frightened because she associated the threats against Leisey with the threatening phone calls that she had received. (27RT 10114.) At times she identified with the defendants and put herself in their place. (27RT 10115.) However, she affirmed that she was a fair and impartial person. (27RT 10115.)

Juror No. 11 stated that she could continue if she could talk to someone to resolve her personal issues. (27RT 10116.) If she was not able to talk to anyone, her issues might not be resolved, and that would frighten her more and more. (27RT 10116.) Juror No. 11 was also afraid of not being able to sleep. (27RT 10116-10117.) Juror No. 11 wanted to talk to a counselor to get these issues resolved. (27RT 10117.) The juror was sure it would take more than one session; she guessed it might take three to ten sessions. (27RT 10118.) The juror offered to try to see a counselor in the downtown area. (27RT 10118.)

Juror No. 11 was briefly excused from the courtroom while the court and the parties discussed the matter. (27RT 10118.) The court tentatively ruled that it would excuse the juror. (27RT 10118-10119.) The court noted that the juror appeared to be very fragile emotionally and physically; she moved very slowly and she talked slowly. (27RT 10118.) The court

expressed the concern that in seeking assistance from a counselor, the juror would contaminate herself by discussing her juror duties with another person. (27RT 10118-10119.) The court opined that requiring the juror to continue would be asking too much of her; she might have a significant emotional breakdown. (27RT 10119.)

Defense counsel objected: he noted that Juror No. 11 did not ask to be excused, argued that one counseling session might be sufficient, that the juror might only need a good night's sleep, and that he felt Juror No. 11 was an excellent juror for the defense. (27RT 10119-10120.) The prosecutor argued that the juror should be excused: she had insomnia, was spiraling down, was in a fragile psychological state, and did not know how many counseling sessions she would need. (27RT 10121.) John Hodges's attorney said that he had had a similar case which required only one counseling session and some short-term medication. (27RT 10122.) Defense counsel (Castro) adopted these comments. (27RT 10124.) The court replied that the juror might be in more distress and might need more than one counseling session. (27RT 10122.) The court confirmed its tentative ruling, and excused Juror No. 11. (27RT 10121-10124.)

C. The Trial Court Properly Excused Juror No. 11

The trial court did not abuse its discretion by excusing Juror No. 11. The juror was under physical and emotional stresses which justified her removal. Among other factors, Leisey's testimony had brought back memories of harassing phone calls which were an unresolved psychological issue. (27RT 10109, 10114.) The day before the hearing, Juror No. 11 felt that she had come to the end of her rope. (27RT 10111-10112.) Although she felt better on the day of the hearing she was still very tired. (27RT 10112.) At one point, she believed she was afraid of the defendants. (27RT 10113-10114.) Juror No. 11 was concerned that if she was unable to see a counselor her issues might not be resolved and that would frighten her

more. (27RT 10116.) Juror No. 11 was also afraid of the effects of her insomnia. (27RT 10116-10117.) The juror was sure her psychological issues would require more than one counseling session; she estimated they might involve three to ten sessions. (27RT 10118.) Moreover, the trial court observed that the juror appeared to be emotionally and physically fragile; she moved and talked slowly. (27RT 10118.)

Thus, Juror No. 11's statements and the trial court's firsthand observations support the conclusion that the juror was suffering from various physical and psychological problems which impaired her ability to function as a juror. Among these problems were: the psychological effects of the harassing phone calls, physical exhaustion, and fear of the defendants. The juror believed that she needed numerous psychological counseling sessions; more than the trial court could accommodate. As the trial court pointed out, the counseling sessions might involve the juror discussing the case with another person. For all these reasons, the grounds for removing Juror No. 11 appear in the record as a demonstrable reality.

Appellant claims that Juror No. 11 was sleep deprived and that was causing her emotional distress. (AOB 230-231.) But as noted, Juror No. 11 was experiencing psychological and physical problems which were more numerous and complicated than mere insomnia.

Appellant notes that Juror No. 11 did not request to be excused. (AOB 231.) However, it was the juror who contacted the court regarding her insomnia and her need for counseling and it is clear that the juror was under considerable physical and psychological stress. (See e.g., 27RT 10093.) Juror No. 11 was amenable to taking a "break" -- but it is unclear how long of a break would have been required.

Appellant also asserts that Juror No. 11 could have fulfilled her duties without counseling, or alternatively, could have received counseling without discussing the case. (AOB 235-236.) But Juror No. 11 clearly and

consistently expressed her strong desire for counseling. (27RT 10110, 10116-10118.) Further, based on Juror No. 11's statements, it is plain that some of her psychological issues were related to the case (e.g., the association between Leisey's testimony and the harassing phone calls the juror received and her fear of the defendants). Hence, appellant has not shown that the trial court abused its discretion.

Case law supports the conclusion that the trial court acted properly by excusing Juror No. 11. In *People v. Collins* (1976) 17 Cal.3d 687 (*Collins*) (overruled on other grounds) the juror said she was more emotionally than intellectually involved in the case and was unable to cope with the experience of being a juror. (*Id.* at pp. 690-691.) The trial court excused the juror and this Court upheld the excusal. (*Id.* at pp. 691, 695-696.) This Court concluded that the extensive hearing in which the juror maintained that she could not follow the court's instructions, that she had been upset throughout the trial, and that she wanted to be removed, justified the conclusion that she could not perform her duty. (*Id.* at p. 696.)

Likewise, in the present case, Juror No. 11 developed emotional and physical problems because of the case and was unable to cope with the experience of being a juror. Juror No. 11 was also thoroughly examined at the hearing. Although Juror No. 11 did not expressly state she could not follow the court's instructions, her inability to perform her duties was clear from the record developed at the hearing. And, as noted, although Juror No. 11 did not explicitly request to be excused, she was the one who contacted the court concerning her physical and psychological difficulties.

People v. Van Houten (1980) 113 Cal.App.3d 280 (*Van Houten*) also supports the conclusion that the trial court acted within its discretion. In *Van Houten*, the juror (Driscoll) was distressed by graphic evidence the Manson family murders. The *Van Houten* court described the juror's condition:

> The record indicates that the trial judge was confronted with a situation in which a trial juror, because of the photographs and the testimony, was losing her composure; was being upset to the point that she felt she really could not continue as a juror; was affected to the point that she would think of other matters rather than concentrate on the testimony therein so as not to lose her composure; was crying; was having trouble sleeping; was afraid that she might become physically ill by reason of the service as a juror and did not think that she could sit and actually follow the evidence during the rest of the trial.

(*Van Houten, supra*, 113 Cal.App.3d at p. 286.)

The trial court excused the juror and the appellate court upheld the dismissal. (*Van Houten, supra*, 113 Cal.App.3d at pp. 287-288.) In *Van Houten* and the present case, the jurors were properly excused because of the emotional distress caused by the trial. Indeed, in *Van Houten*, the juror had some of the same symptoms as Juror No. 11 (e.g., sleeplessness). It is true that in *Van Houten* the juror was tuning out evidence. However, Juror No. 11's physical exhaustion and psychological problems would have impaired her ability to follow the evidence or otherwise perform her duties as a juror.

In addition, *People v. Fudge* (1994) 7 Cal.4th 1075, 1098-1100, supports the propriety of the trial court's ruling. In *Fudge*, the juror's job-related anxiety was good cause to excuse the juror (i.e., filling out paperwork so she could vacate her current employment). (*Ibid.*) If anything, the juror's anxiety in *Fudge* was less severe than Juror No. 11's anxiety in the present case.

Appellant contends that, at best, the record shows Juror No. 11 feared that her emotions might render her unable to fulfill her duties in the future and such speculation does not amount to a demonstrable reality. (AOB 234.) However, at the time of the hearing, Juror No. 11 was suffering serious psychological and physical problems. The trial court was in the best position to evaluate the gravity of the situation and determine whether

Juror No. 11's issues impaired her ability to function as a juror. The trial court was not required to wait and see whether Juror No. 11 had a physical or emotional breakdown before excusing her. Appellant cites *Fudge* in support of his position; but, as noted, *Fudge* indicates that a juror can be excused based on less anxiety than Juror No. 11 demonstrated in the present case.

D. Any Error Was Non-Prejudicial

Respondent submits that any error was an error of state law only; accordingly, it should be reviewed under the "miscarriage of justice" test:

> [A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.

(*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Appellant claims that wrongful removal of a juror violates the federal Constitution by allowing the prosecution to obtain a conviction without convincing all the jurors that a conviction is justified. (AOB 237.) However, appellant was convicted by a unanimous jury.

Appellant contends that reversal is warranted for the erroneous dismissal of a juror favorable to the defense. (AOB 238.) However, the cases that appellant cites are distinguishable. In *People v. Wilson, supra*, 44 Cal.4th at pages 813-814, 841, this Court found that a juror was wrongly excused during the penalty phase and reversed the penalty without discussing prejudice. However, the discharged juror was the only holdout for a life sentence, so the prejudice was obvious. (*Id.* at pp. 813-814.) In *People v. Cleveland, supra*, 25 Cal.4th 466, a non-capital case, one juror viewed the evidence differently from the way the rest of the jury viewed it. (*Id.* at p. 486.) This juror – who was excused by the trial court – was a lone

holdout juror. (*Id.* at pp. 470-474.) Again, because the discharged juror was a holdout, the prejudice was clear.

Appellant also relies on *People v. Hamilton* (1963) 60 Cal.2d 105, disapproved on other grounds. *Hamilton* is distinguishable. In *Hamilton,* the prosecution moved for substitution of a juror on the ground that she had disclosed her opposition to the death penalty. Thus, her disqualification could only be beneficial to the prosecution and prejudicial to the defense. The juror asked questions which indicated that (temporarily at least) she was considering the probability of a life sentence. This Court concluded that to dismiss the juror without proper, or any, cause was tantamount to loading the jury with those who might favor the death penalty, which was obviously prejudicial to the defense. (*Id.* at p. 128.) In the present case, Juror No. 11 was not removed because she held any views favorable to the defense. Instead, she was removed due to her physical and emotional problems. Hence, it cannot be said that the defense was prejudiced by the removal of Juror No. 11 in the way that the defense was prejudiced in *Hamilton.*

Appellant claims that the record shows that Juror No. 11 was favorable to the defense. (AOB 238- 240.) Not so. That defense counsel felt that Juror No. 11 would be an excellent juror for the defense and that the prosecutor sought her removal does not mean that she actually would have been favorable to the defense. Appellant speculates when he argues that Juror No. 11's ability to identify with him made her receptive to his mental state defense. (AOB 239.) Appellant asserts that the defense theory, based on his fear of the Hodgeses, would have resonated with Juror No. 11 because she also feared them. (AOB 239.) Actually, Juror No. 11 said that at one point she was afraid of all of the defendants (not just the Hodgeses). (27RT 10113-10114.)

Juror No. 11's statements regarding her feelings about the defendants were equivocal and contradictory; thus, it is unclear that she would have favored the defense. Juror No. 11 said she identified with the defendants but was afraid of the defendants. (27RT 10113-10114.) Later, she decided she was not afraid of the defendants but was frightened because she associated the threats against Leisey with the threatening phone calls that she had received. (27RT 10114.) At times she identified with the defendants and put herself in their place. (27RT 10115.) However, she affirmed that she was a fair and impartial person. (27RT 10115.) On this record, it is not clear that appellant was prejudiced by Juror No. 11's removal.

Moreover, a "[d]efendant has a right to jurors who are qualified and competent, not to any particular juror.'" (*People v. Kelly* (2007) 42 Cal.4th 763, 777.) Appellant has not shown that the alternate who replaced Juror No. 11 was biased or unqualified. (See e.g., *People v. Abbott* (1956) 47 Cal.2d 362, 371-372 [no showing that new juror favored one side].) Accordingly, appellant has not shown that it is reasonably probable he would have received a more favorable verdict had the trial court not discharged Juror No. 11. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

For the foregoing reasons, appellant's contention must be rejected.

VI. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT ON DURESS

Appellant contends that the trial court committed prejudicial error by failing to instruct that duress is a defense to robbery and murder and that it may raise a reasonable doubt about the specific intent to rob and premeditate and deliberate. (AOB 241-263.) Appellant also argues that under the federal Constitution, the Legislature cannot restrict duress to non-murder offenses. (AOB 254-257.)

This argument must be rejected. Appellant has forfeited his federal constitutional claim. There was no substantial evidence of duress; in fact, the evidence refutes any claim of duress. Further, this Court's precedents indicate that there was no error. There was no federal constitutional violation: there is a rational basis for disallowing duress as a defense to murder and appellant was not denied his right to present a defense. Moreover, appellant was not prejudiced: there was overwhelming evidence of appellant's culpable mental state and in view of the parties' arguments and the instructions, the jury would have considered duress as it related to intent to rob, premeditation, and deliberation.

A. Background

Appellant moved for instructions on duress. (2CT 528-542.) Appellant's proposed instructions provided:

> I.
>
> If the evidence presented in this trial has created a reasonable doubt whether the defendant, Carl Powell had an honest and reasonable belief that his life was endangered, and that he engaged in the act of killing Keith McDade under such fear and threat, you should negate the "premeditation" and "deliberation" mental states required to find murder in the first degree.
>
> II.
>
> If the evidence presented in this trial has created a reasonable doubt whether the defendant, Carl Powell had the specific intent required in the charge of robbery, you should find him not guilty of that charge. This doubt may be created if you find he acted under immediate threats against his life.
>
> III. [¶] (CALJIC 4.40 with addition)
>
> A person is not guilty of a crime when he engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances:

1. Where the threats and menaces are such that they would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged and,

2. If such person then believed that his life was so endangered. This rule does not apply to threats, menaces and fear of future danger to his life

[]

This defense, through its immediacy requirement, negates criminal intent. If the evidence raises a reasonable doubt as to whether the danger perceived by defendant negated criminal intent, you must find that such intent was not formed.

(2CT 528-529.)

One of appellant's proposed instructions, instruction III, was a modified version of CALJIC No. 4.40, a standard instruction on duress. (3CT 654.) Moreover, at the time of appellant's trial, CALJIC No. 4.41 provided:

Where a person commits a crime punishable with death, it is not a defense that he committed the act or made the omission charged under threats or menaces of immediate death or bodily harm.

(3CT 655.)

Interestingly, this instruction (CALJIC No. 4.41) was requested by the defense. (3CT 655.) The court and the parties discussed this issue extensively. (30RT 10911-10913, 10914-10915, 10924-10926, 10928-10937, 10940-10941, 10960-10968, 10974-10975, 10997-11005, 11008-11010, 11016-11042, 11048-11050; 31RT 11051-11057.) At one point, the court ruled that it would give the standard CALJIC instructions on duress. (30RT 10937.) Later, however, the court reversed this decision. The court ruled that there was insufficient evidence to support the instructions, specifically, that there was insufficient evidence of an immediate danger to

appellant. (30RT 11048-11051; 31RT 11052.) In reaching this conclusion, the court read Leisey's statement, Banks's statement, and appellant's statement to Detective Lee. (30RT 11048.) Notably, in appellant's statement to Lee, appellant only mentioned threats by McDade. (30RT 11048, 11049.) Leisey and Banks's statements likewise did not support the immediacy of any threat. (30RT 11049, 31RT 11051.)

The court also ruled that defense counsel could argue that the allegedly coercive circumstances created a reasonable doubt as to premeditation, deliberation, and intent to rob. (31RT 11051-11052, 11056.) The court added that defense counsel could argue that appellant acted under pressure or domination from the Hodgeses and that appellant's statement to police was affected by his fear of the Hodgeses. (31RT 11053, 11055-11056.)

B. Appellant Has Forfeited His Federal Constitutional Claim

Appellant argues that under the federal Constitution, the Legislature cannot restrict duress to non-murder offenses; to do so would violate his federal constitutional right to present a defense. (AOB 254-257.) Appellant did not present this argument in the trial court; accordingly, it has been forfeited. (*People v. Saunders, supra*, 5 Cal.4th at pp. 589-590.)

C. Legal standards

A trial court must instruct sua sponte on a duress defense if there is substantial evidence of the defense and if it is not inconsistent with the defendant's theory of the case. (*People v. Wilson* (2005) 36 Cal.4th 309, 331 (*Wilson*).) An instruction on duress, such as the one requested by appellant, may be appropriate if warranted by the circumstances of the case. (*People v. Burney* (2009) 47 Cal.4th 203, 249.) "[A] trial court may be required to give a requested jury instruction that pinpoints a defense theory

of the case by, among other things, relating the reasonable doubt standard of proof to particular elements of the crime charged. [Citations.] But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation]." (*Coffman, supra*, 34 Cal.4th at p. 99, internal quotation marks omitted.)

"[F]ear for one's own life does not justify killing an innocent person. Duress is not a defense to murder." (*People v. Anderson* (2002) 28 Cal.4th 767, 770 (*Anderson*).) This Court has recognized sound policy reasons for this rule. For example, if duress was recognized as a defense to murder, then a criminal gang could coerce its members into killing and the murder could be justified by the actual killer:

> California today is tormented by gang violence. If duress is recognized as a defense to the killing of innocents, then a street or prison gang need only create an internal reign of terror and murder can be justified, at least by the actual killer. Persons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting than would those who know they must face the consequences of their acts. Accepting the duress defense for any form of murder would thus encourage killing.

(*Anderson, supra*, 28 Cal.4th at pp. 777-778.)

Moreover, a killing under duress -- like any killing -- may or may not be premeditated, depending on all of the circumstances. If a defendant obeys an order to kill without reflection, the jury could find no premeditation and thus convict the defendant of second degree murder. As with implied malice murder, this circumstance is not due to the doctrine of duress but to the legal requirements of first degree murder. (*Anderson, supra*, 28 Cal.4th at p. 784.)

Further, duress can, in effect, provide a defense to murder on a felony-murder theory by negating the underlying felony. If the defendant is not

guilty of the underlying felony due to duress, he cannot be guilty of felony murder based on that felony. (*Anderson, supra*, 28 Cal.4th at p. 784.)

D. The Trial Court Did Not Err By Refusing to Instruct on Duress

This Court has stated that duress cannot, as a mater of law, negate intent, malice, or premeditation for first degree murder:

> We recently rejected the argument that duress could negate the elements of malice or premeditation, thereby reducing a first degree murder to manslaughter or second degree murder. (*People v. Anderson* (2002) 28 Cal.4th 767, 781–784, 122 Cal.Rptr.2d 587, 50 P.3d 368.) We decline defendant's invitation to reconsider the holding in *Anderson*. Moreover, because duress cannot, as a matter of law, negate the intent, malice or premeditation elements of a first degree murder, we further reject defendant's argument that duress could negate the requisite intent for one charged with aiding and abetting a first degree murder. (See *Anderson, supra*, 28 Cal.4th at p. 784, 122 Cal.Rptr.2d 587, 50 P.3d 368.)

(*People v. Vieira* (2005) 35 Cal.4th 264, 290.)

And as the trial court noted, there was no substantial evidence of duress. Appellant's own pretrial statements to Detective Lee and Littlejohn undermine his claim of duress. Leisey and Banks's testimony do not support the conclusion that the Hodgeses coerced appellant into killing McDade. Appellant's statements to Martinez and Scott before the robbery-murder support the conclusion that appellant intended to rob, intended to kill, and killed with premeditation (i.e., that he was not coerced into killing McDade). Indeed, there was overwhelming evidence of premeditation and intent to rob; it was not necessary to instruct on duress as to these mental states. In fact, instructing on duress as to premeditation would have been incorrect.

Appellant's claim that the Hodgeses coerced him is rebutted by his statement to Lee. Appellant told Lee that McDade threatened to have him

killed. (31CCT 9001-9004.) Appellant did not say that the Hodgeses coerced him.

Appellant claims that he withheld information from Detective Lee because he was afraid the Hodgeses would harm his family. (AOB 253.) But, as noted, during his interview with Lee, appellant implicated the Hodgeses in the crimes. (31CCT 9011, 9013, 9015, 9016, 9018-9020.) Indeed, appellant claimed that the Hodgeses were the ones who suggested killing McDade. (31CCT 9015, 9016, 9018.) This undermines the argument that appellant was afraid to implicate the Hodgeses.

Moreover, in his interview with Lee, appellant said that he had met Terry two weeks before the interview (approximately January 13). (31CCT 9012.) Clearly, appellant had been contemplating the robbery long before he met Terry. Appellant also told Lee that he had been thinking about the crime for about two weeks before it occurred; but he only discussed it with Terry about a day or two before. (31CCT 9014-9015.) This is strong evidence that appellant formed the intent to rob independent of any influence by the Hodgeses.

Appellant told Littlejohn that he had shot and killed the KFC manager. Appellant said that he shot McDade because McDade had threatened him. (31CCT 9263.) This belies appellant's claim that the Hodgeses coerced him.

Leisey's testimony also indicates that appellant intended to rob McDade and was not coerced into killing him. According to Leisey, Terry Hodges said that appellant ("the boy") had been talking about robbing McDade. (32CCT 9303; 25RT 9494 [Terry and appellant went to KFC to rob McDade]; 25RT 9497.) Terry and appellant robbed McDade; Terry instructed appellant to kill McDade and he did so. (32CCT 9307-9308, 9313; 25RT 9494.) Appellant was a wimp and Terry had to coach him to get him to kill McDade. (32CCT 9315; 25RT 9498.) Based on Leisey's

testimony, it is clear that appellant helped to plan the robbery and was a willing participant. Further, although Terry "coach[ed]" appellant to kill McDade, he did not coerce appellant to do so. In addition, Leisey's testimony supports the conclusion that appellant had the time to premeditate and deliberate. While Terry was "coaching" appellant, he (appellant) had time to consider Terry's instruction to kill McDade before carrying it out.

Likewise, Banks's testimony supported the conclusion that appellant helped to plan the robbery and was not coerced into killing McDade. The robbery-murder was planned at a woman's home on G Parkway; John and appellant were present. (25RT 9422-9426; see also 25RT 9452-9453.) Appellant suggested robbing the KFC. (25RT 9423-9424; 31CCT 9154-9155, 9159.) John told appellant that McDade would have to be killed so there were no witnesses. (25RT 9424-9425.) Appellant did not want to kill anyone; but John told appellant that he had to kill McDade so that he would not be able to identify "none of us." (25RT 9425-9426; see also 25RT 9449, 9463; 31CCT 9146, 9151, 9160.) This evidence indicates that appellant had a critical role in planning the robbery (i.e., he was a willing participant). Further, although John instructed appellant to kill McDade, there is no evidence that he coerced appellant to do so. Moreover, Banks's testimony supports the conclusion that appellant had significant time to premeditate and deliberate before deciding to kill McDade.

Additionally, on Halloween 1991, almost three months before the murder, appellant told Martinez that he should watch his back when taking the deposit to the bank because something could happen. (16RT 6718, 6736.) This supports the conclusion that appellant was contemplating stealing the bank deposit while it was being transported to the bank. This indicates that appellant had the intent to rob, had time to premeditate, was a

willing participant in the robbery, and rebuts the theory that he was coerced into the robbery-murder.

In November and December of 1991, appellant told Scott that he planned to rob the KFC; he said this about nine or ten times. (18RT 7255-7258.) Appellant said he wanted to rob the KFC because he got fired and because he wanted money. (18RT 7256, 7257, 7270.) About a month before the murder, appellant told Scott he was going to rob Keith McDade; he said this about ten times as well. (18RT 7259-7260.) Appellant said he was going to knock out McDade with a board or rock. (18RT 7271.) Appellant told Scott that if he robbed KFC he did not want her to be working there at the time of the robbery. (18RT 7336.) This is crystal-clear evidence of appellant's intent to rob McDade, shows that he was a willing participant in the robbery, had time to premeditate, and it undermines appellant's claim that he was coerced into the robbery-murder.

Appellant used to call Scott just about every day; but he stopped calling her a few days before the murder. (18RT 7349.) It is reasonable to infer that appellant broke off contact with Scott because he was planning to rob the KFC (Scott's workplace) in the near future. Again, this is evidence of appellant's intent to rob and it cuts against appellant's argument that he was coerced into the robbery-murder.

All of this evidence -- combined with the other evidence of guilt -- constitutes overwhelming evidence of appellant's premeditation and intent to rob. (See Argument I.E.2., *ante* [overwhelming evidence of guilt].) Accordingly, there was no substantial evidence supporting any instruction on duress. That is, there was no substantial evidence supporting instructions on duress as a defense to robbery or as a means to create reasonable doubt regarding intent to rob and premeditation.

For all these reasons, this Court must reject appellant's argument that there was sufficient evidence for jurors to determine that appellant robbed

and killed McDade because the Hodgeses coerced him. (AOB 249-254.) Contrary to appellant's assertion, Banks and Leisey's testimony did not show that the Hodgeses coerced appellant. (AOB 249-252.)

Appellant claims that the jurors could have interpreted the evidence as showing that the Hodgeses were present when he committed the crimes. (AOB 250-251.) Banks's testimony is unclear on this point. Banks's testimony focused on the planning of the robbery-murder at the G Parkway home. (25RT 9422-9426.) Indeed, Banks did not know whether John Hodges was at the murder scene. (31CCT 9151, 9155-9156, 9158.)

In his police interview, Leisey stated that Terry had returned to the (Hodgeses') car when appellant shot McDade. (32CCT 9307-9308.) Leisey's trial testimony was more ambiguous; however, a close reading indicates that Terry had returned to the car when the shooting occurred. (25RT 9495.) For example, Terry said that a couple of minutes after his coaching, appellant came running back to the car. (25RT 9495.) Clearly, Terry was already at the car. Thus, when Leisey testified that Terry was "right there with Carl Powell[,]" he did not mean that Terry was physically next to appellant at the moment of the shooting. (25RT 9495.) This is especially clear when Leisey's testimony is viewed in connection with his pretrial statement. In any event, Leisey's testimony does not support the conclusion that Terry's coaching of appellant amounted to coercion.

Appellant claims that because he had only a single bullet in his pistol, he could not have resisted the Hodgeses, who had one or two firearms. (AOB 251.) Evidence that the Hodgeses were armed on the night of the robbery-murder was very flimsy. For example, Banks speculated that John "probably" had the pistol. (31CCT 9155.) In his interview, Leisey stated that Terry owned some firearms, was an enforcer, always had weapons, and was always robbing people. (32CCT 9303-9304, 9311.) Leisey also said that, although he could not prove it, Terry, John, and some others had been

involved in a lot of drive-by shootings. (32CCT 9311.) The basis for Leisey's (unsworn) statements is unclear. At any rate, these statements do not show that the Hodgeses were armed on the night of the murder. Further, they do not support the inference that the Hodgeses forced appellant – at gunpoint – to shoot McDade.

Additionally, even with a single bullet in his pistol, appellant could have resisted Terry, if Terry had been the only one of the brothers at the scene of the shooting. Moreover, even if both brothers had been present, appellant could have attempted to hold both of them at bay (neither brother would have wanted to be the one to get shot). As this Court has stated: "A person can always choose to resist rather than kill an innocent person. The law must encourage, even require, everyone to seek an alternative to killing." (*Anderson, supra*, 28 Cal.4th at p. 777.)

Appellant reiterates Littlejohn's speculation that the brothers "forced" appellant to shoot McDade; appellant was weak and stupid. (AOB 253-254; 31CCT 9266, 9270; 28RT 10412.) But, as noted, Littlejohn's comment about the brothers forcing appellant to commit the crime was pure conjecture. (31CCT 9270.) Littlejohn related that appellant said he was "under pressure" but it is not clear who the pressure was coming from (e.g., the Hodgeses or McDade). (31CCT 9269.)

For all of these reasons, the trial court did not err in declining to instruct on duress.

E. This Court's Jurisprudence Indicates That There Was No Error

People v. Wilson, supra, 36 Cal.4th 309, supports the conclusion that in this case the trial court did not err. In *Wilson*, the defendant claimed that there was substantial evidence of duress regarding robbery, felony-murder, and the robbery-murder special circumstance. This Court found no error in "failing" to instruct on duress. (*Id.* at pp. 331-332.) The defendant did not

offer substantial evidence of duress and defendant's pretrial statement undermined his claim of duress:

> We conclude the trial court did not err in failing to give the duress instruction because defendant failed to present substantial evidence of the defense. "Substantial evidence is 'evidence sufficient "to deserve consideration by the jury," not "whenever *any* evidence is presented, no matter how weak."'" [Citations.] Although defendant testified Anderson pointed a gun at him and told him to drive, defendant conceded that he did not actually see Anderson with a gun. Moreover, in his pretrial statement, defendant admitted to detectives that he and Anderson planned Swader's robbery and murder, that he and Anderson shared the idea to commit these crimes "50–50," and that he had the motive to rob Swader in order to pay off a $13,000 debt.

(*Wilson, supra*, 36 Cal.4th at pp. 331-332.)

Likewise, in the present case, appellant's claim of coercion was undermined by his pretrial statement to Detective Lee and the other evidence recited above.

F. Appellant's Federal Constitutional Rights Were Not Violated

Appellant asserts that under the federal Constitution, the Legislature may not restrict the duress defense to non-murder offenses. (AOB 254-257.) This contention must be rejected. As this Court has explained, there is a rational basis for disallowing duress as a defense to murder. If duress was recognized as a defense to murder, then a criminal gang could coerce its members into killing and the murder could be justified by the actual killer. (*Anderson, supra*, 28 Cal.4th at pp. 777-778.) This Court also stated:

> [B]ecause duress can often arise in a criminal gang context, the Legislature might be reluctant to do anything to reduce the current law's deterrent effect on gang violence. These policy questions are for the Legislature, not a court, to decide.

(*Anderson, supra*, 28 Cal.4th at p. 784.)

Thus, this issue is really a policy question which should be left to the Legislature.

Moreover, as this Court has noted, the rule that duress is not a defense to murder stems from the common law. (*Anderson, supra*, 28 Cal.4th at p. 770.) Accordingly, this rule is firmly rooted in our traditions and does not violate due process.

Appellant also claims that his federal constitutional right to present a defense was violated. (AOB 255-257.) Appellant was not denied the opportunity to present a defense. Appellant presented a defense case and defense counsel thoroughly cross-examined the People's witnesses. Counsel elicited testimony favorable to the defense (e.g., Banks's and Leisey's testimony that the Hodgeses instructed appellant to kill McDade). And of course, appellant could have presented a more extensive defense if he had exercised his right to testify.

Further, this Court has implicitly rejected a similar claim. In *People v. Maury* (2003) 30 Cal.4th 342, the trial court gave CALJIC Nos. 4.40 and 4.41. The defendant complained that CALJIC No. 4.41 (limiting duress) violated due process. This Court rejected the argument, noting that duress is not a defense to any murder:

> At trial, defendant claimed that he struck Weeden with a rock under duress because he feared that Morris would shoot him if he did not do so. The trial court instructed that "A person is not guilty of a crime when he engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances: [¶] 1. Where the threats and menaces are such that they would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged and [¶] 2. If such person then believed that his life was so endangered." (See CALJIC No. 4.40 (5th ed.1988).) The court also instructed that such threats are not a defense "[w]here a person commits a crime punishable with death" and that "[a] first degree murder with a special circumstance is a

> crime punishable with death." (See CALJIC No. 4.41 (5th ed.1988).)
>
> Defendant contends that the limitation in CALJIC No. 4.41 deprived him of a duress defense to the Weeden murder, in violation of the Eighth Amendment and his right to due process. He argues that the multiple-murder special-circumstance allegation permitted classifying the Weeden homicide as a crime punishable by death under section 26 and that, had he been tried separately on that charge before the deaths of Berryhill and Stark, he would have been entitled to a duress defense without limitation. However, duress is not a defense to *any* murder. (*People v. Anderson* (2002) 28 Cal.4th 767, 770, 780, 122 Cal.Rptr.2d 587, 50 P.3d 368.) Because the instructions were unduly *favorable* to defendant, he cannot complain.

(*People v. Maury, supra*, 30 Cal.4th at p. 421, italics in original.)

Thus, *Maury* implicitly rejected a due process attack on CALJIC No. 4.41 which states that duress is not a defense to a death-eligible murder. Hence, *Maury* indicates that a due process attack on *Anderson's* limitation on the duress defense should also be denied.

G. Appellant Was Not Prejudiced

Respondent submits that any error was, at most, an error of state law so the *Watson* harmless-error standard applies: reasonable probability of a different result. Moreover, there was no prejudice under any standard.

Appellant contends that the evidence could have supported an outcome more favorable to him. (AOB 259.) At trial, defense counsel argued that appellant was guilty of only second-degree murder (no intent to kill, no premeditation). (31 RT 11273-11276, 11324, 11338, 11339.)

However, as respondent has explained, there was overwhelming evidence of appellant's guilt, including his culpable mental state. (Argument I.E.2., *ante*.) Further, as noted, there was strong evidence undermining any duress "defense" to robbery (intent to rob) or premeditation. (Argument VI.D., *ante*.)

Additionally, in light of the instructions and the arguments of counsel any error was harmless. The jury was instructed on the required mental states and defense counsel argued appellant was coerced. The court gave the jury the standard instruction on deliberate and premeditated murder. (3CT 608-609; 31RT 11121-11122.) This instruction defined "deliberate" as determined as a result of careful thought and weighing of considerations. (3CT 608; 31RT 11121.) The instruction stated that to find first degree premeditated murder, the jury had to find that the killing was preceded by a clear, deliberate, intent to kill which was the result of deliberation and premeditation; that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation. (3CT 608; 31RT 11121.) A mere unconsidered and rash impulse, even if it included an intent to kill, was not sufficient for first degree premeditated murder. (3CT 609; 31RT 11122.) Further, to constitute deliberate and premeditated killing, the defendant had to weigh and consider the reasons for and against killing. (3CT 609; 31RT 11122.) Thus, the jury was thoroughly instructed on the concepts of deliberation and premeditation.

Likewise, the trial court gave the standard instruction on the robbery-murder special circumstance. Under this instruction, the murder had to be committed while the defendant was engaged in robbery, or to carry out the robbery, or to facilitate escape from or avoid detection of the robbery. (3CT 619; 31RT 11125-11126.) The trial court gave the standard instruction on robbery which required the specific intent permanently to deprive McDade of the property. (3CT 623; 31RT 11127-11128.) Thus, the jury was thoroughly instructed on intent to rob.

Defense counsel argued that the Hodgeses coerced appellant into shooting McDade. Defense counsel said that the main issue was appellant's mental state, not whether he was the shooter. (31RT 11249-

11250, 11252.) Defense counsel suggested that appellant was alone when he approached McDade to discuss getting his job back; later, the Hodgeses arrived, gave appellant the gun, and forced him to shoot McDade. (31RT 11257, 11263, 11267, 11270, 11280-11281, 11307, 11313-11314, 11318, 11329, 11333-11334.)

Defense counsel also argued that appellant had no intent to rob McDade. (31RT 11273, 11274-11276, 11324, 11338.) Likewise, appellant had no motive to kill McDade; in fact, he wanted his job back. (31RT 11290, 11291, 11325, 11332.) Appellant could have burglarized the KFC without violence. (31RT 11276, 11326.) Appellant was not the type of person who would kill someone; he must have been forced to do it. (31RT 11294, 11326-11327.) The pressure that the Hodgeses placed on appellant precluded him from premeditating and deliberating. (31RT 11331.) The Hodgeses formed the plan to kill McDade; appellant was merely drafted as a soldier. (31RT 11331-11332.) Appellant was coerced and manipulated by the more criminally sophisticated Hodges brothers. (31RT 11334, 11335.)

Defense counsel argued that appellant was afraid of the Hodgeses when he was talking to Detective Lee, so he withheld information. (31RT 11255, 11271, 11285, 11286.)

Finally, defense counsel argued that appellant was guilty of only second-degree murder; there was no premeditation and deliberation; appellant was captured by people beyond his control (i.e., he was a pawn of the Hodgeses). (31RT 11339.)

In his rebuttal argument, the prosecutor addressed appellant's coercion argument. For example, the prosecutor called defense counsel's argument a "Svengali defense." (31RT 11339.) The prosecutor argued that the Hodgeses were not present when appellant shot McDade and that appellant was the only person with a gun. (31RT 11344; 32RT 11357.)

The prosecutor also argued that appellant was not scared of the Hodgeses; indeed, he attempted to set up Terry. Specifically, the prosecutor cited appellant's jail phone call in which he told Tony Scott to say that he saw appellant give the gun to Terry two weeks before the shooting. (32RT 11354; 28RT 10283.) Further, the prosecutor argued at length that appellant premeditated, deliberated, and had the intent to kill. (See e.g., 31RT 11340-11346.)

In light of the instructions on premeditation, deliberation, and robbery-murder, and in view of the parties' arguments, the jury considered the issue of whether the Hodgeses coerced appellant into killing McDade. The jury considered the issue of coercion as it bore upon premeditation, deliberation, and intent to rob. After considering these issues, the jury rejected appellant's mental state defense.

For these reasons, there is no merit to appellant's claim that the jurors did not reject the defense of duress under other, properly given instructions. (AOB 259-260.)

Appellant admits that defense counsel proffered a mental state defense based on duress. (AOB 260.) But appellant contends that the failure to instruct on duress was prejudicial for three reasons. First, appellant says defense counsel's argument went principally to the subjective component of duress. (AOB 260-261.) This is a hair-splitting distinction without a difference. As explained above, defense counsel's argument on duress was comprehensive.

Second, appellant argues that when the duress defense is seen as a policy decision not to hold accountable a guilty defendant, then the jury could have rejected defense counsel's argument while entertaining reasonable doubt about whether appellant acted under duress. (AOB 261.) This sophistry should be rejected. The jury would have evaluated the

(flimsy) evidence of duress in a common-sense manner, in accordance with the arguments of the parties and the instructions.

Third, appellant states that defense counsel was forced to make his argument without concrete support in the instructions. (AOB 261-262.) Defense counsel's argument on coercion was thorough and clear; as explained above, he related the alleged coercion to the issues of intent to rob, premeditation, and deliberation. For this reason, this Court should also reject appellant's sub-argument that defense counsel was unprepared and his argument was disorganized. (AOB 262, fn. 80.) That counsel made a few minor mistakes during his closing argument did not detract from the clarity of his argument that the Hodgeses coerced appellant.

For all these reasons, appellant's argument must be rejected.

VII. THE TRIAL COURT PROPERLY ADMITTED THE CHALLENGED FIREARM EVIDENCE; ANY ERROR WAS HARMLESS

Appellant contends that the erroneous admission of evidence connecting him to firearms not used in the charged offenses was an abuse of discretion and violated his right to due process. (AOB 264-284.)

This contention has been forfeited and must be rejected. The trial court did not abuse its discretion in permitting this evidence. The gun displayed to the KFC employees around Halloween may have been the murder weapon. Further, the evidence was probative of appellant's intent and tended to rebut the defense theory that appellant was forced to use the gun to kill McDade. Moreover, any error was harmless in light of the overwhelming independent evidence of guilt, the court's instruction on other-crimes evidence, and the prosecutor's limited use of the challenged firearm evidence.

A. Background

Shortly after Halloween 1991, appellant went to the KFC and displayed a gun to some of the employees. (16RT 6570, 6595-6596, 6614, 6617, 6722-6725.) Martinez was positive that the gun was a revolver. (16RT 6725, 6726.) Appellant's gun (Ex. T-18A) was also a revolver. (29CCT 8664.) At the time of trial (1994), Martinez recalled that it was a black gun with a brown handle. (16RT 6729.) Previously, however, Martinez told the police that the gun had a dark handle; appellant's gun (Ex. T-18A) also had a dark handle. (16RT 6772-6774; 29CCT 8664.)

Rodriquez also saw the gun; however, she did not get a good look at it and did not recall what it looked like. (16RT 6570, 6595-6596.) She was able to remember that it was a small handgun. (16RT 6596.) Rodriquez did not think that appellant's gun (Ex. T-18-A) was the gun she saw, but she was not sure. (16RT 6598-6599.)

In addition, Martinez had heard that appellant sold a shotgun. (16RT 6759-6760.)

During his interview with Detective Lee, appellant admitted that he had owned a .32 automatic; he claimed that this was the only gun he ever owned. (30CCT 8982, 8994.)

B. Appellant Has Forfeited This Claim

Appellant admits he did not object to evidence of the post-Halloween gun display or evidence that he sold a shotgun. (AOB 269.) Further, although appellant lodged an objection to the evidence that he had owned a .32 automatic, he did not object on the bases that he now asserts on appeal. In the trial court, defense counsel objected to references to the .32 automatic on the ground that it might ultimately lead to the admission of gang-related evidence (i.e., a photo of appellant and Akens holding guns and flashing gang signs). (23RT 8863-8866.) Accordingly, appellant has

forfeited his claim relating to the .32 automatic. Evidence Code section 353 provides that a defendant cannot obtain a reversal based on erroneously admitted evidence unless he raised the same ground in the trial court:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
>
> (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

(Evid. Code, § 353.)

In sum, appellant has forfeited all of Argument VII because he did not object to the admission of evidence of the post-Halloween gun display, or that he sold a shotgun, and he did not raise his current objections to the admission of evidence of the .32 automatic.

Appellant claims that his objection to the evidence of the .32 automatic was sufficient and that any objection to the evidence of the post-Halloween gun display or shotgun sale would have been futile. (AOB 269-270.) Appellant's objection to the evidence of the .32 automatic was insufficient under Evidence Code section 353. Moreover, the futility doctrine does not excuse appellant's failure to object to the other gun evidence. As this Court has stated: "We also reject the premise that the court's treatment of unrelated objections shows that all objections would have been futile." (*People v. Arias* (1996) 13 Cal.4th 92, 159-160.) For these reasons, all of appellant's Argument VII has been forfeited.

C. The Trial Court Did Not Abuse Its Discretion by Declining to Exclude The Evidence

Claims of error in admitting evidence are reviewed under the abuse of discretion standard. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113 (*Guerra*), overruled on other grounds.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*Ibid.*)

The trial court did not abuse its discretion in allowing evidence of the post-Halloween gun display because the gun that appellant possessed might have been the murder weapon. As noted, Martinez was positive that the gun was a revolver. (16RT 6725, 6726.) Appellant's gun (Ex. T-18A) was also a revolver. (29CCT 8664.) At trial (1994), Martinez recalled that it was a black gun with a brown handle. (16RT 6729.) But previously Martinez told law enforcement that the gun had a dark handle; appellant's gun (Ex. T-18A) also had a dark handle. (16RT 6772-6774; 29CCT 8664.) There were significant similarities between Martinez's description of the gun and the murder weapon (Ex. T-18A). Thus, on balance, Martinez's testimony supports the conclusion that the gun appellant displayed around Halloween might have been the murder weapon. The jury was entitled to conclude that any differences between Martinez's description and appellant's gun were due to the passage of time. Any differences go to weight, not admissibility.

Rodriquez's testimony did not preclude the conclusion that the gun appellant displayed around Halloween may have been the murder weapon. Rodriquez saw the gun; however, she did not get a good look at it and did not remember what it looked like. (16RT 6570, 6595-6596.) But she did recall that it was a small handgun. (16RT 6596.) Rodriquez did not think that appellant's gun (Ex. T-18A) was the gun she saw, but she was not sure. (16RT 6598-6599.) The jury was entitled to conclude that Rodriquez's

failure to identify Ex. T-18A as the weapon she saw was due to her brief viewing of the gun and her fading memory. Any differences between Rodriguez's memory of the gun and appellant's gun go to weight not admissibility.

