IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN LEE CUNNINGHAM,

Defendant and Appellant.

S051342

CAPITAL CASE

San Bernardino County Superior Court No. RCR 22225
The Honorable Michael A. Smith, Judge Presiding

RESPONDENT'S BRIEF

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INTRODUCTION

On June 27, 1992, Cunningham robbed Jose Silva, Wayne Sonke and David Smith at gunpoint while they were working at an office supply business in Ontario. After marching his bound victims around the building to steal small amounts of cash, Cunningham herded them into a bathroom where he brutally shot each man in the head. Mr. Silva and Mr. Sonke died immediately. When Cunningham subsequently noticed Mr. Smith was still alive, he callously fired an additional fatal shot into Smith's head.

After killing the three men, Cunningham set fire to the building and drove to a nearby vantage point where he watched until fire personnel arrived. Cunningham fled cross-country with a girlfriend until he was apprehended for a parole violation in Deadwood, South Dakota on July 23, 1992. Subsequently, Cunningham confessed to the murders and participated in a videotaped reenactment of his crimes.

Cunningham waived jury for the guilt phase. The trial court found Cunningham guilty of the armed robberies, arson, burglary, being a felon in possession of a firearm and the three murders with special circumstances.

A jury was selected to try the penalty phase, which included evidence of

two prior child molests and a prior armed robbery committed by Cunningham in addition to victim impact testimony and the evidence proving the murders of Mr. Silva, Mr. Sonke and Mr. Smith. The jury returned a death verdict. After denying Cunningham's automatic motion for modification of the verdict, the trial court imposed a death sentence.

On appeal, Cunningham claims various errors in the guilt phase based on his being shackled, his jury waiver, his waivers of personal presence, the admission of his police interviews and the admission of the videotaped reenactment of the crimes. Cunningham alleges various errors in the penalty phase concerning jury selection, his right to counsel, the admission of photographic evidence, juror misconduct, sentencing and the constitutionality of California's death penalty laws.

None of Cunningham's claims have merit or warrant reversal. Accordingly, the judgment should be affirmed.

STATEMENT OF THE CASE

In a nine-count information filed by the San Bernardino County District Attorney on December 22, 1992, Cunningham was charged with three counts of willful, deliberate and premeditated murder in violation of Penal Code[1/] section 187, subdivision (a) (Counts 1, 2 & 3); one count of burglary in violation of section 459 (Count 4); three counts of robbery in violation of section 211 (Counts 5, 6 & 7); one count of arson of another's property in violation of section 451, subdivision (d) (Count 8); and one count of possession of a firearm by a felon in violation of section 12021, subdivision (a) (Count 9). (4 CT 985-992.)

The information alleged each of the murders was committed while Cunningham was engaged in the commission of a burglary and robbery within the meaning of section 190.2, subdivision (a)(17). It also alleged Cunningham committed multiple murders within the meaning of section 190.2, subdivision (a)(3). The information further alleged Cunningham personally used a firearm in the commission of the murders, robberies and burglary within the meaning of section 12022.5, subdivision (a). It was also alleged that Cunningham was previously convicted of two serious felonies within the meaning of section 667, subdivision (a), and served a prior prison term for a felony conviction within the meaning of section 667.5, subdivision (b). (4 CT 985-992; 4 RT 1036.)

On January 20, 1995, Cunningham waived his right to a jury for the guilt phase. (5 CT 1189-1190, 1202.) On March 20, 1995, the trial court found Cunningham guilty of all counts as charged in the information. The court set each murder in the first degree and set the robberies and burglary in the second degree. (5 CT 1294; 4 RT 1088-1089.)

The court found the burglary special circumstances true as to Counts 1

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1. All further statutory references are to the Penal Code unless otherwise noted.

and 2, the robbery special circumstance true as to Counts 1 and 3[2/], and the multiple murders special circumstance true as to all counts. Having neglected to render any findings on the robbery special circumstance on Count 2 and burglary special circumstance on Count 3, the court subsequently deemed those to constitute not true findings. The court found the firearm enhancements true as to Counts 1 through 7. The court further found each of the prior conviction and prison term allegations were true. (5 CT 1294; 7 CT 1913-1915; 4 RT 1089-1092; 19 RT 5745.)

On July 7, 1995, a jury was sworn for the penalty phase. (7 CT 1683.) On October 18, 1995, the jury returned a death verdict. (7 CT 1888-1890; 19 RT 5732-5734.)

On January 12, 1996, the trial court considered and denied a motion to modify the verdict pursuant to section 190.4, subdivision (e). (7 CT 1908, 1912-1936; 8 CT 1943-1967; 19 RT 5745-5768.) On the same date, the trial court sentenced Cunningham to death for the special circumstance murders and 16 years in state prison for the remaining counts and allegations. (7 CT 1908-1911, 1939-1941; 8 CT 1969-1971; 19 RT 5770-5777.)

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

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution

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2. In rendering its finding on the robbery special circumstance allegation for Jose Silva, the victim named in Count 3, the court inadvertently referred to Count 2 rather than Count 3. The court determined that this constituted a true finding for the robbery special circumstance allegation for Count 3. (7 CT 1914; 4 RT 1089-1092.)

a. Background

Cunningham had a relationship with Diana Jamison between February of 1990 and June of 1992, while both were married to other people. Jamison, who was in the process of separating from and divorcing her husband, permitted Cunningham to live in her home during that time despite her concerns about Cunningham's suspected infidelity, lying and questionable employment. Cunningham moved out some time prior to June 20, 1992. (4 RT 804-805, 824-830.)

Despite their "rocky relationship" which she felt had to be ended, Jamison continued to see Cunningham on Sundays and pay expenses for him. (4 RT 808-809.) Jamison characterized Cunningham as a quiet and private person who "had a lot of things going on inside his head that he didn't share," but had a way of making people feel comfortable around him.[3/] (4 RT 815.)

Alana Costello met Cunningham in 1990 and became romantically involved with him in late 1991.[4/] In May of 1992[5/], Cunningham moved into Costello's apartment in Highland. Other than $200 which Cunningham contributed towards the rent, Costello paid all the bills. (4 RT 966-968.)

Prior to Cunningham moving into the Highland apartment, Costello

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3. Jamison testified that Cunningham would at times wake up at night in a cold sweat and complain of bad dreams or headaches. He also claimed to have premonitions about things happening in other places. Cunningham told Jamison that he was captured and tortured and had to kill a young girl to save his own life in Vietnam. He also brooded from time to time about his natural mother abandoning him and claimed he had recurrent symptoms of malaria. Cunningham attended some type of counseling at a veterans center in Riverside. (4 RT 834-837, 846-847.)

4. Costello testified that Cunningham would wake up in the middle of the night with bad dreams and "wrapped up" in himself. (4 RT 1005-1006.)

5. All further references to dates in this Statement of Facts occurred in 1992, unless otherwise noted.

borrowed a Ruger .22-caliber semi-automatic rifle from her mother. Costello wanted the gun because she was living in a bad neighborhood. In the latter part of May or early June, Cunningham suggested that Costello shorten the weapon to make it easier to store. Cunningham subsequently altered the rifle by sawing off part of the stock and barrel. (4 RT 969-971.)

Cunningham and Costello both had access to the rifle, which was stored in a blue nylon bag. At various times, Cunningham would take the rifle with him. (4 RT 971-972.)

Cunningham and Costello planned to move into a new apartment on July 1. They agreed that Cunningham would pay the rent, which was about $1,000 a month. However, Costello was not confident that Cunningham would have the money by the end of June since he was not working full-time. This caused a stressful situation because Costello had already given her 30-day notice to vacate the Highland apartment. (4 RT 968-969.)

Wayne Sonke, David Smith and Jose Silva worked at Surplus Office Sales ("hereafter S.O.S.") in the city of Ontario. Sonke was the store manager; Smith was the assistant manager; and Silva was a temporary employee. (3 RT 782-783.) Michael Ray, the owner of S.O.S., had previously employed Cunningham in the early and mid-1980's at two other businesses. (3 RT 764-765, 768-770.)

Cunningham was consistently trying to obtain employment from various people whose business cards he kept in his wallet. Those included Evelyn Eriksen and a person named "Eddie" who worked at S.O.S. (4 RT 850-856.)

About a month prior to June 27, Cunningham called and left a message for Ray. When Ray returned the call, Cunningham asked him how business was going. Ray said business was bad. Ray had not heard from Cunningham for three or four years prior to the call. (3 RT 767, 770.)

Jamison and Cunningham spent the weekend of June 19 and 20 together.

That weekend, Jamison rented a charcoal gray Nissan 240 SX for Cunningham so that he could drive to a job interview in either Los Angeles or San Diego. Cunningham was supposed to return the car to the rental agency the following Monday. (4 RT 805-806.)

On the afternoon of Wednesday, June 24, Cunningham went to S.O.S. in Ontario. Eriksen brought him into the office of Betty Flodter, the office manager. Flodter had not seen Cunningham since 1986. (3 RT 776-779.)

Cunningham told Flodter he was in town for a meeting and wanted to see her. Cunningham stayed for at least an hour. At one point, Sonke came into Flodter's office to remove money from a fireproof file. Flodter introduced Cunningham to Sonke. (3 RT 779-780.)

Smith also spoke with Cunningham that afternoon. It appeared that Cunningham had previously met Smith. (3 RT 781.)

Cunningham indicated that he had visited S.O.S. the prior Saturday, and asked, "Is all your Saturdays as bad as last Saturday was?" Flodter told him that sometimes business was better. Cunningham then asked Flodter, "Hey Betty, are you working this Saturday?" She replied, "No, you know I don't work on Saturdays. . . ." (3 RT 780-781.)

Later that day, Cunningham reimbursed Costello's friend, Michelle Munier, for money she had contributed for a deposit on the new apartment. Cunningham gave Munier $130 in cash. He also paid for dinner that night. (4 RT 1007-1008, 1023.)

On Thursday, June 25, Cunningham told Jamison that he had driven the Nissan to Mexico and bought gifts for her and her son. Cunningham seemed agitated, brought up strange subjects, and told Jamison that he was not good for her and she did not need someone like him in her life. (4 RT 839-841.)

On Friday, June 26, Cunningham came to Jamison's home and was acting strange. Cunningham told Jamison that he had borrowed another

vehicle. However, when she followed him outside, Jamison saw that Cunningham was still driving the Nissan. Cunningham promised that he would return the car the following Monday. (4 RT 806-808.) Upset about his continuing lying, Jamison told Cunningham that he would have to think about their relationship and make some changes by Sunday. (4 RT 817-818.)

On the morning of Saturday, June 27, Cunningham woke up and asked Costello if she had money for gas. Costello borrowed a credit card from a friend and put gas in the Nissan. Cunningham then drove off in the Nissan, while Costello went to a horseshoe tournament. (4 RT 972-974.) When she left the apartment, Costello believed the Ruger was still under the bed. However, Cunningham was free to come and go from the residence as he wanted while she was not home. (4 RT 982.)

b. The Fire And Discovery Of The Bodies

S.O.S. was open on June 27 from 9:00 a.m. to 4:00 p.m. Sonke, Smith and Silva were working that day. (3 RT 782-783.)

Around 4:00 p.m., Ontario firefighters were dispatched to S.O.S. in response to a fire alarm. The fire, which no longer appeared active, was primarily in the office portion of the building. Firefighter Michael Mondino and his crew cut a chain on the door and forced entry through two glass doors on the north side of the warehouse portion of the building. There was light hazy smoke inside. (3 RT 718-721, 733-737.)

Mondino and his crew proceeded into the office area of the building where the smoke was heavier and the fire sprinklers were still spraying water. Yet, they did not detect any heat or fire. (3 RT 721-722.)

Mondino then started searching various rooms off the office hallway. (3 RT 722-723.) Inside the women's bathroom, Mondino observed three dead bodies. (3 RT 723-724, 737-740.)

Ontario Police Officer Susan Bennett secured the scene and called for

detectives and a watch commander. (3 RT 715-717.) Detective Donald McGready arrived at S.O.S. at approximately 6:30 that evening, while the bodies were still in the bathroom. (4 RT 1027.)

Ray subsequently identified the victims as Sonke, Smith and Silva. (3 RT 766.) Sonke was closest to the door with Silva and Smith next to him in a clockwise pattern. (4 RT 1027-1028.)

The cash register had been moved from a small room near the entrance to the desk in Flodter's office. The register drawer was open with the money clips flipped up and a clump of register tape next to it. Approximately $90 was missing from the register. (3 RT 783-785.)

A petty cash box, which was normally kept in a locked fireproof file in a file cabinet, was also on the desk. Sonke, Smith, Ray, and Flodter had keys to the file. Approximately $1,000 was missing from the cash box. (3 RT 772-775, 783-786.)

There were additional fireproof files with substantial amounts of cash which remained undisturbed in the cabinet. One of those files was behind a sliding panel in the back of the cabinet. Another file containing money remained locked in a rear cabinet in Flodter's desk. (RT 772-775, 783-787.)

Another locked fireproof file containing substantial amounts of cash was still in the bottom drawer of the file cabinet. Only Flodter and Ray had the keys to that file. (3 RT 794-798.) None of the files showed signs of forced entry. (3 RT 798-799.)

c. Cunningham's Flight And Capture

At approximately 6:30 p.m. on June 27, Jamison was driving home from the shopping mall when she noticed Cunningham following her in the Nissan. Cunningham followed Jamison back to her residence. (4 RT 809-812.)

Cunningham, who appeared sober, normal and in a good mood, gave Jamison $50 for the phone bill. It was very unusual for Cunningham to ever

give her money. Cunningham explained that a married couple with whom he was living had paid him for some work. (4 RT 812, 815-816.)

Cunningham had sexual intercourse with Jamison and stayed at her residence until about 8:00 p.m. They discussed their relationship. Cunningham told Jamison that he wanted to get back together and live with her, and was trying to find work. (4 RT 812-816.)

Between 8:30 and 9:30 p.m., Cunningham returned to Costello's apartment. Munier was visiting Costello at the time. Cunningham seemed very stressed, tense and "wrapped up in himself." However, it was not unusual for Cunningham to be introspective. After Cunningham made a phone call, he and Costello went to buy some food, which they brought home. Cunningham, Costello and Munier then went to see a movie. Cunningham paid for everyone's movie ticket. (4 RT 974-979.)

Cunningham told Costello that he had rented a hotel room for the night because he wanted to be alone and "get some thoughts together." However, he later invited Costello to join him at the hotel. Costello was surprised that he had money for a hotel room since he did not have steady employment. After the movie, Cunningham took Costello to a hotel in the city of San Bernardino. (4 T 977-979.)

Cunningham did not tell Costello what was bothering him. They were awakened early the next morning by two large earthquakes. Cunningham called Jamison to check on her welfare and told her he was coming over. Cunningham, who seemed to be in a hurry, dropped Costello back at her apartment. (4 RT 814-816, 979-984.)

Cunningham arrived at Jamison's home around noon on Sunday, June 28. That evening, they went out for dinner and a movie. Jamison paid for the movie. However, Cunningham paid for dinner which was close to $50. Being able to pay for dinner appeared to make Cunningham feel good. He seemed

like he was trying to prove stability for a relationship. Cunningham explained that he was going to find work and salvage the relationship. (4 RT 814-818.)

Cunningham stayed at Jamison's home until midnight. Cunningham discussed a song about a boxer who stopped fighting after he killed a man and made Jamison play this particular song on the stereo several times. He also took a couple hits off Jamison's cigarette although he had previously quit smoking. (4 RT 818, 841-842.)

On Monday, June 29, and Tuesday, June 30, Costello spoke to Cunningham on the phone, but he did not return to her apartment. By Tuesday, Costello noticed that the Ruger was missing. (4 RT 984-985.)

On June 29, Jamison talked to Cunningham on the phone. However, he did not tell her that he left the state. On June 30, Cunningham called her again. Jamison told him that his parole officers had come by looking for him. Cunningham then called Jamison less frequently. At some point, Cunningham said he was on the run because someone, perhaps the Mexican Mafia, was after him. (4 RT 818-821.)

On the morning of Wednesday, July 1, Cunningham called Costello, said he had left California and asked her to join him. Costello flew to Las Vegas, where Cunningham picked her up in the Nissan. (4 RT 984-985.)

They drove east through various states until they reached Atlantic City, New Jersey. They then drove south and west through Arkansas before heading north to South Dakota. (4 RT 987-990.)

Cunningham and Costello both paid for food and lodging. Along the way, Cunningham placed an Ohio license plate on the Nissan and registered under false names at motels. (4 RT 985-991.)

Costello realized the Ruger was in the car when she found the blue nylon bag, lifted it and felt how heavy it was. She also noticed Cunningham had a box of .22-caliber ammunition in the glove compartment. (4 RT 985-991.)

Cunningham never told Costello why he left California and embarked on the cross-country trip. When Costello asked what the problem was, Cunningham did not want to talk about it. (4 RT 990-991.)

After Costello noticed how anxious Cunningham got when police cars passed them, she concluded that Cunningham was running from the law. (4 RT 1015-1018.) Because she was worried Cunningham was leaving too many trails and she might be deemed an accomplice, Costello told him to drop her off at the home of some friends in Rapid City, South Dakota and continue on alone. (4 RT 1021-1022.)

Sometime prior to July 23, Cunningham called Jamison. He was upset and crying. Cunningham said something terrible had happened and he wanted to come back and do the right thing. Jamison told Cunningham to turn himself in and not call her anymore. Cunningham asked Jamison to call someone at the veterans center for him. (4 RT 843-845.)

On the way to Rapid City, Cunningham was stopped in Deadwood, South Dakota, by state highway patrol officer Troy Boone for a parole violation on July 23. Costello was in the front passenger seat. Robert Overturf (a special agent with the United States Justice Department Drug Enforcement Administration) and Douglas Grell (a special agent with the F.B.I.) assisted in the traffic stop.[6/] (3 CT 604-608, 681-685; 4 RT 991.)

Cunningham was ordered out of the Nissan at gunpoint and directed to walk backwards toward Boone's vehicle, where he was placed on his knees and handcuffed. (3 CT 608-609, 637-645, 681-685.) After Cunningham was detained, Overturf confirmed Cunningham's name verbally and through identification in his shirt pocket. When Overturf asked if there were any

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6. The parties stipulated that the trial court could consider the prior testimony of Overturf, Grell and Boone from the preliminary hearing. (4 RT 1064.)

weapons in the car, Cunningham replied in the affirmative. (3 CT 609-610, 637-645; 4 RT 866.)

Overturf then approached the Nissan where the other officers were speaking with Costello. Overturf looked inside the car and saw the blue nylon bag on the front passenger seat. The bag was partially open with part of the sawed-off Ruger rifle visible. (3 CT 610-611A.) Grell also observed the stock of the rifle protruding from the bag. (3 CT 648-649.) The officers opened the trunk, which contained the Nissan's California license plate and other items. (3 CT 649.)

While he was handcuffed and leaning against one of the vehicles, Cunningham spontaneously told the officers something to the effect that Costello did not know what was "going on" and she would not be there had she known. (3 CT 686-688.) Cunningham was transported to the Lawrence County Sheriff's station. Costello was also handcuffed and brought to the station. (3 CT 610-611A; CT 645-650.) After being interviewed, Costello was dropped off at a motel. (4 RT 992.)

The Ruger rifle and nylon bag were seized as evidence. (4 RT 863-865.) A box containing 31 rounds of .22-caliber long rifle Blazer CCI bullets and a magazine loaded with 10 rounds of .22-caliber ammunition were found in the glove compartment of the Nissan. (4 RT 864-865, 1028.)

A pair of black boots belonging to Cunningham was found in the car during an inventory search. (4 RT 822-823, 860-863.) Cunningham's personal military papers were found in a notebook inside a black carrying case in the back seat. A medicine pouch, a headband with feathers and jewelry were found under the driver's seat. According to Jamison, Cunningham claimed to be part Indian, carried feathers, wore a medicine bag under his shirt all the time and made jewelry. (4 RT 856-857, 860-863.)

d. Investigation

Dr. Nenita Duazo, a forensic pathologist, performed autopsies on the three victims on June 30 and July 2, 1992. (4 RT 883-887, 891, 894-895.)

Dr. Duazo determined that Sonke died from a single gunshot wound to the head. The bullet, which was fired into the left ear at an upward angle, pierced the brain and lodged in the right side of his head under the scalp. "Stippling" or burned skin around the entrance wound indicated that the gun was fired at a distance between one and one-and-a-half feet from Sonke's head. This injury would have rendered Sonke unconscious almost immediately and resulted in death within five minutes. (4 RT 887-890, 903.)

Dr. Duazo determined that Silva died from two gunshot wounds to the back of his head just behind the right ear. One bullet, which was fired at a slightly upward and forward angle, lodged in his brain. This bullet would have immediately incapacitated Silva. The other bullet, which was fired into the back of his head at a more upwards angle, perforated the brain and lodged in the head below the scalp. These gunshot wounds would have resulted in death in five to 15 minutes. (4 RT 891-894.)

Dr. Duazo determined that Smith died from multiple gunshot wounds to the head and neck. One bullet, which was fired into his right forehead at a slightly downward angle, perforated the brain and lodged in the rear left side of the head. This wound would have been fatal in and of itself. A second bullet, which was fired into his left eye (without entering the skull), lodged in the left shoulder blade, indicating that the head was almost level with the shoulder at the time. This wound would have caused blindness in the left eye, but was not fatal. A third bullet, which grazed the back of the head, fractured his skull. Although broken bone penetrated and damaged the brain, this wound was not immediately fatal. A fourth bullet fired into the back of his neck at a downward angle slightly fractured the thoracic vertebrae, bruised the spinal cord and

lodged in the left lung. This wound was not immediately fatal, but led to potentially fatal hemorrhaging in the chest. A fifth bullet that was fired into his chest only penetrated skin, fat and muscle. (4 RT 894-899, 936, 942, 953-954.)

Smith would have been expected to survive only a matter of minutes from these wounds. Dr. Duazo testified that, if the fourth and fifth bullets were fired first, Smith would have still been able to struggle, break free or try to stand up. She eliminated fire or smoke inhalation as the cause of death for any of the victims. (4 RT 899-900, 948-950, 964.)

Various forensic technicians with the Ontario Police Department collected the bullets removed from the victims at the time of the autopsies as well as .22-caliber shell casings and bullet fragments found near the bodies at the murder scene.[7] (1 CT 37-41, 44-47, 50, 69-74.)

William Matty, a criminalist with expertise in firearms identification and bullet casing comparison, test-fired the rifle found in Cunningham's car and determined that it was operable and working properly. He testified that the weapon was a .22-caliber semi-automatic rifle which had been shortened at the barrel and stock. Matty further testified that the CC Blazer bullets found in the glove compartment were the type of ammunition that would be used in the Ruger rifle. (4 RT 869-874.)

Based on microscopic comparisons of striation marks on casings from the test fires and casings found at the murder scene, Matty determined that the casings at the murder scene were ejected by the Ruger firearm found in Cunningham's vehicle. (4 RT 874-877.) Matty also concluded based on striation mark comparisons that the bullets removed from Silva's brain, the right side of Sonke's head and the back of Smith's head were fired by the Ruger.

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7. The parties stipulated that the prior preliminary hearing testimony of the forensic technicians regarding the collection of evidence was admissible for purposes of the court trial. (4 RT 1065.)

The bullet lodged in Smith's lung was a possible match. The other bullets and fragments were too damaged to make any comparison. (4 RT 877-882; 1 CT 37-41, 72-74.)

Fire Inspector James Pettigrew inspected the S.O.S. building and found the fire damage concentrated mostly on the carpet in the hallway. A pour pattern of stains along the hallway had the odor of gasoline, indicating that an accelerant was used. There was some paper debris near the carpet stains. Based on char patterns, Pettigrew determined the point of origin was the hallway carpet. He eliminated electrical or smoking-related materials as ignition sources. (3 RT 742-748.)

There was no fire damage inside the women's bathroom. Char patterns on the outside of the bathroom door indicated that it was closed during the fire. There appeared to be more accelerant on the carpet in front of the bathroom door. However, this could have been a result of absorption rather than more accelerant being poured there. (3 RT 752-753.)

Based on his investigation, Pettigrew opined that the fire was started by someone pouring a flammable substance (most likely gasoline) through the hallway and up to the showroom area and then igniting the carpet with some type of open flame. (3 RT 747.) Pettigrew testified that, if the sprinklers had not extinguished the fire, the flames would have spread throughout the entire showroom area and extended into the rooms off the hallway. According to Pettigrew, it was highly unlikely that the culprit set the fire before shooting the three individuals in the bathroom because the fire would have been very "hot" by then. (3 RT 754-756.)

e. Cunningham's Statements And Reenactment Of The Murders

Ontario Detectives Gregory Nottingham and Pat Ortiz flew to Deadwood on July 23 to interview Cunningham. They arrived late in the evening, and

interviewed Cunningham four times over the following two days. (1 RT 235-236, 243; 2 RT 338-340, 271; 8 CT 2104.)

Following six minutes of conversation that were not admitted at trial, Detective Nottingham read Cunningham his *Miranda*[8] rights. After Cunningham confirmed that he understood his rights, Nottingham proceeded to ask Cunningham about his relationships with Costello and Jamison, his military and employment background and his prior robbery arrest. (Ex. 5 at pp. 1-13.)[9]

Cunningham indicated that he worked for Ray at a facility in Long Beach in 1979, but was fired for unsatisfactory job performance. Cunningham claimed he did not hold any resentment against Ray. (Ex. 5 at pp. 13-14.)

Cunningham told the detectives that he went to S.O.S. in Ontario in early June to visit Ericksen and look for a job. However, he called Ray and Ericksen first. (Ex. 5 at pp. 14-17.)

Cunningham then volunteered, "I know what you guys are getting at," "I know why you're here in my dreams and that's all," and asked when they were going back to San Bernardino. (Ex. 5 at pp. 16-18.) When asked to clarify, Cunningham replied, "You know as well as I do that I committed an armed robbery in Ontario." Cunningham said the robbery took place at "Mike's

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8. *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

9. Videotapes and corresponding transcripts of the statements and reenactment were admitted into evidence. (4 RT 1037; 5 CT 1292 [Exs. 3a [videotape of Deadwood interview], 3b [videotape of Deadwood interview], 4[videotape of reenactment], 5[transcript of Deadwood interview] & 6[transcript of reenactment]].) The transcripts, however, were not included in the corrected record on appeal as required by California Rules of Court, rule 8.320(b)(11). Therefore, respondent will cite to the court exhibits, and, pursuant to California Rules of Court, rules 8.224(a) and 8.634, will request to transmit these exhibits at the time oral argument is calendared in this case.

company." (Ex. 5 at pp. 19-20.)

Cunningham reiterated that he committed an armed robbery and asked, "[S]hould I have somebody here talking for me, is this the way it's supposed to be?" Detective Ortiz responded that although they were there to investigate the crimes, they were there to protect Cunningham's rights. Ortiz asked Cunningham if he wanted his rights re-read to him. Cunningham said he did. Nottingham reread Cunningham his *Miranda* rights and asked if he understood them. When Cunningham said, "I believe I do," the detectives said that was not sufficient. Cunningham then said, "I do understand." (Ex. 5 at pp. 21-22.)

Nottingham asked Cunningham to tell them everything he did on June 27. Cunningham replied, "I'm afraid to go back that day[.]" (Ex. 5 at pp. 22.)

In response to subsequent questioning, Cunningham indicated that he had stayed at Costello's apartment the prior evening and left about 9:00 a.m. on the morning of June 27 to deliver a package of drugs from Moreno Valley to Colton. Upon further questioning about the drug transaction, Cunningham told the detectives that they were "shooting around the world here," and stated, "We all know I'm in the right place, okay." (Ex. 5 at pp. 22-25.)

Cunningham indicated that he arrived at S.O.S. some time in the afternoon. He then volunteered the following comments:

> I was up that day, I was up. I could have done anything that day. I remember, I stayed um, I stayed close after I left and I was up on the freeway, watching. [unintelligible].

(Ex. 5 at p. 26.)

Cunningham then made the following statements:

> What I believe, I don't know while I'm in my right mind, I want to talk to you guy[]s, okay. But I'll tell you for my own benefit I hope the State or Federal or whatever puts me where I belong, not in a gage [*sic.*] with a bunch of guys. My dreams tell me what came down.

(Ex. 5 at pp. 26-27.)

When asked about his dream comment, Cunningham continued:

> I can't even fight this case, I don't even want to, but the people that care about me live a case. I don't even, I don't even really need a [l]awyer[.] I just need help. So if it is a matter of whether I shut up or just, I know a [unintelligible]. I remember that night, I went back to Diane's, made love, everything was alright again. It wasn't until. It was Sunday, it was Sunday, it was Sunday I believe. It was Sunday, I was scared[.] I didn't know exactly why, but I knew I was..[..] I think every time I went to sleep I knew a little bit more. I don't sleep anymore. I didn't go there to hurt anybody, hell, I don't know how I could say that was so. I was uh. I went there to commit an armed robbery. I did just that.

(Ex. 5 at p. 27.)

When Ortiz asked what type of weapon he used, Cunningham stated that he used a ".22 long rifle carbine." Cunningham confirmed that the rifle found in the Nissan was the weapon he used in the robberies. (Ex. 5 at p. 27.)

Cunningham then commented, "I remember the, I remember the interrogations, never leave the enemy alive [unintelligible] . . . we would [unintelligible]." (Ex. 5 at p. 27.) Cunningham continued:

> It's like, it's like it couldn't be true, but I know it is. [T]hat's why I'm running, there's no more running. That's why I hope the DA or the State helps me ar [*sic.*] just puts me to death. I guess that's the way it is. I don't know why I went back to the bathroom. I only know the L.T. said, never leave anybody. I used to just kill everybody and set the village on fire.

(Ex. 5 at p. 28.) Cunningham further stated, "That's what I did, didn't I?" (Ex. 5 at p. 28.)

In response to further questioning, Cunningham said he watched the building from the top of the freeway until the fire department arrived. However, he commented that the "the place didn't burn," and there was not much smoke. Cunningham said he started the fire with gasoline which he always carried in the back of his car. He believed the container of gasoline was probably still in the back of the Nissan. (Ex. 5 at pp. 28-29.)

When asked about the condition of the victims when he returned to the

bathroom, Cunningham replied, "You always tie, you always tie the V.C. up, and put them on the ground," and stated that he bound the victims with gray electrical tape which he had bought at a store two or three days prior. (Ex. 5 at pp. 29-30.) Cunningham said he took about $800 in cash after the older victim told him where the money was. Cunningham stated that he had met Sonke once before and had known Smith and Silva for about a week. (Ex. 5 at pp. 30-31.)

Cunningham did not recall how many times he returned to the bathroom. When asked whether he personally bound or had one of the others tie the victims, Cunningham stated with a somewhat subdued look, "I left the spool, I left the rest on one of the guys." He said he had Smith first bind the other two victims with the tape before he bound Smith. Then, he removed the gloves and put more tape on the victims. (Ex. 5 at pp. 31-33.)

Cunningham clarified that he wore a pair of work gloves, which he removed before leaving the spool on Sonke's body. Cunningham subsequently threw the gloves away. (Ex. 5 at p. 33.)

Cunningham told the detectives that no one else was with him, he left S.O.S. prior to the robberies and returned an hour later after he "popped a little speed." He then commented, "I know in my state of mind, I'm better off inside then [*sic*.] on the street." (Ex. 5 at pp. 33-35.)

Cunningham subsequently told the detectives: "I knew that um I made a decision that I was going to talk and I was going to find out exactly and say what I felt was right and what I felt happened." He then stated that he did not know what a lawyer could do for him, he would rather just die than spend his life in jail, and was "better off inside right now," and that even people he cared about were not safe around him. (Ex. 5 at p. 36.)

Cunningham stated that Ray was a decent person and claimed that he had no motive other than to commit a robbery. Cunningham denied that he killed the victims because they and Cunningham knew each other. Prior to

identifying photographs of each of the victims, Cunningham said, "I've already seen them in my dreams." (Ex. 5 at pp. 37-39.)

After discussing the Nissan and the Ohio license plate he stole, Cunningham indicated that the ammunition found in the glove box of the Nissan was the same ammunition he used in the crimes. (Ex. 5 at pp. 40-41.) Cunningham claimed he did not recall pulling the trigger or know how many times he shot Smith. However, when asked whether he felt he committed the crimes, Cunningham stated, "What do you think," and "[Y]eah, yeah, I know I did," while nodding in the affirmative. (Ex. 5 at pp. 42-43.)

When asked whether the shooting of the victims was the last thing he did before setting the fire, Cunningham replied:

> I was ready to go. Why I just couldn't walk out and never come back. I just don't understand. I was ready to go, I don't know why. There was just times I don't remember much.

(Ex. 5 at p. 43.)

Cunningham told the detectives that he must have returned to the bathroom after going to the front door, but did not recall whether he already had the gas can with him or had to retrieve it after the shootings. Cunningham then said:

> I'm sitting here telling what, um I'm sitting here telling you what I [] came down, second hand in my own dreams. I don't have all the answers, but I know there [*sic.*] true. One of these days, somebody's going to bring them out of me. [Unintelligible].

(Ex. 5 at p. 44.)

Cunningham indicated that he stopped for a couple drinks before returning to Jamison's apartment. Later that evening, Cunningham had dinner and went to a movie with Costello and Munier. He also called Ericksen. (Ex. 5 at pp. 44-46.)

Cunningham said he used the money from the robbery as well as drug-running money during his cross-country trip. When asked if he had any of the

money left, Cunningham laughed. He said he had spent or gambled away the last $300 and stated, "It was at the right time to get caught." Cunningham also told the detectives that he removed the Ohio license plate found on the Nissan from another car. (Ex. 5 at pp. 47-52.)

The detectives again asked Cunningham about his motive for the robberies. Cunningham replied,

> I knew that I didn't feel that, I wasn't working except for doing some runs making some money. But with my rationalization at that time was, I just wanted to leave and I needed more money.

(Ex. 5 at p. 52.)

When asked why and when he picked SOS, Cunningham made the following statement:

> It wasn't something that was just uh it wasn't something that was planned out for a long time. I mean, I had, I had went down I believe a week before and I had spent the day with Evelyn and Mike helping him do some stuff. I just spend time with everybody. And the more [i]rrational I got, I, it was something that I just did. I just.

(Ex. 5 at p. 52.)

Cunningham explained that he knew he was going to take some money after his Saturday morning pickup. (Ex. 5 at p. 53.) He further stated:

> I knew that something was going to be done, I just didn't know where I was I uh thinking more of ripping off, people that I was working with than anything else. But it happened. I always knew by taking things from people that are not going by laws that was no problem. When the time came to take the money I just uh, there was no turning back, no rational thought, I just did it.

(Ex. 5 at p. 53.)

When asked when he planned to burn the S.O.S. building, Cunningham responded, "That was something that had to be done a long time ago." He then discussed how he used to go into villages to find collaborators, interrogate them and burn everything to the ground. He then indicated that he remembered "bits and pieces" and did not look forward to knowing the details he did not

remember. Cunningham then talked about going to a hospital, being incarcerated or dying. (Ex. 5 at pp. 53-54.)

Cunningham subsequently stated:

> My dreams told me you would be here. When I came down the F.B.I. list, I knew it. My dreams told me that, my dreams told me the running was over. You see, I have a, I've been as straight with you guys as I can, in what I believe, in what I know. And I know that what you guys have here, there's no reason to go to court now. And I don't even, I don't even, I don't even know if I'd put anybody through that. I know I don't with the, with the mind I have right now with the way things are. I guess I did, I did this interview because I had to.

(Ex. 5 at p. 54.)

In a subsequent interview, Cunningham told the detectives that he altered two "DD-214" military personnel forms which were found in the Nissan because he was looking for work, wanted to look better and wanted to cover for time when he was incarcerated. Cunningham stated that he was a buck sergeant who spent 13 months in Vietnam rather than a master sergeant who spent two years there as indicated on the forms. (2 RT 271, 339; 8 CT 2104.) He further stated that he wore a pair of black boots found in the Nissan at the time of the S.O.S. murders. (8 CT 2104-2105.)

Within the various interviews, Cunningham indicated that he had been a courier of narcotics who "ripped off a shipment." (2 RT 272-276.) There were also references to the victims' families, some mention of lawyers getting involved in the case and a request for protective custody. (2 RT 281-285, 339-343.)

On August 2, 1992, Detective McGready conducted a videotaped reenactment of the crimes with Cunningham at the S.O.S. building in Ontario. Cunningham agreed to participate in the reenactment. He was then advised of and waived his *Miranda* rights before starting the reenactment. (2 RT 288-292, 359-361, 367; Ex. 6 at pp. 1-2.)

Cunningham stated that he first arrived at S.O.S. shortly after noon and

stayed about a half hour talking with the three victims. He then left and returned after 3:00 p.m. (Ex. 6 at pp. 3-5.)

Cunningham said he returned to S.O.S. for the purpose of committing a robbery. He described how he reentered the business with the .22-caliber rifle (which he had shortened by cutting the stock and barrel) concealed in a paper bag. (Ex. 6 at pp. 7-10.)

Cunningham explained that the three victims were sitting in the warehouse. At gunpoint, he ordered them to follow him through the hallway to the front lobby. (Ex. 6 at pp. 7-11.)

Cunningham described how he forced Sonke to give him the money from the cash register while he had the other two victims seated on the floor. (Ex. 6 at p. 12.) Cunningham then explained:

> Wayne gave me the money, I put it in my pocket. I had some tape on me and uh I had, I handed the tape to David and told him to tie the Mexican up on the floor and then I, and then I had him tie Wayne up and put him on the floor. And I must have tied up David. They were right here on the floor.

(Ex. 6 at p. 12.)

Cunningham stated that he then asked Sonke where the rest of the money was. When Sonke indicated that the money was down the hall, Cunningham made all the victims get up and go with him to that location. Sonke then opened a filing cabinet with some keys, but did not remove anything. Cunningham took the keys and made the victims enter the bathroom where he told them to lie down on the floor and be quiet. He left all three victims with their hands bound behind them. (Ex. 6 at pp. 12-15.)

Cunningham stated that the victims were bound with heavy duty tape which Cunningham had purchased weeks prior. He reiterated that he had planned to commit the robbery earlier that day before he returned to S.O.S. (Ex. 6 at pp. 15-16.)

After leaving the victims in the bathroom, Cunningham removed a cash

drawer and a yellow folder which contained money from the open filing cabinet, but only took the money from the cash drawer. Cunningham said he stole a total of approximately $800 during the entire robbery. (Ex. 6 at pp. 16-17.)

Cunningham explained that he returned to the bathroom after taking the money and shot all three victims. He said that he shot Sonke first as soon as he entered the bathroom. (Ex. 6 at p. 17.)

Cunningham stated that he then retrieved the can of gasoline from his car and went back inside to burn down the building. When Cunningham entered the bathroom, he saw Smith breaking loose of his bonds. Smith did not try to get up or fight Cunningham. He was merely looking at Cunningham. Silva and Sonke were not moving. Cunningham shot Smith again. (Ex. 6 at pp. 18-20.)

Cunningham described how he poured the gasoline along the hallway in front of the bathroom and ignited it with a match. Cunningham stated that he removed a key from inside the front door, exited and locked the door from the outside. Cunningham said he drove to a location on the Pomona Freeway where he watched the building for a minute or so until a fire truck responded. He then drove to San Bernardino and called Costello. (Ex. 6 at pp. 20-23.)

