In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **RICHARD LEON,** **Appellant.**	**CAPITAL CASE** Case No. S056766

Los Angeles County Superior Court Case No. PA012903
The Honorable Ronald S. Coen, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an information filed by the District Attorney of Los Angeles County, appellant was charged with two counts of first degree special circumstance murder (Pen. Code,[1] § 187, subd. (a); counts 1, 18), sixteen counts of robbery (§ 211; counts 2-3, 6-10, 13-17, 19-22); three counts of assault with a firearm (§ 245, subd. (a)(1); counts 4-5, 11); one count of resisting a peace officer (§ 148, subd. (a); count 12); and one count of evading an officer with willful disregard (Veh. Code, § 2800.2; count 23). The special circumstances alleged were that appellant committed multiple murders (§ 190.2, subd. (a)(3); count 1) and committed murder while engaged in the commission of a robbery (§ 190.2, subd. (a)(17); counts 1, 18). It was further alleged that appellant had two prior serious felony convictions (§ 667, subd. (a)(1); counts 1-11, 13-23) and personally used a handgun (§ 12022.5, subd. (a); counts 1-3, 6-10, 13-21).[2] (7CT 1502-1517.) Appellant pled not guilty and denied the special allegations. (8CT 1777, 1813, 1816.)

Following a jury trial, appellant was convicted of: two counts of first degree murder (§ 187, subd. (a); counts 1, 18); sixteen counts of second degree robbery (§ 211; counts 2-3, 6-10, 13-17, 19-22); three counts of assault with a firearm (§ 245, subd. (a)(2); counts 4-5, 11); one count of resisting a peace officer (§ 148, subd. (a); count 12); and one count of evading an officer with willful disregard (Veh. Code, § 2800.2; count 23), with findings that he personally used a firearm (§ 12022.5, subd. (a)) in counts 1 through 11, and 13 through 21), and special circumstance findings

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

[2] It was also alleged that appellant personally used a firearm (§ 12022.5, subd. (a)(1)) as to count 22. However, the court granted appellant's motion to dismiss the allegation. (CT 1503-1516.)

that the murders were committed while appellant was engaged in the commission of a robbery (§ 190.2, subd. (a)(17)), and that appellant was convicted of multiple murders (§ 190.2, subd. (a)(3)). (9CT 2068-2091, 2117-2127.)

Following a penalty phase jury trial, the jury fixed the penalty at death for counts 1 and 18. (10CT 2369-2370, 2373-2374.) Appellant's motions for a new trial and to modify the verdict of death were denied. (10CT 2382, 2386.) Appellant was sentenced to death as to counts 1 and 18, and a stayed determinate term of 39 years, 8 months in state prison for the remaining counts. (10CT 2382-2395.)

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

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. Prosecution Case

a. Summary

From January 12, 1993, until his apprehension on February 18, 1993, appellant committed twelve armed robberies throughout Los Angeles County. Two accomplices, Ray Rios and Darren White, assisted in the majority of these robberies. In the course of two of the robberies, two men were shot and killed. Norair Akhverdian was killed during the robbery of the Sun Valley Shell gasoline station and Varouj Armenian was killed during the robbery of Jack's Liquor in Hollywood. During one of the robberies, which occurred at Ben's Jewelry in Beverly Hills, appellant, Rios, and White took approximately $800,000 in merchandise. Eleven days later, appellant attempted to pawn some of the stolen jewelry at the H&R Pawnshop in North Hollywood. When appellant was displeased with the price offered for the jewelry, he returned to the pawnshop, opened fire,

and stole merchandise from the pawnshop. On February 17, 1993, appellant committed four armed robberies within the span of a few hours.

Appellant was eventually arrested after a high-speed chase. The vehicle he was driving matched the description of a vehicle seen at the two murder scenes. Two handguns were recovered from the vehicle, which were later matched to casings and bullets at the various crime scenes. Appellant's palm prints were also matched to latent palm prints found at one of the crime scenes. Eyewitnesses identified appellant as participating in the robberies and murders at all but one of the crime scenes.[3] Approximately 16 witnesses identified appellant, placing appellant at the crime scenes.

b. The January 12, 1993, and February 14, 1993, Robberies at Jambi 3 Jewelry Store

On January 12, 1993, Julio Cube was working at the Jambi 3 Jewelry Store, located at 6646 Hollywood Boulevard in Hollywood, California. (16RT 656-657.) The store specialized in watch and jewelry repair and sales, and Cube owned the store with his siblings. (16RT 657, 676.) At approximately 3:00 p.m., appellant entered the store while Cube was sitting on his work table preparing some food to eat. (16RT 658, 679; 17RT 768-769.) Cube noticed appellant, stood up, and asked if he could help appellant. Appellant moved around the counter and pushed a bowie knife in Cube's belly. (16RT 658-659, 682; 17RT 772.) Appellant demanded, "Give me your money." Cube replied, "I got no money." Appellant demanded that Cube give him money a second time and pushed Cube towards the counter where the cash register was located. Appellant went around to the employee-side of the counter and told Cube to open the

[3] No identifications were made of appellant regarding the robbery at Original Blooming Design.

register. (16RT 659-660, 683-684; 17RT 772.) When Cube did not open the register immediately, appellant wielded the knife at Cube. Cube, who was scared, opened the register. (16RT 659-660.) Cube picked up the paper bills and handed them to appellant. Appellant then pushed Cube towards the safe and demanded that Cube open the safe. (16RT 660, 684.) The steel safe contained money, valuables being repaired, and a handgun. (16RT 660.) Cube opened the safe and appellant said, "Give me the money." (16RT 661.) Cube told appellant that there was no money in the safe. Appellant tried to look inside the safe. However, the interior of the safe was dark and appellant could not see inside. Appellant felt inside the safe with his hand. (16RT 685.) Appellant looked around the work area and then tried to look inside the safe a second time. (16RT 661-663, 686.) Appellant felt inside the safe with his hands and took out a gun, a Walther handgun (Peo. Exh. 6 [Walther handgun with serial number 755738]). (16RT 662-663, 666-667.) Appellant placed the Walther handgun in his waistband. (16RT 663.) Appellant told Cube to sit or lie down on the floor, and Cube sat on the floor. (16RT 663, 687.) Appellant then left the store. After Cube heard the door close, he called 911. (16RT 664.)

On February 14, 1993, at approximately 5:00 to 6:00 p.m., Cube was working in the Jambi 3 Jewelry Store alone. (16RT 667-668; 17RT 774, 782-783.) After Cube closed the store and locked the door, a Black man came to the door and asked to have some jewelry fixed or cleaned. Cube opened the door and asked the man what he needed. (16RT 668, 689.) At that time, appellant approached and pushed Cube back into the store. Appellant held a gun to the right side of Cube's neck and demanded that Cube give him money. (16RT 669, 689, 692.) When Cube said that he had no money, appellant pushed Cube back to the counter near the register and told Cube to open the register. Cube opened the register, and appellant

took approximately $100 from the register. (16RT 669, 691; 17RT 774.) Appellant then left. (16RT 670.)

Cube told the police the robber was approximately five feet nine inches tall and weighed approximately 140 to 160 pounds. Cube also described the robber as wearing a baseball cap and a leather jacket. (16RT 688, 705.) Cube told the police that the robber picked up a watch that was on a glass case while walking to the cash register area. (17RT 772.) Cube also stated that the robber opened all the drawers for the safe, grabbed "whatever he could," and took the gun inside the safe. (17RT 772.) Cube told the police that he believed, based on the robber's voice, language, and looks, the person who robbed him the first time was the same person who robbed him the second time. (16RT 672-673, 692, 697; 17RT 784.) Cube was shown a six-pack photographic lineup (Peo. Exh. 10 [photographic lineup]) and identified appellant (Peo. Exh. 11 [identification report]) as the robber. (16RT 670-672, 698; 17RT 769-770.) Without any hesitation, Cube pointed at appellant's photograph and stated that appellant came in twice and robbed him.[4] (17RT 770.)

Cube attended a live lineup on June 6, 1994, and identified appellant (Peo. Exh. 12 [live lineup report]. (16RT 673-674, 698-699; 26RT 1774.) Cube also made an in-court identification of appellant as the person who robbed him in January 1993. (16RT 675.)

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[4] As Cube talked to the police, he became nervous. (17RT 774.) When Los Angeles Police Detective Deborah Broker explained that it might be necessary for Cube to testify, Cube stated he was only 10 to 25 percent sure of his identification. (16RT 670-672, 698; 17RT 787-788.)

c. The January 14, 1993, Robbery at the Hollywood Shell Station

On January 14, 1993, David Su was working as the manager of Chan's Shell Service Station ("Hollywood Shell Station"), located at 6420 Franklin Avenue in Hollywood.[5] (17RT 713-714.) Roberto Zaldivar was also working at the Hollywood Shell Station. (17RT 714-715.) At approximately 7:00 p.m., appellant walked into the mini-market and stood in front of the candy bar display. (17RT 715, 722, 724-728.) Appellant then came around to the cash register and put a gun to Su's neck. Appellant demanded that Su open the cash register. 17RT 715, 723.) Su opened the cash register, appellant took all the money, and stuffed it into his pockets. (17RT 716, 723.) Appellant ordered Su to get down. Appellant told Su that if he moved, he would "die." Su got down on the ground. (17RT 716.) At that time, Zaldivar, who was changing into his uniform in the restroom, came out of the restroom. (17RT 716, 724, 760-761.) Appellant pointed the gun at Zaldivar's head and told Zaldivar to get back in the restroom. Zaldivar complied. (17RT 716, 724, 762.) Approximately $600 was taken from the business. (17RT 717.)

A video camera inside the mini-market was operating that day. (17RT 714.) When the police arrived after the incident, Su gave the police the videotape (Peo. Exh. 7 [videotape]). (17RT 714, 717.) Su described the robber as having dark hair in a ponytail and a mustache.[6] (17RT 726, 750.) Su also described the robber as White, wearing a black t-shirt and dark pants, approximately six feet in height, and weighing approximately

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[5] The Hollywood Shell Station on Franklin Avenue was located approximately one-half of a mile from the Jambi 3 Jewelry Store. (17RT 778.)

[6] Su had attended a school for gas station dealers and was taught about trying to get information during a robbery. (17RT 750-751.)

150 to 155 pounds. (17RT 749-750, 753.) Su was shown a six-pack photographic lineup (Peo. Exh. 10 [six-pack photographic lineup]) and identified appellant's photograph as the robber (Peo. Exh. 13 [photographic identification report]). (17RT 724-726, 769.) Su later attended a live lineup on May 17, 1994, (Peo. Exh. 14-15 [photographs from live lineup]) and selected appellant as the man who robbed him (Peo. Exh. 16 [live lineup report]). (17RT 726-727, 775; 26RT 1704-1705.) Su identified appellant in court as the person who robbed him. (17RT 728.) Zaldivar was unable to make an identification. (17RT 763.)

d. The January 19, 1993, Robbery at Ben's Jewelry Store

On January 19, 1993, Yossi Dina, Stuart Broutian, and Marina Pekel were working at Ben's Jewelry, located at 8326 Wilshire Boulevard in Beverly Hills. (18RT 793, 799, 841.) The jewelry store, located in a small retail shopping center, was owned by Dina. (18RT 794, 841.) Broutian worked as a jeweler at the store, and Pekel worked as a secretary. (18RT 793, 797-798, 841; 24RT 1574.) The store consisted of a showroom and four to five offices. (18RT 794-795.)

At approximately 1:00 to 2:00 p.m., Broutian was in his work area at the back of the shop. (18RT 796-797, 800, 842.) There was a window in Broutian's work area, enabling him to see the showroom. (18RT 796-797, 800.) Dina was in his office, which also contained a window looking out to the showroom. (18RT 798, 801, 842.) Pekel was at her desk talking to a customer on the phone. (24RT 1574.) A Black man entered the store[7] and Pekel assisted him. (18RT 800, 802, 825.) Pekel showed the Black man some jewelry. (18RT 800, 826.) Five minutes after the Black man

[7] The store had an iron security gate and customers were "buzzed" in. (18RT 799.)

entered, a White man with long hair and wearing a green coat, later identified as appellant, entered the store.[8] (18RT 803, 824, 860-861, 879-880; 20RT 997-999; 24RT 1582-1584; 26RT 1773, 1775-1776.) Appellant appeared to be looking at jewelry on the other side of the store and looked at the Black customer. (18RT 803, 827.) When Pekel asked if appellant needed help, appellant pulled out a gun, lifted one of the showcase countertops, and entered the employee-side of the store. (18RT 804, 827, 829-830; 24RT 1575, 1587.)

Appellant pointed the gun at Pekel's face. (24RT 1576, 1588.) Appellant ran to the back of the store towards Broutian's work area.[9] (18RT 805.) Broutian reached down and retrieved his .380 stainless steel handgun as appellant entered his work area. (18RT 805-806, 831.) Appellant, who was carrying a black gun that appeared to be a revolver, pointed the gun at Broutian's head. (18RT 805-807, 831.) Appellant and Broutian pointed their weapons at each other for a second, then Broutian motioned for appellant not to shoot and handed his .380 handgun to appellant. (18RT 806-807.) Appellant told Broutian to leave the work area, and Broutian complied. (18RT 807, 833.)

In the meantime, the Black customer went to Dina's office. Dina opened his desk drawer and began to pull out his gun. The Black man entered Dina's office and pointed a gun at Dina's face. (18RT 807-808, 842-844.) Dina saw appellant point a gun at Broutian, and Dina put his gun down. (18RT 846.) The Black man took Dina's silver semiautomatic gun.

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[8] According to Pekel, appellant entered the store followed by a Black man. (24RT 1576, 1586, 1591.)

[9] According to Pekel, appellant ran to Dina's office, but did not go inside, but pointed a gun at Dina. (24RT 1588-1589.)

(18RT 845-846, 870.) The Black man also put his gun in Dina's mouth and told Dina, "You lucky you Moslem, if not, I kill you." (18RT 844-845.)

Broutian and Pekel were taken to the hallway and forced to lie down on the floor. (18RT 807, 810; 24RT 1577.) They were then directed to go to the back, near the bathroom area, and lie down on the floor. (18RT 807, 810, 812, 834-835; 24RT 1577.) Dina was also taken to the back and forced to lie down on the floor. (18RT 846.) The Black man asked for the key to the showcases, and Dina gave him the key. (18RT 809-810, 846-847.) The Black man pointed a gun at Dina's left temple and demanded that Dina tell him where the cash was located. (18RT 808-815, 834-836; 24RT 1580.) Dina told the Black man that he had no cash in the store. (24RT 1580.) The Black man also asked for the keys to the safe,[10] located in the conference room. (24RT 1580.) Dina gave the Black man the keys to the safe. (24RT 1581.) Dina was then taken to the back of the store, where the safe was located.[11] (18RT 808, 812.) By this time, a second Black man, who appeared younger than the first, was participating in the robbery. (18RT 808, 813; 24RT 1577, 1579.) The second Black man began tying up Broutian using duct tape. (18RT 810-812, 814-815, 834-836.)

The first Black man told Pekel to go to the front of the store and she complied. (24RT 1578.) When Pekel arrived at the front of the store, appellant was standing at the counter holding a black trash bag. The first Black male gave Pekel a key and directed her to open the showcases, take out the merchandise, and place the merchandise into the trash bag. Pekel

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[10] The safe, which was approximately six feet tall, was normally locked. 18RT 820.)

[11] Dina did not remember if he went to the room where the safe was located with the robbers. (18RT 854.)

did as she was told. (24RT 1578-1579.) After Pekel had emptied almost all of the showcases, she returned to the bathroom area, where she was tied up with duct tape by the second Black man. (18RT 812-815; 24RT 1579, 1581.) Dina was also brought back to the bathroom area and tied up with duct tape by the second Black man. (18RT 815, 854, 857.) Broutian, Pekel, and Dina were placed in the bathroom. (18RT 811; 24RT 1577.)

In the meantime, Clifford Young went to Ben's Jewelry to pick up a watch he was having sized. (19RT 934-934, 934.) Young was "buzzed" in the door and entered the store. He was immediately approached by a "shorter heavier" Black man who held a gun to Young's head (19RT 935-936.) Appellant[12] also approached Young. (19RT 936-937.) The Black man and appellant demanded, "Where's the money?" (19RT 937.) Young told the robbers that he did not work in the store and had no idea where the money was kept. (19RT 937.) The two men reached into Young's pockets and pulled out Young's money clip, which contained $300. (19RT 938.) The two men took the money. (19RT 939.) The Black man and appellant pushed Young back towards the bathroom. (19RT 939, 945-947.) At gunpoint, Young was pushed into the bathroom and told to get down on his knees. (19RT 939; see also 18RT 814, 816; 24RT 1578.) Young was also tied up with duct tape. (19RT 940; see also 18RT 814, 816; 24RT 1578.) The victims were all threatened that they would be killed if they were not quiet. (19RT 940.)