This Court has said that there is no error in admitting evidence that the gun the defendant possessed on another occasion might have been the murder weapon. (*People v. Cox* (2003) 30 Cal.4th 916, 955-957 [although prosecutor argued victims had been stabbed, victims might also have been shot; further, gun might have been used to kidnap victims before murders]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052 [evidence did not merely show that defendant was a person who possesses guns, but showed he possessed a gun that might have been the murder weapon].) Accordingly, it was proper to admit evidence that appellant showed a gun to KFC employees around Halloween that might have been the murder weapon.

Appellant cites *People v. Riser* (1956) 47 Cal.2d 566, 577 (*Riser*), in arguing that evidence connecting the defendant to a weapon that could not have been used in the charged crimes is irrelevant and can be prejudicial. (AOB 270-272.) (*Riser* has been overruled on other grounds in several cases.) Relying on *Riser*, appellant asserts that the challenged firearm evidence was bad-character evidence. (AOB 270-274.)

In *People v. Smith* (2003) 30 Cal.4th 581, 613-614, this Court clarified *Riser*, stating that weapons not used in the crime may still be relevant. For example, they may be relevant to the defendant's state of mind when he shot the victim. (*Ibid.*) In the present case, appellant's post-Halloween display of the weapon to the KFC employees supports the inference that he was thinking about an armed robbery of the KFC. Of course, other explanations are possible (e.g., an act of bravado). But one reasonable inference is that he was thinking about an armed robbery of the restaurant. For this reason the evidence was relevant and probative.

There is a further reason why the evidence that appellant possessed other firearms on other occasions was relevant to and probative of his state of mind at the time of the robbery-murder. Appellant contends that he did not approach McDade with a gun. Instead, one or both of the Hodges brothers gave him a gun, quite possibly at the crime scene, when they ordered him to kill McDade. (AOB 279.) Appellant argues that he had an innocent (or at least partially innocent) state of mind when he approached McDade. Appellant has offered an "innocent" (or partially "innocent") explanation for his possession of the murder weapon: that the Hodgeses forced the weapon on him before forcing him to shoot McDade.

That appellant possessed other weapons on other occasions tends to negate appellant's innocent explanation for his possession of the gun at the time of the murder. In a different but analogous context, this Court has stated:

> "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act. . . ." (2 Wigmore, *supra*, (Chadbourn rev. ed. 1979) § 302, p. 241.)

(*People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds.)

Likewise, in the present case, appellant's possession of other weapons on other occasions tends to negate the defense theory that he was a naïve, hapless pawn of the Hodges brothers.

Further, respondent submits that the firearm evidence was admissible under Evidence Code section 1101, subdivision (b). Evidence Code section 1101, subdivision (a) sets forth a general rule prohibiting evidence of criminal propensity. Evidence Code section 1101, subdivision (b) provides exceptions to this rule: e.g., intent.

In the present case, the firearm evidence was admissible to show intent. Respondent does not claim that appellant harbored the same intent on each of these occasions of gun possession. Instead, the other instances of gun possession tend to negate the defense theory that appellant had an innocent state of mind of the night of the robbery-murder.[9]

Moreover, this Court has stated that the general test for admissibility is whether the evidence tends to establish a material fact for the People or overcome a material fact for the defense. If it does, it is admissible, even if not similar:

> 'The general tests of the admissibility of evidence in a criminal case are: . . . does it tend logically, naturally, and by reasonable inference to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not.'

(*People v. Peete* (1946) 28 Cal.2d 306, 315; see also *People v. Enos* (1973) 34 Cal.App.3d 25, 34.)

The principle recited above supports the admissibility of the evidence that appellant possessed firearms on other occasions.

For all of the foregoing reasons, the challenged firearm evidence was probative; and, as explained in section D, *post*, it was not prejudicial.

---

[9] Thus, it is not important that *Ewoldt* states: "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant probably harbor[ed] the same intent in each instance. [Citations.]" (*People v. Ewoldt*, *supra,* 7 Cal.4th at p. 402, internal quotation marks omitted.) For the reasons above, this general rule does not apply in this case. Further, as explained in the text, respondent submits that the challenged firearm evidence is not impermissible character evidence.

Accordingly, the trial court did not abuse its discretion under Evidence Code section 352 by permitting the evidence.[10]

For the same reasons, this Court should reject appellant's claim that the evidence was collateral impeachment. (AOB 280-283.) Appellant relies heavily on *People v. Lavergne* (1971) 4 Cal.3d 735 (*Lavergne*) (AOB 281-282) but that case is distinguishable. *Lavergne* involved a robbery with multiple perpetrators; one co-perpetrator denied stealing the car used in the robbery; the defense tried to impeach the co-perpetrator with evidence that he stole the car. (*Lavergne, supra*, at pp. 738-739, 741.) The trial court sustained a prosecution objection to this impeachment and this Court upheld the trial court's exercise of discretion. (*Id.* at pp. 742-744.)

Thus, *Lavergne* is distinguishable because this Court was merely upholding a trial court's exercise of discretion. Further, some of the reasons this Court cited are not applicable in the present case. For example, a witness may have a strong reason to lie about the collateral fact but no motive to lie in his other testimony. (*Lavergne, supra.* at p. 743.) This factor is not applicable: the KFC employees had no motive to lie about the post-Halloween gun display or the evidence that appellant sold a shotgun. Similarly, it was not a prosecution witness, but appellant himself who referred to the .32 automatic; his motive to lie about this "collateral" fact was no greater than his motive to lie about anything else. Moreover, in *Lavergne*, it appeared that the defendant, on cross-examination, purposely elicited the testimony about the car for the purpose of impeaching the

---

[10] 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.

witness. (*Ibid.*) In the present case, the KFC employees' testimony was not elicited for purposes of impeaching them. And appellant's remark about his .32 automatic was his own self-serving statement.

For all these reasons, the trial court did not abuse its discretion in permitting evidence of the post-Halloween gun display and the other firearm-related evidence.

D. Appellant Was Not Prejudiced

Respondent submits that the *Watson* harmless-error standard is applicable (reasonable probability of a different result). As this Court has stated:

> But the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.] Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error.

(*People v. Partida* (2005) 37 Cal.4th 428, 439, italics in original.)

Any error was harmless under any standard. There was overwhelming evidence of appellant's guilt (i.e., his culpable mental state) apart from evidence that he had previously possessed firearms. (Argument I.E.2., *ante*.)

Moreover, the trial court instructed the jury that evidence of appellant's uncharged misconduct could not be considered as proof of his criminal disposition. (CALJIC No. 2.50.) The jury was instructed that the evidence, if believed, could not be considered to prove that appellant was a person of bad character or that he had a disposition to commit crimes.

(2CT 580; 31RT 11110.) The evidence could be considered only for limited purposes (e.g., intent). (2CT 580-581; 31RT 11110.)[11]

It is worth noting that the United States Supreme Court cited similar language in rejecting a claim that an instruction on prior-injury evidence constituted a "propensity" instruction:

> [T]he trial court guarded against possible misuse of the instruction by specifically advising the jury that the "[prior injury] evidence, if believed, was not received, and may not be considered by you[,] to prove that [McGuire] is a person of bad character or that he has a disposition to commit crimes." [Citation.] Especially in light of this limiting provision, we reject McGuire's claim that the instruction should be viewed as a propensity instruction.

(*Estelle v. McGuire* (1991) 502 U.S. 62, 75.)

Appellant claims that the trial court's instruction was ineffective and actually would have invited the impermissible inference that appellant was the type of person who illegally armed himself with firearms. (AOB 277.) Appellant cites the language that he "possessed the means that might have been useful or necessary for the commission of the crime charged." (2CT 581.) Appellant's argument is a rehash of his argument based on *Riser*, *supra*. Respondent submits that appellant's argument should be rejected for the reasons stated in the discussion of *Riser*: e.g., the evidence was probative of state of mind. Moreover, this Court should presume that the jury followed its instruction and did not consider the evidence as showing bad character.

Additionally, the prosecutor did not emphasize the challenged firearm evidence in his closing argument. The prosecutor's argument contained only a few brief references to the post-Halloween gun display. (31RT

---

[11] The instruction was couched in general language and did not specifically refer to gun possession.

11185, 11186; 32RT 11359.) The prosecutor's argument also contained an ambiguous reference to appellant possessing a gun before the robbery-murder. (31RT 11341-11342.) The prosecutor did not refer to the other, challenged firearm evidence (the shotgun sale and the .32 caliber gun).

For all these reasons, any error in admitting the disputed firearm evidence was non-prejudicial.

E. There Was No Due Process Violation

Appellant also claims that his due process rights were violated. (AOB 274-280.) This contention must be rejected. Evidence violates due process only if no permissible inferences can be drawn from it and it prevents a fair trial:

> Evidence introduced by the prosecution will often raise more than one inference, some permissible, some not; we must rely on the jury to sort them out in light of the court's instructions. [Footnote.] Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must "be of such quality as necessarily prevents a fair trial." [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose.

(*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.)

Here, as noted, the challenged firearm evidence permissibly supported an inference of intent to rob and one of the guns could have been the murder weapon. Moreover, the evidence permissibly tended to rebut the defense theory that appellant acted with a relatively "innocent" state of mind (i.e., he acted under duress). Further, for the reasons explained above, the disputed firearm evidence did not prevent a fair trial.

Appellant relies heavily on two Ninth Circuit cases which are non-binding and distinguishable. In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 (*McKinney*) the disputed evidence was more inflammatory and the case against the defendant was not as strong. In *McKinney*, the victim's

throat was slit; almost any type of knife could have been the murder weapon and the murder weapon was never identified. McKinney was proud of his knife collection, he sometimes carried a knife, and he used a knife to scratch "death is his" on a door. (*Id.* at pp. 1381-1382.) The evidence was emotionally charged and the prosecutor portrayed McKinney as a young man fascinated by knives and a commando lifestyle. The case against McKinney was purely circumstantial and there was another plausible suspect. (*Id.* at p. 1385.)

By contrast, in the present case it was undisputed that appellant shot McDade. The issue was his mental state. The evidence against appellant was overwhelming, even excluding the disputed firearm evidence. (Argument I.E.2., *ante.*)

The strongest evidence that appellant was the shooter was his own admission to police. Appellant's admissions also shed light on his mental state at the time of the crime and belie his claim that the Hodges brothers coerced him into killing McDade. Appellant told Littlejohn that he had shot and killed the KFC manager. Appellant said that he shot McDade because McDade had threatened him. This belies appellant's claim that the Hodgeses coerced him. Leisey's testimony also indicated that appellant was the shooter and shed some light on appellant's mental state at the time of the crime. Based on Leisey's testimony, it is clear that appellant helped to plan the robbery. Further, although Terry "coach[ed]" appellant to kill McDade, he did not coerce appellant to do so. Likewise, Banks's testimony supported the conclusion that appellant was the shooter and was probative of appellant's mental state at the time of the robbery-murder. Banks's testimony and/or statements indicated that appellant had a critical role in planning the robbery. Further, although John instructed appellant to kill McDade, there is no evidence that he coerced appellant to do so. Schuyler's testimony supported the inference that appellant was the shooter

and it contradicted the theory that appellant merely waited in the car while someone else robbed and shot McDade. Eversole and Brogdon's statements and testimony also supported the conclusion that appellant's gun and bullets were used in the crime. (Argument I.E.2., *ante.*)

There was further evidence of appellant's culpable mental state. On Halloween 1991, appellant told Martinez that he should watch his back when taking the deposit to the bank because something could happen; this supports the inference that he was thinking about taking the deposit. In November and December of 1991, appellant told a friend (Kim Scott) that he planned to rob the KFC. (Argument I.E.2., *ante.*)

Moreover, the fact that appellant approached McDade at closing time, after 10:00 p.m., when he knew McDade would have the bank bag and there would be few people around, strongly supports the inference that appellant intended to rob McDade (as opposed to asking to be rehired). Appellant asked Littlejohn to return his gun because he needed it to get money. This supports the inference that appellant had previously used the gun in a robbery. Appellant's phone calls from the jail also show that he was willing to manufacture evidence – which shows consciousness of guilt. Thus, the evidence was overwhelming that appellant was the shooter and that he had the intent to rob, the intent to kill, and acted with premeditation. (Argument I.E.2., *ante.*) Additionally, the challenged firearm evidence was not inflammatory.

In *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, the police discovered a knife near the victim's body; the prosecutor argued that this was the murder weapon. (*Id.* at p. 886.) The prosecutor admitted two unused sets of knives seized from Alcala's home – a home he shared with others. The same company made the unused knives and the knife found at the murder scene. However, the murder weapon was not part of the unused knife sets. (*Ibid.*) The Ninth Circuit concluded that there were no

permissible inferences based on this evidence. That the same company made the murder weapon and the unused knife sets was not probative of anything. (*Id.* at p. 887.) Further, Alcala was prejudiced: that the murder weapon and the knife sets were made by the same company fit into the prosecution's theme of "strange coincidences." (*Id.* at p. 888.) Moreover, the perpetrator's identity was at issue in *Alcala*. (*Id.* at pp. 866-868.)

By contrast, in the present case, the firearm evidence was probative of appellant's lack of an "innocent" explanation for the shooting. In addition, there was no dispute that appellant was the shooter. Further, for the reasons explained above, there was no prejudice (overwhelming evidence of guilt, the trial court's instruction on other-crimes evidence, and the prosecutor's minimal use of the challenged firearm evidence in his argument).

Thus, for the foregoing reasons, appellant's argument must be rejected.

VIII. THE INTRODUCTION OF THE PURPORTED "GANG EVIDENCE" WAS PROPER AND NOT PREJUDICIAL

Appellant contends that gang-related evidence was introduced and that this was reversible error. (AOB 285-308.) Part of this argument has been forfeited and it must be rejected on the merits.

Appellant's claim concerns trivial examples of "gang evidence" (1) appellant's nicknames (Scrooge and "Baby Hoove"); (2) appellant's associate (Brandon) was a "home[y]" and "road dog", (3) appellant's friend Roosevelt Coleman was a Crip; and (4) Schuyler's testimony that appellant was "Crippin" and a Crip based on how he was dressed. (AOB 285.) These examples of "gang evidence" are too inconsequential to warrant reversal.

A. Background

Before the trial, defense counsel moved to exclude any mention of gang involvement by any of the defendants, especially appellant. (5RT

2116.) The prosecutor stated that he wanted to impeach appellant with his gang involvement. (5RT 2116.) The court denied the prosecutor's motion to permit evidence concerning appellant's gang affiliation as reflecting on his credibility and moral turpitude. (5RT 2118.)

Later, the prosecutor stated his understanding that – regarding his opening statement – he could not bring in anything related to appellant's gang affiliation. (14RT 6095.) Subsequently, the court stated its view that evidence of gang membership was not relevant. (15RT 6235.) And the court ordered that the opening statements could not refer to gang affiliation. (15RT 6239.) At a later point, in response to a question by Terry Hodges's attorney, the court confirmed that there would be no mention of gang affiliation in the case at all. (15RT 6242-6243.)

In his opening statement, the prosecutor said that appellant's nicknames were "Scrooge" and "Baby Hoove," and that Baby Hoove was a street name. The prosecutor's references to appellant's nicknames occurred when he was describing Martinez's expected testimony and appellant's statement to Detective Lee. (15RT 6310, 6347.) Appellant did not object to these references at the time.

During the prosecution's case-in-chief, the prosecutor asked Martinez if he knew appellant's nicknames. (16RT 6721.) Defense counsel objected on relevance grounds and the court initially sustained the objection, but then overruled it after confirming that the prosecutor had stated the purpose of the evidence in his opening statement. (16RT 6722.) Martinez testified that appellant's nicknames were Baby Hoove or Scrooge. (16RT 6722.)

Later, defense counsel noted that the prosecutor's opening statement and Martinez's testimony had referred to appellant's nicknames (Baby Hoove and Scrooge) and argued that "street names" implied gangs, which was very prejudicial. (16RT 6792-6793.) The court reiterated its ruling that gang evidence would not be allowed because its relevance had not been

shown. (16RT 6793-6794.) During this discussion, the court stated that Martinez could be questioned about his gang affiliation if appellant testified that he tried to protect Martinez because of his gang ties. (16RT 6793-6795, 6797-6798.) Again, in response to a question from Terry Hodges's attorney, the court confirmed there would be no reference to gangs, absent a different order by the court. (17RT 6822-6823.)

Subsequently, during Schuyler's cross-examination, Schuyler requested a sidebar. (18RT 7110, 7121.) After the jury was excused, Schulyer explained that he had seen appellant wearing his pants low – a gang style of dressing. (18RT 7129-7131.) At this point, Schuyler was not admonished about gang evidence. The jury returned and Schuyler testified that on the day of the murder appellant was wearing his pants low – he was "crippin." (18RT 7170.) According to Schuyler, this was how one identified a Crip. (18RT 7170-7171.)

During a recess, defense counsel (and co-defendants' counsel) requested that the jury be admonished regarding Schuyler's use of the term "crippin.'" (18RT 7194-7195.) Defense counsel suggested that the jury be cautioned not to view the clothing as showing gang involvement. (18RT 7195-7196.) The court declined to give a limiting instruction at that point, but would consider limiting instructions at the end of the case. (18RT 7198-7199.) The court ruled that Schuyler could describe a person's clothing but should not volunteer opinions about whether this reflected gang membership. (18RT 7199.) Schuyler complied with this order – although he said that the low-hanging pants had meaning to him. (18RT 7217-7218, 7220.)

Later, during a break in Detective Lee's testimony, in anticipation of the playing of a video of Lee's interview of appellant, defense counsel objected to the references to "Scrooge," "Baby Hoove," "street name[s],"

"homies," and "road dog" as being gang-related. (23RT 8867, 8868.) The court overruled these objections. (*Ibid.*)

The jury saw a video of appellant's interview with Lee and received a transcript. In the interview, appellant admitted having the names Scrooge and Baby Hoove and that Baby Hoove was a street name. (30CCT 8974.) Lee referred to appellant's associate (Brandon) as a "home[y]," and appellant called him his "road dog." (30CCT 8988.) Appellant also said that his friend Roosevelt was a Crip and had the street name of Babysnake. (31CCT 9023, 9030.)

Appellant acknowledges that limiting instructions on gang evidence were not discussed at the instructional conferences. (AOB 293 & fn. 84.)

B. Part Of Appellant's Argument Has Been Forfeited

Part of appellant's argument has been forfeited due to lack of objection in the trial court. Appellant did not object to the evidence that his friend Roosevelt was a Crip and had a street name. Accordingly, these claims have been forfeited. (Evid. Code, § 353; *People v. Saunders, supra*, 5 Cal.4th at pp. 589-590.) Moreover, appellant's claim regarding Schuyler's testimony has also been forfeited. Appellant did not actually object to Schuyler's testimony and did not move to strike it. Thus, appellant's argument concerning Schuyler's testimony has been forfeited. (Evid. Code, § 353.) Appellant's request for a curative instruction – made during the evidentiary portion – was insufficient under Evidence Code section 353. Further, appellant failed to renew his request for a limiting instruction at the end of the evidentiary portion of his trial (i.e., at the instructional conferences).

Appellant contends that his pretrial motion in limine was sufficient to preserve the gang-evidence issues related to Roosevelt and Schuyler. (AOB 297.) Respondent disagrees. "In limine rulings are not binding . . ." (*People v. Mattson* (1990) 50 Cal.3d 826, 850, superseded by statute on

other grounds) and are "subject to reconsideration upon full information at trial." (*People v. Turner* (1990) 50 Cal.3d 668, 708; *People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3 [party should renew in limine motion during trial because "until the evidence is actually offered, and the court is aware of its relevance in context . . . , the court cannot intelligently rule on admissibility"]; *People v. Yarbrough* (1991) 227 Cal.App.3d 1650, 1655 ["in limine rulings are not binding because the trial court has the power to reconsider, modify or set aside its order at any time prior to the submission of the cause"].) Consequently, appellant's in limine motion did not preserve these issues.

Appellant also asserts that it would have been futile to request any curative conduct by the court as to the Roosevelt evidence. (AOB 298-299.) This contention is purely speculative and rests upon an inapt comparison of the Roosevelt evidence with Schuyler's testimony. It is impossible to know how the court would have ruled on Roosevelt's gang affiliation based on Schuyler's vague testimony.

Accordingly, parts of appellant's argument have been forfeited. Specifically, that Roosevelt was a Crip and had a street name and Schuyler's testimony about appellant dressing like a Crip.

C. The Trial Court Did Not Abuse Its Discretion in Permitting the "Gang" Evidence; Alternatively, Any Error Was Harmless

As noted, claims of error in admitting evidence are reviewed under the abuse of discretion standard. (*Guerra, supra*, 37 Cal.4th at p. 1113.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*Ibid.*)

This standard applies to the admission of gang evidence:

> [T]he decision on whether evidence, including gang evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. [Citation.] "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" [Citations.] It is appellant's burden on appeal to establish an abuse of discretion and prejudice. [Citation.]

(*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225 (*Albarran*), emphasis in original.)

Further, respondent submits that any error in allowing the "gang" evidence was harmless. The applicable standard is *Watson*'s reasonable-probability test. (See e.g., *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.) But the purported error was non-prejudicial under any standard.

In the first place, respondent notes that the identity of the shooter was not an issue in this case. Appellant shot McDade; the issue was whether appellant had the intent to rob and acted with premeditation and deliberation. Because of the limited issue at trial, the nicknames and possible gang affiliations were not prejudicial.

There are more reasons why the evidence of appellant's nicknames (Scrooge and Baby Hoove) was not prejudicial. Scrooge appears to be an innocuous nickname without any obvious gang connotations. There is no evidence in the record concerning the meaning of "Baby Hoove." The nickname does not have a gang connotation that would be clear to a lay juror (i.e., a person not in law enforcement). Likewise, the term "street name" does not necessarily imply gang affiliation. That a person is known by a certain name out in "the streets" does not necessarily mean that person is a gang member. Various types of people hang out on "the streets" but are not gang members. Moreover, "street name" may be a synonym for nickname, like "street clothes" is a synonym for ordinary clothes, or the

"man in the street" is a synonym for an average person. The jury would not necessarily have considered appellant's nicknames to be criminal aliases: many non-criminals have nicknames. Further, it is speculation to suggest that the jurors would have inferred that appellant was a gang member based on his nicknames, youth, and socio-economic status. Finally, although appellant's nicknames had little probative value, they were also non-prejudicial. Accordingly, appellant's contrary arguments must be rejected. (AOB 302-304.)

For similar reasons, the evidence that Brandon was appellant's "homie" and "road dog" was likewise non-prejudicial. In the context of the interview, "homie" apparently referred to a friend or someone from the same neighborhood or hometown – not necessarily a gang member. Likewise, in the context of the interview, "road dog" apparently referred to a friend or traveling companion. (30 CCT 8988.) Appellant pulls definitions from an obscure website, but even these definitions do not state that "homie" and "road dog" are exclusively used to refer to gang members. For example, "homie" can mean from the same neighborhood; "road dog" can mean homie, partner, or close friend. (AOB 304.) Appellant's reference to Brandon as his road dog appears to mean that Brandon is a friend – not necessarily a fellow gang member. There is no evidence that jurors were schooled in the meaning of "homie" or "road dog."

Appellant claims that no legitimate purpose was served by allowing his statement to Lee that Roosevelt was a Crip nicknamed Babysnake. Further, appellant argues that jurors would have surmised that because appellant was closely associated with a Crip, appellant was also a Crip. (AOB 305.) It is very speculative to suggest that because appellant had a friend who was a Crip, jurors would have inferred that appellant was a Crip. Moreover, even assuming arguendo that some jurors might have inferred that appellant was associated with the Crips, this evidence was still

non-prejudicial. This was not a gang-related case. There is no reasonable probability that, had the evidence of Roosevelt's gang membership been excluded, appellant would have secured a more favorable result.

Appellant also asserts that the trial court erred in denying his request for a curative instruction regarding Schuyler's testimony. (AOB 305-307.) Any error was non-prejudicial. It is not reasonably probable that the jury accorded great weight to Schuyler's lay opinion that appellant was dressed like a Crip. Certainly, it is not reasonably probable that appellant would have obtained a more favorable result if the trial court had given the admonition that appellant requested.

There are additional reasons for concluding that the "gang evidence" was non-prejudicial. For example, there was overwhelming evidence of appellant's guilt (including his culpable mental state) that was independent of the "gang evidence." (Argument I.E.2., *ante*.)

Appellant contends that evidence of a defendant's gang ties invites jurors to reason that the defendant is prone to criminal behavior and, therefore, committed the charged offenses. (AOB 300.) Appellant cites *People v. Williams* (2009) 170 Cal.App.4th 587, but *Williams* is distinguishable because that case involved a large amount of gang evidence: numerous gang-related incidents and gang expert testimony. (*Id.* at pp. 595, 598-602.) Appellant cites *People v. Cardenas* (1982) 31 Cal.3d 897, 903, 904-906, but that case is also distinguishable because it involved significantly more extensive gang evidence than the "gang evidence" presented in this case.

Appellant argues that gang evidence is highly inflammatory and has been condemned if only tangentially relevant. (AOB 301.) Appellant cites *People v. Cox* (1991) 53 Cal.3d 618, which stated that: "When offered by the prosecution, we have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly inflammatory

impact." (*Id.* at p. 660.) (*Cox* has been disapproved and superseded by statute on other grounds.) Technically, this statement in *Cox* was dicta since *Cox* involved *defense counsel's* elicitation of gang evidence. (*Id.* at pp. 660-661.) It is not clear that appellant is attempting to analogize to *Cox*, but if he is, *Cox* is easily distinguishable. In *Cox*, defense counsel elicited testimony of gang affiliation, which was more extensive than the "gang" testimony in the present case. (*Ibid.*)

Appellant also cites *People v. Hernandez* (2004) 33 Cal.4th 1040, which states: "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*Id.* at p. 1049, emphasis in original.) Technically, this statement was dicta because *Hernandez* was a case which did involve a gang enhancement. (*Id.* at pp. 1047-1048.) Further, as to cases not involving a gang enhancement, *Hernandez* cites only *Cardenas*, which has been distinguished. (*Id.* at p. 1049.)

Next, appellant cites *People v. Albarran, supra*, 149 Cal.App.4th 214, but *Albarran* is readily distinguishable. In *Albarran*, the prosecution presented a panoply of incriminating gang evidence. This evidence included threats to kill police officers, descriptions of crimes of other gang members, and references to the Mexican Mafia. (*Id.* at pp. 220-221, 227-228, 230-231.) The appellate court found prejudice under the federal constitutional standard (not the state standard) and held that the trial court should have granted Albarran's new trial motion. (*Id.* at pp. 230-232.) Thus, the gang evidence in *Albarran* was much more extensive and inflammatory than the "gang evidence" in the present case. Further, because the "gang evidence" in this case was not nearly as extensive and inflammatory as it was in *Albarran*, this Court should apply the usual, state-law harmless error test. Moreover, the question before this Court is

whether to reverse the judgment, not merely whether the trial court erred in denying a new trial motion.

Finally, appellant cites *People v. Bojorquez, supra*, 104 Cal.App.4th 335. But *Bojorquez* is distinguishable because the gang testimony was much more extensive and inflammatory than the "gang evidence" in this case. In *Bojorquez*, a detective testified that, inter alia, the criminal activity of gangs included robbery (the charged offense) and that gang members who snitch on each other may be killed. (*Id.* at pp. 341-342, 343, 344.)

For all of the foregoing reasons, appellant has not shown abuse of discretion or prejudice. Appellant's argument must fail.

IX. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING APPELLANT'S STATEMENTS TO LITTLEJOHN THAT HE WANTED HIS GUN SO HE COULD OBTAIN MONEY; ANY ERROR WAS HARMLESS

Appellant claims that his statements to Littlejohn that he intended to commit robbery in the future should have been excluded as more prejudicial than probative. (AOB 309-320.) Part of this argument has been forfeited and it must be rejected. The trial court did not abuse its discretion by admitting this evidence and any error was non-prejudicial.

A. Background

After the start of the evidentiary portion (but before Littlejohn's testimony), defense counsel moved to prohibit Littlejohn from testifying that appellant wanted his gun back to commit more robberies or to make more money. (16RT 6787-6788.) Defense counsel argued that any such testimony would not be "relevant" under Evidence Code section 1101 because it was a statement of future intent. (16RT 6788.) Defense counsel also argued that the evidence was prejudicial. (16RT 6790.)

The prosecutor noted that under Evidence Code section 1101, subdivision (b), uncharged misconduct is admissible to show plan, motive,

intent, etc. (16RT 6788-6789.) That appellant wanted his gun back within days of committing the robbery-murder, to commit more robberies, was probative of what he used the gun for on the date of the robbery-murder (i.e., that he used the gun to commit robbery). (16RT 6789.) John Hodges's attorney argued that appellant's statement that he wanted the gun back to do more robberies omitted reference to the Hodgeses. Thus, it was relevant to show appellant's state of mind (he was on a crime spree) and it tended to show that appellant was acting alone. (16RT 6790.)

The court denied appellant's motion and stated its agreement with John Hodges's attorney and to some extent the prosecutor. (16RT 6791.) Although the court's comments were not completely clear, the court appeared to say that appellant's statements were relevant to motive, identity, and other issues under Evidence Code section 1101, subdivision (b). (16RT 6791.) (The court initially said that section 1101, subdivision (b) did not apply but then explained that it did apply to show motive, identity, etc.) Further, the statements were arguably admissions: saying he wanted the gun for more robberies implied that he committed an earlier robbery. (16RT 6791.) Moreover, the statements were relevant because they arguably showed consciousness of guilt. (16RT 6791.)

Later, just before Littlejohn's testimony, defense counsel renewed his motion. (28RT 10372-10373.) Defense counsel conceded that the statements were probably relevant to the intent for the robbery; however, counsel argued that the statements were prejudicial under Evidence Code section 352. (28RT 10373; see also 28RT 10377.) The court affirmed its prior ruling. (28RT 10374, 10377.) The court reasoned that: the statements were relevant to appellant's state of mind; probative of his robbery purpose; that appellant was arguably in flight when he made the statements; and that the probative value outweighed the arguable prejudice. (28RT 10374-10375.)

As noted in the Statement of Facts, the jury saw a video of Littlejohn's interview with police. (29RT 10499-10501; 31CCT 9253-9292.) In Littlejohn's interview she said that appellant had requested that she return his gun so that he could get money. (31CCT 9273, 9285.) Littlejohn refused to give the gun to appellant or another man (James Vale, a.k.a. "Doc") because she was afraid they would use it to commit a murder. (31CCT 9258, 28RT 10391 [identity of Doc]; 31CCT 9265, 9285.)

B. Parts of Appellant's Argument Have Been Forfeited

Portions of appellant's argument have been forfeited by lack of trial court objection. (Evid. Code, § 353; *People v. Saunders, supra*, 5 Cal.4th at pp. 589-590.) Specifically, the following sub-arguments have been forfeited: Littlejohn's statements were cumulative of other evidence on this point (AOB 316); the prejudice was exacerbated by Littlejohn's interpretation (she feared that the gun would be used to commit murder) (AOB 317); Littlejohn's comments played on racial fears (AOB 317-318); and the potential prejudice was heightened because of gang connotations. (AOB 318.)

C. The Trial Court Did Not Abuse Its Discretion

Again, claims of error in admitting evidence are reviewed under the abuse of discretion standard. (*Guerra, supra*, 37 Cal.4th at p. 1113.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*Ibid.*)

Littlejohn's statements relating appellant's request for the gun are analogous to statements regarding present state of mind which shed light on a former state of mind. Usually, where a former mental state is at issue, declarations regarding a present mental state, which provide insight on the

former mental state, are admissible. (*People v. Cruz* (1968) 264 Cal.App.2d 350, 357 (*Cruz*).)

As an example of a present mental state bearing on a former mental state, *Cruz* noted expressions of grief or sorrow by the defendant over the victim's death which would indicate that earlier the defendant did not want her dead. (*Cruz, supra*, 264 Cal.App.2d at p. 357.)

Likewise, in the present case, Littlejohn's statement that appellant requested she return his gun so he could get money could be construed as reflecting a present intent to commit robberies. This in turn supports the inference that appellant formerly had the mental state of intent to rob.

Further, this Court has explained why declarations are admissible to prove state of mind even though they are made before or after the relevant mental state. "'[U]nder certain circumstances declarations are admissible to prove a state of mind at a particular time although uttered before or after that time, apparently on the theory that under these particular circumstances '(t)he stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current.'" (*People v. Hamilton* (1961) 55 Cal.2d 881, 894, overruled and superseded by statute on other grounds.) Certainly, this principle applies here, especially because appellant made his statements to Littlejohn shortly after the robbery-murder.

Further, evidence of a present mental state can be circumstantial evidence of a former mental state. One court explained this in the context of the hearsay rule:

> [A] statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind.

(*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.)

Likewise, in the present case, appellant's present mental state was circumstantial evidence of his former mental state. That is, appellant's desire for the return of his gun in order to get money (commit robbery) was circumstantial evidence of his previous intent to rob McDade.

"[E]xtrajudicial statements which lend credibility to an asserted state of mind are relevant, competent evidence." (*People v. Duran* (1976) 16 Cal.3d 282, 295.) Appellant's extrajudicial statements to Littlejohn lent credibility to the argument that he had the intent to rob McDade.

All of these factors show not only that appellant's statements to Littlejohn were relevant, but that they were highly probative of his mental state at the time of the robbery-murder.

Appellant cites *People v. Karis* (1988) 46 Cal.3d 612 (*Karis*) (AOB 312), but *Karis* actually favors respondent. In *Karis*, the defendant made a statement of future intent (to eliminate witnesses) which involved circumstances similar to those which preceded the murder. (*Karis, supra*, at pp. 634, 637-638.) This Court held that the statement had great probative value as evidence of identity, motive, and mental state. (*Id.* at pp. 637-638.) This Court also said that "prejudice" within the meaning of Evidence Code section 352 refers to evidence which evokes an emotional bias against the defendant. (*Id.* at p. 638.)

Likewise, in the present case, appellant's statements to Littlejohn (reflecting intent to rob) were probative of his mental state at the time of the robbery-murder. Further, appellant's statements to Littlejohn were not "prejudicial" within the meaning of Evidence Code section 352: they did not evoke an emotional bias against appellant.

Appellant also argues that his intent to commit future robberies was only hypothetical, and this diminishes the statements' probative value. (AOB 314.) This argument misses the mark. Appellant's statements that

he intended to use the gun to get money (commit robberies) supports the inference that he had – in the recent past – used the gun to rob McDade. It does not matter whether appellant actually would have committed any future robberies (i.e., whether appellant would have formed the intent to rob while taking property from a specific victim at a future time). For similar reasons, it is not important whether appellant's statements may have been inflated by bravado or cheap talk. (AOB 314-315.)

Appellant further contends that once he was wanted for the robbery-murder he had to either turn himself in or live like an outlaw. Consequently, appellant's intent to rob after these circumstances arose was not necessarily probative of his earlier intent. (AOB 315.) This inventive argument should be rejected. As explained above, appellant's statements to Littlejohn were probative of his intent at the time of the robbery-murder. That appellant has now constructed a wildly speculative counter-argument does not diminish the probative value of the statements. Moreover, these arguments go to the weight of the evidence not its admissibility.

Next, appellant argues that his statements to Littlejohn were cumulative of other evidence of his intent to rob. (AOB 316.) As respondent has explained, there was very strong evidence of appellant's intent to rob – evidence independent of appellant's statements to Littlejohn. (Argument I.E.2., *ante*.) However, appellant's statements to Littlejohn were a significant piece of evidence against him. The statements at issue (about using the gun to commit future robberies) were not replicated by any other witness. Accordingly, the statements were not cumulative.

Additionally, appellant asserts that the statements invited jurors to see him as a dangerous person predisposed to criminal conduct. (AOB 316.) As explained above, the statements were legitimate circumstantial evidence of appellant's intent at the time of the robbery-murder. Further, the jury was instructed on the use of other-crimes evidence. (2CT 580-581; 31RT

11110.) Although the instruction was limited to evidence of other crimes actually committed, it had some tendency to blunt any inference of bad character from any type of other-crimes evidence.

Appellant complains that he was prejudiced by Littlejohn's fear that the gun would be used to commit murder. (AOB 317.) It is clear from the record that Littlejohn's fear was nothing more than that. Appellant's statements to Littlejohn did not include the statement that he was planning to kill anyone. The jurors would have understood that distinction. Accordingly, appellant was not prejudiced by Littlejohn's expression of fear.

Appellant also claims that Littlejohn's statements played on racial fears and increased the prejudice from the "gang evidence." (AOB 317-318.) Respondent has explained that the "gang evidence" was non-prejudicial. (Argument VIII, *ante*.) Appellant's statements to Littlejohn did not refer to a gang in any way. Thus, they did not increase the prejudicial effect of any "gang evidence."

Appellant's argument concerning racial fears is baseless. Appellant has not shown that any of his jurors were racially biased against him. (AOB 318.) Appellant does not claim on appeal that any of his jurors were unqualified to serve because of racial bias. This Court should presume that the jurors followed their instructions and decided the case based on the evidence and the law and not on racial bias.

Accordingly, for all these reasons, the trial court did not abuse its discretion under Evidence Code section 352.

D. Appellant Was Not Prejudiced

Respondent submits that the *Watson* harmless-error standard is applicable (reasonable probability of a different result). (*People v. Partida*, *supra*, 37 Cal.4th at p. 439.) Further, any error was harmless under any standard. To a large extent, respondent has already discussed the issue of

prejudice. The evidence was not prejudicial within the meaning of Evidence Code section 352 because it did not evoke an emotional bias against appellant. Respondent also notes that there was overwhelming evidence of appellant's guilt (including mental state) that was independent of his statements to Littlejohn about future gun use. (Argument I.E.2., *ante*.) Hence, appellant was not prejudiced and his argument should be rejected.

X. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING A PHOTO OF THE DECEASED VICTIM; ANY ERROR WAS HARMLESS

Appellant contends that the admission of an irrelevant and unduly gruesome photo of McDade (People's Ex. T-4) requires reversal. (AOB 321-330.) Part of this argument has been forfeited and it must be denied. Exhibit T-4 clearly displayed the powder burns to McDade's head and was therefore probative of intent to kill, premeditation, and lack of duress.

A. Background

Before the evidentiary portion of the trial, Terry Hodges moved to exclude photos of McDade's body on the grounds that they were irrelevant and unduly prejudicial. (2CCT 461-465; see also 29CCT 8643-8646 [Exs. T-1 to T-4: photos of decedent].) The People filed a brief in support of admission of photos of McDade. (2CT 437-442.) The court heard extensive arguments from the prosecutor and the Hodgeses. (15RT 6252-6262.) The prosecutor argued that Exhibit T-4, a close-up photo of the deceased victim at the crime scene (29CCT 8646), showed that the bullet wound was a very precise, near-contact wound, rebutting appellant's expected position that he was ordered to fire the shot and did so without looking at McDade. (15RT 6252-6253.) The Hodgeses argued that the photos were irrelevant, inflammatory, and lacked probative value, especially as to the Hodgeses who were not the shooter. (15RT 6259-

6262.) Appellant did not join in the Hodgeses' arguments. The court made a tentative ruling that Exhibits T-1 through T-3 had probative value outweighing their prejudicial effect. (15RT 6260.) The court also expressed doubts about the probative value of Exhibit T-4, but stated that if a witness needed Exhibit T-4, the court would reconsider. (15RT 6251-6254.) The court deferred final ruling on the admissibility of Exhibits T-1 through T-4. (15RT 6260, 6262.)

At trial, Officer Chapman (the first officer to arrive at the murder scene) testified that Exhibit T-4 was the best photo in terms of showing the powder burns on McDade's head. (19RT 7474.) All defendants objected to admission of Exhibit T-4; however, the court tentatively admitted T-4 into evidence. (19RT 7475, 7487-7488.) The court deferred publishing the photo to the jury. (19RT 7475-7476.)

Outside the jury's presence, the court and parties had a lengthy discussion about Exhibit T-4, after which the court admitted the exhibit. (19RT 7546-7556.) Appellant's counsel objected to the inflammatory nature of the photo (19RT 7547, 7555-7556) and the Hodgeses' counsel argued that it lacked probative value and was prejudicial. (19RT 7549, 7551, 7553.) The court stated that Exhibit T-4 showed McDade's powder burns more clearly than photos taken from more distant viewpoints; thus, its probative value outweighed the prejudice. (19RT 7546-7547.) The court noted that an execution-style shooting was relevant to premeditation and deliberation, the non-accidental nature of the shooting, and whether the shooting was in the course of a robbery. (19RT 7552-7553.)

The court did not allow publication of Ex. T-4, but allowed its use in argument. (23RT 8830; 29RT 10524-10525.) In closing argument, the prosecutor told the jury to look at the photographs which would show how precise the shot was. (31 RT 11200.) It does not appear that the jury used the photos during deliberations. (3CT 670, 672.)

B. The Trial Court Did Not Abuse Its Discretion in Admitting Exhibit T-4

Again, claims of error in admitting evidence are reviewed under the abuse of discretion standard. (*Guerra, supra*, 37 Cal.4th at p. 1113.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*Ibid.*)

Our Supreme Court has recently discussed the admission of allegedly gruesome photos in a murder case:

> "This court is often asked to rule on the propriety of the admission of allegedly gruesome photographs. [Citations.] At base, the applicable rule is simply one of relevance, and the trial court has broad discretion in determining such relevance. [Citation.] '"[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant"' [citation], and we rely on our trial courts to ensure that relevant, otherwise admissible evidence is not more prejudicial than probative (Evid. Code, § 352). A trial court's decision to admit photographs under Evidence Code section 352 will be upheld on appeal unless the prejudicial effect of such photographs clearly outweighs their probative value. [Citation.] Finally, prosecutors, it must be remembered, are not obliged to prove their case with evidence solely from live witnesses; the jury is entitled to see details of the victim's bodies to determine if the evidence supports the prosecution's theory of the case. [Citations.]" [Citation.]

(*People v. Lewis* (2009) 46 Cal.4th 1255, 1282 (*Lewis*).)

To determine whether the trial court abused its discretion, the reviewing court addresses two factors: (1) whether the photos were relevant, and (2) whether the trial court abused its discretion by finding that the probative value of each photo outweighed its prejudicial effect. (*Lewis, supra*, 46 Cal.4th at p. 1282.)

In the present case, the photograph (Ex. T-4) was relevant to the prosecution's case and had significant probative value. The first degree murder charges were tried under the theories of premeditation and felony murder. The photograph was pertinent because it showed the "nature and placement of the fatal wounds." (*People v. Loker* (2008) 44 Cal.4th 691, 704-705 (*Loker*), citing *People v. Pride* (1992) 3 Cal.4th 195, 243.) The photo supported the prosecution's theory of how the murder was committed. (*Loker, supra*, 44 Cal.4th at p. 705, citing *People v. Crittenden, supra,* 9 Cal.4th at pp. 132-133, impliedly overruled on other grounds.) Exhibit T-4, a close-up photo of McDade as he was found at the crime scene, clearly shows that this was an execution-style killing. (29CCT 8646.) From the photo, it is obvious that McDade was shot in the left temple and there are obvious powder burns supporting the conclusion that he was shot at close range. (29CCT 8646; see also 19RT 74737474; 23RT 8829; 27RT 9973-9974 [testimony re powder burns].) This supports the People's theory that the murder was premeditated, that it was a robbery-murder, and that it was intentional. This photo also tends to rebut the defense theory that appellant killed under duress from the Hodges brothers. The manner of killing suggests a cool, calculated decision to kill, and does not suggest one acting under the stress of duress. The photo tended to refute appellant's expected position that he was ordered to fire the shot and did so without looking at McDade. (15RT 6252-6253.)