2. Defense

Cunningham did not testify or present any witnesses on his behalf. (4 RT 1062.)

B. Penalty Phase

1. Prosecution

a. The Murders

The prosecutor presented the evidence proving the burglary, arson,

robberies and murders of Silva, Smith and Sonke through firefighter Michael Mondino (10 RT 2710-2725), Deputy Sheriff Susan Quesada (10 RT 2726-2727), Fire Captain Dennis Pattie (11 RT 2731-2747), Fire Inspector James Pettigrew (11 RT 2748-2766), Detective Donald McGready (11 RT 2768-2819, 2826-2832), Michael Ray (11 RT 2833-2843), Evelyn Eriksen (11 RT 2844-2862), Betty Flodter (11 RT 2865-2893), forensic criminalist William Matty (11 RT 2899-2934; 13 RT 4127-4133), Alana Costello (12 RT 2944-3000, 3005-3014), forensic pathologist Dr. Nenita Duazo (12 RT 3017-3095, 4004-4049, 4053-4122), Detective Gregg Nottingham (13 RT 4209-4216), Diana Jamison (13 RT 4287-4325), videotapes and transcripts of the July 1992 Deadwood interviews and August 1992 reenactment (13 RT 4215-4216, 4247-4250), and stipulations of the crime scene technicians who collected evidence (11 RT 2896-2898; 13 RT 4249).

b. Victim Impact Evidence

Jose Silva's brother, Jesus, and sister, Josefina, testified. (13 RT 4191, 4194.) Jose, who lived in Rancho Cucamonga, was the youngest of ten children. (13 RT 4191-4193.)

After Jose's mother died, Josefina helped raise him for 11 years. (13 RT 4195.) Jose regularly attended family functions. He spent Father's Day with his family approximately a week before his murder. (13 RT 4192-4193, 4195.) Jose had a one-year old son at the time of his death. (13 RT 4192.)

Jesus's son informed him of his brother's murder. Jose's wallet and identification were never returned to the family. (13 RT 4192-4193.)

David Smith's wife, Mimi, testified. At the time of David's murder, they had been married ten years and had a daughter named Tiffany. (13 RT 4200, 4201-4202.)

Mimi Smith was notified of her husband's death through a phone call from the coroner's office. His wallet and identification were never returned to

her. (13 RT 4202-4203.)

David Smith's older half-brother, Edward Smith, testified. David lived for a time with Edward and his wife. Edward and David fished together. David loved the outdoors and "was a very gentle soul." (13 RT 4196, 4199-4200.)

Edward met Cunningham in 1978 or 1979 when they both worked with Mike Ray at Southern California Salvage. Edward and Cunningham continued working for Ray in managerial positions at his S.O.S. store in La Mirada. Subsequently, Cunningham was laid off and Edward became the manager of the Ontario store. In 1990 or 1991, Edward opened up his own business. (13 RT 4196-4199.)

Prior to leaving, Edward helped David secure a job at S.O.S. David first managed the repair and refurbishing department, and later became the assistant manager. (13 RT 4199.)

c. Prior Violent Conduct

On April 24, 1976, Herta Gill was working as a cashier at the Vinelynn Drive-In in the City of Industry. Around 9:00 p.m., Cunningham approached the drive-up window and demanded all of Gill's money. When Gill asked if he was kidding, Cunningham pulled out a handgun, pointed it at Gill and said he was not kidding. (13 RT 4134-4135.)

Cunningham told Gill to hurry as she removed cash from a drawer and began handing it to him. Cunningham ordered Gill to give him everything, including her personal money. Gill explained that employees were not allowed to bring their purses into the cashier's booth. (13 RT 4136-4137.)

Cunningham then told Gill to open a safe inside the cashier's booth. When Gill explained that she did not know how to open it, Cunningham said she "better know how" in a threatening tone. (13 RT 4137.)

Cunningham then ordered Gill to sit on the floor next to the safe while

he continued to point the gun at her. Gill looked down, fearing Cunningham was going to shoot her. After a few minutes, Gill looked up and saw Cunningham had left. (13 RT 4137-4138.)

Gill called employees in another section of the store and reported that she had been robbed. Those employees notified the police, who caught Cunningham in possession of the gun and stolen cash. (13 RT 4138.)

On July 5, 1977, Cunningham pled guilty to robbery and admitted he personally used a handgun. He was placed on felony probation and ordered to serve one year in county jail. (13 RT 4139, 4326.)

In 1982, fourteen-year-old Michelle I. lived with her family in La Mirada. Cunningham and his wife, Myrna, were friends with Michelle's parents. (13 RT 4140-4141.)

On April 5, 1982, Michelle was home alone when Cunningham knocked on the door. Cunningham said he needed to use the telephone because his car had broken down. Michelle opened the door and allowed Cunningham to enter the house. Cunningham picked up the telephone and appeared to make a brief call. (13 RT 4141-4143.)

After he hung up the phone, Cunningham approached Michelle and asked her to give him "a blow job." When Michelle refused, Cunningham pushed her down to the ground. Michelle began screaming. Cunningham punched Michelle in the face with a closed fist and told her to stop screaming. (13 RT 4143-4144.)

Cunningham then dragged Michelle by her hair to the sofa, where he forced her to kneel in front of him as he sat down. Cunningham threatened to beat Michelle if she continued to scream. Cunningham unzipped his pants, inserted his penis into Michelle's mouth and ordered her to "suck him." (13 RT 4144-4145.)

Cunningham forced Michelle to orally copulate him for approximately

ten minutes. Whenever Michelle tried to stop, Cunningham placed his hands on her head and forced her to continue. Eventually, Cunningham removed his penis from Michelle's mouth and masturbated himself to climax. (13 RT 4145-4146.)

Before Cunningham left, he warned Michelle that she was not to tell anyone about what had happened. Cunningham said he had killed his ex-wife and her lover and that he would "come back" and do the same to Michelle if she did not heed his warning. (13 RT 4146.)

Nonetheless, Michelle reported the incident to her family and the police, and testified against Cunningham at a trial. (13 RT 4146.) On July 1, 1982, Cunningham was convicted of forcible oral copulation with a minor and sentenced to state prison. (13 RT 4326.)

In 1987, fifteen-year-old Samira S. lived with her mother and younger sister in Paramount.[10/] Cunningham moved into the home in April of 1987 after he separated from his wife, Myrna. Cunningham slept on the sofa. (13 RT 4152-4154.)

Samira's mother had a day-time job. Since Cunningham was not working at the time, he offered to be responsible for Samira and take her to school. (13 RT 4154-4155.)

Within two or three weeks of moving into the home, Cunningham began fondling and kissing Samira when they were alone. Samira told Cunningham to stop. However, Cunningham would continue touching different parts of her body. (13 RT 4155-4156.)

Subsequently, Cunningham forced Samira to orally copulate him. When Samira was only able to take part of his penis into her mouth, Cunningham told her, "Put it further." Samira said, "I can't do this, no." Cunningham slapped Samira when she did not orally copulate him as he demanded. He then

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10. Samira suffered from Lupus. (13 RT 4156.)

masturbated and ejaculated into a cloth. (13 RT 4156-4158.)

Cunningham engaged in oral copulation with Samira once or twice a week between April and September of 1987. (13 RT 4156-4157, 4163.) At times, Cunningham ejaculated inside Samira's mouth. (13 RT 4163.)

On one occasion, Cunningham grabbed Samira, placed her on top of him and orally copulated her vagina. When Samira told him to stop, he just continued. (13 RT 4158-4159.)

At other times, Cunningham forced Samira to orally copulate him while he did the same to her. When Samira resisted, Cunningham got angry and slapped her. (13 RT 4160.)

Except for one time, each of the sexual assaults occurred when Cunningham and Samira were home alone. On that one occasion, Cunningham took Samira into the bedroom and tried to have sexual intercourse with her while Samira's mother was showering. (13 RT 4161-4162.)

Cunningham repeatedly tried to convince Samira to have intercourse with him. Samira refused. However, Cunningham would put Vaseline or baby oil on his penis and partially penetrate her vagina.[11/] (13 RT 4162-4163.)

Cunningham also asked to take naked photographs of Samira. However, Samira refused. (13 RT 4166.) Although Cunningham gave Samira money and bought her gifts, he caused her to be truant from her summer school courses. (13 RT 4160, 4164-4165.)

In September or October of 1987, Samira told a friend from church and a school counselor about Cunningham's sexual assaults. The counselor asked Samira to call the police. After the police were contacted, Cunningham left Samira's home. (13 RT 4163-4165.)

Samira attended court proceedings concerning Cunningham. (13 RT

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11. Samira told a doctor that Cunningham attempted to have sexual intercourse with her but stopped when she said it was painful. (13 RT 4176.)

4165-4166.) On February 4, 1988, Cunningham was convicted of two counts of oral copulation with a minor and sentenced to state prison. (13 RT 4326.)

2. Defense

a. Personal And Family Background

Ronald Forbush, a defense investigator, initially investigated the circumstances of the crimes. After the preliminary hearing, he shifted the focus of his investigation to Cunningham's personal and social history. (13 RT 4329-1431.)

Cunningham's parents, Vivian and Maurice Cunningham, divorced when Cunningham was approximately two-years-old. Vivian had prior and subsequent marriages to other men. Cunningham had two brothers, Sam[12/] and Wesley, and several half-brother's and half-sisters. (13 RT 4331-4351.)

Various relatives testified that Vivian abandoned Cunningham and his brothers at a young age while Maurice was serving in the army, forcing them to steal food to survive. Eventually, Cunningham and his brothers were placed in an orphanage. (13 RT 4368-4371, 14 RT 4676-4691; 16 RT 5037-5040.) The defense witnesses also testified that Vivian was dishonest and had a drinking problem. (15 RT 4739-4743; 16 RT 5032-5035.)

Wesley Cunningham testified that Maurice and his stepfather, Gene Collins, beat him and his brothers. (16 RT 5036, 5042-5043.) Wesley also described an incident wherein Vivian sexually fondled him. After the molest, Wesley left and Vivian called his other brothers into the room. (16 RT 5035-5036.) However, Wesley testified that his parents took good care of him and his brothers after they left the orphanage and moved to California. (16 RT 5050-5051.)

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12. At the time of Forbush's investigation, Sam Cunningham was in Huntsville State Prison in Texas. (13 RT 4351-4358.)

Two of Cunningham's older half-siblings, Carolyn Manning and Jerry Crawford, testified that Maurice molested them and was violent at times. (15 RT 4729-4739, 4743-4744, 4750-4754.) However, Wesley testified that he, and to the best of his knowledge his two brothers, were not molested by Maurice. (5053-5054.)

b. Testimony Regarding Prior Offenses

Daniel and Olivia Negron knew Samira and her mother through church. They also met Cunningham and his ex-wife. While Cunningham was residing in Samira's home, the Negron's attended social functions where Samira acted "flirtatious" with Cunningham and appeared to be "going after" him with inappropriate behavior. (14 RT 4616-4619, 4624-4526, 4632-4633.)

On one occasion, Ms. Negron saw Samira's mother kiss Cunningham. Samira complained to Ms. Negron that her mother would not allow her to date and see other men. (14 RT 4627.)

Damarie Hassouneh, Samira's aunt, stayed at Samira's home for approximately six months. Cunningham slept on the sofa and often bought groceries for the family. He gave Samira gifts and took her to the movie theater. (14 RT 4648-4651.)

At one point, Hassouneh became concerned about Samira's relationship with Cunningham and asked her if anything was going on between them. Samira became defensive and nervously replied that her mother was "starting to get on her about the same thing." At other times, Samira told Hassouneh that Cunningham was very nice and she cared for him. Samira tried to imply there was something going on between Cunningham and her mother. (14 RT 4650-4651.)

Hassouneh noticed that Samira received a lot of attention from Cunningham and did not shy away from it. At times, Samira sat with Cunningham on the sofa, which appeared to annoy Samira's mother.

According to Hassouneh, Samira was envious of her brother who received a lot of praise and attention from the family. (14 RT 4651-4655.)

Hassouneh testified that Samira was not always truthful. Although Samira bruised easily, Hassouneh did not recall seeing any bruises on her during the time Cunningham was staying with them. (14 RT 4653-4655.)

On one occasion, Deputy Sheriff Pierre Nadeau interviewed Samira at her high school. Samira had bruising around her eyes and swelling on the back of her head. Samira told Nadeau that she bruised easily since she had Lupus. (14 RT 4613-4615.)

When Deputy Sheriff Goran[13/] interviewed Samira on October 5, 1987, she never mentioned that Cunningham slapped her. Samira told Goran that she was afraid to say no to Cunningham because other men had previously slapped or beat her for refusing sex. (14 RT 4674.)

Dr. Kerry English examined Samira on October 27, 1987. Samira did not tell Dr. English that Cunningham slapped her. Although she indicated that Cunningham attempted to have sexual intercourse with her twice, Samira's hymen was still intact. Samira stated that Cunningham stopped because it was painful for her. However, there was some scarring of the posterior fourchette of the vagina which was consistent with Samira's account of attempted intercourse or digital penetration. (14 RT 4594-4596.)

Samira told Detective Nottingham that Cunningham forced her to miss school, which caused her grades to suffer and resulted in her dropping out of high school. (14 RT 4634-4536.)

c. Military Background

On July 24, 1969, Cunningham was court-martialed for being absent without leave ("AWOL") between May 23 and July 9, 1969. He was punished

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13. No first name was given for Deputy Goran. (14 RT 4674.)

with a loss of grade. (14 RT 4452.)

On January 26, 1970, Cunningham was court-martialed and found guilty again for being AWOL between August 28 and November 23, 1969. He was sentenced to hard labor and denied pay. (14 RT 4452-4453.)

On March 6, 1970, Cunningham was disciplined at the company level ("Article 15") for being AWOL for about 25 days. Soon thereafter, Cunningham was sent to Vietnam. (14 RT 4453.)

Cunningham served approximately 11 months in Vietnam. (14 RT 4453.) Cunningham's military records showed he served in Vietnam before being stationed for three years at Fort Hood, Texas. Cunningham received the Combat Infantryman's Badge[14] and various awards in Vietnam and ultimately was promoted to sergeant. (14 RT 4396-4411, 4442-4448; 16 4933.)

When he returned to Fort Hood, Cunningham was court-martialed again for being AWOL four different times. (14 RT 4453-4454, 4561-4563.) Cunningham was demoted from his sergeant rank and honorably discharged as a private. (14 RT 4454.)

G. Robert Baker, a marine corps veteran, reviewed and testified about Cunningham's personal military files as well as archived military records from the Vietnam War. Cunningham received combat training and served in three different units in Vietnam. (14 RT 4490-4497.) Cunningham's units engaged in normal reconnaissance missions and had one confrontation with either the Viet Cong or North Vietnamese Army in which one enemy combatant was killed and one wounded. On other occasions, Cunningham's unit found a cache of enemy weapons and enemy bunkers. (14 RT 4497-4506, 4509.)

Most of the time, Cunningham's unit worked on foot. At times, the unit was flown by helicopter to certain locations. (14 RT 4510-4511.) One day,

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14. The Combat Infantryman's Badge is awarded to any soldier in a unit which has received enemy fire. (14 RT 4557-4558.)

Cunningham's unit was in a "free fire zone" which meant the soldiers had permission to kill anyone in the area of operation. (14 RT 4513.)

Records showed several "fire fights" in which enemy troops or sympathizers were killed or captured. (14 RT 4517-4523.) On one occasion, mechanical ambushes killed four North Vietnamese soldiers and a medic. (14 RT 4540-4541.) On other occasions, artillery and white phosphorous rounds of ammunition were fired either at Cunningham's unit or another battalion (14 RT 4535-4536), enemy soldiers were seen fleeing from an ammunition box (14 RT 4533), enemy and friendly bunkers were destroyed (14 RT 4533-4535), and booby-traps and mines were found (14 RT 4539-4540).

The records showed requests for aerial insecticide spraying (14 RT 4537), a "flame drop" which might have meant a Napalm drop (14 RT 4541), and a chemical officer regarding a rat problem, Napalm drops or mortar tubes (14 RT 4541-4542). The records also showed a truce on the Vietnamese TET holiday, which was usually a one-sided truce. (14 RT 4538.)

Baker discussed how enemy combatants in Vietnam who surrendered were retrained as scouts or informants for the Americans. (14 RT 4516.) He also explained "blood trails" which were left by the enemy when they dragged their wounded or dead soldiers away from combat scenes. (14 RT 4506-4507.) The records showed Cunningham was sent for rest and recuperation after a mine sweeping operation. (14 RT 4524-4527.)

Nineteen veterans who served in Cunningham's reconnaissance platoon testified about their daily activities and various missions in Vietnam.[15/] (15 RT 4760-4485, 4801-4804; 4817-4856, 4869-4897; 16 RT 4916-4920, 4928-4935, 4951-4957, 4962-4978, 4986-4989, 4991-5010, 5013-5017, 5019-5021, 5022-

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15. Forbush testified that three veterans, including one who allegedly knew Cunningham the best, were unable to attend the trial and testify for various reasons. (16 RT 5168-5170; 17 RT 5181-5182.)

5027, 5059-5061, 5065-5067, 5075-5090, 5111-5120, 5122-5136, 5137-5141, 5147-5150, 5152-5158, 5159-5167.) Other than the death of a medic from a mortar accident on base, there were no casualties or fatalities in Cunningham's platoon. (15 RT 4776; 16 RT 5094.)

Cunningham was never captured or tortured by the enemy; and his unit never destroyed a village, killing women and children. (14 RT 4454-4455, 4557-4558; 15 RT 4802-4805, 4811-4812, 4864-4865; 16 RT 4925, 4935-4936, 5102-5103.)

Cunningham did not participate in long-range reconnaissance patrols or special forces. (15 RT 4803-4804.) Once, Cunningham required medical attention due to heat exhaustion. (16 RT 4933.)

On one occasion, Cunningham's unit took 30 to 50 prisoners including women and children who were sympathetic to the enemy. However, none of the prisoners were bound or mistreated in any way. (16 RT 4980-4982.) Cunningham's unit rarely took prisoners. (16 RT 5101-5102.)

Some of the veterans characterized Cunningham as a good soldier and a "loner" who generally kept to himself. Others did not remember Cunningham. (15 RT 4874-4875; 16 RT 4933, 4946-4947, 4984, 5010, 5027, 5061-5062, 5111-5112, 5135, 5140, 5159-5160, 5166-5167.)

Some of the veterans suffered from Post Traumatic Stress Syndrome ("PTSD"), flashbacks, depression or other problems as a result of their service in Vietnam. However, none of them committed any felonies or crimes of violence after they returned home. (16 RT 4937-4940, 4942-4943, 4957-4959, 4982-4984, 4990, 5013-5016, 5072-5073, 5136, 5144-5145, 5150-5151.)

d. Post Traumatic Stress Syndrome

G. Robert Baker and Thomas Williams testified as PTSD experts. Baker was a psychologist with the Veterans Administration and clinical coordinator for the National Center for Post-Traumatic Stress Disorder. (14 RT 4477-

4479.) Williams was a psychologist who served in the Marine Corps and completed two tours of duty in Vietnam. (17 RT 5183-5188.)

Baker and Williams described PTSD as the reaction to unusual and frightful events outside the normal range of human experiences, such as those experienced in war zones. The symptoms of PTSD include nightmares, intrusive and unwanted thoughts and images, flashbacks, avoidance and dissociate behaviors (such as fantasy), depression, social isolation, disassociation from and distrust of others, anxiety, sleeping difficulties, anger management problems, hyper-vigilance, avoidance behaviors, sensation-seeking behaviors, memory impairment, numbing of emotions, sleep disorders and concentration difficulties. (14 RT 4479-4486; 17 RT 5191-5195, 5210-5213, 5217-5218.) Although there is no cure for PTSD, the symptoms can be treated and individuals can be taught how to manage them. (17 RT 5203-5204.)

Williams testified that symptoms such as flashbacks or nightmares could happen at any time depending on the particular individual and his experiences. However, certain stimuli such as loud noises would be expected to trigger them. Williams explained how military training especially sensitized soldiers to various stimuli and caused them to react quickly to perceived danger. (17 RT 5205-5207.)

Thus, PTSD sufferers may have exaggerated startle reactions to certain stimuli or engage in "survivor-like behavior." (17 RT 5207-5210.) PTSD may also be retriggered by secondary traumatic experiences. (17 RT 5197-5198.)

Baker and Williams explained that the Vietnam conflict presented unique difficulties for soldiers because the war had no front lines, there were no clearly defined objectives other than killing people, it was often unclear who was the enemy, there were no safe areas, there was no winning strategy, the primary goal was survival, the environmental conditions were terrible, neither the Vietnamese civilian population nor the American public appreciated them,

there was little unit cohesion, and the soldiers tended to be very young. (14 RT 4486-4489; 17 RT 5198-5203.)

These factors made it more difficult to treat Vietnam War veterans suffering from PTSD. Particularly, the social isolation Vietnam veterans felt prevented them from seeking treatment. (17 RT 5204-5205.) Current treatments for PTSD were not available to veterans in the early 1970's. (17 RT 5188-5189.) Baker explained "survivor guilt" and testified how soldiers who suffered from PTSD often exaggerated their combat roles. (14 RT 4489-4493.)

Based on his review of the records, Baker opined that Cunningham was involved in the type of combat which could, but did not always, produce PTSD. (14 RT 4542.) However, he never met or evaluated Cunningham for PTSD. (14 RT 4578-4579.) Baker also admitted that it would be important to talk to people close to an individual to determine whether he suffered from PTSD. (14 RT 4581-4582.)

Baker explained how individuals are screened for PTSD and the importance of confirming the truthfulness of reported personal histories in rendering a diagnosis. He testified that malingering, or feigning symptoms of a disorder, can apply to someone claiming to suffer from PTSD. (14 RT 4564-4565, 4574-4577.) According to Baker, although soldiers suffering from PTSD would be expected to avoid events such as fireworks displays which trigger combat memories, they might still carry guns which would likewise trigger combat memories because guns were a source of protection. (14 RT 4580-4581.)

Medical records showed Cunningham was diagnosed with malaria in November of 1970. Baker testified how a recurrence of malaria symptoms can act as a PTSD trigger.[16/] (14 RT 4497, 4523.)

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16. Baker testified that malaria infections, which were common in Vietnam, did not cause PTSD. (14 RT 4577-4578.)

Williams met with Cunningham for three days in May and June of 1995. Based on these conversations, Williams diagnosed Cunningham as having PTSD. In arriving at this opinion, Williams also considered the videotapes of Cunningham's interviews with the detectives and the reenactment, charts of the daily activities of Cunningham's Vietnam units, statements of the veterans who served with Cunningham, and statements from various family members. (17 RT 5189-5191, 5216-5217.) Williams did not meet with Costello, Jamison or any of the other witnesses in the case. (17 RT 5264.)

Cunningham told Williams how his mother abandoned him and his brothers, their electricity and water was turned off, and they had to steal food to survive. Cunningham claimed he broke into other people's homes to observe what normal childhood and family life was like. (17 RT 5220-5221.)

Cunningham told Williams that he was isolated in an orphanage, sexually molested by his mother once, fondled by his natural father once, observed Manning have sex with his father and heard Crawford being sodomized by his father.[17] Cunningham refused to give details of the alleged molest by his mother. However, Williams felt Wesley's reported sexual abuse corroborated Cunningham's claims. (17 RT 5221-5225, 5320-5325.)

Williams testified that Cunningham's PTSD was caused by childhood neglect and sexual abuse as well as combat experiences in Vietnam. (17 RT 5215.) He opined that Cunningham most likely developed PTSD when he was approximately nine years old. (17 RT 5226.) According to Williams, Cunningham was re-traumatized in Vietnam, which contributed to his current PTSD. (17 RT 5235.)

Williams believed Cunningham had PTSD when he robbed Ms. Gill and committed the sexual offenses against Michelle and Samira as well as at the

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17. Williams testified that PTSD can also be caused by one observing sexual abuse of others. (17 RT 5225-5226.)

time of the S.O.S. murders. (17 RT 5319.) However, he did not know whether Cunningham was going through a dissociative episode when he committed the prior offenses. (17 RT 5358-5359.) Williams conceded that child molestation, robbery and murder were not part of the criteria of PTSD. (17 RT 5282-5283.)

Williams found Cunningham had an "'[i]nability to delay sexual gratification and generally poor sexual adjustment.'" However, he did not consider Cunningham a pedophile based on the fact that he committed a sexual offense against a 14-year-old girl.[18] (17 RT 5287-5291.)

Cunningham told Williams that he always had an active "fantasy life," had difficulty at times distinguishing fantasy from the truth, and relied on dreams for memory. When relating stories about Vietnam, Cunningham said he was not sure whether they really happened or not. Williams believed this was dissociative behavior indicative of PTSD. (17 RT 5218-5220.) Cunningham also stated that, although his Vietnam service was important to him, he did not remember it well. (17 RT 5240-5241.)

Williams believed Cunningham was a good soldier. (17 RT 5228-5229.) In describing his military training and Vietnam experiences, Cunningham claimed he stayed with a boy who had been fatally shot in a firefight until the boy died and felt like he was watching himself die.[19] (17 RT 5230.)

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18. Williams was not asked about Cunningham's other prior child molest. (17 RT 5287-5291.)

19. Williams was aware that, although none of the veterans who testified related that story, Forbush included the story in one of his reports. Williams reasoned that Vietnam veterans were reluctant to talk about the killings of women and children. (17 RT 5230-5232.) Williams noted that one of the veterans who testified at trial, Howard Wellar, mentioned the killing of a young boy during a confrontation with the enemy, but did not testify that Cunningham held the boy while he died. (17 RT 5349-5350.) Williams saw no reason to question or ascertain the truth of Cunningham's story about the boy. (17 RT 5350.)

Cunningham also told Williams that he observed at least one enemy prisoner being tortured to death. Williams explained that there were Provisional Reconnaissance Units or "dark teams" comprised of intelligence officers who secretly worked in Vietnam and used units such as Cunningham's platoon for security. (17 RT 5232-5233, 5350-5351.) However, based on the testimony of the various witnesses, Williams believed Cunningham probably never saw anyone tortured to death. (17 RT 5269-5270.)

Based on his visit to the crime scene[20/] and his review of autopsy photographs and Cunningham's videotaped statements, Williams believed Cunningham "dissociated" at some point during the S.O.S. killings.[21/] In support of this conclusion, Williams cited Cunningham arming himself with a gun, Cunningham viewing Smith as a threat when he broke his bonds, Cunningham's claim that he felt like he was standing behind himself watching the crimes happen, Cunningham binding the victims with tape, and Cunningham's reference to the "LT" instructing them to burn villages and not leave anyone behind alive. (17 RT 5236-5239.)

However, Williams failed to include in his report various statements made by Cunningham recounting the details of the S.O.S. murders. (17 RT 5344-5349.) Although Cunningham did not refer to his dreams during the reenactment as he had done in the first Deadwood interview, Williams still felt he was "drifting" during the reenactment. (17 RT 5325.)

Williams testified that Cunningham knew robbery was wrong at the time of the S.O.S. incident but did not "really internally" believe he had committed

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20. Williams did not go inside the building because it was locked. (17 RT 5331-5332.)

21. Despite Cunningham's employment history with S.O.S., Williams did not consider the murders to be workplace killings. (17 RT 5359-5361, 5377-5379.)

the other crimes until he participated in the reenactment because he "dissociated" at the time of the murders. (17 RT 5333-5334.) Williams conceded that a person who intentionally makes a decision to injure another or rob someone in order to take money would "probably" not be acting due to PTSD. (17 RT 5359.)

Williams could not distinguish whether Cunningham's statements were reality, fantasy or outright lies. (17 RT 5239.) The false stories about Vietnam which Cunningham told Jamison might be unrelated to PTSD and have been only "embellishments of war stories." (17 RT 5240.)

Cunningham told Williams that he did not make friends in Vietnam and kept people at a distance. Williams testified that such social isolation was common in Vietnam. (17 RT 4241-4242.) He believed Cunningham did not have a loving and supportive family or religion to turn to after returning from Vietnam. (17 RT 4242-4244.)

Williams testified that the military taught soldiers to follow orders rather than the morality of right and wrong. However, "in-country training" in Vietnam taught soldiers rules which prohibited the killing of innocent people, the burning of villages, rape and drug use. (17 RT 5244-5245.)

Williams gave Cunningham an I.Q. test, which showed Cunningham had "high average" intelligence. (17 RT 5266-5267, 5301-5303, 5316.)

Williams gave Cunningham a self-administered and unsupervised test called the Dissociation Experience Scale ("DES") where Cunningham marked scales with checkmarks. (17 RT 5297-5300.) Based on the DES, Williams concluded that Cunningham had a high level of dissociative experiences. (17 RT 5317-5318.)

Williams also gave Cunningham a self-administered and unsupervised Minnesota Multiphasic Personality Inventory 2 Test ("MMPI"), which indicated Cunningham was distrustful and moody, and had poor social skills.

(17 RT 5310-5313, 5316.)

Based on the MMPI, Williams also concluded Cunningham was not malingering. (17 RT 5374.) However, Cunningham declined to answer some of the questions, including ten to fifteen percent of the questions on one scale, which resulted in a notation from the testing service that stated, "The pattern of his item omission should be carefully noted." (17 RT 5380-5383.)

Cunningham's life history essentially fit the description for Antisocial Personality Disorder ("APD") in the Diagnostic Statistical Manual ("DSM") IV, which stated that "the essential feature of antisocial personality disorder is a pervasive pattern of disregard for and violation of the rights of others."[22/] However, Williams did not believe Cunningham fit the criteria for APD because he did not have repeated law violations since the age of 15 and appeared to feel guilty about his past crimes. Williams testified that APD is often confused with PTSD. (17 RT 5283-5287, 5305-5307.)

Williams did not believe Cunningham fit additional criteria for APD which included 1) "failure to conform to social norms with respect to lawful behaviors and indicated by repeatedly performing acts that are grounds for arrest;" 2) "deceitfulness as indicated by repeated lying, use of aliases or conning others for personal profit or pleasure;" 3) "[i]mpulsivity or failure to plan ahead;" 4) "[i]rritability and aggressiveness as indicated by repeated physical fights or assault;" 5) "[r]eckless disregard for the safety of self and others;" 6) "[c]onsistent irresponsibility ... [as] indicated by repeated failure to sustain consistent work behavior or honor financial obligations;" and 7) "[l]ack of remorse as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another." (17 RT 5305-5316.) According to

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22. Williams recognized that DSM cautioned practitioners to strongly suspect malingering in those with APD. He defined malingering as "somebody that purposely feigns or manufactures symptoms for some gain," which generally occurs in a legal context. (17 RT 5291-5293.)

Williams, Cunningham's confession to the detectives was inconsistent with APD. (17 RT 5372.)

Williams was familiar with a "factitious PTSD" study done at the Portland Veterans Administration Hospital in which Vietnam veterans lied about their military history and made false claims of being prisoners of war and other exaggerated claims when they never saw combat. (17 RT 5293-5295, 5365-5366.) Williams conceded that Cunningham made inaccurate or untrue claims about his military background and Vietnam experiences during the Deadwood interviews. He was also aware that Cunningham had altered his military DD-214 form regarding his military experience, listed training and awards he did not receive and operations in which he did not participate in, and deleted references to his AWOL's. (17 RT 5334-5343.) Although he agreed that falsification of military records might indicate a factitious PTSD disorder or malingering, Williams did not investigate that issue during his meetings with Cunningham because he "had more important things to do." (17 RT 5343.)

Williams testified that the more tours of duty one did in Vietnam, the more likely that the person would suffer from PTSD. (17 RT 5363.)

3. Rebuttal

Cunningham told Detective Nottingham during the Deadwood interview that he spent two years in Vietnam and served in special forces. Nottingham explained how he found the original and altered DD-214 forms in the Nissan. (17 RT 5385-5387.)

ARGUMENT

GUILT PHASE ISSUES

I.

CUNNINGHAM FORFEITED ANY OBJECTION TO PRETRIAL SHACKLING DURING TRANSIT BETWEEN THE COURTROOM AND HOLDING CELL, AND FAILS TO SHOW THE TRIAL COURT'S NARROW ORDER OF PRETRIAL SHACKLING CONSTITUTED AN ABUSE OF DISCRETION

Cunningham claims he was unlawfully restrained through shackling during pretrial proceedings in violation of his rights to due process and fair trial, and subjected him to cruel and inhumane treatment in violation of the proscription against cruel and unusual punishment. He argues there was no showing of a "manifest need" for the shackling and the trial court failed to consider less restrictive alternatives. Cunningham contends reversal of the judgment is required because the pretrial shackling constituted structural error. In the alternative, he claims the judgment should be reversed because he was "profoundly prejudiced" by the shackling. (AOB 38-62.)

Cunningham's argument obscures the fact that the only shackling which remained an order of the court prior to any critical stage of the pretrial proceedings following arraignment was merely shackling during transit between the courtroom and holding cell. Cunningham forfeited any objection to this shackling by failing to pursue a ruling on that issue.

Cunningham also fails to recognize that a lesser showing than "manifest need" is needed to justify pretrial shackling. Moreover, the trial court repeatedly granted Cunningham's request for less restrictive alternatives to the point of only requiring leg shackles during the brief transportation between the holding cell and courtroom. Cunningham fails to show how this de minimus and strictly limited shackling for courthouse safety constituted an abuse of

discretion.

Moreover, the record shows Cunningham wished to waive his presence during pretrial proceedings well before he manufactured this shackling issue. Cunningham should not now be allowed to profit from his willfully absenting himself from courtroom proceedings due to eminently reasonable and necessary security procedures in transporting in-custody defendants through the courthouse.

Cunningham is also mistaken in his belief that shackling constitutes structural error which defies harmless error analysis. Since the trial court barred any and all shackling of Cunningham in the courtroom early in the pretrial proceedings before any evidentiary hearings or other critical portions of the trial, Cunningham could not have been prejudiced.

Finally, the record shows trial counsel was able to fully communicate and consult with Cunningham during all pretrial proceedings. Cunningham fails to articulate what specific courtroom proceedings were impacted by shackling or how trial counsel was not able to represent his interests at any particular hearing. Accordingly, any alleged shackling error must be deemed harmless.

A. Relevant Proceedings

Cunningham was arraigned in the San Bernardino Courthouse on January 20, 1993. Following the arraignment, trial counsel indicated that Cunningham wished to waive his "personal presence at many of the court proceedings" pursuant to section 977. Counsel explained that Cunningham wished to absent himself from pretrial proceedings due to some perceived danger in transportation to the San Bernardino Courthouse and because "there's many of the legal things he does not particularly wish to personally be present for." (1 RT 10; 4 CT 997.)

Cunningham agreed that defense counsel could have the option of

determining when his presence would be required. (1 RT 10.) At the urging of the prosecutor, defense counsel indicated that he would "probably" want Cunningham present when there was going to be contested testimony. (1 RT 11.)

Defense counsel then requested that all future court proceedings be held in the Rancho Cucamonga Courthouse because that division of the San Bernardino County Superior Court encompassed the scene of the charged offenses and removal of the case from that court constituted "a violation of various rights" to be addressed by counsel at a later date in a written motion. The trial court took the request under submission. (1 RT 13-14.)

On April 22, 1993, during the hearing on Cunningham's section 1538.5 suppression motion, defense counsel raised his first objection to Cunningham being shackled in the San Bernardino Courthouse. Counsel represented that Cunningham had chains around his ankles and waist with his hands cuffed to his sides while he was in the courtroom. Counsel claimed this made it difficult for Cunningham to sit in a chair. (1 RT 18-19; 4 CT 1035.)

Defense counsel further claimed the handcuffs appeared to be digging into Cunningham's wrists. (1 RT 19.) When asked how the shackling affected the suppression hearing, defense counsel claimed it would effect Cunningham's concentration and argued "nobody can participate while handcuffed." He also argued there were no threats, "acting out," or disciplinary infractions justifying the shackling. (1 RT 19.)

The court offered to have Cunningham handcuffed in front of his body which would allow him to lean forward, write and talk to counsel. The court also assured counsel that the shackling would not influence its rulings. (1 RT 20.) Despite counsel's continued objection, the court ordered Cunningham's waist chains removed and his hands placed in regular handcuffs in front of his body. (1 RT 21.)

After defense counsel further complained of redness on Cunningham's wrists, the prosecutor placed on the record various reasons justifying Cunningham's shackling. The prosecutor noted that Cunningham was being tried for three murders in a capital case and had specialized military training. The prosecutor also stated that bailiffs at the preliminary hearing had informed him that Cunningham's leg shackles were unbuckled during transport to the courtroom on one occasion. (1 RT 22-23.)

Defense counsel contested the prosecutor's statement concerning the unbuckling of the leg shackles. (1 RT 23.) The court indicated that it was not considering it in ordering the "limited restraints" currently placed on Cunningham. (1 RT 23-24.)

Thereafter, the court denied Cunningham's request to transfer his case to the Rancho Cucamonga Courthouse. (1 RT 24; 4 CT 1035.) After some preliminary discussion regarding the suppression motion, the proceedings were adjourned until June 4, 1993. (1 RT 31.)

On June 4, 1993, Cunningham waived his presence. The court and counsel agreed that July 9, 1993, would be the new date to formally hear the suppression motion. (1 RT 32-33; 4 CT 1037.)

At the June 4 proceedings, defense counsel again raised an objection to any shackling of Cunningham. The court indicated that it was willing to order that Cunningham not be restrained in any way in the courtroom, but would continue to be restrained during transport in the halls of the courthouse. Noting that Cunningham "sat through the preliminary hearing without restraints," the prosecutor concurred. (1 RT 34-35.)

Defense counsel continued to object, urging again that the case be sent back to Rancho Cucamonga where such security procedures were allegedly not necessary. (1 RT 35-36.) The court subsequently ordered that Cunningham "not be shackled in the courtroom." (1 RT 37; 4 CT 1038.)

On June 29, 1993, Cunningham filed a written motion and declaration objecting to the use of any restraints in the holding areas of the courthouse and requesting that the case be transferred to Rancho Cucamonga. (4 CT 1039-1050.) However, the defense motion conceded, "The right of law enforcement to transport Mr. Cunningham in restraints is not contested." (4 CT 1044.)

On July 2, 1993, defense counsel conceded that "with respect to the transportation through the corridors I realize it's not practical to have him brought without shackles through these public corridors." (1 RT 39.) In lieu of an objection to Cunningham being shackled during transport, counsel renewed his motion to transfer the case to Rancho Cucamonga "where that doesn't need to be done." (1 RT 39.)

The trial court indicated that it would order Cunningham not to be shackled in the holding facility. However, noting Cunningham's concession in the written motion, the court stated that the standard of procedure of shackling during transit between the holding cell and the courtroom appeared to be a reasonable security precaution. (1 RT 43; 4 CT 1055.)

Accordingly, the court ordered that Cunningham not be handcuffed or shackled in the holding facilities as well as the courtroom.[23/] The court denied without prejudice the request to transfer the case to Rancho Cucamonga, indicating that Cunningham could renew his request at a later time. (1 RT 43-44; 4 CT 1055.) Defense counsel stated that Cunningham would waive his presence for all future pretrial proceedings because shackling during transport through the public hallways was "an affront to his dignity" and "dangerous." (1 RT 44.)

On July 9, 1993, Cunningham appeared in court with leg shackles on.

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23. The court denied without prejudice the defense motion to have the case transferred back to the Rancho Cucamonga courthouse for the pretrial proceedings. However, the court invited Cunningham to renew his motion at a later time, indicating that it would consider transferring the case for trial.