Gregory Lansing also went to Ben's Jewelry to pick up some watches. (20RT 989.) Lansing was "buzzed" in the store and entered. (20RT 989-990.) When Lansing entered the showroom, a six-foot tall White man with

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[12] There was no evidence that Young was shown any photographic lineups and he did not attend any live lineups. (See 19RT 942.) Although Young never identified appellant, his description of a "tall White man with long brown hair" (19RT 936) matched appellant's description.

dark hair and acne scars on his face, later identified as appellant, approached him carrying a gun in each hand. (20RT 990, 994, 995, 998-999.) Appellant pointed one gun at Lansing's head and the other at Lansing's chest. (20RT 990.) Appellant told Lansing, "Come with me," and forced Lansing to the back of the store, in front of the bathroom. Appellant asked Lansing for his money and jewelry. (20RT 990-992, 1003.) Lansing handed appellant his wallet, and Lansing was told to take the money out of the wallet. (20RT 991.) Lansing dropped the wallet and handed appellant the money, approximately $300 to $350. (20RT 991.) Appellant began putting jewelry in trash bags while two Black men grabbed Lansing. (20RT 1004.) The two Black men told Lansing to kneel down, and tied Lansing's hands and feet behind his back using duct tape. (20RT 992.) The two Black men then forced Lansing into the bathroom. (20RT 992-993.)

Dina, Broutian, Pekel, Lansing, and Young remained in the bathroom for five minutes. (18RT 816; 20RT 993.) During that time, Broutian heard footsteps running around the store and to the room where the safe was located. (18RT 816.) During the robbery, it appeared that appellant was the "leader" and was "directing everyone." (18RT 835.)

Broutian eventually freed himself and then freed Dina. (18RT 817, 863; 24RT 1581-1582.) Dina opened the bathroom door and said, "Hello, are you there? Are you still there?" Dina then stepped out into the hallway followed by Broutian. (18RT 817, 863; 19RT 941.) The suspects were gone. (18RT 817.) The showcases and safe were open and there was some jewelry on the floor. (18RT 863.) However, most of the jewelry, including estate pieces, watches, rings, and necklaces, was missing. (18RT 818, 864.) Loose diamonds kept in the safe were also

missing. (18RT 818, 864.) Approximately $800,000 in merchandise was taken. (18RT 864.) There was trash all over the hallway.[13] (18RT 818.) The safe door was open and the safe trays were on the ground in front of the safe. (18RT 819.) There were also white cloths found on the ground.[14] (19RT 895-897, 900.)

The police responded to Ben's Jewelry. (19RT 887, 889.) Various surfaces inside the store were printed for latent fingerprints, but none were found matching appellant's. (19RT 897, 900-916, 920-922.) Pieces of duct tape were recovered from the floor and processed for latent fingerprints, but only partial unidentifiable prints were found. (19RT 917-920.)

A six-pack photographic lineup was assembled (Peo. Exh. 23 [six-pack photographic lineup]), with appellant's photograph in position number five. (26RT 1772-1773.) Broutian was shown the six-pack photographic lineup and selected numbers three and five (Peo. Exh. 24 [lineup report]). (18RT 822-823.) Broutian identified appellant in court as the person "who look[ed] like the man who pointed a gun at [his] face." (18RT 824.) Pekel was also shown a six-pack photographic lineup (Peo. Exh. 23) and selected appellant's photograph (Peo. Exh. 95 [lineup report]). (24RT 1582-1584; 26RT 1773.) Dina was shown a six-pack photographic lineup (Peo. Exh. 23) and selected appellant's photograph (Peo. Exh. 27 [lineup report]). (18RT 860-861; 26RT 1773.) Dina was "100 percent certain" of his identification. (18RT 861.) Dina attended a live lineup and selected appellant (Peo. Exh. 28 [live lineup report]). (18RT 879-880; 26RT 1775-1776.) Dina identified appellant at the preliminary hearing, and

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[13] The suspects had emptied the trash on the floor and placed the jewelry in the trash bags. (18RT 810.)

[14] It was believed that these cloths were used by appellant and his accomplices to deter latent prints on the display cases. (19RT 895-897, 900.)

also identified appellant at trial as one of the robbers. (18RT 858, 880.) Lansing was shown the six-pack photographic lineup (Peo. Exh. 23) and selected numbers three and five (Peo. Exh. 50 [lineup report]). (20RT 994-996, 1000.) However, Lansing believed that appellant's photograph looked like the suspect. (20RT 1001.) Lansing also attended a live lineup and identified appellant (Peo. Exh. 41). (20RT 997-998; 26RT 1775-1776.) In court, Lansing identified appellant as the person who pointed two guns at him. (20RT 999.)

e. The January 30, 1993, Robbery at H&R Pawnshop

On January 30, 1993, Ruben Avsharian was working at his store, H&R Pawnshop, at 6422 Lankershim in North Hollywood. (20RT 1006-1007.) Pawnshop employee Hunan Ganazyan was at the store, as were Vardkes Aslanyan and Ambertsum Sarkisyan. (20RT 1007-1008, 1082-1083.) At approximately 1:00 p.m., a man later identified as appellant and a Black man entered the pawnshop trying to sell a necklace. (20RT 1008, 1029, 1082-1083, 1092.) Avsharian offered a price for the necklace, but appellant and the Black man rejected it. (20RT 1008-1009.) Avsharian advised appellant and the Black man to try another pawnshop, and the two men left. (20RT 1009.) Appellant and the Black man were inside the pawnshop for approximately 10 to 15 minutes. (20RT 1032.)

At approximately 4:00 p.m., Avsharian, Ganazyan, Aslanyan, and Sarkisyan were still inside the pawnshop when appellant and the Black man returned with a second Black man. (20RT 1011, 1082-1083; see also 20RT 1050-1051.) The second Black man was heavier and shorter than the first Black man. (20RT 1013.) The first Black man approached the counter near Avsharian's desk and asked if Avsharian had changed his mind regarding the price. (20RT 1013, 1035-1036.) Appellant "hung back" a little bit while the second Black man stayed at the entrance. (20RT 1036-

1037.) Avsharian replied, "No, that's the most I can offer you. Well, if you weren't happy, why you come back?" (20RT 1013, 1037.) The three men appeared to be browsing for a couple of minutes, and then they turned and walked towards the door. (20RT 1013, 1037.) Avsharian turned his back and began speaking to Sarkisyan. (20RT 1014-1015, 1038.) At that point, Avsharian heard loud voices and turned around. Appellant and the two Black men were pointing guns at Avsharian, Ganazyan, Aslanyan, and Sarkisyan. (20RT 1014-1015, 1038, 1085.) Appellant was holding a "short barrel" revolver or semi-automatic pistol and the second Black man had an "uzi-type small machine gun." (20RT 1034, 1039, 1052, 1065, 1091, 1099.) Appellant jumped over the counter and approached Ganazyan. (20RT 1056, 1066, 1097.) Appellant, who was approximately two feet from Ganazyan, pointed his gun at Ganazyan's right temple and told Ganazyan to lie down. (20RT 1050-1054, 1066-1067.) Ganazyan did not understand what was going on and stood up. (20RT 1053.) Appellant repeated for Ganazyan to lie down. (20RT 1053, 1068.) Ganazyan complied. (20RT 1054, 1057, 1068.)

Avsharian, Aslanyan, and Sarkisyan were also told to get down on the ground. (20RT 1014, 1038, 1084.) A showcase containing jewelry that was near appellant was shattered[15] and then between 10 and 15 shots were fired. (20RT 1015, 1042, 1059-1060, 1084-1085; see also 20RT 1021-1023, 1043-1044 [Avsharian heard a jewelry case shattered by a hand and also heard bullets shattering showcases].) Avsharian and Aslanyan got down on the floor. (20RT 1014, 1085.) The robbers yelled for the security door to be "buzzed open." Aslanyan buzzed open the security gate, and the

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[15] Avsharian told the police that a showcase was broken when a suspect struck the case with the bottom portion of a handgun. (21RT 1118.)

three men left. (20RT 1020, 1024-1025, 1060, 1085.) Avsharian, who was sitting at his desk, was struck in the left wrist after a bullet shattered his Tag Heuer watch. (20RT 1017-1019; 21RT 1110.) Sarkisyan was struck in the left leg and fell into a back storage room. (20RT 1019-1020; 21RT 1110-1112.) Ganazyan and Aslanyan were not injured. (R20T 1026, 1045, 1061; 21RT 1112.)

Two trays of jewelry containing men's rings and bracelets were taken from a showcase. (20RT 1027,1062.) Some of the jewelry, however, was later recovered. (20RT 1028.) Bullet holes were found in the walls behind the counter approximately three to four feet above the ground and near where Avsharian and Sarkisyan were standing. (21RT 1114-1115, 1119, 1121.) A gold ring was recovered from the ground outside the front door. (21RT 1132-1133.)

Four .380 casings were recovered (Peo. Exh. 53) (21RT 1146-1147): two .380 casings were recovered from the floor near the customer-side of the north counter (21RT 1134-1136), and two .380 casings were recovered from the customer side of the east counter (21RT 1139-1140). Four nine-millimeter casings were recovered (Peo. Exh. 53; 21RT 1146-1147), including two nine-millimeter casings recovered near the east wall on the employee-side of the counter. (21RT 1138-1140.) Four spent bullets were recovered (Peo. Exh. 53; 21RT 1147-1149): one spent bullet was found on the employee-side of the north counter (21RT 1134-1136); one spent bullet was found on the floor, near the door leading to the back storage area close to where Sarkisyan was lying (21RT 1137); one bullet was found embedded in the second shelf of Avsharian's desk; and one bullet was found on the floor behind the desk on the employee-side of the east counter (21RT 1138). A brown leather holster (Peo. Exh. 52 [holster]) was found on top of the east-side counter, six to ten inches from where the glass showcase was broken. (21RT 1139.) No handgun was found in the holster,

and the top of the holster was unsnapped. (21RT 1144.) This holster was capable of holding a .380-caliber handgun. (21RT 1143.)

Avsharian was shown a six-pack photographic lineup (Peo. Exh. 43 [six-pack photographic lineup]) and selected appellant's photograph. (20RT 1031; 26RT 1700; Peo. Exh. 44 [lineup report].) In making his identification, Avsharian stated, "[Appellant] is the guy that I am almost positive I saw him two times same day, because his face I can recognize."[16] (20RT 1031, 1700.) Ganazyan was also shown the six-pack photographic lineup (Peo. Exh. 43) and selected appellant's photograph (Peo. Exh. 46 [lineup report]). (20RT 1062-1063; 26RT 1700.) Ganazyan also attended a live lineup and selected appellant. (20RT 1064; 26RT 1775-1776.) Aslanyan was shown a six-pack photographic lineup (Peo. Exh. 43) and selected appellant's photograph (Peo. Exh. 48 [lineup report]. (20RT 1088-1090; 26RT 1700.) Aslanyan also attended a live lineup and selected appellant (Peo. Exh. 49 [live lineup report]). (20RT 1090; 26RT 1700, 1775-1776.) Aslanyan also identified appellant in court as one of the three robbers. (20RT 1090).

Peggy Fiderio, a forensic fingerprint expert for the Los Angeles Police Department, responded to H&R Pawnshop on January 30, 1993. Fiderio dusted the glass display cases, the countertops, and broken pieces of glass in the pawnshop for fingerprints. (22RT 1234-1235, 1241.) Fiderio lifted two latent palm prints from the southeast display cabinet. (22RT 1242-1246; Peo. Exh. 63 [latent print]; Peo. Exh. 64 [latent print].) The fingers for both of these latent prints pointed towards the employee side of the counter. (22RT 1246.) Fiderio compared the latent palm prints recovered from the pawnshop to an exemplar of appellant's palm and matched

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[16] Avsharian attended a live lineup, but did not identify appellant. (20RT 1034; Peo. Exh. 45 [live lineup report].)

the latent prints to appellant's left palm. (22RT 1246-1248; Peo. Exh. 65 [fingerprint report].)[17]

f. The February 2, 1993, Robbery and Murder at the Sun Valley Shell Station

On February 2, 1993, at approximately 7:30 p.m., Norair Akhverdian was working as a cashier at a Shell gasoline station located at 12858 Roscoe Boulevard, near the intersection of Roscoe and Coldwater Canyon Boulevards. (24RT 1550-1552, 1562-1563; 26RT 1680.) Raffi Rassam was a regular customer at the gas station and knew Akhverdian as "Nick." (28RT 1901, 1920-1921.) At approximately 7:30 p.m., Rassam drove his 1991 Honda Accord to a gas pump and walked into the gas station. (28RT 1902-1904.) As Rassam walked into the gas station, he noticed a Jeep Cherokee with side paneling parked behind the store. (28RT 1904-1905, 1924-1927, 1964.) There was a person sitting inside the Jeep and the engine was running. (28RT 1905-1906.) Rassam entered the gas station, handed Akhverdian $14, and went back to his car to fill it up with gas. (28RT 1902-1906, 1928-1931.) Rassam was unable to pump any gas, and turned around and began walking towards the gas station. (28RT 1907, 1932-1933.) As Rassam turned around, he heard change falling, looked up, and saw Akhverdian standing inside the gas station "looking very scared." (28RT 1907, 1933.) Rassam saw a man, later identified as appellant, on the cashier's side of the counter facing the cash register. (28RT 1907-1908, 1918, 1920, 1933-1934, 1938.) From the movement of appellant's hands,

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[17] Previously, another forensic print expert with less experience than Fiderio had compared the latent prints and appellant's exemplar and determined that there was no match. (22RT 1250-1252, 1260.) Upon reviewing the materials, however, Fiderio concluded that there was a match. (22RT 1253.) Fiderio then had two latent print experts verify her results. (22RT 1253, 1261-1262.)

it appeared that he was taking something. (28RT 1936-1937.) Appellant jumped over the counter and immediately extended his arm and fired a single shot at Akhverdian. (28RT 1910-1911, 1945, 1948.) Akhverdian yelled, and appellant walked out at a high speed in the direction of the white Jeep. (28RT 1911.) As appellant exited the gas station and walked past Rassam, he looked at Rassam. (28RT 1914-1915, 1941, 1952.) Rassam noticed that he had a ponytail and an "acne complexion." Appellant was wearing sunglasses, a jacket, and jeans. (28RT 1914-1915.) Rassam ran to a Thai restaurant and called the police. (28RT 1914.)

Meanwhile, Melikset Kirakosyan was working in the back hallway of the Shell station. (24RT 1551-1552, 1565-1566, 1568.) Kirakosyan heard a gunshot and then heard Akhverdian yelling. (24RT 1553-1556, 1570-1571.) Kirakosyan went inside the store area and saw Akhverdian on the ground behind the cash register near the east wall. (24RT 1556-1557.) Akhverdian was breathing, but unconscious. (24RT 1557.) There was a small wound on Akhverdian's chest. (24RT 1558.) Kirakosyan called 911. (24RT 1557.)

A video camera recorded the robbery and murder at the Shell station. (24RT 1553, 1564; 26RT 1745, 1752-1758.) The video depicted a figure jumping over the counter and holding an item in his hand. Akhverdian's arms were down at that time. (26RT 1752-1760.) An expended shell casing was recovered from the scene, along with an expended bullet.[18] The bullet was found behind the cash register area. (27RT 1885-1890; Peo. Exhs. 120 [casing and bullet], 126 [photograph of casing].) The cash register drawer was on the floor and no money was left in the register. (27RT 1891.)

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[18] This casing and bullet were later matched to a Walther handgun recovered from appellant's car. (27RT 1826-1828.)

Rassam was shown a six-pack photographic lineup (Peo. Exh. 43) and selected appellant's photograph and another photograph as "resembl[ing]" the robber. (28RT 1915-1917; Peo. Exh. 132 [lineup report]; see also 26RT 1700, 1702.) Rassam also attended a live lineup and identified appellant as the person who shot Akhverdian. (26RT 1707; 28RT 1917-1918.) Rassam further identified appellant in court as the person who shot Akhverdian. (28RT 1920.) Rassam was "110 percent confident" that appellant was the person who shot Akhverdian. (28RT 1962.)

An autopsy was performed on Norair Akhverdian. (26RT 1720-1722; Peo. Exh. 111 [autopsy report].) At the time of his death, Akhverdian was five feet, seven inches tall, weighed 163 pounds, and was 41 years old. (26RT 1731.) It was determined that Akhverdian died from a gunshot wound to the thorax abdomen. (26RT 1726.) The gunshot entered the front lower left chest and exited the front lower right chest, striking the heart, aorta, and liver. (26RT 1727-1728, 1736.) There was no evidence that the gun was closer than two feet from Akhverdian. (26RT 1727.)

g. The February 10, 1993, Robbery and Murder at Jack's Liquor

On the evening of February 9, 1993, Margaret Armenian gave her husband, Varouj Armenian, $2000 to deposit in their savings account. (23RT 1441-1442, 1444.) Varouj Armenian was the owner of Jack's Liquor, a liquor store located in a small strip mall on Hollywood Boulevard at the intersection of Kenmore Street. (23RT 1347, 1447, 1479.) Varouj Armenian placed the money in a blue Security Pacific bank bag. (23RT 1442.) Varouj Armenian typically placed the bank bag in the back of a counter at the liquor store, where it was visible to customers. (23RT 1443.)