Moreover, the photo illustrated the testimony of the pathologist and other witnesses (e.g., Officer Chapman). (*Loker, supra*, 44 Cal.4th at p. 705, citing *People v. Box* (2000) 23 Cal.4th 1153, 1199 (*Box)*, overruled on other grounds.) As noted in the Statement of Facts, the pathologist confirmed that McDade died from a single gunshot wound to the left temple. (27RT 9972-9973, 9984.) The gun was fired at close range – fewer than six inches from McDade's head. (27RT 9979-9980.)

Exhibit T-4 provides a significantly closer view of the decedent than Exhibit T-3. (29CCT 8645-8646.) In Exhibit T-4, the location of the gunshot wound is more obvious and the powder burns are much clearer. (29CCT 8646.) An autopsy photo (Ex. T-59B), shows the location of the gunshot wound but the powder burns are very faint. (31CCT 9248.) Accordingly, Exhibit T-4 has significant probative value and is not merely cumulative of Exhibits T-3 and T-59B. Appellant's claim that Exhibit T-4 was cumulative of other photos must be rejected. (AOB 326-327; *Box*, *supra*, 23 Cal.4th at p. 1199 [rejecting similar claim of cumulativeness].)

Further, the trial court did not abuse its discretion in finding that the probative value of Exhibit T-4 outweighed its prejudicial effect. The trial court's decision to admit the exhibit should be upheld because the prejudicial effect of the exhibit did not clearly outweigh the probative value. In light of the testimony concerning the condition of McDade's body at the crime scene and the pathologist's testimony, Exhibit T-4 was not so unduly gruesome as to impermissibly sway the jury. (19RT 7466-7468, 7472-7475, 7477; 23RT 8828-8829; 27RT 9972-9974; *Lewis, supra*, 46 Cal.4th at p. 1283; *People v. Smithey* (1999) 20 Cal.4th 936, 974.) For all these reasons, Exhibit T-4 was not of such a nature as to "overcome the jury's rationality." *(Lewis, supra*, at p. 1282.)

C. There Was No Prejudice

Respondent submits that the *Watson* harmless-error standard is applicable (reasonable probability of a different result). (*People v. Partida*, *supra*, 37 Cal.4th at p. 439.) In dealing with a claim that gruesome photos were prejudicial, our Supreme Court stated, "[t]he routine application of state evidentiary law does not implicate [a] defendant's constitutional rights." (*Lewis, supra*, 46 Cal.4th at p. 1284, internal quotation marks and citations omitted.) To a large extent, respondent has already discussed the issue of prejudice. Moreover, use of Exhibit T-4 was minimal. The court

did not allow publication of Exhibit T-4 (23RT 8830; 29RT 10524-10525.) And it does not appear that the jury used the photos during deliberations. (3CT 670, 672.) Respondent adds that there was overwhelming evidence of guilt independent of Exhibit T-4, including evidence of appellant's mental state. (Argument I.E.2., *ante*.) For all these reasons, there was no prejudice under any standard. Appellant's argument must be rejected.

XI. APPELLANT'S ABSENCE FROM PRETRIAL CONFERENCES WHICH INCLUDED DISCUSSIONS OF WHETHER HE WOULD TESTIFY AND THE SUBSTANCE OF HIS TESTIMONY WAS NOT REVERSIBLE ERROR

Appellant contends that his absence from proceedings pertaining to whether he would testify and the substance of his testimony constituted reversible error. (AOB 331- 342.) This contention is without merit. Among other reasons, the pretrial discussions involved questions of law and appellant's presence would not have contributed to the fairness of the proceedings.

A. Legal Standards

Although a defendant generally has a right to be personally present at trial, there are limitations upon this right. First, "'[u]nder the Sixth Amendment's confrontation clause, a criminal defendant does not have a right to be personally present at a particular proceeding unless his appearance is necessary to prevent "interference with [his] opportunity for effective cross-examination."' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1231 (*Cole*); see also *Kentucky v. Stincer* (1987) 482 U.S. 730, 739 ["the Confrontation Clause's functional purpose [is to] ensur[e] a defendant an opportunity for cross-examination"]; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1317 (*Castaneda*).)

Second, "'under the Fourteenth Amendment's due process clause, a criminal defendant does not have a right to be personally present at a

particular proceeding unless he finds himself at a "stage . . . that is critical to [the] outcome" and "his presence would contribute to the fairness of the procedure."' [Citations.]" (*Cole, supra*, 33 Cal.4th at p. 1231; see also *Kentucky v. Stincer, supra*, 482 U.S. at p. 745 [same]; *Castaneda, supra*, 51 Cal.4th at pp. 1317-1318.)

Likewise, under the California Constitution, a defendant has no right to be present at discussions that occur outside the jury's presence (whether in chambers or at the bench), regarding questions of law or other matters that do not have """"a reasonably substantial relation to the fullness of his opportunity to defend against the charges."""" (*Cole, supra*, 33 Cal.4th at p. 1231.) "Thus a defendant may ordinarily be excluded from conferences on questions of law, *even if those questions are critical to the outcome of the case*, because the defendant's presence would not contribute to the fairness of the proceeding. Examples include the exclusion of a defendant from a conference on the competency of child witnesses [citation], a conference on whether to remove a juror [citation], and a conference on jury instructions [citation]." (*People v. Perry* (2006) 38 Cal.4th 302, 312, italics added.) Moreover, a defendant's statutory right pursuant to sections 977 and 1043 to be personally present during certain proceedings does not apply to such conferences, even absent a waiver, where the defendant has no such right under the California Constitution. (*Cole, supra*, 33 Cal.4th at p. 1231; *People v. Bradford* (1997) 15 Cal.4th 1229, 1357.) Finally, the burden is on the defendant to demonstrate that his absence prejudiced the defense or denied him a fair trial. (*People v. Lucero* (2000) 23 Cal.4th 692, 716; *People v. Bradford, supra*, 15 Cal.4th at p. 1357; see also *People v. Jennings* (2010) 50 Cal.4th 616, 682.)

B. Appellant's Presence Was Unnecessary

Appellant's argument concerns several pretrial conferences (i.e., conferences before the People's opening statement).[12] These pretrial conferences involved questions of law. Appellant's presence did not impact his right to cross-examination, would not have contributed to the fairness of the proceeding, and the proceedings did not have a substantial relationship to appellant's opportunity to defend himself. Further, appellant was present at proceedings where his proposed testimony was discussed.

The April 18, 1994, pretrial conference was mostly in chambers. (2RT 1001, 1002, 1007-1008, 1054.) Appellant's attorney had no objection to proceeding without appellant. (2RT 1002.) The attorneys presented their theories of the case and noted issues they considered important. (E.g., 2RT 1009-1015 [prosecutor summarizes case]; 2RT 1015-1017 [Hodgeses' counsels' comments].) Appellant's attorney made various comments about the case. Among other things, appellant's attorney said that appellant was willing to testify for the People. (2RT 1019, 1021.) Appellant's counsel stated that appellant was the shooter but the Hodgeses forced him to kill. (2RT 1019-1020.) The trial court and the parties discussed the issue of appellant testifying, as well as a variety of other pretrial issues (e.g., settlement). (2RT 1022, 1055-1056.) This conference was a freewheeling discussion about a wide range of issues.

Later, on April 18, appellant was present when the court and parties discussed the possibility that he might testify during the People's case. (2RT 1059, 1061-1063.)

Likewise, the April 19, 1994, pretrial in-chambers conference was a wide-ranging discussion concerning a host of issues: e.g., settlement,

---

[12] These conferences occurred on April 18, April 19, May 17, July 6, and July 11. (AOB 334.)

Miranda, *Aranda*, and discovery. (2RT 1090-1092, 1097-1099, 1100-1103.) During this discussion, the trial court raised the possibility of conducting a conditional examination of appellant, which the parties considered. (2RT 1105-1111.) Later, the court decided against a conditional examination. (2RT 1186-1187.)

On May 3, 1994, with appellant present (4RT 1765), the court and parties agreed that if appellant testified in front of his jury and the Hodgeses' jury, then the *Aranda* issues would be moot. (4RT 1786.) Castro stated that he intended to make appellant available to the prosecutor, had told the prosecutor this a number of times, and repeated that statement to the court. (4RT 1787.) Castro said that he was interested in a full and fair examination of his client; even if he testified in the People's case. (4RT 1787.) Castro also noted that the prosecutor would have to redact his opening statement to protect himself. (4RT 1788.)

On May 9, in appellant's presence (4RT 1873), the court mentioned that appellant might testify in the People's case (4RT 1880), and the prosecutor expressed his belief that appellant would testify. (4RT 1888-1889.) Later, on May 9, in appellant's presence, Castro reiterated that appellant was willing to testify during the People's case-in-chief. (5RT 1915.)

On May 17, 1994, the court, the prosecutor, and appellant's counsel had a chambers conference concerning appellant's juror questionnaire. (6RT 2214.) During this conference, appellant's counsel agreed to leave in a question about the defendant not testifying. (6RT 2248-2249.)

On July 6, 1994, the court held an in-chambers conference regarding, inter alia, the prosecutor's opening statement. (14RT 5941-5942, 5947-5948.) As has been explained in Argument I, *ante*, the court permitted the prosecutor to delineate appellant's expected testimony in the People's opening statement. (14RT 5950.) The court ordered disclosure of any

agreement between the People and appellant pertaining to appellant's testimony. (14RT 5962.) Appellant's counsel stated that anything "going on" between himself and the prosecutor had been referred to in the record. (14RT 5964.) This conference was another wide-ranging discussion of a variety of legal topics.

On July 11, 1994, the court held another in-chambers conference in which a number of subjects were discussed, including the prosecutor's opening statement. (14RT 6081, 6082, 6095.) The prosecutor stated his understanding that appellant would be testifying. (14RT 6095.) The prosecutor also said that, in his opening statement, he would refer to appellant's expected testimony and would bring in appellant's statement to police. (14RT 6107-6108.)

On July 12, 1994, appellant was present when the court and parties had an extensive discussion about whether appellant would testify in the People's case-in-chief. (15RT 6230-6281; see especially *id.* at p. 6230-6231, 6269-6270.) During this discussion, the prosecutor again expressed his desire to refer to appellant's statements in his opening statement and reiterated his belief that appellant would testify. (15RT 6263-6266.) The court ruled that it would allow the prosecutor to refer to appellant's statements in his opening statement with the understanding that the prosecutor had an assurance that appellant would testify. (15RT 6266.) The prosecutor stated that he had such an assurance: Castro had assured him several times that appellant was going to testify in the People's case-in-chief. (15RT 6266.) Castro did not contradict this. (15RT 6266-6267.) Appellant was present (15RT 6230-6231, 6269-6270) but did not say anything. John Hodges's attorney referred to a July 8 phone conversation between the prosecutor and appellant's counsel (Castro) regarding appellant's proposed testimony. (15RT 6267-6268.) Immediately thereafter, in response to the court's inquiry, appellant stated that he

understood he had the right to testify or to decline to testify. (15RT 6269-6270.)

Terry Hodges's attorney (Sherriff) argued that the prosecutor should not be allowed to refer to appellant's statements in his opening statement. For example, no one could know whether appellant would testify. (15RT 6272.) The court clarified that it was allowing the prosecutor to refer to appellant's statements because appellant would be testifying in the People's case-in-chief. (15RT 6280-6281.)

Thus, as shown above, all of these proceedings involved questions of law to be hashed out by the trial court and the attorneys. Appellant's absence at some conferences did not interfere with his opportunity to cross-examine witness, his presence would not have contributed to the fairness of the proceeding, and the discussions did not have a substantial relationship to his opportunity to defend himself. Further, as noted above, appellant was present at several proceedings where his proposed testimony was discussed.

Case law supports the conclusion that appellant's rights were not violated. For example, in *People v. Box*, *supra*, 23 Cal.4th at pages 1190-1192, the defendant was absent from an in-chambers conference where the court and attorneys discussed the admissibility of defendant's statements to his girlfriend. This Court held that the defendant's rights were not violated because the discussion was purely legal. Likewise, in the present case, the discussion of whether appellant would testify and the substance of his expected testimony was purely legal. The court and the attorneys were simply discussing the legal issues surrounding appellant's proposed testimony.

Similarly, in *People v. Holloway* (1990) 50 Cal.3d 1098, 1115-1116 (overruled on other grounds), there was an in-chambers argument regarding suppression of defendant's statements. This Court held that the defendant's

absence did not violate his rights and was not prejudicial because only legal arguments were discussed. Likewise, in the case at bar, the court and counsel were merely talking about legal issues.

In light of this case law, it does not matter that appellant had personal knowledge of the facts (his own proposed testimony). (AOB 340.) In *Box* and *Holloway* the defendants had personal knowledge about their own statements, yet the court and the attorneys were permitted to engage in legal arguments outside the defendants' presence. Appellant relies on *People v. Davis* (2005) 36 Cal.4th 510, but *Davis* is distinguishable and actually assists respondent on the issue of prejudice. In *Davis*, the defendant was absent from a pretrial hearing where excerpts of a jailhouse tape were reviewed, discussed, and the words were agreed upon. (*Id.* at pp. 529-530.) Thus, the hearing in *Davis* involved the parties stipulating to evidence (agreeing on the contents of the tape), not simply a legal discussion. In this respect *Davis* is distinguishable. However, the *Davis* court found the defendant's absence non-prejudicial for reasons which also apply to the present case. *Davis* noted that the defendant could have discussed the tape with his attorneys before or after the hearing, and it was impossible to know what defendant would have contributed to the hearing. (*Id.* at pp. 530, 532-534.) Likewise, appellant could have (and presumably did) discuss his proposed testimony with his attorneys before or after the conferences and it is impossible to know what appellant would have contributed to the conferences.

Appellant also argues that his anticipated testimony was based on privileged attorney-client communications and he could have asserted this privilege at the conferences. (AOB 341.) Of course, portions of appellant's potential testimony can be inferred from his pretrial statement to Detective Lee (i.e., that he was the shooter and he felt threatened). To the extent that appellant's counsel's statements were based on attorney-client

communications, it is reasonable to infer that appellant discussed the matter with counsel and authorized counsel to make the disclosures as part of defense strategy (i.e., to present a defense that the Hodgeses coerced appellant).

Moreover, "'[T]he fact that counsel did not think defendant's presence was necessary strongly indicates that [his] presence did not, in fact, bear . . . a substantial relation' to the fullness of his opportunity to defend." (*People v. Jennings, supra*, 50 Cal.4th at p. 683.)

In *Jennings*, a proposed answer to a jury question was read in defendant's presence; he had the opportunity to raise his concerns. (*People v. Jennings, supra*, 50 Cal.4th at p. 683.) Likewise, in the present case, appellant was present when the prosecutor referred to appellant's expected testimony in the People's opening statement. (15RT 6304, 6343; 2CT 447.) Shortly after the People's opening statement, appellant had an opportunity to raise his concerns, but did not do so. (See e.g., 15RT 6418-6428; Argument I.B., *ante*.)

Moreover, because appellant's presence did not bear a reasonably substantial relationship to his opportunity to defend, no written waiver was required. As this Court has explained, "Defendant also contends the waiver must be in writing under section 977, subdivision (b). That section, however, requires the defendant's presence only when it bears a reasonably substantial relation to the fullness of his opportunity to defend against the charge." (*People v. Cooper* (1991) 53 Cal.3d 771, 825.) Accordingly, this Court must reject appellant's claim that he did not validly waive his presence. (AOB 333.)

For all these reasons, appellant's presence at the pretrial conferences was unnecessary.

C. Any error was harmless

As noted, the burden is on the defendant to demonstrate that his absence prejudiced the defense or denied him a fair trial. (*People v. Jennings, supra*, 50 Cal.4th at p. 682.) This Court should reject appellant's claim that the alleged error must be shown to be harmless beyond a reasonable doubt. (AOB 342, citing *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) Reviewing courts have required defendants to show prejudice when they were absent from proceedings much more significant than the pretrial conferences at issue here. For example, in *People v. Jernigan* (2003) 110 Cal.App.4th 131, 137, the appellate court stated that even a defendant excluded from a competency hearing had to show prejudice.

In this case, appellant cannot show prejudice because the matters discussed at the pretrial conferences were legal issues. Appellant claims that the proceedings he missed involved discussions of the prosecutor's opening statement and he was prejudiced by that opening statement. (AOB 338-339.) This argument must be rejected for the reasons stated in Argument I, *ante*.

For all these reasons, appellant's Argument XI should be denied.

XII. THE TRIAL COURT PROPERLY GAVE CALJIC NO. 2.50 (UNCHARGED CRIMES)

Appellant argues that the trial court erred prejudicially by instructing the jury under CALJIC No. 2.50 that evidence of appellant's uncharged crimes could be used to prove intent and other matters. (AOB 343-357.) This contention has been forfeited and must be rejected. The other crimes

evidence (firearm-possession evidence) was relevant to intent, identity, and other issues.[13]

A. Background

Near the beginning of the instructional conference, the court and defense counsel briefly discussed CALJIC No. 2.50 and the court deferred ruling on it. (30RT 10902-10903.) Later, the court and parties discussed the issue more thoroughly; the prosecutor argued that possessing a concealed weapon was a step in the direction of committing an armed robbery. (30RT 10942-10944.) Defense counsel disagreed with this. (30RT 10944.) The prosecutor also noted appellant's statements to Kim Scott that he was going to rob the KFC; the prosecutor and defense counsel debated about whether Scott used the term "robbery." (30RT 10943, 10944.) The court decided to give CALJIC No. 2.50, limiting it to intent, identity, and knowledge or means to commit the crime. (30RT 10944-10945.)

Subsequently, the court reiterated that it would give CALJIC No. 2.50 and the defense did not object. (31RT 11061.) At the end of the instructional conference, defense counsel declined to state any further objections. (31RT 11089.)

Pursuant to CALJIC No. 2.50, the court instructed the jury that evidence had been introduced for the purpose of showing that appellant committed crimes other than those charged. Such evidence was not received and could not be considered to prove that appellant was a bad person or had a "disposition to commit crimes." Such evidence was received and could be considered only for the limited purpose of determining if it tended to show the existence of "intent," the "identity" of

---

[13] At times, CALJIC instructions will be referred to by number, e.g., "No. 2.50."

the perpetrator, and knowledge or possession of means "useful . . . for the commission of the crime[.]" For these limited purposes, the jury was to consider the evidence in the same manner as "all other evidence[.]" And the jury was not permitted to consider the evidence for "any other purpose." (31RT 11110; 2CT 580-581.)

B. Appellant's Claim Has Been Forfeited

As explained above, defense counsel did not actually object to the giving of CALJIC No. 2.50. Defense counsel disagreed with the prosecutor's argument that possessing a concealed weapon was a step in the direction of robbery. (30RT 10943-10944.) But defense counsel did not actually object to CALJIC No. 2.50. "Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]" (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) As will be explained below, the alleged error did not result in a miscarriage of justice. Accordingly, appellant has forfeited his claim.

C. The Trial Court Properly Gave CALJIC No. 2.50 Because the Prior Incidents of Firearm Possession Tended to Show Intent, Identity, and/or Possession of Means Useful or Necessary for the Crime

To a large extent, this issue has been addressed in Argument VII.C., *ante* (firearm-possession evidence). Respondent reiterates a few key points. Regarding the post-Halloween gun display, the gun that appellant displayed might have been the murder weapon. Moreover, that appellant possessed guns on other occasions tends to negate his "innocent" explanation for possession of the murder weapon on the night of the murder (i.e., that the Hodgeses forced the gun upon him). In other words, the other

instances of gun possession tend to negate the defense theory that appellant had an innocent state of mind on the night of the murder.

Accordingly, the prior incidents of gun possession were relevant to appellant's intent on the night of the murder and appellant's contrary arguments must be rejected. (AOB 351-354.) Appellant claims that in order to be admissible on the issue of intent the prior acts have to be similar to the charged offense. (AOB 351-353.) This is not necessarily true in all cases. As noted in Argument VII.C., the general test of admissibility is whether the evidence tends logically, naturally, and by reasonable inference, to establish any fact material for the People, or to overcome any material fact sought to be proved by the defense. If it does, then it is admissible, whether the other crime is similar or not. (*People v. Peete, supra*, 28 Cal.2d at p. 315; *People v. Enos, supra*, 34 Cal.App.3d at p. 34.)

In the present case, as explained in Argument VII.C., the firearm evidence was admissible to show intent. Respondent does not claim that appellant harbored the same intent on each of these occasions of gun possession. Instead, the other instances of gun possession tend to negate the defense theory that appellant had an innocent state of mind of the night of the robbery-murder.[14]

Moreover, appellant acknowledges that the evidence that he carried a firearm during the visit to the park before the murder and shortly after the murder (when he spoke with Littlejohn) was arguably relevant to identity.

---

[14] Thus, it is not important that *Ewoldt* states: "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant probably harbor[ed] the same intent in each instance. [Citations.]" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402, internal quotation marks omitted.) For the reasons above, this general rule does not apply in this case. Further, as explained in Argument VII.C., respondent submits that the challenged firearm evidence is not character evidence.

(AOB 355.) Respondent submits that these incidents were highly probative of identity. Further, these incidents were relevant to and probative of appellant's possession of means useful to and necessary for commission of the crime (i.e., possession of the gun and bullets used in the crime). As explained in Argument I.E.2., *ante*, Eversole and Brogdon's statements and testimony supported the conclusion that appellant's gun and bullets were used in the crime. Several days before the murder, appellant visited a park with Eversole and Brogdon; he had a gun and some bullets which were similar to the gun and bullets used in the murder.

Likewise, as noted in Argument I.E.2., *ante*, appellant told Littlejohn that he had shot and killed McDade; Littlejohn threw appellant's gun into a dumpster and later led the police to it. Further, appellant asked Littlejohn to return his gun because he needed it to get money; this supports the inference that he had used the gun in a robbery.

Appellant's contention that CALJIC No. 2.50 lightened the People's burden of proof must be rejected. (AOB 350.) CALJIC No. 2.50 clearly limited the purposes for which the other-crimes evidence could be considered. (2CT 580-581.) Notably, CALJIC No. 2.50 stated that the other-crimes evidence could not be used as disposition evidence. (2CT 580.) CALJIC No. 2.50 stated that the jury must weigh the other-crimes evidence in the same manner as all other evidence. (2CT 581.) The jury was also properly instructed on the presumption of innocence, reasonable doubt, and the People's burden of proof. (2CT 594.) Some of the cases that appellant cites warn of the dangers of propensity evidence. (AOB 350.) But, as noted above, CALJIC No. 2.50 clearly stated that the other-crimes evidence could not be used as disposition evidence. (2CT 580.) This Court must presume that the jury followed this instruction. (*People v. Frank, supra*, 51 Cal.3d at p. 728.) Moreover, respondent reiterates that the United States Supreme Court cited similar language in rejecting a claim

that an instruction on prior-injury evidence constituted a "propensity" instruction. (*Estelle v. McGuire, supra*, 502 U.S. at p. 75.) Accordingly, this Court should deny appellant's claim that CALJIC No. 2.50 lessened the prosecutor's burden of proof.

For all these reasons, the trial court properly instructed the jury with CALJIC No. 2.50.

D. Any Error Was Non-Prejudicial

In analyzing claims of instructional error, this Court applies the harmless-error standard set forth in *People v. Watson, supra*, 46 Cal.2d at page 836. (*People v. Falsetta* (1999) 21 Cal.4th 903, 924-925 [any error in failing to instruct jury on how to use propensity evidence was harmless under *Watson*]; *People v. Flood* (1998) 18 Cal.4th 470, 489-490 [instructional error involving omission of element is to be reviewed under the *Watson* harmless error standard]; *People v. Carpenter* (1997) 15 Cal.4th 312, 393 (*Carpenter*) [mere instructional error under state law re consideration of evidence does not violate the federal Constitution; failure to give cautionary instruction is not a category of error making a trial fundamentally unfair] [*Carpenter* was superseded by statute on other grounds]; cf. *People v. Bunyard* (1988) 45 Cal.3d 1189, 1225-1226 [any error in failing to give CALJIC No. 2.50 was harmless under *Watson*].)

Moreover, any error was harmless under any standard. There was overwhelming evidence of appellant's guilt (i.e., his culpable mental state). (Argument I.E.2., *ante*.) This evidence is still overwhelming even if the challenged firearm evidence is excluded. Further, there is no chance the jury found appellant guilty of robbery-murder because he was not punished for a prior instance of gun possession.

Additionally, CALJIC No. 2.50 had the effect of blunting any prejudice from the other-crimes evidence. As noted, pursuant to CALJIC No. 2.50, the trial court instructed the jury that evidence of appellant's

uncharged misconduct could not be considered as proof of his criminal disposition. Moreover, as explained in Argument VII.D., *ante*, the prosecutor did not emphasize the challenged firearm evidence in his closing argument. For all these reasons, any error in giving CALJIC No. 2.50 was non-prejudicial.

Appellant's argument must be rejected.

XIII. THE TRIAL COURT PROPERLY GAVE CALJIC NO. 2.06 (EFFORTS TO SUPPRESS EVIDENCE)

Appellant contends that the trial court erred prejudicially by instructing the jury pursuant to CALJIC No. 2.06 that it could consider appellant's efforts to suppress evidence, if any, to show consciousness of guilt. (AOB 358-365.) This argument must be rejected. Substantial evidence supported the conclusion that appellant concealed evidence in a variety of ways: lying to the police and discarding the items found at Golf View Drive.

A. Background

Near the start of the instructional conference, the court and parties briefly discussed CALJIC No. 2.06. (30RT 10897-10899.) Appellant's counsel said there was no evidence that appellant tried to suppress evidence. (30RT 10897, 10899.) The prosecutor said that he was requesting CALJIC No. 2.06 with respect to the murder weapon (the gun) for the following reasons. (30RT 10898-10899.) Appellant gave the gun to someone who may have given it to Littlejohn; the jury did not have to believe Littlejohn's explanation for why she disposed of the gun; Littlejohn was related to appellant's friend and the bottom line was that it wound up in a dumpster in an alley. (30RT 10898-10899.) The court deferred ruling on the instruction. (30RT 10899.)

Later, the court and parties addressed CALJIC No. 2.06. (30RT 10937-10939.) Defense counsel objected to the instruction: appellant was

trying to get the gun back from Littlejohn. (30RT 10938.) The court noted that the jury did not have to believe Littlejohn's explanation for how the gun got into the dumpster; and the prosecutor pointed out that there was an association between Littlejohn and appellant which was helpful to appellant. (30RT 10939.) The court ruled it would give CALJIC No. 2.06. (30RT 10939.)

Subsequently, the court reiterated that it would give CALJIC No. 2.06; the defense did not object. (31RT 11058.)

Pursuant to CALJIC No. 2.06, the court instructed the jury that if it found that appellant attempted to suppress evidence ("such as by concealing evidence"), such an attempt might be considered as a circumstance "tending to show a consciousness of guilt." However, such conduct was not sufficient "by itself" to prove guilt and its weight was for the jury's consideration. (31RT 11104; 2CT 565.)

B. It Was Appropriate to Give CALJIC No. 2.06

There must be substantial evidence supporting an instruction on suppression of evidence. (*People v. Hart* (1999) 20 Cal.4th 546, 620-621.) In the present case, substantial evidence supported the instruction on suppression of evidence under at least two theories. Appellant's false statements to Detective Lee were a form of concealing evidence. (See e.g., 30CCT 8976; 31CCT 9001-9002: appellant's claims that a third party shot McDade or the shooting was accidental; *People v. Jackson* (1996) 13 Cal.4th 1164, 1225 [false statement to police can be a form of concealing evidence and the basis for CALJIC No. 2.06].) Moreover, it can be inferred that appellant and his confederates discarded the items found near Golf View Drive and Mangrum in an effort to conceal evidence. (Statement of Facts, Guilt Phase, People's Case, section C, Events after the murder; police investigation, *ante*.) These items connected appellant and his confederates to the KFC robbery-murder (the bank bag, KFC chicken box,

KFC paper bag, etc.). The giving of CALJIC No. 2.06 (suppressing evidence) can be supported by, inter alia, discarding identifying documents. (*Coffman, supra*, 34 Cal.4th at pp. 101-103.)

Thus, regardless of whether there was substantial evidence that Littlejohn concealed the gun for appellant's benefit, the evidence supported other theories (described above) that warranted giving CALJIC No. 2.06.

Appellant cites *People v. Hannon* (1977) 19 Cal.3d 588 (*Hannon*), *People v. Terry* (1962) 57 Cal.2d 538 (*Terry*), and *People v. Williams* (1997) 16 Cal.4th 153 (*Williams*), in support of his argument that the evidence failed to show that appellant actually authorized Littlejohn to dispose of the gun. (AOB 360-362.) Again, regardless of whether there was substantial evidence that Littlejohn concealed the gun for appellant's benefit, there were other theories supporting the CALJIC No. 2.06 instruction.

For all these reasons, the trial court properly gave CALJIC No. 2.06.

C. Any Error Was Harmless

As noted, for instructional error claims, the *Watson* harmless-error standard applies. (*People v. Flood, supra*, 18 Cal.4th at pp. 489-490 [instructional error involving omission of element is to be reviewed under the *Watson* harmless error standard]; *People v. Carpenter, supra*, 15 Cal.4th at p. 393 [mere instructional error under state law re consideration of evidence does not violate the federal constitution; failure to give cautionary instruction is not a category of error making a trial fundamentally unfair].)

In the present case, any error was harmless under any standard. There was overwhelming evidence of appellant's guilt (including his culpable mental state). (Argument I.E.2., *ante*.) This evidence is still overwhelming even if the evidence of concealment is subtracted. *People v. Gloria* (1975) 47 Cal.App.3d 1, 5-7 (AOB 364) is distinguishable because in this case

there was a proper basis for CALJIC No. 2.06 and the evidence of guilt was very strong.

Moreover, the wording of CALJIC No. 2.06 and other instructions support the conclusion that any error was harmless. CALJIC No. 2.06 did not require the jury to find that appellant suppressed evidence nor did it require the jury to give any particular weight to evidence of concealment. CALJIC No. 2.06 said that "if" the jury found that appellant attempted to suppress evidence, such an attempt "may" be considered as a circumstance "tending" to show consciousness of guilt. (2CT 565.) Further, CALJIC No. 2.06 stated that such conduct was not sufficient by itself to prove guilt, and its weight and significance, "if any," was for the jury's consideration. (2CT 565.) It is also worth noting that the jury was instructed on the reasonable doubt standard and was instructed that not all instructions necessarily applied. (2CT 594; 3CT 638.)

Appellant's argument must be rejected.

XIV. THE TRIAL COURT PROPERLY GAVE CALJIC NO. 2.52 (FLIGHT AFTER CRIME)

Appellant argues that the jury instruction on flight (CALJIC No. 2.52) authorized an irrational permissive inference. Appellant claims that the trial court should have modified No. 2.52 sua sponte to provide that the defendant's flight must be for the purpose to avoid being observed or arrested. Because it lacked such language, No. 2.52 authorized an irrational inference: it allowed the jury to infer appellant's consciousness of guilt merely from post-offense movement, regardless of its motivation. (AOB 366-372.) This contention is without merit: as explained below, this Court has rejected very similar claims.

A. Background

After murdering McDade, appellant went to Stockton and then traveled to Los Angeles. (30CCT 8984-8987; 17RT 6901-6902.) While in

Stockton, appellant had a phone conversation with a police officer in which he stated that he knew that the police were looking for him and he expressed concern that the police would lock him up. (17RT 6901-6902.) In Los Angeles, appellant visited his mother. But appellant only stayed with his mother for a couple of hours; he was told the police were watching his mother's house. Appellant's mother advised him to turn himself in before the police shot him. (30CCT 8987.)

At the instructional conference, the court ruled it would give CALJIC No. 2.52 (flight after crime); this drew no objection. (30RT 10903.) Later, the court reminded the parties that it would give No. 2.52 and the defense did not object. (31RT 11061.)

Pursuant to CALJIC No. 2.52, the court instructed the jury that the flight of a person after the commission of a crime or an accusation was not sufficient "in itself" to establish guilt, but could be considered in light of "all other" evidence in deciding the issue of guilt. The weight was for the jury to determine. (31RT 11111-11112; 2CT 585.)

B. It Was Appropriate to Give CALJIC No. 2.52

This Court has rejected claims similar to appellant's. In *People v. Mendoza* (2000) 24 Cal.4th 130, 179-180, this Court rejected the argument that the standard flight instruction created an unconstitutional permissive inference. This Court concluded that due process permits a jury to infer that the flight of a defendant immediately after the crime indicates consciousness of guilt. Contrary to appellant's assertion, the Court's due process analysis was clear. (AOB 369-370.)

Likewise, *People v. Abilez* (2007) 41 Cal.4th 472, 521-523, rejected a similar contention. For example, *Abilez* denied a claim that the jury should have been required to make a preliminary finding that the defendant fled to avoid arrest. The *Abilez* court noted that the instruction left the fact of flight and its significance up to the jury.

Abilez also explains why it was sufficient for the trial court to define "flight" by giving CALJIC No. 2.52. In other words, *Abilez* explains why the trial court did not have to define "flight" beyond giving No. 2.52. That is because No. 2.52 is derived from section 1127c, which sets forth the required instruction on "flight." As *Abilez* stated:

> Section 1127c provides: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. [¶] No further instruction on the subject of flight need be given." In accordance with this section, defendant's jury was instructed with CALJIC No. 2.52, which is substantially identical to the statutory language. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1182, 32 Cal.Rptr.3d 759, 117 P.3d 476 [CALJIC No. 2.52 is "derived" from § 1127c].)

(*People v. Abilez, supra*, 41 Cal.4th at p. 521.)

Appellant claims that *Abilez* begs the question of what sort of flight might the jury find relevant to the question of guilt. (AOB 370.) However, *Abilez* cited several cases in which flight instructions were properly given. (*People v. Carter* (2005) 36 Cal.4th 1114, 1182 [flight instruction proper where defendant left California for Las Vegas a few days after the crimes]; *People v. Smithey* (1999) 20 Cal.4th 936, 982 [flight instruction proper where "defendant drove to another town instead of summoning help"]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055 [flight instruction proper where defendant left the apartment where he killed the victim, went to another apartment, packed his belongings and asked for a ride out of town]; see *People v. Abilez, supra*, 41 Cal.4th at p. 522.)

In light of *Mendoza*, *Abilez*, and the cases cited in *Abilez*, it is clear that the trial court properly instructed the jury with CALJIC No. 2.52. In the present case, the jury was entitled to infer that after murdering McDade, appellant fled to Stockton. While in Stockton, appellant was aware that the police were looking for him and was concerned that they would lock him up. (17RT 6901-6902.) Accordingly, the jury may properly have inferred that appellant fled to Los Angeles to avoid arrest. While in Los Angeles, appellant was unable to find refuge (i.e., at his mother's house). (30CCT 8987.) Accordingly, appellant left Los Angeles.

Appellant offers innocent explanations for his travels to Stockton and Los Angeles. (AOB 370-371.) Appellant also notes that when riding with Littlejohn, she was stopped by the highway patrol and he did not flee. (AOB 371.) However, "To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury could find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.) In the present case, for the reasons discussed above, the jury could have found that appellant fled and could properly have inferred consciousness of guilt.

C. Any Error Was Non-Prejudicial

As noted, for instructional error claims, the *Watson* harmless-error standard applies. (*People v. Flood, supra*, 18 Cal.4th at pp. 489-490; *People v. Carpenter, supra*, 15 Cal.4th at p. 393.) And the *Watson* standard applies to the giving of CALJIC No. 2.52. (*People v. Turner* (1990) 50 Cal.3d 668, 695.) But the alleged error was harmless under any standard. The strong evidence of flight was discussed in the Background section, *ante*. As noted, there was overwhelming evidence of guilt (including culpable mental state). There was ample evidence of appellant's guilt independent of the evidence of flight. There was overwhelming evidence

that appellant was the shooter and that he had the required mental states (i.e., that he intended to rob and kill the victim; that it was a premeditated murder). The evidence that appellant was the shooter included the testimony and statements of various witnesses (Martinez, Schuyler, Littlejohn, Leisey, Banks, and appellant's statement to Lee); it also included evidence indicating that appellant's gun was the murder weapon. The evidence of appellant's mental state included appellant's statements before and after the murder and the testimony concerning statements by the Hodges brothers. Thus, there was strong evidence of appellant's guilt independent of the evidence of flight.

Moreover, the language of CALJIC No. 2.52 was not prejudicial to appellant. No. 2.52 states that flight is not sufficient, by itself, to establish guilt. (2CT 585.) No. 2.52 also says that the weight of the evidence of flight is for the jury to determine. (2CT 585.) This Court has stated that, "the instruction did not assume that flight was established, leaving that factual determination and its significance to the jury." (*People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Indeed, the instruction would tend to benefit a defendant by warning the jury that evidence that otherwise might be considered incriminating is not, by itself, sufficient to prove guilt.

Appellant's argument must be rejected.

XV. THE TRIAL COURT PROPERLY GAVE CALJIC NO. 2.71.7 (PRE-OFFENSE STATEMENT BY DEFENDANT)

Appellant contends that the trial court erred prejudicially by instructing jurors under CALJIC No. 2.71.7 to view his exonerating unrecorded oral statements with caution. (AOB 373-379.) This claim should be denied: the instruction was essentially favorable to the defense; moreover, there was no basis for distinguishing between the inculpatory and "exculpatory" statements related by Banks and Scott.

A. Background

At the instructional conference, the court stated it would give CALJIC No. 2.71.7 (pre-offense statement by defendant); the court noted the evidence about the conversation at G Parkway; the defense did not object. (30RT 10904.) Later, the court and parties discussed No. 2.71.7; the court indicated it would give the instruction and defense counsel did not object. (30RT 10945-10946.) Subsequently, the court reminded the parties it would give No. 2.71.7 and again the defense did not object. (31RT 11062.)

Pursuant to CALJIC No. 2.71.7, the court instructed the jury that evidence had been received from which the jury could find that appellant made an oral statement of "intent, plan, motive, or design" before the offense. It was for the jury to decide if appellant made such a statement and evidence of such a statement had to be treated "with caution." (31RT 11113; 2CT 590.)

B. Appellant Has Forfeited His Claim

"Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]" (*People v. Anderson*, *supra*, 152 Cal.App.4th at p. 927.) As noted, appellant's trial counsel failed to object to the alleged error. As will be explained below, the alleged error did not result in a miscarriage of justice. Accordingly, appellant has forfeited his claim.

C. It Was Appropriate to Give CALJIC No. 2.71.7; Alternatively, Any Error Was Harmless

First, it should be noted that this Court has held that CALJIC No. 2.71.7 is a standard cautionary instruction, intended for the defendant's benefit, which must be given sua sponte where applicable. (*People v.*

Zambrano (2007) 41 Cal.4th 1082, 1157, disapproved on other grounds.) Moreover, the principal effect of this instruction is to emphasize, on defendant's behalf, that his inculpatory extrajudicial statements, if any, should be viewed with caution. (*Id.* at pp. 1157-1158.)

In the alternative, any error was harmless. Like the other instructional error claims, the *Watson* harmless-error standard applies. (*People v. Flood, supra*, 18 Cal.4th at pp. 489-490; *People v. Carpenter, supra*, 15 Cal.4th at p. 393; see also *People v. Wilson* (2008) 43 Cal.4th 1, 19-20 [for failure to give CALJIC No. 2.71.7, use *Watson*].)

"'The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made.' [Citation.]" (*People v. Carpenter, supra*, 15 Cal.4th at p. 393.) In analyzing whether the failure to give such an instruction was prejudicial, courts examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. (*People v. Dickey* (2005) 35 Cal.4th 884, 905.) When there is no such conflict in the evidence, and the defendant simply denies making the statements attributed to him, or denies being present at the time and in the place the statements were purportedly made, the reviewing court may conclude the failure to give the cautionary instruction was harmless. (*People v. Wilson, supra*, 43 Cal.4th at p. 19.) In that situation, the issue is not whether the oral admissions were remembered and repeated accurately, but whether the witnesses testifying to the defendant's statements are credible. (*Id.* at pp. 19-20.) The instructions relating to credibility of witnesses may sufficiently advise the jury of the matters to be considered in evaluating that testimony.

In the present case, appellant's pre-offense statements were related by Eric Banks and Kim Scott. Banks testified about John Hodges's statements pertaining to the planning of the robbery-murder at a home on G Parkway.

(25RT 9422-9426, 9452-9453.) Appellant (the "youngster") suggested robbing the KFC; but he did not want to kill anyone. (25RT 9423-9426, 9449; 31CCT 9146, 9151, 9154-9155, 9159-9160.) Scott testified that, in the months before the robbery-murder, appellant repeatedly told her that he was going to rob the KFC. (18RT 7255-7260, 7270.) Appellant said he was going to knock out McDade with a board or rock. (18RT 7271.)

Appellant argues that CALJIC No. 2.71.7 was erroneous because it told jurors to view with caution pre-offense statements by appellant regardless of whether they were harmful or helpful to the defense. (AOB 374.) Appellant contends that not all of his statements at the G Parkway planning session were incriminating; i.e., his statements that he did not want to kill McDade. (AOB 375-376.)

Appellant's argument should be rejected. As an initial matter, appellant's statements at the G Parkway planning session were incriminating because he helped to plan the robbery. Appellant's intent to rob also incriminates him under a felony-robbery-murder theory.

Moreover, there is no reason to believe that the jury would have distinguished between the inculpatory and "exculpatory" portions of Banks's and Scott's testimony. The inculpatory portions of Banks's and Scott's testimony are no less credible than the "exculpatory" portions. There is no reason to think that Banks and Scott misstated or misremembered the inculpatory portions but not the "exculpatory" portions. It seems more likely that the jury would have either accepted or rejected their testimony. Either Banks was telling the truth or he was a liar. Either Scott remembered appellant's statements correctly or she did not. There is no basis for choosing to believe the "exculpatory" portions but not the inculpatory portions. As in cases where the failure to give CALJIC No. 2.71.7 was harmless, the issue was not whether the oral admissions were remembered and repeated accurately, but whether the witnesses testifying

to the defendant's statements were credible. The issue of Banks and Scott's credibility was adequately presented to the jury through cross-examination, instructions on witness credibility, and argument. (See e.g., Statement of Facts, Guilt Phase, People's Case, section A, Events Before the Murder, Scott's testimony and section C, Events After the Murder; Police Investigation, Banks's testimony; 2CT 569-576 [instructions on witness credibility]; 31RT 11258, 11274-11275, 11307, 11309, 11315-11320, 11331 [defense argument].)

As noted in the Statement of Facts, Banks was examined at length about subjects pertaining to his credibility. Banks was afraid that if he went to state prison he would be killed for being a snitch. (23RT 8723, 8730-8731; 24RT 8931-8932, 8959-8960.) In 1992, the prosecution helped Banks stay out of state prison (i.e., Banks received a county jail sentence for his offense). (23RT 8754-8756, 8762-8763; 24RT 8953-8954.) At the time of the 1994 trial, Banks had an agreement with the prosecution under which he hoped to avoid state prison for a San Bernardino County case. (23RT 8751, 8783; 24RT 8937-8942, 8944, 8957, 8998-8999.) Banks admitted that he had an extensive criminal record and had been to prison three times. (23RT 8753-8754; 24RT 9075-9076.) Banks was questioned at length about matters related to his credibility: e.g., his motive for testifying and his understanding of his agreement with the prosecution. (24RT 9028-9037, 9044-9055, 9062-9069, 9082-9092, 9102-9114, 9134, 9139, 9141.) But none of these issues provided a basis for believing the "exculpatory" portions of Banks's testimony while disbelieving the inculpatory portions. Banks's cross-examination on these issues raised the possibility that Banks might have fabricated his testimony to curry favor with the prosecution. But Banks's cross-examination on these subjects did not provide a basis for distinguishing between the "exculpatory" portions of his testimony and the inculpatory portions. Again, either Banks was telling

the truth or he was a liar. There is no basis for concluding that Banks was lying about appellant planning the robbery but was telling the truth when he related that appellant did not want to kill anyone.