Defense counsel stated that "perhaps" the shackles be removed. Noting Cunningham's previously stated purpose to briefly appear to simply waive his presence at the suppression motion hearing, the court did not order the removal of the shackles. However, the court assured Cunningham that the shackles would be removed if he chose to participate in the "on-going" proceedings. (1 RT 68-69.)

Cunningham waived his presence and was transported back to the jail. (1 RT 69-79; 4 CT 1061.) Defense counsel asked that Cunningham not be transported to court again until jury trial or transfer of the case to Rancho Cucamonga. Counsel explained, "There's no reason for him to be here. And if I need to consult with him I'll go to the jail." (1 RT 70.) Thereafter, the suppression motion hearing commenced. (1 RT 79.)

Prior to the court trial for the guilt phase, the prosecutor stated on the record that Cunningham had been "unshackled, freedom inside the courtroom to be with his attorney." (1 RT 218.) The prosecutor further stated:

> I just wanted the record to reflect that we have had earlier motions over the last couple of years on the shackles of the defendant and him being brought over on special transportation routes. And [Cunningham] has not been through, I don't think, any peculiar laborious type things to be brought to trial and to communicate with his attorney.

(1 RT 218.)

The balance of pretrial proceedings as well as the court trial for the guilt phase took place in the San Bernardino Courthouse. (1 RT 123-4 RT 1100.)

On April 1, 1995, Cunningham filed a written request to have the penalty phase tried in the Rancho Cucamonga Courthouse with jurors from its West End Judicial District. (6 CT 1345-1377.)

On April 17, 1995, the trial court denied the request and ordered that jury selection would occur in the San Bernardino Courthouse (rather than an offsite facility). However, the Court ordered that the jury panel for the penalty phase be drawn exclusively from the West End Judicial District. (5 RT 1101-

1117; 6 CT 1412.)

After the court ordered Cunningham to personally appear on the next court date to address jury selection issues, defense counsel objected, claiming that the court's promises concerning shackling had not been kept. The court overruled the objection, finding it had accommodated Cunningham throughout the proceedings. (5 RT 1129-1130; 6 CT 1411.)

Defense counsel complained about the in-transit shackling, claiming that the entire building in Rancho Cucamonga and some courtrooms in San Bernardino did not require that defendants be transported through any public hallways. However, counsel again conceded: "I agree that the law says that he does go through the public halls in shackles. I mean, they can shackle him to take him through the public halls." (5 RT 1132-1133.) The trial court again ordered Cunningham to appear on the next court date. (5 RT 1133.)

Subsequent pre-penalty phase proceedings and the initial portion of jury selection (primarily hardship excusals and challenges for cause based on the juror questionnaires) took place in the San Bernardino Courthouse. (5 RT 1170- 7 RT 2034.)

On July 5, 2005, the trial court resumed jury selection in the Rancho Cucamonga Courthouse. (7 CT 1670.) Thereafter, the penalty phase was tried in Rancho Cucamonga, and there were no further shackling objections.[24/] (See 7 CT 1670-1888.)

B. Cunningham Forfeited Any Claim Regarding The Only Pretrial Shackling That Remained Ordered By The Court

As shown above, Cunningham conceded the propriety of shackling

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24. Based on defense counsel's representations that in-transit shackling was not necessary anywhere in the Rancho Cucamonga Courthouse (see 5 RT 1132.), it appears that Cunningham was not shackled in any way for the penalty phase trial.

in transit to and from the courtroom and expressly declined to contest that issue. (1 RT 39, 5 RT 1132; 4 CT 1044.) By abandoning his earlier objection to in-transit shackling, Cunningham forfeited any challenge to such shackling on appeal.

It is well-settled "'that the use of physical restraints in the trial court cannot be challenged for the first time on appeal . . .'" (*People v. Ward* (2005) 36 Cal.4th 186, 206, quoting *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583.) Likewise, a defendant fails to preserve a shackling issue for review if he fails to "press for a ruling on the necessity for physical restraint" despite raising an objection in the trial court. (*People v. Ramirez* (2006) 39 Cal.4th 398, 450.)

The only shackling which remained ordered by the court prior to any evidentiary hearings or other critical stages of the post-arraignment proceedings was the in-transit shackling. As such, Cunningham's shackling claim has been forfeited for purposes of appeal.

C. The Trial Court Properly Exercised Its Discretion In Strictly Limiting The Use Of Restraints To Transit Through The Public Hallways Of The Courthouse During Pretrial Proceedings

Prior to the suppression motion which was the first evidentiary hearing in the pretrial proceedings, the trial court granted Cunningham's requests to be completely free of any type of shackling or restraint during courtroom proceedings. The court also granted Cunningham's request not to be restrained in any manner while inside the holding facility where he would be consulting with counsel. However, the trial court required that Cunningham be shackled in transit through the public hallways for security reasons. Notwithstanding his waiver, Cunningham fails to show the court's pretrial shackling order was an abuse of discretion.

In *People v. Duran* (1976) 16 Cal.3d 282, this Court held

> a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a

manifest need for such restraints.

(*People v. Duran, supra,* 16 Cal.3d at p. 293.) Unless the record shows "violence or a threat of violence or other nonconforming conduct," the imposition of physical restraints on a defendant will be deemed an abuse of discretion. (*Id.* at p. 291.)

In *People v. Fierro* (1991) 1 Cal.4th 173, this Court extended restrictions on shackling to preliminary hearings. (*Id.* at p. 220.) Citing the "evident necessity" rule of *People v. Harrington* (1871) 42 Cal. 165, this Court reasoned that restrictions on shackling

> serve[] not merely to insulate the jury from prejudice, but to maintain the composure and dignity of the individual accused, and to preserve respect for the judicial system as a whole; these are paramount values to be preserved irrespective of whether a jury is present during the proceeding. Moreover, the unjustified use of restraints could, in a real sense, impair the ability of the defendant to communicate effectively with counsel [citation], or influence witnesses at the preliminary hearing.

(*Id.* at pp. 219-220.)

However, this Court allowed "a lesser showing than that required at trial" for shackling at preliminary hearings since the dangers of such pretrial shackling "are not as substantial as those presented during trial." (*People v. Fierro, supra,* 1 Cal.4th at p. 220.) Accordingly, "some showing of necessity" rather than a "manifest need" will justify shackling at a preliminary hearing. (*Ibid.*) It follows that this lesser showing would apply to shackling at other pretrial evidentiary hearings. (*Small v. Superior Court* (2000) 79 Cal.App.4th 1000, 1017.)

The requisite showing to support shackling

> which must appear as a matter of record [citation], may be satisfied by evidence, *for example*, that the defendant plans to engage in violent or disruptive behavior in court, or that he plans to escape from the courtroom [citation].

(*People v. Anderson* (2001) 25 Cal.4th 543, 595 [emphasis added].) However,

an attempt to escape or disrupt courtroom proceedings is not a precondition on a trial court's discretion to order shackling. (*People v. Hawkins* (1995) 10 Cal.4th 920, 944, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

Moreover, the restraint need not be based on the defendant's conduct at the time of trial. (*People v. Livaditis* (1992) 2 Cal.4th 759, 774.) Although a shackling decision cannot be based solely on a defendant's record of violence or status as a capital defendant, his criminal background and record of violence may be considered in conjunction with violent and nonconforming behavior in jail. (See *People v. Hawkins, supra,* 10 Cal.4th at p. 944; see also *People v. Ramirez, supra,* 39 Cal.4th at p. 450 [court considered "history of this case"].)

"[T]he prosecutor may bring to the court's attention matters which bear on the issue" of shackling, but it is the court's function to initiate sufficient procedures for due process determination of the issue. (*People v. Duran, supra,* 16 Cal.3d at p. 293, fn. 12.) Thus, uncontested representations by the prosecutor may properly be considered by the court and justify its ruling. (See, e.g., *People v. Combs* (2004) 34 Cal.4th 821, 838 [prosecutor informed court that defendant possessed shanks in jail and threatened custodial officers]; *People v. Medina* (1995) 11 Cal.4th 694, 730 [prosecutor informed court of defendant's criminal history as well as defendant's prior attempted and completed escapes and violent conduct in custody and the courtroom].)

Although a shackling order must be based on facts rather than "rumor or innuendo," no formal evidentiary hearing is required. (*People v. Lewis* (2006) 39 Cal.4th 970, 1032.) In lieu of a formal hearing, the trial court may "base its determination on factual information properly brought to its attention." (*People v. Medina, supra,* 11 Cal.4th at p. 731.) The trial court's decision must be upheld unless a "manifest abuse of discretion" is shown. (*People v. Lewis, supra,* 39 Cal.4th at p. 1032; *People v. Medina, supra,* 11 Cal.4th at p. 731;

People v. Duran, supra, 16 Cal.3d at p. 293, fn. 12.)

Applying these principles, the trial court's decision to limit Cunningham's shackling to transport through public hallways between the courtroom and holding cell did not constitute a manifest abuse of discretion. The court stated that this appeared "to be a reasonable safety precaution." (1 RT 43.)

People v. Hardy (1992) 2 Cal.4th 86, validates the trial court's decision. In *Hardy*, the trial court ordered that the two defendants be shackled in view of the jurors during their transport to and presence at a jury viewing of the crime scene. (*Id.* at p. 180.) Although one of the defendants had no history of violence, this Court held "the trial court did not abuse its discretion in concluding the danger of flight or escape was greater outside the courtroom." (*Ibid.*) Likewise, the risks of Cunningham's flight or escape were greater while being transported through the public hallways of the courthouse outside the confines of the holding cell or courtroom.

Even defense counsel recognized that it was "not practical to have [Cunningham] brought without shackles through these public corridors." (1 RT 39.) Accordingly, "[t]he right of law enforcement to transport Mr. Cunningham in restraints [was] not contested." (4 CT 1044.)

Hardy also noted that there was no indication that the trial court failed to consider less drastic alternatives. (*People v. Hardy, supra,* 2 Cal.4th at p. 180.) The trial court in Cunningham's case not only considered but granted substantially less drastic alternatives to his initial shackling by ordering that he not be restrained in any manner inside the courtroom or his holding cell and by strictly limiting the shackling to the few minutes during which Cunningham was in transit to or from court through the public hallways.

The trial court's legitimate concerns about public safety during transport of a defendant outside the confines of the holding cell or courtroom satisfied the

standard of "some showing of necessity" required for its pretrial shackling order. (Cf. *People v. Fierro, supra,* 1 Cal.4th at p. 220.) Since Cunningham cannot show this minimal and eminently reasonable restraint constituted a "manifest abuse of discretion," his shackling claim must be rejected. (See *People v. Lewis, supra,* 39 Cal.4th at p. 1032; *People v. Medina, supra,* 11 Cal.4th at p. 731; *People v. Duran, supra,* 16 Cal.3d at p. 293, fn. 12.)

D. Cunningham Fails To Show He Was Prejudiced By The Limited In- Transit Shackling

Contrary to Cunningham's argument, improper shackling does not constitute structural error. (See AOB 56-59.) Shackling does not compel reversal unless Cunningham can show he was deprived of a fair trial or was otherwise prejudiced. (*People v. Fierro, supra,* 1 Cal.4th at p. 220.)

It is unclear whether the applicable harmless error standard is governed by *People v. Watson*[25] (1956) 46 Cal.2d 818 or *Chapman v. California*[26] (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People v. Soukomlane* (2008) 162 Cal.App.4th 214, 232.) However, Cunningham fails to show any prejudice under either standard.

For *courtroom* shackling, prejudice can be shown by evidence that the jurors saw the defendant's restraints or the shackling impaired his right to testify or participate in his defense. (See *People v. Combs, supra,* 34 Cal.4th at p. 838.) However, prior to any pretrial evidentiary hearings or critical stages in the post-arraignment proceedings, the trial court granted Cunningham's request to

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25. Under the *Watson* standard for state law error, reversal is unwarranted unless it is reasonably probable that the defendant would have received a more favorable outcome in the absence of the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

26. Under the *Chapman* standard for federal constitutional error, reversal is required unless the error can be deemed harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

be totally unrestrained in the courtroom. Thus, there was no courtroom shackling which could have prejudiced Cunningham.

Cunningham's vague and generic complaints that his ability to consult with counsel were frustrated and his ability to participate meaningfully in his defense fail to establish prejudice. (See AOB 54-55, 60-61.) As this Court stated in *People v. Cleveland* (2004) 32 Cal.4th 704, a criminal defendant

> does not have a right to be present at every hearing held in the course of a trial. [Citation.] A defendant's presence is required if it bears a reasonable and substantial relation to his full opportunity to defend against the charges. [Citation.] The defendant must show that any violation of this right resulted in prejudice or violated the defendant's right to a fair and impartial trial. [Citation.]

(*Id.* at p. 741, quoting *People v. Hines* (1997) 15 Cal.4th 997, 1038-1039 [internal quotes omitted].)

Cunningham fails to articulate which specific pretrial proceedings or hearings were affected by his alleged inability to consult with counsel and participate in his defense, why those particular proceedings or hearings bore a substantial relation to his full opportunity to defend against the charges and how any alleged impairment resulted in prejudice in each instance. (See AOB 53-62.) Cunningham's vague generalizations fall far short of demonstrating prejudice.[27/]

Moreover, as in *Cleveland*, the record amply shows counsel was present

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27. On appeal, Cunningham restates his claim before the trial court that the shackling "adversely influenced the general perception of him before the court . . . ." (AOB 54.) However, the court assured defense counsel that the shackling would not influence its rulings. (1 RT 20.) Moreover, no jury was involved in the pretrial proceedings.

Cunningham also reiterates his vague allegations before the trial court that the shackling subjected him to public humiliation and an unarticulated risk of harm from unspecified persons. (See AOB 54.) Again such amorphous allegations unrelated to any particular proceeding do not show prejudice.

and fully capable of representing Cunningham's interests throughout the pretrial proceedings and on many occasions expressly waived Cunningham's presence. (Compare *People v. Cleveland, supra,* 32 Cal.4th at p. 741.) No prejudice has been shown.

In light of the fact that the trial court strictly limited Cunningham's pretrial shackling to the few minutes of transit between the holding cell and courtroom, Cunningham's claim that his rights to communicate with counsel and participate in his own defense were impaired amounts to mere hyperbole. Cunningham fails to explain how he was unable to exercise his rights where the court permitted him to remain totally unrestrained in the courtroom as well as his holding cell. (See AOB 59-62.) Moreover, defense counsel indicated that he was fully able to consult with Cunningham in the jail and, "There's no reason for him to be here." (1 RT 70.)

Cunningham further argues the pretrial shackling "inexorably" caused him to absent himself from all proceedings in the San Bernardino Courthouse. (See AOB 59.) However, as discussed above, Cunningham wished to waive his "personal presence at many of the court proceedings" in San Bernardino well before any shackling complaints were raised. (See 1 RT 10.)

It is evident from the record that Cunningham's absence from the pretrial proceedings was motivated by his long-stated (as early as the first Deadwood interview) personal desire not to contest the charges or participate in his trial rather than the minimal in-transit shackling ordered by the court and conceded by defense counsel to be a legitimate security practice. As the trial court generously granted the defense requests to free Cunningham of any and all restraints *in the courtroom* for pretrial proceedings, Cunningham cannot blame the court's shackling order for his absence from *courtroom proceedings*.

Cunningham fails to explain how shackling limited to the few minutes he was in transit *outside the courtroom* prevented him from participating in

proceedings *inside the courtroom* where he would be unrestrained. (See AOB 59-62.) There has been no showing that the in-transit shackling had any effect on Cunningham's decision to absent himself from the pretrial proceedings. Accordingly, any alleged shackling error can be deemed harmless under either *Chapman* or *Watson*, and the judgment should be affirmed.

II.

CUNNINGHAM FAILS TO SHOW THE WAIVER OF HIS RIGHT TO BE PRESENT AT THE GUILT PHASE PROCEEDINGS WAS INVOLUNTARY DUE TO SHACKLING, AND CUNNINGHAM EXPRESSLY FORFEITED ANY OTHER CLAIM ON APPEAL REGARDING THE WAIVER OF HIS PERSONAL PRESENCE AT THE GUILT PHASE

Cunningham claims the waiver of his constitutional and statutory rights to be present at the guilt phase was involuntary because it was "induced" and "coerced" by improper shackling. (AOB 62-78.) He further claims his guilt phase waivers were invalid because the trial court did not comply with Penal Code sections 977 and 1043. (AOB 70-73, 78-81.) He contends these infirmities in the waivers constituted structural error, or in the alternative, prejudicial error, mandating reversal. (AOB 81-86.)

Cunningham fails to show his guilt phase waivers were involuntary due to shackling. Cunningham expressly forfeited all other challenges to his waiver of presence at the guilt phase. Since there is no showing that Cunningham's waivers were involuntary due to shackling and there is no cognizable statutory error, Cunningham's structural error and prejudice arguments are rendered moot.

A. Cunningham's Guilt Phase Waivers Were Not Involuntary

Cunningham premises his claim challenging the voluntariness of his guilt phase waivers of presence entirely on the argument that they were induced

and coerced by improper shackling.[28] (See AOB 62-78.) He argues he was forced to waive his presence "simply because he could not endure the effects of the wrist, waist and leg chains *every day for more than eight hours a day*. . . . " (AOB 63 [emphasis added].)

However, as shown in Argument I, *ante*, the trial court relieved Cunningham of all restraints in the courtroom and holding cell prior to any evidentiary hearings or critical phases of the post-arraignment proceedings. Thus, Cunningham remained subjected only to shackling for the few minutes of transit to and from the courtroom -- not the eight hours per day claimed by Cunningham.

As explained previously, Cunningham fails to demonstrate how shackling coerced his waivers of presence at the courtroom proceedings when the trial court granted Cunningham's request to be free of any and all restraints during those very proceedings. Accordingly, Cunningham must rest his argument on the fiction that he was to be shackled eight hours a day for every court appearance.

A similar claim to that raised by Cunningham was rejected by this Court in *People v. Lang* (1989) 49 Cal.3d 991. In *Lang*, the defendant objected to being "'paraded around in handcuffs or shackles'" at a jury viewing of the crime scene, and subsequently waived his right to be present at the viewing without giving a reason. (*Id.* at p. 1025, quoting from record.) On appeal, the defendant argued his waiver of personal appearance was coerced by the alternative of having to appear before the jury in shackles at the viewing. (*Ibid.*) In part, this Court rejected the claim because "the record fail[ed] to show that concern about appearing in shackles motivated defendant to waive

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28. As shown below, Cunningham expressly exempted any shackling-based claim from his waiver of appeal rights regarding his lack of personal presence for the guilt phase. (See 1 RT 75.)

his presence at the jury view." (*People v. Lang, supra,* 49 Cal.3d at p. 1026.)

Moreover, as discussed in Argument I, *ante*, the trial court did not abuse its discretion in limiting Cunningham's shackling merely to his transport between the courtroom and holding cell through the public hallways. Since the minimal shackling ordered by the court was neither improper nor the cause of Cunningham waiving his presence at the guilt phase, Cunningham's involuntary waiver claim must be rejected.

B. Cunningham Expressly Forfeited His Other Claims Concerning The Validity Of The Guilt Phase Waivers

Cunningham further claims his waivers of personal presence at the guilt phase were invalid because they did not comply with Penal Code sections 977 and 1043. (AOB 70-73, 78-81.) However, Cunningham expressly forfeited his right to appeal these statutory challenges to his guilt phase waivers.

Section 977 requires the defendant's personal presence in felony cases at the preliminary hearing, arraignment, the time of any plea and sentencing and other portions of the trial where evidence is taken before the trier of fact. (§ 977, subd. (b)(1).) The statute further specifies that a written waiver in open court must be obtained for a felony defendant to waive his or her rights to be personally present for other trial proceedings. (*Ibid.*)

Section 1043 also requires the personal presence of defendants in felony cases. (§ 1043, subd. (a).) The statute provides for an exception where the defendant is removed from the courtroom for disorderly, disruptive and disrespectful conduct following an appropriate warning by the judge. (§ 1043, subd. (b)(1).)

A capital defendant may waive his or her right of presence at critical stages of the trial. (*People v. Mayfield* (1997) 14 Cal.4th 668, 738.) Yet, the restrictions of sections 977 and 1043 bar trial courts from granting capital defendants' voluntary requests to absent themselves during portions of the trial

in which evidence is taken as well as the other proceedings listed in section 977. (*Ibid.*, citing *People v. Jackson* (1996) 13 Cal.4th 1164, 1211.)

Error in complying with sections 977 and 1043 is "one 'of purely statutory dimension'. . . ." (*People v. Mayfield, supra,* 14 Cal.4th at p. 738.) As this Court explained in *People v. Price* (1991) 1 Cal.4th 324:

> We reject defendant's contention that the right of presence during the guilt phase of a capital trial is of such fundamental importance that, as a matter of state or federal constitutional law, it may not be waived. The United States Supreme Court has never held that a defendant cannot waive the constitutional right to be present at critical stages of even a capital trial, and this court has concluded, as a matter of both federal and state constitutional law, that a capital defendant may validly waive presence at critical stages of the trial.

(*Id.* at p. 405.)

In general, criminal defendants may waive appellate rights which are statutory rather than constitutionally based. (*People v. Rosso* (1994) 30 Cal.App.4th 1001, 1006.) Thus, it is significant that violations of sections 977 and 1043 are purely errors of "statutory dimension."

Cunningham forfeited his right to appeal his section 977 and 1043 claims.

> "Waiver is ordinarily a question of fact. [Citation.]" [Citation.] It is defined as "[a]n intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and the conduct of the accused." [Citation.]
>
> "[T]he valid waiver of a right presupposes an actual and demonstrable knowledge of the very right being waived. [Citations.]" [Citation.] It "'[i]s the intelligent relinquishment of a known right after knowledge of the facts.' [Citation.]" The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver. [Citation.] The right of appeal should not be considered waived or abandoned except where the record clearly establishes it. [Citation.]

(*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1661-1662.)

Applying this standard, Cunningham forfeited any statutory claims regarding the validity of his waiver of presence. On July 2, 1993, prior to any evidentiary hearings, Cunningham filed a written waiver of personal presence with the trial court. (4 CT 1059.) The declaration signed by Cunningham, which was witnessed and consented to by trial counsel stated:

> The undersigned defendant, having been advised of his right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on questions of fact and law, and to be confronted by and cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceedings in this cause. The undersigned defendant hereby requests the court to proceed during every absence of the defendant that the court may permit pursuant to this waiver, and hereby agrees that his interest is represented at all times by the presence of his attorney, the same as if the defendant were personally present in court, and further agrees that notice to his attorney that his presence in court on a particular day at a particular time is required is notice to the defendant of the requirement of his appearance at that time and place.
>
> The undersigned defendant specifically waives his right to be present on July 2, 1993, when the court considers his Motion re Physical Restraints.
>
> The undersigned defendant also waives his right to be present at any future date where the hearing is held in the Courthouse in San Bernardino.

(4 CT 1059-1060.)

The court and prosecutor expressed reservations about allowing Cunningham's proposed general waiver and the propriety of the procedures insisted upon by defense counsel. However, trial counsel insisted that Cunningham had a right to make such a general waiver of presence. (See 1 RT 44-55, 68-75.)

To assuage the concerns of the court and prosecutor, trial counsel indicated that Cunningham was forfeiting all rights of appeal regarding the

validity of his waiver of personal appearance except for those based on the court's shackling orders. (1 RT 75.) On the record, trial counsel asked Cunningham:

> Mr. Cunningham, you understand that by entering into this waiver of your personal presence you cannot appeal other than on the grounds of the court's illegal orders that's caused you to waive your personal presence, your lack of presence at subsequent hearings.

(1 RT 75.) Cunningham stated that he understood. (1 RT 75.)

The trial court also informed Cunningham that he had the right to effective assistance of counsel at all stages of the proceedings and would not be able to raise an ineffective assistance of counsel claim based on his inability to assist counsel due to his absence from the courtroom. The court explained that Cunningham would be entitled to raise any other ineffective assistance of counsel claims. Cunningham stated that he understood. (1 RT 76-78.)

The court further informed Cunningham that it intended to ask for specific written waivers for each court appearance, but Cunningham had a right to decline such waivers and appear at any court proceeding should he so desire. Cunningham stated that he understood. (1 RT 78-79.) Accordingly, the court accepted Cunningham's general waiver of appearance and appeal rights. (4 CT 1061.)

Finally, the court specifically asked Cunningham if it was his desire to waive his presence at the suppression motion scheduled for that day despite the fact that he was already in court. Cunningham replied in the affirmative. (1 RT 79.)

Subsequently, when Cunningham waived his right to jury for the guilt phase, the prosecutor reiterated his concerns about Cunningham also waiving his personal presence for the court trial. (1 RT 208-209.) Defense counsel replied:

> What I would suggest that we do is, and what I've told Mr. Cunningham, I believe in the past, is tell Mr. Cunningham that when he waives his right to be present pursuant to Penal Code 977, he will not be able to appeal in the future the fact that he was not present during the guilt trial. And forget all that other stuff about issues I don't wish to waive.

(1 RT 209.)

The following colloquy then transpired between the court and Cunningham:

> THE COURT: You understand, Mr. Cunningham, that knowing that you have a right to be present and voluntarily deciding not to be present, the appeals courts, including the California Supreme Court and the federal district courts, would very likely determine that you could not then raise your lack of appearance at the trial as a ground[] for appeal;
>
> You understand that?
>
> THE DEFENDANT: I discussed all that with my attorney, yes.
>
> THE COURT: Okay. And you are aware of that?
>
> THE DEFENDANT: Yes, I am.
>
> THE COURT: And knowing that [,] it's still your desire to waive your presence?
>
> THE DEFENDANT: Yes.
>
> THE COURT: All right.

(1 RT 209-210.)

The record clearly shows Cunningham intelligently and knowingly relinquished his appeal rights for claims challenging the validity of his waiver of personal appearance for any reason other than the trial court's shackling order. (Compare *People v. Rosso, supra,* 30 Cal.App.4th at p. 1007 [where no written form or oral advisement of appellate rights].) Accordingly, Cunningham's statutory based claims attacking the validity of his personal presence waivers are not cognizable on appeal. The judgment should be affirmed.

III.

CUNNINGHAM FORFEITED ANY CLAIM THAT HIS JURY WAIVER FOR THE GUILT PHASE WAS INVOLUNTARY BY REPEATEDLY REFUSING THE TRIAL COURT'S OFFERS TO WITHDRAW THE WAIVER AND RETRY THE GUILT PHASE; AND THE JURY WAIVER WAS NOT INVOLUNTARY

Cunningham claims his waiver of jury for the guilt phase was involuntary because it was "coerced by the inhumane courtroom restraints" in San Bernardino. Thus, he argues the guilt judgment must be reversed. (AOB 86-96.)

However, Cunningham forfeited this claim by repeatedly declining the trial court's offers to withdraw his jury waiver and retry the guilt phase. Moreover, the jury waiver was not involuntary.

A. Relevant Proceedings

On August 8, 1994, defense counsel informed the court that he would recommend to Cunningham that he agree to a court trial for the guilt phase. (1 RT 190.)

On December 16, 1994, Cunningham filed a written "WAIVER OF TRIAL BY JURY; REQUEST FOR COURT TRIAL," in which he stated that he had been advised of his rights to a jury trial and requested that the waiver be executed from the jail via closed circuit television. Cunningham's signature on the pleading was witnessed by defense counsel. (5 CT 1189-1190.)

On December 19, 1994, defense counsel represented that Cunningham was indeed willing to waive jury for the guilt phase. (1 RT 194-195.) Counsel explained the reasons for the waiver as follows:

> Mr. Guzzino [the prosecutor] is anxious to get the guilt phase on. We felt that as we don't wish to have a jury decide that and just the court, we could then separate the guilt phase form the penalty phase because I, I have no discovery to give and I can't forsee having any to give on the guilt phase. It all relates to the penalty phase. So we've filed a waiver of a right to a jury trial in the guilt phase.

(1 RT 195.)

Defense counsel requested that the jury waiver be taken via closed circuit television from the jail because he did not wish Cunningham to "wander through the halls" or appear in court. (1 RT 199.)

On January 20, 1995, the trial court advised Cunningham via video closed circuit television of his constitutional right to a jury trial for the guilt phase. Cunningham stated that he understood his rights and wished to waive jury for the guilt phase. The court further advised Cunningham of his right to be present in court for the guilt phase trial. Cunningham stated that he understood that right and wished to waive his presence. The court accepted the waivers after defense counsel joined in them. (1 RT 205-210.)

During pretrial motions for the penalty phase, the court offered to vacate the guilt phase verdicts, give Cunningham the opportunity to effectively revoke his jury waiver and grant Cunningham a new guilt phase trial "either jury trial or court trial, with or without his presence." (5 RT 1406-1407.) Defense counsel rejected the court's offer stating, "I think you're out of luck, quite frankly. Because I think you can't retry him. It'd be double jeopardy."[29] Although counsel indicated that he would consult with others, he said, "But I, I think we're where we are." (5 RT 1408.)

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29. There is no double jeopardy violation if the defendant consents to a new trial. (See *Larios v. Superior Court* (1979) 24 Cal.3d 324, 329; *In re Carlos V.* (1997) 57 Cal.App.4th 522, 525, fn. 4, citing *T.P.B. v. Superior Court* (1977) 66 Cal.App.3d 881, 884, fn. 2.)

During the penalty phase pretrial motions, the prosecutor revisited the issue, arguing that no additional waivers were required for the guilt phase. (6 RT 1499-1502.) When asked for any response, defense counsel stated, "No. I mean, I have no comment. I mean -- what's done is done." (6 RT 1503.)

Subsequently, the trial court repeated its offer to allow Cunningham to revoke his jury waiver, vacate the guilt verdicts and grant Cunningham a new guilt phase trial. (6 RT 1575.) Defense counsel again declined the court's offer, stating "what's done is done." (6 RT 1576.)

Later, the trial court stated:

> I had down any additional waivers with regard to the waiver of jury trial. But based on Mr. Negus's [defense counsel] statements that he would prefer not to give Mr. Cunningham the opportunity to either make additional waivers, or if he refused to make additional waivers, to vacate the guilt phase and have a new guilt phase, but rather rely on the current state of the record, we won't go into that further.

(6 RT 1646.)

Defense counsel replied:

> I would prefer it to — rather than my – – I would prefer that – – basically what I said was I thought what was done is done. And we shouldn't re-visit it, rather than giving Mr. Cunningham waivers, or not giving him opportunities – – I mean, it's my position that any such thing would be superfluous and of no legal significance.

(6 RT 1646.) Trial counsel's rejection of the court's offer to "vacate the guilt phase, and let defendant have another guilt phase" was recorded in the minutes. (6 CT 1634-1635.)

B. Cunningham Forfeited His Jury Waiver Claim

Cunningham forfeited his jury waiver claim by repeatedly rejecting the court's offers to revoke his waiver, set aside the verdicts and grant him a new

guilt phase trial with or without a jury. (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 124 [defendant forfeited claim that prosecutor intentionally elicited improper testimony by rejecting court's offer to admonish jury]; *People v. Silva* (2001) 25 Cal.4th 345, 374 [although defendant objected to prosecutor's question, claim of error was unreviewable since defense declined court's offer to admonish jury to disregard question]; *People v. Jennings* (1991) 53 Cal.3d 334, 373-374 [defendant's claims regarding improper volunteered testimony was waived where defense counsel failed to respond to court's solicitations for remedial actions]; *People v. Levels* (1989) 209 Cal.App.3d 410, 423 [defendant's rejection of trial court's offer to allow her to withdraw no contest pleas as well as her failure to raise issue on appeal constitutes waiver]; *People v. Felix* (1986) 178 Cal.App.3d 1168, 1172 [defendant's due process claim based on lack of adequate notice of probation violation allegations rejected where defense counsel did not entertain court's offer to consider a motion for continuance]; *People v. Garcia* (1984) 160 Cal.App.3d 82, 89 [defendant's claim regarding court's unreported communication with jurors out of defendant's and counsel's presence effectively waived by defendant's refusal of court's offer to make jurors available for questioning]; *People v. Velez* (1983) 144 Cal.App.3d 558, 569 [defendant's claim of prosecutorial misconduct in closing argument waived where counsel refused court's offer to reopen closing argument and failure to request admonition]; *People v. Ames* (1975) 52 Cal.App.3d 389, 390-391 [defendant impliedly waived claim that her right to be tried by 12 jurors was violated where she declined court's offer to declare a mistrial and counsel expressly consented to continue trial with 11 jurors].)

Cunningham is also barred from raising his jury waiver claim on appeal through the doctrine of invited error. In *People* v. *Wickersham* (1982) 32 Cal.3d 303, this Court recognized the "doctrine of invited error" as a rule

"designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest." (*People* v. *Wickersham, supra,* 32 Cal.3d at p. 330.) Accordingly, "[i]f defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal." (*Ibid.*; see also *People* v. *Greenberger* (1997) 58 Cal.App.4th 298, 371; *People v. Laster* (1997) 52 Cal.App.4th 1450, 1469.)

Where a claim is based on a sua sponte duty of the trial court, the doctrine of invited error will not apply unless defense counsel expressly caused the error and indicated a tactical reason for his or her actions. (See *People v. Wickersham, supra,* 32 Cal.3d at pp. 330-333; *People v. Gallego* (1990) 52 Cal.3d 115, 183; *People v. Solis* (1998) 66 Cal.App.4th 62, 67 fn. 3 [tactical reason must be affirmatively shown in the record]; *People v. Jones* (1997) 58 Cal.App.4th 693, 708 [mere acquiescence insufficient]; *People v. Ojeda-Parra* (1992) 7 Cal.App.4th 46, 51.) However, all that is required for the doctrine to apply is an indication of trial counsel's tactical reason for his or her actions, not a critique of the strengths and weaknesses of counsel's explanation. (See *People v. Wickersham, supra,* 32 Cal.3d at pp. 330-333.)

In Cunningham's case, defense counsel repeatedly rejected the trial court's offer to cure any alleged infirmities in the jury waiver by allowing Cunningham to effectively revoke the waiver, setting aside the verdicts and granting Cunningham a new guilt phase trial. The record demonstrates that defense counsel's tactical reason for steadfastly refusing the trial court's generous offers was to preserve the jury trial claim as a ground for attacking the judgment on appeal.

Rather than give the trial court an opportunity to remedy any alleged violation of Cunningham's rights by accepting the offer of a new guilt phase trial with or without a jury, defense counsel insisted that "what's done is done" and told the court that it was "out of luck." (See 5 RT 1408; 6 RT 1503, 1576,

1646; 6 CT 1634-1635.) The doctrine of invited error should serve to bar Cunningham from now complaining about the jury waiver *and requesting a new guilt phase trial* on appeal when he rejected such an offer in the trial court. Cunningham has forfeited his jury waiver claim.

C. Cunningham's Jury Waiver Was Not Involuntary

Cunningham contends his jury waiver was involuntary due to "the inhumane *courtroom* restraints" in San Bernardino. (AOB 86 [emphasis added].) However, as pointed out previously in Arguments I and II, *ante*, the underlying premise of Cunningham's argument that he would have been subjected to "courtroom restraints" for a guilt phase jury trial is patently false. Accordingly, his contention that his jury waiver was involuntary for that reason should be rejected.

Moreover, the record shows Cunningham's decision to waive jury was upon the recommendation of defense counsel and motivated by the strategy of separating the guilt and penalty phases so that he would not be required to turn over any defense discovery at that time. (See 1 RT 190, 195.) Since there is no evidence that Cunningham's jury waiver was coerced by courtroom shackling, the judgment should be affirmed.

IV.

CUNNINGHAM FORFEITED ANY CLAIM THAT HIS JURY WAIVER FOR THE GUILT PHASE WAS INADEQUATE, AND THE COURT TRIAL WAS NOT A "SLOW PLEA" REQUIRING ADDITIONAL WAIVERS

Cunningham claims his guilt phase court trial was the "functional equivalent of a guilt plea" or "slow plea" which required additional express waivers which were not taken by the trial court. Accordingly, Cunningham

claims the guilt phase verdicts must be reversed and he be afforded a new trial. (AOB 97-111.)

However, Cunningham forfeited this claim by repeatedly rejecting the trial court's offer to set aside the verdicts and grant him a new guilt phase trial with or without a jury. Moreover, no additional guilt phase waivers were required since Cunningham did not submit on the preliminary hearing transcripts or police reports, and did not give up his right to confront and cross-examine the prosecution's chief witnesses.

A. Forfeiture

During the pretrial motions for the penalty phase, the trial court raised a concern about taking additional waivers from Cunningham regarding the guilt phase trial because defense counsel had indicated on a couple occasions that the defense was not contesting the charges. The court indicated that Cunningham could choose to enter such waivers or have a new guilt phase trial with or without a jury. (See 5 RT 1406-1407.) After further discussion of the issue, the court again offered Cunningham "the opportunity to have a new trial on the guilt issue," noting if "he doesn't wish to avail himself of that, so be it." (5 RT 1407-1410.)

Subsequently, the prosecutor argued there was no "slow plea" because Cunningham did not submit on the preliminary hearing transcripts and did not stipulate to any elements of the crimes. (6 RT 1499-1502.) When asked to respond, defense counsel merely retorted "what's done is done." (6 RT 1503.) Defense counsel later formally declined the court's offer to remedy any alleged defect in the waivers by setting aside the verdicts and granting Cunningham a new guilt phase trial. (6 RT 1646; 6 CT 1634-1635.)

As discussed in Argument III(B), *ante*, Cunningham forfeited any

alleged infirmities in the jury waiver by repeatedly refusing the trial court's offer to set aside the verdicts and conduct a new guilt phase trial with or without a jury. Similarly, Cunningham forfeited any alleged defect in the waivers insofar as he argues the court trial constituted a "slow plea." Where Cunningham steadfastly rejected offers of a new guilt phase trial in the trial court, he should not be permitted to argue now on appeal that he is entitled to a new guilt phase trial.

Moreover, as discussed previously, Cunningham is barred from challenging the adequacy of his guilt phase waivers through the doctrine of invited error. When the prosecutor pointed out that it was the trial court which raised the "slow plea" issue, defense counsel sarcastically replied, "That's a freebie. We call it a freebie." (6 RT 1576.) Then, counsel engaged in the strategy of assuring that this "freebie" issue remained as grounds for reversal on appeal by refusing the court's renewed offer of a new guilt phase trial. (6 RT 1646-1647.) Accordingly, Cunningham's "slow plea" claim should be deemed forfeited for purposes of appeal.

B. The Court Trial Was Not A "Slow Plea"

In *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, this Court held a defendant's submission on the preliminary hearing transcript for a finding of guilt required an advisement and waiver of the right to jury trial, right to confront and cross-examine witnesses and the right against self-incrimination ("*Boykin-Tahl*[30] rights") because the submission was tantamount to a plea of guilty. (*Id.* at p. 605.) However, this rule

applies only to pleas of guilty and submissions on the preliminary

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30. *Boykin v. Alabama* (1969) 395 U.S. 238 [89 S.Ct. 1709, 23 L.Ed.2d 274]; *In re Tahl* (1969) 1 Cal.3d 122.

> hearing transcript, or slow pleas, "by virtue of which [defendant] surrenders one or more of the three specified rights."

(*People v. Sanchez* (1995) 12 Cal.4th 1, 28, quoting *People v. Hendricks* (1987) 43 Cal.3d 584, 592.)