On February 10, 1993, at approximately 3:45 p.m., Hratch Hannessian was working at Shirak Printing, a bookstore and printing shop located next to Jack's Liquor. (23RT 1347-1348.) Hannessian heard two to three gunshots. (23RT 1347-1350.) Hannessian looked up and saw a man, later identified as appellant, walking out of the liquor store. (23RT 1350, 1381.) Appellant had brown hair in a ponytail and was holding a black and brown revolver. (23RT 1373, 1381, 1400-1401.) Appellant turned to his left, took a step towards Hollywood Boulevard, and then turned back towards the liquor store. Appellant tucked the gun in his shirt with his left hand. (23RT 1351-1352, 1354, 1395-1397.) Appellant then turned and walked slowly towards Hollywood Boulevard. (23RT 1354.)

Hannessian ran out of the bookstore and went inside Jack's Liquor. (23RT 1354, 1409.) Armenian was on the floor behind the counter and covered in blood. (23RT 1354-1355.) The counter door was open. (23RT 1355.) Hannessian ran back to the bookstore and called 911. (23RT 1354, 1409.) Hannessian then ran back to Jack's Liquor and attempted to administer first-aid. (23RT 1355.)

Meanwhile, Yepraksia Kazanchian was working at Tony's Burgers, a hamburger stand in the same parking lot area as Jack's Liquor. (25RT 1599-1600.) Kazanchian heard gunfire coming from Jack's Liquor and went to the front of the hamburger stand. (25RT 1600-1601.) Kazanchian walked to a window and saw a beige or white car with wood paneling stopped at a parking meter on Hollywood Boulevard, approximately 25 to 30 feet from Jack's Liquor.[19] (25RT 1601, 1602, 1615.) The car drove away and turned onto Kenmore Street. (25RT 1604.)

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[19] The car seen by Kazanchian outside Jack's Liquor was similar to that driven by appellant at the time of his apprehension. (25RT 1604-1605.)

The police arrived, and Armenian was found on the floor near a small service door leading to a counter. (23RT 1447.) Armenian appeared to have suffered two gunshot wounds, which struck his face and the back of his head. (23RT 1448; see also Peo. Exh. 72 [crime scene photos].) Armenian's body was no more than two feet from the store entrance and was approximately six feet from the cash register. (23RT 1454.) There were no bruises or scratches on Armenian's body indicating that he had been in a fight, and no gun or weapon was found inside the business. (23RT 1455.) Approximately $1000 was found in Armenian's pocket. (23RT 1455.) Two $5 bills and some small change were left in the cash register. (23RT 1456.) Two empty .380 semiautomatic bullet casings were recovered: a casing stamped "W.W." was found near Armenian's left knee and a casing stamped "R.P." was found on the top of the service counter. (23RT 1459, 1461-1463, 1467-1468; Peo. Exh. 84.) One intact .380 automatic bullet was recovered near Armenian's right hip. (23RT 1459, 1461, 1463, 1469; Peo. Exh. 71 [bullets and casings]; Peo. Exh. 84.) A .380 automatic bullet fragment was also recovered near Armenian's right leg. (23RT 1459, 1463, 1470; Peo. Exh. 84.) The blue Security Pacific bag containing $2000 was not found, and Margaret Armenian later learned that the money was never deposited in the savings account. (23RT 1445, 1455.)

Hannessian was shown a six-pack photographic lineup but did not make an identification at that time. (23RT 1374-1376, 1472; Peo. Exh. 79 [six-pack photographic lineup].) During the photographic lineup, Hannessian's father was present and Hannessian's father spoke to Hannessian in Armenian, telling his son not to make an identification because he was fearful for his family. (23RT 1375, 1417-1418.) Hannessian later attended a live lineup. (23RT 1376; Peo. Exh. 73 [live lineup report].) Hannessian selected appellant at the live lineup and was "a hundred percent sure" of his identification." (23RT 1377, 1379, 1422,

1430, 1475; 26RT 1707.) Hannessian also identified appellant in court as the man he saw exiting Jack's Liquor. (23RT 1381.)

An autopsy was performed on Varouj Armenian. (24RT 1526, 1528; Peo. Exh. 89 [autopsy report].) At the time of his death, Armenian was 39 years old. (24RT 1530.) Armenian received two gunshot wounds: (1) an entrance wound on the back of the neck that exited under the left eye; and (2) an entrance wound on the right side of the face that exited on the other side of the jaw. (24RT 1531-1535.) The first wound was fatal because it passed through the spinal cord. (24RT 1536.) There was no evidence that Armenian was shot at a distance of less than two feet. (24RT 1538-1540.) There were some small abrasions on Armenian's right upper back consistent with his falling down or scratching a rough surface. (24RT 1542.)

h. The February 11, 1993, Robbery at the Seven Star Motel

On February 11, 1993, Mai Chai was working as the manager at the Seven Star Motel at 1730 North La Brea Boulevard in Hollywood.[20] (19RT 950.) At approximately 2:00 to 2:15 p.m., appellant and a Black man were in the lobby, "hanging around" Chai's office. (19RT 951-954, 960.) Appellant had long hair and a mustache, and a tattoo on his arm. (19RT 960.) Chai, who was inside her office, called out for a maid to clean a room. At that time, appellant and the Black men entered Chai's office. (19RT 955-956.) The Black man had something in his hand that was covered with a towel. Chai believed this object might have been a gun. The Black man pushed Chai into a corner and held "something" to Chai's

[20] The Seven Star Motel was located approximately one mile from the Sun Valley Shell Station and approximately two-thirds of a mile from the Jambi 3 Jewelry Store. (17RT 778.)

back. (19RT 956-957, 962, 974, 976.) Appellant said he wanted money. Appellant then opened Chai's desk drawer and took approximately $200 to $300. Appellant then asked for more money. Chai told appellant that the only money she had was in the drawer. Appellant saw Chai's purse under the desk. Appellant took Chai's purse and emptied the contents onto the floor. Appellant took the money, approximately $70, from the purse. (19RT 958-959.) Appellant and the Black man ran outside the office and ran north on La Brea. (19RT 959.)

Chai was shown a six-pack photographic lineup (Peo. Exh. 10 [six-pack photographic lineup]) and selected appellant's photograph (Peo. Exh. 37 [lineup report]). (19RT 966-967.) Chai later attended a live lineup and selected appellant (Peo. Exh. 39 [live lineup report]). (17RT 776; 19RT 968; 26RT 1704-1706.) One to two days before the robbery, Chai had seen appellant at the motel sitting in front of the office. (19RT 969-970.) At the time of the robbery, Chai also recognized appellant because he had stayed at the motel previously. Chai, who kept records of people who stayed at the motel, gave the police an index card with appellant's name. (19RT 978-979.)

i. The February 17, 1993, Robbery at Original Blooming Design

On February 17, 1993, Homer Vela was working at Original Blooming Design, a flower shop located at 8634 Woodman Avenue in Arleta. (22RT 1283-1284, 1333; see also 22RT 1221.) Vela was the only employee at the store that day. (22RT 1285.) At approximately 11:00 a.m. to 12:00 p.m., three men entered the store and asked if there were any"after-Valentine" specials. (22RT 1284, 1309.) One of the men, later identified as appellant, was tall and fair-skinned with facial blemishes and

was approximately six feet tall.[21] (22RT 1286-1287, 1293-1294, 1297, 1299.) The second man appeared to be Hispanic and was "chunky" and approximately five feet, eight inches. (22RT 1294-1295.) The third man appeared to be Black and was approximately six feet tall. (22RT 1295.) They were all wearing baseball caps and dark clothing. (22RT 1294.) Vela told the men there were no such specials, but that there were some reasonably-priced arrangements. (22RT 1285, 1312.) Vela looked down and continued writing out an order. (22RT 1285, 1312.)

The three men came towards Vela. Appellant grabbed Vela's hair and pulled Vela down. Appellant told Vela not to look up and cursed at Vela. (22RT 1285, 1312-1313.) Appellant then jumped over the counter, pulled out a gun, and held it to Vela's head. (22RT 1286-1288.) Appellant told Vela to lie down on the floor and threatened to shoot if Vela looked up. (22RT 1286-1288.) The Black man went to the door, and the Hispanic-looking man walked behind the counter and pointed a gun at Vela. (22RT 1286-1287, 1293, 1317.) Appellant unsuccessfully attempted to open the cash register. Appellant then grabbed Vela, held the gun to Vela's head, and directed that Vela open the cash register. (22RT 1288.) Vela opened the cash register, and appellant directed him to lie down on the ground again. Vela complied. Appellant took the money from the cash register and then asked Vela if there was any more money in the store. Vela responded, "no." Appellant asked if Vela had a wallet and Vela responded, "no." Appellant continued to ask for money, and Vela emptied

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[21] In the police report, Vela described appellant as a Black male approximately six feet tall with acne on his face, and armed with a black semiautomatic handgun. (22RT 1340.) Vela believed that appellant, who he also described as tall and "fair-skinned," was of "mixed" ethnicity. (22RT 1324.) Vela explained that appellant appeared Black because he had wavy hair and that the lights in the store were off and that appellant might have appeared "a shade darker." (22RT 1324, 1326.)

his pockets to show that he had none. (22RT 1289.) Appellant threatened that Vela "better not lie." At that point, the Hispanic-looking man told appellant, "Let's go. Let's go. Leave him alone." The three robbers told Vela that they would shoot him if he looked up. (22RT 1290.) The men then left. Vela called the police. Vela also checked the cash register and discovered that approximately $50 was gone. (22RT 1291.)

Meanwhile, Michael Madelon was working at Dean Security, a locksmith service near Original Blooming Design. (22RT 1221.) Madelon walked outside Dean Security and noticed an "older" four-door, tan Jeep Wagoneer, backed into a parking space outside the front door of his business. (22RT 1223-1226.) The engine of the Jeep Wagoneer was running and there was a Black man, weighing approximately 240 pounds with short curly hair, in the driver seat covering his eyes with his right hand. (22RT 1224, 1226.) Madelon walked to the Altadena market located in the same complex. (22RT 1224, 1227.) When Madelon was inside the market, he learned that there was a robbery at the flower shop. Madelon exited the market and saw that the car was gone. (22RT 1227.)

Vela attended a live lineup on September 9, 1993, but was unable to make any identifications. (22RT 1317-1323.) Madelon was shown a six-pack photographic lineup (Peo. Exh. 61 [lineup]) and identified the man in the Jeep Wagoneer. (22RT 1228-1229.)

j. The February 17, 1993, Robbery at Rocky's Video

On February 17, 1993, Maria and Jose Medina were at Rocky's Video, located at 14028 Van Nuys Boulevard in Pacoima, approximately two miles from Original Blooming Design. (21RT 1160, 1180; 22RT 1265, 1333; see also 26RT 1681 [location a "few minutes" driving time].) Maria, who was Jose's aunt, was 18 years old and worked at the store. (21RT 1160, 1172; 22RT 1265.) Jose's father owned Rocky's Video, and

Jose was 12 years old. (21RT 1159-1160.) At approximately 12:15 p.m., Jose was listening to the radio, and Maria was helping a customer. (21RT 1160-1161.) Two Black men and a White man, later identified as appellant, entered the store. (21RT 1164; 22RT 1266.) Appellant was wearing a white shirt, blue jeans, and a black baseball cap. (21RT 1180-1181.) One of the Black men asked Jose if the store had the movie, "Nine and One-Half Weeks." (21RT 1164, 1181.) Jose went to the store computer and looked up the movie's availability. (21RT 1165.) At that moment, the Black man who asked about the movie walked around the counter to the employee area where Jose was located. (21RT 1165-1166.) At the same time, appellant went to Maria and pointed a small automatic gun at her while the second Black man pointed a machine gun at both Jose and Maria. (21RT 1168, 1173-1174.)

The first Black man held an automatic handgun to the left side of Jose's head and motioned for Jose to walk towards the office. (21RT 1167-1168, 1182.) Jose complied. (21RT 1168.) The first Black man asked Jose if there was a gun in the office, and Jose replied that there was no gun. (21RT 1169.) The first Black man told Jose to lie down on the floor with his hands on his head. Jose did as directed. (21RT 1169-1170.) The first Black man then searched Jose's pockets and found a candy bar and $2 in cash. The first Black man dropped the candy, but put the $2 in his pocket. (21RT 1170.)

Meanwhile, appellant jumped over the counter where Maria was located. (21RT 1166-1167; 22RT 1266-1267.) Appellant pointed a small automatic handgun at Maria's stomach and told Maria to give him money. Maria took money from the cash register and gave it to appellant. (RT 1168, 1174, 1184, 1267.) Appellant told Maria to look for more money, and Maria gave appellant money from her front pants pocket. (22RT 1268.) Appellant looked for money in a drawer next to the cash

register and took money from the drawer. (22RT 1268-1269 At gunpoint, appellant took Maria to the office and demanded that she lie on the floor with her hands on her back. Maria complied. (21RT 1170-1171; 22RT 1269-1270.) Appellant and the first Black man left the office. (21RT 1172; 22RT 1270.)

Maria went outside the office to see if the men were gone. (21RT 1174; 22RT 1270.) Maria saw the second Black man who was holding a machine gun and returned to the office. (21RT 1174; 22RT 1270-1271.) A few minutes later, Jose left the office and did not see the men in the store. (21RT 1175; 22RT 1271.) Jose and Maria called the police. (21RT 1175; 22RT 1271.)

Jose's radio "boom box" was missing. (21RT 1175.) Maria checked the register and found that the money, approximately $200, was gone. (21RT 1175; 22RT 1271.)

Jose was shown a six-pack photographic lineup (Peo. Exh. 43 [six pack photographic lineup]) and selected appellant's photograph (Peo. Exh. 55 [lineup report]). (21RT 1176-1177, 1190; 26RT 1700.) Jose attended a live lineup on May 17, 1994, and identified appellant as one of the robbers. (21RT 1178-1179; 26RT 1704-1705.) Jose was "sure" of his identification. (21RT 1193.) Jose also identified appellant in court as the person who jumped over the counter and pulled the gun on his aunt. (21RT 1179.) Jose remembered appellant because he had scars on his face and had a face Jose "c[ould]n't forget." (21RT 1190-1191.) Maria was shown a photographic lineup (Peo. Exh. 43) and identified appellant as the person who pointed a gun at her stomach and robbed the video store (Peo. Exh. 66 [lineup report]). (22RT 1272-1274; 26RT 1700.) Maria was "absolutely sure" of her identification. (22RT 1275.) Maria also attended a live lineup and identified appellant as one of the robbers. (Peo. Exh. 67 [live lineup report]). (22RT 1275; 26RT 1704-1705.)

k. The February 17, 1993, Robbery at Nice Price Store

The Nice Price Store, a discount merchandise store, was located at 14026 Van Nuys Boulevard and was next to Rocky's Video. (21RT 1180; 24RT 1489, 1491.) On February 17, 1993, at approximately 12:20 p.m., Alma Najarro was working by herself at the Nice Price Store. (24RT 1489-1492.) As Najarro was placing merchandise in a shelf case, a "chubby" Black man entered, followed by a White man with acne scars and a ponytail. The White man, later identified as appellant, was carrying a portable stereo. (24RT 1492-1495, 1507-1510, 1517.) The Black man, later identified as Darren White, walked towards where the cookies were located while appellant stood in front of the counter where Najarro was standing. (24RT 1493, 1515-1516; 26RT 1704.) Appellant told Najarro "this is a robbery," leaned on the counter, and pointed a machine gun at her.[22] (24RT 1493-1499, 1511-1512.) Najarro took a step backwards and became aware that the White man was standing behind her. (24RT 1493, 1497, 1499.) Najarro felt something against her back. (24RT 1499.) White told Najarro to open the cash register and give him all the money. Najarro gave the coins to White and the cash to either appellant or White. (24RT 1500.) Appellant told Najarro to give him the money that she had in her purse and Najarro complied. (24RT 1500-1503.)

A "regular" customer entered the store and greeted Najarro. (24RT 1503.) Najarro did not respond and the customer picked up some tortillas. (24RT 1504-1505.) White then put his weapon underneath his jacket and walked out with appellant. (24RT 1505.) The police later came to the store and took a police report. (24RT 1506.)

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[22] Immediately following the robbery, Najarro told the police that the White man had a blue steel semiautomatic handgun and that the Black man had a "machine-type handgun." (27RT 1780-1781.)