Scott's credibility issues were not nearly so significant. Scott claimed that she thought appellant was joking about robbing the KFC, so she did not notify the KFC managers even though she worked there. (18RT 7288-7289, 7327, 7339.) But the detective who interviewed Scott did not get the impression that Scott thought appellant was joking. (24RT 8904-8905.) This issue – whether Scott thought appellant was joking – might have some impact on her overall credibility. But it does not provide a basis for distinguishing between the "exculpatory" and inculpatory aspects of Scott's testimony. Either Scott believed appellant was joking or she did not. Either appellant was joking when he made statements about robbing the KFC or he was serious. But there is no basis for concluding that appellant was joking about robbing the KFC but was serious about merely knocking out McDade (as opposed to killing him).

Additionally, as appellant concedes, appellant told Detective Lee that he did not want to kill McDade. (AOB 379.) This bolsters the "exculpatory" portions of Banks and Scott's testimony. This also supports the conclusion that the jury would not have found the "exculpatory" portions of Banks and Scott's testimony less credible than the inculpatory portions.

Finally, there was overwhelming evidence of appellant's guilt (including his mental state). This is still true even if the jury had not been instructed to view all of appellant's pre-offense statements with caution.

For all these reasons, appellant's argument must be rejected.

XVI. THE TRIAL COURT PROPERLY GAVE CALJIC NO. 3.16 (WITNESS ACCOMPLICE AS MATTER OF LAW)

Appellant asserts that the instructions that the Hodgeses were accomplices as a matter of law wrongly directed the jurors to find that appellant was the direct perpetrator of the robbery and murder. (AOB 380-398.) This argument is not persuasive. First, the Hodgeses were clearly accomplices as a matter of law. Moreover, there was abundant evidence that appellant was the shooter (the direct perpetrator) and the instructions told the jury that they must decide whether appellant was the direct perpetrator.

A. Background

Near the start of the instructional conference, the court referred to CALJIC No. 3.16 and asked the parties to consider whether it should instruct the jury that the Hodgeses were accomplices as a matter of law. (30RT 10908.) Defense counsel stated that he was willing to stipulate that the Hodgeses were accomplices as a matter of law. (30RT 10908.) The prosecutor said he wanted to think about the issue. (30RT 10908.)

Later, the court and parties discussed CALJIC No. 3.16. (30RT 10954-10957.) Defense counsel agreed with the court that the Hodgeses were accomplices as a matter of law and that No. 3.16 was appropriate. (30RT 10954, 10955.) The court read a proposed version of No. 3.16, stating that the Hodgeses were accomplices as a matter of law, and defense counsel approved this version. (30RT 10955-10957; see e.g., 30RT 10957 [counsel approves].) Subsequently, the court reminded the parties it was going to give No. 3.16 and the defense did not object. (31RT 11063.)

Pursuant to CALJIC No. 3.16, the court instructed the jury that if the crimes of robbery, murder, or the special circumstance were committed by anyone, the Hodgeses were accomplices "as a matter of law" and their

statements (to the extent they incriminated appellant) were "subject to the rule requiring corroboration." (31RT 11119; 3CT 604.)

B. Appellant Has Forfeited This Claim

Respondent reiterates: "Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]" (*People v. Anderson, supra*, 152 Cal.App.4th at p. 927.) As noted, appellant's trial counsel failed to object to the alleged error. As will be explained below, the alleged error did not result in a miscarriage of justice. Accordingly, appellant has forfeited his claim.

Moreover, appellant's trial counsel invited the purported "error." It appears that appellant's trial counsel wanted an instruction that would say that the Hodgeses were accomplices as a matter of law, and that their statements – to the extent they incriminated appellant – were subject to the rule requiring corroboration. (30RT 10954-10957.) Evidently, appellant's trial counsel was trying to protect appellant from uncorrobated statements by the Hodgeses that incriminated his client.

C. It Was Appropriate to Give CALJIC No. 3.16

"Section 1111 provides, 'A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. . . .' It defines an accomplice as 'one who is liable to prosecution for the identical offense charged against the defendant on trial . . . .' (§ 1111; [citation].) Whether a person is an accomplice within the meaning of section 1111 presents a factual question for the jury 'unless the evidence permits only a single inference.' [Citation.] Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the

facts regarding the witness's criminal culpability are 'clear and undisputed.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 679.)

In the present case, the Hodgeses were accomplices as a matter of law. Respondent has explained that there was overwhelming evidence that appellant was the shooter. (Argument I.E.2., *ante*.) In other words, there was overwhelming evidence that appellant was the direct perpetrator. Moreover, at trial, the parties agreed that the Hodgeses were accomplices. Obviously, the People prosecuted the Hodgeses for the robbery-murder. And appellant's trial counsel argued that the Hodgeses coerced appellant into committing the murder. (31RT 11249-11250, 11252.) Defense counsel suggested that appellant was by himself when he approached McDade to discuss returning to his old job; later, the Hodgeses arrived, handed appellant the gun, and forced him to shoot McDade. (31RT 11257, 11263, 11267, 11270, 11280-11281, 11307, 11313-11314, 11318, 11329, 11333-11334.)

Appellant argues that the jury could have determined that the Hodgeses were direct perpetrators who committed the offenses without appellant's participation or encouragement. (AOB 384.) According to appellant, jurors could have concluded that, after committing the crimes by themselves, the Hodgeses gave appellant a share of the proceeds either to keep him quiet or reward him for providing information about the KFC. (AOB 385.) Appellant also contends that the jurors could have determined that the Hodgeses were accomplices because they were direct perpetrators who committed the crimes with appellant's assistance. (AOB 386.) Respondent disagrees: as noted, there was very strong evidence that appellant was the shooter. (Argument I.E.2., *ante*.)

In a prior argument, appellant noted that he first told Detective Lee that he waited in the car while his confederate robbed and killed the victim, after which he got a share of the loot. (AOB 128.) Appellant argued that

under this version of events, the jurors could have rejected his liability for murder and robbery and convicted him of only receiving stolen property. (AOB 129-130.) Appellant may attempt to raise this argument in his reply brief in response to respondent's argument on No. 3.16. However, in light of the evidence described Argument I.E.2., *ante*, no reasonable juror would have convicted appellant of only receiving stolen property. The evidence of robbery-murder is simply overwhelming.

D. Alternatively, Any Error Was Harmless

As with other instructional error claims, the *Watson* harmless-error standard applies. (*People v. Flood, supra*, 18 Cal.4th at pp. 489-490; *People v. Carpenter, supra*, 15 Cal.4th at p. 393.)

The overwhelming evidence that appellant was the shooter (the direct perpetrator) also supports the conclusion that any error in giving CALJIC No. 3.16 was harmless. Thus, this Court should reject appellant's claim that the evidence gave jurors reason to doubt whether he was the direct perpetrator. (AOB 396-397.)

Likewise, it cannot be said that there was a reasonable likelihood that CALJIC No. 3.16 directed jurors to find that appellant was the direct perpetrator. (See AOB 388; see also AOB 394.) The instructions, when viewed in their entirety, in a common-sense manner, made it clear that the jury had to determine whether appellant was the direct perpetrator of the robbery-murder. (3CT 606, 617, 619, 623, 625, 626; 31RT 11119-11120, 11124, 11127-11129 [instructions on murder, special circumstances, robbery, second degree robbery as a matter of law, personal use of firearm].) Additionally, the instructions told the jury to decide the case based on the evidence, detailed how the jury was to evaluate evidence, and described the People's burden of proof. (See e.g., 2CT 553, 570-571, 594.) In light of all of these instructions, no single instruction can be viewed as

directing a verdict on the issue of whether appellant was the direct perpetrator.

The parties' arguments also told the jury that they had to decide whether appellant was the direct perpetrator based on the evidence; i.e., not based on the instruction that the Hodgeses were accomplices. The prosecutor argued that the evidence showed that appellant was the direct perpetrator – and he went through this evidence in detail. (See e.g., 31RT 11160, 11163-11164, 11173-11177, 11179.) As noted, defense counsel argued that the Hodgeses coerced appellant into killing McDade – and defense counsel thoroughly discussed the evidence in making this argument. (31RT 11257, 11263, 11267, 11270, 11280-11281, 11307, 11313-11314, 11318, 11329, 11333-11334.) The parties' arguments told the jury to review the evidence before making their decision.

Case law supports the conclusion that CALJIC No. 3.16 did not direct the verdict that appellant was the direct perpetrator. As appellant concedes, *People v. Heishman* (1988) 45 Cal.3d 147 (*Heishman*) rejected a similar claim. (AOB 392.) In *Heishman*, one defense theory was that a witness (Gentry) killed the victim on her own; this was supported by some evidence. The trial court instructed the jury that, if a murder was committed, then Gentry was an accomplice as a matter of law (CALJIC No. 3.16). The defendant argued that this instruction precluded the jury from finding that Gentry acted alone. This Court rejected this argument. The instructions did not tell the jury that it could not find Gentry was the killer. CALJIC No. 3.16 was given to make clear that Gentry's testimony had to be corroborated. The instruction could not be understood as precluding rejection of Gentry's testimony, including rejection because the jury found she was the killer. Moreover, the defendant's interpretation would make the instruction practically a direction of conviction; yet the jury was

instructed on the presumption of innocence and the People's burden of proof. (*Heishman, supra*, at pp. 162-163.)

Likewise, in the present case, it cannot be said that CALJIC No. 3.16 amounted to a directed verdict in light of the instructions on deciding the case based on the evidence, the evaluation of evidence, and the burden of proof. As in *Heishman*, the obvious purpose of CALJIC No. 3.16 was to make clear that the Hodgeses "statements" – presented through Banks and Leisey – had to be corroborated. (See e.g., 3CT 601 [CALJIC No. 3.11 – modified – statements of accomplices must be corroborated].)

Appellant contends that *Heishman* has been implicitly overruled and that it is inconsistent with *People v. Hill* (1967) 66 Cal.2d 536 (*Hill*). (AOB 392-393.) Appellant cites *People v. Ward* (2005) 36 Cal.4th 186 in support of this argument. However, *Ward* is distinguishable. On appeal, defendant Ward argued that witness Springer was the actual killer. This Court held that there was no evidence that Springer conspired with Ward or aided or abetted him and there was no evidence that Springer was the direct perpetrator. (*Id.* at p. 212.) Hence, *Ward* is distinguishable because there was no evidence that Springer had any criminal liability.

It is true that *Ward* disapproved of *People v. Gordon* (1973) 10 Cal.3d 460, 468-469, to the extent that *Gordon* indicated that a witness could be the defendant's accomplice even if the evidence showed the witness committed the crime without defendant's participation. (*People v. Ward, supra*, 36 Cal.4th at p. 212.) However, *Ward's* holding on this point is not applicable here because the evidence in this case showed that appellant committed the crime.

Appellant's reliance on *Hill* is also misplaced as it deals with the issue of a testifying co-defendant who confesses on the stand, implicating the defendant. In *Hill*, the defendants complained that the trial court should have instructed that co-defendant Madroid was an accomplice as a matter of

law. Co-defendant Madroid testified about the crime, basically confessing and implicating the defendants. (*Hill, supra*, 66 Cal.2d at pp. 554-555.) This Court held that there was no error in leaving to the jury the determination of Madroid's role; thereby avoiding imputing the testifying co-defendant's guilt to the other defendants. As this Court stated:

> [W]here a codefendant has made a judicial confession as to crimes charged, an instruction that as a matter of law such codefendant is an accomplice of other defendants might well be construed by the jurors as imputing the confessing defendant's foregone guilt to the other defendants. [Citation.] It is not error even to forego the giving of accomplice instructions where the giving of them would unfairly prejudice a codefendant in the eyes of the jury. [Citation.] In the instant case it was not error to leave to the jury the determination of Madorid's role as an accomplice and thus avoid imputations of the guilt of Hill and Saunders which might have flowed from the court's direction that the confessing Madorid was their accomplice as a matter of law.

(*Hill, supra*, 66 Cal.2d at pp. 555-556.)

In the present case, the Hodgeses did not testify and present confessions implicating appellant. The statements of the Hodgeses (presented through the testimony of Banks and Leisey) did not pose the same risk of prejudice as a co-defendant's in-court confession which implicates the defendant. Among other reasons, counsel for all defendants were able to fully cross-examine Banks and Leisey on the reliability of their testimony and pretrial statements.

Appellant's reliance on *People v. Riggs* (2008) 44 Cal.4th 248, 311-313, is also unwarranted. In *Riggs*, the trial court denied the defendant's request to instruct that his common law wife (Hilda) was an accomplice as a matter of law. This Court held that Hilda was not an accomplice as a matter of law. (*Id.* at pp. 312-313.) By contrast, the Hodgeses were accomplices as a matter of law. Moreover, *Riggs* cites *Hill* for the

uncontroversial proposition that Hill's accomplice (Madroid) was an accomplice as a matter of law. (*Id.* at p. 313.)

People v. Bittaker (1989) 48 Cal.3d 1046, 1100, called into doubt on other grounds, does not assist appellant. Bittaker and Norris committed several rapes and murders together. (*Id.* at pp. 1063-1066.) The trial court instructed the jury that Norris was an accomplice as a matter of law and this Court held that this instruction was correct. (*Id.* at p. 1100.) This Court noted that when a codefendant has made a judicial confession to the crimes charged, an instruction that -- as a matter of law -- such codefendant is an accomplice of other defendants might be interpreted by the jury as imputing the confessing codefendant's guilt to the other defendants. (*Ibid.*, citing *Hill.*) However, this Court stated that there was no significant danger that the jury would impute Norris's guilt to Bittaker. (*Id.* at p. 1100.) Apparently, this was because both Norris and Bittaker were equally guilty. Likewise, in the present case, the Hodgeses were accomplices as a matter of law. Both appellant and the Hodgeses had high levels of culpability, so there was no danger that appellant would be tainted by the Hodgeses' greater level of culpability.

For the foregoing reasons, appellant's argument must be rejected.

XVII. THE TRIAL COURT HAD NO SUA SPONTE DUTY TO INSTRUCT ON THEFT AS A LESSER-INCLUDED OFFENSE OF ROBBERY

Appellant argues that the trial court erred in failing to instruct on theft as a lesser-included offense of robbery. (AOB 399-416.) This contention should be rejected. Among other reasons, there was no substantial evidence supporting such an instruction and the standard instructions on felony murder and robbery sufficiently addressed the issue of the time of the formation of intent to rob.

A. Background

Near the start of the instructional conference, the court asked defense counsel what lesser-included offense instructions he was requesting; defense counsel mentioned the possibility of second degree felony murder, but did not mention theft as a lesser included of robbery. (30RT 10918.) The court did not instruct on theft as a lesser-included offense of robbery. Later, after most of the instructions were given, the defense argued for giving an instruction on receiving stolen property as a lesser offense related to the robbery-murder. (31RT 11137-11139, 11141, 11144-11148.) During the course of this argument, defense counsel acknowledged that instructing on theft as a lesser-included of the robbery-murder did not make sense. (31RT 11141, 11145; see also 31RT 11146, 11148 [receiving as alternative to robbery].) The court ultimately agreed to give an instruction on receiving stolen property and did so. (31RT 11151; 32RT 11364, 11366-11367.)

B. The Trial Court Had No Sua Sponte Duty to Give an Instruction on After-Formed Intent

Appellant argues that there was substantial evidence that he formed the intent to steal after shooting McDade. (AOB 399, 403, 407.) Accordingly, appellant claims that the jury should have been instructed on theft as a lesser-included offense of robbery. (AOB 399, 401-403.) Although appellant phrases his argument in terms of a lesser-included offense, appellant is really arguing that the trial court -- on its own initiative -- should have given the jury a special instruction highlighting the issue of after-formed intent (i.e., that a defendant who forms the intent to steal only after killing or otherwise using force against the victim is not guilty of robbery). This Court should reject this contention because an after-formed intent instruction is a pinpoint instruction that a trial court has no duty to

give when neither party has requested it. (*People v. Silva* (2001) 25 Cal.4th 345, 371.)

C. There Was No Substantial Evidence of Theft

"Instructions on after-acquired intent and theft as a lesser included offense of robbery are unwarranted absent `substantial evidence' that the defendant first formed the intent to take the victim's property after applying force." (*People v. Zamudio* (2008) 43 Cal.4th 327, 360.) Respondent reiterates that there was overwhelming evidence that appellant formed the intent to rob before killing McDade. (Argument I.E.2., *ante*.) Respondent has also dealt with some of appellant's counter-arguments on this point (e.g., the lapse of time between when McDade left the KFC and when he was shot). (Argument I.E.3., *ante*.)

In arguing that there was substantial evidence to support an after-acquired intent instruction, appellant relies on a portion of his statement to Detective Lee. (AOB 404-407.) But this part of appellant's statement does not support his argument. In this portion of his statement, appellant says he told McDade to hand over the money bag. (30CCT 9000.) Appellant claimed that McDade wanted to get out of the car and hurt him; appellant pulled out his gun; McDade sat down; appellant told McDade to hand over the money bag and McDade did so; at this point, McDade started threatening appellant and his family. (30CCT 9000-31CCT 9001.) Thus, even this version of events does not support an after-acquired intent instruction because appellant states that he pulled out his gun and then demanded the money.

Although the trial court instructed on receiving stolen property, it did so out of "an abundance of caution[.]" (31RT 11151.) The court commented that it was very difficult to believe that the jury would discount all of the evidence showing appellant's involvement in robbery and homicide. (31RT 11151-11152.)

D. Any Error Was Harmless

Again, for instructional error claims, the *Watson* harmless-error standard applies. (*People v. Flood, supra*, 18 Cal.4th at pp. 489-490; *People v. Carpenter, supra*, 15 Cal.4th at p. 393.) Further, the alleged error was harmless under any standard.

The standard instructions on felony-murder and robbery adequately cover the issue of the time of the formation of the intent to steal. (*People v. Hendricks* (1988) 44 Cal.3d 635, 642-643 [CALJIC No. 8.21 (first degree felony murder) and No. 9.10 (robbery) adequately cover the subject of the timing of formation of intent to steal]; see also *People v. Hughes* (2002) 27 Cal.4th 287, 358-363 [rejecting similar claims] (*Hughes*); *People v. Zamudio, supra*, 43 Cal.4th at pp. 360-361 [also rejecting similar claims].) In the present case, the trial court gave the standard instructions on first degree felony murder and robbery. (3CT 610, 623; 31RT 11122, 11127-11128.) Additionally, the trial court gave the standard instruction on the robbery-murder special circumstance. (3CT 619; 31RT 11125-11126.) Further, the court provided the standard instruction on concurrence of act and specific intent, and applied it to all crimes and the special circumstance allegation. (3CT 630; 31RT 11130; CALJIC No. 3.31.) All of these instructions – viewed as a whole – made it clear that to find appellant guilty he must have had the intent to steal at the time he applied the force.

Moreover, as noted, the evidence that appellant had the intent to rob at the time he applied the force was overwhelming. (Argument I.E.2., *ante*.) Appellant's statement to Lee does not alter that. (30 CCT 9000-31 CCT 9001.) It is also worth noting that the jury was instructed on receiving stolen property but declined to find appellant guilty of this lesser-related offense. (3CT 635-636; 32RT 11364, 11366-11367.) Moreover, the jury found that appellant personally used a gun in the commission of the robbery. (3 CT 675.)

Accordingly, for all these reasons, appellant's argument must be rejected.

XVIII. CALJIC No. 8.81.17 (SPECIAL CIRCUMSTANCES – MURDER IN COMMISSION OF ROBBERY) -- AS GIVEN -- WAS ADEQUATE AND NON-PREJUDICIAL

Appellant contends that the trial court erred prejudicially by using the disjunctive between paragraphs one and two of CALJIC No. 8.81.17 (special circumstances – murder in commission of robbery). (AOB 417-426.) This argument is without merit. The jury was adequately instructed that -- for the special circumstance -- the robbery could not be incidental to the murder. Any error in the instruction was harmless; especially in light of the parties' arguments and the strong evidence of intent to rob.

A. Background

The court said it would give CALJIC No. 8.81.17 and defense counsel did not object. (30RT 10916, 10981; 31RT 11069-11070, 11073, 11089.)

The court instructed the jury as follows:

> [T]o find that the special circumstance referred to in these instructions as murder in the commission of robbery is true it must be proved, one, the murder was committed while the defendant was engaged in the commission of a robbery, or, [¶.]
>
> two, the murder was committed in order to carry out or advance the commission of the crime of robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder.
>
> The crime of robbery will be defined hereafter.

(31RT 11125-11126; 3CT 619; CALJIC No. 8.81.17.) (The formatting of the paragraphs in the version of CALJIC No. 8.81.17 given orally has been altered slightly to easily distinguish between paragraphs one and two.)

B. Appellant Has Forfeited His Claim

Respondent reiterates that: "Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]" (*People v. Anderson, supra*, 152 Cal.App.4th at p. 927.) As noted, appellant's trial counsel failed to object to the alleged error. As will be explained below, the alleged error did not result in a miscarriage of justice. Accordingly, appellant has forfeited his claim. (See e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 113 [finding similar claim forfeited].)

C. There Is No Reasonable Likelihood That the Jury Failed to Understand That the Robbery Could Not Be Incidental to the Murder

"When reviewing a claim based on assertedly ambiguous instructions, we inquire whether the jury was reasonably likely to have construed them in a manner that violates the defendant's rights." (*People v. Friend* (2009) 47 Cal.4th 1, 79 (*Friend*).) In the present case, it is not reasonably likely that the jury believed it could find the robbery special circumstance true even if it thought that the robbery was incidental to the murder. The key sentence in CALJIC No. 8.81.17 states: "In other words, the special circumstance referred to in these instructions is not established if the robbery was merely incidental to the commission of the murder." (3CT 619.) This sentence refers to "the special circumstance," i.e., the robbery special circumstance. The sentence thus refers to the robbery special circumstance as a whole. The sentence relates to both of the theories described in the special circumstance instruction: (1) the murder was committed while the defendant was engaged in the commission of a robbery, or (2) the murder was committed to carry out the robbery,

facilitate escape, etc. Accordingly, the sentence told the jury that under either of these theories, the robbery could not be incidental to the murder.

Appellant seems to suggest that the jury would have limited this sentence to the second theory. (AOB 417-418, 424, 426.) For the reasons stated above, this is not reasonably likely.

Appellant misplaces reliance on *Friend, supra*, 47 Cal.4th at page 79. (AOB 418.) It is true that *Friend* says that using the disjunctive between the elements of CALJIC No. 8.81.17 would be inappropriate. (*Friend, supra*, 47 Cal.4th at p. 79.) However, in *Friend* disjunctives were not used. (*Ibid.*) Accordingly, that statement from *Friend* is dicta. Moreover, despite the disjunctive used in the present case, the sentence which stated that the robbery could not be incidental applied to the special circumstance as a whole.

Likewise, *People v. Prieto* (2003) 30 Cal.4th 226 (*Prieto*) (AOB 418) does not assist appellant. *Prieto* is distinguishable in that the felony-murder special-circumstance instruction in *Prieto* did not contain a sentence stating that the felony could not be incidental to the murder. (*Prieto, supra*, 30 Cal.4th at p. 256.)

D. Any Error Was Harmless

As with other instructional error claims, the *Watson* harmless-error standard applies. (*People v. Flood, supra*, 18 Cal.4th at pp. 489-490; *People v. Carpenter, supra*, 15 Cal.4th at p. 393.) It is true that *Prieto, supra*, 30 Cal.4th at pages 256-257, states that omission of an element from a special circumstance instruction is reviewed under *Chapman*. (AOB 424.) However, *Prieto* relied on *People v. Odle* (1988) 45 Cal.3d 386, a case which predated *Flood*, and *Neder v. United States* (1999) 527 U.S. 1, 4, a federal criminal prosecution. Although *Neder* states that *Chapman* applies, it appears that the United States Supreme Court was merely

exercising its supervisory powers over federal criminal prosecutions in federal courts. (*Id.* at pp. 15-16.)

Moreover, this Court should reject appellant's contention that the alleged error amounted to the omission of an element. (AOB 418-421, 424.) The second paragraph of CALJIC No. 8.81.17 is based on *People v. Green* (1980) 27 Cal.3d 1, 61 (*Green*), in which this Court observed that the purpose of the special circumstance was to single out those "defendants who killed in cold blood in order to advance an independent felonious purpose. . . ." Although the defendant in *Green* technically committed a robbery, it was clear from the evidence that it was not "a murder in the commission of a robbery but the exact opposite, a robbery in the commission of a murder[,]" i.e., the victim was robbed of certain items to prevent identification of her body. (*Id.* at pp. 60, 61-62.) (*Green* has been overruled and treated adversely in several cases not relevant here.) But in *People v. Kimble* (1988) 44 Cal.3d 480 (*Kimble*), this Court rejected the "suggestion that *Green*'s clarification of the scope of felony-murder special circumstances has somehow become an 'element' of such special circumstances, on which the jury must be instructed in all cases regardless of whether the *evidence* supports such an instruction." (*Id.* at p. 501, emphasis in original.) *Green* simply made clear that a robbery -- in a special circumstance allegation -- cannot be "merely incidental to the murder[.]" (*Green*, at p. 61; *People v. Valdez, supra*, 32 Cal.4th at pp. 113-114.) Accordingly, any error in omitting the second paragraph of CALJIC No. 8.81.17 or in using the disjunctive between the first and second paragraphs of CALJIC No. 8.81.17 should not be treated like the omission of an element.

In any event, any error in CALJIC No. 8.81.17 as given here was harmless under any standard. At the very least, CALJIC No. 8.81.17 told the jury that to find the special circumstance, the murder had to be

committed while appellant was engaged in robbery or appellant committed the murder to carry out the robbery or facilitate escape. Further, the special circumstance was not shown if the robbery was merely incidental to the murder. (3CT 619.) Even in this arguably imperfect form, CALJIC No. 8.81.17 conveyed that the robbery could not simply be incidental to the murder.

Additionally, the parties' arguments emphasized the issue of whether the murder was committed to advance the commission of the robbery. The prosecutor argued repeatedly and forcefully that this was a robbery-murder. (See e.g., 31RT 11160, 11163-11164, 11174-11180.) Defense counsel argued that appellant shot McDade because of pressure from the Hodges brothers -- not to facilitate a robbery. (31RT 11257, 11270-11271, 11276, 11280-11281, 11285-11286, 11313-11318, 11331-11334, 11339.)

Furthermore, as respondent has explained, there was overwhelming evidence of appellant's guilt – including his intent to rob. (Argument I.E.2., *ante*.) Respondent has dealt with appellant's counter-arguments on this subject. (Argument I.E.3., *ante*.) Based on these arguments, this Court should reject appellant's contention that the jury could have found that appellant's primary objective was to kill McDade out of personal animus (frustration over not getting rehired). (AOB 422-424.) Appellant reiterates some of his other criticisms of the People's case (AOB 425), but these minor points do not undermine the overwhelming evidence showing appellant had the intent to rob. (Arguments I.E.2. and I.E.3., *ante*.) Finally, it is worth noting that *Prieto, supra*, 30 Cal.4th at pages 256-257, found a similar error harmless based on the strong evidence of guilt.

For all these reasons, appellant's argument is without merit.

XIX. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FIRST DEGREE MURDER UNDER PREMEDITATION AND FELONY-MURDER THEORIES

Appellant claims that the trial court erred by instructing the jury on first degree murder (premeditated murder and felony murder) because the information charged only second degree murder. (AOB 427-433.) This Court has rejected this argument many times and appellant provides no basis for reexamining these precedents.

A. Background

In June 1992, the district attorney filed an information charging appellant with murder, citing section 187 and stating that appellant murdered McDade willfully, unlawfully, and with malice aforethought. (1CCT 47 [count 1].) The information also charged appellant with robbery and alleged a robbery-murder special circumstance. (1CCT 48.) This case was the subject of an extensive preliminary hearing. (1CT 1-216.)

Near the start of the instructional conference, the court indicated that it would instruct on premeditated murder and first degree felony murder; defense counsel did not object. (30RT 10914.) Later, the court confirmed that it would instruct on deliberate and premeditated murder and first degree felony murder (robbery murder); again, defense counsel did not object. (30RT 10979-10980.) (At 30RT 10979, it is clear that the court is speaking.) Subsequently, the court proposed instructing the jury that in a prosecution for first degree murder it was not necessary that all jurors agree on the theory of first degree murder; the defense did not object. (30RT 11045-11046.) Finally, the court reiterated that it would instruct on premeditated murder and first degree felony murder; still, defense counsel failed to object. (31RT 11067; see also 3CT 608, 610.)

Pursuant to the standard CALJIC instructions, the court instructed the jury on deliberate and premeditated murder and first degree felony murder

(i.e., robbery-murder). (31RT 11121-11122; 3CT 608-610; CALJIC Nos. 8.20, 8.21.)

B. Appellant Has Forfeited His Claim

Once again, "Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]" (*People v. Anderson*, *supra*, 152 Cal.App.4th at p. 927.) As noted, appellant's trial counsel failed to object to the alleged error. As will be explained below, the alleged error did not result in a miscarriage of justice. Accordingly, appellant has forfeited his claim.

C. Appellant's Contention Must Be Rejected in Light of This Court's Precedents

Appellant's argument has been rejected many times. (*Hughes, supra*, 27 Cal.4th at pp. 368-370; see also *People v. Moore* (2011) 51 Cal.4th 386, 412-413; *People v. Morgan* (2007) 42 Cal.4th 593, 616-617 (*Morgan*).)

This Court has held that a defendant may be convicted of first degree murder even though the information charged only murder with malice in violation of section 187. (*Morgan, supra*, 42 Cal.4th at p. 616.) This Court has rejected the argument that under *People v. Dillon* (1983) 34 Cal.3d 441 felony murder and premeditated murder are separate crimes. (*Morgan, supra*, at p. 616.) This Court has also rejected the contention that the trial court lacked jurisdiction to try a defendant for first degree murder and improperly instructed on theories of first degree murder. (*Ibid.*)

To the extent that appellant is claiming he received inadequate notice of the prosecution's theory of the case, this Court has explained that generally a defendant will receive adequate notice of the prosecution's theory from the testimony presented at the preliminary hearing. (*Morgan, supra*, 42 Cal.4th at p. 616.) In the present case, during the preliminary

hearing, Detective Lee testified about his interview with appellant which supported the theories that the crime was premeditated murder and felony-robbery-murder. (1CT 33-35, 37, 40-41.) Banks and Leisey also testified and their testimony likewise supported the prosecution's theories of premeditated murder and felony-robbery-murder. (1CT 65, 68-73, 124-132.)

Moreover, this Court has stated that *Apprendi v. New Jersey* (2000) 530 U.S. 466 does not require a unanimous jury verdict as to the particular theory justifying a finding of first degree murder. (*Morgan, supra*, 42 Cal.4th at p. 617.) For all of the foregoing reasons, this Court must reject appellant's contentions under both state law and the federal Constitution.

XX. THE PROSECUTOR DID NOT COMMIT MISCONDUCT; ALTERNATIVELY, ANY ERROR WAS NON-PREJUDICIAL

Appellant contends that the prosecutor committed misconduct during his closing argument: denigrating the role of the defense, offering personal opinions, referring to matters not in evidence, making emotional appeals, and commenting on lack of remorse. (AOB 434-447.) This argument has been forfeited and must be rejected: the prosecutor's remarks were permissible responses to defense counsel's argument.

A. Appellant Has Forfeited His Claim

Appellant has forfeited his claims of prosecutorial misconduct. To preserve such claims for appeal, "a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 960, internal quotation marks omitted.)

In the present case, with one exception, defense counsel failed to object to the alleged misconduct. The one exception was when the prosecutor stated that on a lot of occasions the witnesses were manipulated by defense attorneys through leading questions. (31RT 11191.) Defense

counsel objected to this comment. (31RT 11191.) The court overruled the objection, noting that the defense could respond during its argument. (31RT 11191.) Although defense counsel objected to this remark, he did not request an admonition. Thus, as to all of the remarks at issue, defense counsel either failed to object or failed to ask for an admonition; accordingly, appellant has forfeited his prosecutorial misconduct claim.

Appellant claims that, by refusing to sustain his initial meritorious objection and by stating that defense counsel's remedy was to respond during defense argument, the trial court rendered subsequent objections futile. (AOB 444.) Respondent disagrees. This is not a case like *People v. Hill* (1998) 17 Cal.4th 800, 821, in which unusual circumstances excused the defense attorney's failure to object. In *Hill*, the defense attorney was subjected to a constant barrage of the prosecutor's unethical conduct, including misstating the evidence, sarcastic and critical comments demeaning the defense attorney, and stating outright falsehoods. The prosecutor's continual misconduct, was coupled with the trial court's failure to rein in her excesses (e.g., comments before the jury suggesting that defense counsel was an obstructionist, delaying the trial with meritless objections). Under these exceptional circumstances, this Court excused defense counsel from the obligation to object and ask for admonishments. (*Ibid.*) As will be shown below, the present case does not rise to this level.

Appellant also claims that additional objections would not have unrung the bell of the prosecutor's misconduct. (AOB 444.) However, as explained below, unlike *People v. Kirkes* (1952) 39 Cal.2d 719, 721-724, 726, this was not a situation where the prosecutor vouched for his case. Further, as noted above, this was not a case where objections would have been futile.

B. The Prosecutor Did Not Denigrate the Role of the Defense

Appellant claims that the prosecutor denigrated the role of the defense by attacking the integrity of defense counsel (e.g., they manipulated witnesses with leading questions). (AOB 435-436.) Appellant also argues that the prosecutor's reference to appellant's "Svengali defense" implied that defense counsel relied on deception. (AOB 436-437.) Further, appellant complains about the prosecutor's remark that defense counsel did not care about a just verdict. (AOB 437.) These contentions lack merit.

"A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. [Citations.] In other words, the misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial. [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citations.]" (*People v. Clark, supra*, 52 Cal.4th at p. 960, internal quotation marks omitted.)

"[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature. [Citation.] A prosecutor may vigorously argue his case and is not limited to Chesterfieldian politeness [citation], and he may use appropriate epithets. . . . " (*People v. Hill, supra*, 17 Cal.4th at p. 819.)

"A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel ." (*People v. Hill, supra*, 17 Cal.4th at p. 832.) "A defendant's conviction should be based on the evidence adduced at trial, and not on the purported improprieties of his counsel. [Citation.] When a prosecutor denigrates defense counsel, it directs the jury's attention away from the evidence and is therefore improper. [Citation.] In addressing a claim of prosecutorial misconduct that is based on the denigration of opposing counsel, we view the prosecutor's comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 978, overruled on other grounds.)

In the present case, the prosecutor's remarks were merely comments on defense tactics or the defense view of the evidence. "[T]he prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) The prosecutor's comment about defense counsel's use of leading questions was simply an argument regarding defense counsel's tactics. (31RT 11191.)

Likewise, the prosecutor's comment that the defense had presented a Svengali defense was also a comment on defense tactics. (31RT 11339.) In context, it is clear that the prosecutor was referring to the defense theory of the case: the Hodgeses were the Svengalis who evilly manipulated appellant. The prosecutor's subsequent reference to the "Svengali defense" makes this plain. Later in his argument, the prosecutor said: "This Svengali defense is baloney. And that Carl Powell was duped is baloney. Carl Powell was a street kid; he was a tough kid. He knew what he was doing." (31RT 11344.)

Similarly, the prosecutor was commenting on defense tactics when he said that defense counsel was trying to defend his client and did not care about a just verdict. (31RT 11341.) The prosecutor was arguing that defense counsel was a zealous advocate for his client, was not seeking justice in a neutral manner, and his argument should be viewed accordingly. The prosecutor was also responding to a defense argument which suggested that the defense was merely seeking a just verdict (i.e., a second degree murder verdict). (31RT 11339; see also 31 RT 11339 [defense counsel argues for second degree murder].)

This Court's precedents support the conclusion that the prosecutor did not commit misconduct. *People v. Seaton* (2001) 26 Cal.4th 598, 663, rejected a claim that the prosecutor improperly attacked defense counsel's integrity by describing the defense case as "'ludicrous,' 'contrived,' 'concocted,' and 'bogus'" because the remarks "were comments on the evidence." (*Ibid.*) Likewise, in the present case, the prosecutor's comments about the defense's use of leading questions and the Svengali defense were merely comments on the defense theory of the case. In *People v. Medina* (1995) 11 Cal.4th 694, 759, this Court found unobjectionable a prosecutor's argument that "'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something. . . .'" This was a fair comment on defense advocacy. Likewise, in the present case, the prosecutor's comment that the defense attorney was only interested in defending his client was a permissible remark on defense advocacy. *People v. Gionis* (1995) 9 Cal.4th 1196, 1215–1217, rejected a claim of prosecutorial misconduct where the prosecutor argued that defense counsel was "arguing out of both sides of his mouth" and "this was an example of 'great lawyering' which 'doesn't change the facts, it just makes them sound good[,]'" and read the jury several "classic quotations about lawyers" on the theme of lawyers'

ability to manipulate facts. Likewise, in the present case, the prosecutor's comments about the defense's use of leading questions and defense counsel's overriding desire to defend his client were merely comments on defense tactics and defense advocacy in general.

Appellant relies on *People v. Perry* (1972) 7 Cal.3d 756 (*Perry*) (overruled on other grounds) (AOB 437) but *Perry* is distinguishable because in that case the prosecutor's actions were more egregious. In *Perry*, during rebuttal argument, the prosecutor read from an opinion of Justice White of the United States Supreme Court which stated that defense attorneys will often cross-examine a witness and try to impeach him even if the witness is known to be telling the truth.[15] The prosecutor questioned the sincerity of defense counsel in challenging the sufficiency of a police report concerning the killing. Finally, the prosecutor accused defense counsel of unethical conduct and the defense investigator of trickery for their roles in obtaining statements from a prosecution witness which contradicted the account she gave the police. In effect, the prosecutor attacked the defense attorneys because, according to him, defense counsel were not ethically obligated to present the facts and were free to obscure the truth. (*Perry, supra*, 7 Cal.3d at p. 789.)

This Court held that it was misconduct to assert that defense counsel was acting in bad faith in challenging the sufficiency of the police report. Likewise, the prosecutor committed misconduct by implying that defense counsel had improperly obtained statements from the prosecution witness. (*Perry, supra*, 7 Cal.3d at p. 789.) Clearly, the misconduct in *Perry* was more egregious than the asserted misconduct in the present case. In the present case, as explained above, the prosecutor's remarks were permissible

---

[15] It is not clear that this is the same Justice White opinion cited in *People v. Hawthorne* (1992) 4 Cal.4th 43, discussed below.

comments on defense tactics or the defense view of the evidence. In this case, the prosecutor's comments were within the range of acceptable remarks as indicated by cases such as *Seaton*, *Medina*, and *Gionis*.

Appellant also relies on *People v. Hawthorne*, *supra* 4 Cal.4th 43 (AOB 438) but that case is distinguishable. In *Hawthorne*, the defendant claimed the prosecutor impugned the integrity of his counsel, in part by quoting from Justice White's dissenting opinion in *United States v. Wade* (1967) 388 U.S. 218, 256–258, to the effect that law enforcement has an obligation to ascertain "the true facts surrounding the commission of the crime" (*id.* at p. 256), which defense counsel do not. (*People v. Hawthorne, supra*, 4 Cal.4th at p. 59.) This Court disapproved of the use of Justice White's dissent, stating that the views expressed in that opinion interject an extraneous generalization, potentially diverting the jury's attention from the specifics of the case. Further, White's generalization was not shared by all judges or courts. (*Id.* at pp. 60-61.) In the present case, as explained above, the prosecutor's comments were within permissible limits. None of the prosecutor's comments were an extraneous generalization which could have diverted the jury from the specifics of the case at hand.

C. The Prosecutor Did Not Refer To Matters Outside the Evidence

Appellant contends that the prosecutor expressed his personal opinion of appellant's guilt and suggests that the jury may have assumed that there was other, extra-record evidence on which the prosecutor based this conclusion. (AOB 438-439.)

"A prosecutor may vigorously argue his case, marshalling the facts and arguing inferences to be drawn therefrom. [Citation.] We have held he may not express a personal belief in defendant's guilt, in part because of the danger that jurors may assume there is other evidence at his command on

which he bases this conclusion." (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.)

During the defense argument, defense counsel claimed that the defense and the prosecution shared a common view of much of the evidence. (See e.g., 31RT 11246, 11249-11250, 11252.) In his rebuttal argument, the prosecutor emphasized that the prosecution and the defense did not share a common view of the evidence. The prosecutor said that appellant was a "cold-blooded murderer." (31RT 11340.) The prosecutor stated: "That's what Carl Powell is, and that's what I think he is." (31RT 11340.) The prosecutor added that it was "baloney" that the prosecution and defense agreed on various facts. (31RT 11340.) The prosecutor stated emphatically that he was not aligned with defense counsel in any way. (31RT 11340.)

Viewed in context, it is clear that the prosecutor was simply responding to the defense argument that the prosecution and the defense held the same interpretation of key evidence. The prosecutor was properly emphasizing critical differences in how the prosecution and the defense saw the evidence. When the prosecutor stated that appellant was a cold-blooded murderer, he was plainly referring to the evidence that he had painstakingly presented and thoroughly argued in his opening argument. The prosecutor's statement that he thought appellant was a cold-blooded murderer referred to the prosecution view – based on the evidence – that appellant was a first degree murderer. The prosecutor was contrasting this view with the defense theory that appellant was only a second degree murderer. (31RT 11339.)

People v. Sandoval, supra, 4 Cal.4th at page 184, is instructive. In that case, the defendant claimed that the prosecutor expressed his personal opinion by stating, inter alia, "I shake my head in disbelief[]" at one witness's testimony. This Court held that the remark was made in the

context of reviewing discrepancies in defense testimony and was not likely to be understood as based on anything outside the record. Likewise, in the present case, the prosecutor's remark was made in response to a defense argument and was not likely to be understood as referring to any evidence outside of the record.

Appellant's reliance on *People v. Fiero* (1991) 1 Cal.4th 173 (disapproved on other grounds) (AOB 439) is misplaced. In *Fierro*, the prosecutor accused the defense attorney of duplicity; here, the prosecutor did no such thing.

In response to a defense argument, the prosecutor discussed the testimony of the neighbor (Henrietta Senner) who said that she heard a gunshot at about 10:45 p.m. or 11:00 p.m. The prosecutor acknowledged that what the neighbor said about the timing of the shot did not quite fit with the other evidence. (32RT 11352.) But, said the prosecutor, "in a case like this, everything never fits." (32RT 11352.) The prosecutor noted that there were many witnesses and "all kinds of things [were] happening[.]" (32RT 11352.) Appellant argues that the prosecutor relied on the existence of evidentiary incongruities in other cases to shore up the prosecution's evidence in this case. (AOB 439.) Not so. Viewed in context, the prosecutor was making an appeal to common sense: in a complex case like this one, not all pieces of evidence will fit together perfectly.