In *Sanchez*, this Court defined a slow plea

> as a submission of the guilt phase to the court on the basis of the preliminary hearing transcripts that is tantamount to a plea of guilty because guilt is apparent on the face of the transcripts and conviction is a foregone conclusion if no defense is offered.[31]

(*People v. Sanchez, supra,* 12 Cal.4th at p. 28.) A slow plea also occurs where the defendant submits the issue of guilt on police reports (*In re Jennings* (2004) 34 Cal.4th 254, 265, fn. 5) or "other documentation" (*People v. Watson* (2007) 42 Cal.4th 822, 826, fn. 3).

There was no slow plea in Cunningham's case. Cunningham did not submit on the preliminary hearing transcript, police reports or any other documents. Rather, after waiving jury, he enjoyed a full court trial in the guilt phase wherein he exercised his rights to confront and cross-examine the chief prosecution witnesses.

At the court trial, defense counsel cross-examined firefighter Modino and Fire Captain Pattie regarding the arson evidence. (3 RT 726-729, 740-741.) In his cross-examination of Inspector Pettigrew, defense counsel challenged Pettigrew's conclusions regarding the origin and progression of the fire. (3 RT 747-753, 756-758.)

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31. Where the defendant submits on the preliminary hearing transcripts, there are still situations in which the submission will not be considered a slow plea. (See *People v. Sanchez, supra,* 12 Cal.4th at pp. 28-29, citing *People v. Wright* (1987) 43 Cal.3d 487, 496-497, abrogated on other grounds, as recognized in *People v. Mosby* (2004) 33 Cal.4th 353, 360.)

Defense counsel attempted to impeach Mr. Ray's testimony about Cunningham's pre-offense statements and motives as well as what moneys were or were not stolen during the robberies. (3 RT 768-775.) Likewise, defense counsel's cross-examination of Flodter exposed possible inconsistencies about what moneys were taken or left undisturbed. (3 RT 787-800.) Counsel further tried to show Flodter was a biased witness through her prior statement to the defense investigator that Cunningham was the focus of her suspicion early in the case. (3 RT 799-700.)

Defense counsel fully cross-examined Jamison and Costello on each of their relationships with Cunningham, the events surrounding the S.O.S. murders and Cunningham's flight. (4 RT 823-847, 858-859, 991-1025.)

In an extensive and combative cross-examination of Dr. Duazo, defense counsel aggressively sought to undermine Duazo's credibility, contest her opinions as to the manner and timing of each victim's death and attempted to expose inconsistencies in her testimony. (4 RT 901-915, 917-922, 925-961.)

After being advised of his right to confront and cross-examine Overturf, Grell, Boone and various identification technicians who recovered evidence, Cunningham personally waived that right and stipulated to their prior testimony. (4 RT 1064-1066.) While he was present in court, Cunningham further represented to the court that he did not request additional questioning of any witness and nothing additional needed to be presented on behalf of the defense. (4 RT 1063-1064.)

Recognizing what was apparent in Cunningham's Deadwood interviews and reenactment, defense counsel indicated in closing argument that Cunningham desired not to contest the charges. However, counsel countered "that failing a settlement that I can live with, as a lawyer *I must contest the charges*. So we're here in this particular situation because of that." (4 RT 1079 [emphasis added].)

In light of the extensive cross-examination and attempts to impeach various important prosecution witnesses, Cunningham's court trial cannot be deemed a slow plea or tantamount to a guilty plea. Although he acknowledged in his closing argument that Cunningham wished to and did take responsibility for the crimes (4 RT 1086), counsel neither conceded guilt nor the necessary elements for the various offenses. (See 4 RT 1079-1086.) Rather, defense counsel sought to infuse the prosecution's case with reasonable doubt in various critical areas, most importantly the testimony of Dr. Duazo regarding the cause and manner of death of each victim and the conclusions of the fire investigator.

Another fact showing the court trial was not tantamount to a guilty plea was the fact that the trial resulted in not true findings on the robbery special circumstance on Count 2 and the burglary special circumstance on Count 3. (See 5 CT 1294; 7 CT 1913-1915; 4 RT 1089-1092; 19 RT 5745.) A "slow plea" on the preliminary hearing transcript would have resulted in true findings on those two special circumstances.

None of the factors defining a "slow plea" as set forth in *Sanchez* were present in Cunningham's guilt phase trial. Cunningham did not submit on the preliminary hearing transcript, police reports or any other documents. Also, in light of defense counsel's contesting of the charges through his vigorous cross-examination of the prosecution witnesses, the convictions were not a foregone conclusion.

Since there was no "slow plea" in this case, no additional *Boykin-Tahl* waivers were required. Cunningham's jury waiver was all that was necessary for his court trial. Having fully exercised his right to confront and cross-examine witnesses, there was no need for Cunningham to waive that right. Having declined to testify, there was no need for Cunningham to waive his right against self-incrimination. The judgment should be affirmed.

V.

CUNNINGHAM'S STATEMENTS IN THE DEADWOOD INTERVIEWS AND THE REENACTMENT WERE PROPERLY ADMITTED

Cunningham claims his Deadwood interviews with Detectives Ortiz and Nottingham should have been suppressed because they were involuntary, were the result of "a deliberate violation of *Miranda v. Arizona,*" and were obtained following an "unambiguous request for counsel." He further claims his videotaped reenactment of the crimes should have been suppressed because he was improperly induced to participate in it. Accordingly, Cunningham contends the guilt phase verdicts and findings must be reversed. (AOB 111-160.)

Each of Cunningham's claims lacks merit. Cunningham's statements during the Deadwood interviews were neither involuntary nor violative of *Miranda*. In light of judicial acceptance of implied waivers, the trial court's finding that there was no deliberate violation of *Miranda* is amply supported by the record. Moreover, Cunningham never made an unambiguous request for counsel. Furthermore, any alleged error in admitting the Deadwood interviews was harmless in light of the fact that Cunningham fully admitted the charged offenses during the reenactment which occurred after a full *Miranda* advisement and express waivers, and was not the result of any improper inducement.

A. Relevant Proceedings

Prior to trial, Cunningham filed various written motions to suppress all custodial statements obtained from him as violations of *Miranda,* in that they were involuntary or improperly induced. (5 CT 1215-1230, 1243-1283.) The

trial court conducted an evidentiary hearing on Cunningham's motions.

1. Evidence Presented At The Hearing

a. Cunningham's Interviews In Prior Cases

On April 6, 1982, Cunningham was interviewed by Deputies Sonya Cruz and Sergeant Doug Dickinson of the Los Angeles County Sheriff's Department at the Norwalk station regarding a charge of oral copulation with a minor.[32] They advised Cunningham of his *Miranda* rights from a standard departmental form. After reading the rights, they asked Cunningham if he understood each of them. Cunningham answered in the affirmative. They then asked, "Do you want to talk about this case or not?" and, "Do you want a lawyer or not?" Cunningham agreed to talk to them and wrote down his responses to the waiver questions. (1 RT 221-223.)

On January 20, 1988, Deputy Daniel Scott of the Los Angeles County Sheriff's Department interviewed Cunningham at the central jail facility regarding a child molest.[33] He advised Cunningham of his *Miranda* rights from a departmental form. After being advised of his rights, Cunningham was asked whether he understood them. Cunningham answered in the affirmative. Scott then asked whether he wanted to talk about the case. Cunningham answered in the affirmative. Scott then asked whether he wanted a lawyer. Cunningham answered in the negative. (1 RT 229-231.)

Cunningham then signed the following statement:

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32. Based on the date of the interview, the questioning presumably related to the offenses against Michelle I.

33. Based on the date of the interview, the questioning presumably related to the offenses against Samira S.

> I have read this statement of my rights or I have been informed orally of my rights. And I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me, and no pressure or coercion of any kind has been used against me.

(1 RT 231-232.)

b. The S.O.S. Interviews And Reenactment

Cunningham's July 24, 1992, interview took place in the office of the Lawrence County Sheriff in Deadwood, and was conducted by Detectives Nottingham and Ortiz. The interview was audio and videotaped. The recording equipment was in plain view. (1 RT 236-239, 242; 2 RT 314-315.)

Nottingham had previously interviewed Costello and was aware of Cunningham's statement at the arrest scene to the effect that Costello had nothing to do with the crimes. Nottingham had also previously interviewed Jamison and knew Cunningham was romantically involved with her. (1 RT 244-246.)

Initially, Nottingham asked Cunningham questions about his general welfare, mental state and whether he had slept the previous night. Cunningham seemed sullen and contemplative. (Ex. 5 at pp. 1-2; 1 RT 257-262; 2 RT 327-332.)

During the first six minutes of the interview, Nottingham discussed his suspicions about Costello. Cunningham asked if Costello was in jail. Ortiz told Cunningham that Costello was in their custody and being protected by them.[34/] Cunningham told the detectives that Costello should not be in custody because she was not involved "in any of this," just "wanted to come along," and did not

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34. Costello was at a hotel rather than in custody at the time. (8 RT 2092.)

know what was going on. (Ex. 5 at pp. 2-6 ; 1 RT 257-262.)

Ortiz then asked Cunningham why he thought they were there. Cunningham replied, "I know, I know, there are things I know and things I don't know," and "[T]here's times I know exactly what I'm doing and times I don't."[35/] (Ex. 5 at p. 6.)

Nottingham then read Cunningham his rights to silence and counsel and his right against self-incrimination pursuant to *Miranda v. Arizona*. Nottingham asked Cunningham if he understood those rights. After Cunningham indicated that he understood his rights, Nottingham began asking him questions. (Ex. 5 at p. 7.)

Nottingham deliberately omitted the second question from Ontario Police Department form 4.17 which asked the suspect whether, having these rights in mind, he or she wished to talk to about the case. (2 RT 292-297.) Nottingham and Ortiz agreed ahead of time that they would not ask Cunningham this "second" or waiver question during the *Miranda* advisement. (2 RT 336.)

During the interview, Cunningham became emotional at times. (1 RT 263.) Although all of Cunningham's answers were responsive to the questions, some of his responses were unexpected and required clarification. (1 RT 264.) A few times, Cunningham answered questions about the crime with references to events in Vietnam. Nottingham believed Cunningham was building a defense with these answers, attempting to convince them that the homicides were caused by his experiences in Vietnam. (1 RT 264-265.)

When Cunningham commented, "Should I have someone here talking

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35. Cunningham appeared calm, rational and unemotional during the initial six minutes of conversation prior to the *Miranda* advisement. However, he paused for considerable periods of time before answering questions and appeared very pensive, weighing his answers. (1 RT 262-263.)

for me. Is this the way it's supposed to be done?," Nottingham was not sure what Cunningham meant. The detectives did not ask Cunningham to clarify this ambiguous comment. (2 RT 301-302, 332-336; Ex. 5 at p. 21.)

However, Ortiz asked Cunningham,

> You've been advised of your rights, okay. Do you recall your rights? We don't want any, we don't want any legal problems that's why we have this. Okay, you've been advised of your rights. Would you like your rights re-read? Because we don't want any snaffoos here, this is very serious, John. Would you like your rights re-read? Because we don't want any legal problems, we do not want to violate your rights. You understand that? Part of our responsibility is to protect your rights and we don't want to tread on those. Do you understand? Would you like your rights re-read?

(2 RT 351-352; Ex 5 at p. 21.)

Cunningham replied, "Please." (Ex. 5 at p. 21.) Because Ortiz felt there was a potential of Cunningham being confused about his rights or wanting an attorney, the detectives reread Cunningham his *Miranda* rights. The express waiver question was again omitted. After confirming that Cunningham understood his rights, the detectives continued the interview. (2 RT 300-301, 332-336; Ex. 5 at pp. 21-22.)

Later in the interview, Cunningham said he did not want to fight the case, he did not need a lawyer and just needed help. (2 RT 352-352; Ex. 5 at p. 27.) At another point, Cunningham stated,

> I don't know that you've done anything more than I would have to do. . . . I don't know that a lawyer can do for me. . . . I don't believe in the routine of lawyers, or courts and all that.

He subsequently stated that he would rather die than spend the rest of his life in jail, but was "better off inside right now with my state of mind when I'm on the street." (2 RT 352-353; Ex. 5 at p. 36.)

During the interview, Ortiz showed Cunningham a binder and stated, "This book is what we've done. This is what we know. This is our work product." (2 RT 326-327.)

In the latter part of this first interview, Ortiz indicated to Cunningham that he had cleared Costello and attempted to reinforce in Cunningham's mind that he had done the right thing by confessing. The detectives did not tell Cunningham the potential of this being a capital case. (2 RT 347-349; Ex. 5 at pp. 58-61.)

After searching the car, the detectives interviewed Cunningham twice more that afternoon at 1:40 p.m. and 4:05 p.m. The detectives interviewed Cunningham again at 7:55 p.m. the following day. No additional *Miranda* advisements were given at these subsequent interviews, which were either audio or videotaped. At no time did Cunningham ask them to stop those interviews or request an attorney. (1 RT 243, 2 RT 338-340.)

In these additional interviews, the detectives discussed Cunningham's military forms as well as the victims' families. (2 RT 339-340.) In the third interview, Ortiz made a statement about it getting a lot more complicated once the lawyers get involved. (2 RT 349.) During the last interview, Cunningham asked for protective custody, which the detectives subsequently requested on his behalf. (2 RT 342-343.)

To the best of his knowledge, Nottingham believed no other law enforcement agencies interviewed Cunningham. (1 RT 243.) Cunningham was not represented by counsel at his extradition hearing. (2 RT 356.)

Between July 27 and July 31, Ortiz and Nottingham spoke with the prosecutors in this case and played for them the interview tapes. Because the quality of the tapes was not very good, the prosecutors suggested a videotaped reenactment at the crime scene. (2 RT 286-288, 343-347.) The prosecutors

told the detectives that the reenactment should be done before an arrest warrant was filed in order to avoid any impropriety. (2 RT 288-292.)

On July 31, Wesley Lewis, a correctional sergeant at Folsom prison[36], interviewed Cunningham to determine whether he would be willing to participate in the reenactment. Cunningham, who was classified as high security and placed in the Administrative Segregation Unit, did not appear happy with his housing. (2 RT 403-409, 427-428.)

Lewis did not advise Cunningham of his *Miranda* rights prior to the interview because he did not ask Cunningham any particulars of the case. Lewis simply asked Cunningham whether he would be willing to cooperate with an ongoing investigation into some murders in a warehouse rather than specifically ask Cunningham to reenact the crimes. (2 RT 409-413.)

Cunningham indicated that he would be willing to cooperate. No housing promises were made to Cunningham to induce his cooperation. (2 RT 422-425.)

Ortiz transported Cunningham from Folsom prison for the August 2 reenactment. They did not converse during the six-hour drive. However, Cunningham mumbled about some things. After they arrived at S.O.S., Cunningham waited in the patrol car 15 to 20 minutes before the reenactment started. (2 RT 285-286, 343-347.)

Prior to conducting the reenactment, Detective Donald McGready asked Cunningham if he agreed to participate and gave Cunningham a full *Miranda* advisement, which included the waiver question. Cunningham indicated that he understood his rights and then waived them, agreeing to talk to McGready and participate in the reenactment. (2 RT 359; Ex. 6 at pp. 1-2.) Detective

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36. Cunningham being held at Folsom Prison for a parole violation. (See 2 RT 424.)

McGready then conducted the reenactment, which was videotaped. (2 RT 302-303, 359-361, 367.)

The trial court also considered the preliminary hearing testimony of Overturf, Grell and Boone (who were involved in the traffic stop and arrest of Cunningham) for purposes of the motion. (2 RT 367.)

c. Ontario Police Department Practice Regarding The Waiver Question

According to Nottingham, it was a new departmental practice at the time of Cunningham's interview to omit the express waiver question during *Miranda* advisements. This change in practice was the result of a class taught by Orange County Deputy District Attorney Devallis Rutledge on March 16, 1992, at Chapman College. In the class, Rutledge told law enforcement officers that it was not necessary to ask the "second" question of standard admonishment forms and obtain an express waiver of a suspect's *Miranda* rights.[37] (2 RT 251, 297-300.) Sometime after April, 1992, Nottingham became aware of criticism of the practice of not asking the waiver question. (2 RT 471-472.)

This new practice was based on Mr. Rutledge's videotape, which indicated that suspects tend to be "over-*Mirandized,*" the waiver question was not necessary and implied waivers were acceptable. In the tape, Rutledge also advised officers to interview defendants even if they cannot obtain a waiver because the statements could still be used for impeachment even if ruled inadmissible in the prosecution's case in chief. (3 RT 505-511.)

In July of 1992, although official departmental policy still required an express waiver, Detective Ortiz made a conscious decision to omit the waiver

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37. The trial court also took judicial notice of a manual entitled Criminal Interrogation, Law and Tactics by Devallis Rutledge. (2 RT 437-443.)

question based on Rutledge's training. Ortiz was taught the waiver question was simply not required and might possibly give an additional, unnecessary prompt to a suspect to invoke his or her rights. Ortiz did not consult with anyone in the San Bernardino County District Attorney's office about this issue. (2 RT 318-324.)

Sandra Waite, a deputy public defender in San Bernardino County, testified that she spoke with Ortiz following a preliminary hearing on February 20, 1992, in an unrelated case. In that case, Ortiz interrogated the defendant without asking the waiver question and testified that it was not necessary based on his training. When Waite asked him why he did not ask the waiver question, Ortiz told her that it would give the suspect an extra opportunity to refuse to speak to the officers. (2 RT 446-448, 453.) Ortiz did not recall the conversation with Waite, but testified that it could have occurred. (3 RT 524-525.)

In September of 1992, Ortiz interviewed a mother and daughter who were suspects in a murder case. Although both women asked Ortiz when they were going to get a lawyer, Ortiz went ahead and interviewed each of them after reading their *Miranda* rights without asking the waiver question. One suspect made at least two requests for a lawyer and was confronted with an autopsy report for 15 or 20 minutes prior to the *Miranda* advisement. (3 RT 541-549.)

Some time in 1990, Detective McGready was trained that it was not necessary to ask the waiver question in a *Miranda* advisement. Although he generally continued to seek express waivers in his interviews, he failed to do so in an October 1991, homicide case. (2 RT 477-470, 482.) McGready asked Cunningham for an express waiver as part of his *Miranda* advisement at the August 2, 1992, reenactment, after discussing the issue with Nottingham. (2 RT 479-480.)

Officer Eric Hopley, who worked in the Ontario Police Department's

gang detail, was trained through one of Mr. Rutledge's videotapes that it was not necessary to obtain express *Miranda* waivers. (2 RT 370-372.) Hopley believed asking the waiver question might suggest to some suspects to invoke their rights. Nevertheless, Hopley sometimes asked the waiver question. (2 RT 377-378, 386.)

In formulating his new *Miranda* practice, Hopley spoke with other officers in the department. (2 RT 381-382.) However, he did not recall discussing the issue with Ortiz, Nottingham or McGready. (2 RT 384-386, 396-397.)

On occasion, Hopley discussed the practice with prosecutors in the San Bernardino County District Attorney's office. He was given pros and cons of not asking the waiver question, and some deputies expressed concerns about the practice. Based on the information they were given by the prosecutors, as well as court decisions of which he was made aware, Hopley and other officers believed it was an acceptable practice not to obtain express waivers. (2 RT 388-390.)

In August of 1991, Hopley and another detective interviewed four suspects in a double murder case. Following the *Miranda* advisements, the detectives elected not to ask any of the suspects the waiver question. (2 RT 378-380.) At a hearing, Hopley testified that he feared the suspects might exercise their rights if asked directly for an express waiver. (2 RT 380-381.) Nonetheless, Hopley was permitted to testify about the suspects' statements. (2 RT 393.)

The court took judicial notice of a preliminary hearing transcript in yet another case in which Detective Cormican testified, "The consensus was, at the time, that the second question raised a flag that you were telling the -- your suspect that it is better for him not to talk in his interest." (2 RT 434-436.)

Officer Joseph Giallo worked in the Ontario Police Department's gang unit in 1992. As a result of discussions with other officers including Hopley and Nottingham,[38] Giallo began omitting the waiver question on a case-by-case basis, although the official department policy continued to include the waiver question. (3 RT 501-505.)

In January of 1992, Giallo interrogated a suspect without obtaining an express *Miranda* waiver. In a hearing on the admissibility of the statements, Superior Court Judge Damansky encouraged Giallo to precisely follow the departmental *Miranda* card and warned the practice of omitting the second question could backfire. (3 RT 512-513, 519.) In other cases, Superior Court Judge Kayashima criticized the practice of not obtaining an express *Miranda* waiver as sloppy police work and a waste of judicial resources.[39] (3 RT 513-514, 519.)

Giallo recalled discussing the practice with other officers because the judges were perturbed by the proliferation of suppression motions by defendants. However, Giallo was aware that the prosecution won most of these motions and the defendants' statements were not suppressed. In October of 1992, the San Bernardino County District Attorney's office issued a memorandum or bulletin advising the Ontario Police Department to ask the waiver question in their interviews. (3 RT 515-517.)

2. The Trial Court's Findings Of Fact And Rulings

The trial court addressed Cunningham's various statements in sequence.

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38. Detective Nottingham did not recall speaking with Officer Giallo about omitting the waiver question. (2 RT 470.)

39. Officer Hopley was also aware of such criticisms by two San Bernardino County West End Judicial District judges. (2 RT 398-399.)

The court first ruled Cunningham's statement at the arrest scene in response to Overturf's question whether there were weapons in the car was admissible under the public and officer safety exception to *Miranda*. (3 RT 642-646.)

The trial court then made findings in regards to the Deadwood interviews. The court found the detectives received training based on case law that it was not necessary to ask the waiver question in order to interview suspects and were aware that at least two judges handling the bulk of criminal matters in Ontario at that time were critical of the practice, but nonetheless prevailed in most of the motions seeking to suppress statements obtained without the waiver question. Accordingly, the court found the detectives had a good-faith belief that the practice of not obtaining an express waiver was lawful.[40] (3 RT 646-648.)

The trial court found the detectives' initial inquiry into Cunningham's physical and mental well-being at the first interview was proper. However, the court found their comments about Costello being "in custody" and "safeguarded" despite Cunningham's protestations of her innocence constituted psychological inducement or "softening up" which was likely to evoke statements from Cunningham. (3 RT 650-652.)

The trial court observed that such "softening up" did not necessarily invalidate Cunningham's implied waiver, and was only one factor in determining the voluntariness of the waiver. The court found, under the totality of the circumstances, the prosecutor had shown by a preponderance of the evidence that the waiver of Cunningham's rights "was voluntary and was a result of his own desire to make statements and was not influenced or not the product of the improper influences that were present." (3 RT 652-659.)

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40. The trial court recognized that deliberate attempts by officers to evade Fifth Amendment and *Miranda* protections can violate due process. (3 RT 649.)

The trial court explained:

> First of all, the defendant, at the time of the interview, was a forty-two-year-old mature adult. He had had prior contacts with law enforcement. And with the legal system. He, on two prior occasions, he had been advised of his rights, including the waiver question. And on those prior occasions waived his rights and talked to officers.
>
> So the Court is satisfied that the defendant, even prior to being readvised of his rights by the officers at the time of the interview here, was certainly aware of his rights and aware that he had the right not to talk and could decide whether or not he wanted to talk.
>
> While the Court did find that the references to Alana did constitute psychological inducement or pressure or coercion or softening up, those were relatively brief comments lasting maybe three to four minutes at the most, out of that six-minute period before the *Miranda* rights were given.
>
> This was not a situation where the officers continued to pressure the defendant and basically wear him down, where there was no free will left.
>
> And then those brief comments were followed immediately by a recitation of the *Miranda* rights. And following the admonition of the *Miranda* rights the defendant clearly and unambiguously stated that he did understand those rights and then proceeded to continue to talk with the officers.

(3 RT 659-660.)

The trial court found Cunningham's decision to continue talking to the detectives after a clear statement and understanding of his rights, constituted an implied waiver. The court noted that further into the interview, Cunningham was again readvised of his rights, indicated he understood them and continued to talk rather than invoke his rights to counsel or silence. (3 RT 660-662.)

The court concluded:

> Under all of those circumstances the Court finds by a preponderance of the evidence that despite the improper influences that did exist, the defendant did understand his rights, the defendant knowingly and voluntarily decided not to invoke his rights, but voluntarily decided to talk to the officers in that he – – and that was a knowing and voluntary

decision on his part uninfluenced by the improper influences that admittedly were present.

(3 RT 662.)

The trial court found Cunningham's statements made it clear that he intended to discuss the case with the officers and "get it off his chest" before any questions about the crimes were even asked by the detectives. (3 RT 662.) The court cited various comments by Cunningham such as:

> "I knew that, um, I made a decision that I was going to talk and I was going to find out exactly and say what I felt was right and what I felt happened;" "I had to tell you what I knew and what I believed to be true;"
>
> "My dreams told me you would be here. . . . I know I don't with – – with – – with the mind I have right now, with the way things are, I – – guess I did – – I did this interview because I had to."

(3 RT 662-663.)

The court cited additional comments in which Cunningham stated:

> I don't know that you've done anything more that I would have to do. I don't think that — see, I don't know what a lawyer can do for me. I don't believe -- I don't believe in the routine of lawyers or courts and all that.

(3 RT 663-664.)

The court reasoned:

> And I think all of those statements, and there's numerous others throughout the transcript that make it very clear the defendant, at the time he was arrested, was basically, in his own mind, resigned to the fact that he'd been caught and that it was over, that he was going to get it off his chest, say whatever he felt was right, things that he could remember. Whether he was motivated by sorrow or remorse or fear of what he did or what he might do, or an attempt to try to remember it himself, to put everything into context, or combination of all of those, it's certainly clear, those statements make it abundantly clear that he had decided once he was caught that it was over, that he was actually glad it was over and was going to get it off his chest and say what he felt was right, as he said to the officers.

> And again, that makes it clear that those statements were the product of his own independent decision and not the product of, and not influenced by, any of the improper influences that again were present.

(3 RT 664-665.)

The trial court further found Cunningham's comment about having "someone here to talk for me" was an ambiguous statement which did not constitute an invocation of the right to counsel. (3 RT 665-666.)

The trial court held no further *Miranda* advisements were required for the second, third and fourth Deadwood interviews since they were to briefly clarify matters covered in the first interview. Nonetheless, the court found even if there were a *Miranda* violation in any of the interviews, nothing in those interviews inexorably led to or invalidated the August 2 reenactment. The court also found nothing in the extradition proceedings impacted the reenactment. (3 RT 666-668.)

The trial court found Lewis' inquiry about Cunningham's willingness to cooperate with authorities was not an interrogation, and Cunningham was not improperly induced to do the reenactment. However, later specific questioning of Cunningham at Folsom Prison about whether he was willing to reenact the crimes should be suppressed because an affirmative answer in and of itself would be incriminating. Yet, the court found the reenactment was not the product of that one question since Cunningham had previously indicated his willingness to participate in the reenactment. (3 RT 659.)

The trial court also found the reenactment was done after a full *Miranda* advisement with an express waiver. The court found any improper influences in the initial Deadwood interview did not carry over to the reenactment. The court noted the qualitative difference in the locations of the South Dakota sheriff's office and the crime scene in California, again citing the full readvisal of rights prior to the reenactment and intervening circumstances. (3 RT 659-

673.)

The court reiterated that any misconduct by the detectives in initially discussing Costello constituted relatively brief conversational comments in which they were responding to Cunningham's concerns rather than trying to overbear his free will. The court again noted that the omission of the waiver question was based on training that taught the detectives that the practice was lawful as well as favorable results in various courtrooms that confirmed their beliefs. As such, the court found no bad faith intent to intentionally violate Cunningham's rights. (3 RT 673-675.)

Thus, the trial court found the reenactment was not tainted by any prior illegalities in the first interview, and would be admissible even if the first interview were suppressed. The court noted that Costello's custody status or potential as a suspect was no longer an issue at the time of the reenactment. It "had already been resolved and was not a factor that was operative anymore." Also, "the lack of asking the waiver question was not operative at the time of the August 2d interview" since Cunningham was fully advised with the waiver question and clearly indicated his desire to do the reenactment. (3 RT 675.)

In sum, the court found no causal connection between any initial illegalities and the reenactment. (3 RT 675.) Accordingly, all of Cunningham's statements were ruled admissible except the first six minutes of the initial Deadwood interview and any questioning at Folsom Prison which specifically referred to reenacting the crimes. (3 RT 676-679.)

B. There Was No Deliberate Violation Of *Miranda* By The Detectives

Cunningham claims his first interview at the Deadwood Sheriff's office should have been suppressed because Detectives Nottingham and Ortiz intentionally declined to seek an express waiver of his right to silence after

giving the *Miranda* advisement. He contends this constituted a "deliberate violation" of *Miranda* which required suppression of the entire interview. (AOB 121-130.) Cunningham is mistaken.

California applies the federal standard in evaluating whether statements are elicited in violation of *Miranda*. (*People v. Crittenden* (1994) 9 Cal.4th 83, 129.)

> In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda v. Arizona, supra*, 384 U.S. 436, we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we "give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence. [Citations.]

(*People v. Wash* (1993) 6 Cal.4th 215, 235-236.)

In determining whether a suspect has waived his or her *Miranda* rights, courts must examine the totality of the circumstances. (*Fare v. Michael C.* (1979) 442 U.S. 707, 724-725 [99 S.Ct. 2560, 61 L.Ed.2d 197].) A knowing and intelligent *Miranda* waiver need only be proved by a preponderance of the evidence. (*People v. Whitson* (1998) 17 Cal.4th 229, 248; *People v. Wash, supra,* 6 Cal.4th at pp. 235-236.)

In *Miranda v. Arizona, supra,* 384 U.S. 436, the United States Supreme Court held a criminal defendant

> must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed

prior to custodial interrogation. (*Id.* at p. 444.) Questioning may then occur if the defendant voluntarily, knowingly and intelligently waives those rights.

(*Miranda v. Arizona, supra,* 384 U.S. at p. 444)

However, law enforcement is not required to obtain an express written or oral waiver of constitutional rights prior to interviewing a defendant. (*North Carolina v. Butler* (1979) 441 U.S. 369, 373 [60 L.Ed.2d 286, 99 S.Ct. 1755].) Waiver can be inferred from a defendant's words and actions. (*People v. Whitson, supra*, 17 Cal.4th at p. 246.) Implied waivers of *Miranda* rights are acceptable under California and federal case law. (*Id.* at p. 247.)

Where a defendant's actions demonstrate that he or she intended to waive *Miranda* rights, there has been a valid waiver. (*People v. Whitson, supra*, 17 Cal.4th at p. 250.) In *People v. Sully* (1991) 53 Cal.3d 1195, 1233, and *People v. Davis* (1981) 29 Cal.3d 814, 823-826, this Court found implied waivers where defendants gave statements, but no express waivers, after they had been admonished of and had indicated they understood their *Miranda* rights.

As in *Sully* and *Davis*, Cunningham elected to discuss the S.O.S. murders immediately after he was admonished of and had indicated he understood his *Miranda* rights. By his actions, Cunningham made it clear that he wanted to waive his constitutional rights and discuss the incident with the detectives. This constituted a valid implied waiver.

Moreover, Cunningham had been interviewed in two prior cases in which he gave express waivers. (1 RT 221-223, 229-232.) This prior knowledge of *Miranda* further supports the conclusion that Cunningham knowingly and intelligently waived his rights by agreeing to talk to the detectives in Deadwood. (See *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1127.)

In finding an implied waiver, the trial court cited numerous statements by Cunningham which showed he wanted to talk to the officers and "get it off his chest" well before the interviews even took place. (3 RT 662-665.) Since

the trial court's finding of an implied waiver is supported by substantial evidence, its ruling should be upheld. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 814; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 56; *People v. Mayfield, supra,* 14 Cal.4th at p. 733.)

Implicitly conceding the validity of implied waivers, Cunningham argues the detectives "deliberately" violated *Miranda* by following Mr. Rutledge's advice in not seeking an express waiver. Cunningham's argument lacks merit.

In *Jablonski*, this Court recognized that "the deliberate, intentional and repeated violation of [*Miranda*] may violate a defendant's constitutional rights" and, at a minimum, "must be 'strongly disapproved.'" (*People v. Jablonski, supra,* 37 Cal.4th at p. 816, quoting *People v. Neal* (2003) 31 Cal.4th 63, 81.) No such misconduct occurred in Cunningham's case.

As shown above, implied waivers were approved by the High Court as early as 1979. (See *North Carolina v. Butler, supra*, 441 U.S. at p. 373.) Therefore, the detectives' decision not to obtain an express waiver could not have constituted misconduct or a deliberate violation of *Miranda*.

As pointed out in *Duckworth v. Eagan* (1989) 492 U.S. 195 [109 S.Ct. 2875, 106 L.Ed.2d 166], "[t]he inquiry is simply whether the *warnings* reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" (*Id.* at p. 203, quoting *California v. Prysock* (1981) 453 U.S. 355, 361 [101 S.Ct. 2806, 69 L.Ed.2d 696] (*per curiam*)(emphasis added).) Accordingly, in *Missouri v. Seibert* (2004) 542 U.S. 600 [124 S.Ct. 2601, 159 L.Ed.2d 643], the Court held an officer's "'conscious decision'" to withhold *Miranda* warnings" through a "question-first tactic" of obtaining a confession before advising the defendant of her rights rendered the statements inadmissible. (*Id.* at pp. 605-606, 617.)

In Cunningham's case, no *Miranda* warnings were withheld. Detective

Nottingham fully advised Cunningham of his right to silence, right against self-incrimination and right to counsel as required by *Miranda.* Nottingham confirmed Cunningham understood his rights before continuing the interview. (Ex. 5 at p. 7.) That was all that was required.

Moreover, as found by the trial court, the detectives relied in good faith on the training of Deputy District Attorney Rutledge which was supported by case law and validated by prevailing in most suppression motions where the express waiver question was not asked. (3 RT 646-648, 673-675.) This lack of bad faith is important.

Seibert consisted of a plurality decision in which Justices Breyer and Kennedy filed separate concurring opinions. (See *Missouri v. Seibert, supra,* 542 U.S. 600, 617-622 (opns. Breyer & Kennedy, JJ.) In his concurring opinion, Justice Breyer stated, "Courts should exclude the "fruits" of the initial unwarned questioning unless the failure to warn was in good faith." (*Id.* at p. 617.) Without Justice Breyer's concurrence, there would have been no majority supporting the result in *Seibert.* Therefore, the trial court's finding of good faith is significant.

Similarly, there would be no "deliberate, intentional" violation of *Miranda* where the detectives relied in good faith on existing case law which was validated by the admission of statements in the majority of the cases handled by the superior court judges who handled the bulk of the local criminal calendar. (Compare *People v. Jablonski, supra,* 37 Cal.4th at p. 816 [officers repeatedly refused to honor defendant's invocation of rights].) Since the trial court's finding of good faith is supported by substantial evidence, its ruling should be upheld. (See *People v. Jablonski, supra,* 37 Cal.4th at p. 814; *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 56; *People v. Mayfield, supra,* 14 Cal.4th at p. 733.)

Cunningham's valid implied waiver was not undermined by any

deliberate attempts to violate *Miranda*. Accordingly, the trial court properly denied Cunningham's motion to suppress the Deadwood interviews.

C. Cunningham Did Not Invoke His Right To Counsel

Cunningham claims he invoked his right to counsel during the first Deadwood interview when he asked, "'I'm charged with robbery. Should I have someone here talking for me? Is this the way it's supposed to be done?" He argues this constituted an unambiguous request for counsel which was ignored by the detectives. (AOB 130-137, quoting 5 CT 1256-1258; 2 RT 301, 332.) Cunningham's claim lacks merit.

For a statement to qualify as an invocation of the right to an attorney for purposes of *Miranda*, the defendant "must unambiguously request counsel." (*Davis v. United States* (1994) 512 U.S. 452, 459 [114 S.Ct. 2350, 129 L.Ed.2d 362].) He "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Ibid.*) Where the defendant invokes the right to counsel, the officers must cease interrogation unless the defendant's counsel is present or the defendant initiates further exchanges, communications, or conversations. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880, 68 L.Ed.2d 378].)

The standard in *Davis* "is an objective inquiry." (*Davis v. United States, supra,* 512 U.S. at p. 459.) Thus,

> a reviewing court – – like the trial court in the first instance – – must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant.

(*People v. Gonzalez, supra,* 34 Cal.4th at p. 1125, citing *Davis v. United States, supra,* 512 U.S. at pp. 460-462.)

Cunningham's ambiguous comment about having "someone here talking for me," did not qualify as an unequivocal invocation of the right to counsel. (See, e.g., *People v. Gonzalez, supra,* 34 Cal.4th at p. 1126 [defendant's comment that he wanted a lawyer if he was going to be charged not an invocation]; *People v. Crittenden*[41], *supra,* 9 Cal.4th at pp. 128-131 ["Did you say I could have a lawyer?" was clarification of rights rather than unambiguous invocation of right to counsel]; *People v. Johnson* (1993) 6 Cal.4th 1, 27-30, disapproved on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826, 879 ["Maybe I ought to talk to my lawyer, you might be bluffing, you might have not enough to charge murder" and mother would secure "a high priced lawyer" not invocation].)

Like the conditional comment in *Gonzalez*, Cunningham's question about whether he should have "someone here talking for me," could at most have been understood to be an indication that Cunningham "might" want an attorney. A comment which merely indicates that a suspect might be invoking his or her right to counsel is insufficient. (*People v. Gonzalez, supra,* 34 Cal.4th at p. 1126.)

> [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.

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41. In *Crittenden*, this Court noted that earlier decisions which found such equivocal questions or comments to constitute invocations were no longer valid in light of article I, section 28, subdivision (d) of the California Constitution, which now requires application of the federal standard for admissibility of statements as articulated in *Davis*. (*People v. Crittenden, supra,* 9 Cal.4th at pp. 129-130.)

(*United States v. Davis, supra,* 512 U.S. at p. 459 [emphasis in original].)

Moreover, Cunningham had prior contacts with law enforcement, which included two interviews in which he expressly waived his right to counsel. Thus, the detectives "could reasonably have assumed that [Cunningham] was capable of making an unequivocal request for counsel if he so desired." (See *People v. Gonzalez, supra,* 34 Cal.4th at p. 1127.)

Cunningham complains that the detectives did not ask any questions to clarify Cunningham's comment about someone helping him. (AOB 131.) However, as noted above, there is no requirement that law enforcement officers ask clarifying questions of an ambiguous or equivocal reference regarding an attorney. (*People v. Gonzalez, supra,* 34 Cal.4th at p. 1125.)

Nonetheless, it became very clear soon after Cunningham's initial vague comment that he was not invoking his right to counsel. Cunningham stated that he did not want to fight the case and did not need a lawyer. (Ex. 5 at p. 27.) Later, Cunningham commented that he did not "believe in the routine of lawyers, or courts and all that" and did not feel a lawyer could do anything for him. (Ex. 5 at p. 36.)

Cunningham contends the detectives discouraged him from exercising his right to counsel. (AOB 131-132.) Cunningham's contention is belied by the record.

After uttering his vague comment about having someone help him, Detective Ortiz asked Cunningham whether he wanted his rights re-read. When Cunningham replied in the affirmative, the detectives readvised Cunningham of his *Miranda* rights and confirmed that he understood them. (Ex. 5 at p. 21.)