Najarro was shown a six-pack photographic lineup (Peo. Exh. 86 [six-pack photographic lineup]) and selected appellant's photograph. (24RT 1513-1515, 1518; 26RT 1700-1701.) Najarro was shown another six-pack photographic lineup and identified White as the Black man who robbed the store. (24RT 1515; 26RT 1704; Peo. Exh. 87 [lineup]; Peo. Exh. 88 [lineup report].) Najarro identified appellant in court as the White man who robbed the store. (24RT 1516.)

l. The February 17, 1993, Robbery at Valley Market

On February 17, 1993, Joon Kim was working at Valley Market, located at 7561 Laurel Canyon Boulevard in North Hollywood. (21RT 1198-1199.) Valley Market was located within a few miles of Rocky's Video, the Nice Price Store, and Original Blooming Design. (26RT 1681.) At approximately 12:25 p.m., three men walked into Valley Market. One of the men, a man who appeared to be of "mixed race," and was wearing sunglasses and a baseball hat, pointed a gun at Kim's face. (21RT 1198-1203, 1209, 1215; Peo. Exh. 9 [videotape of robbery].) The man reached over the counter, and removed money from the cash register. (21RT 1201-1202.) A video camera recorded the robbery (Peo. Exh. 9; 26RT 1740-1741). This video tape showed one of the robbers wearing a black jacket that was similar to the jacket appellant was wearing at the time of his arrest. (26RT 1741-1743.) Detective Michael Oppelt, one of the investigating officers in the case, believed that the video depicted appellant, Ray Rios, and Darren White. (26RT 1741-1745.)

Kim was later shown a six-pack photographic lineup (Peo. Exh. 43) and selected appellant's photograph. (21RT 1203-1205; 26RT 1700; Peo. Exh. 58 [lineup report].) Kim also attended a live lineup, but was unable to make an identification. (21RT 1204-1206; Peo. Exh. 59 [live lineup

report].) Kim identified appellant in court as one of the men who robbed the Valley Market on February 17, 1993. (21RT 1205.)

m. The Apprehension of Appellant, Recovery of Evidence, and Further Investigation

On February 18, 1993, Los Angeles Police Department Officers John Eum and Richard Tompkins were driving in a marked police car on patrol in the area of Van Nuys and Roscoe Boulevards. (25RT 1618-1619, 1623, 1651.) There was a light rain at the time and the streets were wet. (25RT 1631.) The officers were looking for a white Jeep Cherokee with wood paneling. (25RT 1619.) The officers had been briefed that morning about the case and were looking for the suspects in the vicinity of some of the robberies. (25RT 1647-1648.)

As Officers Eum and Tompkins drove westbound on Roscoe, they saw a white Jeep Cherokee with wood paneling turning onto Roscoe, proceeding eastbound.[23] (25RT 1620, 1652-1653; Peo. Exh. 96 [photograph of Jeep Cherokee]; see also Peo. Exh. 97 [videotape of chase route].) The officers made a "u-turn" and followed the vehicle. (25RT 1621.) Meanwhile, another patrol vehicle began following the Jeep Cherokee behind Officers Eum and Tompkins. (25RT 1622-1623.) As Officers Eum and Tompkins approached Woodman, they activated their overhead lights. (25RT 1623-1624, 1654.) After the Jeep Cherokee failed to respond, the officers activated the siren. (25RT 1624, 1654.) The Jeep Cherokee then accelerated rapidly, to approximately 65 miles an hour, traveling eastbound on Roscoe. (25RT 1625, 1631.) It then turned

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[23] This Jeep was similar to that seen by Rassam at the Sun Valley Shell gasoline station on February 2, 1993, and that seen by Kazanchian outside Jack's Liquor on February 10, 1993. (25RT 1604-1605; 26RT 1749; 28RT 1905, 1964.)

onto Woodman, traveling southbound, where it struck two vehicles. (25RT 1624-1625, 1646-1647.) The Jeep Cherokee proceeded through a red light at the intersection of Woodman and Saticoy, and began weaving in the intersection. (25RT 1626.) The vehicle then attempted to make a left turn onto Saticoy, but struck the curb and a pole. It traveled up into the air and came to a stop. (25RT 1626, 1631-1635; Peo. Exh. 98 [photographs of Jeep].) During the pursuit, the following traffic violations were committed: excessive speed, failure to stop for a red light, swerving in and out of traffic, failure to activate a turn signal or safely change lanes, and driving on the wrong side of the street. (25RT 1653-1655.)

Appellant exited the driver's side of the vehicle, and Darren White exited the front passenger door of the vehicle. Appellant and White both ran southbound on Woodman Place. (25RT 1627, 1631-1632, 1636-1637, 1641, 1656; see also 26RT 1699.) Ray Rios, the rear passenger, crawled out of the Jeep and was taken into custody by Officer Eum. (25RT 1627, 1636-1637, 1656; see also 26RT 1699.)

Officers participated in a perimeter security search of the area. (25RT 1665-1666.) White was apprehended in a wash near a lumber yard. (25RT 1637-1640.) Appellant was apprehended hiding in some bushes along the east wall of an industrial building south of Saticoy and east of Woodman, approximately 100 yards from the location of the car crash. (25RT 1666-1670, 1672.)

When appellant was apprehended, he was wearing a black jacket and had his hair in a ponytail. (26RT 1697; 27RT 1894-1895; Peo. Exhs. 128-129 [photographs of appellant on day of arrest].) He was six feet, two inches tall, and weighed approximately 185 pounds. (26RT 1698.) Ray

Rios was five feet, six inches tall, and weighed 160 to 165 pounds.[24] (26RT 1699.)

The Jeep was searched. A .380-caliber Iver Johnson blue steel semiautomatic handgun, serial number US001350 (Peo. Exh. 5), was recovered from the center area of the front seat of the vehicle. (26RT 1682-1684, 1688, 1693; Peo. Exhs. 103-105 [photographs of gun in Jeep].) The handgrip of the Iver Johnson was brown on one side and missing on the other side. (26RT 1686-1687, 1770-1771; 27RT 1813.) Six live rounds of .380-caliber ammunition were found inside the Iver Johnson handgun. (26RT 1688-1689, 1693.) A .380-caliber Walther blue steel semiautomatic handgun (Peo. Exh. 6), serial number 75573A, was found on the front driver's-side floorboard. (26RT 1689-1691; Peo. Exh. 106 [photograph of gun].) Eight live .380-caliber bullets were found inside the magazine. (26RT 1693.) Duct tape (Peo. Exh. 4) was recovered from the rear portion of the Jeep. (26RT 1682, 1694-1695, 1769.) Three baseball caps were recovered from the rear portion of the Jeep, including a dark-colored Raider's cap.[25] (26RT 1695-1696, 1769-1770; 28RT 1980-1982; Peo. Exh. 107.) A baseball cap was also recovered from the front seat next to the Iver Johnson handgun. (28RT 1981.)

Richard Marouka, a firearms examiner for the Los Angeles Police Department, compared the Iver Johnson handgun and the Walther handgun to the cartridge cases and expended bullets recovered from the H&R Pawnshop. (27RT 1786, 1790, 1808-1812.) Marouka determined that the

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[24] Based on the descriptions, it appears Rios was the "shorter" Black man. (See 29RT 935-936 [testimony by Clifford Young regarding robbery at Ben's Jewelry], 20RT 1013 [testimony regarding H&R Pawnshop].)

[25] The baseball cap worn by the man who robbed and killed Akhverdian was similar to the Raider's cap discovered in the Jeep. (26RT 1752.)

four .380-caliber casings (Peo. Exh. 53) and one .380-caliber expended bullet recovered from H&R Pawnshop were fired by the Iver Johnson handgun (Peo. Exh. 5). (27RT 1812-1816.) The Iver Johnson handgun was tested and functioned as designed, with a trigger-pull of three and one-quarter pounds that precluded an accidental firing. (27RT 1814-1815.) Marouka did not match any of the evidence recovered from the H&R Pawnshop to the Walther handgun (Peo. Exh. 6). (27RT 1812, 1817, 1825.) The Walther handgun was tested and properly functioned. Marouka opined that the Walther handgun would not accidentally discharge. (27RT 1818-1819.) Marouka further determined that the four nine-millimeter cartridge cases and two nine-millimeter jacketed bullets recovered from the H&R Pawnshop were fired from a third firearm. (27RT 1823.) These cartridges and bullets could have been fired by firearms that resembled machine guns. (27RT 1823-1824.)

Marouka compared the Iver Johnson handgun and the Walther handgun to the bullet and casing recovered from the Sun Valley Shell station (Peo. Exh. 120 [.380-caliber cartridge casing and .380-caliber bullet]). (27RT 1826-1827.) Marouka determined that the cartridge casing and bullet recovered from the Sun Valley Shell station were fired by the Walther pistol (Peo. Exh. 6). (27RT 1827-1828.)

Marouka compared the Iver Johnson handgun and the Walther handgun to the bullets and casings recovered from Jack's Liquor. (27RT 1828; Peo. Exh. 84 [two .380-caliber discharged cartridge cases, one expended .380-caliber bullet].) Marouka determined that the discharged cartridge casings and expended bullet were fired by the Walther handgun (Peo. Exh. 6). (27RT 1828-1832.)

B. Defense Case

Appellant presented evidence regarding the robbery and murder at Jack's Liquor. (30RT 2057-2130.) On February 10, 1993, Anthony Schilling and Gordon Keller were repairing drains on the roof of Silvia's Costumes. (30RT 2057, 2114, 2070, 2098.) Silvia's Costumes was located near the intersection of Hollywood and Kenmore, next to Jack's Liquor. (30RT 2057-2059.) During the afternoon, Schilling and Keller heard two gunshots coming from the direction of Jack's Liquor. (30RT 2059-2060, 2088, 2114, 2122, 2123.) Schilling walked to the front corner of the roof facing Jack's Liquor. (30RT 2060.) From this vantage point, Schilling could see part of the sidewalk in front of Jack's Liquor. (30RT 2061-2062.)

Schilling saw a man, approximately six feet tall with long brown hair in a ponytail, walking from the mall sidewalk in front of Jack's Liquor onto the Hollywood Boulevard sidewalk. (30RT 2062-2063, 2076, 2083.) The man with the ponytail appeared to be coming from Jack's Liquor. (30RT 2105.) The man with a ponytail made a left turn. (30RT 2063.) Schilling then saw a Black man, over 5 feet, 10 inches tall, jogging on the sidewalk of Hollywood Boulevard. This second man caught up to the first man and walked with the first man. The two men walked together at a normal pace and then turned down Alexandra Street. (30RT 2063-2065, 2068, 2089.)

Keller also looked over the side of the building and saw two men in front of the liquor store. (30RT 2115-2118, 2123.) One of the men was between five feet, ten inches and six feet tall, and had dirty-blond hair in a ponytail. The other man had a dark complexion and dark hair.[26]

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[26] Keller stated that he was wearing sunglasses and that there was glare from the roof. (30RT 2125-2126.)

(30RT 2118-2119, 2125, 2127.) The two men were walking next to each other. (30RT 2118.)

Schilling and Keller descended from the roof, requested that the secretary inside the costume shop call 911, and then ran to the front of the store. (30RT 2066, 2121, 2124.) After the police arrived, Schilling approached a policeman and told him what he had seen. Schilling gave his name and number to the police, but was never contacted by them. (30RT 2066-2067.) Keller also gave a description of the men to the police, but was told by the police that it did not match any of the other descriptions. (30RT 2121-2122.)

Appellant's photographs, taken the day of his arrest (Peo. Exhs. 128-129), looked like the person Schilling saw walking down Hollywood Boulevard following the murder. (30RT 2077.) The Black man walking with the man with the ponytail had coloring similar to that of Darren White and Ray Rios. (30RT 2087, 1637, 1698-1699.)

C. Penalty Phase Evidence

1. Prosecution Case

a. Testimony of Family and Friends

Zhneta Torosyan was married to Akhverdian for six years. They had two children, who were three and five years old at the time of Akhverdian's death. (34RT 2534.) Two other children from Torosyan's first marriage lived with Akhverdian and Torosyan. They were 13 and 15 years old at the time of Akhverdian's death and had a good relationship with Akhverdian. (34RT 2534, 2537.)

Torosyan learned that Akhverdian was killed from her brother-in-law. (34RT 2535.) Akhverdian was a "great" husband and father, and they were very happy. After Akhverdian's death, "everything" changed. (34RT 2536.) Torosyan lost her health and had heart problems requiring

medication. (34RT 2537.) Akhverdian's death impacted his children, and the youngest child was treated by a psychologist. (34RT 2537.)

Akhverdian had three sisters and two brothers, including Hrair Akhverdian. (34RT 2538-2539.) Hrair and Akhverdian were close and went skiing and played soccer together. (34RT 2539.) Akhverdian was a good father and brother. Akhverdian coached his children, teaching them swimming and soccer. Akhverdian helped everybody "as best he could." (34RT 2540.) When Hrair learned Akhverdian was shot, he went to the hospital and learned his brother had passed away. (34RT 2541.) Akhverdian's death was "hard" for Hrair and the family – Akhverdian had acted as the family head and advised the family. (34RT 2539, 2545.) After Akhverdian's death, his mother became sick, stayed home all the time, and cried a lot. (34RT 2547.) Akhverdian was 41 years old at the time of his death. (34RT 2546; see also Peo. Exh. 139 [videotape of Akhverdian and family.)

Margaret Armenian was married to Armenian for seven years and they had two children, Jack and Christina.[27] (34RT 2547-2548.) At the time of Armenian's death, Jack was four years old and Christina was five years old. (34RT 2548.) Margaret and Armenian had a "beautiful marriage," and Armenian was a "very loving and caring man." (34RT 2548.) Armenian was a good father and his son was "everything to him." (34RT 2549.) Armenian's death was a "nightmare" for Margaret. (34RT 2549.) On the day of Armenian's death, Margaret and Armenian had plans to eat lunch at the store. (34RT 2550.) Margaret's mother

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[27] Margaret and Armenian were divorced on March 15, 1989. (34RT 2555.) While they were separated, Armenian always visited the children. (34RT 2556.) Margaret and Armenian reunited in 1990 and were remarried in 1991. (34RT 2563-2564.) Margaret never stopped loving her husband during their separation. (34RT 2563.)

received a phone call that there was something "going on" at the liquor store and Margaret went to Jack's Liquor. Armenian learned about her husband's death when she arrived at the liquor store. (34RT 2549-2559.) Jack Armenian, Armenian's son, loved and missed his father. Jack felt sad after his father's death. (34RT 2580-2581.) Christina Armenian, Armenian's daughter, remembered her father combing her hair, helping her brush her teeth, and taking her to kindergarten. (34RT 2583.) Christina also felt sad by her father's death. (34RT 2582-2583.) At the time of his death, Armenian was 39 years old. (34RT 2547; see also Peo. Exh. 140 [videotape of Armenian and family].

b. Appellant's Prior Robbery

On September 30, 1985, Richard Burd was living in Hermosa Beach and working in Torrance in a warehouse. (36RT 2707, 2710.) Burd had recently moved to the Los Angeles area from Ohio and had not yet set up a checking account or a savings account. (36RT 2712.) Burd was carrying two weeks worth of pay, approximately $450 in cash. (36RT 2712.) He left work at approximately 7:00 p.m., after having a couple of beers. (36RT 2707, 2725.) Burd dropped off a coworker in the area of Hawthorne and Rosecrans. (36RT 2707-2708.) As he drove, a hitchhiker with long brown hair and a dark mustache, later identified as appellant, attracted Burd's attention. (36RT 2708.) Burd, who was driving a Chevy van, picked up appellant and asked where he was going. Appellant stated he was going to a friend's house, and Burd agreed to take him. (36RT 2709, 2721.)

As they drove, they saw a man on a bicycle and appellant told Burd that the man on the bicycle was the person he was going to visit. (36RT 2710.) Burd picked up the man on the bicycle. The man on the bicycle called himself "Paul," and was later identified as Paul Weber.

(34RT 2606; 36RT 2710-2711.) Burd drove to Weber's house, near Hawthorne and 190th Street in Lawndale. (36RT 2710-2711.) Weber went inside the house while Burd stood out near the van. Appellant also went inside the house for a couple of minutes and then came back out. Appellant and Burd decided to go get some beer. Appellant and Burd went to a little liquor store near Weber's house and purchased a 12-pack of beer. (36RT 2711-2712, 2726.) Burd paid for the beer, and appellant and Burd went back to Weber's house. (36RT 2712.)

Appellant and Burd picked up Weber and the three men went to the Redondo breakwater. (36RT 2713.) The three men drank at the breakwater, and Burd had three to four beers. (36RT 2714-2715.) At appellant's and Weber's suggestion, the three men went to a drainage ditch in Palos Verdes. (36RT 2714-2715.) Appellant, Weber, and Burd drank beer, talked, and sang. (36RT 2715.)

The next thing Burd remembered was waking up the following morning. He had blood all over his face and hands, and his glasses were gone. (36RT 2715.) Burd could not see out of his left eye and blood was coming from his head. (36RT 2716.) Burd heard a car and tried to climb up the hill to the road. (36RT 2716-2616.)

At approximately 5:30 to 5:45 a.m. on October 1, 1985, Spencer Woodard was driving on Palos Verdes Drive. (35RT 2700-2701.) Woodard passed a drainage ditch in the area and saw Burd laying down. Burd sat up and waved his arms. Woodard pulled over and got out of the car. (35RT 2701-2702.) It appeared that Burd had been beaten up. (35RT 2701.) Burd had lacerations on his face, his eye was swollen shut, his clothes were torn and dirty, and his face and hands were bloody. (35RT 2702.) It appeared Burd was intoxicated, and Woodard smelled alcohol on Burd's breath. (35RT 2704.) Woodard asked Burd what had happened and Burd told Woodard that he had met up with somebody

while drinking at a bar, and that the person asked if Burd wanted to go to a party. Burd told Woodard that he went with the person and that they went to Palos Verdes. (35RT 2702.) Woodard took Burd to the police station down the street. (35RT 2703.)