D. The Prosecutor Did Not Make an Emotional Appeal

Defense counsel argued that appellant was afraid to snitch on the Hodgeses because he feared that they would harm his family. (31RT 11255, 11271, 11285, 11286.) In rebuttal, the prosecutor questioned the closeness of the connection between appellant and his family. The prosecutor stated that appellant might love his family, but they did not seem very supportive of him. (32RT 11353.) The prosecutor noted that appellant's mother told him to turn himself in and appellant's brother was

going to kick him out of his house (on to the street). (32RT 11354.) The prosecutor asked rhetorically: "Where is his family that he's trying to protect so much?" (32RT 11354.) Thus, the prosecutor was questioning appellant's family's closeness to him and, implicitly, appellant's closeness to his family. In this way, the prosecutor was attacking the defense argument that appellant declined to inform on the Hodgeses out of loyalty to his family. Accordingly, this Court should reject appellant's argument that the prosecutor made an emotional appeal to the effect that appellant's family did not care about him. (AOB 440-441.)

E. The Prosecutor Properly Referred to Banks and Littlejohn's Statements Which Included References to Appellant's Lack of Remorse

Banks's statement included a remark that appellant had no remorse (the youngster was "without no remorse[]"). (31CCT 9154.) Littlejohn's statement also included remarks to the effect that appellant had no remorse. According to Littlejohn, appellant acted like the murder was "nothing big." (31CCT 9266.) In response to the detective's question, Littlejohn affirmed that appellant did not show any remorse (he did not care). (31CCT 9266.) Littlejohn also stated that appellant was telling everyone about the crime like he had done "something big." (31CCT 9269.) When Littlejohn saw appellant on the news he was laughing and kissing at the camera. (31CCT 9269.) Appellant does not contend that this evidence was improperly admitted. Accordingly, when the prosecutor commented on these remarks, he was simply commenting on evidence that was properly before the jury. (31RT 11193-11195, 11207-11208, 11213, 11224, 11237; 32RT 11356.)

Contrary to appellant's argument (AOB 441-443), the evidence of appellant's lack of remorse was relevant. As noted, defense counsel argued that the Hodgeses coerced appellant into shooting McDade. If appellant had been coerced into shooting McDade (someone he knew and supposedly

liked), then presumably he would feel remorse or sorrow after the crime. Instead, appellant displayed no remorse and, indeed, boasted about the crime. The evidence of appellant's lack of remorse supported the inference that the murder was a cold-blooded, premeditated, robbery-murder.

It is true that *People v. Jones* (1998) 17 Cal.4th 279, 307, contains a broad statement that "unless a defendant opens the door to the matter in his or her case-in-chief [citation], his or her remorse is irrelevant at the guilt phase." However, a closer examination of *Jones* suggests that the relevance of remorse evidence depends on the facts of the case. In *Jones*, at the guilt phase, the defendant testified that he felt remorse during interrogations on the day after the crimes. However, an investigator told the jury that the defendant showed no remorse when being interrogated. This Court held that this was proper rebuttal evidence. (*Id.* at pp. 306-307.) Thus, under *Jones* lack of remorse can be proper rebuttal evidence. This suggests that the People can also put on evidence of lack of remorse to preemptively rebut an anticipated defense (e.g., duress). Finally, *People v. Riggs* (2008) 44 Cal.4th 248, 301, simply follows *Jones* and adds nothing analytically.

Accordingly, for the foregoing reasons, the prosecutor did not commit misconduct.

F. Alternatively, Any Error Was Non-Prejudicial

'"A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.]' (*People v. Crew* (2003) 31 Cal.4th 822, 839.)" (*People v. Williams* (2009) 170 Cal.App.4th 587, 628-629.)

In the present case, any prosecutorial misconduct was harmless under any standard. Again, the evidence of appellant's guilt (including mental state) was overwhelming. (Argument I.E.2., *ante*.) (See e.g., *People v. Riggs, supra*, 44 Cal.4th at p. 301 [in light of overwhelming evidence of

guilt, comments re lack of remorse were harmless].) Further, the prosecutor's allegedly improper comments were brief; they constituted a small portion of the prosecutor's lengthy argument.

It is worth noting that *Perry, supra*, 7 Cal.3d at pages 790-791, discussed above, found the prosecutor's misconduct to be non-prejudicial. *Perry* cited a number of factors, including the fact that the statements came at the conclusion of a lengthy trial and the remarks were relatively brief. (*Ibid.*) Likewise, *Hawthorne, supra*, 4 Cal.4th at page 61, discussed above, also found the misconduct to be non-prejudicial. The *Hawthorne* court noted, inter alia, that the improper portion of the argument was relatively brief and, when viewed in context, was not so inflammatory as to distract the jury from a thorough and reasoned consideration of the evidence. (*Ibid.*) Similarly, in the present case, the comments at issue would not have distracted the jury from a reasoned evaluation of the evidence. The comments were brief, a small part of the prosecutor's argument, and came at the end of a lengthy trial.

For all these reasons, appellant's claim must be rejected.

XXI. THE TRIAL COURT'S ADMONITIONS DISPELLED ANY PREJUDICE FROM THE JURORS' REVIEW OF NEWSPAPER ARTICLES CONCERNING THE HODGES BROTHERS; THE TRIAL COURT'S INQUIRY WAS SUFFICIENT

Appellant contends that the judgment should be reversed due to juror misconduct in reviewing newspaper articles concerning the Hodgeses' mistrial. Appellant also claims that reversal is warranted because of the trial court's inadequate inquiry into this matter. (AOB 448-460.) Appellant's argument is without merit. Among other reasons, the trial court's instructions rebutted any presumption of prejudice.

A. Background

On August 23, 1994, after the close of guilt-phase evidence, the trial court granted a mistrial as to the Hodges brothers. (30RT 10840, 10841, 10852.) The court advised appellant's jury that the Hodgeses would no longer be present and told them not to speculate about the status of their cases. (30RT 10867-10868.) The court reminded the jurors to avoid media reports about the case. (30RT 10868.) The court reiterated that the jury was to limit itself to the evidence presented regarding appellant. (30RT 10868.)

On August 24, an article appeared in the Sacramento Bee (a local newspaper) which was captioned "Mistrial delivered in slaying of KFC manager." (32RT 11390-11391.)

On August 27, the Sacramento Bee ran an article captioned "Charges dropped in KFC murder case." (31RT 11153; 32RT 11390.)

On August 29, defense counsel brought the August 27 article to the court's attention, requested an inquiry of the jury, and a curative instruction. (31RT 11153.) The court proposed asking the jurors if they had read the article and if they could assure the court that it would not affect their decision. (31RT 11153-11154.) Defense counsel agreed with this procedure, adding his concern that the jurors might be inclined to "load up" on appellant because the Hodgeses were gone. (31RT 11154.)

The court asked the jurors if they had read the article or its headline; six jurors and two alternates indicated that they had. (31RT 11155-11156.) The court asked these jurors and alternates if the article or headline would affect their verdict; the jurors/alternates indicated (by declining to raise their hands) that it would not. (31RT 11156.) Next, the court asked the jurors/alternates if they would have a problem disregarding what they had read if so instructed. (31RT 11156.) The jurors/alternates indicated that would have no such difficulty (again by declining to raise their hands).

(31RT 11156.) Defense counsel expressed satisfaction with these results. (31RT 11156-11157.)

On August 30, after the jury had been sent out for deliberations, defense counsel raised the issue of the August 24 article. (32RT 11390-11393.) Defense counsel opined that part of the article might be harmful to appellant. (32RT 11392-11393.) After a long discussion, the court proposed sending the jurors a note and having the court attendant ask the alternates about the article. (32RT 11395.) The court suggested asking the following: did any of the jurors/alternates read the article (or headline) which appeared in the Bee on August 24? If so, respond by name. Next, would any of the jurors/alternates who read the article/headline have any difficulty disregarding that information? If so, respond by name. (32RT 11395.) (This is a paraphrase). Defense counsel agreed to this procedure. (32RT 11395-11396.)

On this date, the court sent a note to the jurors/alternates asking them if they had read the August 24 article/headline. (3CT 669.) Two jurors and three alternates indicated that they had. (3CT 669; 2CT 422-423 [identity of jurors/alternates].) The note instructed the jurors/alternates to disregard the article/headline. If any of the jurors/alternates would have difficulty disregarding the article, they were to list their last names; no one did so. (3CT 669.)

B. Appellant Has Forfeited His Claim That the Trial Court's Inquiry Was Inadequate

As noted above, defense counsel expressed satisfaction with the trial court's handling of this juror misconduct issue. In other words, appellant's trial counsel did not object to the manner of the trial court's inquiry. Accordingly, appellant has forfeited his argument that the trial court's inquiry was insufficient. (Cf. *People v. Burgener* (1986) 41 Cal.3d 505, 521 [the record shed no light on cause of juror's behavior; lack of record

was result of defense attorney's preference that trial court conduct no inquiry; defendant cannot prevent inquiry, then challenge lack of inquiry on appeal]; disapproved on other grounds; see also *People v. Holloway* (2004) 33 Cal.4th 96, 126-127 [defendant waived claim of inadequate examination of juror; defendant did not seek broader inquiry of juror or object to trial court's course of action].)

C. Any Prejudice Was Dispelled by the Trial Court's Instructions, The Evidence Of Guilt, And The Parties' Arguments

1. Legal standards

"'[W]here a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance . . . which suggests a likelihood that one or more members of the jury were influenced by improper bias.' (*In re Hamilton* (1999) 20 Cal.4th 273, 294, italics omitted.) A juror who 'consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors' commits misconduct. [Citation.] Jury misconduct 'raises a rebuttable "presumption" of prejudice.' [Citation.]" (*Tafoya* , *supra*, 42 Cal.4th at p., 192.)

"On appeal, the determination whether jury misconduct was prejudicial presents a mixed question of law and fact 'subject to an appellate court's independent determination.' (*People v. Danks* (2004) 32 Cal.4th 269, 303 (*Danks*).) We accept the trial court's factual findings and credibility determinations if supported by substantial evidence. [Citation.]" (*Tafoya, supra*, 42 Cal.4th at p. 192.)

Because juror misconduct gives rise to a presumption of prejudice, the prosecution must rebut the presumption by demonstrating that "there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment." (*People v. Clair* (1992) 2 Cal.4th 629, 668 (*Clair*);

see also *Hardy* , *supra*, 2 Cal.4th at p. 174 ["The presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm."].) "By contrast, with ordinary error, prejudice must be shown and reversal is not required unless there is a reasonable probability that an outcome more favorable to the defendant would have resulted. [Citation.]" (*Clair, supra*, at p. 668.) "Manifestly, the standard is stricter for misconduct than for ordinary error. [Citations.]" (*Ibid.*)

"We assess prejudice by a review of the entire record. 'The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways. First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror. [Citations.] Second, we look to the nature of the misconduct and the surrounding circumstances to determine whether it is substantially likely the juror was actually biased against the defendant. [Citation.] The judgment must be set aside if the court finds prejudice under either test.' [Citation.]" (*Tafoya, supra*, 42 Cal.4th at p. 192.)

"The first of these tests is analogous to the general standard for harmless error analysis under California law." (*In re Carpenter* (1995) 9 Cal.4th 634, 653 (*Carpenter*).) "'Under this standard, a finding of "inherently" likely bias is required when, but only when, *the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment*. Application of this "inherent prejudice" test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information.' [Citation.]" (*Danks, supra*, 32 Cal.4th at p. 303, italics added.)

"'[E]ven if the extraneous information was not so prejudicial, in and of itself, as to cause "inherent" bias under the first test,' the nature of the misconduct and the 'totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose.' [Citation.] 'Under this second, or "circumstantial," test, the trial record is not a dispositive consideration, but neither is it irrelevant. All pertinent portions of the entire record, including the trial record, must be considered.' [Citation.]" (*Danks, supra*, 32 Cal.4th at p. 303.)

"In an extraneous-information case, the 'entire record' logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant." (*Carpenter, supra*, 9 Cal.4th at p. 654.) "In general, when the evidence of guilt is overwhelming, the risk that exposure to extraneous information will prejudicially influence a juror is minimized. [Citation.]" (*Tafoya, supra*, 42 Cal.4th at p. 192; see also *Carpenter, supra*, 9 Cal.4th at p. 654 ["the stronger the evidence, the less likely it is that the extraneous information itself influenced the verdict"].) Further, "[a]n admonition by the trial court may also dispel the presumption of prejudice arising from any misconduct." (*Tafoya, supra*, at pp. 192-193.)

"'We emphasize that before a unanimous verdict is set aside, the likelihood of bias under either test must be *substantial*.' As indicated in the high court decisions discussed above, the 'criminal justice system must not be rendered impotent in quest of an ever-elusive perfection. The jury system is fundamentally human, which is both a strength and a weakness.' [Citation.]" (*Danks, supra*, 32 Cal.4th at p. 304, italics added.)

2. Analysis

In the present case, any presumption of prejudice arising from any misconduct was dispelled by the trial court's admonitions. With regard to the August 27 article, the court asked the jurors/alternates if they would have a problem disregarding what they had read if so instructed. (31RT 11156.) The jurors/alternates indicated that would have no such difficulty. (31RT 11156.) Under the circumstances, the jury would have understood the court's comments as an admonition to disregard the article. This Court must presume that the jurors/alternates followed this instruction. (*People v. Zapien* (1993) 4 Cal.4th 929, 996, superseded by statute on other grounds.)

With regard to the August 24 article, the note instructed the jurors and alternates to disregard the article/headline. (3CT 669.) In addition, the court told appellant's jury that it was to limit itself to the evidence presented regarding appellant. (30RT 10868.) Further, the court instructed the jury to determine the facts from the evidence received in the trial and not from any other source. (2CT 553; 31RT 11096.) The court also instructed the jury on unjoined perpetrators. The court noted that there was evidence that others may have been involved in the crime. The court told the jury not to discuss or consider why the other persons were not still being prosecuted or whether they would be prosecuted further. The jury's duty was to decide whether the People had proved appellant's guilt. (2CT 568; 31RT 11105.) Again, this Court should presume that the jurors/alternates followed these instructions.

Moreover, respondent again reiterates that the evidence against appellant (including mental-state evidence) was overwhelming. (Argument I.E.2., *ante*.) Additionally, the parties' arguments made it clear that the jury had to decide appellant's guilt based on the evidence presented at trial. (See e.g., Arguments VI.G. and XVI.D., *ante* [summarizing attorneys' arguments].)

Appellant claims that he was prejudiced by the articles. (AOB 454-455.) Appellant notes that the articles appeared at the end of the guilt phase, on the eve of deliberations, and coincided with the disappearance of the Hodgeses. (AOB 454.) Appellant argues that the articles suggested that the Hodgeses were not responsible for the crimes and created the danger that appellant's jury would lash out at him because he was the only remaining defendant. (AOB 455.) The record does not contain the articles which makes it difficult for appellant to show prejudice. Also, respondent reiterates that the trial court's comprehensive instructions would have cured any such harm. Further, as noted above, the evidence against appellant was very strong.

D. The Trial Court Did Not Abuse Its Discretion in Conducting Its Inquiry

Appellant also claims that he is entitled to relief due to the trial court's inadequate inquiry into the effect of the articles on appellant's jurors. (AOB 455-460.) This contention must be rejected. "The specific procedures to follow in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion." (*People v. Seaton, supra,* 26 Cal.4th at p. 676.) "The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry." (*People v. Beeler* (1995) 9 Cal.4th 953, 989.)

In the present case, the trial court conducted an adequate inquiry. With regard to the August 27 article, the court inquired about the extent of the jurors' exposure to the story. (31RT 11155-11156.) The court ascertained from the jurors whether the article would affect their decision. (31RT 11156.) The court also admonished the jury to disregard the article (at least, a reasonable juror would have understood the court's comments as an admonishment). (31RT 11156.) Indeed, the court inquired whether any

of the jurors would have difficulty obeying such an admonition. The jury's response indicated that they could comply with this instruction. (31RT 11156.) With respect to the August 24 article, the court inquired into which jurors had read the article/headline. (3CT 669.) The court admonished the jury to disregard it and the court inquired if any of the jurors/alternates would have difficulty obeying such an instruction. (3CT 669.) The jury's response indicated they could abide by this instruction. (3CT 669.) Thus, the court did not abuse its discretion in conducting this inquiry.

Appellant disputes the adequacy of the trial court's inquiries. As an initial matter, respondent notes that appellant relies mainly on lower federal court decisions. (AOB 456-459.) *Silverthorne v. United States* (9th Cir. 1968) 400 F.2d 627, 630, was a federal criminal prosecution; thus, the Ninth Circuit was exercising its supervisorial powers over the federal district courts, not stating a rule of federal constitutional law. Further, *Silverthorne* is distinguishable in that it dealt with voir dire of prospective jurors regarding pretrial publicity. (*Id.* at pp. 635-640.) The concern was that the jurors might have prejudged the case. In the present case, by contrast, the newspaper articles appeared at the end of the guilt phase and the court gave numerous instructions which reminded the jurors to decide the case based on the evidence. In light of the evidence, the instructions, and the parties' arguments, the jurors would not have formed opinions of appellant's guilt based on the newspaper articles.

United States v. Davis (5th Cir. 1978) 583 F.2d 190 (*Davis*) is distinguishable for the same reasons. *Davis* was a federal criminal prosecution (*id.* at pp. 191-192) and involved pretrial publicity and the voir dire of prospective jurors. (*Id.* at pp. 196-198.) *Davis* says that the trial court has the same responsibilities regardless of when the publicity occurs (pretrial or during trial). (*Id.* at p. 197, fn. 10.) However, it is also true that

jurors are less likely to be prejudiced by media publicity when, as here, they have heard the evidence.

United States v. Accardo (7th Cir. 1962) 298 F.2d 133 (*Accardo*), another federal prosecution (*id.* at p. 134) involved much greater publicity than the present case. (*Id.* at pp. 135-136.) *Coppedge v. United States* (D.C. Cir. 1959) 272 F.2d 504 (*Coppedge*) was also a federal prosecution, the news accounts were highly prejudicial (e.g., Coppedge had pistol-whipped a witness's brother), and the trial court failed to admonish the jury against reading newspapers. (*Id.* at pp. 505, 507.) In *People v. Andrews* (1983) 149 Cal.App.3d 358, 366 (*Andrews*), the appellate court said that when juror misconduct is brought to the trial court's attention, the preferred procedure is to question jurors in chambers. However, subsequent cases have established that the trial court has broad discretion in determining the appropriate form of inquiry. (See, e.g., *People v. Beeler, supra*, 9 Cal.4th at p. 989.) As explained above, the trial court did not abuse its discretion in this case.

Marshall v. United States (1959) 360 U.S. 310 (*Marshall*), was a federal prosecution in which the United States Supreme Court expressly exercised its supervisory power over the lower federal courts. (*Id.* at pp. 311, 313.) In *Irvin v. Dowd* (1961) 366 U.S. 717 (*Irvin*), the pretrial publicity was highly prejudicial (e.g., the defendant had confessed to multiple murders). (*Id.* at pp. 725-726.) During voir dire, eight of the twelve jurors said the defendant was guilty. (*Id.* at p. 727.) Finally, in *People v. McNeal* (1979) 90 Cal.App.3d 830, 836 (*McNeal*), the trial court performed cursory questioning of the juror. Here, by contrast, the trial court conducted a sufficient inquiry of the entire jury and admonished the entire jury.

Accordingly, appellant's argument must be rejected.

XXII. THE JURY DID NOT COMMIT MISCONDUCT BY LEARNING ABOUT AN UNRELATED CASE; ANY "MISCONDUCT" WAS CURED BY THE TRIAL COURT'S INSTRUCTIONS

Near the end of the penalty phase, there was an unrelated robbery and shooting which was arguably similar to the instant offense. Appellant claims that the trial court failed to conduct an adequate inquiry into the publicity surrounding this crime. Appellant also argues that the jurors' exposure to publicity about this crime constituted juror misconduct. (AOB 461-468.) This contention must be rejected. Jurors did not commit misconduct because they saw news reports about an unrelated case; further, any prejudice was dispelled by the court's instructions. Moreover, the court's inquiry was adequate because the publicity did not concern this case.

A. Background

On September 30, 1994, just before the death verdict, defense counsel mentioned a recent shooting at a local McDonald's restaurant. (36RT 12653.) Defense counsel proposed that the court ask the jury (1) if they had read reports on the shooting, and (2) if so, did the reports influence them? (36RT 12654.) According to defense counsel, the incident occurred during penalty phase arguments and deliberations. (36RT 12654.) Defense counsel requested that the jury be asked as a panel, rather than individually. (36RT 12654.) Defense counsel suggested that the McDonald's shooting might have been gang-related. (36RT 12653, 12655.) The prosecutor noted that all current events might have some effect on a juror's decision. (36RT 12655.) After further discussion, and with defense counsel's assent, the court decided to make the inquiries after the jury's verdict. (36RT 12656.)

After the jury returned its death verdict, the court told the jury that it was excused. (36RT 12661.) Defense counsel reminded the court about the inquiry. The court then asked the jurors if any of them had been exposed to news reports about the recent McDonald's fast-food robbery/murder case. (36RT 12662.) Ten jurors had heard or seen such reports. (36RT 12662.) The court asked if any of the ten jurors had been influenced by these reports; if so, they were to raise their hands. (36RT 12662.) There was no response. (36RT 12662.) The news reports do not appear in the record.

B. Appellant Has Forfeited His Claim That the Trial Court's Inquiry Was Insufficient

Appellant's trial counsel did not object to the manner of the trial court's inquiry. In fact, as noted above, the trial court conducted the inquiry exactly as defense counsel requested. Accordingly, appellant has forfeited his argument that the trial court's inquiry was insufficient. (Cf. *People v. Burgener, supra*, 41 Cal.3d at p. 521 [the record shed no light on cause of juror's behavior; lack of record was result of defense attorney's preference that trial court conduct no inquiry; defendant cannot prevent inquiry, then challenge lack of inquiry on appeal]; see also *People v. Holloway, supra*, 33 Cal.4th at pp. 126-127 [defendant waived claim of inadequate examination of juror; defendant did not seek broader inquiry of juror or object to trial court's course of action].)

C. There Was No Juror Misconduct; Any Prejudice Was Dispelled by the Trial Court's Instructions

Many of the relevant legal standards have been stated in Argument XXI.C.1., *ante*.

Moreover, this Court has stated that: "'It is well settled that it is misconduct for a juror to read newspaper accounts'—or, one could add, to listen to broadcast media reports or otherwise to acquire extrajudicial

information regarding—'a case on which he is sitting. . . .'" (*People v. Stanley* (1995) 10 Cal.4th 764, 836.) In the present case, the newspaper accounts relating to the McDonald's robbery/murder did not pertain to this case. Accordingly, under the standard for misconduct, as articulated in *Stanley*, there was no misconduct.

It is true that other cases have articulated the standard more broadly. For example, quoting a case from the 1800's, this Court stated:

> '"There is no doubt . . . that the reading of newspapers by jurors, while engaged in the trial of a cause, is an inattention to duty which ought to be promptly corrected; and if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty, the act would constitute ground for a motion for a new trial. Jurors in a criminal action are sworn to render a true verdict according to the evidence. They cannot, under the oath which they take, receive impressions from any other source.'"

(*People v. Holloway* (1990) 50 Cal.3d 1098, 1108, quoting *People v. McCoy* (1886) 71 Cal. 395, 397. *Holloway* has been disapproved of on other grounds.)

Respondent submits that *Stanley* provides a more reasonable statement of the rule. A finding of misconduct should be limited to media accounts pertaining to the case on which the jurors are sitting. Among other reasons, jurors are not likely to be influenced by media reports concerning unrelated cases. *Holloway*'s statement of the rule is based on an extremely old case which, in view of *Stanley*, appears to be outdated. Moreover, even under *Holloway*'s version of the rule, it cannot be said that the McDonald's robbery/murder was a matter connected to the subject of the trial which would have been likely to influence the jurors. Clearly, the McDonald's robbery/murder was not connected to the present case. For example, the current robbery-murder was not a gang crime. But the

McDonald's robbery/murder may have been a gang crime. (36RT 12653, 12655.)

In any event, any prejudice has been dispelled by the trial court's penalty phase instructions in this case. (See e.g., *Tafoya, supra*, 42 Cal.4th at pp. 192-193; see also *Carpenter, supra*, 9 Cal.4th at p. 654.) The court instructed the jury that they were to determine the facts from the evidence received during the trial. (36RT 12625; 3CT 695.) The jury was told that, in determining the penalty, it should consider all of the evidence that had been received during the trial. (36RT 12629; 3CT 742.) The jury was instructed on the factors it should consider in determining the penalty (these obviously did not include media reports on unrelated crimes). (36RT 12629-12631, 12644; 3CT 742-743.)

The jury was also given some written instructions which – because they had been given at the guilt phase – were not re-read at the penalty phase. (36RT 12625-12626.) The jury was advised of this and told to consider these instructions. (*Ibid.*; 3CT 696.) These instructions included the instruction that the jury must decide all questions of fact from the evidence received in this trial and not from any other source. (3CT 699.)

United States v. Littlefield (9th Cir. 1985) 752 F.2d 1429 (*Littlefield*) (AOB 467) is non-binding and distinguishable. *Littlefield* was a federal criminal prosecution; thus, the Ninth Circuit was exercising its supervisory powers over the federal district courts. (*Littlefield, supra*, at p. 1430.) Littlefield appealed his convictions for tax-related criminal offenses arising from tax shelter activities. The Ninth Circuit remanded for a new trial because a Time magazine article on similar fraudulent tax shelters was taken by one of the jurors into the jury room during deliberations and was read and discussed by one or more of the other jurors. (*Id.* at pp. 1430, 1432.) Clearly, the showing of juror misconduct was much greater in

Littlefield than in the present case. In this case, there is no evidence that the jury discussed news reports of the McDonald's robbery/murder.

In the present case, the substance of the McDonald's news reports is not reflected in the record. This makes it difficult for appellant to show prejudice.

D. The Trial Court's Inquiry Was Adequate

As noted, "[t]he specific procedures to follow in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion." (*People v. Seaton, supra*, 26 Cal.4th at p. 676.) "The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry." (*People v. Beeler, supra*, 9 Cal.4th at p. 989.) The trial court did not abuse its discretion in this case. The McDonald's crime was plainly unrelated to the present case. The trial court's penalty phase instructions clearly prohibited the jury from considering such extraneous information. In light of these circumstances, the court was justified in conducting a limited inquiry. Indeed, the court could have properly refused to conduct an inquiry at all.

On the subject of the trial court's inquiry, appellant cites a number of cases which he cited in Argument XXI, *ante*. (AOB 464-465.) Respondent has addressed these cases in Argument XXI.D., *ante*. For the reasons stated in that argument, those cases are again non-binding, distinguishable, and unpersuasive. Moreover, the cases are distinguishable and inapposite because they involved publicity concerning the case which the jury was deciding or the same defendant. (See *Irvin, supra*, 366 U.S. at pp. 725-726; *Marshall, supra*, 360 U.S. at pp. 310-312; *Davis, supra*, 583 F.2d at p. 196; *Accardo, supra*, 298 F.2d at pp. 135-136; *Coppedge, supra*, 272 F.2d at p. 505; *Andrews, supra*, 149 Cal.App.3d at p. 362.) *McNeal, supra*, 90

Cal.App.3d at page 836, is inapposite because it did not involve news reports.

Appellant also contends that careful examination of the jurors was needed because (1) the jurors were exposed to the publicity around deliberations, and (2) the court made its inquiry after the jurors had returned the death verdict. (AOB 465.) However, it was reasonable for the court to accept the jurors' indication that they had not been influenced by the news reports of the McDonald's crime. After all, the crime was unrelated to this case. Moreover, as noted, shortly before penalty phase deliberations, the court instructed the jury to decide the issue of penalty on the basis of the evidence presented at trial.

For all these reasons, appellant's argument must be rejected.

XXIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING DR. NICHOLAS'S TESTIMONY

Appellant contends that the trial court erred in placing significant restrictions on the testimony of his mental health expert (Dr. Nicholas). Appellant argues that these restrictions violated his federal constitutional rights. (AOB 469-495.) This contention must be rejected. The trial court acted within its discretion under *People v. Price* (1991) 1 Cal.4th 324 (*Price*) (superseded by statute on other grounds) and this Court's case law does not violate the federal Constitution.

A. Background

During the defense's penalty phase opening statement, defense counsel referred to Dr. Nicholas's expected testimony and started to recite what appellant had told the doctor. (33RT 11819, 11822.) The prosecutor objected and the trial court sustained the objection. (33RT 11822, 11823.) The court and parties discussed the issue at length outside the jury's presence. (33RT 11823-11845.) Defense counsel stated that Dr. Nicholas would testify that appellant told him that the Hodgeses coerced him into

shooting McDade. (33RT 11824.) Defense counsel argued that this was relevant to mental duress and mental incapacity. (33RT 11825.) Defense counsel complained that if he could not ask the doctor about what appellant told him, then the defense would be unable to explain why the doctor had come to some of his conclusions. (33RT 11826.) The prosecutor replied that this was merely the defense's attempt to get appellant's testimony before the jury without putting appellant on the stand. (33RT 11828, 11830, 11831.) During the argument, defense counsel added that he was looking for a basis to argue lingering doubt. (33RT 11838.) At the end of the discussion, the court ruled that the expert could not, through testifying as to his opinion, put inadmissible hearsay before the jury. (33RT 11844, 11845.) Without conceding the point, defense counsel stated that he thought the court was probably right. (33RT 11845.)

Later, the court expanded on its ruling, stating that the doctor could not testify regarding the content of appellant's statement to him about how the offense occurred. (34RT 11989, citing *People v. Coleman* (1985) 38 Cal.3d 69 (*Coleman*) and *Price, supra*, 1 Cal.4th 324.)

B. The Trial Court's Ruling Was Correct under *Price*

The trial court's ruling was correct under this Court's decision in *Price, supra*, 1 Cal.4th at page 416. In *Price*, this Court explained that an expert may give the reasons for his/her opinion, including the materials the expert reviewed in formulating the opinion. But an expert may not -- under the guise of stating reasons for the opinion – present to the jury incompetent hearsay evidence. Moreover, the trial court has considerable discretion to control the questioning of the expert to prevent the jury from being exposed to incompetent hearsay. (*Ibid.*, citing *Coleman, supra*, 38 Cal.3d at p. 92.) Accordingly, in the present case the trial court acted within its discretion as defined by *Price* and *Coleman*.

Appellant contends that the trial court never exercised its discretion to admit Dr. Nicholas's testimony regarding appellant's statements because of its erroneous belief that case law mandated exclusion of the evidence. (AOB 475-488.) Appellant is mistaken: the trial court's interpretation of the law was correct; accordingly, the court acted within its discretion.

Appellant cites *Sears v. Upton* (2010) __ U.S. __ [130 S.Ct. 3259, 3263, fn. 6] for the general proposition that reliable hearsay evidence that is relevant to the defendant's mitigation defense should not be excluded by rote application of a state hearsay rule. (AOB 477.) However, this Court has noted that: "The rule allowing all relevant mitigating evidence has not `abrogated the California Evidence Code.' [Citation.] `[T]he trial court determines relevancy in the first instance and retains discretion to exclude evidence whose probative value is substantially outweighed by the probability that its admission will create substantial danger of confusing the issues or misleading the jury.'" (*People v. Carpenter, supra*, 15 Cal.4th at p. 404.) Likewise, the rule allowing all relevant mitigating evidence has not abrogated *Price* and *Coleman*; the trial court retains discretion to exclude incompetent hearsay.

People v. Edwards (1991) 54 Cal.3d 787, 837-838, also supports the conclusion that the trial court properly excluded appellant's statements. In *Edwards*, the defendant's tape-recorded statement to police was properly excluded at the penalty phase as hearsay which was self-serving and unreliable. (*Ibid.*; see also *id.* at pp. 818-821 [discussing the unreliable and self-serving nature of defendant's statements].) Likewise, in the present case, appellant's statements to the doctor were hearsay. Also, appellant's statements to the doctor were unreliable and self-serving. These statements were made after appellant had been arrested when he had a motive to lie; i.e., a motive to minimize his culpability. These statements were made to a defense expert who was supposed to help appellant.

Appellant cites *People v. Ainsworth* (1988) 45 Cal.3d 984 (*Ainsworth*) (AOB 480) but *Ainsworth* is distinguishable. In *Ainsworth*, a doctor testified regarding co-defendant Bayles's statements – including his statement regarding involvement in the crime. (*Ainsworth, supra*, at pp. 1010-1011.) This Court said that the doctor's testimony was relevant to Bayles's defense and Bayles's statement was relevant and admissible regarding the development of the doctor's diagnosis. (*Id.* at p. 1012.) However, there is an important distinction between *Ainsworth* and the present case: in *Ainsworth* co-defendant Bayles testified about the crime. (*Id.* at pp. 998-999.) Thus, co-defendant Bayles was available for cross-examination, unlike appellant in the present case. Accordingly, *Ainsworth* was not a case of a defendant attempting to get his statements before the jury, by means of an expert witness, without being cross-examined.

Next, appellant cites *People v. Mickey* (1991) 54 Cal.3d 612 (*Mickey*) (AOB 480-481, 485) but *Mickey* is also distinguishable. In *Mickey*, the People put on a psychiatrist whose opinion was based in part on statements by the defendant's ex-wife. (*Mickey, supra*, at pp. 686-688.) The psychiatrist testified about these statements. (*Id.* at p. 687.) This Court found this to be proper; among other reasons, there was no evidence that the information given to the psychiatrist by the ex-wife was unreliable. (*Id.* at p. 688.) *Mickey* is distinguishable because it did not involve a defendant attempting to get his own statements before a jury without testifying. Further, in *Mickey* there was no evidence that the ex-wife's statements were unreliable; here, as noted, appellant's statements to the doctor were unreliable.

People v. Montiel (1993) 5 Cal.4th 877, 922-923 (*Montiel*) (AOB 481) is distinguishable for similar reasons. In *Montiel*, a doctor testified about hearsay details of prior unfavorable psychological reports. (*Montiel, supra*, at pp. 922-923.) Again, *Montiel* did not involve a defendant trying

to get his own statements before the jury without being cross-examined. And the evidence in *Montiel* would have been more reliable than appellant's self-serving statements.

Appellant cites *Carpenter, supra*, 15 Cal.4th at page 410 (AOB 481) but this case is distinguishable for the same reasons. In *Carpenter*, the trial court allowed a prosecution expert to testify about hearsay statements that defendant had referred to himself as "Devious Dave," would discuss committing perfect crimes, and would brag about his Mafia connections. This Court found no abuse of discretion. (*Carpenter, supra*, at p. 410.) Again, it appears that *Carpenter* did not involve a defendant trying to get his own statements before the jury (it appears that the statements were from other people who had heard defendant make such comments). And it cannot be said that these statements were as unreliable as appellant's self-serving post-arrest statements to the doctor. Moreover, in *Carpenter* the statements were not exculpatory.

Appellant cites a Ninth Circuit opinion – *Heishman v. Ayers* (9th Cir. 2010) 621 F.3d 1030 (*Heishman*) – which is obviously non-binding. (AOB 481.) In *Heishman*, the Ninth Circuit reviewed a California case and said that an expert could have testified regarding: (1) the defendant's psychological disorder and, (2) the defendant's hearsay statements underlying the expert's opinion. (*Heishman, supra*, at p. 1041, fn. 3.) However, the Ninth Circuit did not discuss *Price* or *Coleman*. The Ninth Circuit's discussion of California case law is incomplete. As explained above, under *Price* and *Coleman* the trial court had the discretion to exclude appellant's statements.

Appellant notes that California courts have approved the admission of (1) declarations to physicians to support expert diagnoses, and (2) hearsay statements to support gang experts' opinions. (AOB 482-484.) Appellant cites *People v. Brown* (1958) 49 Cal.2d 577 (*Brown*) (AOB 482)

(superseded on other grounds) but *Brown* is distinguishable. In *Brown*, a doctor was allowed to recite his patient's statements; however, the patient was not the defendant. (*Brown, supra*, at pp. 580, 585-586.) Moreover, it is reasonable to believe that a patient's statements to her doctor will be reliable; the patient wants the doctor to correctly diagnose her medical condition. Thus, the hearsay statements at issue in *Brown* were inherently more reliable than appellant's statements in the present case.

With respect to gang expert testimony, this Court has stated that: "Of course, any material that forms the basis of an expert's opinion testimony must be reliable." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) As noted, appellant's statements were not reliable. Accordingly, appellant's reliance on *Gardeley* and other gang-expert-testimony cases is misplaced. (AOB 483-484.) Moreover, *Gardeley* cites *Price* for the proposition that a trial court has discretion to control the form in which an expert is questioned to exclude incompetent hearsay. (*Gardeley, supra*, at p. 619.) Thus, *Gardeley* and other gang-expert-testimony cases are consistent with *Price*, and do not compel the conclusion that the trial court abused its discretion under *Price*.

Appellant also contends that any prejudice to the People from Dr. Nicholas's testimony could have been cured by an instruction. (AOB 487.) Respondent disagrees. Under *Price* and *Coleman*, the trial court had a duty to exclude incompetent, unreliable hearsay (i.e., appellant's statements).

Appellant relies on *Green v. Georgia* (1979) 442 U.S. 95 (*Green*) (AOB 489-491) but *Green* is distinguishable. In *Green*, at the penalty phase, the defendant sought to introduce testimony by a witness that a co-perpetrator (Moore) had confessed that he (Moore) had killed the victim. (*Green, supra*, at pp. 95-96.) The trial court excluded this evidence; Georgia did not recognize a hearsay exception for declarations against penal interest. (*Id.* at p. 96 & fn. 1.) The United States Supreme Court

found a due process violation. The high court noted that there were substantial reasons to believe that the witness's proposed testimony was reliable. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was strong; indeed, sufficient to procure a conviction of Moore and a capital sentence. The statement was against Moore's interest, and there was no reason to conclude that Moore had any ulterior motive in making it. Finally, the State considered the testimony sufficiently reliable to use it against Moore, and to base a death sentence upon it. In these "unique circumstances," the United States Supreme Court found a due process violation. (*Id.* at p. 97.) Clearly, appellant's statements to the doctor did not have similar indicia of reliability.

Appellant claims that his statements to Dr. Nicholas, like Moore's statements in *Green*, were against appellant's interest. (AOB 490.) Not so. Plainly, appellant was attempting to minimize his culpability by claiming that the Hodgeses coerced him into shooting McDade. Appellant also notes that the prosecutor wanted to use appellant's testimony against the Hodgeses at the guilt phase. (AOB 490-491.) However, if the prosecutor had used appellant's testimony at the guilt phase, appellant would have been subject to cross-examination. The weaknesses in appellant's testimony would have been exposed (i.e., the weakness of appellant's claim that he was coerced). This would not have been the case if appellant's statements had come in through Dr. Nicholas. Further, although the prosecutor hoped to put appellant on the stand, this did not mean that the prosecutor vouched for appellant's testimony in all respects. That the prosecutor wanted to use appellant as a witness did not mean that appellant's testimony was 100 percent reliable.

C. Any Error Was Harmless

Any error in excluding Dr. Nicholas's recitation of appellant's statements was harmless. Respondent submits that *Watson* is the correct harmless-error standard (reasonable probability of a different result). "[G]enerally, violations of state evidentiary rules do not rise to the level of federal constitutional error." (*People v. Benavides* (2005) 35 Cal.4th 69, 91.) As noted, there was overwhelming evidence of appellant's guilt (including his culpable mental state). (Argument I.E.2., *ante*.) Moreover, appellant's own pretrial statements to Detective Lee and Littlejohn undermined his claim of duress. Leisey and Banks's testimony did not support the conclusion that the Hodgeses coerced appellant into killing McDade. Appellant's statements to Martinez and Scott before the robbery-murder support the conclusion that appellant intended to rob, intended to kill, and killed with premeditation (i.e., that he was not coerced into killing McDade). (Argument VI.D., *ante*.) Thus, appellant's statements to Dr. Nicholas were conter-balanced by evidence of appellant's culpable mental state. Accordingly, admitting appellant's statements would not have altered the balance of aggravating and mitigating evidence.

For all of these reasons, appellant's argument must be rejected.

XXIV. THE PROSECUTOR'S PENALTY PHASE ARGUMENT WAS PROPER AND NON-PREJUDICIAL

Appellant contends that reversal is required due to prosecutorial misconduct during penalty phase closing argument. (AOB 496-575.) Appellant's claims have been forfeited and must be rejected.

A. Appellant Has Forfeited His Argument by Failing to Object

Appellant concedes that his trial attorney made no objections during the prosecutor's penalty phase argument. (AOB 572.) Thus, appellant has forfeited his claims of prosecutorial misconduct. As noted, to preserve

such claims for appeal, "a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety. [Citations.]" (*People v. Clark, supra*, 52 Cal.4th at p. 960, internal quotation marks omitted.)

Appellant asserts that the trial court conveyed the message that any objections to the prosecutor's penalty phase arguments would be futile. (AOB 572.) Appellant notes that - during the prosecutor's guilt phase argument - defense counsel objected and the trial court overruled the objection, stating that defense counsel should respond in his own argument. (AOB 572; 31RT 11191.) Again, this is not a case like *People v. Hill*, *supra*, 17 Cal.4th at page 821, in which the defense attorney was subjected to a constant barrage of the prosecutor's unethical conduct, including misstating the evidence, sarcastic and critical comments demeaning the defense attorney, and stating outright falsehoods. In *Hill*, the prosecutor's continual misconduct was coupled with the trial court's failure to rein in her excesses (e.g., comments before the jury suggesting that defense counsel was an obstructionist, delaying the trial with meritless objections). (*Ibid.*) In the present case, as will be shown, neither the prosecutor's alleged misconduct, nor the trial court's alleged failings, rise to the level found in *Hill*. Further, the penalty phase of the trial was distinct from the guilt phase. The two phases had different purposes, involved different evidence, and had different arguments. Accordingly, the overruling of an objection at the guilt phase should not excuse the failure to object at the penalty phase.

Appellant also contends that additional objections would not have unrung the bell of the prosecutor's misconduct. (AOB 572.) However, as explained below, unlike *People v. Kirkes, supra*, 39 Cal.2d at pages 721-724, 726, this was not a situation where the prosecutor vouched for his case. Further, as noted above, this was not a case where objections would

have been futile. Accordingly, appellant has forfeited his argument by failing to object.

B. The Prosecutor's Arguments Were Proper

Respondent has set forth the legal standards for prosecutorial misconduct. (Argument XX.B., *ante*.) Respondent reiterates that the prosecutor has wide latitude during argument. (*Ibid.*) On appeal, this Court applies the same standard to review a claim of prosecutorial misconduct at the penalty phase that it applies at the guilt phase. When misconduct has been established, in determining prejudice, this Court must decide whether there is a reasonable possibility that the jury construed the prosecutor's comments in an objectionable fashion. In conducting this inquiry, this Court does not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. (*Guerra, supra,* 37 Cal.4th at p. 1153.)

> "State law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an error affected a verdict. [Citations.] Our state *reasonable possibility* standard is the same, in substance and effect, as the *harmless beyond a reasonable doubt standard* of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. [Citations.]"

(*People v. Nelson* (2011) 51 Cal.4th 198, 218, fn. 15, italics in original.)[16]

1. Under this Court's precedents, the prosecutor's "Bengal tiger" analogy was not misconduct

During his argument, the prosecutor compared appellant to a Bengal tiger. The prosecutor told a story to illustrate that a Bengal tiger may be peaceful in a zoo, but dangerous in its natural habitat. Likewise, argued the

---

[16] Some of the following sub-arguments contain harmless-error arguments. Moreover, harmless error will be addressed in section C, *post*.

prosecutor, appellant might seem harmless in the courtroom, but is dangerous out on the streets. (35RT 12488-12489.)