As shown above, Cunningham made several comments thereafter *during the first interview* clearly demonstrating that he did not want an attorney. Thus, Detective Ortiz's belated comment during a subsequent interview (well after

Cunningham had already confessed to the murders in the first interview) about lawyers complicating the case or causing pain to the victims' families merely expressed agreement with Cunningham's previously volunteered reasons for not invoking his right to counsel. (2 RT 340-341, 349)

Since the trial court's finding that Cunningham did not invoke his right to counsel is supported by substantial evidence, its ruling should be upheld. (See *People v. Jablonski, supra,* 37 Cal.4th at p. 814; *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 56; *People v. Mayfield, supra,* 14 Cal.4th at p. 733.) Cunningham's statements made during the Deadwood interviews were properly admitted.

D. Cunningham's Admissions During The Deadwood Interviews Were Voluntary

Cunningham claims his Deadwood interviews were involuntary because the detectives threatened to arrest Costello if he did not make inculpatory statements. Accordingly, he contends the statements should have been suppressed. (AOB 147-156.) This claim should be rejected.

For a *Miranda* waiver to be valid and the ensuing statement admissible, they must be voluntary. (*People v. Kelly* (1990) 51 Cal.3d 931, 950.) Voluntary means "'the product of a free and deliberate choice rather than intimidation, coercion, or deception.'" (*Ibid.* quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed.2d 410].)

A statement will be deemed involuntary where "among other circumstances, it 'was "'extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight . . . .'" [Citations.]" (*People v. Jablonski , supra,* 37 Cal.4th at pp. 813-814, quoting *People v. Neal* (2003) 31 Cal.4th 63, 79.) In evaluating a claim of psychological coercion, the

> question posed . . . is whether the influences brought to bear upon the accused were "such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined."

(*People v. Kelly, supra,* 51 Cal.3d at p. 952, quoting *People v. Hogan* (1982) 31 Cal.3d 815, 841.)

The resolution of a voluntariness claim "must be derived from the totality of the facts and circumstances of each case, keeping in mind the particular background, experience and conduct of the accused." (*People v. Kelly, supra,* 51 Cal.3d at p. 950.) Accordingly, "'[v]oluntariness does not turn on any one fact, no matter how apparently significant . . . .'" (*People v. Jablonski, supra,* 37 Cal.4th at p. 814, quoting *People v. Neal, supra,* 31 Cal.4th at p. 79; see *People v. Kelly, supra,* 51 Cal.3d at p. 950 [no single event, word or phrase determinative of voluntariness]; *People v. Neal, supra,* 31 Cal.4th at p. 79; *In re Cameron* (1968) 68 Cal.2d 487, 498.)

Under the federal and state constitutions, the prosecution need only prove the voluntariness of an admission or confession by a preponderance of the evidence. (*People v. Markham* (1989) 49 Cal.3d 63, 71-72.) The trial court's ruling is subject to independent review on appeal. (See *People v. Jablonski, supra,* 37 Cal.4th at p. 814.) The trial court's underlying determinations as to coercion, the existence of a promise, and if the promise induced the confession, are also subject to independent review. (*People v. Jones* (1998) 17 Cal.4th 279, 296.)

However, factual findings which are based on the trial court's resolution of factual disputes and conflicting inferences as well as its evaluations of witness credibility must be accepted where they are supported by substantial evidence. (*People v. Jablonski, supra,* 37 Cal.4th at p. 814, citing *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 56, and *People v. Mayfield, supra,* 14 Cal.4th at p. 733.) Likewise, the reviewing court must accept the version of

events which is most favorable to the People to the extent that it is supported by the record. (*People v. Belmontes* (1988) 45 Cal.3d 744, 773-774.)

In *People v. Honeycutt* (1977) 20 Cal.3d 150, this Court found "clever softening-up" of a defendant which caused him to waive his *Miranda* rights rendered the ensuing statements involuntary. (*Id.* at pp. 160-161.) For example, "a threat to arrest a near relative" can render a confession involuntary. (*People v. Matlock* (1959) 51 Cal.2d 682, 697.) However, there must be evidence that such softening-up "overbore defendant's free will" for the statements to be found involuntary. (*People v. Gurule* (2002) 28 Cal.4th 557, 603.)

Although coercive police conduct "is a necessary predicate" of an involuntary statement, it does not necessarily compel a finding that the resulting statement is involuntary. (*People v. Jablonski, supra,* 37 Cal.4th at p. 814, quoting *People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) The police misconduct must be "'the "proximate cause" of the statement in question, and not merely a cause in fact.' " (*Ibid.*, quoting *People v. Mickey* (1991) 54 Cal.3d 612, 647, and *People v. Benson* (1990) 52 Cal.3d 754, 778-779.)

Applying these principles, the trial court found the detectives did engage in improper "softening up" at the beginning of the first Deadwood interview by discussing Costello and suggesting that she was in custody or being safeguarded. (3 RT 650-652.) However, the court recognized that this was only one factor in determining the voluntariness of Cunningham's waiver, and that it had to look to the totality of the circumstances. (3 RT 652-659.)

The court first noted Cunningham's mature age and prior experience with law enforcement that included two prior interviews in which he was advised of and expressly waived his rights. The court further found the "softening up" consisted of "relatively brief comments lasting maybe three to four minutes at the most, out of that six-minute period before the *Miranda*

rights were given" and "was not a situation where the officers continued to pressure the defendant and basically wear him down, where there was no free will left." (3 RT 659-660.)

The trial court further found the evidence showed Cunningham wanted to talk to the detectives and "get it off his chest" prior to the interview. The court cited several comments by Cunningham which made it "abundantly clear" that he had previously made up his mind to talk to the detectives about the case and get the matter "off his chest" for various personal reasons. Thus, the court concluded Cunningham's "statements were the product of his own independent decision" rather than the initial discussion regarding Costello. (3 RT 662-665.)

The trial court's findings are supported by substantial evidence. The detectives' brief discussion about Costello lasted only a few minutes and contained vague and inconsistent references to her being safeguarded or in custody. In contrast, the "softening-up" in *Honeycutt* consisted of a half-hour discussion of "unrelated past events and former acquaintances and, finally, the victim" which included comments that the victim had homosexual tendencies and was a suspect in a homicide case. (*People v. Honeycutt, supra,* 20 Cal.3d at p. 158.) Moreover, the detective in *Honeycutt* testified that it was his duty to "soften up" the defendant in an effort to get him to talk and that he was successful in doing so. (*Ibid.*) Thus, *Honeycutt* is distinguishable.

The totality of the circumstances showed Cunningham was well aware of his constitutional rights and decided to talk to the detectives long before and irrespective of any discussion about Costello. Thus, as found by the trial court, any attempt at "softening up" did not overbear Cunningham's will to resist or his ability to freely determine whether he wanted to talk to the detectives. Likewise, substantial evidence showed the discussion about Costello was not the proximate cause of Cunningham waiving his rights and electing to discuss the case.

Since the trial court's resolution of the factual disputes and conflicting inferences are supported by substantial evidence, its finding of voluntariness should be upheld on appeal. (See *People v. Jablonski, supra,* 37 Cal.4th at p. 814.) Accordingly, Cunningham's *Miranda* waiver was valid and his Deadwood interviews were properly admitted.

Cunningham also claims his Deadwood interviews should be deemed involuntary because the detectives "exploited his frail metal [*sic.*] condition" as evidenced by "irrational behavior" such as being soft-spoken, sullen and vague in his responses as well as referring to his dreams and questioning why he was even talking to the detectives. (AOB 156-158.) This attack on the admissibility of the interviews must be rejected as well.

In deciding whether the statement is the product of a rational intellect and free will, "[t]he only issue is whether the accused's abilities to reason or comprehend or resist were in fact *so disabled* that he was incapable of free or rational choice." (*In re Cameron, supra,* 68 Cal.2d at p. 498 [emphasis added]; see also *People v. Frye* (1998) 18 Cal.4th 894, 988; *People v. Mayfield* (1993) 5 Cal.4th 142, 204.) The fact that a murder suspect who had been apprehended is soft-spoken or sullen is hardly an indication of mental disease. To the contrary, it is an understandable and expected reaction of any person in such a predicament, especially when confronted with committing such horrendous crimes.

It is also not uncommon or unusual for one to dream about significant events in his or her life and the likely ramifications of those events. Indeed, Dr. Williams testified that Cunningham tended to rely on his dreams as a memory tool. (17 RT 5219.) Thus, Cunningham's reference to his dreams during the Deadwood interviews did not show any mental defect as claimed on appeal.

Cunningham's comment that he could not believe that he was talking to the detectives was merely a figure of speech often used by individuals reflecting

on their actions – – not evidence of a mental defect.

Furthermore, Cunningham's references to his prior alcohol and substance abuse, PTSD and alleged lack of sleep are unavailing since the detectives inquired of Cunningham's general welfare, mental state and sleep prior to interviewing him. Contrary to his claims on appeal, Cunningham expressed no such concerns at the time of the interview. (See Ex. 5 at pp. 1-2; 1 RT 257-262; 2 RT 327-332.)

In arguing he "exhibited bizarre and irrational behavior" in his Deadwood interviews, Cunningham selectively lifts a handful of comments out of context. As such, he fails to view the evidence in the light most favorable to the prosecution. (See *People v. Davis, supra*, 29 Cal.3d at p. 826.) A fair assessment of those lengthy interviews in their entirety shows Cunningham rationally responded to the inquiries of the detectives while exhibiting normal emotions to be expected of a murder suspect facing his accusers and reliving the details of a horrible crime.

Even if assuming arguendo, Cunningham had some psychological problems, the record shows they did not so disable him at the time of his interviews as to render him incapable of free or rational choice. (See *People v. Frye, supra,* 18 Cal.4th at p. 988; *People v. Mayfield, supra,* 5 Cal.4th at p. 204; *In re Cameron, supra,* 68 Cal.2d at p. 498.) The Deadwood interviews were not rendered involuntary by any mental disease or defect. Accordingly, Cunningham's statements to Detectives Nottingham and Ortiz were properly admitted.

E. Any Alleged Error In Admitting The Deadwood Interviews Was Harmless In Light Of Cunningham's Admissions At The Reenactment

Even if assuming arguendo there was some type of *Miranda* violation

during the Deadwood interviews, it was harmless in light of Cunningham's detailed and complete admissions to the murders, robberies and arson during the reenactment. In *Oregon v. Elstad* (1985) 470 U.S. 298 [105 S.Ct. 1285, 84 L.Ed.2d 222], the United States Supreme Court held

> a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.

(*Id.* at p. 318 [rejecting fruit of the poisonous tree analysis].)

Thus, to the extent Cunningham claims the detectives violated *Miranda* by failing to ask the "second question" on the departmental advisal card regarding waiver, the reenactment which followed a full *Miranda* advisement and express waivers remained admissible. In addition, as discussed in Argument V(E), *ante*, the trial court found Cunningham's waiver for the Deadwood interviews was not coerced by any "softening up," and the trial court's finding of voluntariness was supported by substantial evidence.

Moreover, as explained below, the reenactment was not the product of any improper inducements or violation of Cunningham's Sixth Amendment right to counsel. Accordingly, the reenactment was admissible under *Elstad.*

The erroneous admission of an otherwise voluntary statement in violation of *Miranda* is subject to harmless error analysis. If, in light of all the evidence, error from admitting the statement can be deemed harmless beyond a reasonable doubt, then the judgment should be affirmed. (*People v. Samayoa* (1997) 15 Cal.4th 795, 831, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-309 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Sims* (1993) 5 Cal.4th 405, 447-448, citing *Chapman v. California*, *supra*, 386 U.S. 18 [violation of "'prophylactic' *Miranda* requirements" harmless in light of overwhelming evidence of guilt].)

Since Cunningham admitted all of the charged offenses during the reenactment, any alleged *Miranda* error in admitting the Deadwood interviews was harmless beyond a reasonable doubt. Indeed, Cunningham's admissions during the reenactment were far more complete and detailed than his statements to the detectives in South Dakota. Accordingly, the judgment should be affirmed regardless of any alleged *Miranda* violation during the Deadwood interviews.

F. The Reenactment Was Properly Admitted

Cunningham raises various challenges to the admission of the videotaped reenactment of the crimes which can be summarily dismissed. First, Cunningham claims the reenactment should have been suppressed because the detectives took advantage of a post-arrest delay in his arraignment. He primarily relies on *People v. Bonillas* (1989) 48 Cal.3d 757, and *People v. Thompson* (1980) 27 Cal.3d 303, as support. (AOB 137-142.)

However, *Bonillas* and *Thompson* address pre-indictment delay where the defendant is arrested for the crimes which form the bases of the indictment. (See *People v. Bonillas, supra,* 48 Cal.3d at p. 787; *People v. Thompson, supra,* 27 Cal.3d at p. 328.) In contrast, Cunningham was arrested in South Dakota and returned to Folsom Prison solely for a parole violation unrelated to the S.O.S. crimes. (3 CT 604-608, 681-685; 4 RT 991.) Nor was an arrest warrant for the murders issued prior to the reenactment. (2 RT 288-292.) Accordingly, *Bonillas* and *Thompson* are inapposite.

Implicitly conceding this flaw in his claim, Cunningham argues in the alternative that his Sixth Amendment right to counsel attached when he became the focus of the S.O.S. investigation and that his right to counsel was violated by the delay regardless of the fact that he was arrested and confined for a parole

violation. (See AOB 142-143.) However, "[a] criminal defendant's right to the assistance of counsel under the Sixth Amendment does not exist until the State initiates adversary judicial criminal proceedings, such as by formal charge or indictment." (*People v. DePriest* (2007) 42 Cal.4th 1, 33, citing *Davis v. United States, supra,* 512 U.S. at pp. 456-457; *Patterson v. Illinois* (1988) 487 U.S. 285, 290-297 [108 S.Ct. 2389, 101 L.Ed.2d 261]; *People v. Frye , supra,*18 Cal.4th at p. 987; see also *People v. Huggins* (2006) 38 Cal.4th 175, 244-245.)

> Moreover, the Sixth Amendment right to counsel is 'offense specific'; and may be asserted only as to those offenses for which criminal proceedings have formally begun.

(*People v. DePriest, supra,* 42 Cal.4th at p. 33, citing *McNeil v. Wisconsin* (1991) 501 U.S. 171, 175 [111 S.Ct. 2204, 115 L.Ed.2d 158]; *People v. Webb* (1993) 6 Cal.4th 494, 527.) Prior to the reenactment, there were no adversarial judicial proceedings, formal charges or indictment regarding the S.O.S. crimes. Therefore, Cunningham's right to counsel for those offenses had not attached at the time of the reenactment.

Cunningham nonetheless attempts to rely on *Escobedo v. Illinois* (1964) 378 U.S. 478, 490-491 [84 S.Ct. 1758, 12 L.Ed.2d 977] for his argument that the right to counsel attached when he became the focus of the detectives' investigation. (AOB 142.) An identical argument was rejected by this court in *DePriest* as follows:

> Defendant cites *Escobedo v. Illinois* (1964) 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, for the notion that his Sixth Amendment right to counsel arose "even before indictment" in the present case. This approach is flawed for reasons we have previously explained. (*Webb, supra,* 6 Cal.4th 494, 528, fn. 24, 24 Cal.Rptr.2d 779, 862 P.2d 779.) Specifically, *Escobedo* purported to recognize a preindictment right to counsel where the criminal investigation "has begun to focus on a particular suspect" who makes incriminating statements to police. (*Escobedo, supra,* 378 U.S. at pp. 490-491, 84 S.Ct. 1758.) Despite

> contrary language in *Escobedo* itself (see *id.* at p. 491, 84 S.Ct. 1758), *Miranda* later made clear (*Miranda, supra,* 384 U.S. 436, 440-442, 444 & fn. 4, 86 S.Ct. 1602), that *both* cases are concerned solely with prophylactic measures available to suspects undergoing custodial interrogation, including the right to counsel, and that such safeguards help protect the *Fifth* Amendment privilege against self-incrimination at trial. (Accord, *Moran v. Burbine* (1986) 475 U.S. 412, 429, 106 S.Ct. 1135, 89 L.Ed.2d 410.) "Hence, *Escobedo* does not support defendant's claim that his Sixth Amendment right to counsel was violated, nor does it give rise to any Fifth Amendment claim not otherwise available under *Miranda.*" (*Webb, supra,* 6 Cal.4th at p. 528, fn. 24, 24 Cal.Rptr.2d 779, 862 P.2d 779.)

(*People v. DePriest, supra,* 42 Cal.4th 34, fn. 9 [emphasis in original].)

Finally, Cunningham claims the reenactment should have been suppressed because his cooperation was improperly induced by Sergeant Lewis' promise that he would be transferred out of Folsom Prison. (AOB 143-147.) Cunningham's claim is belied by the record.

Lewis simply asked Cunningham whether he was willing to cooperate with the ongoing investigation by meeting with the detectives in Ontario. (2 RT 409-413.) Despite Cunningham's concerns about being placed in administrative segregation and a high security unit, Lewis specifically testified that no promises about Cunningham's housing were made to induce his cooperation. (2 RT 422-425.)

Implicitly finding Lewis to be a credible witness, the trial court found Cunningham was not improperly induced to participate in the reenactment. (3 RT 659.) Also, as found by the trial court, any prior "softening up" regarding Costello was not a factor by the time of the reenactment since she was no longer suspected of any wrongdoing. (3 RT 675.)

Since the trial court's evaluation of witness credibility and resolution of factual disputes and conflicting inferences were supported by substantial evidence, its ruling regarding the admissibility of the reenactment must be

upheld on appeal. (See *People v. Jablonski, supra,* 37 Cal.4th at p. 814; *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 56; *People v. Mayfield, supra,* 14 Cal.4th at p. 733.) The reenactment was properly admitted.

In sum, Cunningham's incriminating statements offered during the Deadwood interviews were admissible. Nevertheless, Cunningham's detailed admissions to the murders, robberies and arson during his voluntary and fully *Mirandized* reenactment of the crimes in Ontario rendered any challenge to the Deadwood interviews moot. (See *Oregon* v. *Elstad, supra,* 470 U.S. at p. 318.) Accordingly, the judgment should be affirmed.

VI.

THERE WAS NO CUMULATIVE EFFECT OF GUILT PHASE ERRORS WARRANTING REVERSAL IN CUNNINGHAM'S CASE

Cunningham argues the cumulative effect of the various guilt phase errors claimed on appeal requires reversal of the judgment. (AOB 160-162.) However, as each of Cunningham's individual claims of error (as previously discussed) lacks merit, his claim of cumulative error must also be rejected.

This Court has recognized that multiple trial errors may have a cumulative effect. (*People v. Hill* (1998) 17 Cal.4th 800, 844-848; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) In a "closely balanced" case, this cumulative effect may warrant reversal of the judgment "where it is reasonably probable" that it affected the verdict.[42/] (*People v. Wagner* (1975) 13 Cal.3d

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42. A criminal defendant is entitled to a fair trial, but not a perfect one, "for there are no perfect trials." (*United States v. Payne* (9th Cir. 1991) 944 F.2d 1458, 1477, quoting *Brown v. United States* (1973) 411 U.S. 223, 231-232 [93 S.Ct. 1565, 36 L.Ed.2d 208]; see also *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1485; *People v. Bradford, supra,* 14 Cal.4th at p. 1057.)

612, 621.)

However, if the reviewing court rejects all of a defendant's claims of error, it should reject the contention of cumulative error as well. (*People v. Anderson, supra,* 25 Cal.4th at p. 606; *People v. Bolin* (1998) 18 Cal.4th 297, 335.) Even where "nearly all of [a] defendant's assignments of error" are rejected, reversal is not warranted based on cumulative error. (*People v. Bradford, supra,* 14 Cal.4th at p. 1057; see also *People v. Hughes* (2002) 27 Cal.4th 287, 407 [where "one possible significant error" at penalty phase].) As none of Cunningham's individual claims of error in the guilt phase are well-founded, there should be no finding of cumulative error. (See *People v. Anderson, supra,* 25 Cal.4th at p. 606; *People v. Bolin, supra,* 18 Cal.4th at p. 335.) The judgment should be affirmed.

PENALTY PHASE ISSUES

VII.

AS CUNNINGHAM FAILED TO SHOW THE SYSTEMATIC EXCLUSION OF HISPANIC JURORS, THE TRIAL COURT PROPERLY DENIED HIS MOTION TO QUASH THE JURY VENIRE

Cunningham claims the trial court erred in denying his motion to quash the jury venire based on the systematic exclusion of Hispanics. (AOB 163-190.) However, since the testimony presented at an evidentiary hearing did not show any such exclusion of Hispanic jurors, the trial court properly denied the motion.

A. Relevant Proceedings

Prior to the penalty phase trial, Cunningham filed a discovery motion in

which he claimed all racial minorities were systematically excluded from the jury pool because they were disproportionately underrepresented in voter and Department of Motor Vehicle ("DMV") data bases used by the jury commissioner. (5 CT 1296-1309.) The prosecutor filed an opposition. (5 CT 1310-1318.) Subsequently, Cunningham filed a motion to quash the jury panel on the grounds that Hispanic jurors were systematically excluded from those summoned for service in the West End Judicial District where the penalty phase was ultimately tried. (6 CT 1576-1613, 1618-1630.)

1. Evidence Presented At The Hearing

The trial court conducted a hearing on Cunningham's motion, in which the following testimony was presented:

Shirley Stoudt, the Deputy Jury Commissioner for San Bernardino County, explained how potential jurors were summoned from a master list compiled from DMV and Registrar of Voters records. The DMV records included persons with driver's licenses (valid, suspended and restricted) and identification cards. The master list excluded individuals who had previously been excused as dead or with permanent medical disabilities. (6 RT 1438-1439.)

Stoudt testified how summoned jurors could request excusal from jury service and how her office processed such requests according to statutory exemptions as well as the local rules of court. (6 RT 1439-1440.) Those excusals included financial hardship, medical reasons, caretaker responsibilities and transportation difficulties. (6 RT 1444-1454, 1464-1465.)

Individuals were also exempted from service if they represented they were not United States citizens, residents in the county or at least 18 years of age, did not understand English well or were convicted felons who had not yet

had their voting rights restored. (6 RT 1446, 1451-1455, 1461-1462.) Summoned jurors who proved they were police officers or members of the grand jury were removed from the master list for a year. (6 RT 1446-1447.)

Individuals who were not excused but still did not appear for their jury summons were sent a second notice. After one failure to appear, the individual may still be pre-screened as ordered by the court but would not be able to claim the standard excusals. At the time of Cunningham's trial, no further action was taken if the second notice was ignored. (6 RT 1440-1441, 1456-1457.)

Some individuals requested postponements or excusals for service by mail or upon appearing on their summons. As a matter of course, jurors received a 90-day postponement for a first request. Some judges also authorized the Commissioner to pre-screen and excuse jurors for time conflicts such as vacations and medical appointments. Where there was some question about the validity of the claimed time conflict, the individual was retained and sent to a courtroom. (6 RT 1441-1444, 1455-1456.)

Stoudt testified that, out of an initial group of 200 jurors summoned for a case in the Rancho Cucamonga courthouse, typically 25 individuals appeared for service. On average, 100 people were lost through undeliverable mail or excusals and 75 people failed to appear. (6 RT 1451-1453.) Stoudt subsequently testified that roughly one-third of the approximately 3200 jurors summoned each week to Rancho Cucamonga appeared. (6 RT 1565-1566.)

According to Stoudt, a recent countywide survey of 501 jurors showed 4.3 percent of them were excused for language difficulties and 1.78 percent were excused based on lack of citizenship. Although these figures included all languages and non-citizens, Hispanics probably would have constituted a larger percentage of that group. The survey was voluntary, and the individuals were not asked to state their ethnic or racial background. (6 RT 1462-1464, 1556-1559, 1670-1672.)

In the survey, one person was excused as deceased, one percent of the jurors were excused for "medical permanent" reasons, 1.84 percent were excused for "medical temporary" reasons, 8.18 percent were excused for child or elder care reasons, and only 1.03 percent were excused for transportation reasons. The percentage of Rancho Cucamonga summonses which were undeliverable was between 14 and 16 percent. (6 RT 1672-1674.)

If a qualified individual was not on the master list but wanted to serve as a juror, the Jury Commissioner's Office would tell that person to obtain a driver's license or identification card from the DMV or register to vote to become eligible. However, that person would not be otherwise added to the master list since the juror selection process must be random at all stages. (6 RT 1459-1460.) Stoudt testified that the Jury Commissioner's Office was not aware of the race, religion or ethnic background of the jurors when excusing or exempting them for service and did not do anything to keep any specific or minority group off the jury panels. (6 RT 1461.)

Julia Arias[43/] grew up in Fontana and Rancho Cucamonga. She testified about her family background and described her childhood, education, religious upbringing and racial discrimination her family faced. Arias currently taught a citizenship class as well as elementary school. (6 RT 1478-1487.)

Arias believed the Hispanic community was "being attacked" by the government and felt the school district at which she taught caused her to be in very poor health. Arias continued to rant about herself, her family and her people being "wronged," and stated that she was "sick and tired" of what the court system was doing to all immigrants. Arias told the court that she was always active in politics. (6 RT 1487-1488.)

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43. Arias was permitted to give a narrative statement rather than respond to questions from defense counsel. (6 RT 1478-1490.)

Arias felt Hispanics were underrepresented in juries because they were forced to refuse jury service in order to preserve their "meager pay" and because they were unaware of the importance of exercising their right to vote. She then read various statistics from the Weeks study (see below), stated that she "need[ed] food now," and suggested that the court read the survey "more carefully" to find out what was happening to her community and her people. (6 RT 1487-1489.)

On cross, Arias admitted that she had a driver's license and was a registered voter. She reiterated that she was employed as an educator. (6 RT 1490-1490A.)

John Weeks[44/] was retained by the San Bernardino County Public Defender's office to conduct a demographic survey of jurors reporting for jury duty. This included 574 juror surveys for the Rancho Cucamonga Courthouse. Weeks compared the surveys to the demographics of the West End Judicial District. (6 RT 1512-1513.)

Weeks found 16.9 percent of the jurors in the Rancho Cucamonga surveys were Hispanic. He compared that to his estimate of 23.1 percent as the eligible Hispanic population in the West End Judicial District in 1995. (6 RT 1513.) Weeks based his 1995 estimate on geometric extrapolations from 1980 and 1990 census data which he "controlled" with two sets of projections of the ethnic makeup of every county in the state by the California State Department of Finance Demographic Research Unit for 2000 and 2010. (6 RT 1515-1516, 1526.)

However, the Department of Finance figures did not distinguish between

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44. Weeks was a professor of Geography and Director of the International Population Center at San Diego State University. (6 RT 1539-1540.)

citizens and non-citizens. Although the census did contain a question about citizenship, Weeks simply used the 1990 figure ("I just leave it at that") rather than geometrically extrapolate a 1995 figure from the difference between the 1980 and 1990 census as he had done with the overall population figures. (6 RT 1528-1529.)

Because Weeks felt there were too many variables regarding illegal immigration between 1980 and 1995, he simply used the 1990 figure which he believed was "a conservative estimate" of citizens. (6 RT 1547-1551.) However, after further questioning by the trial court, Weeks admitted that the census only included "probably half" of the illegal immigrants in the United States. He further conceded that there would be an increase in absolute numbers of Hispanic migration, but assumed the relative rates of legal and illegal immigrants remained constant. (6 RT 1552-1554.)

In addition, Weeks did not incorporate the number of Hispanics who might be ineligible for jury service due to felony convictions in his overall population estimate of 23.1 percent. He was not even aware of that figure for San Bernardino County, but claimed it was an insignificant number in San Diego County. (6 RT 1531-1532.)

Based on these figures, Weeks found there was an absolute disparity of 6.2 percent between the number of Hispanics reporting for jury duty and the number of Hispanics residing in the judicial district. Dividing the absolute disparity of 6.2 percent by the community percent of 23.1, Weeks concluded there was a "relative disparity" of 27 percent.[45/] Thus, according to Weeks, there were 27 percent fewer Hispanics in the Rancho Cucamonga jury pool than would be expected from the demographics of the community. (6 RT 1513-

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45. More accurately, 6.2 percent divided by 23.1 percent is 26.84 percent.

1514.) Dividing the results by gender, Weeks found an absolute disparity of 7.2 percent and "relative disparity" of 30 percent for male Hispanics. (6 RT 1514-1515.)

On cross, Weeks admitted that based solely on the 1990 census data, the absolute disparity of Hispanic jurors was only 1.8 percent and the relative disparity was 10 percent. (6 RT 1523-1524.)

Relying on his extrapolated figures, Weeks concluded that there was "a substantive and a statistically significant underrepresentation of Hispanics showing up for jury duty in the Rancho Cucamonga District courthouse." He testified that this was a pattern seen in other judicial districts which was "potentially correctable, or at least diminishable." (6 RT 1519.)

Weeks felt the biggest cause of the disparity was lack of follow-up by the Jury Commissioner's office for unserved jury summonses. He specifically criticized the summons form for stating "do not forward," for prominently inviting excusal requests and for not explicitly asking for address corrections. Weeks believed this disadvantaged Hispanics who were more "residentially mobile." Weeks claimed San Diego County made "some remedies" in this regard which increased the number of Hispanics on the master list. (6 RT 1520-1522.)

2. The Trial Court's Findings And Ruling

The trial court ruled there was no underrepresentation of Hispanics by significant numbers due to systematic exclusion in the jury selection process. (6 RT 1704-1705.) Specifically, the court found Weeks' survey of 574 people over a five-week period was insufficient to show underrepresentation. In addition, Weeks' study was based on the number of prospective jurors who actually appeared for court rather than the group of prospective jurors originally

summoned from the master list prior to excusals and no-shows. (6 RT 1705-1708.)

The court found the absolute disparity figure of 1.8 percent based on the 1990 census was insufficient to show underrepresentation of Hispanic jurors, and Weeks' extrapolations were unreliable. Nonetheless, even an actual disparity as high as 7.2 percent for male Hispanics would have been insufficient. The court noted the unreliable and misleading nature of relative or comparative disparity figures. (6 RT 1709-1713.)

Finally, the court found any alleged underrepresentation was not the result of systematic exclusion of Hispanics. The court noted that economic, social and cultural factors and valid excusals were unavoidable and acceptable reasons for underrepresentation. (6 RT 1712-1717.) Based on these findings, the trial court denied Cunningham's motion to quash. (6 RT 1717.)

B. Cunningham Failed To Make A Prima Facie Showing Of Systematic Exclusion Of Hispanic Jurors

The federal and state Constitutions guarantee criminal defendants juries drawn from representative cross-sections of the community. (*People v. Burgener* (2003) 29 Cal.4th 833, 855.) "That guarantee mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community." (*Id.* at p. 856.)

The test for a claim of systematic exclusion of jurors was articulated by the United States Supreme Court in *Duren v. Missouri* (1979) 439 U.S. 357 [99 S.Ct. 664, 58 L.Ed.2d 579].

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the

community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

(*Id.* at p. 364.) If the defendant makes a satisfactory showing of a prima facie case, the burden then shifts to the prosecutor to provide more precise statistics showing there is no constitutionally significant disparity or offer a compelling justification for the procedures that resulted in the disparity. (*People v. Sanders* (1990) 51 Cal.3d 471, 491.)

In this case, Cunningham failed to show a prima facie case of systematic exclusion of Hispanics. As the trial court recognized, the first prong of the *Duren* test was satisfied since Hispanics constitute a cognizable group in the community. (See *People v. Ramirez, supra,* 39 Cal.4th at p. 445; *People v. Ochoa* (2001) 26 Cal.4th 398, 42; *People v. Ramos* (1997) 15 Cal.4th 1133, 1154, and *People v. Sanders, supra,* 51 Cal.3d at p. 491.) However, Cunningham did not satisfy the second and third prongs of *Duren.*

Under the second prong of *Duren*, Cunningham must show there was an unfair and unreasonable representation of Hispanic jurors compared to their numbers in the community. Cunningham failed to do so in several significant aspects.

First, Cunningham's claim was based on an insufficient survey of jurors. Weeks based his conclusions on one survey of only 574 people. (6 RT 1512-1513.)

In *People v. Morales* (1989) 48 Cal.3d 527, the defense expert relied on a survey of two consecutive sample panels totaling 788 people reporting for jury duty. (*People v. Morales, supra,* 48 Cal.3d at p. 542.) This Court found the "statistical showing was based upon an inadequate sample" which was "too small in size, and too short in duration, to support a finding of unreasonable underrepresentation or systematic exclusion." (*Id.* at p. 548.) Thus, Cunningham's statistical showing which was based on a substantially smaller

sample of potential jurors was inadequate.

Moreover, using the concrete figures of the 1990 census, the absolute disparity of Hispanic jurors was only 1.8 percent with a relative disparity of 10 percent. (6 RT 1523-1524.) Neither this Court nor the United States Supreme Court has decided whether absolute or relative disparity is the better test for systematic exclusion.[46/] (*People v. Burgener, supra,* 29 Cal.4th at pp. 859-860; *People v. Ochoa, supra,* 26 Cal.4th at p. 427, citing *People v. Ramos, supra,* 15 Cal.4th at p. 1155; see also *People v. Sanders, supra,* 51 Cal.3d at p. 492, fn. 6.)

Nonetheless, in *Ramos,* this Court found an absolute disparity between 2.7 and 4.3 percent with a comparative disparity between 23.5 and 37.4 percent was constitutionally permissible. (*People v. Ramos, supra,* 15 Cal.4th at p. 1156.) Therefore, the most reliable statistical disparity shown by Weeks' testimony fell well within constitutional limits.

Of course, Cunningham attempted to rely on Weeks' geometric extrapolations of estimated Hispanic populations in 1995 which showed an absolute disparity of 6.2 percent and relative disparity of 26.84 percent for all Hispanics and an absolute disparity of 7.2 percent and relative disparity of 30 percent for male Hispanics. (6 RT 1513-1515.) The trial court found those

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46. Respondent urges this Court to adopt the absolute disparity test since the relative or comparative disparity test unfairly tends to inflate the disparity of minority groups as was done in Cunningham's case. For example, a group which constitutes ten percent of a community's population and nine percent of the venire would only be underrepresented by one percent. Yet, its relative disparity would be 10 percent -- ten times more than the absolute disparity.

The statistical trickery of relative disparities becomes even more apparent for smaller minority groups. A group which constitutes one percent of a community's population and .75 percent of the venire clearly shows a minimal discrepancy. However, the relative disparity would be 25 percent – 100 times more than the absolute disparity of .25 percent.

extrapolations to be too speculative and unreliable upon which to base a finding of systematic exclusion. (6 RT 1709-1713.)

The trial court was correct. Weeks' failure to survey and distinguish eligible jurors based on citizenship because there were too many variables to consider constituted a substantial flaw in his method. Moreover, his simplistic assumption that the relative rates of legal versus illegal immigrants remained constant between 1980 and 1995 was unfounded. (See 6 RT 1528-1529, 1552-1554.)

In addition, Weeks failed to survey or calculate how many of those jurors he claimed were systematically excluded would have been ineligible due to felony convictions. (6 RT 1531-1532.) His assumptions that the number of such individuals in San Bernardino County was insubstantial based on dated San Diego County figures was wholly inadequate for an issue of such importance where a single percent or fraction of a percent might be determinative. Since Weeks' 1995 extrapolations were substantially compromised by rank assumptions and unfounded speculation, the trial court properly declined to base its ruling on Weeks' 1995 figures.

Notwithstanding the fatal flaws in Weeks' extrapolations, his 1995 figures were still well within the constitutionally tolerable limits for underrepresentation. As this Court noted in *Ramos*, the United States Supreme Court found a 10 percent absolute disparity inadequate in *Swain v. Alabama* (1965) 380 U.S. 202, 208-209 [85 S.Ct. 824, 13 L.Ed.2d 759], overruled on other grounds in *Batson v. Kentucky* (1986) 476 U.S. 79, 100, fn. 25 [106 S.Ct. 1712, 90 L.Ed.2d 69]. (*People v. Ramos, supra,* 15 Cal.4th at p. 1156.)

Also, the Ninth Circuit "has consistently held that absolute disparities below 7.7% are insubstantial and constitutionally permissible." (*United States v. Cannady* (9th Cir. 1995) 54 F.3d 544, 548.) As previously noted a comparative or relative disparity between 23.5 and 37.4 percent was found

constitutional in *Ramos.* (*People v. Ramos, supra,* 15 Cal.4th at p. 1156.) Therefore, even based on Weeks' 1995 figures, Cunningham failed to meet his burden of showing underrepresentation under the second prong of *Duren.*

Finally, Cunningham did not satisfy the third prong of *Duren.*

> A defendant does not discharge the burden of demonstrating that the underrepresentation was due to systematic exclusion merely by offering statistical evidence of a disparity. A defendant must show, in addition, that the disparity is the result of an improper feature of the jury selection process.

(*People v. Burgener, supra,* 29 Cal.4th at p. 857.)

In Cunningham's case, the master list was derived from DMV and voter registration lists. (6 RT 1438-1439.) This Court has "held that such a list ""shall be considered inclusive of a representative cross-section of the population"" where it is properly nonduplicative."" (*People v. Burgener, supra,* 29 Cal.4th at p. 857, quoting *People v. Ochoa, supra,* 26 Cal.4th at p. 427; see also *People v. Ramirez, supra,* 39 Cal.4th at p. 446.) Cunningham presented no evidence that the master list was duplicative in any way.

Rather, Ms. Arias suggested that Hispanics were underrepresented because they were unaware of the importance of voting. (6 RT 1487.) However, "the failure of a particular group to register to vote in proportion to its share of the population cannot constitute improper exclusion attributable to the state." (*People v. Ochoa, supra,* 26 Cal.4th at p. 427, citing *United States v. Cecil* (4th Cir. 1988) 836 F.2d 1431, 1448-1449.)

Dr. Weeks testified that San Bernardino County could have remedied any disparities in Hispanic jurors by following up on unserved summonses, soliciting address corrections and making the excusal form less prominent. (6 RT 1520-1522.) However, as this Court pointed out in *Burgener,*

> the United States Constitution 'forbids the *exclusion* of members of a cognizable class of jurors, but it does not require that venires created by

> a neutral selection procedure be supplemented to achieve the goal of selection from a representative cross-section of the population." [Citation.] So long as the state uses criteria that are neutral with respect to the underrepresented group, the state's failure to adopt other measures to increase the group's representation cannot satisfy *Duren's* third prong.

(*People v. Burgener, supra,* 29 Cal.4th at pp. 857-858, quoting *People v. Ochoa, supra,* 26 Cal.4th at p. 427 [emphasis in original].) Merely pointing to a remedy is not enough. (*People v. Ochoa, supra,* 26 Cal.4thaat p. 428.)

As shown by Ms. Stoudt's testimony, juror excusals were based on race-neutral reasons provided by statute and the Rules of Court. (6 RT 1439-1465.) Indeed, the excusal forms did not even indicate the prospective juror's race. Non-citizenship or lack of understanding of English included all races and national origins falling into those categories, not simply Hispanics or Spanish-speaking individuals. (See 6 RT 1462-14654, 1556-1559.) Stoudt reiterated that the Jury Commissioner's office was not aware of the race, religion or ethnic background of prospective jurors in conducting the excusal process and did nothing to exclude any cognizable minority group. (6 RT 1461.)

Thus, the jury summons process in Cunningham's case was race-neutral.

> Where, as here, a county's jury selection criteria are neutral with respect to the distinctive group, the defendant must identify some aspect of the manner in which those criteria are applied that is not only the probable cause of the disparity but also constitutionally impermissible.