Burd went to the hospital and it was determined that he had a fractured eye socket. He received stitches to his head. (36RT 2717.) Burd was in the hospital for four to five days and did not return to work for three to four weeks. When Burd woke up in the hospital, he checked his pants pockets and found that his car keys and wallet were gone. (36RT 2718.) Burd got back his van 10 days later. The radio and speakers were missing, and his bicycle, which was inside the van, was damaged. (36RT 2720.) After the incident, Burd had dizzy spells. (36RT 2718-2719.)

Detective Sergeant Arthur Clabby of the Palos Verdes Police Department investigated the case. (34RT 2590-2591.) Burd took Detective Sergeant Clabby and Detective Vanderpool to a house on Gavella Street near 172nd Street in Lawndale. (34RT 2594-2595.) Detective Sergeant Clabby learned that three men lived at the address. (34RT 2595.) Detective Sergeant Clabby and Detective Vanderpool drove by the residence and saw two men, who matched Burd's description of his assailants, leaving on a bicycle. Appellant was pedaling the bicycle and the other man, later identified as James Weber, was sitting on the crossbar. (34RT 2596.) Detective Sergeant Clabby and Detective Vanderpool stopped the bicycle and advised appellant he was under arrest on a charge of robbery, assault with a deadly weapon, and grand theft auto. (34RT 2596-2597.) Appellant was transported to the police station, advised of his rights, and interviewed. (34RT 2597-2600.)

During the interview, appellant stated that he, Paul Weber, and Burd, had driven up to a drainage ditch near Palos Verdes drive. (34RT 2601-2602.) Appellant stated that he, Weber, and Burd sang songs, and then he

struck Burd over the head with a beer bottle. (34RT 2602.) Weber instructed appellant to remove Burd's wallet and money from Burd's pockets, along with the keys to Burd's Chevrolet van.[28] (34RT 2603.) Appellant and Weber ran up the side of the drainage ditch, got in the van, and drove off, leaving Burd in the drainage ditch. (34RT 2603.) As appellant related the events, he was "fairly matter of fact" and did not express any remorse. (34RT 2603-2604.)

A criminal case relating to the incident was filed in Los Angeles County Superior Court case number A912916. (34RT 2604-2605.)

c. Incidents Following Appellant's Incarceration

(1) The August 20, 1993, Incident With Chris Anders

On August 20, 1993, Chris Anders was an inmate at Los Angeles County Jail. (34RT 2611.) Anders was incarcerated on a charge of making terrorist threats (§ 422), and was later convicted. (34RT 2611, 2619.) On August 20, 1993, Anders saw a visitor and received a $20 bill. (34RT 2611-2613.) As Anders returned to the lockup area, he asked appellant, the only inmate in the area, to provide him "jailhouse change."[29] (34RT 2613-2614, 2618.) Appellant was approximately six feet tall, weighed 170 pounds, had long black hair and a mustache, and had a slightly olive complexion and tattoos on his back. (34RT 2617.)

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[28] The police report reflected that appellant told the police that Weber searched Burd's pockets and removed the money and car keys at appellant's direction, whereas Weber told the police appellant went through Burd's pockets and took the wallet and keys. (34RT 2608-2609.)

[29] Jailhouse change is where a large bill is exchanged for smaller denominations. The person providing the smaller denominations will generally keep $1. (34RT 2614.)

Appellant agreed, and Anders flashed the $20 bill at appellant. Appellant and Anders went to an area that was out of sight and appellant pulled out a mesh money bag. Anders saw two $5 bills and five $1 bills in the money bag. (34RT 2615, 2623-2624.) Appellant gestured for Anders to give him the $20 bill, and Anders gave appellant the money. Appellant took the $20, shoved it down his pants, and walked towards the visiting area. (34RT 2615.)

Anders followed appellant, saying "Hey, hey what's going on? What are you doing?" (34RT 2616, 2625.) Anders said, "What the fuck is going on?" Appellant turned around and threw a punch at Anders. (34RT 2616.) Anders avoided the punch, but appellant continued to throw punches at Anders and backed Anders against a wall. (34RT 2616, 2628.) Anders blocked some punches with his arms and avoided other punches by jerking his head. (34RT 2616, 2628.) However, Anders struck his head in the concrete wall behind him. (34RT 2616, 2628-2629.) Anders went down to his knees and he saw appellant "getting ready to kick him in the face." (34RT 2616, 2629.) Anders grabbed appellant's foot, and appellant fell to the ground. (34RT 2616, 2629.) Anders got up from the ground. (34RT 2629.) The deputies arrived and appellant got up from the ground and threw the $20 bill on the ground. (34RT 2616, 2629-2630.)

Meanwhile, Deputy John Meehan of the Los Angeles County Sheriff's Department heard an altercation in the hallway separating the county jail from the inmate reception center. (35RT 2686-2687.) Deputy Meehan investigated the altercation and saw Anders and appellant fighting. As Deputy Meehan approached, Anders and appellant stopped fighting. Appellant turned around and tried to walk away while Anders turned towards Meehan covering his face "like he had just been hit." (35RT 2687, 2694-2696.) Deputy Meehan had Anders and appellant accompany him to

a work station, and Deputy Meehan filled out an inmate incident report. (35RT 2687.)

Appellant told Deputy Meehan, "I did nothing." (35RT 2687.) Anders told Deputy Meehan that he had tried to make change with appellant and that appellant snatched his $20 and "took off walking." (35RT 2688, 2692; see also 35RT 2691; Peo. Exh. 143 [statement by Anders].) Anders further told Deputy Meehan that when he tried to get the money back, appellant turned around and struck him in the face, "hitting him up against a wall." (35RT 2688, 2699; see also 35RT 2691.) Anders, who had red marks on his face and back, and a lump on his head, told Deputy Meehan that appellant made contact with his face. (35RT 2688, 2697.)

Anders sustained an injury to the back of his head and was treated at the infirmary. (34RT 2617; 35RT 2691.) Anders received no special offers or deals as a result of his testimony, and he served his full prison term. (34RT 2635.)

(2) The June 16, 1994, Incident in the Van Nuys Lockup

On June 16, 1994, Los Angeles County Sheriff's Department Deputy Keith Warloe was working in the main court lockup in the Van Nuys Municipal Building. (35RT 2669.) Deputy Warloe was responsible for monitoring the inmates in the lockup. (35RT 2670.) Groups of inmates, waiting to go to court, were placed in various cells. (35RT 2670-2671.) On June 16, 1994, appellant was in the lockup with approximately 45 other inmates. (35RT 2671.)

At approximately 8:20 a.m., Deputy Warloe heard a loud commotion inside one of the cells. (35RT 2672.) Deputy Warloe looked through the viewing window into the cell and saw approximately 10 to 15 men fighting.

Appellant was not in the group fighting, and was standing on the west side of the cell. (35RT 2672-2674, 2681.) Deputy Warloe requested backup to make entry into the cell. (35RT 2673.)

As Deputy Warloe opened the cell door, he saw appellant leave his position, walk over to the group of men fighting, and throw a punch into the group of men fighting. It appeared that the punch landed. (35RT 2674.) Appellant then retreated back to the west side of the wall. (35RT 2674.) Appellant went back to the group of fighting men, threw another punch, and walked back to the west wall. (35RT 2674.) No inmates were "going after" appellant before appellant threw the punches. (35RT 2675.)

Sheriff's deputies made entry into the cell, broke up the fight, and interviewed several of the inmates involved, including appellant. (35RT 2675-2679.)

(3) The July 27, 1994, Incident With Bryan Soh

On July 27, 1994, Los Angeles County Sheriff's Department Deputy Jeffrey Hutchinson was supervising inmates at the North County Correctional Facility in Saugus. (34RT 2637.) These inmates included appellant, Tony Bryant, and Bryan Soh.[30] (34RT 2637-2638.) Deputy Hutchinson observed appellant exiting a corridor with Tony Bryant. (34RT 2638.) Appellant and Bryant followed Soh into a day room and appeared to call out to Soh. (34RT 2639.) Soh, who appeared mentally

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[30] Bryan Soh had been convicted of: second degree burglary on June 7, 1985, in Los Angeles County Superior Court case number A810135; second degree burglary on October 22, 1985, in Los Angeles County Superior Court case number A811102; second degree burglary on September 12, 1986, in Los Angeles County Superior Court case number A811936; second degree burglary and grand theft on October 5, 1990, in Ventura County Superior Court case number CR25487; and second degree burglary on April 19, 1994, in Los Angeles County Superior Court case number PA016592. (36RT 2784.)

retarded, was by himself. (34RT 2639, 2647, 2649-2650.) Appellant and Bryant stopped approximately a foot in front of Soh and faced Soh. (34RT 2639.) Appellant and Bryant appeared to talk to Soh, and Soh looked "somewhat threatened." (34RT 2649.) Appellant and Bryant looked angry. (34RT 2641.) Soh reached down into his pocket, pulled something out, and gave it to Bryant. Appellant and Bryant turned around and exited the day room. (34RT 2641, 2653.)

Deputy Hutchinson walked to the area where appellant and Bryant were located and ordered them to stop. Appellant and Bryant complied. Deputy Hutchinson asked appellant and Bryant what was going on. Appellant told Deputy Hutchinson that "nothing" was going on. (34RT 2642.) Deputy Hutchinson asked appellant if he received anything from Soh, and appellant replied, "no." Bryant also denied that he had received anything from Soh. Deputy Hutchinson went into the day room and spoke to Soh. (34RT 2644.) Soh appeared angry. Soh told Deputy Hutchinson that appellant and Bryant made him give them all his money. Soh told Deputy Hutchinson that appellant and Bryant took a $20 bill from him. (34RT 2645.)

Deputy Hutchinson went back to talk to appellant and Bryant. At that time he noticed a crumpled $20 bill at appellant's feet. The $20 bill had not been at appellant's feet when Deputy Hutchinson first stopped appellant. (34RT 2646, 2655-2656.) When Deputy Hutchinson asked appellant about the $20 bill, appellant stated that it was not his and that he knew nothing about it. Deputy Hutchinson picked up the $20 bill and Soh stated that it was his. (34RT 2646.) Deputy Hutchinson wrote a report about the incident. (34RT 2647.)

D. Defense Case

1. Testimony of Family and Friends

a. Testimony of Shirley Kolb

Shirley Kolb was appellant's aunt and the sister of appellant's mother. (37RT 2894.) Kolb was born on an Indian reservation in South Dakota. In 1953, when appellant's mother was approximately nine years old, the family was relocated and went to Los Angeles. (37RT 2895-2896.) When appellant's mother was 15 years old, she met appellant's father, Richard Browne. (37RT 2897, 2912.) Appellant's father and mother oftentimes disappeared for a few days and appellant's maternal grandmother, Josephine Jumping Eagle, would have the police find appellant's mother. (37RT 2897; see also 37RT 2918.) Josephine did not trust or like appellant's father. (37RT 2897-2898.)

Appellant's parents were eventually married. (37RT 2898-2900.) After the marriage, Josephine's dislike of appellant's father grew stronger. (37RT 2901.) Josephine stated that appellant's father would not work or support his children, and that he used a lot of drugs. (RT 2901.) Josephine helped to support appellant's parents. (37RT 2902.)

b. Testimony of Tina Browne

Tina Vae Browne, appellant's sister, was a licensed vocational nurse and psychiatric technician. Tina, who was eleven months older than appellant, testified regarding appellant's family background. (37RT 2786.)

Tina, appellant, and their parents lived in a truck when appellant was approximately two years old. (37RT 2787.) Appellant and Tina then lived with their paternal grandmother on Commonwealth Avenue in Los Angeles. (37RT 2787-2788.) Appellant's and Tina's parents left the children with their grandmother and they did not see their parents for "a

longtime." (37RT 2787.) Appellant's and Tina's paternal grandmother was "mean" and did not like appellant or Tina. (37RT 2788.)

When appellant was approximately three years old, appellant, Tina, and their parents moved to "a big pink house" in Los Angeles. (37RT 2789.) While they lived in this location, appellant's and Tina's parents would "stay up really late all night long." (37RT 2789-2790.) In the morning, appellant and Tina would "scramble around the house looking for food." (37RT 2790.) Friends of appellant's parents came to the house and stayed in the bedroom. These friends were "very dirty and scary looking." (37RT 2791.) On one occasion, when appellant was four years old, Tina knocked down a bag of sugar onto the floor. When her father woke up, he blamed appellant and gave appellant a beating. (37RT 2790.) Tina's mother protected her from any beatings. (37RT 2790-2791.) On another occasion, when appellant was approximately four years old, his father put him in a closet and blew marijuana smoke in appellant's face. Appellant's father then pulled appellant out of the closet and let appellant "walk around all high." (37RT 2804.) No one, including their parents, paid any particular attention to appellant and Tina at that time. (37RT 2792.)

Appellant, Tina, their younger brothers, Nicholas and Joey, and their parents, moved in with their maternal grandmother Josephine and cousin Lester on Sequoia Street in Los Angeles. (37RT 2792-2793; see also 37RT 2919.) Appellant's father was unemployed and "just slept [at the house] but was never there." (37RT 2793.) Josephine, who was "a full-blooded Indian woman," did not like appellant's father and called him "the White man." (37RT 2794-2795.) Josephine stated that "White men were no good." (37RT 2794.) Family members went to Josephine's house on the weekends and got mad at appellant's father because he would not drink with them. (37RT 2795.) Josephine expressed her contempt for appellant's

father and told appellant's mother to leave his father. (37RT 2796, 2842.) When appellant was approximately six years old, he and his family visited his father in the county jail. (37RT 2794.)

Appellant's parents moved the family to a house across the street from his maternal grandmother. (37RT 2796; see also 37RT 2919.) Appellant's parents "partied" all night long and various people came to the house. (37RT 2797.) If appellant did something wrong, his father beat him "for hours" with his hot wheels racing tracks. (37RT 2797, 2833.) Appellant was also beaten with a belt. (37RT 2834.) Appellant's father "beat the shit out of [appellant]."[31] (RT 2797.) After the beatings, appellant cried on his bed. (37RT 2798, 2834.) The beatings, however, did not cause bruises or require appellant to stay home from school. (37RT 2834.) Appellant was approximately eight to nine years old at the time. (37RT 2798.)

Appellant's family moved a couple of times and the "partying" activity and the beatings continued. (37RT 2798.) No adults supervised appellant's or Tina's activities and they were "left to fend for themselves." Appellant's father slept all day long, and appellant's mother tried to keep the children quiet. Appellant's mother and the children moved back in with appellant's maternal grandmother for two months. Appellant's grandmother did not let appellant's father move in. (37RT 2799.)

Appellant, his father, mother, sister, and brothers, then moved into an old Victorian house in Los Angeles when appellant was approximately eleven or twelve years old. (37RT 2800-2801.) Appellant's parents

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[31] Tina never actually witnessed any beatings and she never saw any bruises. (37RT 2832, 2834.) Tina was interviewed by Tina Katz, a senior paralegal for the Public Defender's Office on July 15, 1993, March 23, 1995, March 29, 1995, April 1, 1995, May 31, 1995, and April 3, 1996. However, Tiny never mentioned that appellant had been beaten by his father until the March 29, 1995, interview. (40RT 3197.)

continued to "party" at this location. The children were "kept upstairs on the top floor" while appellant's parents had friends over. The children were not allowed downstairs to even eat or use the restroom.[32] (37RT 2800.) During this time period, appellant's mother had a heart attack and went to the hospital. Appellant's father was left in charge of the children and did not allow the children to go downstairs at all. Appellant's father and approximately 10 people stayed in the house downstairs doing drugs. There were needles, drug paraphernalia, a big bag of pot, beer cans, and people sleeping on the floor. (37RT 2802.) While appellant's mother was in the hospital, he visited his mother only once because his father said he did not have time to take the children to visit their mother. (37RT 2803.) Appellant's mother eventually returned from the hospital. After living in the Victorian house for approximately eight months, the family was evicted for nonpayment of rent. (37RT 2805.)

Appellant and Tina stayed with their paternal grandmother on occasions. Appellant's paternal grandmother was a live-in nurse and lived in a house with her patients/employers, Mr. and Mrs. Berman. (37RT 2808.) One night, when Tina was at the Berman's house, appellant woke Tina up and told her, "Let's go get some money" from "the old man." Appellant left and came back with a wad of money. (37RT 2809.) Appellant told Tina that their father had directed him to take money from Mr. Berman. (37RT 2809, 2843.) Tina saw appellant give his father a wad of money on various occasions when they returned from staying at the Berman's house. (37RT 2808-2809.)

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[32] For two to three months during this time period, however, appellant's father drove appellant and Tina to school in Los Feliz or Glendale. (37RT 2857.)

Appellant and his family moved to Lawndale when appellant was approximately eleven years old. At this time, his parents quit doing drugs and "everything was perfect." The family moved into a three-bedroom house and his father was employed. (37RT 2806.) Appellant's parents established rules for the children and took the family on camping trips. (37RT 2807.)