Appellant (who is African-American) claims that this argument was racist, dehumanizing, inflammatory, and an improper argument regarding future dangerousness. (AOB 498-515.)

This Court rejected a very similar argument in *People v. Duncan* (1991) 53 Cal.3d 955 (*Duncan*). In *Duncan*, the prosecutor used the metaphor of a Bengal tiger: in captivity the tiger seems docile; but in its natural habitat the tiger is different. In *Duncan* the defendant was African-American and the victim was Caucasian. This Court concluded that the Bengal tiger argument was not misconduct. The prosecutor did not want the jury misled by Duncan's docile courtroom behavior. This Court rejected Duncan's assertion that the Bengal tiger metaphor was racist: likening a vicious murderer to a wild animal did not invoke racism. (*Id.* at pp. 976-977.)

Appellant attempts to distinguish *Duncan* on the ground that the argument in *Duncan* was a guilt phase argument, not a penalty phase argument. (AOB 504.) However, in *People v. Brady* (2010) 50 Cal.4th 547 (*Brady*), the prosecutor made a similar Bengal tiger argument at the penalty phase and this Court rejected the contention that it was a racist allusion. (*Id.* at p. 585.)

Appellant asks this Court to reconsider *Duncan*, again arguing that it is a racist metaphor. (AOB 505-507.) Respondent notes that this Court recently followed *Duncan* in *Brady*, a 2010 case. (*Brady, supra*, at p. 585.) The reasoning of *Duncan* and *Brady* is sound: comparing a vicious murderer to a dangerous animal is permissible. Indeed, as explained below, this Court has upheld the use of epithets involving non-human entities. The Bengal tiger metaphor is used for a legitimate purpose: to explain that a defendant's behavior on the streets may be different from the behavior he

exhibits in the courtroom. The tiger analogy has a non-racial purpose which does not invoke any alleged stereotypes about African-Americans.

Appellant next contends that the Bengal tiger story was a dehumanizing, inflammatory characterization. (AOB 507-510.) This argument must be rejected: this Court has declined to find misconduct in the use of similar epithets. (*People v. Thomas* (1992) 2 Cal.4th 489, 537 [prosecutor called defendant a perverted murderous cancer and a walking depraved cancer]; *People v. Sully* (1991) 53 Cal.3d 1195, 1249-1250 [prosecutor called defendant a human monster and a mutation]; see also *People v. Farnam* (2002) 28 Cal.4th 107, 167-168 [in opening statement, prosecutor called defendant monstrous and a predator].)

Thus, this Court has declined to find misconduct in the use of similar epithets even though they might arguably be characterized as dehumanizing or inflammatory. Calling a defendant a cancer, a monster, a mutation, or a predator might arguably be dehumanizing the defendant. Alternatively, such epithets might arguably be considered inflammatory. Yet this Court has found no misconduct when they have been employed. Likewise, this Court should decline to find the Bengal tiger story dehumanizing or inflammatory.

Appellant claims that the prosecutor's tiger analogy was an improper argument regarding future dangerousness. (AOB 511-515.) This contention is without merit.

A prosecutor may comment upon a capital defendant's potential for future dangerousness. (*People v. Burney* (2009) 47 Cal.4th 203, 266.) In his argument, the prosecutor noted that Dr. Nicholas had testified that in the jail setting appellant was paranoid and stressed out. (35RT 12492.) The prosecutor acknowledged that Nicholas had stated that appellant would do fine in an institutional setting. (35RT 12492.) The prosecutor questioned this testimony. The prosecutor asked rhetorically: if appellant was

paranoid and stressed in an institutional setting, would appellant be a future danger in prison? (35RT 12492.) The prosecutor asked another rhetorical question: would appellant become a Bengal tiger – unrestrained – once he adjusted to the institutional setting? (35RT 12492.)

Appellant accuses the prosecutor of twisting Dr. Nicholas's testimony. (AOB 511-515.) However, a fair reading of the testimony and the prosecutor's argument shows that this is not so. The prosecutor cross-examined Dr. Nicholas about whether appellant would become more paranoid and dangerous in prison. The doctor acknowledged that appellant would become more paranoid in prison, but testified that appellant would not necessarily become more dangerous. (34RT 12106-12107.) In argument, it was permissible for the prosecutor to question this conclusion. It is certainly reasonable to think that an inmate who is paranoid will be more dangerous than one who is not. Thus, the prosecutor was not twisting the doctor's testimony; instead, he was criticizing it from a common-sense standpoint.

The jury was instructed that it was not bound to accept an expert opinion as conclusive, but should give to it the weight to which the jury found it to be entitled. The jury was instructed that it could disregard any such opinion if the jury found it to be unreasonable. (3CT 720.) Clearly, the prosecutor was arguing that Dr. Nicholas's opinion that appellant would not be dangerous was entitled to little weight or was unreasonable.

Moreover, for the above-stated reasons, any error in using the Bengal tiger metaphor was harmless. Harmless error will also be addressed in section C, *post*.

2. The prosecutor properly argued that the jury should show no mercy to appellant because he showed none to McDade

Appellant contends that the prosecutor improperly appealed to the jurors' passions by urging them to show no mercy toward appellant because he showed none to McDade. (AOB 515-522.) This claim must be rejected in light of this Court's precedents.

The prosecutor presented an argument regarding section 190.3, subdivision (k), one of the factors considered in determining whether to impose the death penalty. Factor (k) is "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (*Ibid.*) The trial court instructed on factor (k), including the statutory language and also stating that the jury could consider any sympathetic or other aspect of the defendant's character or record. (3CT 742-743; 36RT 12629, 12631.) In this case, the prosecutor referred to factor (k) and asked whether appellant deserved any sympathy. The prosecutor asked rhetorically, "[w]hat sympathy did [appellant] give [McDade]?" (35RT 12487.) The prosecutor added that if the jury deliberated about appellant's fate for five minutes, it would have deliberated longer about his fate than appellant considered McDade's fate. (35RT 12487.)

This Court has stated: "It is not improper to urge the jury to show the defendant the same level of mercy he showed the victim." (*People v. Collins* (2010) 49 Cal.4th 175, 230, and California Supreme Court cases cited therein.) This authority disposes of appellant's claim that the prosecutor's appeal for equal mercy for appellant was improper.

Nevertheless, appellant asks this Court to find the prosecutor's equal-mercy argument improper, noting that other jurisdictions hold this view. (AOB 517-522.) This Court has demonstrated awareness of the contrasting

views of other jurisdictions, but has held the equal-mercy argument is acceptable. (*People v. Ochoa* (1998) 19 Cal.4th 353, 464-465.) As this Court has noted, a capital jury is instructed that it may consider mercy or sympathy for the defendant. In making an equal-mercy argument, the prosecutor is merely arguing that the defendant does not deserve mercy or sympathy, given the circumstances of the crime. (*Ibid.*)

Moreover, the prosecutor's comment that appellant gave less than five minutes' thought to McDade's fate is a comment on the callousness of the offense. Thus, the prosecutor's remark pertains to the circumstances of the present offense, which is a permissible factor. (§ 190.3, subd. (a).)

Appellant also claims that the prosecutor's equal-mercy argument invoked the Biblical concept of vengeance, which is improper. (AOB 522.) Not so. The prosecutor's equal-mercy argument is premised upon a notion of proportionality which is a principle underlying our system of criminal law. Deciding whether to impose the death penalty is a normative process involving moral considerations. As this Court has noted, in making the penalty decision, the jury must make a moral assessment. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1418.) Accordingly, the prosecutor's equal-mercy argument was within permissible bounds.

3. The prosecutor properly argued that the jury should look at the crime through McDade's eyes

Appellant contends that the prosecutor improperly appealed to the jury to view the crime through McDade's eyes via a graphic, invented script. (AOB 522-528.) This claim should be rejected.

In the present case, the prosecutor invited the jury to view the crime through McDade's eyes. The prosecutor argued that McDade must have realized that appellant was planning to kill him; the prosecutor asked the jury to imagine what it would have been like to look at the barrel of the gun in the isolated, lonely parking lot; the prosecutor suggested that McDade

realized that he would not see his wife and children again; and the prosecutor argued that McDade was in sheer terror. (35RT 12450-12451.)

This Court has approved of similar arguments. For example, in *People v. Dykes*, *supra*, 46 Cal.4th 731, the prosecutor requested that the jury imagine the murder victim's experience: "Think about what it must have felt like for Lance Clark to have a hot piece of lead tear through his chest, go through his heart, his lungs, his liver and come out his back." (*Id.* at p. 793.) At the penalty phase, the prosecutor usually may ask the jury to consider the pain suffered by the victim. Contrary to the defendant's claim, it was permissible at the penalty phase for the prosecutor to invite the jurors to put themselves in the place of the victims and imagine their suffering. This Court did not consider the prosecutor's statement inflammatory. (*Id.* at pp. 793-794.)

Likewise, in *People v. Bennett* (2009) 45 Cal.4th 577, 617 (*Bennett*), the prosecutor argued that the victim likely sought mercy before being killed. This Court concluded that this argument was a reasonable inference from evidence in the record. (*Ibid.*)

Appellant notes that many federal and sister state courts have condemned arguments asking the jurors to look at the crime from the victim's standpoint. (AOB 524-525.) Respondent submits that this Court's precedents correctly approve of this type of argument. The murder victim's suffering is a circumstance of the offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1233-1234.)

Appellant complains that the prosecutor created a scenario of facts not in the record and asked the jurors to consider a hypothetical situation. (AOB 527.) Respondent disagrees. As in *Bennett,* the argument consisted of reasonable inferences based on the record. In *Bennett*, the prosecutor's argument that the victim likely sought mercy was a reasonable inference from the evidence. (*Bennett, supra*, 45 Cal.4th at p. 617.) Likewise, in the

present case, it was a reasonable inference from the record that McDade experienced terror in the final moments of his life. Next, appellant contends that the prosecutor's "script" of the crime was inflammatory and prejudicial. (AOB 527.) But the argument in the present case was no more inflammatory than the argument this Court approved in *Dykes*. In *Dykes*, the prosecutor asked the jury to imagine what it felt like for the victim to have a hot piece of lead tear through his body. (*People v. Dykes, supra*, 46 Cal.4th at p. 793.) Clearly, the prosecutor's argument in this case – asking the jury to image McDade's terror – was no more "inflammatory" than the argument in *Dykes*.

4. The prosecutor properly suggested that appellant could have killed others during the Zeke Moten/Kennedy High School shooting

Appellant asserts that the prosecutor improperly urged jurors to speculate that he could have killed others during the Zeke Moten/Kennedy High School shooting. (AOB 528-530.) This argument is meritless.

The prosecutor argued that appellant fired at Moten and a group of about 15 other students at a bus stop near Kennedy High School. (35RT 12464, 12468, 12470, 12474.) The prosecutor pointed out that appellant could have killed someone thereby causing suffering for another family. (35RT 12464-12465, 12470.)

Appellant claims that there was no evidence that the 15 other students were in the line of fire. (AOB 529.) Akens (who was one of appellant's confederates in the shooting) confirmed that there were about 15 people with Moten at the bus stop. (33RT 11753-11754.) Based on this testimony, the jury was entitled to conclude that these 15 people were in the zone of danger created by appellant's gunfire.

Appellant also claims that the evidence showed Akens was the shooter. (AOB 529.) Although there was conflicting evidence, the jury

could reasonably conclude that appellant was the shooter. Akens admitted that appellant was one of the shooters. (33RT 11755.) Later in his testimony, Akens claimed he did not see appellant fire a gun. (33RT 11791, 11799.) However, during the investigation of the high school shooting, Akens told Detective Aurich that appellant was the shooter. (33RT 11804-11806.) Thus, there was evidence supporting the prosecutor's argument that appellant was one of the shooters.

Appellant asserts that it was improper for the prosecutor to prey on jurors' fears by speculating that he could have killed others. (AOB 530.) First, as explained above, the prosecutor's argument that appellant could have killed others was not speculation – it was a reasonable inference from the evidence that others were in the zone of danger.

Second, the prosecutor's comments, even to the extent that they referred to "generalized fears aroused by random violence," were not unduly inflammatory. (*People v. Riggs*, *supra*, 44 Cal.4th at p. 323 (*Riggs*).) In *Riggs*, the prosecutor argued that the victim was just in the wrong place at the wrong time and that the victim could have been any of us. (*Ibid.*) Also the victim was a motorist on the highway and the prosecutor noted the scary nature of violence on the highways. (*Ibid.*; see also *id.* at p. 258.) This Court found this argument permissible. "[T]he randomness of the crime was a relevant consideration, and the prosecutor's comments, even to the extent that they referred to generalized fears aroused by random violence, were not unduly inflammatory." (*Id.* at p. 323.) For all these reasons, appellant's claim must be rejected.

5. The prosecutor's reference to gang activity was not an improper appeal to passion

Appellant condemns the prosecutor for referring to gang-related evidence. (AOB 530-538.) This complaint lacks merit. The prosecutor was entitled to refer to the gang evidence. Contrary to appellant's

contentions, the gang evidence was admitted for proper purposes at the penalty phase. Moreover, the prosecutor did not mischaracterize the gang evidence. The prosecutor discussed the gang-related evidence to counter the anticipated defense argument that appellant deserved mercy because he was naïve, easily manipulated, and criminally inexperienced. Thus, the prosecutor's argument – based on the gang evidence – was not misconduct.

When discussing the 1990 Hernandez bicycle robbery, the prosecutor noted that appellant and others (notably Willie Akens) acted in concert to knock Hernandez off his bike and steal it. (35RT 12462-12463.) The prosecutor commented that this showed that appellant was involved with his "Crip buddies" at that point. (35RT 12463.) The prosecutor's characterization was cautious – stating only that appellant was "involved" with his Crip buddies. The prosecutor did not say that the crime itself was gang-related (i.e., committed for the benefit of the gang) or that appellant was himself a Crip at that point. And the prosecutor was correct that at least one of appellant's buddies was a Crip; e.g., Akens was a Crip. (33RT 11749.) Thus, the prosecutor did not mischaracterize the evidence of the Hernandez bicycle robbery.

It was also reasonable for the prosecutor to point out the close relationship between appellant and Akens, and that Akens – a gang member – respected appellant. (35RT 12466-12467; see also 33RT 11748, 11781.) This argument was intended to defuse the expected defense argument that appellant was innocent and unsophisticated in criminal matters. Thus, the prosecutor's comments about Akens were appropriate.

The prosecutor briefly discussed the Rigsby assault at Land Park Bowl (a Sacramento bowling alley), arguing it was "kind of gang-related[,]" and there were gang overtones. (35RT 12463.) The prosecutor's characterization was accurate. Rigsby admitted that he was a member of the Broderick Boys street gang. (33RT 11689.) Rigsby's

assailants said that they were Freeport Crips. (33RT 11727-11728.) Thus, the prosecutor's comments about the bowling-alley incident were permissible.

Appellant faults the prosecutor for emphasizing Detective Aurich's "unsubstantiated" testimony that appellant was a "main player" in the Crips. (AOB 533-534.) Appellant's contention seems to boil down to the assertion that Detective Aurich's testimony was improperly admitted. This claim will be discussed more fully in Argument XXV, *post*. With regard to the current argument, the prosecutor properly discussed Detective Aurich's testimony that appellant was a "main player" in the Crips gang. (35RT 12473-12475.) Aurich testified that appellant was reputed to be a "main player" in the Freeport Crips. (33RT 11803, 11809-11810.) A "main player" was a more hardcore gang member, a more sophisticated criminal, the kind of gang member that would be a leader. (33RT 11810.) It is reasonable to infer that Aurich developed information about appellant's reputation from his contacts as an experienced gang detective. (33RT 11803, 11809.) Indeed, Aurich cited his experience as a basis for his testimony about appellant's reputation. (33RT 11809.) Thus, there was an adequate basis for Aurich's testimony about appellant's reputation. Further, the prosecutor cited Aurich's testimony to blunt the defense argument that appellant was criminally unsophisticated. The prosecutor's comments were proper argument concerning appellant's background.

Moreover, the prosecutor properly used a photograph of appellant and Akens displaying guns and Crip gang signs. (36RT 12609; 45CT3A 13409; People's Ex. P-3; CT3A refers to the Clerk's Third Augmented Transcript.) Again, this photo tends to rebut the defense argument that appellant was not a sophisticated criminal. Thus, the prosecutor's comments were a permissible argument concerning appellant's background.

Further, the prosecutor's argument concerning gang evidence was a relatively small part of his overall penalty phase argument, which was extensive. Accordingly, any error in making the gang-evidence argument was harmless. Moreover, the issue of prejudice will be discussed more extensively in section C, *post*.

6. The prosecutor properly commented on the absence of remorse as a mitigating factor

"The prosecutor is entitled to note the absence of the mitigating circumstance of remorse . . . ." (*People v. Burney*, *supra*, 47 Cal.4th at p. 266.) "There is no statutory bar to a logical comment on a defendant's lack of remorse. [Citation.] To the contrary, we have recognized that consideration of lack of remorse is proper. 'A defendant's remorse or lack thereof is a proper subject for the jury's consideration at the penalty phase [citation], and the prosecutor's comment thereon, which lacked any suggestion that the absence of remorse should be deemed a factor in aggravation of the offense, was proper.' [Citation.]" (*People v. Salcido* (2008) 44 Cal.4th 93, 160.)

In the present case, the prosecutor told the jury that it could consider remorse as mitigation. (35RT 12451-12452.) The prosecutor then examined the issue of remorse. The prosecutor commented that, after the murder, appellant partied with girls and/or drugs, bragged about the murder, and told Littlejohn that he wanted his gun back in order to commit more robberies and kill police officers if they caught him. (35RT 12452-12453; see also 35RT 12455-12459.) The prosecutor also cited Banks's testimony that John Hodges said appellant had no remorse and Dr. Nicholas's testimony that appellant lacked remorse. (35RT 12454; see also 35RT 12484 [further argument on Banks's statement that appellant lacked remorse].) The prosecutor noted Littlejohn's statement that appellant showed no remorse (did not care). (35RT 12457.) The prosecutor

reiterated some of these points during his rebuttal argument. (36RT 12607-12608.) The prosecutor also argued that appellant appeared remorseless in a videotape taken shortly after his arrest. (36RT 12609.)

Looking at the prosecutor's argument as a whole, the main thrust of the comments on remorse was that it was not a mitigating factor. Appellant showed no remorse, so remorse was not a circumstance in mitigation. As noted, this was a proper argument.

This case is similar to *People v. Jurado* (2006) 38 Cal.4th 72, 141. In *Jurado*, the prosecutor noted that, after the murder, the defendant played darts and enjoyed pizza and beer. This Court approved of these comments, concluding that the jury would have viewed the remarks as meaning remorse was not available as a mitigating factor. (*Ibid.*) Appellant's jury would have interpreted the prosecutor's comments in a similar manner.

Appellant claims that the prosecutor did more than simply tell the jury to find that appellant's post-crime conduct demonstrated the absence of a mitigating factor. Appellant states that the prosecutor referenced appellant's post-crime conduct during the portion of his argument devoted to discussion of aggravating factors. (AOB 543.) Respondent disagrees with this interpretation of the prosecutor's comments. As noted, at the outset of his remarks on remorse, the prosecutor told the jury that it could consider remorse as a factor in mitigation. (35RT 12451-12452.) All of the prosecutor's subsequent comments on remorse must be viewed in light of that preface. Accordingly, the prosecutor made it clear that the absence of remorse was merely an absence of mitigation.

Further, the prosecutor's argument that appellant lacked remorse was a comparatively small part of his overall penalty phase argument, which was quite lengthy. Thus, any error in making the lack-of-remorse argument was harmless. Respondent will make additional harmless-error arguments in section C, *post*.

7. The prosecutor did not commit *Boyd* error

Appellant contends that the prosecutor committed *Boyd* error by improperly converting mitigating evidence into aggravating evidence. (AOB 543-545; *People v. Boyd* (1985) 38 Cal.3d 762.) Appellant claims that the prosecutor converted mitigating evidence of appellant's impoverished childhood and his family's love for him into aggravating evidence. (AOB 543-545.) This contention lacks merit.

At the penalty phase, the defense presented evidence about appellant's tough childhood. (Statement of Facts, Penalty Phase, Mitigating Evidence, *ante*.) In his argument, the prosecutor responded to this testimony. The prosecutor argued that appellant had a loving family; he noted that other people have worse situations and yet do not become murderers. (35RT 12438.) The prosecutor pointed out that appellant had brothers who were responsible members of society. (*Ibid.*) The prosecutor also argued that appellant had opportunities in life. (*Ibid.*)

None of these arguments constituted an effort to convert mitigating evidence into aggravating evidence. Instead, the prosecutor was arguing that the mitigating evidence regarding appellant's childhood should be given little weight. The tough aspects of appellant's childhood were counter-balanced by his loving family. Many people (e.g., appellant's brothers) endure similar or greater hardships but do not become murderers. Accordingly, the mitigation evidence about appellant's childhood was not persuasive.

This Court has found analogous arguments to be proper. In *People v. Caro* (1988) 46 Cal.3d 1035, 1062-1063, overruled on other grounds, the prosecutor argued that the defense factor (k) evidence did not excuse the crime, but made it worse. The prosecutor argued that Caro wasted the opportunity to go to college, wasted an opportunity in the military, and wasted job training. (*Id.* at p. 1062, fn. 14.) This Court concluded that this

argument was proper; the prosecutor was merely arguing the lack of weight of Caro's factor (k) evidence. (*Id.* at pp. 1062-1063.) Likewise, in *People v. Sims* (1993) 5 Cal.4th 405, 463-464, overruled on other grounds, this Court stated that it was proper for a prosecutor to argue that the defendant's background (childhood abuse) had no mitigating effect in relationship to the crime. Accordingly, this Court should reject appellant's argument.

Further, the prosecutor's arguments about appellant's childhood constituted a relatively small part of his overall penalty phase argument. Hence, any error in the prosecutor's argument about appellant's childhood was harmless. Respondent will present additional harmless-error arguments in section C, *post.*

8. The prosecutor made a proper argument concerning appellant's relationship with the McDades; any error was harmless

Appellant contends that the prosecutor misrepresented his relationship with the McDades in order to aggravate the crime, inflame jurors, and prevent consideration of sympathy. (AOB 546-548.) In essence, appellant contends that the prosecutor made it appear that appellant's relationship with the McDade family was closer than it actually was. (*Ibid.*) This contention must be rejected.

"Although it is misconduct to misstate facts, the prosecutor `enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom.'" (*People v. Collins, supra,* 49 Cal.4th at p. 230.)

In the present case, in looking at the circumstances of the crime, the prosecutor urged the jury to examine the relationship between appellant and the McDade family. (35RT 12443.) The prosecutor argued that appellant had a relationship of trust with the family (an employment relationship). (35RT 12443.) The prosecutor noted that Keith McDade had driven

appellant to work, appellant knew Colleen McDade, and had played with the McDade children at the KFC. (35RT 12443-12444.) The gist of the prosecutor's argument was to emphasize the familiarity between appellant and the McDade family.

Appellant takes one of the prosecutor's statements out of context. Appellant points to the prosecutor's statement that appellant "went through" the Christmas holiday season with the McDade family. (35RT 12444; AOB 547-548.) Clearly, the prosecutor did not mean to suggest that the McDades treated appellant like a member of the family during the Christmas season. In context, the prosecutor was arguing that – despite the Christmas season – appellant continued to think about robbing (and perhaps murdering) Keith McDade. (35RT 12444-12445.)

Next, appellant claims that the prosecutor argued that appellant was plotting the robbery as Keith McDade was driving him to work, and he was interacting with Colleen McDade and the McDade children. (AOB 548.) The prosecutor argued that appellant had been thinking about the robbery for a long time before it occurred. (35RT 12444-12445.) The prosecutor also argued that as appellant was being friends with the McDades he was not appreciating his relationship with them. (35RT 12445.) The prosecutor ran these two thoughts together, so reading the argument literally, it appears to state that appellant was thinking about robbing the McDades at the same time that he was friends with them. (35RT 12445.) In other words, taken literally, the prosecutor's argument appears to suggest that appellant started thinking about robbing the McDades during the same period that he worked for them (i.e., when Keith McDade was driving appellant to work). However, as explained above, this was not the prosecutor's actual argument. Instead, as noted, the prosecutor was arguing (1) that appellant had been thinking about the robbery for a long time, and (2) that appellant did not appreciate his relationship with the McDades. The prosecutor did

not mean to argue that appellant was thinking about robbing the McDades during the period that he worked for them.

Looking at the prosecutor's argument as a whole, it appears that the prosecutor's argument was premised upon the theory that appellant developed his plan to rob McDade only after he was fired from KFC in May 1991. For example, the prosecutor referred to the "history of the crime." (35RT 12444.) The first event that the prosecutor described in this history was appellant's statements to Kim Scott. (35RT 12444-12445.) The prosecutor pointed out that appellant spoke to Kim Scott many times about robbing the KFC; so the crime was not a spur-of-the-moment event. (35RT 12444-12445.) It is important to recall that appellant made his statements to Scott in November and December of 1991 – well after he was fired from the KFC in May 1991. (18RT 7255-7258.) The prosecutor did not suggest otherwise. Thus, the prosecutor did not mean to suggest that appellant planned the crime prior to November 1991. This would have been clear from the prosecutor's argument as a whole. Accordingly, any suggestion by the prosecutor that appellant was planning to rob the McDades before he was fired in May 1991 was clearly minor, inadvertent, and harmless. Respondent will present further harmless-error arguments in section C, *post.*

9. The prosecutor did not misstate Dr. Nicholas's testimony in order to persuade the jury to reject his opinions

Appellant claims that the prosecutor misrepresented Dr. Nicholas's testimony about who pressured appellant. According to appellant, the prosecutor argued that Dr. Nicholas thought that the pressure was from the Hodgeses brothers. The prosecutor argued that actually the pressure that appellant was referring to came from Keith McDade. Appellant contends that Dr. Nicholas knew that appellant told police McDade pressured him.

However, Dr. Nicholas opined that the Hodges brothers were the ones who actually pressured appellant, and the prosecutor knew that Dr. Nicholas believed that the Hodgeses pressured appellant. (AOB 548-551.) This contention must be rejected.

The prosecutor argued that Dr. Nicholas testified that appellant was being pressured by the Hodgeses. The prosecutor argued that Dr. Nicholas did not know enough about the case to know that the pressure that appellant was referring to was pressure from McDade. Accordingly, the prosecutor argued that Dr. Nicholas based his opinion on inaccurate information. (35RT 12480.)

The prosecutor had examined Dr. Nicholas about his understanding of appellant's statement to the police. (34RT 12141-12142.) The prosecutor asked the doctor who appellant said pressured him. (34RT 12141.) Rather than answering this question, the doctor volunteered that it was his opinion that appellant was pressured by the Hodgeses. (34RT 12141.) The prosecutor pointed out that that was not his question. The prosecutor again asked, during the police interview, who did appellant say pressured him? (34RT 12141.) The defense lodged an objection and the court asked the prosecutor to clarify his question. (34RT 12141-12142.) The prosecutor then asked whether appellant said in the interview who he felt pressured by. (34RT 12142.) The doctor replied that he did not recall. (*Ibid.*) The prosecutor asked whether that was significant in forming an opinion as to whether the Hodgeses pressured appellant. The doctor said no. The prosecutor asked the doctor if he was aware that appellant said that it was McDade who pressured him. The doctor replied that that "kind of rings a bell" but he read the document months ago. (34RT 12142.)

Thus, the prosecutor's argument accurately characterized the doctor's testimony. Dr. Nicholas opined that the Hodgeses had pressured appellant. However, Dr. Nicholas apparently did not recall that, during his police

interview, appellant said that McDade had pressured him. The prosecutor properly pointed out the doctor's lack of familiarity with appellant's police interview.

In any event, even if the prosecutor somehow mischaracterized Dr. Nicholas's testimony on this issue, it was a minor point. Dr. Nicholas was a psychological expert. The main thrust of his testimony was psychological issues (e.g., appellant's IQ). Whether the doctor was confused about who allegedly pressured appellant was a minor point. Thus, any error in arguing this point was minor. Hence, any error was harmless.

10. The prosecutor properly argued that appellant acted alone in shooting McDade

Appellant claims that the prosecutor's argument that appellant acted alone in shooting McDade was based on misrepresentation of the record. (AOB 551-556.) This contention must be rejected.

The prosecutor argued that appellant acted alone when he shot McDade. (35RT 12446, 12486.) The Hodgeses were in their car at the moment of the shooting. (35RT 12446, 12486.) Appellant's statement to police supported the conclusion that appellant acted alone when he shot McDade. (35RT 12479, 12483-12484.) Indeed, appellant told police that he shot McDade while the Hodgeses were back in the car. (35RT 12481, 12483-12484.) The prosecutor also quoted from Daryl Leisey's statement and argued that it supported the conclusion that, at the moment of the shooting, appellant was alone and the Hodgeses were in the car. (35RT 12486.) John Hodges was the driver; he was in the car at the moment of the shooting. (*Ibid.*) At the scene of the robbery, Terry Hodges encouraged appellant to shoot McDade ("Just whack the motherfucker . . ."); but Terry returned to the car and was in the car at the moment of the shooting. (*Ibid.*) A minute or two after Terry returned to the car, appellant came back to the car, told the Hodgeses that it was finished, and said they should "get the

hell out" of the location. (*Ibid.*) This scenario was also consistent with Banks's statement. (35RT 12481.)

The prosecutor's argument was supported by the record. Appellant's interview with the police supported the conclusion that he acted alone when he shot McDade. For example, Detective Lee asked appellant: "You did the robbery, you shot Keith while both guys stayed in the car, right[?]" Appellant replied, "Uh hmm." (31CCT 9011.) Appellant's "Uh hmm" appears to be an affirmative response. Later, appellant again confirmed that the Hodgeses stayed in the car at the time of the robbery-murder; i.e., appellant was by himself:

> Lee: Okay. These are the same two guys with you at the time, that did the robbery?
>
> Powell: Uh hmm.
>
> Lee: They stayed in the car?
>
> Powell: Uh hmm.
>
> Lee: They didn't come with you, huh?
>
> Powell: Uh hmm.
>
> Lee: You sure?
>
> Powell: Positive. I was by myself.

(31CCT 9020.)

Leisey's pretrial statement supported the prosecutor's argument. In his police interview, Leisey stated that Terry had returned to the (Hodgeses') car when appellant shot McDade. (32CCT 9307-9308.) More specifically, Terry told appellant to "whack" McDade; Terry returned to his car; within a minute or two, appellant came back to the car; appellant said it was finished and they should "get the hell out" of the area. (32CCT 9307-9308.) This supports the conclusion that Terry was in the car at the

moment that appellant shot McDade. Moreover, according to Leisey's statement, John was the driver – he was in the car. (32CCT 9307.)

Leisey's trial testimony was more ambiguous; however, a close reading indicates that Terry had returned to the car when the shooting occurred. (25RT 9495.) For example, Terry said that a couple of minutes after his coaching, appellant came running back to the car. (25RT 9495.) Clearly, Terry was already at the car. Thus, when Leisey testified that Terry was "right there with Carl Powell[,]" he did not mean that Terry was physically next to appellant at the moment of the shooting. (25RT 9495.) This is especially clear when Leisey's testimony is viewed in connection with his pretrial statement.

Banks's testimony was unclear on the issue of whether the Hodgeses were present for the murder. Banks's testimony focused on the planning of the robbery-murder at the G Parkway home. (25RT 9422-9426.) Indeed, Banks did not know whether John Hodges was at the murder scene. (31CCT 9151, 9155-9156, 9158.) Thus, Banks's testimony and pretrial statement did not support the conclusion that the Hodgeses were with appellant at the moment of the shooting. In this way, Banks's testimony and statement were consistent with the prosecutor's argument that appellant was alone at the moment of the shooting (i.e., they did not contradict the prosecutor's argument).

Accordingly, the record supports the prosecutor's argument that appellant acted alone in shooting McDade. Even if the prosecutor somehow erred in making this argument, any error was harmless. As noted in Argument VI.D., *ante*, there was no substantial evidence of duress; i.e., no substantial evidence that the Hodgeses coerced appellant into shooting victim. This means that there was no substantial evidence of duress as a mitigating factor at the penalty phase. Instead, appellant acted alone and of his own free will in committing this cold-blooded murder. Thus, the

circumstances of the offense were an aggravating factor favoring imposition of the death penalty.

11. Any error by the prosecutor in stating that Akens was on probation was harmless

Appellant contends that the prosecutor went beyond the evidence concerning the Kennedy High School shooting, vouched for Akens, and falsely stated that Akens was on probation. (AOB 556-560.) Appellant's contention boils down to a complaint that the prosecutor incorrectly stated that Akens was on probation. (AOB 558.) Any error by the prosecutor was harmless.

The prosecutor argued that appellant shot at the students outside Kennedy High School. (35RT 12464.) The prosecutor argued that Akens's testimony that appellant was the shooter should be believed because Akens was under penalty of perjury and he was on probation. (35RT 12464.)

Before Akens's testimony, outside the jury's presence, the court and parties discussed the fact that Akens was on parole from the California Youth Authority (CYA). (33RT 11733, 11742, 11743.)

As noted, although there was conflicting evidence, the jury was entitled to conclude that appellant was the shooter. Akens admitted that appellant was one of the shooters. (33RT 11755.) Later in his testimony, Akens claimed he did not see appellant fire a gun. (33RT 11791, 11799.) However, during the investigation of the shooting, Akens told Detective Aurich that appellant was the shooter. (33RT 11804-11806.)

During his testimony, Akens admitted that he had served time at the CYA. (33RT 11758-11759, 11760-11761.) Apparently referring to his CYA commitment, Akens mentioned that he had been in for nine months and the day of his testimony was his second or third day out. (33RT 11797.)

Akens did not testify that he was on probation. It appears that Akens was on CYA parole. Even though the jury never heard evidence that Akens was on parole, any error was harmless. The jury knew that Akens had served time at CYA and had just been released. The jury would have understood that Akens had an especially strong incentive to refrain from perjury because he had a strong desire to avoid recommitment to the CYA. Thus, any error was harmless.

12. The prosecutor properly commented on defense tactics

Appellant asserts that the prosecutor attacked the integrity of defense counsel. Specifically, appellant claims that the prosecutor argued that the defense was attempting to try someone other than appellant (the Hodgeses) and that the prosecutor was suggesting that defense counsel were dishonest. (AOB 560-564.) Appellant also contends that the prosecutor smeared defense counsel by stating that the defense's lingering-doubt argument was a red herring. (AOB 562-563.) Appellant's argument is without merit.

In the present case, the prosecutor's remarks were merely comments on defense tactics or the defense view of the evidence. "[T]he prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account." (*People v. Bemore, supra*, 22 Cal.4th at p. 846.) The prosecutor discussed factor (g), whether appellant acted under duress or substantial domination of the Hodges brothers. (35RT 12440.) In the course of this discussion, the prosecutor mentioned a famous defense attorney who said that in death penalty cases the defense attorney should not allow the defendant to be tried, but should try someone else. (*Ibid.*) The prosecutor argued that the defense was employing this tactic – trying the Hodgeses. (*Id.* at p. 12441; see also 36RT 12604.) The prosecutor told the jury to look at the evidence and determine whether there was any evidence that appellant was under the substantial domination of the

Hodgeses. (35RT 12441.) The prosecutor stated that he would go into this in detail as he went through the evidence. (35RT 12441-12442.) Later, the prosecutor discussed the duress issue in detail, explaining how the evidence supported his position. (35RT 12475-12486.)

The prosecutor also discussed lingering doubt. He argued that there was no lingering doubt in this case and the jury should not "fall for this defense tactic." (35RT 12493.) The prosecutor described the evidence of appellant's guilt which quashed any lingering doubt. (35RT 12493.) Later, in his rebuttal argument, the prosecutor called lingering doubt a red herring. (36RT 12603.) In light of this Court's prior cases, discussed below, these comments were permissible remarks regarding defense tactics.

This Court's precedents (cited in Argument XX.B., *ante*) support the conclusion that the prosecutor did not commit misconduct. *People v. Seaton, supra*, 26 Cal.4th at page 663, rejected a claim that the prosecutor improperly attacked defense counsel's integrity by describing the defense case as "'ludicrous,' 'contrived,' 'concocted,' and 'bogus'" because the remarks "were comments on the evidence." (*Ibid.*) Likewise, in the present case, the prosecutor's comments about the defense tactic of trying the Hodgeses and lingering doubt were merely comments on the evidence. The prosecutor argued that the evidence of appellant's culpability was strong and thus the jury should reject defense arguments that the Hodgeses coerced appellant or that there was lingering doubt. (35RT 12475-12486, 12493.)

In *People v. Medina, supra*, 11 Cal.4th at page 759, this Court found unobjectionable a prosecutor's argument that "'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something. . . .'" This was a fair comment on defense advocacy. Likewise, in the present case, the prosecutor's comment that the defense was attempting to try the Hodgeses and that lingering doubt was a

red herring were permissible remarks on defense advocacy. *People v. Gionis, supra*, 9 Cal.4th at pages 1215-1217, rejected a claim of prosecutorial misconduct where the prosecutor argued that defense counsel was "arguing out of both sides of his mouth" and "this was an example of 'great lawyering' which 'doesn't change the facts, it just makes them sound good[,]'" and read the jury several "classic quotations about lawyers" on the theme of lawyers' ability to manipulate facts. Likewise, in the present case, the prosecutor's comments about the defense tactic of trying the Hodgeses and the red herring of lingering doubt were merely comments on defense tactics and defense advocacy in general.

Appellant again relies on *People v. Perry, supra*, 7 Cal.3d 756 (AOB 563), but *Perry* is distinguishable because in that case the prosecutor's actions were more egregious. (Argument XX.B., *ante*.) Appellant cites several Ninth Circuit cases (AOB 563) which should not be followed because they are inconsistent with the California Supreme Court authority discussed above.

Finally, the prosecutor's comments on defense tactics were a relatively small part of his overall penalty phase argument. Any error in these comments was harmless. Respondent will present further harmless-error arguments in section C, *post*.

13. The prosecutor's comments about Dr. Nicholas were proper

Appellant accuses the prosecutor of improper attacks on Dr. Nicholas. Specifically, appellant argues that the prosecutor improperly characterized Nicholas as a hired gun and belittled Nicholas's IQ testing as unrealistic. (AOB 564-570.) These contentions are without merit.

The prosecutor made an argument regarding Dr. Nicholas which questioned his impartiality and criticized the IQ tests that he administered. (35RT 12490-12491.) The prosecutor said that Dr. Nicholas was "bought

and paid for" in this case. (35RT 12490.) Dr. Nicholas would not make money if he did not come to conclusions that the defense wanted. (*Ibid.*) Dr. Nicholas made little effort to determine if his IQ tests of appellant would be confirmed in the community. (*Ibid.*) The prosecutor argued that "everybody" said appellant was of normal intelligence except for Dr. Nicholas. (*Ibid.*) The prosecutor also characterized Nicholas's testimony as saying that the lower a person's IQ, the less likely he/she would be a leader. (*Id.* at pp. 12490-12491.) The prosecutor stated that Winston Churchill was a terrible student and he probably would not have done well on an IQ test. (*Id.* at p. 12491.) Further, the prosecutor referred to common experience and said that if one has a low IQ that does not necessarily mean that one is easily manipulated. (*Id.* at p. 12491.)

The prosecutor's argument that Dr. Nicholas had a bias, interest, or other motive to testify favorably for the defense was a proper argument. Indeed, the standard CALJIC instruction on credibility of witnesses (given at the penalty phase) said that in determining the believability of witnesses, the jury could consider the existence of a bias, interest, or other motive. (3CT 705.) Dr. Nicholas was going to be paid a significant amount of money for his work in this case. (34RT 12064.) Although Nicholas testified that only five to ten percent of his income came from expert testimony (34RT 12063), the jury was entitled to consider this factor in weighing his testimony. Accordingly, the prosecutor was entitled to point out Nicholas's possible bias, his financial interest in this case, and his financial interest in testifying favorably for clients so that he could continue to derive income from expert testimony. In fact, this Court recently noted that the prosecutor can make colorful attacks on opposing witnesses which include the subject of financial bias:

> As for defendant's assertion that the prosecutor's remarks were an improper personal attack on the integrity of the defense

> experts, our decisions make clear that "harsh and colorful attacks on the credibility of opposing witnesses are permissible. [Citations.]" (*People v. Arias*, [(1996)] *supra*, 13 Cal.4th [92] at p. 162, 51 Cal.Rptr.2d 770, 913 P.2d 980 [prosecutor's argument that the defense expert "stretched" a principle "for a buck" was a permissible comment suggesting a paid witness may be biased]; *People v. Cook* (2006) 39 Cal.4th 566, 613, 47 Cal.Rptr.3d 22, 139 P.3d 492 [applying similar reasoning to reject the assertion that the prosecutor's comment on fees paid to an expert witness who "'comes up with something that excuses this man's responsibility'" improperly implied that the witness gave false evidence for a fee].) No misconduct appears on this record.

(*People v. Clark* (2011) 52 Cal.4th 856, 962.)

The prosecutor was also entitled to argue that Nicholas's IQ tests did not reflect appellant's ability to function in the real world. For example, McDade's widow (who was also a manager at the KFC) believed that appellant was an intelligent person: e.g., he was a fast learner, mastered detailed procedures, etc. (32RT 11599-11602, 11610.) Akens had known appellant for about four or five years, considered him a close friend, and opined that appellant was an independent person, capable of making his own decisions. (33RT 11747-11748, 11781, 11782.) Most of appellant's friends and relatives testified that he had average intelligence. (34RT 12249; 35RT 12293-12294, 12321; but see 34RT 11962 [appellant was a slow student].)

It is true that Littlejohn thought that appellant was "stupid." (E.g., 31CCT 9266, 9269.) Thus, the prosecutor made a minor overstatement when he said that "everybody" believed appellant was of normal intelligence, except for Dr. Nicholas. (35RT 12490.) But clearly many people who interacted with appellant in the real world considered him to have average intelligence. Thus, any error by the prosecutor in stating that "everybody" believed appellant had normal intelligence was such a minor overstatement that it was harmless.

Appellant also faults the prosecutor for stating that Winston Churchill was a poor student. Appellant cites an official-looking website for the proposition that Churchill was actually a good student. (AOB 567.) Regardless of whether Churchill was a good student, there is no reasonable likelihood that the jury's penalty phase decision turned on this issue. Moreover, the prosecutor's larger point, based on common experience, was that if one has a low IQ that does not necessarily mean that one is easily manipulated. (35RT 12491.)

Next, appellant relies on *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 314-316 (*Gall*) (superseded on other grounds) (AOB 567-569), a Sixth Circuit case, to argue that the prosecutor's attack on the mental health expert's testimony was misconduct. *Gall* is distinguishable for several reasons. The misconduct in *Gall* was more extreme than any alleged error by the prosecutor in this case. For example, Gall's prosecutor expressed a personal opinion of the defendant's mental health expert based on long experience, suggesting he had knowledge outside the record. (*Gall, supra*, at p. 312 & fn. 23.) Also, the misrepresentations by Gall's prosecutor were more egregious than any alleged error in the present case (e.g., misrepresenting Gall's expert's testimony). (*Id.* at pp. 312-313.) Moreover, Gall's prosecutor attacked the use of the insanity defense (*id.* at p. 314); here, the prosecutor did not attack the use of mental health evidence as mitigating evidence; instead, he challenged the weight of the evidence. Further, Gall's prosecutor's most outrageous misconduct was warning the jury that Gall would go free if found not guilty by reason of insanity. (*Id.* at p. 315.) In the present case, the prosecutor's penalty phase argument raised no such concern. Finally, in *Gall* the comments were not isolated and the evidence rebutting the insanity defense was weak. (*Id.* at pp. 315, 320, 336.) In the case at bar, the comments were isolated and the People's penalty phase evidence was strong.