(*People v. Burgener, supra,* 29 Cal.4th at p. 858.) Cunningham failed to do so in his case.

Instead, Cunningham relied on Arias's rank speculation and offensive stereotyping of Hispanics as evading jury service in order to avoid losing the "meager pay" they received in their employment. (See 6 RT 1487.) Cunningham also relied on Weeks' wholly unsupported musings that Hispanics in Rancho Cucamonga were "residentially mobile" because they had low

incomes, were unlikely to own homes and were transient as renters, and consequently more difficult to summon for jury duty. (See 6 RT 1520.)

However,

> [s]peculation as to the source of the disparity is insufficient to show systematic exclusion [citation], as is evidence the disparity is unlikely to be a product of chance [citation] or has endured for some time [citation].

(*People v. Burgener, supra,* 29 Cal.4th at p. 858.) Also,

> [e]vidence that "race/class *neutral* jury selection processes may nonetheless operate to permit the de facto exclusion of a higher percentage of a particular class of jurors than would result from a random draw" is insufficient to make out a prima facie case.

(*People v. Sanders, supra,* 51 Cal.3d at pp. 492-493, quoting *People v. Morales, supra,* 48 Cal.3d at p. 546 [emphasis in original].) Thus, Cunningham failed to show systematic exclusion by the state as required under the third prong of *Duren*.

Since Cunningham did not satisfy his burdens under the second and third prongs of *Duren*, a prima facie case of underrepresentation and systematic exclusion of Hispanic jurors was not made and the burden did not shift to the prosecution. Accordingly, the trial court properly denied Cunningham's motion to quash the venire.

VIII.

THE TRIAL COURT PROPERLY GRANTED THE PROSECUTOR'S MOTION TO EXCUSE FOR CAUSE A JUROR WHO STATED AN INABILITY TO IMPOSE THE DEATH PENALTY DUE TO HIS RELIGIOUS BELIEFS; AND CUNNINGHAM WAIVED ANY CLAIM THAT THE TRIAL COURT ERRED BY EXCUSING THE JUROR SOLELY BASED ON HIS RESPONSES IN THE QUESTIONNAIRE

Cunningham claims the trial court improperly granted the prosecutor's motion to excuse prospective juror ("G.P.") for cause because G.P. merely indicated a reluctance to impose the death penalty. Cunningham further claims the court erred by relying solely on G.P.'s responses in the written jury questionnaire in granting the motion rather than give G.P. the opportunity during voir dire to clarify his views and show that he could fairly decide the case. Accordingly, Cunningham contends the improper removal of G.P. compels reversal of the penalty judgment. (AOB 190-203.)

However, Cunningham mischaracterizes G.P.'s responses as a mere reluctance to impose the death penalty. Rather, G.P.'s strong opposition to the death penalty except in cases in which the defendant agreed to the sentence provided sufficient grounds for the trial court to excuse him for cause.

Also, Cunningham expressly agreed to the trial court's procedure of entertaining and granting challenges for cause based solely on the jurors' responses to the questionnaires and to only conduct voir dire when the challenge for cause was denied. Defense counsel not only stipulated to, but also endorsed, the procedure. Thus, Cunningham waived any claim that the trial court erred in excusing the juror solely based on his responses in the questionnaire. Accordingly, both of Cunningham's claims regarding the excusal of G.P. should be rejected.

A. The Trial Court Properly Excused G.P. For Cause Based On His Stated Inability To Impose The Death Penalty In A Contested Penalty Phase

Where the trial court's ruling on a challenge for cause is based solely on a juror's responses on a written questionnaire, the ruling is subject to de novo review by this Court. (*People v. Avila* (2006) 38 Cal.4th 491, 529.)

> Decisions of the United States Supreme Court establish the circumstances under which a prospective juror's views on the death penalty properly may serve as the basis for a challenge for cause. In *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776, the United States Supreme Court held that a defendant cannot be sentenced to death if the jury that imposed the penalty was chosen by excluding prospective jurors for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." In *Wainwright v. Witt* (1985) 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841, the high court clarified its decision in *Witherspoon* and held that a prospective juror may be excluded for cause because of his or her views on capital punishment if those views would "'prevent or substantially impair'" the performance of his or her duties as a juror in accordance with the trial court's instructions and his or her oath. (Accord, *People v. Cunningham* (2001) 25 Cal.4th 926, 975, 108 Cal.Rptr.2d 291, 25 P.3d 519.) But neither *Witherspoon* nor *Witt* requires that a prospective juror automatically be excused if he or she expresses a personal opposition to the death penalty. Those who firmly oppose the death penalty may nevertheless serve as jurors in a capital case as long as they state clearly that they are willing to temporarily set aside their own beliefs and follow the law. (*Lockhart v. McCree* (1986) 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137; accord, *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146, 36 Cal.Rptr.2d 235, 885 P.2d 1.)

(*Ibid.*)

Applying these standards, the trial court properly excused G.P. for cause. G.P. expressed views on capital punishment which clearly would have prevented or substantially impaired him in the performance of his duties as a penalty phase juror.

In his questionnaire, G.P. stated that he was "educated and raised in the strict Catholic teachings and standards," "I find it hard to be a judge of another person," and "I was taught that God is the only rightful judge."[47] (8 RT 2045-2046.) He further stated that he agreed with and would be greatly influenced by the Catholic Church's position opposing the death penalty. (8 RT 2046.) G.P. elaborated:

> I have always been taught to try to understand why people become the way they are and that one might always forgive and that one might never lose hope. Somehow these teachings have become my own and have influenced my decision in life.

(8 RT 2046.)

G.P. further stated that "God is the only rightful judge," and "he strongly opposes the death penalty." (8 RT 2046.) Although he wrote, "I have no problem in judging as to whether are not a person is guilty or has done wrong," G.P. stated, "I do have a problem as to whether or not punishment or appropriate punishment is right or wrong." (8 RT 2046.) Despite the fact that he "like[d] to sit on cases because the law has always been fascinating to me," G.P. reiterated, "it just so happens that sentencing someone is against my beliefs." (8 RT 2046.)

G.P. believed the death penalty only served an economic purpose and was part of a system which "has lost all hope." He wrote: "That should not be the case in any system. One must never stop to improve itself [sic.]." (8 RT 2047.) G.P. even stated that life in prison without parole (hereafter "LWOP") served no purpose other than draining the economy. (8 RT 2047.)

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47. After thoroughly reviewing the nine volumes comprising the Clerk's Supplemental Transcript, it does not appear that G.P.'s questionnaire was included in the record on appeal. Therefore, as Cunningham does in his Opening Brief, Respondent derives G.P.'s questionnaire responses from the Reporter's Transcript of the discussions between the trial court and counsel.

When asked "what types of crime, if any, deserve the death penalty," G.P. answered, "I couldn't think of one." (8 RT 2047.)

In his responses to two questions, G.P. indicated that he would not make up his mind until after he first heard the cases for life without possibility of parole and the death penalty. (8 RT 2047.) However, G.P. stated that it was "very possible" that he would reject the death penalty and choose LWOP due to his beliefs and would only see himself choosing a death penalty verdict if the defendant himself requested it and was of sound mind and body. (8 RT 2048.)

The trial court granted the prosecutor's motion to excuse G.P. for cause as follows:

> I think the combination of the strong religious beliefs and not – because of those strong religious beliefs, not believing that he should judge someone is reflected in [question] 5-A where he says being educated and raised in strict Catholic teachings and standards, I find it hard to be a judge of another person, always thought that God is the only rightful judge; and [question] nineteen, I have a problem as to whether or not punishment or appropriate punishment is right or wrong; and [question] seventy-six, it just so happens that sentencing someone is against my beliefs, those statements combined with the statements regarding the death penalty, that he's strongly opposed to it, couldn't think of a crime that deserves the death penalty, indicates that he would certainly be substantially impaired in seriously considering death penalty as an option. So the Court will grant the challenge for cause.

(8 RT 2048.)

Subsequently, the trial court formally excused G.P. for cause. G.P. thanked the court. (8 RT 2088.)

The record shows G.P. had strong religious views against the death penalty which would have prevented or substantially impaired his ability to serve on Cunningham's penalty phase jury. As this Court stated in *People v. Mattson* (1990) 50 Cal.3d 826,

> The only question the court need resolve during this stage of the voir

> dire is whether any prospective juror has *such conscientious or religious scruples about capital punishment*, in the abstract, that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

(*People v. Mattson, supra,* 50 Cal.3d at p. 826 [emphasis added].) G.P. had such conscientious and religious scruples against capital punishment.

G.P. received strict religious teachings that only God should judge people and the death penalty was wrong. He was firmly in agreement with and greatly influenced by those teachings. (8 RT 2045-2046.)

G.P. conclusively demonstrated his inability to return a death verdict by indicating that *he could not think of a single case which deserved the death penalty*. (8 RT 2047.) He further showed his strong bias against the death penalty by his scathing characterization of it as a system that "has lost all hope" and only served economic purposes. (8 RT 2047.)

Although G.P. had no problem fairly judging someone on the issue of guilt, he expressed an unwillingness to judge someone on the issue of punishment. (8 RT 2046.) Of course, G.P. was being considered for service on a penalty phase jury which would only be deciding the appropriate punishment. Thus, G.P. was particularly incapable of serving as a fair juror in Cunningham's case.

G.P. stated that he would only choose a death verdict where the defendant himself requested it. (8 RT 2048.) That was not the case in Cunningham's penalty phase trial. Cunningham waged a vigorous and impassioned defense against a death verdict. Again, G.P. was particularly unqualified to serve on Cunningham's jury.

Cunningham argues a juror who personally is opposed to capital punishment should not be excused if he assures the court that he can set aside those personal views. (AOB 195, citing *People v. Kaurish* (1990) 52 Cal.3d

648, 699 and *Ross v. Oklahoma* (1988) 487 U.S. 81, 91, fn. 5 [108 S.Ct. 2273, 101 L.Ed.2d 80].) However, G.P. clearly indicated that he could not set aside his religious views except in the highly unlikely scenario of a defendant exercising his right to a jury trial *in order to request* the death penalty.

Cunningham also argues jurors who "probably" would vote against death or found it "very difficult" to return a death verdict should not be disqualified. (AOB 196, citing *People v. Fields* (1983) 35 Cal.3d 329, 355.) Cunningham's argument grossly understates G.P.'s unwavering religious convictions regarding the death penalty. G.P.'s views made it impossible for him to return a guilty verdict in a case such as Cunningham's where the defendant did not request a death sentence.

Cunningham attempts to rely on G.P.'s statement that he would hear both sides of the case before rendering a decision. (See AOB 197.) Despite G.P.'s willingness to comply with trial procedures, his stated views made it clear that no verdict other than LWOP would be considered in Cunningham's case.

An argument similar to that presented by Cunningham was rejected by this Court in *People v. Cook* (2007) 40 Cal.4th 1334. In *Cook*, the excused juror stated in her questionnaire that she did not believe in the death penalty, the death penalty was randomly imposed, she could never vote for the death penalty even in the case of a murder with special circumstances, and she could not impose the death penalty in a case in which the two deaths occurred during a single incident. (*People v. Cook, supra*, at p. 1343.) However, she stated that in the abstract she could set aside her feelings about the death penalty and follow the trial court's instructions. (*Ibid.*) This Court found the trial court properly excused the juror based on her responses in the questionnaire. (*Id.* at p. 1334.)

Similarly, in *People v. Avila, supra,* 39 Cal.4th 491, this Court found the

trial court properly excused an individual who acknowledged his duties as a juror and stated that he could set aside his personal beliefs and follow the law despite his strong opposition to the death penalty, but indicated that he would automatically vote for any guilt or penalty verdict which would avoid the death penalty. (*People v. Avila, supra,* 39 Cal.4th at p. 532, cited with approval in *People v. Cook, supra,* 40 Cal.4th at p. 1343.) Like the excused jurors in *Cook* and *Avila*, G.P.'s responses to the questionnaire showed he would never impose the death penalty in a contested penalty phase such as Cunningham's case despite his willingness to sit through the trial and hear both sides of the case before rendering an LWOP verdict.

Contrary to Cunningham's gross understatement of G.P.'s opposition to the death penalty as a mere "reluctance," G.P.'s responses on the questionnaire clearly demonstrated that his strict religious beliefs would have prevented or substantially impaired him from performing his duties as a juror in Cunningham's penalty phase trial. Accordingly, the trial court properly granted the prosecutor's challenge for cause, and the judgment should be affirmed.

B. Cunningham Waived Any Claim That The Trial Court Erred By Excusing G.P. Without Conducting Voir Dire By Expressly Agreeing To The Court's Procedure

Prior to jury selection for the penalty phase, Cunningham moved for individual, sequestered voir dire of jurors under *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80. (6 CT 1413-1420.) The prosecutor filed an opposition. (6 CT 1450-1452.) The trial court denied the motion. (5 RT 1188-1190.)

Thereafter, the trial court proposed ruling on stipulations and challenges for cause based on the jurors' responses to the questionnaires. (5 RT 1249-1251.) Given the trial court's ruling on the *Hovey* motion, defense counsel "endorse[d] that procedure." (5 RT 1251.) Defense counsel further commented

on "[t]he beauty of the Court's procedure" in protecting against potential jurors who may "pollute the panel" with their views on the death penalty during voir dire. (5 RT 1251.)

Subsequently, the following discussion was held between the trial court, Cunningham, defense counsel and the prosecutor:

> THE COURT: All right. We'll go ahead and do that.
>
> Again, one of the so-called normal procedures would be we would have the jurors – – jury panel in the courtroom. After they filled out the questionnaire, the attorneys would have the questionnaire. The people would be called up into the jury box, and the attorneys would then be able to begin their questioning of the jurors. And if there was a basis for a challenge for cause or they wanted to stipulate to excuse a juror, they would do it at that point in time.
>
> As I'm sure you know, there was a request by your attorney to have individualized sequestered voir dire of all the jurors.[48/] And the Court denied that.
>
> An alternative to that normal procedure of just having the jurors here, calling them into the jury box and questioning them and make whatever challenges, would be, since we will have the questionnaires available, *to allow the attorneys to meet with the Court before we bring the jury panel in and give them an opportunity to either stipulate to excuse certain jurors based solely on the questionnaire, and to make any challenges for cause based solely on the answers in the questionnaire.* With the understanding, of course, that if a challenge for cause is denied based on the questionnaire, the attorneys would still have the opportunity to question that juror, perhaps even individually, to further develop the challenge for cause.
>
> But obviously, as I said, normal procedure would be to wait until the jurors are here, question them, and then after the questioning make any challenge for cause.
>
> Did Mr. Negus [defense counsel] also discuss with you this procedure?
>
> THE DEFENDANT: Yesterday.

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48. Cunningham does not challenge that ruling on appeal. (See AOB i-viii [Table of Contents].)

THE COURT: And is that agreeable with you that we could use this alternative procedure of the attorneys meeting with the court and stipulating to excuse jurors *and making challenges for cause that the court would rule on based solely on the questionnaire* initially?

THE DEFENDANT: I agree.

THE COURT: And that's agreeable with defense as well?

MR. NEGUS: Yes.

THE COURT: People?

MR. GUZZINO: Yes.

THE COURT: We'll utilize that procedure then. . . .

(6 RT 1659-1660 [emphasis added].)

Prior to hearing the attorneys' challenges for cause, the trial court noted,

> And pursuant to our earlier stipulation as to procedures [,] counsel were to meet and confer with regard to stipulations that they might enter into with regard to excusing various jurors or stipulating to challenges for cause, as well as making challenges for cause based on the questionnaires at this time.

(7 RT 1966.) Both defense counsel and the prosecutor indicated their agreement. (7 RT 1966.)

Thus, the record shows Cunningham and defense counsel expressly agreed to the court excusing jurors for cause based solely on their responses to the questionnaires without any voir dire. Cunningham should not be allowed to now complain of that very procedure for the first time on appeal.

This Court addressed a similar situation in *People v. Cook, supra,* 40 Cal.4th 1334. In *Cook*, defense counsel and the prosecutor expressly agreed to submit on juror questionnaires for challenges for cause with no voir dire unless the challenge was denied. (*Id.* at pp. 1341-1342.) On appeal, the defendant argued the trial court erred in excusing a particular juror for cause without conducting voir dire to clarify her views on the death penalty. (*Ibid.*)

This Court found Cook forfeited his right to complain of the court's

failure to conduct voir dire because he had agreed to the trial court's procedure of granting challenges for cause solely on the questionnaires. (*People v. Cook, supra,* 40 Cal.4th at p. 1342 [distinguishing *People v. Stewart* (2004) 33 Cal.4th 425, 452, where this Court found trial court erred in failing to voir dire prospective jurors without the agreement of the parties and where defendant repeatedly objected to the procedure].) Similarly, Cunningham forfeited any claim attacking the trial court granting challenges for cause based solely on the jurors' responses in the questionnaires where he expressly consented to that procedure.

Respondent recognizes that Cunningham's *Hovey* motion was denied prior to his stipulation to the trial court's procedure. However, *Hovey*, which was adopted pursuant to this Court's supervisory authority rather than a constitutionally compelled rule of criminal procedure, was abrogated in 1990 through the passage of Proposition 115 and the enactment of section 223 of the Code of Civil Procedure requiring voir dire of any prospective jury in the presence of all other jurors where practicable. (*People v. Vieira* (2005) 35 Cal.4th 264, 287-288.) Thus, the *Hovey* procedure of sequestered, individualized voir dire was no longer valid at the time of Cunningham's penalty phase trial in 1995.

Moreover, the use of individual questionnaires answered privately by each juror serves the same purposes as *Hovey*. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 629.) Indeed, defense counsel recognized this in commenting on the "beauty" of the trial court's procedure. (See 5 RT 1251.) Thus, the denial of Cunningham's *Hovey* motion has no bearing on the forfeiture issue.

Moreover, the trial court's ruling left open the opportunity for Cunningham to request individualized, separate voir dire for G.P. or any other particular juror whose questionnaire responses defense counsel deemed in need of clarification. Only "a *blanket* sequestered *Hovey* motion of *all* the jurors

beyond the questionnaire [was] denied." (5 RT 1190 [emphasis added].) When taking the stipulation from Cunningham and defense counsel, the trial court reiterated that "individualized sequestered voir dire *of all the jurors*" was denied. (6 RT 1659 [emphasis added].)

Cunningham did not request any individual voir dire for G.P. prior to the court ruling on the prosecutor's challenge for cause. (See 8 RT 2045-2048.) Accordingly, Cunningham waived any claim that the trial court erred in failing to conduct voir dire prior to excusing G.P. for cause. (See, e.g., *People v. Vieira, supra,* 35 Cal.4th at p. 289; *People v. Cudjo, supra,* 6 Cal.4th at p. 629.) The judgment should be affirmed.

IX.

THE TRIAL COURT PROPERLY DENIED CUNNINGHAM'S *BATSON/WHEELER*[49] OBJECTION AS TO ONE PROSPECTIVE JUROR; CUNNINGHAM WAIVED ANY CLAIM REGARDING TWO OTHER PROSPECTIVE JURORS; AND THERE IS NO SHOWING THAT A FOURTH JUROR WAS A MEMBER OF THE COGNIZABLE CLASS CLAIMED BY CUNNINGHAM ON APPEAL

Cunningham claims the prosecutor improperly exercised four of his six peremptory challenges against African-Americans in jury selection for the penalty phase trial, listing "D.W., A.L., S.A-M., and A.C." as the four potential jurors. Cunningham contends the trial court erred in failing to find a prima facie case of discrimination based on the four challenges, the trial court abdicated its duty to conduct a sincere evaluation of the prosecutor's reasons for excusing those potential jurors and their improper removal requires automatic

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49. *Batson v. Kentucky, supra,* 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

reversal of the judgment. (AOB 204-228.)

However, there is no indication in the record that A.L. was African-American. Cunningham failed to make a sufficient record showing A.L. was a member of a cognizable class. Thus, the underlying theme of Cunningham's argument, that four African-Americans were excused as a result of the prosecutor's peremptory challenges, is not supported in the record.

Moreover, Cunningham waived any claim regarding A.L. by failing to sufficiently articulate his objection. Cunningham also waived any *Batson/Wheeler* claim regarding S.A-M. and A.C. by failing to object to their excusal prior to the swearing of the jury and alternates.

As to the one remaining African-American juror for whom Cunningham did preserve his *Batson/Wheeler* claim, D.W., there was no prima facie case which would have required the trial court to evaluate the prosecutor's volunteered explanations for excusing her. Accordingly, Cunningham's *Batson/Wheeler* claim was properly denied. Moreover, this Court need not engage in comparative juror analysis for the first time on appeal for this claim of "first stage" *Batson/Wheeler* error.

Finally, even if this Court were to find a prima facie case of discrimination, the remedy would be to remand the case for the trial court to conduct a sincere and reasoned evaluation of the prosecutor's explanations, rather than automatic reversal of the judgment.

A. Relevant Proceedings

The prosecutor used his first peremptory challenge to excuse juror J.E. (9 RT 2394.) Presumably J.E. was not African-American since he is not named as one of the prospective jurors forming the basis of Cunningham's *Batson/Wheeler* claim. (See AOB 204.)

Subsequently, defense counsel stated that there was "a pattern emerging." (10 RT 2408.) The trial court responded, "Pattern? He's used one peremptory." (10 RT 2408.)

Defense counsel then argued if the prosecutor were to prospectively exercise a peremptory challenge against any African-American juror, a prima facie case of discrimination would be established because "approximately fifty percent of the persons [the prosecutor challenged for cause] were [B]lack." (10 RT 2408-2409.) Counsel further alleged the prosecutor had devoted an inordinate amount of time questioning African-American jurors for cause. (10 RT 2409.) The trial court pointed out that most of the case law is to the contrary, criticizing prosecutors for exercising peremptory challenges against minority jurors with little or no voir dire. (10 RT 2409.)

Defense counsel disagreed with the court, indicated that he wanted to make sure "everybody's on notice," and discussed remedies for his anticipated motion. (10 RT 2410-2411.) The court and counsel then discussed various case law on the subject. The prosecutor objected to defense counsel's attempts to intimidate him in his exercise of peremptory challenges. (10 RT 2411-2414.)

After additional discussion, the court found the prosecutor had legitimate race-neutral reasons for all of his challenges for cause even if some of those challenges were not ultimately granted. (10 RT 2414-2415.) Accordingly, the court did not find any attempt to systematically exclude minority jurors at that point. (10 RT 2415.)

Defense counsel then alleged the prosecutor did not question a White juror who did not completely fill out his questionnaire as much as an African-American juror during the challenges for cause. (10 RT 2416.) The court indicated that it would look to any patterns should a motion be made. (10 RT 2416.) The court then discussed potential remedies should any motion be granted. (10 2416-2419.)

The prosecutor exercised his second peremptory challenge against D.W. (10 RT 2427.) At that time, defense counsel objected as follows: "Batson challenge. She's a correctional officer. She was one he picked on for no good reason just to ask a lot of questions." (10 RT 2427.)

The trial court denied the *Batson/Wheeler* challenge, finding there had been no systematic pattern of exclusion of minorities. (10 RT 2427-2428.) The court invited the prosecutor to place his reasons for exercising the challenge on the record, but stated that he was not obligated to do so. The prosecutor elected to explain his reasons when he completed all of his peremptory challenges. (10 RT 2428.) The court excused D.W. (10 RT 2428.)

The prosecutor exercised his third peremptory challenge against juror A.L. Defense counsel stated, "Batson again," but did not state the basis of his objection. The court excused A.L. without expressly ruling on the Batson challenge. (10 RT 2443A.)

The prosecutor exercised his fourth peremptory challenge against juror S.A-M. (10 RT 2449.) Defense counsel stated, "I'll wait till he does one more, then I'll do that. I'm going to make a motion. So we don't have to argue it each time." (10 RT 2450.)

The trial court responded:

> All right. For the record, the court notes that there was a challenge for cause as to [S.A-M.] and she did indicate an attitude that was definitely leaning against the death penalty, although probably not sufficient, the court found, to grant a challenge for cause. But certainly it's a basis for an exercise of the peremptory challenge.

(10 RT 2450.)

The prosecutor added: "I expect to only have one or two more, so if there's going to be an issue on it we can handle it at the end of my preempts, which I'm getting close to the end." (10 RT 2450.) The court then excused

S.A-M. (10 RT 2450-2451.)

The prosecutor exercised his fifth peremptory challenge against A.C. Defense counsel made no objection. The trial court excused A.C. (10 RT 2460.)

The prosecutor exercised his sixth peremptory challenge against R.A., who is not the subject of Cunningham's *Batson/Wheeler* claim. The trial court excused R.A. (10 RT 2466.)

Subsequently, twelve jurors were accepted by both parties and sworn to try the case without any further *Batson/Wheeler* objections being raised. (10 RT 2470, 2500.) During the selection of the alternate jurors, no *Batson/Wheeler* motion was made. Thereafter, six alternate jurors were sworn. (10 RT 2472-2523.)

After the jurors and alternates were sworn, the prosecutor asked whether the *Batson/Wheeler* motion was still pending. The trial court and defense counsel indicated that it had already been denied. (10 RT 2524.)

The prosecutor stated that he exercised additional peremptory challenges against some jurors of minority status after D.W. and asked whether the court found no prima facie case as to "all three" of them. (10 RT 2524.) The court explained:

> If I recall correctly, the – – Mr. Negus made a Batson-Wheeler motion after the first peremptory of a black juror by the prosecution. The Court made a specific finding that there was not a prima facie showing of any systematic or attempted systematic exclusion of [B]lacks or any other minority and denied the challenge. And therefore, did not require an explanation from the prosecution as to the reasons for the excusal. [¶] As I recall, there were two other – –.

(10 RT 2525.)

Defense counsel and the prosecutor then indicated that the prosecutor exercised peremptory challenges against two other African-American jurors,

S.A-M. and A.C. (10 RT 2525.) The court noted that defense counsel did not renew or make another *Batson/Wheeler* motion for those two prospective jurors. (10 RT 2525.) Defense counsel replied:

> I didn't – – I mean, I had made the motions. You had denied it. And I guess the reasons for my not doing it again will have to go with me to the federal habeas or whatever.

(10 RT 2525.)

The prosecutor then asked for the opportunity to "go on the record" regarding the various challenges. (10 RT 2525.) The trial court stated:

> Sure. Let me, at this point, say that after — even after the two additional challenges the Court is still satisfied that there is not a prima facie showing or prima facie demonstration to the Court of any systematic or attempted systematic exclusion of [B]lack jurors by the prosecution, particularly with regard to the last two peremptories of [B]lack jurors.
>
> The responses in the questionnaire, and the responses of the jurors orally, in the Court's view, provided adequate non-racial basis for the peremptory challenges. And if the motion had been renewed, it would have been denied again at that point, again on the basis that there was not a prima facie showing.
>
> [The] Court will also note that the jury that the prosecution passed on that was actually sworn does include two [B]lack jurors. Which is, again, additional evidence to the Court that there was not an attempt to systematically exclude [B]lacks.

(10 RT 2525-2526.)

The court continued:

> But again, I indicate even though the Court had made the finding that there was not a systematic – – that there was not a prima facie showing of systematic exclusion, and therefore, was not requiring an explanation from the prosecution, and the motion is denied on that basis, however, if the prosecution wanted to preserve for the record its reason for those excusals, the Court would give him an opportunity to do so.

(10 RT 2526.)

Thereafter, the prosecutor explained that he excused D.W. because she was argumentative during voir dire and gave defensive body language motions. He further explained that D.W.'s occupation as a prison guard presented a potential problem because she linked her job with a career opportunity of becoming a psychologist counseling inmates. The prosecutor was especially concerned with her serving as a juror in this case which specifically involved psychologists and psychiatric testimony. (10 RT 2526-2527.)

The prosecutor noted that D.W. described herself as being "on the opposite end of the spectrum" of juror D.P.[50] regarding her views of psychologists and psychiatric testimony. This indicated to the prosecutor that D.W. would tend to always believe such testimony. (10 RT 2527.)

The prosecutor further explained that he confronted D.W. about rolling her eyes at D.P., and D.W. admitted doing so during while D.P. was speaking. However, D.W. approached the prosecutor during a break in violation of a court order not to discuss the case and told the prosecutor that she was just batting her eyes rather than rolling them. This inappropriate behavior coupled with animosity in D.W.'s voice concerned the prosecutor. (10 RT 2527.)

The prosecutor explained that he excused A.C. because she failed to write responses to six questions regarding her views on the death penalty as well as other questions on the questionnaire. He further indicated that A.C. expressed severe reservations about the death penalty during voir dire and lied

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50. During voir dire, D.P. had expressed fairly hostile views about "counselors, therapists, whatever you want to call them, psychologists, psychiatrists," and expressed great skepticism about two psychological experts evaluating a stranger over a short time and suddenly claiming to know what was wrong with that person. (9 RT 2293-2295.) D.P. further stated that an expert's credentials "doesn't mean squat" if they have only spent a few hours, days or weeks talking with the person they are evaluating. D.P. admitted that she was "opinionated." (9 RT 2295.)

about seeing news coverage of a recent planned execution in California which never occurred. (10 RT 2527-2528.)

The prosecutor further explained that he excused S.A-M. due to her responses on the questionnaire indicating that her religious beliefs taught her not to judge others and that she would not consider imposing the death penalty on a combat veteran. He further noted that S.A-M. had a relative who was killed by a deputy sheriff in Los Angeles and that her family wanted criminal charges brought against the sheriff's department. This bias against law enforcement concerned the prosecutor as well. (10 RT 2528-2529.)

Finally, the prosecutor pointed out that, despite S.A-M.'s recognition that there were "probably circumstances where the death penalty could be imposed," she hoped she would never participate in such a decision. Those reservations about the death penalty which were developed during voir dire led the prosecutor to believe S.A-M. would not be an appropriate juror for Cunningham's case. (10 RT 2529.)

Defense counsel did not respond to or comment on the prosecutor's volunteered explanations. (10 RT 2529.) Having previously denied the *Batson/Wheeler* objection for failure to make a prima facie showing of discrimination, the trial court likewise did not evaluate or make any findings on the prosecutor's explanations. (10 RT 2529.)

B. Standard Of Review

"Both the state and federal Constitutions prohibit the use of peremptory challenges to remove prospective jurors based solely on group bias." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1100, citing *Batson* and *Wheeler*.) However, peremptory challenges are presumed to have been based upon constitutionally permissible grounds. (*People v. Alvarez* (1996) 14 Cal.4th 155,

193.)

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

(*People v. Wheeler, supra,* 22 Cal.3d at p. 275.)

Peremptory challenges "based on 'hunches' and even 'arbitrary' exclusion are permissible" provided they are not based on impermissible group bias. (*People v. Turner* (1994) 8 Cal.4th 137, 164-165, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th. 536, 555, fn. 5.) "In addition, peremptory challenges are properly made in response to 'bare looks and gestures' by a prospective juror that may alienate one side." (*Id.* at p. 171, quoting *People v. Wheeler, supra,* 22 Cal.3d at p. 276.)

The party alleging *Batson/Wheeler* error carries the burden of establishing a prima facie case of discrimination. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1203.) The complaining party must "first. . . make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule." (*Id.* at pp. 1199-1200, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154.)

The complaining party must then "make out a prima facie case by 'showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" (*Johnson v. California* (2005) 545 U.S. 162, 168 [125 S.Ct. 2410, 162 L.Ed.2d 129] quoting *Batson v. Kentucky, supra,* 476 U.S. at pp. 93-94.) "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" (*Id.* at p. 170 [rejecting this Court's previous "more likely than not" standard to testing sufficiency of prima

facie case].)

If a prima facie case of discrimination is established, the burden shifts to the party exercising the peremptory challenge to show the absence of discrimination by offering permissible race-neutral reasons for the challenge. (*Johnson v. California, supra,* 545 U.S. at p. 168; *People v. Alvarez, supra,* 14 Cal.4th at p. 193.)

Finally, the trial court must decide whether the objecting party has proved purposeful racial discrimination. (*Johnson v. California, supra,* 545 U.S. at p. 168.) Where a prima facie case has been established, the trial court must make a "sincere and reasoned" evaluation of the offered explanations in light of the particular case, the court's knowledge of trial techniques, and how the party exercising the challenge questioned jurors and exercised other challenges during voir dire. (*People v. Snow* (1987) 44 Cal.3d 216, 222.)

The trial court must determine if the reasons for the peremptory challenge were race-neutral. (*People v. Wheeler, supra*, 22 Cal.3d at pp. 281-282.) If the peremptory challenge was exercised based on race-neutral reasons, the *Wheeler* motion should be denied. However, if the reasons for the challenge were not race-neutral, the motion will be granted. (*Ibid.*) The prosecutor's explanation does not need to rise to the level that would justify a challenge for cause. (*Batson v. Kentucky, supra,* 476 U.S. at p. 97.)

Rulings on *Wheeler* motions are generally reviewed for substantial evidence. (*People v. Alvarez, supra*, 14 Cal.4th at p. 196.) Where the record shows the trial court did not find a prima facie case of discrimination, the entire record is considered for substantial evidence supporting the court's ruling. (See *People v. Davenport, supra,* 11 Cal.4th at p. 1200; *People v. Howard, supra,* 1 Cal.4th at p. 1155; *People v. Jones, supra,* 17 Cal.4th at pp. 293-294.) "If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question," the judgment should be affirmed. (*People*

v. Howard, supra, 1 Cal.4th at p. 1155, quoting *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092; see also *People v. Turner, supra,* 8 Cal.4th at p. 168.)

However, where the trial court failed to articulate or appears to have applied an incorrect standard in its prima facie case ruling, its decision is not entitled to deference. (*People v. Avila, supra,* 38 Cal.4th at pp. 553-554.) Rather, the issue is subject to independent review. (*People v. Howard* (2008) 42 Cal.4th 1000, 1017; *People v. Bonilla* (2007) 41 Cal.4th 313, 342.)

In such cases, this Court must

> apply the high court's standard articulated in *Johnson* . . . and "resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror on the basis of race."

(*People v. Avila, supra,* 38 Cal.4th at p. 554, quoting *People v. Cornwell* (2005) 37 Cal.4th 50, 73 [emphasis in original].) Where the record discloses "reasons other than racial bias for *any* prosecutor to challenge" the juror, no inference of a discriminatory purposes in the exercise of the peremptory challenge can be drawn. (*People v. Cornwell, supra,* 37 Cal.4th at p. 70 [emphasis in original].)

As to the final stage of a *Batson/Wheeler* motion, trial judges are in the best position to assess the credibility of prosecutors and evaluate their reasons for exercising peremptory challenges. (See *People v. Jackson, supra,* 13 Cal.4th at p. 1197; *People v. Turner, supra,* 8 Cal.4th at p. 168.) Therefore,

> [i]f the trial court makes a "sincere and reasoned effort" to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.

(*People v. Montiel* (1993) 5 Cal.4th 877, 909; see also *People v. Jackson, supra,* 13 Cal.4th at p. 1197; *People v. Fuentes* (1991) 54 Cal.3d 707, 720-721 ["great deference"].)

C. Cunningham Failed To Show A.L. Was A Member Of A Cognizable Group, And Waived Any Claim As To A.L.

As noted above, *Batson/Wheeler* objections must establish that the persons excluded are members of a legally cognizable group. (*People v. Davenport, supra,* 11 Cal.4th at pp. 1199-1200; *People v. Howard, supra,* 1 Cal.4th at pp. 1153-1154.) Specifically, the objecting party "should make as complete a record of the circumstances as feasible" and "must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule." (*People v. Wheeler, supra,* 22 Cal.3d at p. 280; see also *People v. Hayes* (1999) 21 Cal.4th 1211, 1264; *People v. Williams* (1997) 16 Cal.4th 635, 663.)

Cunningham failed to satisfy his burden of making as complete a record as possible showing A.L. was a member of the cognizable class which is the subject of his claim. On appeal, Cunningham assumes A.L. was a fourth African-American juror against whom the prosecutor exercised a peremptory challenge. (AOB 204-206.)

However, when A.L. was excused, defense counsel merely stated, "Batson again," without stating any basis for his objection or making any record as to what cognizable class pertained to A.L. (10 RT 2443A.) There is simply no indication in the record that A.L. was African-American. (See 9 RT 2282-2283, 2324-2325, 2340 [voir dire of A.L.].)

Indeed, the record appears to show A.L. was not African-American. In their discussion following the swearing of the jury, the court, defense counsel and the prosecutor all stated that there were only two additional African-American jurors excused after D.W. and a total of three African-American prospective jurors against whom the prosecutor exercised peremptory challenges. The two additional African-American jurors were identified as

S.A-M. and A.C. (See 10 RT 2524-2525.)

It should be noted that defense counsel did not restrict his *Batson/Wheeler* objections to African-Americans or racial groups. He also attempted to argue Vietnam veterans were a cognizable class. (10 RT 2512-2516.) Thus, there is simply no way of knowing what cognizable class Cunningham was asserting as the basis for his *Batson* objection to the prosecutor's peremptory challenge of A.L.

Since Cunningham did not satisfy his initial burden of making as complete a record as possible regarding the peremptory challenge against A.L. or establishing A.L. as a member of a cognizable class, no prima facie case of purposeful discrimination was made and the burden never shifted to the prosecutor to explain his challenge. (See *Batson v. Kentucky, supra,* 476 U.S. at p. 94; *People v. Williams, supra,* 16 Cal.4th at pp. 663-664; *People v. Wheeler, supra,* 22 Cal.3d at p. 281.)

Moreover, the underlying premise of Cunningham's entire *Batson/Wheeler* argument which emphasizes that "this case affected four potential jurors who had an unqualified right to serve on the jury and to be free from discrimination based on race," is severely undermined. (See AOB 228.)

In addition, Cunningham did not clearly articulate his objection to the peremptory challenge against A.L. Instead, he simply stated, "Batson again." (10 RT 2443A.) "The failure to articulate clearly a *Wheeler/Batson* objection forfeits the issue for appeal." (*People v. Lewis* (2008) 43 Cal.4th 415, 481, citing *People v. Gallego, supra,* 52 Cal.3d at p. 166.)

Furthermore, whatever cognizable class might have applied to A.L., Cunningham did not press for any ruling on his generic *Batson* objection. (See 10 RT 2443A.) Failure to press for a ruling on a *Batson/Wheeler* objection also forfeits the claim for purposes of appeal. (*People v. Lewis, supra,* 43 Cal.4th

at pp. 481-482.) Therefore, Cunningham's *Batson/Wheeler* claim as to A.L. can be summarily rejected on this basis as well.

D. Cunningham Waived Any *Batson/Wheeler* claims As To Jurors S.A-M. And A.C. By Failing To Timely Object

In order to preserve a *Wheeler* claim based on the prosecutor's peremptory challenges, the defendant must make a timely objection. (*People v. Fuentes, supra,* 54 Cal.3d at p. 714.) To be timely, a *Wheeler* objection must be made before the jury is sworn. (*People v. Bolin, supra,* 18 Cal.4th at p. 316; *People v. Montiel, supra,* 5 Cal.4th at p. 909; *People v. Howard, supra,* 1 Cal.4th at pp. 1154-1155; *People v. Thompson* (1990) 50 Cal.3d 134, 179-180; *People v. Johnson* (1989) 47 Cal.3d 1194, 1216.)