When appellant was approximately 12 years old, he ran away from home and was gone for three days. During that time, appellant robbed Mr. Berman and stayed in Hollywood spending the money. When appellant was found, he had a new bicycle and a pocketful of money. Appellant's father took him home and punished him. (37RT 2810.)

Two months later, appellant ran away again and stole money from the Bermans. Appellant's father found appellant and took him to the authorities. (37RT 2811.) Appellant was eventually placed in Pacific Lodge, a juvenile hall facility. Appellant was 12 years old at the time. (37RT 2811-2812, 2844.)

During the next several years, appellant's family continued to live in Lawndale and appellant's father had a job. Appellant was "in and out" of the home. (37RT 2813.) When appellant was approximately 16 years old, he went to Boy's Republic, another juvenile facility. (37RT 2813, 2847.) Appellant was the "mayor" of Boy's Republic and did well in school. However, appellant "got into trouble again" and left Boy's Republic. Appellant was missing for approximately three months. During this time, appellant's mother saw appellant at a 7-11 store, but he turned around and ran away. (37RT 2814.) Appellant's mother ceased any contact with appellant at that point. (37RT 2815.) Appellant then went back to Boy's Republic. (37RT 2816.)

Appellant's mother died in January 1984. (37RT 2816-2817.) Appellant learned of his mother's death while he was at Boy's

Republic and attended the funeral. (37RT 2818.) Appellant's father was "traumatized" by appellant's mother's death. (37RT 2819.) Appellant's father stopped going to work, consumed more alcohol, and smoked more marijuana. (37RT 2819-2820; see also 39RT 3038.)

Appellant's family moved to a house in Gardena. (37RT 2820.) Appellant left Boy's Republic and went back to stay with his family. At that time, Tina began using drugs and appellant and Tina would "get real high" together. (37RT 2820-2821.) Appellant's father became angry with appellant's and Tina's drug use and told them to stop. Appellant's father did not want the younger children exposed to drugs. Appellant and Tina refused to stop using drugs. (37RT 2821, 2859; see also 39RT 3036-3037.) When appellant was approximately 17 years old, his father took his younger brothers and moved to a trailer park in Acton. (37RT 2821, 2859.) Appellant's father told appellant and Tina that they could do "whatever they want[ed]." Appellant and Tina were "left to fend for themselves." (37RT 2821.)

After appellant's father left, appellant and Tina stayed in the house in Gardena doing drugs. They then moved into an apartment. In order to get money, appellant and Tina sold their belongings at garage sales. They then spent the money on drugs. (37RT 2822.) At some point, Tina became pregnant and appellant took care of her. (37RT 2822-2823.) Appellant "made sure [Tina] had everything." (37RT 2823.) Tina assumed that appellant was committing crimes in order to support her. (37RT 2828.) When Tina was eight months pregnant, appellant was arrested and went to prison. (37RT 2823, 2848.)

Tina believed appellant's father taught appellant how to steal and that appellant grew up to be a violent person because his father beat him. (37RT 2830.) When appellant was young, he did not know the difference between right and wrong. (37RT 2850.)

During appellant's childhood, he was taught about Native American culture and he participated in powwows and was a member of the American Indian Center. (37RT 2847.) Appellant's mother and maternal grandmother took him to Native American activities and appellant was taught Native American values. (37RT 2846-2847; see also 37RT 2919.) Appellant's mother instilled good values in her children. (37RT 3018, 3020, 3025, 3032-3033.)

c. Testimony of Nicholas Browne

Nicholas Browne was appellant's youngest brother. (37RT 2877.) When Nicholas was approximately eight or nine years old, his father beat him with a belt approximately two to three times a month. (37RT 2887-2888.) When Nicholas was eleven or twelve years old, his father punished him by denying him food. (37RT 2882.)

When Nicholas's mother died, his father moved him and his brother Joey into a van and they lived in a campground. (37RT 2882.) On occasions when Nicholas's father was angry, he would move the van in the campground so that Nicholas and Joey did not know where the van was and would have to find it. (37RT 2883.)

Once when Nicholas was 14 years old, his father became angry with him. Nicholas's father put a pillow over Nicholas and jumped up and down on him until Nicholas could not breathe anymore and had blood coming out of his nose and mouth. (37RT 2877-2879, 2887.) When Nicolas's father became angry, he would say, "I brought you into this world, I can take you out of this world." (37RT 2880.)

When Nicholas was 17 years old, his father moved to Las Vegas. During this time, appellant took care of Nicholas, making sure that Nicholas had food and clothes and a warm place to sleep. (37RT 2884-2885.)

When Nicholas was 21 years old and living in Compton with his father, his father asked if he wanted to get "coo-coo." Nicholas said "Yes." (37RT 2880-2881.) Appellant's father gave Nicholas a cigarette laced with PCP. When Nicholas realized "it was something real heavy," he put it out. Nicholas's father finished smoking the cigarette. (37RT 2881.

Nicholas did not see his father beat appellant and did not recall seeing his parents using drugs, staying up all night, or "weird" people coming to the house. (37RT 2889.)

d. Testimony of Boyd Hiatt

Boyd Hiatt was appellant's first cousin. (37RT 2910.) Hiatt was close to appellant's mother. (37RT 2912.) After appellant's mother met Richard Browne, she started using drugs. (37RT 2912.)

After appellant's parents were married, Hiatt "hung" out at their house and did drugs with appellant's parents. (37RT 2913, 2921.) Drug addicts and thieves came into the house, and there were a lot of "late nights." (37RT 2913.) When appellant's mother was pregnant with appellant, she used speed and marijuana. (37RT 2914.) After appellant was born, "no one tended to the children." On one occasion, someone overdosed at the house. (37RT 2915.) On another occasion, Tina was crawling around on the floor and ingested a Benzedrine tablet. (37RT 2915-2916.) Appellant's father did not work, and the family supported themselves on welfare. (37RT 2916.)

Appellant's father often yelled at appellant, saying, "I made you and I can unmake you." Appellant's father also humiliated appellant, telling people to hide their valuables if appellant was around. (37RT 2917.) Appellant was treated differently from the other children. (37RT 2918.)

Appellant's maternal grandmother, Josephine, said negative things about White people and "put down" appellant's father in appellant's presence. (37RT 2919-2920.)

e. Testimony of Karen Chambers

Karen Chambers, a retired eighth grade biology teacher, taught in the Lawndale School District in 1972. Appellant was one of Chambers's students. (38RT 2951.) Chambers had expertise in behavioral patterns of children from dysfunctional families. (38RT 2952-2953.) Chambers did some counseling work with appellant and talked with appellant on a regular basis while he was her student. (38RT 2955.)

In Chambers's opinion, appellant did not act out, was relatively invisible, and was withdrawn. Chambers classified appellant a "lost child." (38RT 2954-2956, 2958, 2964-2965.) Chambers suspected "trouble in the home" as "lost children" were common in alcoholic or drug-addicted families. (38RT 2963-2965.) Chambers, however, was unaware of any disciplinary problems, appellant's juvenile record, or what criminal acts appellant committed as an adult. (38RT 2958-2961.) Chambers saw no evidence of physical abuse in the home. (38RT 2961.)

f. Testimony of Lyn Browne

Lyn Browne was married to appellant's father and had two children with appellant's father. Appellant baby-sat for Lyn's children. (38RT 2988.) One time, Lyn left her children with appellant for a week while she and appellant's father went to Las Vegas to be married. When she returned, the children were "fine." Appellant played with Lyn's children. (38RT 2989.) When Lyn and appellant's father did not have a lot of money or food, appellant would come by with food and diapers. (38RT 2990.)

Appellant's brother, Joey, was in jail in Las Vegas, Nevada. (38RT 2991.)

g. Testimony of Donald Turney

Donald Turney was a school counselor at the North County Correctional Facility, also known as Wayside Honor Rancho. (38RT 2966-2967.) Turney, who taught adult education, was appellant's counselor. (38RT 2967.) In 1994, Appellant obtained a diploma and graduated from high school, with a certificate of achievement in computer operations. (38RT 2968, 2970.) Appellant was studying computers in order to obtain a job. (38RT 2968.) Such school was available to all inmates and was encouraged. (38RT 2970.)

Appellant previously attended a substance abuse program in 12th grade while at Youth Training School. (38RT 2986-2987.)

2. Expert Testimony

Robert Ryan was an expert in the area of drug and alcohol abuse relating to Native Americans. (39RT 3042.) Ryan talked with appellant and reviewed the police reports, some penalty phase testimony, probation records, California Youth Authority evaluations, juvenile court records, parole records, and interviews with appellant's family. (39RT 3046-3047.) Ryan concluded that appellant's Native American background "had an impact on him." (39RT 3048.)

Ryan testified that the history of Native Americans effected Native American individuals. (39RT 3048.) Native Americans were placed on reservations. (39RT 3051.) The creation of the reservations told Native Americans that they could not do certain things or engage in certain activities. (39RT 3052-3053.) The reservation system also had an economic impact on Native Americans because Native Americans became

dependent on food rations. (39RT 3053.) Mandatory boarding schools on the reservations were established, where Native American children were separated from their parents and did not learn about "Indian things." (39RT 3053-3054.) Family life in Native American culture broke down as a result of the forced separation of children from parents, with generations losing parenting skills. (39RT 3054-3055.) Native Americans on the reservations were also precluded from practicing spiritual rituals. (39RT 3055-3056.)

In the 1950's, the "relocation" policy was commenced, whereby Native Americans were moved off the reservations into the cities and trained in different occupations. (39RT 3056.) Relocation was a "failure." (39RT 3057.) Alcoholism and drug addiction rates among relocated Native Americans were high. (39RT 3057-3058.) Relocated Native American families were also in lower economic levels. (39RT 3058.)

The history of Native Americans had a psychological impact on the group by showing that Native Americans could not be successful. There was residual anger from this history that was passed down from generation to generation, and there was no place for Native Americans to take out this anger. (39RT 3059-3061.) Accordingly, Native American history produced misplaced aggression amongst Native Americans. (39RT 3059.)

Appellant's cultural background had an impact on appellant. Appellant's mother's family was relocated to Los Angeles from a reservation in South Dakota. (39RT 3062.) Appellant was exposed to some Native American values, but had "no opportunity to delve into the real culture." (39RT 3063-3066.) Further, although appellant was told he was Native American, he heard disparaging comments about his father and White people, and could not separate himself from these comments. (39RT 3064.) This created identity issues, where appellant had no "clear

picture" of how he was supposed to function in the world. (39RT 3074; see also 39RT 3116-3117, 3124-31.)

Alcohol was consumed at family gatherings and members of appellant's family had problems with alcohol. (39RT 3066.) Drug and alcohol addiction was common among Native Americans and alcoholism passed on from generation to generation. (39RT 3068-3071.) Alcohol was a "big problem" for appellant's family. (39RT 3071.) Appellant was addicted to alcohol and drugs. (39RT 3072.) Appellant was exposed to alcohol and drugs from the time he was born and he probably began drinking at age nine. (39RT 3072, 3075.) Appellant probably started taking marijuana early, and then began using "hard drugs" in Boy's Republic at age 17. (39RT 3075-3076.) His drug use then accelerated. (39RT 3076-3077.) In Ryan's opinion, appellant was addicted to and using drugs and alcohol at the time he committed the crimes in the present case. (39RT 3079, 3081, 3122.) Ryan, however, did not see any reports regarding drug or alcohol testing of appellant and did not review any videotapes of appellant committing the crimes. (39RT 3122.)

Ryan did not interview appellant's family or relatives, and assumed that appellant was telling the truth. (39RT 3089-3090.) Ryan reviewed a psychiatric report that stated there was no family history of alcoholism, drug abuse, or mental illness. (39RT 3101, 3104.) Ryan previously testified in cases involving Native Americans that drug abuse and alcohol contributed to the commission of crimes by Native Americans. (39RT 3108.)

Appellant told Ryan that his father "treated him good." Appellant further stated that although his father spanked him, his father "really didn't put his hands on [appellant]." (39RT 3112.)

Ryan perceived appellant as a victim because appellant "did not have the opportunity to have his cultural identity when he was a child." (39RT 3114.)

3. Testimony Relating to the Prosecution's Penalty Phase Evidence

Detective Marshall White of the Los Angeles Police Department interviewed Bryan Soh on May 15, 1995. Soh told Detective White that two men approached him on his way back from visitation area. The two men took Soh to a cubicle area and one of the men put Soh in a headlock while the other went through his pockets and removed his money. (36RT 2774-2775.) Soh was six feet, three inches tall and weighed 210 pounds. (36RT 2775.)

E. Rebuttal

Appellant's cousin, Boyd Hiatt, spent a lot of time with appellant's parents when the children were small. Hiatt never saw appellant's parents consume alcohol in large quantities and never observed that they had any problems with alcohol. (40RT 3159.)

Before 1993, Hiatt was helping appellant "get his life together." (40RT 3161.) For six weeks, Hiatt and appellant went to Alcoholics Anonymous meetings. Appellant served coffee at the Alcoholic Anonymous meetings. Hiatt hoped appellant would learn how to live life sober. (40RT 3162, 3162.) Hiatt also took appellant to powwows and places where appellant could learn about his Native American heritage. (40RT 3163.) Appellant sought spiritual counsel to learn how to live "like a good Indian." (40RT 3165, 3166.)

Appellant and his brother Nicholas lived with Hiatt before appellant's arrest. Appellant was sober during this time. (40RT 3159, 3166, 3172, 3179-3180.) At some point, Nicholas moved out, and appellant moved out

a couple of days later. Hiatt did not hear about appellant until after appellant was arrested. (40RT 3168-3169, 3181.)

Appellant's father smoked marijuana "all the time" and was a "pothead." (40RT 3183.) Appellant's father and mother used "hard drugs." Appellant's mother was a "heavy drinker" and there was "a good deal of alcohol" around appellant's mother's family.[33] (40RT 3184.)

F. Surrebuttal

John Jenks was a former police officer for the Ojai Police Department and Port Hueneme Police Department. (41RT 3246-3250.) In 1987, Jenks was an alcoholic and cocaine addict, and stole cocaine valued at $35,000 from the police department property room. (41RT 3249, 3264.) In 1988, Jenks pled guilty to grand theft in Ventura County Superior Court. (41RT 3249, 3262.) After his arrest and dismissal from the police department, Jenks became a drug and alcohol counselor, rehabilitation counselor, and an intervention specialist. (41RT 3250.)

Jenks explained that addiction was "the continued and repeated use of the substance despite adverse consequences." (41RT 3251.) Jenks further testified that addiction was a staged progressive illness, with four stages: experimentation, social use, abuse where problems begin in people's lives, and chemical dependency. (41RT 3252.) According to Jenks, drug addiction is not a choice, and recovery requires a daily commitment to a drug and alcohol free existence. (41RT 3254-3255.) Relapses are common, and occur because people believe they are no longer addicted, or something emotionally or situationally triggers the relapse. (41RT 3257.) An addict not in recovery will have clouded judgment and

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[33] Hiatt, however, told Public Defender's Office paralegal Tina Katz that appellant's parents "only drank minimally." (40RT 3197.)

show the effects of drug and alcohol use, whether or not under the immediate influence. (41RT 3259.) Being an addict continually under the influence effects one's moral judgment. (41RT 3260.) Addicts not in recovery blame others for their drug addiction, and an addict who blames someone else is not accepting responsibility for his or her behavior. (41RT 3266.)

ARGUMENT

I. THE TRIAL COURT PROPERLY CONDUCTED VOIR DIRE

Appellant contends the trial court "unnecessarily restricted the jury selection process in this case." Specifically, appellant claims the trial court erroneously refused his modifications to the juror questionnaire "regarding the issue of penalty." He further argues that voir dire was "improperly truncated." (AOB 58-76.) These claims are without merit. The trial court did not abuse its considerable discretion in refusing defense counsel's modifications to the juror questionnaire or by limiting voir dire.

A. The Trial Court Properly Refused Defense Counsel Proposed Modifications to the Juror Questionnaire

1. Relevant Proceedings in the Trial Court

Prior to jury selection, defense counsel proposed five additional questions to the jury questionnaire concerning jurors' attitudes towards the death penalty. These proposed questions read as follows:

> 55-1. Assume, for the purpose of the following questions only, that a defendant has been found guilty of two counts of murder in the first degree, and that the special circumstance of multiple murder and/or the special circumstance of robbery murder has been found to be true.
>
> At the penalty phase, do you feel so strongly about the death penalty that regardless of the evidence presented by the

defendant and the prosecution in the guilt and penalty phases of the trial:

(a) You would always vote against the death penalty?

_____ Yes

_____ No

Please explain _____

(b) You would always vote in favor of the death penalty?

_____ Yes

_____ No

Please explain _____

55-2 Do you feel that any attempt by the defense to put on mitigation evidence of the defendant's background and character is an "abuse excuse," and should be ignored? Please explain.

55-3 Do you accept the fact that a sentence of life in prison without the possibility of parole means that the person will never get out of prison until they die? Please explain.