Thus, for all the foregoing reasons, any error in the prosecutor's argument regarding Dr. Nicholas was harmless.

14. The prosecutor did not improperly invoke Biblical authority to justify the death penalty

Appellant claims that the prosecutor improperly used the Bible as authority to support the imposition of the death penalty in this case. (AOB 570-571.) Respondent disagrees: the prosecutor's fleeting references to heaven and hell were not an improper religious argument.

The prosecutor made some philosophical comments about free will. He noted that we all make choices which impact our lives (e.g., marriage, children, etc.). (35RT 12437.) The prosecutor argued that appellant had choices and could have chosen not to kill McDade. (*Ibid.*) Theologians call this free will; people who make certain choices will go to heaven; people who make other choices will go to hell. (*Id.* at p. 12438.) Appellant was facing the death penalty because of his own choices. (*Ibid.*)

"[T]he primary vice in referring to the Bible and other religious authority is that such argument may diminish the jury's sense of responsibility for its verdict and . . . imply that another, higher law should be applied in capital cases, displacing the law in the court's instructions." (*People v. Huggins* (2006) 38 Cal.4th 175, 208, internal quotation marks and citations omitted.) In the instant case, the prosecutor's comments did not diminish the jury's sense of responsibility for its verdict. Nor did the prosecutor's remarks suggest that the jury should apply a higher law instead of the law recited in the trial court's instructions. In fact, the prosecutor's comments were simply part of a non-religious philosophical argument focusing on free will (i.e., appellant's own choices brought him to the penalty phase).

Thus, this case is distinguishable from the cases cited by appellant where the Bible was used as support for, or approval of, the death penalty;

e.g., invocation of higher law violated the Eighth Amendment principle of narrowly channeled sentencing discretion. (AOB 570-571.) For example, in *Sandoval v. Calderon* (9th Cir. 2000) 241 F.3d 765, 775, the prosecutor argued that the death penalty was approved by God. Likewise, in *People v. Ervin* (2000) 22 Cal.4th 48, 100, the prosecutor's references to Old Testament verses seemingly approving capital punishment ran afoul of this Court's decisions. In the present case, the prosecutor's remarks did not come close to this type of misconduct.

Moreover, "Even if the prosecutor's argument was error, such error was harmless. [Citation.] The prosecutor's biblical argument was only a small part of [his] argument, the bulk of which focused on arguing to the jury why it should find that the statutory aggravating factors outweighed the mitigating factors." (*People v. Huggins, supra*, 38 Cal.4th at p. 208, internal quotation marks and citations omitted.) Likewise, in the present case, the prosecutor's fleeting references to heaven and hell were a small part of a non-religious, philosophical argument about free will. Further, the prosecutor's free-will argument was a small portion of his total penalty phase argument which properly focused on the statutory aggravating and mitigating factors. Accordingly, any error was harmless and appellant's argument must be rejected.

C. Any Error Was Harmless

As noted previously, when misconduct has been established, in determining prejudice, this Court must decide whether there is a reasonable possibility that the jury construed the prosecutor's comments in an objectionable fashion. In conducting this inquiry, this Court does not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. (*Guerra, supra,* 37 Cal.4th at p. 1153.) State law error occurring during the penalty phase will be considered prejudicial when there is a *reasonable possibility* such an

error affected a verdict. (*People v. Nelson, supra*, 51 Cal.4th at p. 218, fn. 15, italics in original.)

In the present case, the trial court gave several penalty-phase instructions that would have rendered harmless any misconduct by the prosecutor during his argument. The court instructed the jury that: it must determine the facts from the evidence; it must accept the law as stated by the court; it must not be influenced by bias, prejudice, public opinion, or public feelings. (3CT 695.) The court instructed the jury to consider the evidence, follow the law, exercise its discretion conscientiously, and reach a just verdict. (3CT 695.) Later, the court reiterated that the jury must decide questions of fact based on the evidence. (3CT 699.)

Thus, to the extent that any of the prosecutor's comments might be construed as referring to facts outside the record, misstating the law, appealing to religious authority, or appealing to bias, prejudice, or public feeling – any such comments were neutralized by the trial court's instructions. These instructions rendered harmless the prosecutor's allegedly improper comments. To the extent that the Bengal tiger analogy could have been construed as an appeal to prejudice, it was neutralized by the court's instruction not to be influenced by prejudice. To the extent that the invitation to view the crime through McDade's eyes could have been construed as an appeal to passion, it was neutralized by the court's instruction to reach a verdict based on the evidence and the law, to ignore public feelings, and to exercise jury discretion conscientiously. To the extent that the reference to gang activity could have been construed as an appeal to public fear of gangs, it was neutralized by the instruction to reach a verdict based on the evidence and to ignore public feelings. To the extent that the prosecutor's argument about appellant's relationship with the McDades could have been construed as misstating the facts or as an appeal to passion, it was neutralized by the court's instruction to determine the

facts from the evidence, to reach a verdict based on the evidence and the law, and to exercise jury discretion conscientiously. To the extent that the prosecutor's references to heaven and hell could be construed as an appeal to religious authority, they were neutralized by the court's instruction to follow the law.

The jury was also instructed that statements made by the attorneys were not evidence. (3CT 698.) This would have lessened the impact of all of the prosecutor's allegedly improper statements.

The trial court also clearly instructed the jury on the factors that it was to consider at the penalty phase (CALJIC No. 8.85). The jury was told to consider: inter alia, the circumstances of the crime; other violent criminal activity; whether appellant committed the offense under the influence of extreme mental or emotional disturbance; whether appellant acted under duress or substantial domination by another; whether appellant's capacity to appreciate the criminality of his conduct was impaired by mental defect; appellant's psychological age; and any other circumstance which extenuated the gravity of the crime and any sympathetic aspect of appellant's character or record. (3CT 742-743.) The court's instruction on the penalty phase factors would have informed the jury that the People's penalty phase evidence had to be relevant to one of these factors. To the extent that any of the prosecutor's comments strayed beyond these factors, the jury could not consider them. Thus, for example, if any of the prosecutor's comments on the gang-related evidence strayed beyond permissible evidence of other violent crimes, or permissible rebuttal of defense background evidence, the instruction would have neutralized that evidence.

Moreover, CALJIC No. 8.85 clearly told the jury that it had to consider appellant's mental health and background evidence: evidence of duress/substantial domination; mental defect impairing capacity to

appreciate criminality; psychological age; and any other extenuating circumstance or sympathetic aspect of appellant's character or record. (3CT 743.) Thus, regardless of the prosecutor's comments, the jury would have understood that it could consider evidence of appellant's tough childhood and Dr. Nicholas's testimony.

Additionally, the parties' arguments focused the jury on permissible penalty-phase factors. The prosecutor's argument focused on permissible factors, most notably the circumstances of the present offense (the cold-blooded nature of the crime) and the Kennedy High School shooting. (See e.g., 35RT 12433-12435, 12443, 12445-12448, 12461-12470, 12484-12487.) The defense argument focused on permissible factors, most notably the circumstances of the present offense (e.g., lingering doubt), duress, mental health, and background evidence. (See e.g., 35RT 12523-36RT 12574, 12585, 12590-12591, 12596-12597 [present offense, lingering doubt, duress]; 36RT 12576-12583, 12598 [mental health, background].)

Thus, in light of the instructions and the parties' arguments, if any of the prosecutor's comments were improper, they were harmless. Accordingly, appellant's contention must be rejected.

For all of the foregoing reasons, appellant's prosecutorial misconduct argument is without merit.

XXV. THE TRIAL COURT PROPERLY ADMITTED THE PHOTO OF APPELLANT AND AKENS AND DETECTIVE AURICH'S TESTIMONY THAT APPELLANT WAS A "MAIN PLAYER" IN THE CRIP GANG

Appellant argues that the trial court erred by failing to exclude (1) a photo of appellant and Akens holding guns and displaying gang signs and, (2) testimony by Detective Aurich that appellant was a "main player" in the Crip gang. (AOB 576-598.) This contention must be rejected: both the photo and Aurich's testimony had permissible purposes. They tended to

rebut defense evidence that appellant was naïve and criminally unsophisticated. Moreover, any error was harmless.

A. Background

Before the start of the guilt phase evidence, there was a discussion about penalty-phase aggravating evidence, including the photo of appellant and Akens. (13RT 4520-4521.) The prosecutor argued that the actions depicted in the photo might qualify as aggravating evidence (a threat of violence). (13RT 4520-4521.) The court granted a defense motion to strike this evidence (the photo). The court reasoned that although the photo arguably depicted gang membership and arming by the gang, it did not focus on any specific incident of a threat or force, or a specific victim, or any specific criminal purpose. (13RT 4521.) During this discussion of penalty-phase evidence, the trial court agreed with the prosecutor that if a violent incident was gang-related, it would be appropriate penalty phase evidence (e.g., the Land Park bowling alley incident). (13RT 4523.)

Shortly before the start of the penalty-phase evidence, defense counsel reiterated his objection to the photo. Defense counsel argued that any connection with Akens would lead to an endless line of criminal activities by Akens, 99 percent gang-related. (32RT 11437.) The court and the parties discussed the issue of gang affiliation. The court stated that if a capital defendant is gang-affiliated, and the gang affiliation results in a threat or act of violence, then the People are allowed to present gang evidence to show the motivation for the incident. Gang evidence was relevant and its probative value outweighed its prejudicial effect. (32RT 11438-11439; see also 32RT 11439-11440.)

During the People's penalty phase case, Akens, a Freeport Crip, testified that appellant had been a Los Angeles Crip and testified about appellant's involvement in the gang crimes targeting Moten. (33RT 11748-11755, 11756, 11779.) Moten was targeted because he had left the Crips.

(33RT 11748-11750.) At times, Akens tried to minimize appellant's involvement in the Kennedy High School crimes. (33RT 11750-11751 [Akens claims appellant did not go into the classroom to confront Moten]; 33RT 11790 [Akens claims he did not see appellant shoot].) Akens also gave evasive answers when asked whether appellant was in the Freeport Crips. (33RT 11752.)

Akens respected appellant and appellant was pretty well respected in the gang community. (33RT 11781.) Akens admitted that he and appellant had some pictures taken in which both of them were holding guns. (33RT 11795.)

Detective Aurich testified about his interview with Akens regarding the Kennedy High School shooting. (33RT 11804-11809.) For example, Aurich testified that Akens told him that appellant was the shooter. (33RT 11806.)

Over defense objection, Detective Aurich (a gang detective) testified that in late 1991 appellant was reputed to be a "main player" in the Freeport Crips. (33RT 11803, 11809-11810.) A "main player" was a more hardcore gang member, a more sophisticated criminal, the kind of gang member that would be a leader. (33RT 11810.) Detective Aurich was not called as a gang expert. Instead, he was called to impeach Akens's testimony. (33RT 11802.)

During the defense penalty phase case, appellant's relatives denied that he had been a gang member. (34RT 11957, 11963-11964, 12247; 35RT 12266.) Dr. Nicholas, however, opined that appellant had been in a gang since age ten or twelve. (34RT 12088.) When appellant moved to Sacramento at about age 16, he continued his involvement with the Crip gang. (34RT 12099.)

After this testimony, the prosecutor sought to introduce the photo of appellant and Akens holding guns and flashing gang signs. (35RT 12299-

12300; People's Ex. P-3; CT3A 13409.) Defense counsel objected that it was cumulative: after Akens's testimony there was no doubt he and appellant were Crips. (35RT 12301.) Defense counsel also argued that the photo was inflammatory, suggesting that appellant and Akens were on an endless trail of crime. (35RT 12301-12302.)

The court stated that – assuming proper foundation – it would admit the photo. (35RT 12302.) The court found the photo relevant to the penalty phase issues of appellant's level of involvement in gangs, his desire to prove himself, and other gang-related issues. (35RT 12302.) The court found that the probative value outweighed the arguable prejudice. (35RT 12303.) Defense counsel objected that the photo was not proper rebuttal. (35RT 12305.) The court also found the photo to be relevant to the issue of whether appellant was coerced to commit the crime. The photo supported the argument that appellant was receptive to holding a gun to someone's head. The photo showed appellant holding a gun to a person's head (whether or not appellant was joking). That could support the argument that appellant had considered doing such a thing previously. (35RT 12305.) Defense counsel claimed they were surprised by the prosecutor's attempt to admit the photo. (35RT 12305-12306.) The court asked the prosecutor for an offer of proof as to foundation, and the prosecutor supplied one. (35RT 12306-12307.) Defense counsel argued that the photo was not competent evidence of anything. (35RT 12309-12310.) The court reiterated that it would admit the photo if the prosecutor laid the foundation. (35RT 12310.)

During their rebuttal case, the People presented the photo showing appellant and Akens holding guns and making gang signs. Appellant and Akens are pointing guns at each other; with their free hands they are making the letter "C"; and they appear to be smiling. (35RT 12325-12327, 12330, 12429; 29CCT 8642; 45CT3A 13409; Ex. P-3.)

B. Argument

1. The trial court properly admitted the photo

The legal standard for relevance is very broad: '"Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Relevant evidence, however, may be excluded if its "probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

As noted previously, claims of error in admitting evidence are reviewed under the abuse of discretion standard. (*Guerra, supra*, 37 Cal.4th at p. 1113.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*Ibid.*) As respondent has explained, this standard applies to the admission of gang evidence. (*Albarran, supra*, 149 Cal.App.4th at pp. 224-225.)

As the trial court stated, the photo was relevant to show the extent of appellant's involvement in the Crip gang in Sacramento. It was relevant to appellant's desire to prove himself as a criminal. The photo depicts appellant putting a gun to another person's head. (45CT3A 13409.) This has some tendency to suggest that appellant was a violent and callous person. Further, the photo was admitted in *rebuttal* after appellant had introduced evidence minimizing his gang involvement. Accordingly, the photo had significant probative value; i.e., probative value which was not outweighed by the probability that it would create substantial danger of

undue prejudice. The trial court did not abuse its discretion by admitting the photo.

Appellant claims that, after the People's penalty phase case-in-chief and the defense case, there was no dispute as to appellant's gang status. (AOB 584-585.) As an initial matter, respondent points out that appellant's relatives denied that he had been in a gang. (34RT 11957, 11963-11964, 12247; 35RT 12266.) This testimony alone gave the photo relevance and probative value as rebuttal evidence. As noted above, the photo had purposes besides showing gang membership: e.g., tending to show that appellant was a violent and callous person.

Appellant cites cases which have reversed judgments due to introduction of irrelevant or minimally probative gang evidence. (AOB 585-586.) These cases are distinguishable. In *People v. Cardenas*, *supra*, 31 Cal.3d at p. 904, the probative value of the gang membership evidence was minimal. The evidence was offered to establish possible bias of the defense witnesses in favor of the defendant. The prosecution sought to prove that the witnesses and the defendant lived in the same neighborhood and had the same friends. However, these facts had already been established by other testimony. In the present case, by contrast, the photo had significant probative value to rebut evidence presented in the mitigation case that downplays appellant's gang involvement.

In *People v. Albarran, supra*, 149 Cal.App.4th 214, there was highly inflammatory gang evidence: evidence of threats to kill police officers, descriptions of the criminal activities of other gang members, and a reference to the Mexican Mafia, which had little or no bearing on any issue relating to Albarran's guilt on the charged crimes and approached overkill. (*Id.* at p. 228.) In *Albarran*, the prosecutor argued that the motive for the shooting was to gain respect and enhance the shooter's reputation within the gang. The appellate court concluded, however, there was insufficient

evidence to support the contention that this shooting was done with the intent to gain respect because the motive for the underlying crimes was not apparent from the circumstances of the crime. (*Id.* at p. 227)

In the present case, by contrast, the photo was relevant and probative. The lone photo of appellant and Akens was not equivalent in type or quantity to the large amount of inflammatory evidence proffered in *Albarran*. Moreover, in this case the issue was penalty, not guilt as in *Albarran*; i.e., appellant's guilt had already been established.

People v. Bojorquez, supra, 104 Cal.App.4th at page 344, is also distinguishable. In *Bojorquez,* the detective's repeated references to gangs pursuing robberies, followed by his declaration that Bojorquez's alleged gang was involved in criminal activity, tended to ascribe guilt of that conduct to Bojorquez. And the same was true of the detective's accounts of how gang members evade testimony, including through physical retribution. (*Ibid.*) The *Bojorquez* court stated that every defendant has the right to be tried based on evidence tying him to the specific crime charged, and not on general facts accumulated by the police. (*Id.* at p. 345.) Moreover, the testimony about gang retaliation against witnesses, although unconnected to Bojorquez, also was inflammatory. (*Ibid.*) By contrast, in the present case, one isolated photo did not describe the gang's conduct or ascribe that conduct to appellant. The photo was not an attempt to try appellant based on general facts about the Crips accumulated by the police. And again, the issue in this case was appellant's penalty, not his guilt.

Appellant relies on *People v. Henderson* (1976) 58 Cal.App.3d 349, 360 (AOB 587), which rejected the proposition that, from the possession in one's home of loaded guns, an inference could be drawn that the possessor had an intent to commit the crime of assault with a deadly weapon. However, in this case the photo depicted much more than appellant's possession of a gun. As noted, the photo showed the extent of appellant's

involvement in the Crips, was relevant to his desire to prove himself as a criminal, and had some tendency to suggest that he was a violent and callous person.

Appellant argues that the photo was not admissible under the theory that it tended to rebut the defense argument that the Hodgeses coerced appellant into killing McDade. Appellant contends that the photo had no relevance to establishing that he had previously considered robbing and killing McDade or was receptive to doing so. (AOB 586.) Appellant also claims that because he and Akens were "goofing around" in the photo, it lacked probative value. (AOB 587.) Respondent disagrees. As noted, the photo showed the extent of appellant's involvement in the Crip gang and it was relevant to appellant's desire to prove himself as a criminal. Further, the photo showed appellant putting a gun to someone's head, which had some tendency to suggest that appellant was a violent and callous person.

Next, appellant claims that the trial court's ruling reflected impermissible propensity reasoning. (AOB 588.) Not so. First, the general rule against propensity evidence is designed to protect defendants against unfair determinations of *guilt*. The cases cited by appellant illustrate this. *McKinney v. Rees, supra*, 993 F.2d at pages 1380-1385, discussed in Argument VII.E., *ante*, concerned guilt-innocence issues. Likewise, *People v. Riser, supra*, 47 Cal.2d at pages 576-578, discussed in Argument VII.C., *ante*, also involved matters of guilt and innocence.

It is difficult to compare the disputed photo in this case with the disputed evidence in *McKinney* and *Riser* because it involves comparing penalty-phase evidence and guilt-innocence evidence. Nevertheless, respondent submits that in the present case, the photo was admissible as penalty phase evidence tending to show appellant's involvement in the Crips, his desire to prove himself as a criminal, and had some tendency to suggest that appellant was a violent, callous person. In other words, the

photo was evidence of more than just propensity. By contrast, the evidence at issue in *McKinney* and *Riser* was merely bad-character or propensity evidence. McKinney was proud of his knife collection, he sometimes carried a knife, and he used a knife to scratch "death is his" on a door. (*McKinney, supra*, 993 F.2d at pp. 1381-1382.) *Riser* stands for the proposition that, when the prosecution relies on a specific type of weapon, it is error to admit evidence that other weapons were found in defendant's possession, for such evidence tends to show, not that he committed the crime, but only that he is the type of person who carries deadly weapons. (*Riser, supra*, 47 Cal.2d at p. 577.) For the reasons explained above, the photo in the present case had more probative value during the penalty phase than the evidence at issue in *McKinney* and *Riser*, which was presented to the jury when determining guilt.

Appellant also asserts that the photo had substantial potential for prejudice. Appellant argues that the image of two young African-American men pointing guns at each other and throwing gang signs would have triggered jurors' fears. Appellant claims that several jurors were quite vulnerable to such fears. (AOB 588-589.) However, the jurors were instructed that they must not be influenced by bias or prejudice against appellant, nor swayed by public opinion or public feelings. (3CT 695; 36RT 12625.) This Court should presume that the jurors followed this instruction. (*People v. Zapien, supra*, 4 Cal.4th at p. 996.) Moreover, the jury had already found appellant guilty of special circumstances murder (an execution-style killing). The jury was not going to vote for death just because of a photo showing appellant smiling, holding a gun, and making gang signs.

For the foregoing reasons, the trial court properly admitted the photo.

2. Appellant has forfeited his argument pertaining to Detective Aurich's testimony; the trial court properly admitted Aurich's testimony that appellant was a main player in the Crips

Appellant also claims that the court erroneously admitted Detective Aurich's testimony that appellant was a "main player" in the Crips gang. (AOB 590-593; 33RT 11809-11810.)

a. Forfeiture

As a preliminary matter, respondent notes that appellant has forfeited his claim regarding Aurich's testimony. As respondent has explained, Evidence Code section 353 provides that a defendant cannot obtain a reversal based on erroneously admitted evidence unless he raised the same ground in the trial court. On appeal, appellant contends that Aurich's opinion should have been excluded under Evidence Code section 352 because its probative value did not substantially outweigh its prejudicial effect. (AOB 592.) But appellant did not raise an Evidence Code section 352 objection in the trial court. Instead, when the prosecutor asked the detective how he recognized appellant's name, defense counsel objected on the grounds of relevance and one of the court's prior rulings. (33RT 11809.)

Defense counsel's reference to the court's prior ruling was not a sufficient invocation of Evidence Code section 352. Apparently, defense counsel was referring to the court's ruling on gang evidence prior to the guilt phase of trial. However, defense counsel did not recall the ruling correctly. During the pre-guilt-phase discussion of penalty-phase evidence, the trial court agreed with the prosecutor that if a violent incident was gang-related, it would be appropriate penalty phase evidence (e.g., the Land Park bowling alley incident). (13RT 4523.) Thus, the court did not exclude gang evidence at the penalty phase. Moreover, the court did not cite

Evidence Code section 352. Thus, defense counsel's reference to the court's prior ruling was not a sufficient invocation of Evidence Code section 352. Accordingly, appellant did not raise an Evidence Code section 352 objection in the trial court and cannot raise such an argument now.

Moreover, trial defense counsel did not object on the grounds of hearsay or Detective Aurich's lack of personal knowledge. Thus, appellant has forfeited these grounds and may not assert them now. (33RT 11809; *People v. Szeto* (1981) 29 Cal.3d 20, 31-32 [defendant argued on appeal that officer's gang testimony should have been excluded as inadmissible hearsay; this claim was forfeited because of lack of trial court objection].)

b. Merits

In any event, appellant's claim lacks merit. Appellant's argument boils down to the contention that there was an insufficient basis for Aurich's "opinion" that appellant was a "main player." (AOB 591-592.) Appellant complains that Aurich did not provide a source or date for his information identifying appellant as a "main player." (AOB 592.) Appellant argues that the information that he was a "main player" could have been an unsubstantiated rumor or other unreliable source. (AOB 592.)

It is important to note that Detective Aurich did not testify as a gang expert. Instead Detective Aurich testified about appellant's reputation in the community for gang activity to impeach Akens's testimony. (33RT 11809-11810.) Aurich testified that appellant was reputed to be a main player. (*Ibid.*) Thus, Aurich was not expressing his own expert opinion that appellant was a "main player"; instead, Aurich was reporting on appellant's reputation in the community. In response to defense counsel's objection, the trial court limited the prosecutor to questioning Aurich about appellant's reputation. (33RT 11809.) The court did not explain the basis for its ruling.

This reputation evidence was admissible to impeach Akens's evasive testimony regarding whether appellant was in the Freeport Crips gang. The prosecutor asked Akens if appellant was in the Freeport Crips. Akens evaded the question by saying appellant was from Los Angeles. The prosecutor asked if appellant was in a gang with Akens. Akens gave a halting, inarticulate response which included the statement that "it wasn't about no gang with us." (33RT 11752.) Later, the prosecutor again asked Akens whether appellant was a Freeport Crip; Akens replied that he could not speak for appellant. (33RT 11797.) The evidence that appellant was reputed to be a main player in the Crips impeached the credibility of Akens's evasive statements about whether appellant was in the Crips. Based on Detective Aurich's testimony, the jury was entitled to conclude that Akens was being evasive (i.e., dishonest) about appellant's membership in the Crips when it was well known that appellant was a main player in that gang. Based on Akens's dishonesty on this point, the jury was entitled to distrust other aspects of Akens's testimony. (3CT 708 [CALJIC No. 2.21.2: witness willfully false; witness who is willfully false in one part of his testimony is to be distrusted in others].) Specifically, the jury was entitled to disbelieve Akens's attempts to minimize appellant's role in the Kennedy High School crimes. Thus, Aurich's testimony was relevant and admissible to impeach Akens's testimony. Ultimately, Detective Aurich's testimony on this point was relevant to appellant's role in the Kennedy High School crimes.

Moreover, the evidence that appellant was reputed to be a main player in the Crips was admissible to rebut evidence developed during the defense's cross-examination of Akens that the Hodgeses were reputed to be Bloods. (33RT 11770-11772.) It was reasonable to assume that the defense would use evidence that the Hodgeses were Bloods to argue that the Hodgeses were sophisticated criminals who manipulated or coerced

appellant into killing McDade. Thus, the defense opened the door to evidence that appellant was also a sophisticated criminal (a main player in the Crips) who would not have been manipulated or coerced into killing anyone.

This case is distinguishable from *In re Wing Y.* (1977) 67 Cal.App.3d 69. In *Wing Y.*, the minor was accused of committing a robbery but there was no evidence that it was gang-related. (*Id.* at p. 72.) Nevertheless, an officer testified that the minor was reputed to be a gang member. (*Id.* at p. 75.) The appellate court concluded that the testimony about the minor's gang membership was offered to show that the minor committed the crime; the juvenile court could not have avoided using the testimony for this purpose. (*Id.* at p. 78.) Further, the appellate court stated that reputation evidence is admissible as an exception to the hearsay rule under limited circumstances. And the officer could testify to the minor's gang membership only by personal knowledge. (*Ibid.*) Moreover, evidence of the minor's gang membership was not relevant to whether he committed the crime. (*Id.* at p. 79.)

By contrast, in the present case, the Kennedy High School crimes were clearly gang-related and appellant's gang membership was relevant. Moreover, the evidence that appellant was reputed to be a main player in the Crips was admissible to rebut evidence developed by the defense that the Hodgeses were reputed to be Bloods.

3. Appellant was not prejudiced

Respondent submits that the "reasonable possibility" standard applies. (*People v. Nelson, supra*, 51 Cal.4th at p. 218, fn. 15.) Appellant again relies on *McKinney v. Rees*, 993 F.2d at pages 1382-1386. (AOB 596-597.) But again *McKinney* is not applicable because it concerned guilt-innocence issues.

Appellant repeats his contention that the photo evoked jurors' fears and biases against minorities, gangs, and weapons. (AOB 595.) Respondent reiterates that the jurors were instructed that they must not be influenced by bias or prejudice against appellant, nor swayed by public opinion or public feelings. (3CT 695; 36RT 12625.) Jurors are presumed to follow the court's instructions. (*People v. Zapien, supra*, 4 Cal.4th at p. 996.)

Appellant also claims that the prosecutor used the photo and Aurich's "main player" testimony to attack the defense position that the Hodgeses manipulated and coerced him to kill McDade. (AOB 595-596.)

The prosecutor argued that appellant was a well-respected gang member – a leader. (35RT 12473.) The prosecutor noted Detective Aurich's testimony that appellant was a main player: a more hard-core gang member, a more sophisticated criminal, a leader. (35RT 12473-12475.) The prosecutor stated that the defense would try to portray appellant as an easily manipulated follower; but that was not what the evidence showed. (35RT 12475; see also 35RT 12476.) Thus, the prosecutor used the evidence that appellant was a main player to rebut the anticipated defense argument that appellant was naïve and criminally unsophisticated. The prosecutor also used the photo to argue that appellant did not need to be afraid of the Hodgeses: appellant had access to guns and he had Crip buddies. (36RT 12607.) In short, the prosecutor properly used the photo and the "main player" testimony to refute the defense's story that appellant was naïve, criminally unsophisticated, and scared of the Hodgeses. Further, the prosecutor implicitly used the photo and the "main player" testimony to impeach Akens's evasive testimony on the issue of whether appellant was a Freeport Crip.

Moreover, even if the photo and "main player" testimony had somehow been excluded, the People still had a strong penalty phase case.

The circumstances of the present crime constituted strong aggravating evidence. (Arguments I.E.2. and I.E.3., *ante* [overwhelming evidence of guilt; appellant's counter-arguments must be rejected]; Argument VI.D. [no substantial evidence of duress].) Appellant shot his former employer at close range while McDade sat in his car. (3CT 673; Statement of Facts, Guilt Phase, People's Case, *ante.*) The jury found appellant guilty of murder and found the robbery-murder special circumstance to be true. (3CT 673-675.) By finding the robbery-murder special circumstance true, the jury found that appellant committed the murder while he was engaged in robbery or he committed the murder to carry out or advance the robbery or to facilitate escape therefrom or avoid detection. (3CT 619.) By its verdict, the jury necessarily rejected appellant's claim that the Hodgeses coerced him. (See also Argument VI.G., *ante* [appellant not prejudiced: strong evidence undermining any duress defense to robbery]

Further, the evidence that appellant was a shooter during the Kennedy High School shooting was another significant aggravator. The Kennedy High School shooting was clearly gang-related. (33RT 11749-11755.) Appellant's involvement in this gang-related offense suggests that he was a trusted gang member. It is noteworthy that Akens (a Crip) respected appellant and opined that appellant was pretty well respected in the gang community. (33RT 11781.) For all these reasons, any error in admitting the photo or Aurich's "main player" testimony was harmless.

For all of the foregoing reasons, appellant's argument must be rejected.

XXVI. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY ADMITTING EDWINA PAMA'S TESTIMONY ABOUT THE IMPACT OF THE MURDER ON MCDADE'S FAMILY

Appellant contends that the trial court erred prejudicially by admitting testimony by Keith McDade's mother-in-law, Edwina Pama, regarding the

murder's impact on his family. (AOB 599-610.) This contention must be rejected. The bulk of Pama's testimony was proper; any improper testimony was non-prejudicial.

A. Background

Pama testified about the murder's emotional impact on various family members, including herself. (32RT 11612, 11617-11623.) Specifically, Pama testified about the adverse emotional effects on her daughter, Colleen McDade, Collen and Keith's two young children, and Keith's mother and brother. (32RT 11617-11623.) Defense counsel objected to Pama's testimony about the effects on Keith's mother and brother. When the prosecutor began asking Pama about the effects on Keith's mother, defense counsel objected, stating that the prosecutor should call Keith's mother. (32RT 11618.) The court overruled the objection, replying that the witness could describe things she had perceived. (32RT 11618.) Pama explained that she had been in contact with Keith's mother over the previous years and that the murder had been very hard on her. (32RT 11618-11619.) Pama testified that, following the murder, at first Keith's mother did not want to talk about it – as if that would make the murder go away. (32RT 11619.) Defense counsel objected and moved to strike the portion of Pama's testimony regarding Keith's mother's state of mind. (32RT 11619.) The court overruled the objection, stating that Pama could testify to what she perceived and what she believed based on those perceptions – this was proper lay opinion. (32RT 11619.) Pama then testified that if Keith's name was brought up, his mother would become very quiet. (32RT 11620.) Pama also said that Keith's little boy reminded Keith's mother of her murdered son. (32RT 11620.)

The prosecutor asked Pama about the murder's effect on Keith's brother; defense counsel lodged a continuing objection that the witness's testimony should be limited to her observations. (32RT 11620-11621.)

The court sustained an objection to the form of the question and told the prosecutor to restate it so that he asked about her perceptions. (32RT 11621.) Pama then testified about her interactions with Keith's brother and that Keith's murder had been difficult on him. (32RT 11621.) Pama also testified that it was hard for Keith's brother to see his nephew because of his similarity to Keith. (32RT 11621.)

Pama further testified about the emotional effects on Colleen and Keith and Colleen's young daughter. Colleen was on an emotional roller-coaster and her daughter was very angry and was getting worse emotionally. (32RT 11622-11623.)

B. Appellant Has Forfeited Part of His Claim

Appellant has forfeited the portion of his argument relating to Pama's testimony on the effects of Keith's death on his wife and daughter by failing to object at trial. (See AOB 609-610.) He only objected to the testimony pertaining to Keith's mother and brother. Accordingly, appellant's claims involving Colleen and her daughter have been forfeited. (Evid. Code, § 353; see e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 652 [finding forfeiture of victim-impact claim].)

C. Most Of Pama's Testimony Was Permissible Lay Opinion; to the Extent Her Testimony Exceeded Permissible Lay Opinion, It Was Harmless

This Court frequently has upheld the introduction of victim-impact evidence. '"Unless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a).' [Citation.] 'The federal Constitution bars victim impact evidence only if it is "so unduly prejudicial" as to render the trial "fundamentally unfair."'" (*People v. Burney, supra*, 47 Cal.4th at p. 258.) Moreover, '"[t]here is no requirement that family members confine their

testimony about the impact of the victim's death to themselves, omitting mention of other family members.'" (*People v. Scott* (2011) 52 Cal.4th 452, 495.)

Evidence Code section 800 states that a lay opinion must be rationally based on the perception of the lay person:

> If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
>
> (a) Rationally based on the perception of the witness; and
>
> (b) Helpful to a clear understanding of his testimony.

Further, lay persons may testify to their observations of a witness's behavior that are relevant to the overall question of the witness's mental state. (*People v. Gurule* (2002) 28 Cal.4th 557, 622.)

In the present case, most of Pama's testimony fell within the bounds of permissible lay opinion. Pama's testimony about Colleen was clearly based on her perceptions. Pama testified that some days Colleen yelled and screamed and that she had stated that she was overwhelmed. (32RT 11622.) Likewise, Pama's opinion about Colleen's daughter's emotional condition was based on her observations. Pama testified that her granddaughter argued with her mother, got very angry, and that she had never seen such an angry child. (32RT 11623.) All of this was permissible testimony: it was either percipient-witness testimony or acceptable lay opinion.

Similarly, Pama's testimony about Keith's mother was based on their interactions. (32RT 11618-11619.) One key point in Pama's testimony about Keith's mother was that she would become quiet when Keith's name came up. (32RT 11620.) Based on these observations, Pama opined that Keith's mother did not want to talk about her son. (32RT 11619.) This opinion was rationally based on Pama's perceptions and was permissible.

Likewise, Pama's testimony about Keith's brother was also based on their interactions. (32RT 11621.) Pama's opinion that Keith's death was difficult for his brother was rationally based on Pama's perceptions and was permissible. (32RT 11621.)

Appellant complains about Pama's testimony that Keith's son (who looked like his father) was a painful reminder of Keith's death. (AOB 607-608.) This testimony was rationally based on Pama's perceptions. Pama's opinion that her grandson looked like Keith was based on her own perceptions. (32RT 11620.) Pama testified that Keith's mother told her that her grandson's actions were similar to Keith's when he was a boy. (32RT 11620.) Likewise, Pama testified that Keith's brother said that his nephew wiped his nose the same way Keith did when he was a little boy. (32RT 11621.) Pama's testimony about Keith's mother and brother was rationally based on her perceptions.

Appellant argues that Pama's testimony was irrelevant, emotional evidence that invited an irrational, arbitrary response; accordingly, it was prejudicial. (AOB 609-610.) This contention must be rejected. As noted, Pama's opinions were rationally based on her perceptions. Pama's testimony about the emotional impact on Keith's family was unsurprising. One would expect a murder to produce great emotional distress on the part of the victim's family. Moreover, Colleen also testified about the emotional impact on herself and her children. (See Statement of Facts, Penalty Phase, Aggravating Evidence, *ante*.) In addition, appellant's claim involves small portions of the admissible victim-impact evidence. Further, there was strong aggravating evidence, notably appellant's cold-blooded murder of Keith and the Kennedy High School shooting. Accordingly, there is no reasonable possibility that the alleged errors affected the penalty verdict. (*People v. Nelson, supra*, 51 Cal.4th at p. 218, fn. 15 [prejudice standard].)

Thus, for the foregoing reasons, appellant's argument must be rejected.

XXVII. THE TRIAL COURT PROPERLY DECLINED TO GIVE THE DEFENSE'S PROPOSED INSTRUCTION ON VICTIM-IMPACT EVIDENCE AND HAD NO SUA SPONTE DUTY TO INSTRUCT ON THIS EVIDENCE

Appellant claims that the trial court erred in refusing to give his proposed instruction on victim-impact evidence and in failing to otherwise properly instruct the jury on the use of victim-impact evidence. (AOB 611-618.) This contention must be rejected.

The defense proposed the following instruction on the use of victim-impact evidence:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(3CT 781.)

The court refused to give this instruction. (35RT 12397-12398.)

The trial court properly refused to give appellant's requested instruction. Moreover, the trial court had no sua sponte duty to specifically instruct on victim-impact evidence.

Indeed, this Court has recently rejected appellant's claim. (*People v. Russell* (2010) 50 Cal.4th 1228, 1265-1266 (*Russell*).) In *Russell*, the defendant alleged that the trial court erred by denying his request to instruct the jury concerning victim-impact evidence, and erred by failing to instruct the jury sua sponte regarding victim-impact evidence, in violation of his

state and federal constitutional rights. (*Id.* at p. 1265.) The instruction requested in *Russell* was identical to the instruction requested in this case. (*Id.* at p. 1265, fn. 6.)

Citing *People v. Carrington* (2009) 47 Cal.4th 145, 198 (*Carrington*), this Court explained that the trial court need not have instructed the jury sua sponte concerning the use of victim-impact evidence. (*Russell, supra*, 50 Cal.4th at pp. 1265-1266.) The defendant in *Carrington* argued that "raw emotion" would taint the jury absent an instruction concerning its consideration of victim-impact evidence; this Court rejected the defendant's argument, concluding that CALJIC No. 8.85 adequately conveyed to the jury its duty, that emotion may play a part in a juror's determination, and that an instruction to the contrary would be erroneous. (*Id.* at p. 1266; *Carrington, supra*, 47 Cal.4th at p. 198.) Likewise, in the present case, the jury was adequately instructed with CALJIC No. 8.85 (penalty trial—factors for consideration). (3CT 742-743.)

Appellant asks this Court to revisit this issue in light of sister-state cases. (AOB 615-616.) All of these decisions pre-date *Russell*, so they provide no new basis for reconsideration.

Appellant notes that victim-impact evidence was a substantial part of the People's penalty case. (AOB 616-617.) Even so, the jury was adequately instructed on the consideration of penalty-phase evidence by standard instructions such as CALJIC No. 8.85. Moreover, as explained below, CALJIC No. 8.84.1 told the jury not to be influenced by bias, prejudice, or public opinion. (3CT 695.)

Further, this Court has concluded that the trial court did not err by refusing to provide an instruction similar to the one requested by appellant here. (*Russell, supra*, 50 Cal.4th at p. 1266, citing *People v. Harris* (2005) 37 Cal.4th 310, 358-359 (*Harris*), and *People v. Ochoa* (2001) 26 Cal.4th 398, 445 (*Ochoa*), *Ochoa* was abrogated on other grounds.) In *Harris*, this

Court explained that the requested instruction was "unclear as to whose emotional reaction it directed the jurors to consider with caution—that of the victim's family or the jurors' own." (*Russell, supra*, at p. 1266; *Harris, supra*, 37 Cal.4th at p. 359.) The instruction requested in *Russell* and the present case suffers from the same defect.

Citing *Ochoa*, this Court concluded that the jury was adequately instructed pursuant to CALJIC No. 8.84.1. (*Russell, supra*, 50 Cal.4th at p. 1266; *Ochoa, supra*, 26 Cal.4th at p. 455.) Just as in *Russell* and *Ochoa*, the jury here was given an instruction broadly cautioning it to determine the facts from the evidence presented, to follow the law, and to avoid being swayed by bias or prejudice against appellant. (See CALJIC No. 8.84.1; 3CT 695.) This Court has consistently concluded that neither the trial court's refusal to provide a victim-impact evidence instruction worded similarly to appellant's proposed instruction, nor the trial court's refusal to sua sponte provide a similar instruction, constitutes error. (*Russell, supra*, 50 Cal.4th at p. 1266.) As in *Russell*, appellant presents this Court with no compelling reason to reconsider its prior holdings.

Appellant claims that his proposed instruction was not ambiguous and that any ambiguity could have been cured by modifying the instruction. (AOB 613.) Appellant also argues that his proposed instruction was specifically directed at victim-impact evidence while CALJIC No. 8.84.1 was more general. (AOB 613-614.) Respondent submits that the trial court acted within its discretion by choosing to instruct the jury with CALJIC No. 8.84.1. CALJIC No. 8.84.1 embodies an even-handed approach to the issue of bias or prejudice. It does not favor the People or the defense on this issue. (3CT 695.) By contrast, appellant's proposed instruction is argumentative. On the one hand, it suggests that the jury cannot impose the death penalty as a result of emotion. On the other hand, it says that emotion can be used to spare appellant's life. (3CT 781.) The trial court

acted within its discretion in refusing such an instruction; the court was not required to modify the instruction in some unspecified manner in the hope that it might resolve these problems.

For all these reasons, appellant's argument must be rejected.

XXVIII. THE TRIAL COURT PROPERLY REJECTED APPELLANT'S PROPOSED PENALTY PHASE INSTRUCTIONS

Appellant contends that the trial court improperly rejected his proposed penalty phase instructions regarding consideration of mitigation evidence. (AOB 619-632.) This contention must be rejected.

A. The Trial Court Properly Rejected Appellant's Proposed Instruction That Sympathy or Compassion Alone Could Justify a Life Sentence; Appellant Has Forfeited This Claim; Any Error Was Harmless

Appellant argues that the trial court erroneously refused his proposed instruction that sympathy or compassion alone could justify a life sentence. (AOB 622-625.) The proposed instruction read:

> If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject death as a penalty. A mitigating factor does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.

(3CT 780.)

The trial court rejected the first sentence of this proposed instruction which said that sympathy alone could warrant a life sentence. (35RT 12424-12426.) The court believed that the instruction on factor (k) covered this issue. (35RT 12425.) The factor (k) instruction stated that the jury could consider any sympathetic or other aspect of appellant's character or record. (3CT 743.) However, the court confirmed that it would give an instruction that mitigating circumstances did not need to be proved beyond a reasonable doubt. (35RT 12426.) The court reiterated that it would not

give appellant's proposed instruction that sympathy alone could spare his life. (35RT 12426.) Both defense attorneys stated that the factor (k) instruction was adequate. (35RT 12426-12427.) Attorney Holmes said that the factor (k) instruction "totally include[d]" the first sentence of the proposed instruction. (35RT 12426.) Attorney Castro seconded this ("[t]hat's adequate. Right."). (35RT 12426.)

Respondent submits that defense counsel's statements that the factor (k) instruction was adequate constituted a forfeiture. (Cf. *People v. Valdez* (2004) 32 Cal.4th 73, 113 [defendant did not request clarifying language; may not now complain that an instruction correct in law and responsive to the evidence was too general or incomplete].)

In any event, appellant's contention is without merit. In several cases, this Court has held that appellant's proposed instruction is not required. (*People v. Davis* (2009) 46 Cal.4th 539, 622 [finding trial court properly rejected the instruction as duplicative of CALJIC No. 8.85]; *People v. Loker* (2008) 44 Cal.4th 691, 744-745 [rejected claim that trial court should have given the proposed instruction; other instructions given were adequate]; *People v. Hinton* (2006) 37 Cal.4th 839, 911-912 [finding that CALJIC No. 8.85 and other instructions were adequate; no need for the proposed instruction].)