Likewise, federal courts have held a *Batson* claim must be made before the venire is dismissed in order to be timely. (See, e.g., *United States v. Parham* (8th Cir. 1994) 16 F.3d 844, 847; *Morning v. Zapata Protein, Inc.* (4th Cir. 1997) 128 F.3d 213, 216; *United States v. Maseratti* (5th Cir. 1993) 1 F.3d 330, 335; *United States v. Romero-Reyna* (5th Cir. 1989) 867 F.2d 834, 837.) One of the reasons for this rule is that it allows trial courts to remedy *Batson* violations by returning any inappropriately stricken jurors to the venire. (*United States v. Allen* (E.D. Va. 1987) 666 F.Supp. 847, 856; see *People v. Willis* (2002) 27 Cal.4th 811, 823 [*Batson* allows for remedies short of dismissing the venire].)

When the prosecutor exercised his fourth peremptory challenge against S.A-M., defense counsel indicated that he was "going to make a motion," but would wait to until the prosecutor "does one more" before making another *Batson/Wheeler* objection. (10 RT 2450.) However, no defense motion was ever made prior to the jurors and alternates being sworn, and the venire being excused. (See 10 RT 2450-2522.) Therefore, Cunningham's *Batson/Wheeler*

claim regarding S.A-M. was waived.

Moreover, defense counsel did not articulate any reasons for his objection to excusing S.A-M. (10 RT 2450.) As previously noted, failure to clearly articulate a *Batson/Wheeler* objection forfeits the issue for purposes of appeal. (*People v. Lewis, supra,* 43 Cal.4th at p. 481.) Thus, any claim regarding S.A-M was forfeited for this reason as well.

Cunningham made no objection whatsoever to the prosecutor's fifth peremptory challenge against A.C. (10 RT 2460.) Accordingly, any *Batson/Wheeler* claim regarding A.C. has been forfeited.

Even after the jurors and alternates were sworn, Cunningham raised no *Batson/Wheeler* objections regarding S.A-M. or A.C. Instead, defense counsel simply conceded that he did not renew or make new motions regarding those two jurors. (10 RT 2525.) Presumably, the race-neutral reasons for excusing S.A-M. and A.C. were so obvious that counsel elected not to burden the court with additional frivolous *Batson/Wheeler* motions.

Defense counsel did not even discuss or contest the prosecutor's volunteered explanations for the two additional challenges. (See 10 RT 2526-2529.) Thus, Cunningham cannot be deemed to have made any *Batson/Wheeler* objection as to S.A-M. and A.C., neither timely nor untimely.[51]

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51. In *United States v. Thompson* (9th Cir. 1987) 827 F.2d 1254, the Ninth Circuit created an exception to the timeliness rule when the pattern of discrimination is not apparent until after the jury is selected. (*Id.* at p. 1257.) However, as shown above, even after the venire was dismissed, Cunningham made no *Batson/Wheeler* objections as to S.A-M. and A.C. Therefore, the exception in *Thompson* is inapplicable to Cunningham's case.

E. Cunningham Did Not Establish A Prima Facie Case Of Racial Discrimination Based On The Prosecutor's Peremptory Challenge Against D.W.

In Cunningham's case, the trial court expressly found no prima facie case of racial discrimination had been made as to the prosecutor's peremptory challenge against D.W.[52] (10 RT 2427-2428.) However, the trial court appears to have used an incorrect standard by finding "no systematic pattern of exclusion" rather than an inference. (See *People v. Avila, supra,* 38 Cal.4th at pp. 554-555 [court under mistaken impression that only pattern of discrimination through multiple excusals would make prima facie showing].) Accordingly, this Court must independently review the record to determine whether it supports an inference that the prosecutor's exercise of the peremptory challenge was racially motivated. (*Id.* at p. 554.)

No such inference can be drawn as to prospective juror D.W. As correctly noted by the prosecutor, D.W. worked as a correctional officer, but wanted to "lateral over into prison counseling." (9 RT 2352-2356.)

D.W. also expressed total disagreement with the views of prospective juror D.P., a very pro-prosecution juror who was extremely critical of defense psychiatric evidence. Labeling D.P.'s views as "just kind of out there for me," D.W. stated that such experts "would be necessary." (9 RT 2360.)

Subsequently, the prosecutor informed the court that D.W. approached him as she was leaving the courtroom and told him that she was blinking rather

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52. An implied finding of a prima facie case may be inferred from a trial court's request for the prosecutor to explain his or her peremptory challenge to the particular juror. (*People v. Turner* (1986) 42 Cal.3d 711.) However, in Cunningham's case, the trial court simply invited the prosecutor to give his reasons for the peremptory challenge and specifically stated that it was not obligating the prosecutor to do so. (10 RT 2428.) Accordingly, there was no implied finding of a prima facie case.

then rolling her eyes during his questioning. However, the prosecutor did not request D.W. be admonished at that time because he had not yet decided whether to exercise a peremptory challenge against her and an admonishment might force him to do so. The trial court indicated that it would give the jurors a general admonishment which included not talking to any of the parties. (9 RT 2370-2372.)

Thus, the record shows significant race-neutral reasons for exercising a peremptory challenge against D.W. The defense case for the penalty phase relied heavily on psychiatric testimony from Drs. Williams and Baker. Consequently, the prosecutor legitimately wanted jurors who would be least persuaded by such expert testimony. D.W. was not such a juror.

Not only did D.W. express a strong tendency to be receptive of such defense testimony, but also indicated that she herself wanted to enter the prisoner counseling field. This was a legitimate race-neutral reason for excusing D.W.

In *Avila*, this Court found no inference of a discriminatory purpose in the prosecutor's peremptory challenge against a juror who, among other factors, indicated that she worked closely with psychologists and psychiatrists and valued their opinions. (*People v. Avila, supra,* 38 Cal.4th at p. 556 [prospective juror G.B.]; see also *People v. Huggins, supra*, 38 Cal.4th at p. 229 [prosecutor cited seven reasons for excusing Ray F., which included the prospective juror's indication that he would find psychological or psychiatric testimony helpful].) Since any prosecutor in a penalty phase where the defense primarily relies on PTSD and other mental health claims would have challenged D.W., the record does not support an inference that the prosecutor's peremptory challenge was racially motivated. (See *People v. Cornwall, supra,* 37 Cal.4th at p. 70.)

Moreover, D.W. inappropriately confronted the prosecutor in order to argue with him about whether she rolled or batted her eyes. A juror's hostile

or combative attitude is a valid race-neutral reason for exercising a peremptory challenge. (See, e.g. *People v. Ward*, *supra,* 36 Cal.4th at p. 202 [prospective juror expressed hostility toward prosecutor in response to prosecutor questioning him about gangs]; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125 ["Hostile looks from a prospective juror can themselves support a peremptory challenge"]; *People v. Turner, supra,* 8 Cal.4th at p. 170-171 [prosecutor stated prospective juror "'seems mad or hostile about something'"].)

Any prosecutor would have excused D.W. based on her combative behavior in violation of her duty not to converse with any of the attorneys. As such, the record does not support an inference of racial discrimination. (See *People v. Cornwall, supra,* 37 Cal.4th at p. 70.)

In addition, as the trial court noted, the prosecutor accepted two African-Americans on the sworn jury. (10 RT 2526.) "The presence of these jurors on the panel is 'an indication of the prosecutor's good faith in exercising his peremptories.'" (*People v. Lewis, supra,* 43 Cal.4th at p. 480, quoting *People v. Huggins, supra,* 38 Cal.4th at p. 236; see also *People v. Avila, supra,* 38 Cal.4th at p. 555 [several Black jurors remained on the panel]; *People v. Ward, supra,* 36 Cal.4th at p. 203 [five out of 12 sitting jurors were African American].) As this Court stated in *Turner*,

> While the fact that the jury included members of a group allegedly discriminated against is not conclusive, it is an indication of good faith in exercising peremptories, and an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection. [Citations.]

(*People v. Turner, supra,* 8 Cal.4th at p. 168.)

Because the record does not support an inference that the prosecutor excused D.W. on the basis of her race, Cunningham failed to satisfy his burden of establishing a prima facie case of discrimination. (See *Johnson v. California,*

supra, 545 U.S. at p. 170; *People v. Avila, supra,* 38 Cal.4th at pp. 553-554.) Accordingly, the burden never shifted to the prosecutor to explain his peremptory challenges and the trial court had no duty to conduct a sincere and reasoned evaluation of those explanations. (See *Johnson v. California, supra,* 545 U.S. at p. 168; *People v. Snow, supra*, 44 Cal.3d at p. 222; *People v. Wheeler, supra,* 22 Cal.3d at pp. 281-282.) It follows that Cunningham's complaint that the court did not make a sincere and reasoned evaluation of the prosecutor's volunteered reasons cannot form the basis of reversal.

F. Comparative Analysis

For the first time on appeal, Cunningham invites this Court to engage in comparative juror analysis of the prosecutor's reasons for exercising peremptory challenges against potential jurors D.W., A.C. and S.A-M. with the responses of other jurors whom the prosecutor did not seek to excuse. (AOB 223-227.) Cunningham did not make a prima facie showing of discrimination and failed to make an adequate record regarding any alleged similarities between the jurors. Thus, this Court need not engage in comparative juror analysis on appeal. Even if this Court were to undertake comparative analysis, the inferences Cunningham draws are not supported by the record.

This Court recently held that

> "evidence of comparative juror analysis must be considered in the trial court and even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons."

(*People v. Cruz* (2008) 44 Cal.4th 636, 658, quoting *People v. Lenix* (2008) 44 Cal.4th 602, 622.) "'[R]eviewing courts must consider all evidence bearing on the trial court's factual finding regarding discriminatory intent.'" (*Ibid.*, quoting *People v. Lenix, supra,* 44 Cal.4th at p. 607.)

However, this holding

> does not implicate claims of error at *Wheeler/Batson's* first stage. As our case law establishes, "[t]he high court [in *Miller-El II*[53]] did not consider whether appellate comparative juror analysis is required 'when the objector has failed to make a prima facie showing of discrimination.' [Citation.] A fortiori, *Miller-El* [*II*] does not mandate comparative juror analysis in a first-stage *Wheeler-Batson* case when neither the trial court nor the reviewing courts have been presented with the prosecutor's reasons or have hypothesized any possible reasons."

(*People v. Lenix, supra,* 44 Cal.4th at p. 622, fn. 15, quoting *People v. Bell* (2007) 40 Cal.4th 582, 601.)

Although comparative analysis is one form of relevant circumstantial evidence, it is "'not necessarily dispositive [] on the issue of intentional discrimination.'" (*People v. Cruz, supra*, 44 Cal.4th at p. 658 quoting *People v. Lenix, supra,* 44 Cal.4th at p. 622.) The reviewing court must still be mindful of the inherent limitations of conducting comparative juror analysis "on a cold appellate record." (*People v. Lenix, supra,* 44 Cal.4th at p. 622, citing *Snyder v. Louisiana* (2008) ___ U.S. ___ [128 S.Ct. 1203, 1211, 170 L.Ed.2d 175].)

As this Court has observed:

> There is more to human communication than mere linguistic content. On appellate review, a voir dire answer sits on a page of transcript. In the trial court, however, advocates and trial judges watch and listen as the answer is delivered. Myriad subtle nuances may shape it, including attitude, attention, interest, body language, facial expression and eye contact.

(*Ibid.*)

As further recognized by this Court:

> [A]lthough a written transcript may reflect that two or more prospective jurors gave the same answers to a question on voir dire, "it cannot

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53. *Miller-El v. Dretke* (2005) 545 U.S. 231 [125 S.Ct. 2317, 162 L.Ed.2d 196].

> convey the different ways in which those answers were given. Yet those differences may legitimately impact the prosecutor's decision to strike or retain the prospective juror. When a comparative juror analysis is undertaken for the first time on appeal, the prosecutor is never given the opportunity to explain the differences he perceived in jurors who seemingly gave similar answers." [Citation.] Observing that "[v]oir dire is a process of risk assessment" [citation], we further explained that, "[t]wo panelists [i.e., prospective jurors] might give a similar answer on a given point. Yet the risk posed by one panelist might be offset by other answers, behavior, attitudes or experiences that make one juror, on balance, more or less desirable. These realities, and the complexity of human nature, make a formulaic comparison of isolated responses an exceptionally poor medium to overturn a trial court's factual finding."

(*People v. Cruz, supra,* 44 Cal.4th at pp. 658-659, quoting *People v. Lenix, supra,* 44 Cal.4th at p. 623.)

Accordingly, comparative juror analysis is most effectively considered in trial courts where an "inclusive record" of the comparisons can be made by the defendant, the prosecutor has an opportunity to respond to the alleged similarities and the court can evaluate counsels' arguments based on what it saw and heard during jury selection. (*People v. Lenix, supra*, 44 Cal.4th at p. 624.)

Here, the prosecutor was not required to present the reasons for his challenges to the trial court. He did so independent of any request by the court. Nor did the trial court consider those reasons in finding a lack of a prima facie case. Accordingly, this Court does not need to undertake comparative analysis in this "first stage" *Batson/Wheeler* claim because the criteria set forth in *Lenix* is not present.

Comparative juror analysis is a tool for assessing *the trial court's factual findings* regarding a prosecutor's *discriminatory intent.* (*People v. Cruz, supra*, 44 Cal.4th at p. 658; *People v. Lenix, supra,* 44 Cal.4th at p. 607.) In a "first stage" case as this, the trial court merely determines whether the facts give rise to a prima facie showing of discrimination regardless of the prosecutor's actual intent. (See *Johnson v. California, supra,* 545 U.S. at p. 168; *Batson v.*

Kentucky, supra, 476 U.S. at pp. 93-94.) Indeed, defense counsel did not even comment, and the trial court did not evaluate or rule, on the prosecutor's volunteered explanations. (10 RT 2529.) Comparative juror analysis need not be engaged in a case such as this where there is no finding of discriminatory intent or lack thereof to evaluate on appeal.

Moreover, Cunningham failed to make an "inclusive record" regarding his comparative juror analysis arguments in the trial court. (See *People v. Lenix, supra,* 44 Cal.4th at p. 117.) The similarities between various jurors urged by Cunningham for the first time on appeal were not developed in the record, addressed by the prosecutor or evaluated by the trial court based on its personal observations. Accordingly, the record is inadequate for any meaningful review of Cunningham's comparative juror analysis arguments.

Nonetheless, even if this Court elects to consider Cunningham's comparative analysis arguments, the trial court's ruling should be affirmed. As explained below each of Cunningham's arguments is unavailing.

1. Potential Juror A.L.

As to potential juror A.L., Cunningham presents no comparative analysis argument. (See AOB 225-226.) This is not surprising since, as discussed in Argument IX(C), *ante*, there was no evidence in the record that A.L. was the member of any cognizable class.

2. Potential Juror D.W.

Cunningham argues potential juror D.W. was excused for acting "removed," being argumentative and for extremist views whereas "other white male correctional officers, like R.H., were not questioned nearly as vigorously as D.W." (AOB 25, citing 10 RT 2480-2483, 2489-2492, 2526.) However, the

record cited by Cunningham does not indicate R.H's race or support his assumption that R.H. was not African-American like D.W.[54] (See 10 RT 2480-2483, 2489-2492.) Moreover, Cunningham does not articulate who the other alleged "white male correctional officers" were. (See AOB 25.) As such, Cunningham's comparative analysis for D.W. fails at the outset.

Moreover, Cunningham fails to point out that the prosecutor stated during voir dire, "I think I"m going to pick on [R.H.] today. Because you're a correctional officer. And when I have a group I get to pick on one juror." (10 RT 2489.) Thereafter, the prosecutor questioned R.H. about his views and experiences as a correctional officer as well as other issues. (10 RT 2489-2493.) Thus, Cunningham's argument that R.H. was not questioned as vigorously as D.W. is unpersuasive.

Most important, R.H. did not express the strong bias in favor of defense psychiatric testimony as exhibited by D.W. Moreover, R.H. did not confront the prosecutor inappropriately during a break as did D.W. (See 9 RT 2293-2295; 10 RT 2480-2483, 2489-2493, 2526-2527.) In light of these significant dissimilarities between D.W. and R.H., Cunningham's comparative analysis argument based on D.W. should be rejected.

3. Potential Juror A.C.

Cunningham argues potential juror A.C. was excused for failing to completely fill out questions regarding the death penalty on her questionnaire and had severe reservations about capital punishment, whereas "other white jurors – –like R.H[.] – – indicated that he believed he could only vote for the death penalty if the case was proven beyond a shadow of a doubt [citation] and

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54. It appears that R.H.'s juror questionnaire was not included in the ten-volume Supplemental Clerk's Transcript filed with this appeal.

at least one other white juror, P.B., also failed to complete significant portions of the questionnaire but" were not questioned as pointedly by the prosecutor. (AOB 225, citing 10 RT 2528, 2490, 246-2461.)

Again, the record does not indicate R.H.'s race. (See 10 RT 2480-2483, 2489-2493.) Although not cited by Cunningham, P.B. stated that he was "white" in his questionnaire. (7 Supp. CT at 1842.) Cunningham fails to identify the other jurors he implies did not fully complete the questionnaire. (See AOB 25 ["at least one other white juror"].)

Despite his incomplete questionnaire, P.B. expressed very strong pro-prosecution views regarding the death penalty, stating in his questionnaire that he favored the death penalty and thought LWOP was "a waste of taxpayers money." (7 Supp. CT 1860.) Indeed, defense counsel requested in-chambers voir dire of P.B. pursuant to a challenge for cause. (8 RT 2156-2158.) During that examination, P.B. reaffirmed his pro-death penalty views. (8 RT 2159-2163.)

The court denied the defense challenge for cause. (8 RT 2163.) Subsequently, without further inquiry, defense counsel exercised a peremptory challenge against P.B. (10 RT 2461.)

In light of P.B.'s staunchly pro-death penalty views and the clear indication that defense counsel would exercise one of his peremptory challenges against P.B. after having been unsuccessful in excusing him for cause, there was absolutely no need for the prosecutor to question P.B. In sharp contrast, A.C.'s ambiguous view about the death penalty as reflected in her questionnaire warranted questioning by the prosecutor. (See 7 Supp. CT 1944-1950.)

For example in her questionnaire, A.C. stated her belief that the death penalty was randomly imposed. (7 Supp. CT 1948.) During voir dire, A.C. explained that the death penalty "deal[s] with massive killers and stuff like

that." (8 RT 2111.) When asked why she did not answer in her questionnaire what purpose the death penalty served, A.C. replied (after the trial court sustained an objection), "When you're dead, you're dead." (8 RT 2110-2111.)

In contrast to P.B.'s pro-prosecution views, A.C.'s beliefs that the death penalty was randomly imposed and served no purpose other than ending the life of the defendant were antagonistic to the prosecution. Moreover, unlike P.B., A.C. untruthfully stated that she had just heard a news report that someone was to be executed in California. (8 RT 2111-2112; 10 RT 2527-2528.) Based on A.C.'s responses, the prosecutor moved to excuse her for cause. The court denied the motion. (8 RT 2112.)

In sum, P.B. was a strongly pro-death penalty potential juror who was challenged for cause by the defense, whereas A.C. was challenged for cause by the prosecutor for her skeptical views regarding the death penalty. Moreover, P.B. was previously the victim of a robbery. (7 CT 1851.) Of course, the instant case involved robbery special circumstances. In terms of these material differences, Cunningham's comparative analysis argument based on P.B. is meritless.

Cunningham's comparative analysis between A.C. and R.H. is also unavailing. Although R.H. stated in his questionnaire that the death penalty should be proved "beyond a shadow of a doubt in the right mind," he acknowledged during voir dire that the legal standard was different and that he would follow the standard given by the court. (10 RT 2492.)

Also, R.H. testified that his cousin's fiancee was murdered by someone in the commission of a vehicle burglary. (10 RT 2492-2492.) Cunningham's case involved burglary special circumstances. In light of these important dissimilarities, Cunningham's comparative analysis of A.C. and R.H. should be rejected.

4. Potential Juror S.A-M.

Cunningham argues potential juror S.A-M. was excused due to her serious reservations about the death penalty, whereas the prosecutor was forgiving of Hispanic potential jurors such as B.H.[55] and B.A. who also expressed reservations about the death penalty. (AOB 225-226, citing 10 RT 2496, 2508, 2528.) These comparative analysis arguments are meritless.

S.A-M indicated that she hoped she would never be part of a decision to impose the death penalty and did not want such a decision on her conscience. She stated that she would not be able to render a death verdict and would want to oppose it even if the majority was in favor of death. (8 RT 2120-2121.) After further questioning about the death penalty, S.A-M. reiterated, "I'm against it no matter what." (8 RT 2121-2122.)

Subsequently, S.A-M. indicated that she could return a death verdict in certain circumstances. (8 RT 2123-2124.) However, she stated that her religious beliefs were the source of her opposition to the death penalty, and that she agreed with those beliefs which would have some effect on her as a juror. (8 RT 2124-2126.)

S.A-M. further stated that she could not consider imposing the death penalty on a combat veteran, which would be one of the factors in her decision. (8 RT 2127-2129.) She reiterated that her religious beliefs were against the death penalty. (8 RT 2130.)

The prosecutor moved to excuse S.A-M. for cause. The court denied the motion. (8 RT 2131-2132.) However, as the trial court pointed out in finding no prima facie case for the *Batson/Wheeler* objection, S.A-M. "was definitely

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55. It does not appear B.H.'s or B.A.'s questionnaires were included in the Supplemental Clerk's Transcript filed with this appeal.

leaning against the death penalty" and although probably insufficient for a challenge for cause "certainly. . . a basis for an exercise of the peremptory challenge." (10 RT 2450.)

In contrast, B.H. agreed with the prosecutor that he had the "moral fiber" to return a death verdict if he thought it was appropriate, and there is no indication of him having any opposition to the death penalty. (See 10 RT 2495-2496.) Moreover, B.H. worked on and contributed to the political campaign of former San Bernardino County District Attorney Dennis Stout. (10 RT 2495.)

B.A. expressed no leanings whatsoever on the death penalty, declaring himself open-minded the issue. (10 RT 2507-2508.) He further indicated that if any crimes deserved the death penalty it would those involving premeditated and multiple murders. (10 RT 2510.) B.A. also stated that he had been frustrated in the past by sitting on a hung jury where he was in the majority. (10 RT 2508-2510.)

Thus, B.H. and B.A. had pro-prosecution views and experiences, whereas S.A-M. had staunch, religious opposition to the death penalty. Also, S.A.-M's family had a very negative experience with law enforcement and wanted criminal charges filed against the sheriff's department. (See 10 RT 2528-2529.) In light of these dissimilarities, Cunningham's comparative analysis for S.A-M must be rejected.

In sum, each of Cunningham's arguments for D.W., A.C. and S.A-M. compares jurors with significantly different views, beliefs and experiences regarding the death penalty and other material issues. As such, comparative juror analysis fails to provide any circumstantial evidence of discriminatory intent on the part of the prosecutor. Accordingly, the judgment should be affirmed.

G. The Appropriate Remedy For *Johnson* Error Is Limited Remand To The Trial Court To Conduct The Second And Third Stages Of *Batson*

Cunningham contends trial court error in failing to find a prima facie case of racial discrimination requires "automatic reversal" of the judgment. (AOB 227-228.) This argument was rejected in *People v. Johnson* (2006) 38 Cal.4th 1096, upon remand of *Johnson v. California, supra,* 545 U.S. 162, from the United States Supreme Court. Rather than automatic reversal, limited remand to the trial court is the appropriate remedy for such *Batson/Wheeler* errors. (*Id.* at p. 1100.)

In a such a remand, the trial court

> should attempt to conduct the second and third *Batson* steps. It should require the prosecutor to explain his challenges. If the prosecutor offers a race-neutral explanation, the court must try to evaluate that explanation and decide whether defendant has proved purposeful racial discrimination. If the court finds that, due to the passage of time or any other reason, it cannot adequately address the issues at this stage or make a reliable determination, or if it determines that the prosecutor exercised his peremptory challenges improperly, it should set the case for a new trial. If it finds the prosecutor exercised his peremptory challenges in a permissible fashion, it should reinstate the judgment.

(*People v. Johnson, supra,* 38 Cal.4th at pp. 1103-1104.)

Respondent reasserts that Cunningham's various *Batson/Wheeler* claims should be rejected on grounds of forfeiture and failure to satisfy his burden of showing a prima facie case of racial discrimination. However, should this Court disagree, the appropriate remedy would be to remand the case to the trial court to conduct a sincere and reasoned evaluation of the prosecutor's explanations rather than automatic reversal of the judgment.

X.

CUNNINGHAM FAILS TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING HIS REQUEST FOR A CONTINUANCE BASED ON PUBLICITY CONCERNING A TOTALLY UNRELATED AND COMPLETELY DISSIMILAR INCIDENT

Cunningham claims the trial court abused its discretion by denying his request for a continuance based on publicity regarding the April 19, 1995, bombing of the Murrah Federal Building in Oklahoma City. He contends the denial of his continuance request caused voir dire to be conducted in "an unduly prejudicial atmosphere" in violation of his constitutional rights to due process and a fair trial. (AOB 228-235.)

However, the Oklahoma City bombing, which was totally unrelated to Cunningham's case, drastically differed from the S.O.S. murders in kind and degree. Since the Oklahoma City bombing simply had no bearing on Cunningham's case, the trial court's denial of Cunningham's continuance request was eminently reasonable. As Cunningham fails to show an abuse of discretion, his due process and fair trial claims must be rejected.

A. Relevant Proceedings

On May 12, 1995, Cunningham filed a motion requesting a continuance for further defense investigation to address "the difficulty of selecting a fair and impartial jury in this case, due to the interconnection of some of the major issues in Mr. Cunningham's life, and of those persons accused of the bombing of the federal building in Oklahoma City." (6 CT 1485-1486.) Declarations from defense counsel and a clinical psychologist were attached to the motion. These declarations argued Timothy McVeigh, one of the Oklahoma City bombing suspects, was an army veteran like Cunningham. Defense counsel

requested the trial be continued to September, 1995, in order to avoid publicity stemming from the Oklahoma City bombing trial which he represented would take place within 90 days. (6 CT 1487-1502.)

On the same day the motion was filed, the prosecutor objected to the continuance request, noting the case was approaching its third anniversary. The prosecutor further noted there were no similarities between Cunningham's case and the Oklahoma City bombing, any alleged impact would not be ameliorated by September, and any past or future terrorist acts should not affect decisions in Cunningham's case. The prosecutor also indicated that his witnesses wished to proceed with the case with no further continuances. (5 RT 1136-1138)

The trial court noted that McVeigh was a Gulf War rather than Vietnam War veteran and found no similarities between Cunningham's case and the Oklahoma City bombing. Defense counsel responded that Cunningham might raise a PTSD defense and he anticipated that McVeigh might be raising the same defense. Counsel also argued future delays might occur because one of his experts was working with trauma victims in Oklahoma City. (5 RT 1138-1142.)

Finding the events in Oklahoma City had no significant impact on Cunningham's case, the trial court denied the continuance request. (5 RT 1142.)

B. The Trial Court Properly Denied The Continuance

A continuance may be granted only upon a showing of good cause. (*People v. Mickey, supra,* 54 Cal.3d at p. 660, citing § 1050, subd. (d) & former § 1050, subd. (b).) "The granting or denial or a motion for continuance rests within the sound discretion of the trial court." (*Ibid.*)

For a mid-trial[56] continuance motion, the court

> "'must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.'" [Citation.] In the absence of a showing of an abuse of discretion and prejudice to the defendant, a denial of a motion for a continuance does not require reversal of a conviction. [Citation.]

(*People v. Barnett* (1998) 17 Cal.4th 1044, 1125-1126, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 972.)

The moving party bears the burden of establishing on appeal that the denial of the continuance request was an abuse of discretion. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.) Absent a clear abuse of discretion, the trial court's ruling will not be disturbed on appeal. (*People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.)

Abuse of discretion for denial of a continuance is shown where the trial court rules "'in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice'" (*Mendez v. Superior Court* (2008) 162 Cal.App.4th 827, 833, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316) or "exceeds the bounds of reason, all circumstances being considered" (*People v. Froehlig, supra,* 1 Cal.App.4th at p. 265).

> In deciding whether the denial of a continuance was so arbitrary as to violate due process, the reviewing court looks to the circumstances of each case, "'particularly in the reasons presented to the trial judge at the time the request [was] denied.'"

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56. In Cunningham's case, the continuance motion was made after the guilt phase was completed but prior to commencement of voir dire for the penalty phase. Since "the phases of a capital trial are stages of a unitary trial, not distinct trials," Cunningham's motion was made in the midst of trial. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 434 [finding motion for self-representation untimely where made between guilt and penalty phases of capital trial].)

(*People v. Courts* (1985) 37 Cal.3d 784, 791, quoting *People v. Crovedi* (1966) 65 Cal.2d 199, 207.)

In light of these principles, the denial of Cunningham's request for a continuance did not constitute an abuse of discretion. As recognized by the trial court and prosecutor, there was absolutely no relation or similarity between Cunningham's case and the Oklahoma City bombing.

McVeigh committed mass murder through the detonation of a 3,000 to 6,000 pound bomb, killing 168 people which included 19 children and eight law enforcement officials. (*United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1177.) Cunningham shot three victims with a firearm.

The Oklahoma City bombing was politically motivated with the goal of inciting a general uprising against the government (*United States v. McVeigh, supra,* 153 F.3d at p. 1177), whereas Cunningham's murders were financially motivated.

The only common feature argued by defense counsel was that both Cunningham and McVeigh were army veterans. However, that tenuous comparison was further weakened by the fact that, unlike Cunningham, McVeigh was not a veteran of the Vietnam War. Cunningham's jury would hear defense testimony that the Vietnam conflict had significant characteristics not present in any other conflict which generated unique problems for Vietnam War veterans. (See 14 RT 4486-4489; 17 RT 5198-5205.)

In arguing his penalty phase voir dire was conducted in an unduly prejudicial atmosphere, Cunningham cites *Murphy v. Florida* (1975) 421 U.S. 794 [95 S.Ct. 2031, 44 L.Ed.2d 589]; *Norris v. Risley* (9th Cir. 1989) 878 F.2d 1178; *Martinez v. Superior Court* (1981) 29 Cal.3d 574; *People v. Houston* (2005) 130 Cal.App.4th 279; and *Corona v. Superior Court* (1972) 24 Cal.App.3d 872.) (AOB 233-235.)

However, each of those cases addressed juries exposed to prejudicial information specifically related to the defendant or the particular crimes charged against him. (See *Murphy v. Florida, supra,* 421 U.S. at p. 795 [news accounts about defendant's prior felony conviction and facts of charged offense]; *Norris v. Risley, supra,* 878 F.2d at p. 1179 [spectators wearing "Women Against Rape" buttons at defendant's trial]; *Martinez v. Superior Court, supra,* 29 Cal.3d at pp. 578-580 [extensive press coverage of defendant's arrest, offenses and legal proceedings]; *People v. Houston, supra,* 130 Cal.App.4th at p. 309 [spectators at defendant's trial wearing buttons and placards with victim's likeness]; *Corona v. Superior Court, supra,* 24 Cal.App.3d at pp. 879-882 ["[p]ervasive and repeated press and television publicity" regarding defendant's crimes, investigation and psychiatric history].) Thus, the cases upon which Cunningham seeks to rely are inapposite.

In light of the utter lack of any relation or similarity in kind or degree between the massive bombing and massacre of 168 people in Oklahoma City and Cunningham's case, there was no showing of good cause for a continuance based on the Oklahoma City bombing. For the same reasons, Cunningham fails to show the trial court's denial of the continuance request was arbitrary, capricious, patently absurd or beyond the bounds of reason. Accordingly, the trial court's ruling should not be disturbed on appeal. (See *People v. Barnett, supra,* 17 Cal.4th at pp. 1125-1126; *People v. Zapien, supra,* 4 Cal.4th at p. 972; *People v. Mickey, supra,* 54 Cal.3d at p. 660.)

Likewise, Cunningham has failed to establish the trial court's denial of his continuance request "was so arbitrary as to violate due process" in light of the circumstances of his case. (See *People v. Courts, supra,* 37 Cal.3d at p. 791.) Thus, Cunningham's constitutional claims must be rejected as well.

Moreover, contrary to defense counsel's predictions, McVeigh did not put on a PTSD defense. (See *United States v. McVeigh, supra,* 153 F.3d at pp.

1188-1192, 1211-121 [guilt phase defense of alternative perpetrators; penalty phase defense that McVeigh played lesser role and was less culpable than other leaders and organizers of conspiracy, and McVeigh's outrage against government was objectively reasonable in light of Branch Davidian incident in Waco, Texas].) Since the claimed prejudice never materialized, reversal of the judgment is unwarranted. (See *People v. Barnett, supra,* 17 Cal.4th at pp. 1125-1126; *People v. Zapien, supra,* 4 Cal.4th at p. 972.)

Furthermore, contrary to defense counsel's prediction, the McVeigh trial was held in 1997, nearly two years after Cunningham's trial. (See *United States v. McVeigh, supra,* 153 F.3d at p. 1179.) Thus, "substantial justice" would not have been accomplished by the granting of a 90-day continuance into September of 1995. (See *People v. Barnett, supra,* 17 Cal.4th at pp. 1125-1126; *People v. Zapien,, supra,* 4 Cal.4th at p. 972.) Since Cunningham has neither shown an abuse of discretion nor prejudice concerning the denial of his continuance request, the judgment should be affirmed.

XI.

THERE IS NO SUA SPONTE DUTY TO APPOINT A SECOND ATTORNEY IN A CAPITAL CASE IN THE ABSENCE OF A REQUEST BY THE DEFENSE

Implicitly conceding that there was no request for cocounsel in the trial court, Cunningham claims the court erred by failing to sua sponte appoint a second qualified attorney to assist him with his capital case. He contends he was prejudiced by the court's alleged error. (AOB 235-241.) However, there is no sua sponte duty to appoint a second attorney in a capital case absent a request and sufficient factual showing for such a need by defense counsel.

At the time of Cunningham's trial, Penal Code section 987, subdivision (d), provided in relevant part:

> In a capital case, the court *may appoint* an additional attorney as a cocounsel *upon a written request* of the first attorney appointed. The request shall be *supported by an affidavit* of the first attorney setting forth in detail the reasons why a second attorney should be appointed.

(Stats. 1992, ch. 264, § 3, pp. 1076-1077 [emphasis added].) As amended in 1998, the above-quoted language in section 987, subdivision (d), currently remains the same. (See Stats. 1998, ch. 587, § 4, p. 3208.)

Cunningham seeks to rely on section 987 as support for his claim. (See AOB 236.) However, no sua sponte duty to appoint additional counsel can be derived from a statute which grants discretionary authority to the trial court only upon a written request and supporting affidavit by primary counsel.

> Indeed, under the statute, the trial court lacks any specific authority to appoint a second attorney in the absence of a request from the first attorney and the making of a factual record sufficient to support such an appointment.

(*People v. Padilla* (1995) 11 Cal.4th 891, 928, overruled on other grounds in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1 [rejecting argument that trial courts have "inherent power" to appoint second attorney].)

As implicitly conceded by Cunningham, it appears that primary counsel never made any request for co-counsel. (See 1 CT Index i-xxx [Chronological and Alphabetical Indices].) In the absence of a request and supporting affidavit, the trial court had no sua sponte duty or statutory authority to appoint a second attorney. (See § 987, subd. (d); *People v. Padilla, supra,* 11 Cal.4th at p. 928.)

Cunningham cites *Keenan v. Superior Court* (1982) 31 Cal.3d 424, in support of his claim. (See AOB 236.) The defendant in *Keenan* brought a motion supported by specific facts and argument in the trial court. (*Id.* at p. 432.) Thus, Cunningham's reliance on *Keenan* as authority for a sua sponte duty to appoint co-counsel in the absence of a request in the trial court is misplaced.

Cunningham also claims the trial court violated his rights under the federal and state constitutions by failing to sua sponte appoint a second attorney. (AOB 235-239.) However, "there is no constitutional right per se to the appointment of co-counsel in a capital case." (*Riley v. Taylor* (3rd Cir. 2001) 277 F.3d 261, 306 (en banc); see also *Bell v. Watkins* (5th Cir. 1982) 692 F.2d 999, 1009 ["the Constitution dictates no such requirement"]; *People v. Jackson* (1980) 28 Cal.3d 264, 286-288, overruled on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [additional legal representation at penalty phase argument "is not fundamental procedural right akin to the basic right to counsel"].)

As shown above, any right to a second attorney for capital defendants in California is derived from statute rather than the state or federal constitution. Since Cunningham's co-counsel claim must be rejected on constitutional as well as statutory grounds, the judgment should be affirmed.

XII.

CUNNINGHAM FAILS TO SHOWS THE TRIAL COURT'S ADMISSION OF FIVE PHOTOGRAPHS AND A VIDEOTAPE OF THE CRIME SCENE IN THE PENALTY PHASE CONSTITUTED AN ABUSE OF DISCRETION

Cunningham claims the trial court erred by admitting five photographs and a videotape of the crime scene in the penalty phase because the evidence was irrelevant and more prejudicial than probative. He argues the alleged error violated his constitutional right to due process and requires reversal of the judgment.[57] (AOB 241-250.)

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57. Curiously, Cunningham contends this alleged error in the penalty phase requires reversal of his "conviction[s]." (See AOB 250.)

Cunningham fails to appreciate the particular relevance of the video and photographs under section 190.3, subdivision (a), to show the deliberate and brutal circumstances of his crimes, especially where defense counsel vigorously cross-examined and attempted to discredit the findings of the forensic pathologist in the penalty phase. Cunningham fails to show either an abuse of discretion or constitutional error. Moreover, Cunningham waived any claim regarding one of the photographs by withdrawing his objection in the trial court and stipulating to its admission.

A. Relevant Proceedings

Cunningham filed a motion to limit photographic evidence in the penalty phase trial. In the motion, Cunningham argued photographs of the victims were not relevant to any disputed issue, were more prejudicial than probative and admission of the photographs would violate his constitutional rights to due process, a fair trial and a reliable judgment. (6 CT 1515-1522.)

During a court hearing on the motion, the prosecutor indicated that he intended to introduce five photographs which had been previously admitted in the guilt phase. (6 RT 1583-1584.) The court noted that four of the photographs (Exhibits 11, 89, 90 and 91) were three-by-five inches in size and the fifth photograph (Exhibit 19) was either eight-by-ten or eight-by-twelve inches in size. (6 RT 1584.) Defense counsel argued the photographs appealed to "emotion and shock, as opposed to a balanced review of the appropriate penalty." (6 RT 1584.)

The prosecutor stated that all of the photographs depicted the crime scene rather than the autopsies and that he intended to use blowups of the photographs for Dr. Duazo's testimony as he did in the guilt phase. The prosecutor argued the photographs showed premeditation and the binding of the

victims which corroborated Cunningham's statements to the detectives. (6 RT 1585.)

The trial court made the following findings and ruling:

> Well, certainly the large exhibit, Exhibit 19, is a very graphic depiction of the manner in which the crimes were carried out or executed. Shows the condition of the – – each of the bodies as they were left or found in the restroom where they were killed. Shows two of them still having their hands bound behind them.
>
> I think it's highly probative on the circumstances surrounding the commission of the crimes, which is relevant factor (a) evidence for the jury to consider.
>
> And while there is certainly some blood on the floor, it's not – – there's no wounds shown that are graphic. It's not particularly gory or gruesome.
>
> The Court finds that the only prejudicial effect of the photograph is to demonstrate and visualize the manner in which the homicides were committed, which, as I say, is probative in and of itself and is a valid factor (a) aggravation evidence that the district attorney is entitled to put on in the penalty phase and have the jury consider and weigh.
>
> The three of the photographs, smaller photographs, 90, 91 and 11, show the closeups of two of the victims' hands being bound behind them. And again, that's certainly highly relevant and probative on the issues of premeditation and deliberation and the manner in which the crimes were carried out.
>
> And again, they don't' show any wounds. Two of them don't even show any blood. Again, there's nothing particularly gory or gruesome about them.
>
> Court finds they're highly relevant and probative.