55-4 In deciding penalty – that is, life in prison without the possibility of parole or death – would the costs of keeping someone in prison for life be a consideration for you?

_____ No _____ Yes

Please explain _____

55-5 If you were instructed by the court that your decision is to be based solely on aggravating and mitigating factors, which do not include costs, would you be able to follow that instruction?

_____ Yes

_____ No

(8CT 1867-1869, emphasis in original.)

At the hearing on these proposed changes, the trial court indicated that it was "disinclined to give any of those questions" as they were "repetitive of the court's questions." As to Question 55-1, defense counsel agreed that, "to some extent," it was "repetitive." However, counsel argued that Question 55-1 was appropriate due to the fact that the case involved multiple murders and "there's no indication anywhere that multiple murder is a special circumstance." (1-10RT 137A.) The court reminded counsel that, before the jurors filled out the questionnaires, he intended to "identify briefly the charges, among special circumstances of murder committed during the commission of a robbery." (1-10RT 137A-138A.) Defense counsel responded that "that's the [question] in which there is a greater likelihood of that kind of specific prejudice, and that's the only question, obviously, any juror who would not be able to consider mitigating evidence, would not be a proper juror." (1-10RT 138A.) The trial court was "not convinced" and rejected Question 55-1. (1-10RT 138A-139A.)

As to Question 55-2, defense counsel argued that such question was appropriate in light of the recent conclusion of the Menendez Brothers murder trial and the attempt by counsel in that case to present an "abuse excuse." According to counsel, "there are any number of people who feel that it makes absolutely no difference what a defendant's background or character is, that they wouldn't consider any of those facts . . . and they just wouldn't consider such evidence." (1-10RT 141A.) The trial court remained "unconvinced" and rejected Question 55-2. (1-10RT 142A.)

As to Questions 55-3, 55-4, and 55-5, the trial court noted that he believed those topics were sufficiently covered by other questions and rejected any further additions. (1-10RT 142A.)

Later, prior to distributing the juror questionnaires, the trial court advised the prospective jurors that the "special circumstances" of robbery

murder and multiple murders were alleged in appellant's case. (13RT 224-225.)

2. The Trial Court Did Not Abuse Its Discretion When It Refused Defense Counsel's Modifications to the Jury Questionnaire

A prospective juror may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841]; *People v. Coffman* (2004) 34 Cal.4th 1, 47-48.) A challenge for cause may be based on the prospective juror's response "when informed of facts or circumstances likely to be present in the case being tried." (*People v. Coffman, supra*, 34 Cal.4th at p. 47; *People v. Kirkpatrick* (1994) 7 Cal.4th 998, 1005.) This Court has explained that the "real question" is whether the prospective juror's views about capital punishment would prevent or substantially impair the juror's ability to return a verdict of death, or conversely, life without the possibility of parole, "in the case before the juror." (*People v. Cash* (2002) 28 Cal.4th 703, 720-721; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 431.)

In the process of determining prospective jurors' capital case qualifications, the trial court has considerable discretion to place reasonable limits on voir dire (*People v. Carasi* (2008) 44 Cal.4th 1263, 1286; *People v. Zambrano* (2007) 41 Cal.4th 1082) and to determine the number and nature of voir dire questions (*People v. Carasi, supra*, 44 Cal.4th at p. 1286; *People v. Stitely* (2005) 35 Cal.4th 514, 540). "[D]eath-qualifying voir dire seeks to determine prospective jurors' attitudes about capital punishment only in the abstract, and whether, without knowing the specifics of the case, they have an open mind on penalty. [Citations]." (*People v. Carasi, supra*, 44 Cal.4th at p. 1286.) As this Court has said on many occasions, "[d]efendant ha[s] no right to ask specific questions that invite [ ]

prospective jurors to prejudge the penalty issue based on a summary of the aggravating and mitigating evidence [citation], to educate the jury as to the facts of the case [citation], or to instruct the jury in matters of law [Citation.]. [Citations.]" (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1120.)

"Nevertheless, voir dire cannot be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair their performance under *Witt*, *supra*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841. Rules have developed to balance the competing interests." (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1286.) The gist of these rules is that the defense cannot be categorically denied *all* opportunity to inform jurors of case-specific factors that could invariably cause an otherwise reasonable and death-qualified juror to vote for death regardless of the strength of the mitigating evidence. (*Id.* at pp. 1286-1287; *People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1120-1123; *People v. Roldan* (2005) 35 Cal.4th 646, 693-694; *People v. Vieira* (2005) 35 Cal.4th 264, 285-287; *People v. Cash*, *supra*, 28 Cal.4th at p. 721.) As explained by this Court:

> In 1996, when the court made its ruling, the law was clear that "[i]t is not a proper object of voir dire to obtain a juror's advisory opinion based upon a preview of the evidence," and that the relevant inquiry was the juror's "general neutrality toward capital punishment." [Citation.] The court could reasonably rely on our advisement that "[t]he inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination." [Citation.]

(*People v. Butler* (2009) 46 Cal.4th 847, 860.)

In the instant case, it cannot be said that the trial court abused its considerable discretion in limiting voir dire. First, by pre-instructing the jury about the special circumstances alleged in the information, the trial court ensured that prospective jurors' beliefs regarding the death penalty for

someone who had committed multiple murders or a robbery-murder would be explored. Thus, appellant was not "categorically denied all opportunity to inform jurors of case-specific factors." (See *People v. Carasi*, *supra*, 44 Cal.4th at pp. 1286-1287.) Furthermore, the questionnaires asked whether there were *any* circumstances under which the prospective juror would automatically impose the death penalty and included questions about whether or not jurors would disregard any mitigating factors. (See e.g., Question 58(d); Suppl. II 1CT 20.) These questions permitted appellant to "probe the prospective jurors' attitudes as to" the general facts and circumstances presented in the case. (See *People v. Cash*, *supra*, 28 Cal.4th at p. 721; see also *People v. Coffman*, *supra*, 34 Cal.4th at p. 47.) Appellant's statement that the juror questionnaire used in his case contained only three questions "address[ing] the issue of the death penalty" (AOB 68), is misleading. Indeed, Questions 57 and 58 contained numerous subparts.[34] Regardless, the questions were sufficient to identify those jurors

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[34] Section B of the Juror Questionnaire entitled "Attitudes Regarding the Death Penalty" contained the following questions:

56. What are your GENERAL FEELINGS regarding the death penalty?

57. What are you feelings on the following specific questions:

(a) Do you feel that the death penalty is used too often? Too seldomly? Please explain:

(b) Do you belong to any group(s) that advocate(s) the increased use or the abolition of the death penalty?

1. What group(s)?

2. Do you share the views of this group(s)?

3. How strongly do you hold these views?

(c) Is your view in answers (a) and (b) based on a religious consideration?

(Yes? No?)

(continued...)

(...continued)

58. In a death penalty case, there may be two separate phases or trials, one on the issue of guilt and the other on penalty. The first phase is called the "guilt" phase, where the jury decides on the issue of guilt as to the charges against the defendant and the truth of any alleged special circumstance(s). The second phase is called the "penalty" phase. If, and only if, in the guilt phase, the jury finds the defendant guilty of first degree murder (which will be defined at trial) and further finds any alleged special circumstances to be true, then and only then would there be a second phase or trial in which the same jury would determine whether the penalty would be death or life imprisonment without possibility of parole. (A special circumstance is an alleged description which relates to the charged murder, upon which the jury is to make a finding. For example, was the murder committed in the commission of certain felonies such as robbery, rape, or other enumerated offenses, or was the murder an intentional killing of a peace officer in the course of the performance of duty, a previous conviction of murder, etc.?)

The jury determines the penalty in the second phase by weighing and considering certain enumerated aggravating factors and mitigating factors (bad and good things) that relate to the facts of the crime and the background and character of the defendant, including a consideration of mercy. The weighing of these factors is not quantitative, but qualitative, in which the jury, in order to fix the penalty of death, must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors, that death is warranted instead of life imprisonment without parole.

Based on the above:

(a) Assume for the sake of this question only that, in the guilt phase, the prosecution has proved first degree murder beyond a reasonable doubt and you believe the defendant is guilty of first degree murder. Would you, because of any views that you may have concerning capital punishment, refuse to find the defendant guilty of first degree murder, even though you personally believed the defendant to be guilty of first degree murder, just to prevent the penalty phase from taking place?

(b) Assume for the sake of this question only that, in the guilt phase, the prosecution has proven to be true, one or more special

(continued...)

(...continued)

circumstances, beyond a reasonable doubt and you personally believe the special circumstance(s) to be true. Would you because of any views that you may have concerning capital punishment, refuse to find the special circumstance(s) true, even though you personally believe it (them) to be true, just to prevent the penalty phase from taking place?

(c) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more special circumstances to be true and that you are in the penalty phase. Would you, because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of death and automatically vote for a penalty of life imprisonment without the possibility of parole, without considering any of the evidence of any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant?

(d) Assume for the sake of this question only that the jury has found the defendant guilty of first degree murder and has found one or more of the special circumstances true and that you are in the penalty phase. Would you because of any views that you may have concerning capital punishment, automatically refuse to vote in favor of the penalty of life imprisonment without the possibility of parole and automatically vote for a penalty of death, without considering any of the evidence, or any of the aggravating and mitigating factors (to which you will be instructed) regarding the facts of the crime and the background and character of the defendant?

(e) If your answer to either question (c) or question (d) was "yes," would you change your answer, if you are instructed and ordered by the court that you must consider and weigh the evidence and the above mentioned aggravating and mitigating factors regarding the facts of the crime and the background and character of the defendant, before voting on the issue of penalty?

(f) Could you set aside your own personal feelings regarding what the law ought to be and follow the law as the court explains it to you?

(See, e.g., Suppl. II 1CT 17-22.)

who did, or did not, have "an open mind on penalty." (See *People v. Carasi, supra*, 44 Cal.4th at p. 1286.)

Furthermore, the trial court asked individual follow-up questions to each prospective juror and provided them an opportunity to speak privately at a side bar conference.[35] (See 14RT 379-15RT 588.)

Appellant relies on this Court's decision in *People v. Cash, supra*, 28 Cal.4th 703, in support of his claim that the trial court erred in restricting voir dire. (AOB 70, 74.) *Cash* is of no assistance to appellant. In *Cash*, the defendant sought to question prospective jurors about his prior murder of his elderly grandparents, which he anticipated would be used in aggravation during the penalty phase, by asking prospective jurors whether there were

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[35] In addition to questions following up on responses to the juror questionnaire, the trial court asked each prospective juror four questions regarding the death penalty. They are:

> Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would refuse to vote for murder in the first degree merely to avoid reaching the death penalty issue?
>
> Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would automatically vote for a verdict of not true as to any special circumstance charged merely to avoid the death penalty issue?
>
> Do you have such conscientious objections to the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence in this case, you would automatically vote for a verdict of life imprisonment without the possibility of parole and never vote for a verdict of death?
>
> Do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence in this case, you would automatically, and in every case, vote for a verdict of death and never vote for a verdict of life imprisonment without the possibility of parole?

(See, e.g., 14RT 385-387.)

"any particular crimes" which would have caused the jury to "automatically vote for the death penalty." (*People v. Cash*, *supra*, 28 Cal.4th at p. 719.) The trial court refused to allow the defendant to ask the question, and further refused to allow the defendant to question jurors whether there were any aggravating circumstances which would cause them to automatically vote for the death penalty. (*Ibid.*) This Court held that the trial court impermissibly restricted voir dire by limiting defense counsel to the circumstances relating to the charging document, and prohibited the defendant from ascertaining whether any juror harbored bias relating on an individual who had committed a prior murder. (*Id.* at pp. 721-722.)

Cash does not entitle appellant to relief in the instant case. In *Cash*, the trial court's error was "precluding mention of *any* general fact or circumstance not expressly pleaded in the information." (*People v. Cash*, *supra*, 28 Cal.4th at p. 722, emphasis added.) Here, on the other hand, prospective jurors were asked the precise questions prohibited by the trial court in *Cash*. (*Id.* at p. 719.) Specifically, jurors were asked about their views concerning their ability to perform their function in cases involving special circumstances (which in this case included robbery-murder and multiple murders), and specifically asked whether there were any circumstances under which a prospective juror would automatically impose the death penalty. (See Question 58(d).) Indeed, the trial court did not categorically deny appellant the opportunity to question prospective jurors regarding their ability to impose life without the possibility of parole on an individual who was charged with multiple murders. As such, appellant's claim that the trial court abused its discretion, and that his constitutional rights were violated as a result, must be rejected. (*People v. Vieira*, *supra*, 35 Cal.4th at p. 285; *People v. Coffman*, *supra*, 34 Cal.4th at p. 47; *People v. Burgener* (2003) 29 Cal.4th 833, 866.)

This Court's decision in *People v. Carasi*, *supra*, 44 Cal.4th 1263, is instructive. There, as here, the trial court refused defense counsel's proposed additions to the juror questionnaire that specifically referenced certain special circumstances. (*Id.* at p. 1282.) Instead, as here, the trial court assured counsel that it would orally instruct on the special circumstance allegations before prospective jurors completed the preliminary questionnaire and answered oral inquiries about it. (*Id.* at p. 1283.) In determining no voir dire error occurred, this Court held:

> The gravamen of *Cash* and *Viera* – both of which were decided after defendant's trial – is that the defense cannot be categorically denied the opportunity to inform prospective jurors of case-specific factors that could invariably cause them to vote for death at the time they answer questions about their views on capital punishment. By definition, such an opportunity arises where the trial court instructs all prospective jurors on such case-specific factors before any death qualification begins. It is logical to assume that when prospective jurors are thereafter asked (orally or in writing) whether they would automatically vote for life or death regardless of the aggravating and mitigating circumstances, they have answered the question with those case-specific factors in mind, and are aware of the factual context in which the exchange occurs.

(*People v. Carasi*, *supra*, 44 Cal.4th at p. 1287.)

Accordingly, for all the same reasons offered by this Court in *Carasi*, "the [trial] court's procedures in the instant matter were adequate to ascertain the prospective jurors' attitudes on case-specific factors that might disqualify them to participate in a capital trial." (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1288.)

3. Appellant Has Failed to Demonstrated Prejudice

Regardless, appellant has failed to demonstrate any prejudice as a result of the voir dire. Any error in restricting death-qualification voir does not automatically require reversal of a judgment of death. (*People v. Cash*,

supra, 28 Cal.4th at p. 722.) This Court has explained that an error in restricting voir dire "may be deemed harmless if the defense was permitted to 'use the general voir dire to explore further the prospective jurors' responses to the facts and the circumstances of the case,' or if the record otherwise establishes that none of the jurors had a view about the circumstances of the case that would generally disqualify that juror." (*Ibid.* quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 974.) On the other hand, "[a] defendant who establishes that 'any juror who eventually served was biased against him' is entitled to reversal." (*People v. Cash*, *supra*, 28 Cal.4th at p. 722 quoting *People v. Cunningham*, *supra*, 25 Cal.4th at p. 975.)

In the instant case, defense counsel was able to explore any potential prejudice of prospective jurors through the use of the juror questionnaire as well as by the trial court's follow-up questions. Indeed, as explained above, prospective jurors were questioned about their ability to remain impartial during a penalty phase involving a defendant who had engaged in multiple murders. They were also questioned about whether they would follow the law and appropriately consider evidence of aggravating and mitigating factors in making a penalty determination. (See, e.g., Suppl. II 1CT 1-22.)

Here, appellant has not and cannot identify a particular juror who he believes was biased against him, requiring reversal of his death judgment. Indeed, the fact that appellant had peremptory challenges remaining when he accepted the composition of the jury (see 14RT 450-451) demonstrates that he did not believe any of the jurors harbored bias towards an individual who had committed multiple murders. (See *People v. Coffman*, *supra*, 34 Cal.4th at p. 47; *People v. Burgener*, *supra*, 29 Cal.4th at p. 866.)

Contrary to appellant's assertion (AOB 74), it is entirely possible for this Court to determine from the juror questionnaires and oral voir dire whether any of the individuals who were ultimately seated as jurors held the

"disqualifying view that the death penalty should be imposed invariably and automatically on any defendant who had committed one or more murders" other than the offenses charged in the instant case. (See *People v. Cash*, *supra*, 28 Cal.4th at p. 723.) Indeed, "the record otherwise establishes that none of the jurors had a view about the circumstances of the case that would generally disqualify that juror," as the prospective juror questionnaires are available to appellant, and he has presented nothing to this Court to suggest that any of the jurors impaneled to hear his case possessed views about the facts of the case which would have disqualified them from service. (See *id.* at p. 722.) Accordingly, assuming any error in voir dire was committed, no prejudice can be established. (See *ibid.*)

B. The Trial Court Properly Denied Appellant's Request for Sequestered Individual Voir Dire

Finally, although unclear, to the extent appellant argues that the trial court erroneously failed to conduct the death-qualifying voir dire of the prospective jurors individually and in sequestration, appellant's contention is without merit. (AOB 72-73.) This Court has repeatedly rejected essentially the same argument in several previous cases, and appellant fails to present any persuasive grounds for reconsideration.