In the present case, the court gave CALJIC No. 8.85, including the factor (k) instruction, which told the jury to consider "any sympathetic or other aspect of the defendant's character or record . . . ." (3CT 743.) The court also gave CALJIC No. 8.88, which told the jury that the weighing of aggravating and mitigating circumstances was not a mechanical counting of factors, nor the arbitrary assignment of weights to them. (3CT 772.) The jury was free to assign whatever moral or sympathetic value it deemed appropriate to each of the factors. (3CT 772-773.) Further, the jury was instructed to consider the totality of the aggravating and mitigating

circumstances. (3CT 773.) Under this Court's precedent, these instructions adequately covered the role of sympathy in determining penalty.

In light of all of these instructions, it is unimportant that CALJIC No. 8.85 did not inform the jury that sympathy alone could support a life verdict. (AOB 624.) The jury was told it had considerable freedom in assigning value to each of the factors. Appellant cites a social-science study in support of his contention that the factor (k) instruction was unclear. (AOB 624-625.) Respondent submits that this Court should follow its precedents and not the results of a social-science experiment.

Finally, in view of the instructions which the trial court gave, any error in declining to give the proposed instruction was harmless. The "reasonable possibility" standard applies because any error does not rise to the level of federal constitutional error. (*People v. Nelson, supra*, 51 Cal.4th at p. 218, fn. 15 [reasonable possibility standard].) But any error was harmless under any standard.

B. The Trial Court Properly Rejected Appellant's Proposed Instruction on Mental Impairment; Appellant Has Forfeited His Claim; Any Error Was Harmless

Appellant requested the following instruction on mental impairment:

> The mental impairment referred to in this instruction is not limited to evidence which excuses the crime or reduces defendant's culpability, but includes any degree of mental defect, disease or intoxication which the jury determines is of a nature that death should not be imposed. That the jury has rejected a defense of insanity, diminished capacity or diminished actuality at a previous stage of the proceedings does not prohibit its consideration of evidence showing some impairment as a reason not to impose death.

(3CT 781.)

The trial court rejected this proposed instruction. (35RT 12397.) Instead, the court modified CALJIC No. 8.85, factor (i), to inform the jury

that it could consider "[t]he chronological and psychological age of the defendant at the time of the crime." (35RT 12396-12397; 3CT 743.) After the court told the parties that it was going to do this, and would decline to give appellant's proposed instruction, defense counsel stated that was appropriate. (35RT 12397.) The court instructed the jury with the modified version of CALJIC No. 8.85, factor (i). (3CT 743.)

Respondent submits that defense counsel's acquiescence in this modification of CALJIC No. 8.85 and in the rejection of his proposed instruction constitutes a forfeiture. (Cf. *People v. Valdez, supra*, 32 Cal.4th at p. 113 [defendant did not request clarifying language; may not now complain that an instruction correct in law and responsive to the evidence was too general or incomplete].)

Moreover, rejecting the proposed instruction and instructing the jury with the modified version of CALJIC No. 8.85, factor (i) was proper and non-prejudicial. Telling the jury that it could consider appellant's psychological age told the jury that it could consider the mental impairment evidence. For example, some of Dr. Nicholas's testimony suggested that appellant had child-like mental abilities. Specifically, Dr. Nicholas testified that appellant had no more than a fifth-grade reading level. (34RT 12009, 12018.) Further, Nicholas opined that appellant was not capable of complicated planning and tended to live on a moment-to-moment basis. (34RT 12032.)

Additionally, in determining if the jury was properly instructed on the breadth of its duty to consider mitigation evidence, the whole record should be analyzed, including instructions and the parties' arguments. The issue is whether, on the whole record, the jury was misled. If there is no reasonable possibility that the jury was misled, the sentence should be affirmed. (*People v. Champion* (1995) 9 Cal.4th 879, 945-946, overruled on other grounds.)

In the present case, other properly given instructions and the parties' arguments told the jury that it could consider appellant's mental impairment evidence. For example, CALJIC No. 8.85, factor (h) told the jury to consider whether appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect. (3CT 743.) Likewise, CALJIC No. 8.85, factor (k) told the jury to consider any sympathetic or other aspect of appellant's character that he offered as a basis for a life sentence whether or not it related to the offense. (3CT 743.) Moreover, CALJIC No. 8.88 broadly defined a mitigating circumstance as any fact or condition which might be considered as an extenuating circumstance in determining the appropriateness of the death penalty. (3CT 772.)

The prosecutor's argument addressed the evidence of appellant's mental impairment; i.e., Dr. Nicholas's testimony. (35RT 12490-12491.) The prosecutor argued that Dr. Nicholas's testimony was unpersuasive for several reasons. But the prosecutor did not argue that the jury could not consider the mental impairment evidence. (*Ibid.*) Defense counsel argued that the jury should consider Dr. Nicholas's testimony and that it was strong evidence. (36RT 12576-12580.) Defense counsel also argued that appellant did not have the maturity of an adult; that mentally appellant was more like a 12-year-old. (36RT 12582; see also 36RT 12583.) Defense counsel referred to the instruction on chronological and psychological age and said that the jury could consider maturity level and intelligence. (36RT 12582.)

Thus, in view of all of the instructions and arguments, the jury would have understood that it could consider the mental impairment evidence.

C. CALJIC Nos. 8.85 and 8.88 Adequately Instructed the Jury on the Weighing of Mitigating Evidence; Any Error Was Harmless

Appellant requested the following instruction:

> The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors. [¶] A juror may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty. [¶] A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is. [¶] Any mitigating circumstance may outweigh all the aggravating factors. [¶] A juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor.

(3CT 780.)

The trial court rejected this proposed instruction as duplicative, citing CALJIC No. 8.85, factor (k) and indirectly referring to CALJIC No. 8.88 (on the jury's discretion to assign value to the factors). (35RT 12396; see also 35RT 12391-12393 [court and parties discuss CALJIC No. 8.88].)

On appeal, appellant contends that the first and fourth paragraphs were necessary to inform the jurors that the presence of just one mitigating circumstance would have been sufficient to return a life verdict. (AOB 629.) This contention must be rejected.

This Court has stated that CALJIC Nos. 8.85 and 8.88 adequately instruct the jury on its sentencing discretion; no pinpoint instructions are required:

> Similarly, defendant contends the court erred in refusing to modify CALJIC No. 8.85 in various respects. We have rejected similar arguments. CALJIC No. 8.85 is both correct and adequate. [Citations.] The court need not give pinpoint instructions regarding what mitigating evidence the jury may consider, or special instructions regarding mercy and compassion. [Citations.] Contrary to defendant's argument, CALJIC No. 8.88 properly instructs the jury on its sentencing discretion and the nature of its deliberative process. [Citation.]

(*People v. Valencia* (2008) 43 Cal.4th 268, 309-310.)

In this case, the court properly refused the proposed instruction because CALJIC No. 8.85, factor (k) and CALJIC No. 8.88 sufficiently instructed the jury on the weighing of mitigation evidence. As noted, the court gave CALJIC No. 8.85, including the factor (k) instruction, which told the jury to consider "any sympathetic or other aspect of the defendant's character or record . . . ." (3CT 743.) The court also gave CALJIC No. 8.88, which told the jury that the weighing of aggravating and mitigating circumstances was not a mechanical counting of factors, nor the arbitrary assignment of weights to them. (3CT 772.) The jury was free to assign whatever moral or sympathetic value it deemed appropriate to each of the factors. (3CT 772-773.) Further, the jury was instructed to consider the totality of the aggravating and mitigating circumstances. (3CT 773.)

Appellant cites several decisions by this Court which approve instructions stating that any mitigating factor, standing alone, may be sufficient to support a life verdict. (AOB 629-630, citing e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 598-600.) However, these decisions do not mandate the giving of such an instruction. For the reasons explained above, the instructions given in this case were adequate.

Finally, in light of the instructions given, any error in rejecting the proposed instruction was harmless. The "reasonable possibility" standard applies because any error does not rise to the level of federal constitutional

error. (*People v. Nelson, supra*, 51 Cal.4th at p. 218, fn. 15 [reasonable possibility standard].) But for the reasons stated, any error was harmless under any standard.

XXIX. THE REPETITION OF SOME GUILT PHASE INSTRUCTIONS DID NOT DEPRIVE APPELLANT OF A RELIABLE PENALTY DETERMINATION

Appellant claims that the repetition of several erroneous guilt phase instructions at the penalty phase deprived him of a reliable penalty determination. In Arguments VI, XV, and XVI, appellant contended that the trial court erred by: (1) failing to instruct that duress is a defense to robbery and murder and may raise a reasonable doubt as to intent to rob and deliberation and premeditation; (2) instructing the jurors under CALJIC No. 2.71.7 to view appellant's exonerating unrecorded oral statements with caution; and (3) instructing, pursuant to CALJIC Nos. 3.10 and 3.16 that the Hodgeses were accomplices as a matter of law. In appellant's view, the trial court repeated these "errors" at the penalty phase. In other words, the trial court erred by failing to instruct on duress and in giving CALJIC Nos. 2.71.7, 3.10, and 3.16 at the penalty phase. For the reasons set forth in his previous arguments, and for additional reasons stated in his current argument, appellant asserts that these errors prejudiced his right to a reliable penalty determination. (AOB 633-636.) This argument must be rejected.

A. The Trial Court Properly Declined to Instruct on Duress; Any Error Was Harmless

Appellant contends that the trial court should have instructed on duress, that duress was central to his mitigation case, and that Dr. Nicholas's testimony provided additional support for a duress instruction. (AOB 634-635.)

Defense counsel requested instructions on duress. (32RT 11520, 11521; 34RT 12149.) The parties discussed the issue of duress, after which the court ruled there was insufficient evidence to support duress instructions. (35RT 12363-12365, 12367-12368, 12398, 12423-12424.) For the reasons stated in Argument VI, *ante*, there was insufficient evidence presented at the guilt phase to warrant duress instructions.

Dr. Nicholas's testimony did not entitle appellant to duress instructions. Dr. Nicholas testified that appellant had a low IQ and other personality characteristics that tended to make him a follower. (34RT 12006, 12033, 12040-12044, 12046, 12048.) Dr. Nicholas opined that the Hodgeses could have manipulated appellant into committing the robbery-murder. (34RT 12042-12044, 12046, 12048.) Arguably, Dr. Nicholas's testimony had some relevance to appellant's mental state at the time of the crime. However, both CALJIC No. 4.40 and appellant's proposed instruction based on No. 4.40 contain an objective, "reasonable person" component. Both instructions require threats and menaces that would cause a reasonable person to fear that his life would be in immediate danger. (2CT 529; 3CT 654.) Clearly, Dr. Nicholas's testimony does not assist appellant in meeting this objective, reasonable-person prong of the duress defense.

Moreover, any "error" in declining to give CALJIC No. 4.40 or any of the defense-requested duress instructions was harmless under any standard. The trial court gave CALJIC No. 8.85 which allowed the jury to consider evidence of duress or coercion under several penalty-phase factors. The most obvious factors were factor (g) (whether appellant acted under extreme duress or under the substantial domination of another) and factor (k) (any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime). (3CT 743.) Other penalty-phase factors allowed the jury to consider appellant's IQ and other

personality characteristics, which arguably made him more vulnerable to duress or coercion: factor (h) (whether appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired as a result of mental disease or defect); factor (i) (appellant's chronological and psychological age); and another portion of factor (k) (any sympathetic or other aspect of appellant's character or record that appellant offered as a basis for a life sentence, whether or not related to the present offense). (3CT 743.)

Accordingly, the trial court did not prejudicially err in refusing to give the duress instructions requested by the defense.

B. The Trial Court's Repetition of CALJIC No. 2.71.7 Was Proper; Appellant Has Forfeited His Claim; Any Error Was Harmless

Appellant claims that the trial court erred by instructing the jury to view his pre-offense statement with caution (CALJIC No. 2.71.7). (3CT 718.) (AOB 634.) In the first place, appellant forfeited this claim by failing to raise it below. (Cf. *People v. Rogers* (2009) 46 Cal.4th 1136, 1174-1175 [failure to complain below that trial court should have instructed which guilt phase instructions applied to penalty phase forfeits the issue on appeal].) Indeed, the court and parties reviewed the guilt phase instructions that were to be given to the jury at the penalty phase and defense counsel said they looked fine. (35RT 12409.)

Further, this contention should be rejected for the reasons stated in Argument XV, *ante*. Without repeating all of Argument XV, respondent notes that CALJIC No. 2.71.7 is a standard cautionary instruction, intended for the defendant's benefit, which must be given sua sponte where applicable. (*People v. Zambrano, supra*, 41 Cal.4th at p. 1157.) Moreover, the principal effect of this instruction is to emphasize, on defendant's

behalf, that his inculpatory extrajudicial statements, if any, should be viewed with caution. (*Id.* at pp. 1157-1158.)

Additionally, there is no reason to believe that the jury would have distinguished between the inculpatory and "exculpatory" portions of Banks's and Scott's testimony regarding appellant's pre-offense statements. The inculpatory portions of Banks's and Scott's testimony are no less credible than the "exculpatory" portions. Thus, CALJIC No. 2.71.7 did not harm appellant. The instruction would not have caused the jury to accept the inculpatory portions while rejecting the "exculpatory" portions.

Finally, there was overwhelming evidence of appellant's guilt (including his culpable mental state). (Argument I.E.2, *ante*.) Hence, there was no lingering doubt. Even if the jury had not been instructed to view all of appellant's pre-offense statements with caution, this would not have affected the outcome. Accordingly, any error in instructing the jury with CALJIC No. 2.71.7 was harmless under any standard.

C. The Trial Court Did Not Err By Instructing That the Hodgeses and Akens Were Accomplices As a Matter of Law; Appellant Has Forfeited His Claim; Any Error Was Harmless

Appellant now claims that the trial court erred by instructing that the Hodgeses and Akens were accomplices as a matter of law. (AOB 635-636.) At the instructional conference, the court and parties discussed accomplice instructions extensively. (35RT 12369-12381.) At the end of this discussion, defense counsel agreed with the trial court's proposed instructions. (35RT 12377-12378, 12380-12381, 12416.) Appellant failed to raise his current complaint; accordingly, it has been forfeited. (*People v. Rogers, supra*, 46 Cal.4th at pp. 1174-1175.)

Moreover, appellant's argument lacks merit. As explained in Argument XVI, *ante*, the Hodgeses were clearly accomplices as a matter of law. Further, there was abundant evidence that appellant was the shooter

(the direct perpetrator) and the instructions told the jury that they must decide whether appellant was the direct perpetrator. (Argument XVI, *ante*.)

Likewise, it is plain that Akens was an accomplice as a matter of law (an accomplice to the Kennedy High School threat and shooting). (33RT 11660, 11750-11752, 11758-11759, 11789, 11799.) Further, most of the evidence indicates that appellant had a role in the Kennedy High School crimes, either as a direct perpetrator or as an accomplice. (33RT 11660, 11750-11752, 11755; see especially 33RT 11752 [appellant covered Akens's back when Akens threatened Moten]; 33RT 11755 [appellant was shooter]; 33RT 11806.) Thus, contrary to appellant's contention, it is not reasonably possible that the jurors could have determined that Akens was the direct perpetrator of the crimes and committed them without appellant's participation or encouragement. (AOB 636.)

Finally, under CALJIC No. 8.85, the jury was able to consider appellant's role in the present crime and the Kennedy High School crimes. Under factor (a) the jury was told to consider the circumstances of the present crime. (3CT 742.) Obviously, these circumstances would include whether appellant was the direct perpetrator, an accomplice, or was acting under duress by the Hodgeses. Under factor (g), the jury was instructed to consider duress or substantial domination by another. (3CT 743.) Under factor (j) the jury was directed to consider whether appellant was an accomplice and whether his participation was relatively minor. (3CT 743.) Under factor (k) the jury was told to weigh any other circumstance which extenuated the gravity of the crime. (3CT 743.)

With respect to the Kennedy High School crimes, the jury was instructed to consider the presence or absence of criminal activity by appellant involving the use or attempted use of force or violence or an express or implied threat of force or violence. (3CT 742, factor (b).) Thus, the issue of appellant's role in the Kennedy High School crimes was

presented to the jury (i.e., whether appellant used or attempted to use violence and whether appellant threatened Moten). Moreover, the jury was instructed that the Kennedy High School crimes had to be proved beyond a reasonable doubt. (3CT 746.) The jury also received instructions on the Kennedy High School offenses (disturbing the peace, terrorist threats, attempted murder, and assault with a firearm) and the mental state required for these offenses. (3CT 752-761, 768-771.) Thus, these instructions squarely raised the issue of appellant's role in the high school crimes. Accordingly, the instructions given were adequate and/or non-prejudicial.

XXX. THE TRIAL COURT PROPERLY DENIED APPELLANT'S SECTION 190.4 MOTION FOR MODIFICATION OF THE DEATH SENTENCE

Appellant contends that the trial court improperly denied his section 190.4 motion for modification of the death sentence, thereby depriving him of a reliable penalty determination. (AOB 637-651.) This contention has been forfeited and must be rejected.

A. Background

The People filed a motion to affirm the death verdict in which they summarized the aggravating and mitigating evidence in detail. (3CT 844-849.) The defense filed a motion for modification of the death verdict which also summarized the aggravating and mitigating evidence. (43CT3A 12757-12770.) At the outset of the section 190.4 hearing, the trial court stated that it had read the parties' motions. (36RT 12675.)

After listening to oral arguments, the court ruled that the death verdict was supported by the evidence and the law. (36RT 12675-12685.) The court went through the section 190.3 penalty-phase factors and discussed the relevant evidence. (36RT 12685-12690.) For example, under factor (a) (circumstances of the crime), the court noted that: appellant took advantage of a relationship of trust, killed McDade execution-style, had full

knowledge of the consequences of the murder (that McDade had a wife and children), and bragged about the crime. (36RT 12685-12687.) Additionally, McDade was very young. (36RT 12687.) The court stated that it considered the mitigating evidence under factor (k), notably the testimony of appellant's family. (36RT 12687.) The court noted that appellant came from a loving and caring family; he did not come from a family deprived of love and caring. (36RT 12687.) The court acknowledged that there was mitigating evidence of mental status or intellectual ability; but this did not compare to the aggravating evidence, including other criminal activity. (36RT 12688.) The court cited the Hernandez bicycle robbery and the Kennedy High School crimes. (36RT 12688.) The court conceded the absence of prior felony convictions. (36RT 12688.)

With respect to factor (e) (whether the victim was a participant in the homicide or consented to the homicide), the court noted that McDade was not a participant and did not consent; the court believed that the jury could have considered that an aggravating factor. (36RT 12689.) With regard to factor (f) (whether the offense was committed under circumstances which the defendant reasonably believed to constitute moral justification or extenuation), this factor did not apply; thus, the court believed that factor (f) could be considered aggravating. (36RT 12689.)

Further, with respect to the present offense, while there was evidence of influence by other persons, it did not rise to the level of extreme duress or substantial domination. (36RT 12689.) With regard to factor (h), the court concluded that there was insufficient evidence that appellant's capacity to appreciate his criminality was impaired. (36RT 12689-12690.) The court acknowledged that appellant was relatively young at the time of the crime, but did not find this to constitute a mitigating factor; at best, it was a neutral factor. (36RT 12690.) Finally, citing factor (j), the court

explained that appellant's role in the crime was not minor; indeed, appellant was the primary participant – he was the shooter. (36RT 12690.) Accordingly, the court upheld the death verdict. (36RT 12690.) The court's ruling will be discussed in greater detail below.

B. Appellant Has Forfeited His Claim

In the court below, appellant did not object to the trial court's statement of reasons for denying the motion. Accordingly, appellant has forfeited his present claim. (*People v. Jackson* (2009) 45 Cal.4th 662, 697.)

C. The Trial Court Fulfilled Its Obligations under Section 190.4 and the Federal Constitution

Section 190.4, subdivision (e) provides, in pertinent part:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

"Under this standard, the trial judge "'must determine whether the jury's decision that death is appropriate under all the circumstances is adequately supported. [Citation.] . . .' "[T]he trial judge's function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict."'" (*People v. Moon* (2005) 37 Cal.4th 1, 46.)

"In ruling on an automatic motion to modify a death verdict, a trial court need not recount details of, or identify, all evidence presented in mitigation or in aggravation. [Citation.] The trial court's only obligation was to provide a ruling that allows effective appellate review. [Citation.] The trial court here did: It identified what it viewed as mitigating and aggravating evidence of significance to its ruling, and it engaged in the requisite weighing." (*People v. Romero* (2008) 44 Cal.4th 386, 427.)

In the present case, the trial court fulfilled its obligation to provide a ruling that allows for effective appellate review. As noted above, the trial court identified what it viewed as mitigating and aggravating evidence of significance to its ruling. Further, the trial court engaged in the requisite weighing. The court compared the aggravating evidence (circumstances of the crime, other criminal activity, appellant's role in the crime) to the mitigating evidence (testimony by appellant's family, appellant's intellectual ability, and the absence of prior felony convictions). (36RT 12685-12690.)

Appellant contends that the trial court erred by giving aggravating weight to factors which can only be mitigating and in failing to consider mitigating evidence. (AOB 643-645.) With two minor exceptions, this contention is without merit. The two exceptions were the court's comments about factor (e) (victim participated in the homicidal conduct or consented to the homicidal act) and factor (f) (defendant reasonably believed that there was moral justification or extenuation for his conduct). Appellant is correct that these two factors can only mitigate; it is improper to argue that the absence of these factors is a factor in aggravation. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184.) In the present case, the trial court erred because it considered the absence of these factors to be a factor in aggravation. (36RT 12689.) As the court stated:

> Subsection (e), whether or not the victim was a participant in the defendant's homicidal conduct or . . . consented to the homicidal act, and obviously the victim was not such a participant, and for that reason that could have been considered an aggravating factor by the jury.
>
> And subsection (f), whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of its conduct, this offense was not such, and, therefore, that can be considered an aggravating factor, because it was not committed where the defendant reasonably believed it was justified.

(36RT 12689.)

However, the error was harmless. *People v. Hamilton, supra,* 48 Cal.3d at pages 1186-1187, is instructive. In *Hamilton,* the trial court erred in analyzing the statutory factors when it denied the motion to modify the death verdict. Specifically, the trial court found the absence of evidence of factors (e) and (f) to be aggravating. (*Id.* at p. 1186.) But the *Hamilton* court found that any analytical errors were harmless under any standard. The trial court focused on the cold-blooded nature of the murder, the mitigating evidence was relatively weak, and the trial court did not consider the issue of penalty to be a close one. (*Id.* at pp. 1186-1187.)

Likewise, in the present case, the trial court's analytical errors were harmless in light of the trial court's overall analysis. There is no reasonable possibility that the errors affected the penalty verdict. (*People v. Nelson, supra,* 51 Cal.4th at p. 218, fn. 15 [prejudice standard].) As noted, the court went through the section 190.3 penalty-phase factors and discussed the relevant evidence. (36RT 12685-12690.) For example, under factor (a) (circumstances of the crime), the court noted that: appellant took advantage of a relationship of trust, killed McDade execution-style, had full knowledge of the consequences of the murder (that McDade had a wife and

children), and bragged about the crime. (36RT 12685-12687.) Additionally, McDade was very young. (36RT 12687.) The court stated that it considered the mitigating evidence under factor (k), notably the testimony of appellant's family. (36RT 12687.) The court noted that appellant came from a loving and caring family; he did not come from a family deprived of love and caring. (36RT 12687.) The court acknowledged that there was mitigating evidence of mental status or intellectual ability; but this did not compare to the aggravating evidence, including other criminal activity. (36RT 12688.) The court cited the Hernandez bicycle robbery and the Kennedy High School crimes. (36RT 12688.) The court conceded the absence of prior felony convictions. (36RT 12688.)

Further, with respect to the present offense, while there was evidence of influence by other persons, it did not rise to the level of extreme duress or substantial domination. (36RT 12689.) With regard to factor (h), the court concluded that there was insufficient evidence that appellant's capacity to appreciate his criminality was impaired. (36RT 12689-12690.) The court acknowledged that appellant was relatively young at the time of the crime, but did not find this to constitute a mitigating factor; at best, it was a neutral factor. (36RT 12690.) Finally, citing factor (j), the court explained that appellant's role in the crime was not minor; indeed, appellant was the primary participant – he was the shooter. (36RT 12690.) Accordingly, the court upheld the death verdict. (36RT 12690.)

Looking at the trial court's analysis as a whole, there is no reasonable possibility that the errors concerning factors (e) and (f) affected the trial court's decision to deny the motion to modify the death verdict. The court clearly believed that the factors in aggravation outweighed the factors in mitigation. In particular, the court stressed the circumstances of the present offense as an aggravating factor. Moreover, if the trial court had

considered factors (e) and (f) properly, the court would simply have found that these were neutral or inapplicable factors. Factor (e), whether McDade was a participant in the homicide or consented to the homicide, was clearly inapplicable. Factor (f), whether the offense was committed under circumstances where appellant reasonably believed that there was moral justification or extenuation, is also clearly inapplicable. Appellant does not contend that he reasonably believed that there was moral justification or extenuation for his cold-blooded killing of McDade. Accordingly, the trial court's error as to factors (e) and (f) was harmless.

Appellant argues that the trial court treated evidence concerning his family background as aggravating evidence. (AOB 643-644.) Not so. The court discussed the evidence about appellant's family background. The court called appellant's relatives' testimony "compelling" and noted that appellant came from a loving, caring family. (36RT 12687.) The court pointed out that appellant did not come from an abusive home – just the opposite. (36RT 12687-12688.) The court said it sympathized with appellant's family but had greater sympathy for McDade's family. (36RT 12688.) The court did not suggest that appellant's family background was aggravating evidence – merely that it was unpersuasive mitigating evidence.

Appellant also claims that the court ignored mitigation evidence which showed that he did suffer a deprived childhood. (AOB 644-645.) Nothing in the court's comments indicates that it ignored the extensive testimony about appellant's tough childhood. (See Statement of Facts, Penalty Phase, Mitigating Evidence, Appellant's Background, *ante*.) Although the trial court said appellant did not come from a deprived family, it clarified that it meant deprived of love and caring. (36RT 12687.)

Next, appellant asserts that the court ignored evidence of his positive personality traits. (AOB 645.) Again, nothing in the court's comments

indicates that the court ignored the extensive penalty-phase defense testimony about appellant's positive behavior (e.g., his involvement in the church and testimony that he was a model inmate). (Statement of Facts, Penalty Phase, Mitigating Evidence, *ante*.)

Moreover, "The trial court is not required to find that evidence offered in mitigation does in fact mitigate." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1334.) Thus, the trial court was entitled to conclude that appellant's mitigation evidence was not persuasive.

Appellant contends that the trial court refused to consider his youth as a mitigating circumstance and that this is contrary to *Roper v. Simmons* (2005) 543 U.S. 551. (AOB 645-647.) In the first place, the court did consider the issue of appellant's youth. As noted, the court acknowledged that appellant was relatively young at the time of the crime, but did not find this to constitute a mitigating factor; at best, it was a neutral factor. (36RT 12690.) Because appellant was an adult at the time of the crime (18 years old), the trial court was not required to find that appellant's age was a mitigating circumstance. (3CT 856 [age].)

People v. Wallace (2008) 44 Cal.4th 1032, 1095, 1097, is instructive. In *Wallace*, the defendant was 21 years old at the time of the crime. (*Id.* at p. 1095.) This Court held that the trial court properly found that this was not mitigating. (*Id.* at p. 1097.) Likewise, in the present case, the trial court was entitled to find that appellant's age was not mitigating.

The court's finding is consistent with *Roper*, which noted the legally-significant differences between 18-year-olds and juveniles for death-eligibility:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach.

> For the reasons we have discussed, however, a line must be drawn. The plurality opinion in *Thompson* drew the line at 16. In the intervening years the *Thompson* plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of *Thompson* extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

(*Roper v. Simmons, supra*, 543 U.S. at p. 574.)

This Court should decline to follow *Bryant v. State* (Md. 2003) 374 Md. 585, 620-631 (*Bryant*) (AOB 647), which held that if a defendant committed the crime before age 19, the "youthful age" mitigating factor was established as a matter of law. *Bryant*'s analysis rested upon Maryland's statutory scheme and legislative history which are different from California's. (*Bryant, supra*, at p. 630.)

Appellant contends that the trial court's improper conversion of mitigating factors into aggravating factors, in violation of California's death penalty scheme, constituted a deprivation of his protected liberty interest in violation of the federal Constitution. (AOB 648.) This claim is without merit. Although the trial court improperly considered factor (e) (victim participated in or consented to homicide) and factor (f) (reasonable belief in moral justification/extenuation), as factors in aggravation, this error was harmless for the reasons stated above. Notably, these factors were clearly inapplicable; if the trial court had considered them properly it would have given them no weight. With respect to appellant's family-background evidence, the court did not convert this evidence into aggravating evidence; it merely found the mitigation evidence unpersuasive.

Next, appellant asserts that the trial court's improper consideration of mitigating evidence as aggravation and its failure to consider mitigating evidence violated the federal constitutional principle that the sentence not

be precluded from considering, as a mitigating factor, any aspect of appellant's character or record. (AOB 648-649.) First, with the exception of factors (e) and (f), respondent disagrees with appellant's premise that the trial court converted mitigating evidence into aggravating evidence and that it failed to consider mitigating evidence. Moreover, as to factors (e) and (f) the court's error was harmless. Further, the trial court was not precluded from considering, as mitigation, any aspect of appellant's character or record. Indeed, as set forth above, the trial court thoroughly considered appellant's mitigation evidence (e.g., appellant's relatives' testimony and mental-impairment evidence). (36RT 12687-12688.) Nothing in the trial court's comments suggests that it ignored any of the penalty phase defense evidence. That the trial court did not recite every aspect of appellant's penalty phase defense case does not mean that the trial court failed to consider that evidence.

Eddings v. Oklahoma (1982) 455 U.S. 104 (*Eddings*) (AOB 649) is distinguishable. In *Eddings*, the trial court found – as a matter of law – it could not consider defendant's mitigation evidence. (*Eddings, supra*, at pp. 112-113.) The Supreme Court held that a sentencer may not – as a matter of law – refuse to consider mitigation evidence. (*Id.* at p. 114.) In the present case, the trial court did not decline to consider appellant's mitigation evidence; it merely found such evidence unpersuasive. With respect to factor (e) (victim participated in or consented to homicide) and factor (f) (reasonable belief in moral justification/extenuation), the trial court did not refuse to consider evidence. There was simply no evidence of these factors.

Magwood v. Smith (D.C. Ala. 1985) 608 F. Supp. 218 (*Magwood*) (AOB 649-650) is also distinguishable. In *Magwood*, the trial court declined to find extreme mental disturbance or diminished capacity despite overwhelming evidence of these mitigating circumstances. (*Magwood,*

supra, at pp. 225-228.) By contrast, in the present case, the trial court did not decline to find any mitigating circumstances. On the contrary, the trial court carefully considered appellant's mitigation evidence but found it to be outweighed by the aggravating evidence.

D. Any Error Was Harmless

There is no reasonable possibility that the alleged errors affected the penalty verdict. (*People v. Nelson, supra,* 51 Cal.4th at p. 218, fn. 15 [prejudice standard].) Respondent has explained that the court's errors pertaining to factors (e) and (f) were harmless. Moreover, any error by the trial court during its section 190.4 review was harmless under any standard. As explained above, the trial court thoroughly considered the aggravating and mitigating evidence, weighing one against the other. The court's denial of the motion for modification of the death verdict was based on all of the evidence. Any analytical errors were trivial and would not have affected the outcome.

XXXI. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE

Appellant launches a variety of constitutional attacks on this state's death penalty statute. (AOB 652-687.) Most of these claims have been repeatedly rejected by this Court; accordingly, respondent briefs them concisely.

A. California's Death Penalty Scheme Is Not Impermissibly Broad

Appellant claims that his death sentence is invalid because it was improperly imposed pursuant to a statutory scheme that fails to narrow the class of offenders eligible for the death penalty in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and prevailing international law. (AOB 654-656.) This

Court has "considered and consistently rejected" this claim. (*People v. Jablonski* (2006) 37 Cal.4th 774, 837, and cases cited therein.) Specifically, this Court has found that "[t]he special circumstances set forth at section 190.2 are not impermissibly broad and adequately narrow the class of murders for which the death penalty may be imposed. [Citations.]" (*People v. Elliot* (2005) 37 Cal.4th 453, 487.)

Appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting this same claim.

B. Factor (A) of Section 190.3 Is Constitutional

Appellant claims that factor (a) of section 190.3, which directs jurors to consider the "circumstances of the crime" in determining penalty, "has been applied in such a wanton and freakish manner" that it allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 656-658.)

This Court has repeatedly rejected this claim finding that "section 190.3, factor (a) is not impermissibly overbroad facially or as applied." (*People v. Robinson* (2005) 37 Cal.4th 592, 655, and cases cited therein; see also *People v. Vines* (2011) 51 Cal.4th 830, 891, and *id.* at p. 889 [discussing admissibility of victim impact evidence under factor (a)].) Section 190.3, factor (a) correctly allows the jury to consider the "circumstances of the crime." (*People v. Thomas* (2011) 51 Cal.4th 449, 506; *People v. Nelson, supra,* 51 Cal.4th at p. 225; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308.)

Appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting this same claim.

C. California's Death Penalty Statute Contains Adequate Safeguards to Avoid Arbitrary and Capricious Sentencing; the Statute Does Not Deprive Appellant of His Jury Trial Rights

Appellant contends that California's death penalty statute has no safeguards to avoid arbitrary and capricious sentencing and deprives defendants of the right to a jury determination of each factual prerequisite to a sentence of death. (AOB 658-682.) Specifically, appellant claims that his death sentence is invalid because: (1) it was not premised upon findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed, that they outweighed the mitigating factors, and that death was the appropriate penalty (AOB 659-669); (2) the death penalty scheme does not require jurors to be instructed on the beyond-a-reasonable-doubt standard (AOB 669-672); (3) the death penalty scheme does not require written findings regarding aggravating factors (AOB 673-675); (4) the death penalty scheme does not allow for inter-case proportionality review (AOB 675-677); (5) the prosecution may not rely on unadjudicated criminal activity; alternatively, unadjudicated criminal activity must be found by a unanimous jury beyond a reasonable doubt (AOB 677-678); (6) the use of restrictive adjectives in the list of potential mitigating factors acted as a barrier to consideration of mitigation evidence (AOB 678-679); and (7) the jury was not instructed that statutory mitigating factors were relevant solely as mitigators and that aggravating factors were limited to statutorily specified factors. (AOB 679-682.) These contentions must be rejected.

> This Court has found that section 190.3 is not unconstitutional, for failing to require unanimity as to the applicable aggravating factors. [Citation.] Nor is the law unconstitutional for failing to impose a burden of proof except as to other-crimes evidence. The existence of other aggravating circumstances, the greater weight of aggravating circumstances relative to mitigating

> circumstances, and the appropriateness of a death sentence are not subject to a burden-of-proof qualification. [Citations.]

(*People v. Elliot, supra*, 37 Cal.4th at pp. 487-488.) "'Nothing in the United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury trial guarantee (e.g., *Cunningham v. California* (2007) 549 U.S. 270 []; *Ring v. Arizona* (2002) 536 U.S. 584 []; *Apprendi v. New Jersey* (2000) 530 U.S. 466 []) compels a different answer to these questions.' [Citation.]" (*People v. Thomas, supra*, 51 Cal.4th at p. 506; see also *People v. Lee* (2011) 51 Cal.4th 620, 651-652.)

"The death penalty law is not unconstitutional for failing to require that the jury base any death sentence on written findings. [Citation.]" (*People v. Elliot, supra*, 37 Cal.4th at p. 488; see also *People v. Thomas, supra*, 51 Cal.4th at p. 506-507.) Further, "[t]he absence of intercase proportionality review does not violate the Eighth and Fourteenth Amendments." (*People v. Lee, supra*, 51 Cal.4th at p. 651, and cases cited therein.) Moreover, "[t]he jury may properly consider evidence of unadjudicated criminal activity under section 190.3, factor (b) [citation], jury unanimity regarding such conduct is not required [citation], and factor (b) is not unconstitutionally vague. [Citation.]" (*People v. Lee, supra*, 51 Cal.4th at pp. 652-653; *People v. Thomas, supra*, 51 Cal.4th at p. 504; *People v. Murtishaw* (2011) 51 Cal.4th 574, 596-597.)

> The trial court was not constitutionally required to instruct the jury that certain sentencing factors can be considered only in mitigation, and CALJIC No. 8.85's instruction to the jury to consider 'whether or not' certain mitigating factors were present did not unconstitutionally suggest that the absence of such factors was aggravating.

(*People v. Lee, supra*, 51 Cal.4th at p. 653, and cases cited therein.)

> The use of adjectives such as 'extreme' and 'substantial' does not prevent the jury from considering relevant evidence. [Citation.] 'The jury need not be instructed that section 190.3,

> factors (d), (e), (f), (g), (h), and (j) are relevant only as possible mitigators. [Citation.] Nor is the trial court required to instruct that the absence of a particular mitigating factor is not aggravating. [Citation.].

(*People v. Thomas, supra*, 51 Cal.4th at pp. 506-507.)

Likewise, this Court has held that CALJIC No. 8.85, the standard instruction on penalty-phase factors (given here) is not unconstitutional for failing to state that the list of aggravating factors is exclusive and that nonstatutory aggravating factors cannot be considered. (*People v. Moon, supra*, 37 Cal.4th at pp. 41-42; see 3CT 742-743.)

Appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting these same challenges to California's death penalty scheme.

D. California's Death Penalty Law Does Not Deny Capital Defendants Equal Protection Under the Law

Appellant claims that California's death penalty scheme violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it denies procedural safeguards to capital defendants that are afforded to noncapital defendants. (AOB 682-684.) Specifically, appellant claims that the death penalty scheme is unconstitutional because there is no requirement of juror unanimity on the aggravating factors, no standard of proof in the penalty phase, and no reasons need be given for a death sentence. On the other hand, sentencing allegations in a noncapital case must be found unanimously, beyond a reasonable doubt, and a trial court must orally state its reasons on the record for selecting an upper-term sentence. (*Ibid.*)

As this Court has stated, "The death penalty law does not violate equal protection by denying capital defendants certain procedural safeguards that are afforded to noncapital defendants because the two

categories of defendants are not similarly situated. [Citations.]" (*People v. Lee, supra*, 51 Cal.4th at p. 653.)

> 'The availability of certain procedural protections in noncapital sentencing---such as a burden of proof, written findings, jury unanimity and disparate sentence review---when those same protections are unavailable in capital sentencing, does not signify that California's death penalty statute violates Fourteenth Amendment equal protection principles. [Citations.]' [Citation.]

(*People v. Thomas, supra*, 51 Cal.4th at p. 507.)

Once again, appellant has presented no compelling reason for this Court to reconsider its prior decisions rejecting this same claim.

E. Application of the Death Penalty Does Not Violate International Law or the Federal Constitution

In this argument, appellant claims that California's use of the death penalty as a "regular" form of punishment violates international law and the Eighth and Fourteenth Amendments to the United States Constitution. (AOB 685-687.) This claim has also been rejected repeatedly.

> California's use of capital punishment as an assertedly 'regular form of punishment' for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, does not offend the Eighth and Fourteenth Amendments by violating international norms of human decency. [Citation.]

(*People v. Lindberg* (2008) 45 Cal.4th 1, 54; see also *People v. Lee, supra*, 51 Cal.4th at p. 654; *People v. Thomas, supra*, 51 Cal.4th at p. 507; see also *People v. Demetrulias* (2006) 39 Cal.4th 1, 43 [California does not use capital punishment as "'regular punishment for substantial numbers of crimes'"].) Appellant offers nothing new that should cause this Court to reconsider its prior decisions.

XXXII. APPELLANT WAS NOT PREJUDICED BY THE CUMULATIVE IMPACT OF ANY ALLEGED ERRORS DURING THIS CASE

Appellant argues that he was prejudiced by the cumulative impact of the alleged errors set forth in the preceding arguments and was deprived his due process right to a fair trial and penalty phase. (AOB 688-690.) He seeks a reversal of the guilt verdicts and the judgment of death. (*Ibid.*) However, he cannot show that he was denied a fair trial or penalty phase because he failed to show any error and/or that he suffered prejudice as a result of any particular error or combined errors. (See Arguments I – XXXI, *ante*.)

Because appellant has failed to show error or that he suffered prejudice as a result of any particular error or combined error in either the guilt or penalty phase, he has failed to show he was denied a fair trial or otherwise prejudiced as a result of any cumulative error. (See, e.g., *People v. Martinez* (2010) 47 Cal.4th 911, 968 [finding cumulative impact of two arguable errors in prosecutor's argument, which were harmless when considered separately, did not result in prejudice to defendant in penalty phase]; *Panah, supra*, 35 Cal.4th at pp. 479-480 [no cumulative error in penalty phase where court identified few errors and such errors are harmless].) As stated by this Court, defendants are entitled to "a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box*, *supra*, 23 Cal.4th at p. 1214; *People v. Barnett*, *supra*, 17 Cal.4th at p. 1182; see also *People v. Horning* (2004) 34 Cal.4th 871, 913 [no denial of right to fair trial where there was "little, if any error to accumulate"].) There is no reasonable possibility of a result more favorable to appellant in the absence of any of the alleged errors and their cumulative impact was harmless beyond a reasonable doubt. (*People v. Brown* (1988) 46 Cal.3d 432, 448; *Chapman, supra*, 386 U.S. at p. 24.)

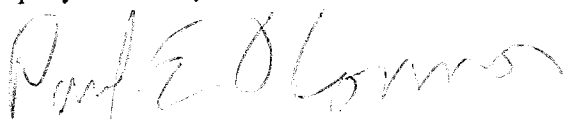
CONCLUSION

For the foregoing reasons, this Court should affirm the judgment and sentence.

Dated: May 11, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
STEPHANIE A. MITCHELL
Deputy Attorney General



PAUL E. O'CONNOR
Deputy Attorney General
Attorneys for Respondent

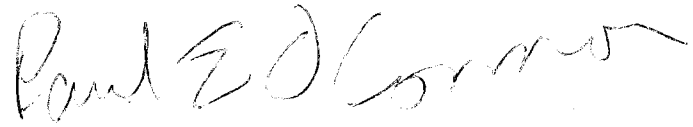
SA1994XS0004
31447496.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 93,893 words.

Dated: May 11, 2012

KAMALA D. HARRIS
Attorney General of California



PAUL E. O'CONNOR
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Powell**
No.: **S043520**

I declare:

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

On May 11, 2012, I served the attached **Respondent's Brief** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Kat Kozik
Attorney at Law
P.O. Box 2663
Berkeley, CA 94702

California Appellate Project
Attn: Luke Hiken
101 Second Street, Suite 600
San Francisco, CA 94105

Gary B. Wells
Attorney at Law
PMB 227
6737 N. Milburn Ave., Ste. 160
Fresno, CA 93722-2143

Carl Devon Powell
P.O. Box J-43000
San Quentin State Prison
San Quentin, CA 94974

Neoma Kenwood
Attorney at Law
PMB 414
1563 Solano Avenue
Berkeley, CA 94707

Sacramento County District Attorney
Jan Scully
901 G Street
Sacramento, CA 95814

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 May 11, 2012, at Sacramento, California.

Katrina Sayles