(6 RT 1585-1586.)

The prosecutor stated that the last small photograph showed tape on one of Mr. Smith's hands which corroborated Cunningham's statements that he shot Smith a second time because he had broken free of his bonds. This was not depicted in the larger photograph. (6 RT 1586.)

As to that photograph the trial court ruled as follows:

And it does show Mr. Smith from the opposite side or angle, showing the other side of his face as well.

Again, it does tend to show manner in which the crimes were carried out visualizing some of the actions that the defendant verbalized. And is, therefore, again relevant and probative in terms of the jury visualizing the manner in which the crimes were committed, the circumstances surrounding the commission of the crimes. And therefore, is relevant as to factor (a) evidence.

Again, there's certainly a fair amount of blood in the photograph. But again, it doesn't show any closeup of any wounds. It's not particularly graphic or gory or gruesome.

And the – – in that it does show the other hand and tape, it's not merely duplicative of the other photograph. Therefore, the court does find that the probative value significantly outweighs any possible prejudicial effect.

The objection is overruled, and the court would allow those photographs to be used. And the court will deem the objection to be made at the time that they're – – or deem that the objection is renewed at the time the photographs are shown and would overrule the objection on the same grounds stated.

(6 RT 1586-1587.)

During the trial, the prosecutor also indicated that he wanted to admit a silent videotape of the crime scene which depicted the freeway and parking lot, forensic experts walking around the building, the hallways and warehouse, the register on the office desk, a ceiling to floor view of the inside of the women's bathroom including the victims' bodies and at least one bullet casing, and the lobby. The videotape (Exhibit 186) was approximately 15 minutes in length and "probably not more than thirty seconds or so is devoted to the bathroom." (11 RT 2822-2823.)

Defense counsel argued the portion of the videotape depicting the bathroom should be excluded because it unduly focused on the victims' faces and blood on the floor. Counsel further claimed the videotape added nothing to the still photographs which the court had ruled admissible. (11 RT 2823-

2824.)

After viewing the videotape, the trial court issued the following findings and ruling:

> All right. The record will reflect we've played that portion of the videotape. The court's had a chance to review it.
>
> It does show the entirety of the bathroom, the ceiling, the walls, the stalls. It shows the position of the three victims with zoom-ins on the hands and the tape of the two victims who are still bound and shows the third victim's hands unbound and zooms in on the broken tape on that, as well as one of the casings.
>
> And it does seem to put into perspective the, the scene as described; showing in the photographs the advantage of a moving camera, and zooming in and out is able to put the various items into better perspective and focus on the items.
>
> So the court does find that it does have significant probative value in that it does tend to further explain and demonstrate the manner in which the killings were carried out. There is a fair amount of blood on the floor but there's no gaping wounds or things of that nature being shown. It's not particularly gory or gruesome. So the court finds that the probative value significantly outweighs any potential prejudicial effect.
>
> The objection is overruled.

(11 RT 2824-2825.)

Subsequently, the trial court formally admitted the five photographs and the videotape. (13 RT 4251, 4255-4257, 4263.) At that time, defense counsel stated that "given the trial court's ruling on other things," he was withdrawing his objection and stipulating to the admission of Exhibit 91 depicting Mr. Sonke in the bathroom. (13 RT 4257.)

B. Cunningham Waived His Claim As To Mr. Sonke's Photograph

Cunningham waived any claim that Exhibit 91, the photograph of Mr. Sonke, was erroneously admitted. Evidence Code section 353 states:

> 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.

In order to preserve a challenge to the admission of trial evidence for appeal purposes, a party must comply with Evidence Code section 353. (*People v. Ramos, supra,* 15 Cal.4th at p. 1171.)

Specifically, a defendant who fails to object to the admission of a victim's photograph at trial forfeits for purposes of appeal any claim that the photograph should have been excluded. (See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 609; *People v. Vieira, supra,* 35 Cal.4th at p. 193; *People v. Boyette* (2002) 29 Cal.4th 381, 418; *People v. Seaton* (2001) 26 Cal.4th 598, 655.) Not only did Cunningham withdraw his objection to Exhibit 91, but he also stipulated to its admission. Accordingly, any claim that the trial court erred in admitting Sonke's photograph has been forfeited.

C. The Photographs And Videotape Of The Crime Scene Were Relevant At The Penalty Phase, Not Unduly Gruesome Or Inflammatory, And Properly Admitted

The trial court properly admitted the photographs and videotape of the crime scene.

> "The admission of allegedly gruesome photographs is basically a question of relevance over which the trial court has broad discretion." [Citations.] The further decision whether to nevertheless exclude relevant photographs as unduly prejudicial is similarly committed to the trial court's discretion: "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." [Citations.] *Notably, however, the discretion to exclude photographs under Evidence Code section 352 is much narrower at the penalty phase than at the guilt phase. This is so because the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences (§ 190.3, factor (a)), and because the risk of an improper guilt finding based on visceral reactions is no longer present.* [Citations.]

(*People v. Bonilla, supra,* 41 Cal.4th at pp. 353-354 [emphasis added].)

In Cunningham's case, the photographs of the victims were highly probative of the circumstances of the crime which was a valid aggravating factor to be considered by the jury. The photographs, which depicted how the victims were bound at the time of the murders, did not depict close-ups of any wounds, were not particularly gory or gruesome and were not duplicative. (See 6 RT 1585-1587.)

The videotape provided the jury with additional relevant evidence of the circumstances of the crimes by depicting the exterior and interior areas of the S.O.S. building where various events described in the testimony took place. The 15-minute video only included approximately 30 seconds of a top-to-bottom panning of the bathroom with "zoom-ins" on the victims' bindings. The video did not focus on the victims' wounds, and was not particularly gory or gruesome. As noted by the trial court, the video gave perspective to the crime scene which was not evident in the photographs. (See 11 RT 2822-2825.)

The trial court cited section 190.3, factor (a), and the relevance of showing the circumstances of the crimes in admitting the photographs and videotape. (See 6 RT 1585-1587, 2824-2825.) Photographic evidence which depicts "the deliberate and brutal nature of the crime" is admissible under section 190.3, factor (a). (See *People v. Staten* (2000) 24 Cal.4th 434, 463.) The prosecutor had a "right to establish the circumstances of the crime[s],

including [their] gruesome consequences" at the penalty phase. (*People v. Bonilla, supra,* 41 Cal.4th at p. 354.)

Also, defense counsel vigorously cross-examined Dr. Duazo at the penalty phase, challenging her conclusions as to the manner and timing of the victims' deaths. (See 12 RT 3034-3095, 4004-4049, 4053-4097, 4111-4117, 4119-4120.) Counsel even used the largest photograph, Exhibit 19, in his cross-examination. (12 RT 4084.) Since the photographs and videotape assisted the jury in understanding and evaluating Dr. Duazo's testimony, the evidence carried additional relevance. (See, e.g., *People v. Bonilla, supra,* 41 Cal.4th at p. 354 [photographs used by pathologist to assist jury in understanding testimony].)

As the photographs and videotape were highly relevant under section 190.3, factor (a), and not particularly gory or inflammatory, their probative value was not clearly outweighed by any prejudicial effect. Accordingly, Cunningham fails to show the trial court abused its discretion or committed constitutional error in admitting the evidence. (See *People v. Bonilla, supra,* 41 Cal.4th at p. 354.)

As this Court observed in *Bonilla*,

> """"[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant."""" [Citation.] Likewise here. But as unpleasant as these photographs are, they demonstrate the real-life consequences of [the defendant's] actions. The prosecution was entitled to have the jury consider those consequences.

(*People v. Bonilla, supra,* 41 Cal.4th at p. 354, quoting *People v. Moon* (2005) 37 Cal.4th 1, 35.) The judgment should be affirmed.

XIII.

CUNNINGHAM FORFEITED ANY CLAIM THAT THE TRIAL COURT ERRED IN FAILING TO DISCHARGE JUROR N.B. FOR MISCONDUCT SINCE HE CONSENTED TO HER REMAINING ON THE JURY AFTER IT BECAME CLEAR THAT THERE WAS NO MISCONDUCT

Cunningham claims the trial court abused its discretion and violated his constitutional rights to due process and a fair trial because it failed to discharge Juror N.B. for misconduct. (AOB 250-262.) However, Cunningham fails to acknowledge that his attorney consented to N.B. remaining on the jury after the court conducted a hearing as to the alleged misconduct. Therefore, the issue has been forfeited for purposes of appeal. Cunningham's claim can also be rejected because the record shows N.B. did not engage in any juror misconduct.

A. Relevant Proceedings

During the defense presentation of evidence in the penalty phase, Deputy Public Defender Sandra Waite[58] notified the court that she overheard jurors S.F. and N.B. having a conversation about Vietnam. Conceding that she had "impressions of the conversation more than [she had] words that were heard," Waite believed S.F. expressed surprise that "people would come and testify." (15 RT 4904.)

Ms. Waite told the court that she "hung around a little bit" to hear more of the conversation which "moved to talk of people lying in court." According to Waite, S.F. said he was shocked about a family lawyer he knew that lied and N.B. agreed with him, commenting, "They all lie." Waite further alleged that

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58. Ms. Waite assisted Mr. Negus in writing and arguing various motions on Cunningham's behalf.

N.B. said, "something about emotion, they get up there and they act all emotional but they don't have an emotional bone in their body." (15 RT 4904-4905.)

Ms. Waite told the court that she then returned to her office after it appeared the two jurors were "on to" her and made their conversation "a little more hushed." Waite assumed N.B. was talking about witnesses. However, Waite admitted, "[T]hat might have just been my reading. I don't think that they said 'witnesses.'" (15 RT 4905.)

The trial court then asked the prosecutor and counsel whether they wanted the two jurors questioned by the court or a generic admonishment to the jury not to discuss the case, witnesses or evidence. (15 RT 4905-4906.) The prosecutor indicated a preference for an admonishment. Defense counsel said he was leaning towards an inquiry by the court but wanted to think about it. (15 RT 4906-4907.) The next day, defense counsel asked the court to inquire of the two jurors regarding Ms. Waite's allegations. (16 RT 4908.)

The court first questioned Juror S.F. whether he had or heard any conversation about Vietnam or witnesses. S.F. said he had not "done or heard" any such conversation. (16 RT 4910.) When the court asked whether there had been any conversation about lawyers, S.F. indicated that the jurors had discussed the O.J. Simpson case the previous day and there was some discussion about lawyers acting emotional or lying in the Simpson case. (16 RT 4910-4911.)

S.F. told the court that none of the jurors' conversation had anything to do with the lawyers in Cunningham's case and that he would not let anything about the Simpson case influence the way he looked at the attorneys in Cunningham's case. S.F. stated that, although there had been a lot of talk regarding the Simpson case, nothing was said about witnesses or lawyers lying. (16 RT 4911.) Neither defense counsel nor the prosecutor had any questions

for S.F. S.F. then exited the courtroom. (16 RT 4911.)

The trial court asked Juror N.B. to enter the courtroom. (16 RT 4911.) In response to questioning by the court, N.B. said she was not aware of any conversation among the jurors regarding Vietnam or anything else concerning Cunningham's case except for comments about how long the trial might last. (16 RT 4911.) When asked if there was any discussion in which a juror expressed surprise about witnesses showing up in court to testify, N.B. replied, "Absolutely not." (16 RT 4912.)

N.B. indicated that the jurors had discussed the Simpson case, but she "just wipe[d] that out." (16 RT 4912-4913.) When asked if any of the jurors made comparisons between the attorneys in the Simpson case and Cunningham's case, N.B. stated, "No, absolutely not." (16 RT 4913.)

The court then asked N.B. whether there had been any talk about lawyers or witnesses lying in court or deceiving people. (16 RT 4913.) N.B. replied, "Well, they talk about the defense attorneys on the O.J. case, but like I — when they bring it up I always say, well, they're in there doing a job, you know, what do you want from them." (16 RT 4913.) Neither defense counsel nor the prosecutor had any questions for N.B. (16 RT 4913.)

After N.B. exited the courtroom, defense counsel commented, "Are we ready to rock and roll, as they say?" (16 RT 4914.) The trial court asked whether either counsel wished to be heard further in regard to the two jurors and Ms. Waite's allegations. (16 RT 4914.) Defense counsel replied,

> No, I, I see nothing in their answers that makes me disbelieve them. And that was my interpretation of what happened at the beginning. But it may have been that, that they, that "Vietnam" was not, was not the word that she heard. And she just wasn't certain of that. *I don't feel it's worth pursuing.*

(16 RT 4914 [emphasis added].)

When the trial court offered to give an additional admonishment to the jurors, defense counsel stated, "I don't think that's really necessary." (16 RT 4914.) When the trial court asked whether he wanted the court to admonish the jurors to keep in mind that the Simpson matter is a different case with different lawyers, defense counsel responded, "No, I think people, our jurors are intelligent enough to know that." (16 RT 4914.)

The trial court then commented, "You don't think they're going to confuse you with Mr. Cochran or – –." (16 RT 4914-4915.) Defense counsel quipped, "No, it's easy to tell this case from that case 'cause in this case the witnesses are better dressed than the lawyers.'" (16 RT 4915.) The trial then recommenced in open court in the presence of the entire jury.[59/] (16 RT 4915.)

B. Cunningham Forfeited His Juror Misconduct Claim

Where a defendant fails to object to a juror's continued service on the jury or request a mistrial on grounds of juror misconduct, a claim of juror misconduct is forfeited on appeal. (*People v. Stanley* (2006) 39 Cal.4th 913, 950; see also *People v. Holloway* (2004) 33 Cal.4th 96, 183 [issue forfeited where defendant did not "seek juror's excusal or otherwise object to the court's course of action"]; *People v. Majors* (1998) 18 Cal.4th 385, 428; *People v. Gallego, supra,* 52 Cal.3d at pp. 187-1881.)

As shown above, Cunningham did not object to N.B.'s continued service on the jury, move for a mistrial based on any alleged misconduct by N.B., or otherwise object to the court's course of action. To the contrary, defense

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59. In his recitation of the relevant proceedings, Cunningham omits these important references on pages 4914 to 4915 which defeat his claim. (See AOB 256.) Instead, he cites to an irrelevant earlier hearing during jury selection in which the prosecutor and defense counsel stipulated to excusing Juror M.L. (See AOB 252-254, citing 9 RT 2369-2389.)

counsel consented to N.B.'s and S.F.'s continued service on the jury, indicating that he did not feel the juror misconduct issue was worth pursuing. (See 16 RT 4914.) Accordingly, Cunningham forfeited any juror misconduct claim regarding N.B. for purposes of appeal.

As in this Court explained in *Holloway,*

> [h]aving expressed no desire to have the juror discharged at the time, and indeed no concern the juror had engaged in prejudicial misconduct, defendant "is not privileged to make that argument now for the first time on appeal."

(*People v. Holloway, supra,* 33 Cal.4th at p. 183, quoting *People v. McIntyre* (1981) 115 Cal.App.3d 899, 906.) Likewise, Cunningham should not be permitted to assert his juror misconduct claim for the first time on appeal.

C. There Was No Juror Misconduct

Notwithstanding forfeiture, the record shows N.B. did not engage in any juror misconduct. Where there

> is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct.

(*In re Hamilton* (1999) 20 Cal.4th 273, 294.) N.B. did not engage in any such misconduct.

Both N.B. and S.F. told the court that there was no discussion concerning Vietnam, the witnesses or the attorneys in Cunningham's case. The only conversation among the jurors regarding lawyers was in reference to the Simpson case. No comparisons of any kind were made with Cunningham's case. (16 RT 4909-4913.) N.B. consistently told the other jurors that the attorneys in the Simpson case were just doing their job whenever the subject

was discussed. (16 RT 4913.)

As noted by defense counsel, Ms. Waite was mistaken in her impressions of the conversation she overheard, and he had no reason to disbelieve Jurors N.B. and S.F. (See 16 RT 4914.) It is clear from the record that no misconduct occurred.

Since N.B. did not engage in any juror misconduct, Cunningham's claim may be rejected on that basis as well as forfeiture. The judgment should be affirmed.

XIV.

THE TRIAL COURT PROPERLY PERFORMED ITS DUTIES UNDER SECTION 190.4 IN DENYING CUNNINGHAM'S AUTOMATIC MOTION FOR MODIFICATION OF THE DEATH VERDICT

Cunningham claims the trial court erred in failing to modify the death verdict pursuant to section 190.4, subdivision (e), because "the evidence was insufficient to find that the aggravating circumstance[s] outweighed the factors in mitigation beyond a reasonable doubt." (AOB 262-267.) However, there is no requirement that the aggravating factors outweigh those in mitigation beyond a reasonable doubt. Moreover, Cunningham's claim merely amounts to a disagreement with the trial court's assessment and weighing of the evidence, which is not grounds for overturning the court's ruling. Thus, Cunningham's claim must be rejected.

Section 190.4 provides for an automatic application for modification of a finding or verdict imposing death in every case in which the jury has returned such a finding or verdict. (§ 190.4, subd. (e).)

> In ruling on the motion, the trial court must independently reweigh the evidence of aggravating and mitigating factors presented at trial and

> determine whether, in its independent judgment, the evidence supports the death verdict. The court must state the reasons for its ruling on the record. On appeal, we independently review the trial court's ruling after reviewing the record, but we do not determine the penalty de novo.

(*People v. Steele* (2002) 27 Cal.4th 1230, 1267, citing *People v. Memro* (1995) 11 Cal.4th 786, 884; see also *People v. Zambrano* (2007) 41 Cal.4th 1082, 1184 [mixed question of law and fact].)

Where the record shows the trial court properly performed its duty under section 190.4, subdivision (e), to conduct an independent reweighing of the aggravating and mitigating evidence, the court's ruling will be upheld. (See *People v. Abilez* (2007) 41 Cal.4th 472, 530; see also *People v. Zambrano, supra,* 41 Cal.4th at p. 1184 [no error where ruling not "contrary to law or the evidence"]; *People v. Steele, supra,* 27 Cal.4th at p. 1268 [no error where trial court "carefully and conscientiously performed its duty under section 190.4"].) The record shows the trial court properly and consciously performed its duty in considering the automatic motion for modification of the verdict in Cunningham's case.

On January 12, 1996, the trial court conducted a hearing on Cunningham's motion to modify the verdict pursuant to section 190.4. (19 RT 5738.) After entertaining arguments from defense counsel and the prosecutor, the court recounted the procedural history of the case. (19 RT 5738-5745.)

The trial court indicated that it had examined and reviewed only and all the evidence presented at the guilt and penalty phases of the trial, including all exhibits admitted into evidence, the daily transcripts from all proceedings and the court's own notes. (19 RT 5745-5746.) The court then outlined its duty to independently review and reweigh the evidence of aggravating and mitigating factors provided in section 190.3 and determine whether the weight of the evidence supported the jury's death verdict. (19 RT 5746-5748.)

The trial court found the circumstances of the crimes constituted an aggravating factor under section 190.3, factor (a), in that Cunningham intended to commit a robbery in order to obtain money, planned to commit the crime against two victims who knew his identity, brought a loaded sawed-off rifle, gasoline and duct tape with him to commit and cover up the crimes, and he premeditated the killings as part of his planned robbery. The court found the crimes were particularly callous and vicious since Cunningham could easily have chosen to commit the robbery elsewhere where he would not have had to resort to killing the victims. (19 RT 5748-5749.)

The trial court further found the manner of the killings demonstrated "cold-blooded callousness" in that Cunningham methodically marched the victims from room to room in search of money before placing them bound on the floor in the bathroom, completing his search of the business for cash, and then "coolly and calmly" reentering the bathroom where he "coldly and methodically" shot each of the victims who lay helpless on the floor, offering no resistance to the robbery. Further callousness was shown by Cunningham's premeditated and methodical actions in setting the fire to destroy evidence of his crimes and stopping on the freeway to watching the building burn. (19 CT-5750.)

The trial court stated:

> The defendant's willingness and premeditated plan to resort to such violence in order to accomplish the taking of a relatively small amount of money demonstrates that the defendant has little or no regard for the sanctity and value of human life, and further demonstrates a particularly high degree of cold-blooded callousness, in the Court's view.

(19 RT 5750.) The court also observed that Cunningham "seemed to exude a sense of satisfaction over having attained the cash in the robbery" by treating Costello and Jamison to dinners and movies while noticeably appearing to be in a good mood. (19 RT 5751.)

The trial court found Cunningham's armed robbery of Ms. Gil and the forced oral copulation of and death threat against Michelle constituted prior activity with the attempted use of force or violence or the express or implied threat to use force and violence within the meaning of section 190.3, factor (b). Although the trial court found Cunningham took advantage of and exploited a position of trust in committing the sexual offenses against Samira, it did not consider those offenses under factor (b) since the court had a reasonable doubt as to whether the incidents involved actual, or the threat of, force or violence. (19 RT 5751-5752.)

However, the court considered all of the prior felony convictions arising from Gil's, Michelle's and Samira's victimizations to be an aggravating factor under section 190.3, factor (c), which "represented a continuing pattern of criminal predatory behavior by the defendant, and therefore, collectively constitute[d] significant circumstances in aggravation." (19 RT 5752.) Finally, the court found the fact that Cunningham was 42 years of age at the time of the offenses after having been sent to prison, paroled three separate times and having significant life experience was an aggravating factor under section 190.3, factor (i), since he "had the maturity and life experience to realize the enormity and wrongfulness of the taking of three innocent lives." (19 RT 5753.)

The trial court found no mitigating circumstances in the commission of the S.O.S. murders or the nature, frequency and pattern of Cunningham's prior felony convictions. However, the court found the fact that Cunningham did not have a more extensive prior record as a 42-year-old defendant was one factor in mitigation. (19 RT 5753-5754.)

As to factors (d), (h) and (k), the trial court found Cunningham had a childhood "characterized by physical, emotional and sexual abuse and ultimately abandonment," recounted the defense evidence pertaining to those

issues in detail, and observed that Cunningham did not receive a traditional moral upbringing. (19 RT 5754-5756.) The court found Cunningham suffered ongoing traumatic events throughout childhood which led to PTSD at an early age which was later compounded by his experiences in Vietnam. The court recounted in detail the evidence regarding Cunningham's tour of duty in Vietnam. (19 RT 5756-5758.)

The court acknowledged the symptoms of PTSD as described by the defense experts, the effect of stress in triggering those symptoms, and that Cunningham was under various forms of stress at the time the crimes were committed. The court further noted that one of Cunningham's expert witnesses believed Cunningham was in a dissociative state at the time of the crimes based on Cunningham's subsequent demeanor and actions in his police interviews and reenactment. (19 RT 5759-5760.)

However, the court found Cunningham's actions, which clearly demonstrated considerable planning and premeditation before the crimes and calculated and logical actions following the murders to avoid detection, undermined the defense expert's opinion. (19 RT 5760-5762.) The court reasoned:

> Defendant was obviously well aware of the law and society's condemnation of such actions based on the defendant's prior contacts with law enforcement and the criminal justice system, his prior commitments to state prison, his prior parol[e]; the Court is therefore convinced and finds that the defendant's capacity to appreciate the criminality of his conduct and his capacity to conform his conduct to the requirements of the law were in no way impaired as a result of any mental or emotional disturbance or as a result of any mental disease or defects or results of, of Post Traumatic Stress Disorder or past abuse or of any drugs or intoxicants.

(19 RT 5762.)

The court found factors (f), (g) and (j) of section 190.3 did not apply,

since Cunningham did not commit the crimes under circumstances which he reasonably believed to be morally justified or extenuating, Cunningham did not act under extreme duress or substantial domination of another, and Cunningham was the sole perpetrator of his crimes with no accomplices. (19 RT 5762-5763.)

The court noted that, although PTSD might have desensitized Cunningham to violence, it was not responsible for unprovoked violence. Indeed, one suffering from PTSD would be expected to avoid activities that might provoke violence. Instead, Cunningham engaged in "repeated criminal conduct involving use of guns against innocent victims, as well as sexual conduct, both forceful and consensual, with very young minors." Accordingly, the court found Cunningham's childhood experiences did not constitute a significant mitigating circumstance and carried less weight because Cunningham's violent conduct was not caused by any disease or defect. (19 RT 5763-5764.)

The trial court recognized that Cunningham's service in Vietnam and resulting PTSD were significant circumstances in mitigation in and of themselves. However, despite the substantial passage of time (approximately 20 years) between Cunningham's return from Vietnam and the current offenses, his intervening opportunities for rehabilitation through the criminal justice system and the availability of treatment for PTSD during that time period, Cunningham returned to a pattern of predatory criminal conduct and never sought counseling or treatment for his problems. Accordingly, the court found the mitigating factors were "greatly attenuated" and did not significantly extenuate the gravity of the circumstances of the current offenses. (19 RT 5764-5766.)

The trial court ultimately ruled as follows:

The Court therefore independently agrees with the jury's findings that the circumstances in aggravation outweigh the circumstances in mitigation, and that that finding by the jury is supported by the substantial weight of the evidence.

The Court further independently finds and specifically agrees that the jury's assessments that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that they warrant death instead of life in prison without the possibility of parole. And that conclusion is likewise supported by the substantial weight of the evidence.

Additionally, the Court's own personal analysis is that the factors in aggravation do substantially outweigh the factors in mitigation.

And, further, the Court independently finds that the evidence in aggravation is so substantial as compared to the evidence in mitigation that it does warrant death rather than life in prison without the possibility of parole.

The Court further finds that the death penalty is not disproportionate to the defendant's individual culpability in this case. The review of all the circumstances surrounding this case as just described by the Court, and the defendant's background as just described by the Court, in this Court's judgment demonstrates that the weight of the evidence supports the jury's verdicts, and that the death penalty is not excessive in relationship to the defendant's moral culpability.

And the Court so finds.

Therefore, for all of the reasons just stated by the Court, the defendant's motion to modify the verdict of death to life in prison without the possibility of parole, the automatic motion for such modification is denied.

(19 RT 5766-5767.)

Cunningham acknowledges that the trial court recognized its duties under section 190.4, subdivision (e), and independently considered and weighed the aggravating and mitigating evidence on the record in ruling on the automatic motion for modification of the verdict. (AOB 263-266.) Nothing more was required. (See *People v. Zambrano, supra,* 41 Cal.4th at p. 1184; *People v. Steele, supra,* 27 Cal.4th at p. 1267; *People v. Memro, supra,* 11 Cal.4th at p. 884.)

Essentially, Cunningham argues the trial court erred in denying the motion because it failed to find his childhood problems, Vietnam experiences and mental health issues to be as significant or weighty as he would have liked. (See AOB 266-267.) However, where the "the trial court applied the correct standard and properly conducted an independent reweighing of the aggravating and mitigating evidence," the fact that the court "did not find defendant's proffered mitigating evidence as persuasive as he would have liked does not undermine this conclusion." (*People v. Abilez, supra,* 41 Cal.4th at p. 472.)

Cunningham argues "the trial court was factually incorrect in its assessment that [he] never sought treatment for his mental health problems." (AOB 266-267.) In support of his argument, Cunningham cites testimony from Jamison that Cunningham merely went to the Veteran's Center for help with a sleep problem and asked Jamison *three weeks after* the current offenses to call his counselor at the Center. (AOB 265, fn. 26.) Thus, the trial court was correct that Cunningham made no efforts to address any mental problems from past abuse, molest and abandonment, or PTSD symptoms (stress, violence, dissociation) which he claimed as extenuating factors *prior to* committing the murders.

Finally, Cunningham argues the trial court erred because the aggravating circumstances did not outweigh the mitigating factors beyond a reasonable doubt. (AOB 262.) However, it is not necessary to prove that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. (See *People v. Montiel, supra,* 5 Cal.4th at p. 943; *People v. Cox* (1991) 53 Cal.3d 618, 692.)

Like in *Zambrano*,

> the court fully considered all the proffered mitigating evidence and simply deemed it insufficient to warrant a sentence less than death. On review, we cannot say that ruling is contrary to law or the evidence. No error occurred.

(*People v. Zambrano, supra,* 41 Cal.4th at p. 1184.) The judgment should be affirmed.

XV.

CUNNINGHAM'S SENTENCE IS NOT DISPROPORTIONATE TO HIS PERSONAL CULPABILITY IN BRUTALLY MURDERING THREE BOUND VICTIMS WHO OFFERED NO RESISTANCE AFTER HE CALLOUSLY MARCHED THEM AROUND THE BUILDING TO TAKE SMALL AMOUNTS OF CASH AND HERDED THEM INTO THE BATHROOM TO AWAIT THEIR IMPENDING DEATHS

Cunningham claims his death sentence constitutes cruel and unusual punishment in violation of the state and federal constitutions because the penalty is grossly disproportionate to his individual culpability in committing the crimes. (AOB 267-270.) In light of the evidence, Cunningham's claim is utterly meritless.

Neither the federal nor state constitution requires intercase proportionality review to ensure a death sentence does not violate due process, equal protection or the proscription against cruel and unusual punishment. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1381-1384.) However, a death sentence is subject to intracase review to determine whether the sentence is disproportionate to the defendant's personal culpability in committing the murders. (*People v. Steele, supra,* 27 Cal.4th at p. 1269.)

> "To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is 'grossly disproportionate

> to the defendant's individual culpability' [citation], or, stated another way, that the punishment 'shocks the conscience and offends fundamental notions of human dignity' [citation], the court must invalidate the sentence as unconstitutional."

(*People v. Steele, supra*, 27 Cal.4th at p. 1269, quoting *People v. Hines, supra*, 15 Cal.4th at p. 1078.)

Applying these standards, Cunningham's sentence is clearly constitutional. Preliminarily, it must be noted that Cunningham's death sentence is based on three murders, not just one.

Mr. Silva, Mr. Sonke and Mr. Smith never harmed or wronged Cunningham in anyway. They were simply working at their place of employment on a Saturday afternoon when Cunningham marked them for death. As noted by the trial court, Cunningham could easily have selected another location to commit the robbery where the victims did not know him. However, Cunningham chose to steal money from S.O.S. where he deemed it would be necessary to kill his victims in order to avoid identification.

Cunningham's only reason for killing the victims was to get away with his theft of meager amounts of cash. Cunningham essentially placed a price tag of a few hundred dollars on the lives of three innocent human beings. The murders were extensively premeditated, planned well ahead of the robbery and meticulously executed by Cunningham.

Cunningham humiliated and terrorized his three victims prior to their deaths by binding and marching them around the business at gunpoint and callously herding them into the bathroom, leaving them for a time to ruminate in abject fear of their impending deaths. Moreover, he forced Mr. Smith to bind the other victims before being bound himself.

Cunningham subsequently shot each victim in succession, creating additional terror in Mr. Silva and Mr. Smith (the second and third victims) who

were forced to observe what would soon happen to them. Cunningham showed absolutely no mercy for his victims who fully cooperated with his demands and offered no resistance at any time. He cruelly rejected an additional opportunity for mercy when he later discovered Smith partially freed from his bonds and looking pleadingly at Cunningham. Cunningham also showed complete disregard for the victims' families by attempting to burn the bodies of their loved ones beyond recognition.

Cunningham never expressed any remorse or regret after the murders. Rather, he appeared to gloat over his accomplishment in garnering some cash and being able to treat his girlfriends to dinners and movies. Although Cunningham confessed to the crimes once he was caught, he never expressed any concern for the victims or their families in his interviews or reenactment.

Furthermore, it is important to note that Cunningham planned and executed his crimes at S.O.S. completely alone. There were no accomplices to whom Cunningham can shift culpability. As previously noted, the victims were utterly blameless. No one other than Cunningham was responsible for the three murders.

Cunningham attempts to minimize his personal culpability by citing his childhood difficulties, Vietnam experiences and mental health concerns. (See AOB 268-270.) However, as aptly noted by the trial court, the evidence did not show those factors had any effect on Cunningham's decision to murder Silva, Sonke and Smith. Cunningham's motive was simply to steal cash, and his actions at the time of the murder showed rational, logical, intelligent and calculated thought processes — not the random or bizarre actions of a mentally ill person. Thus, Cunningham's attempt to shift the blame for the murders must be rejected.

Moreover, by the time of the S.O.S. murders, Cunningham had been taught right from wrong as a result of his mature age, substantial life

experiences, military training, prior felony convictions and rehabilitative opportunities with the criminal justice system. Indeed, Cunningham's efforts to destroy evidence and flee following the murders amply showed Cunningham's awareness of the wrongfulness of his acts.

Cunningham's actions in callously and brutally murdering Mr. Silva, Mr. Sonke and Mr. Smith simply reflected the way Cunningham treated human beings as mere objects for his personal benefit throughout his adult life. Just as Cunningham terrorized Ms. Gill at gunpoint for financial gain and used Michelle and Samira for his selfish sexual gratification, Cunningham murdered Silva, Sonke and Smith in order to enrich himself with a petty amount of cash.

Given the egregious circumstances of the three murders as well as Cunningham's personal characteristics, Cunningham's death sentence does not shock the conscience and is not grossly disproportionate to the crimes. Thus, Cunningham's constitutional attack on the sentence must be rejected and the judgment affirmed. (See *People v. Steele, supra,* 27 Cal.4th at p. 1269.)

XVI.

CALIFORNIA'S DEATH PENALTY STATUTE AS APPLIED IN CUNNINGHAM'S CASE IS CONSTITUTIONAL

Cunningham raises various challenges to the constitutionality of California's death penalty as applied in his case. (AOB 270-312.) As shown below, each of these arguments have previously been rejected by this Court.

Cunningham claims section 190.2 is impermissibly broad because it does not sufficiently narrow the class of murderers eligible for the death penalty. (AOB 273-275.) This argument has repeatedly been rejected by this Court. (*People v. Howard, supra,* 42 Cal.4th at p. 1031, citing *People v. Dickey* (2005) 35 Cal.4th 884, 931; *People v. Zambrano, supra,* 41 Cal.4th at p. 1186, citing

People v. Williams (2006) 40 Cal.4th 287, and *People v. Marks* (2003) 31 Cal.4th 197, 268; *People v. Kipp* (2001) 26 Cal.4th 1100, 1136.)

Cunningham claims factor (a) of section 190.3 allows arbitrary and capricious imposition of the death penalty by allowing any circumstance of the crime to be considered an aggravating factor. (AOB 275-277.) This argument has also been rejected by this Court. (*People v. Howard, supra,* 42 Cal.4th at p. 1031, citing *People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Kipp, supra,* 26 Cal.4th at p. 1137.)

Cunningham next raises a number of contentions that California's death penalty statute does not contain sufficient safeguards to avoid arbitrary and capricious sentencing in violation of the federal Constitution. (AOB 277-278.)

First, Cunningham argues the prosecution should be required to prove beyond a reasonable doubt the truth of every aggravating factor, every fact supporting the aggravating factors, that the factors in aggravation outweigh the mitigating factors, and that death is the appropriate sentence. He cites *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and its progeny in support. (AOB 279-291, 295-298.) These arguments were recently rejected in *People v. Howard, supra,* 42 Cal.4th at p. 1031, citing *People v. Cornwell, supra,* 37 Cal.4th at p. 104, and *People v. Brown, supra,* 33 Cal.4th at p. 401.

Cunningham next argues jury agreement and unanimity as to the aggravating factors is constitutionally required. (AOB 291-294.) This argument has already been rejected by this Court. (*People v. Zambrano, supra,* 41 Cal.4th at p. 1166; *People v. Kipp, supra,* 26 Cal.4th at p. 1137; *People v. Lucero* (2000) 23 Cal.4th 692, 741.)

Cunningham claims written findings by the jury regarding aggravating evidence are constitutionally required. (AOB 298-301.) This Court has repeatedly held there is no such requirement. (*People v. Howard, supra,* 42

Cal.4th at p. 1021, citing *People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Zambrano, supra,* 41 Cal.4th at p. 1186; *People v. Steele, supra,* 27 Cal.4th at p. 1269; *People v. Lucero, supra,* 23 Cal.4th at p. 692, citing *People v. Osband* (1996) 13 Cal.4th 622, 710.)

Cunningham next argues the federal Constitution requires intercase proportionality review of his sentence. (AOB 301-303.) "Intercase proportionality review is not constitutionally required." (*People v. Howard, supra,* 42 Cal.4th 1000, 1031, citing *People v. Dickey, supra,* 35 Cal.4th at p. 931; see also *People v. Zambrano, supra,* 41 Cal.4th at p. 1186; *People v. Lucero, supra,* 23 Cal.4th at p. 741.)

Cunningham claims the use of adjectives such as "extreme" within section 190.3's list of potential mitigating factors is unconstitutional. (AOB 303.) This claim has repeatedly been rejected by this Court. (*People v. Howard, supra,* 42 Cal.4th at p. 1032, citing *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Zambrano, supra,* 41 Cal.4th at p. 1185; *People v. Kipp, supra,* 26 Cal.4th at p. 1138.)

Cunningham argues the federal Constitution requires that factors (d), (e), (f), (g), (h) and (j) of section 190.3 be designated solely as factors in mitigation. (AOB 303-307.) This argument has also been rejected by this Court. (*People v. Howard, supra,* 42 Cal.4th at p. 1032, citing *People v. Elliott, supra,* 37 Cal.4th at p. 488; *People v. Zambrano, supra,* 41 Cal.4th at p. 1185.)

Cunningham next claims California's death penalty scheme violates equal protection because it denies capital defendants procedural safeguards afforded to non-capital defendants. (AOB 307-310.)

> The death penalty law does not deny capital defendants equal protection because it provides a different method of determining the sentence than is used in noncapital cases.

(*People v. Howard, supra,* 42 Cal.4th at p. 1032, citing *People v. Smith* (2005)

35 Cal.4th 334, 374.)

Cunningham also argues California's use of the death penalty as a "regular punishment" in violation of "international norms of human decency" and international law renders it unconstitutional. (AOB 310-312.) This precise argument has already been rejected by this Court. (*People v. Watson* (2008) 43 Cal.4th 652, 704; *People v. Lewis, supra,* 43 Cal.4th at p. 538; *People v. Wilson* (2008) 43 Cal.4th 1, 33; *People v. Blair* (2005) 36 Cal.4th 686, 754-755.)

Cunningham further contends that, although this Court has already rejected each of the challenges he now raises, it has not considered the cumulative impact of each alleged defect on California's sentencing scheme as a whole. (AOB 270-272.) However, since none of the claimed defects in California's death penalty sentencing scheme as alleged by Cunningham are valid and none of his proposed safeguards for those alleged defects are constitutionally required, no constitutional violation will be found when they are considered collectively. (See *People v. Lucero, supra,* 23 Cal.4th at p. 741.)

Cunningham offers no new arguments or compelling reasons for this Court to reconsider its prior rulings finding California's death penalty sentencing scheme constitutional. (See AOB 270-312.) Accordingly, the judgment should be affirmed.

CONCLUSION

Accordingly, for the reasons states, respondent respectfully requests that the judgment be affirmed.

Dated: September 26, 2008.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 58728 words.

Dated: September 26, 2008.

Respectfully submitted,

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