In addition to requesting modifications to the juror questionnaire, defense counsel also filed a "Motion for Attorney Conducted, Sequestered Individual Voir Dire." Specifically, counsel sought permission to conduct "supplemental examination . . . of prospective jurors, individually and outside the presence of other jurors on the issues of death qualification, the nature of the crimes involved, and race/ethnicity." (8CT 1923-1937.) At the hearing on the motion, defense counsel argued that he did not believe the jury questionnaires adequately revealed all prospective jurors who would "automatically vote for death." After the trial court pointed out

that one juror indicated that he/she would automatically vote for death, counsel stated:

> In any event, I think that the point is, and the strong implication is, that we can assume with some degree of certainty that there are other jurors there who do not meet the *Witt* standard, who do not meet the standard articulated in California, *People v. Mickey*, who do not meet the federal requirement of the death penalty jury. They have attitudes in favor of the death penalty sufficient that their ability to follow the court's instruction would be impaired.

(14RT 356-357.)

Following argument, the trial court denied the request and conducted a group death-qualifying voir dire. (14RT 357.)

As this Court has repeatedly found, trial courts are not required to conduct death-qualifying voir dire of each prospective juror individually and/or in sequestration. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 536; *People v. Navarette* (2003) 30 Cal.4th 458, 490; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1199; *People v. Waidla* (2000) 22 Cal.4th 690, 713.) Although this Court previously set forth *People v. Hovey* (1980) 28 Cal.3d 1, 80, that death-qualifying voir dire should be conducted individually and while the prospective jurors are sequestered, *Hovey* was abrogated as of June 6, 1990, the effective date of Proposition 115. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 536; *People v. Navarette*, *supra*, 30 Cal.4th at p. 490; *People v. Slaughter* , *supra*, 27 Cal.4th at p. 1199; *People v. Waidla*, *supra*, 22 Cal.4th at p. 713.) Proposition 115 added section 223 to the Code of Civil Procedure, which provides that voir dire of prospective jurors in a capital case "shall, where practicable, occur in the presence of the other jurors." (*Ibid.*) As appellant has failed to set forth any compelling argument for this Court to depart from its numerous previous rulings on the issue, appellant's contention must be rejected.

Accordingly, for all these reasons, the trial court properly conducted voir dire in the instant matter and appellant's contentions must be rejected.

II. THE FOR-CAUSE EXCUSALS OF THREE PROSPECTIVE JURORS WERE PROPER

Appellant further contends the trial court violated his constitutional right to a "fair and impartial penalty phase jury" by excusing for cause three prospective jurors. (AOB 77-88.) Appellant's contention is without merit. The three prospective jurors at issue were properly excused for cause based on their answers expressing reservations concerning their ability to impose the death penalty.

A. Background

As set forth in the preceding argument, the trial court conducted voir dire of the prospective jurors after they completed their juror questionnaires. (14RT 379-15RT 588.) Counsel was then afforded an opportunity to challenge the prospective jurors for cause. On appeal, appellant challenges the excusal of two potential jurors and one potential alternate juror.

1. The Excusal for Cause of Prospective Juror Ruben C.

> THE COURT: I have read your questionnaire. Is there anything you wish to have changed?
>
> PROSPECTIVE JUROR RUBEN C.: No.
>
> THE COURT: Before I get to the other questions, I want to get to the four questions that I am going to ask every juror. These are questions you have already answered. I may ask them in a different way.
>
> Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would refuse to vote for murder in the first degree merely to avoid reaching the death penalty first.

PROSPECTIVE JUROR RUBEN C.: No.

THE COURT: Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would automatically vote for a verdict of not true as to any special circumstance charged merely to avoid the death penalty issue?

PROSPECTIVE JUROR RUBEN C.: No.

THE COURT: Three, do you have such conscientious objections to the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence in this case, you would automatically vote for a verdict of life imprisonment without the possibility of parole and never vote for a verdict of death?

PROSPECTIVE JUROR RUBEN C.: That's the one I have a problem with.

THE COURT: I understand. What's your answer?

PROSPECTIVE JUROR RUBEN C.: I would vote for life imprisonment.

THE COURT: Regardless of the evidence?

PROSPECTIVE JUROR RUBEN C.: Regardless of the evidence.

THE COURT: Finally, do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence in this case, you would automatically, and in every case, vote for a verdict of death and never vote for a verdict of life imprisonment without the possibility of parole?

PROSPECTIVE JUROR RUBEN C.: It's still life in prison.

THE COURT: Would you always vote for death? That was the question. Regardless of the evidence.

PROSPECTIVE JUROR RUBEN C.: Yes.

THE COURT: You would vote for death?

PROSPECTIVE JUROR RUBEN C.: Well, I mean – can you rephrase the question?

THE COURT: It's the opposite of the third question.

Do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence, you would automatically, and in every case, vote for death and never vote for life imprisonment without the possibility of parole?

PROSPECTIVE JUROR RUBEN C.: No.

THE COURT: Okay. Counsel approach, please. [¶] Are the People challenging for cause?

[THE PROSECUTOR]: Yes, we are.

THE COURT: I'll hear you briefly.

[DEFENSE COUNSEL]: Yes, Your Honor. I think the juror did answer the questionnaire that if instructed, he would follow the law and would weigh – . . . [¶] In response to the question: If your answer to either question (c) or (d) was "Yes," would you change your answer, if you are instructed by the court that you must consider the evidence and the above-mentioned aggravating and mitigating factors before voting on the issue of penalty?

He answered yes.

Could you please set aside your personal feelings regarding what the law ought to be and follow the law as the court explains it?

He answered yes.

I think those questions – I ask that those questions be put to him so that he can demonstrate further whether, in fact, he is willing to set aside his views, follow the instructions, weigh the evidence and come back with death if that's what he finds.

THE COURT: That is denied. Under *Witt* I find that the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions. And

even if this can be viewed as equivocal, which is not under numerous cases, the most recent of which is *People versus Cain*, C-A-I-N, 10 Cal.4th 1, the determination of an equivocal response is by me. And I find that the *Witt* standard has been complied. The challenge for cause is sustained.

(14RT 384-388.)

2. The Excusal for Cause of Prospective Juror A.

THE COURT: I have read your questionnaire. Is there anything that you wish to have changed?

PROSPECTIVE JUROR A.: No.

THE COURT: All right. I am going to ask you the four questions. [¶] Do you have such conscientious objections to the death penalty that, regardless of the evidence in this case, you would refuse to vote for a verdict of guilty of murder in the first degree merely to avoid reaching the death penalty issue?

PROSPECTIVE JUROR A.: Yes.

THE COURT: You wouldn't even vote for murder in the first degree?

PROSPECTIVE JUROR A.: I vote for first degree, but I didn't believe in the death penalty.

THE COURT: I understand that. [¶] Let me ask you, would you let your feelings as to that, regardless of the evidence, stop you from voting guilty of murder in the first degree?

PROSPECTIVE JUROR A.: No.

THE COURT: All right. Do you have such conscientious objections to the death penalty that, no matter what the evidence is, you would automatically vote for a verdict of not true as to any of the special allegations alleged merely to avoid reaching the death penalty issue?

PROSPECTIVE JUROR A.: No.

THE COURT: Do you have such conscientious objections to the death penalty that, should we get to the penalty phase of this

trial, and regardless of what the evidence is, you would automatically, and in every case, vote for a penalty of life imprisonment without the possibility of parole and never vote for death.

PROSPECTIVE JUROR A.: Yes.

THE COURT: Yes?

PROSPECTIVE JUROR A.: Yeah.

THE COURT: Do you have such conscientious opinions about the death penalty that, regardless of the evidence in this case, and should we get to the penalty phase of this trial, you would automatically, and in every case, vote for death and never vote for life imprisonment without the possibility of parole?

PROSPECTIVE JUROR A.: No.

[¶]

THE COURT: Will there be a challenge for cause?

[THE PROSECUTOR]: Yes.

THE COURT: I'll hear from you, [defense counsel].

[DEFENSE COUNSEL]: Your Honor, in her questionnaire she has answered that she would consider both aggravating and mitigating circumstances if instructed to do so by the Court. And also on (f), she answered that she could set aside her personal feelings and follow the law. That immediately followed the *Witherspoon* questions.

I think she indicated when she sat down, the Court began to question her, that she didn't want to change any of her answers. The Court has not inquired if she feels that way or not now. I think her answer does not sufficiently indicate that she is impaired by the *Witt* standard and therefore she should not be disqualified.

THE COURT: Challenge is sustained.

(14RT432-434.)

3. The Excusal for Cause of Nenita C.

THE COURT: Let me ask you the four questions before I go on. [¶] By the way, I do have your questionnaire, is there anything you want to change?

PROSPECTIVE ALTERNATE JUROR NENITA C.: No.

THE COURT: As to the four questions. Do you have such conscientious objections to the death penalty, that regardless of the evidence, you would absolutely refuse to vote for a verdict of guilty of murder in the first degree merely to avoid reaching the death penalty issue?

PROSPECTIVE ALTERNATE JUROR NENITA C.: No.

THE COURT: Do you have such conscientious objections to the death penalty that, regardless of the evidence, you would automatically vote for a verdict of not true as to any of the special circumstances alleged merely to avoid reaching the death penalty issue?

PROSPECTIVE ALTERNATE JUROR NENITA C.: No.

THE COURT: Do you have such conscientious objections to the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence, you would automatically, and in every case, vote for a verdict of life imprisonment without the possibility of parole and never vote for a verdict of death?

PROSPECTIVE ALTERNATE JUROR NENITA C.: Yes.

THE COURT: Do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of this trial, and regardless of the evidence, you would automatically, and in every case, vote for a verdict of death and never vote for a verdict of life imprisonment without the possibility of parole?

PROSPECTIVE ALTERNATE JUROR NENITA C.: No.

[¶]

THE COURT: Do you wish to make a challenge for cause?

[THE PROSECUTOR]: Yes.

THE COURT: I'll hear from you, [defense counsel].

[DEFENSE COUNSEL]: Your Honor, on her questionnaire she did give the yes answer as she did in court. She also indicated under 58(e) that she would change if instructed by the Court, and the Court has not addressed that with her here. And I think that if asked she would so indicate as she had. She said she didn't want to change anything, and accordingly, she is not in fact disqualified by virtue of her answer to the *Witherspoon* question.

THE COURT: Again, I am not going to cite all the cases regarding equivocal responses. This happens to be unequivocal in any event. The challenge is sustained.

(15RT 549-551.)

B. The Trial Court Properly Excused Prospective Juror Ruben C., Prospective Juror A., and Prospective Alternate Juror Nenita C.

In *Wainwright v. Witt*, *supra*, 469 U.S. at page 424, the United States Supreme Court held,

> the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

(See also *People v. Williams* (1997) 16 Cal.4th 635, 667; *People v. Crittenden* (1994) 9 Cal.4th 83, 120-121; *People v. Mincey* (1992) 2 Cal.4th 408, 456.) The critical question is each challenge is "whether the juror's view about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror*." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1318-1319, italics in original.) A prospective juror who has expressed an unwillingness to impose the

death penalty may be properly excused for cause. (*People v. Jenkins* (2000) 22 Cal.4th 900, 986-987.) "Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court." (*People v. Boyette* (2002) 29 Cal.4th 381, 416.)

"A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause." (*People v. Lancaster* (2007) 41 Cal.4th 50, 78-79.) "The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.]" (*Ibid.*)

> Indeed, where answers given on voir dire are equivocal or conflicting, the trial court's assessment of the person's state of mind is generally binding on appeal. [Citation.] The trial court is in the unique position of assessing demeanor, tone, and credibility firsthand – factors of "critical importance in assessing the attitude and qualifications of potential jurors." [Citation.] Hence, the trial judge may be left with the "definite impression" that the person cannot impartially apply the law even though, as is often true, he has not expressed his views with absolute clarity. [Citation.]

(*People v. DePriest* (2007) 42 Cal.4th 1, 21; see also *Uttecht v. Brown* (2007) 551 U.S. 1, 20 [127 S.Ct. 2218, 167 L.Ed.2d 1014].)

Here, affording the appropriate substantial deference to the trial court's assessment of each prospective juror's state of mind, it is clear the decision to excuse them did not violate appellant's constitutional rights. Appellant argues that the decision to excuse the potential jurors is not entitled to deference in the instant matter because the trial court's voir dire was "inadequate, superficial, and accordingly unconstitutional." (AOB 87.) As explained in detail above, however, appellant's argument is without merit. Indeed, substantial evidence supports the trial court's findings in this case. Each of the prospective jurors in question gave equivocal and

conflicting responses indicating a view about capital punishment that would prevent or impair their ability to return a verdict of death.

1. Prospective Juror Ruben C. Was Properly Excused for Cause

Substantial evidence supports the trial court's ruling that Prospective Juror Ruben C.'s views concerning the death penalty would prevent or substantially impair his performance as a juror. (See *People v. Lancaster*, *supra*, 41 Cal.4th at pp. 78-79.) Indeed, the trial court's questioning revealed that this prospective juror would "automatically" vote for a verdict of life imprisonment without the possibility of parole and never vote for a verdict of death "regardless of the evidence." (14RT 385-386.) On his juror questionnaire, in describing his general feelings regarding the death penalty, Prospective Juror Ruben C. wrote that he did not "believe the death penalty is a humain [*sic*] punishment." (Supp. II 3CT 867.) He further wrote in response to Question 58(c) that he would automatically refuse to vote in favor of death and would instead automatically vote for life imprisonment. (Supp. II 3CT 870.) Although Prospective Juror Ruben C. also wrote that he could set aside his personal feelings and follow the law, deference must be given to the trial court's resolution of these conflicting statements. As this Court recognized:

> [W]e pay due deference to the trial court, which was in a position to actually observe and listen to the prospective jurors. Voir dire sometimes fails to elicit an unmistakably clear answer from the juror, and there will be times when "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror." [Citations.]

(*People v. Lancaster*, *supra*, 41 Cal.4th at p. 80.)

Accordingly, appellant's challenge to this prospective juror's excusal for cause is without merit and must be rejected.

2. Prospective Juror A. Was Properly Excused for Cause

Substantial evidence also supports the trial court's ruling that Prospective Juror A's views concerning the death penalty would prevent or substantially impair his performance as a juror. (See *People v. Lancaster*, *supra*, 41 Cal.4th at pp. 78-79.) As with Prospective Juror Ruben C., the trial court's questioning revealed that this prospective juror would "automatically" vote for a verdict of life imprisonment without the possibility of parole and never vote for a verdict of death "regardless of the evidence." (14RT 385-386.) On her juror questionnaire, in describing her general feelings regarding the death penalty, Prospective Juror A. wrote that she was "opposted [*sic*] to the death penalty." (Suppl. II 3CT 798.) She further wrote that she thought "we should not have a death penalty at all" and that she would automatically refuse to vote in favor of death and would instead automatically vote for life imprisonment. (Suppl. II 3CT 799, 802.) Although Prospective Juror A. also wrote that she could set aside her personal feelings and follow the law (Suppl. II 3CT 802), deference must be given to the trial court's resolution of her conflicting statements. (See *People v. Lancaster*, *supra*, 41 Cal.4th at p. 80.)

Accordingly, appellant's challenge to this prospective juror's excusal for cause is without merit and must be rejected.

3. Prospective Alternate Juror Nenita C. Was Properly Excused for Cause

Finally, substantial evidence supports the trial court's ruling that Prospective Alternate Juror Nenita C's views concerning the death penalty would prevent or substantially impair her performance as a juror. (See *People v. Lancaster*, *supra*, 41 Cal.4th at pp. 78-79.) As with Prospective

Juror Ruben C., the trial court's questioning revealed that this prospective juror would "automatically" vote for a verdict of life imprisonment without the possibility of parole and never vote for a verdict of death "regardless of the evidence." (14RT 385-386.) On her juror questionnaire, Prospective Alternate Juror Nenita C. gave conflicting responses. In describing her general feelings regarding the death penalty, she wrote that she disagreed with the death penalty "because if he is guilty & death penalty will be the punishment – person will not suffer anymore." (Suppl. II 2CT 476.) She then wrote, however, that the death penalty is used "too seldomly." (Suppl. II 2CT 477.) She further wrote that she would automatically refuse to vote in favor of death and would instead automatically vote for life imprisonment. (Suppl. II 2CT 479.) Although Prospective Alternate Juror Nenita C. also wrote that she could set aside her personal feelings and follow the law (Suppl. II 2CT 480), deference must be given to the trial court's resolution of her conflicting statements. (See *People v. Lancaster*, *supra*, 41 Cal.4th at p. 80.)

Accordingly, appellant's challenge to this prospective alternate juror's excusal for cause is without merit and must be rejected.

In sum, the answers provided by the challenged prospective jurors provides sufficient and ample evidence to support the conclusion that their views on the death penalty would "prevent or substantially impair the performance of their duties as a juror in accordance with their oath." (See *People v. Millwee* (1998) 18 Cal.4th 96, 146-147.) Thus, the trial court's decision to remove these jurors for cause must be upheld. Appellant's contentions are without merit and must be rejected.

III. THE TRIAL COURT PROPERLY ADMITTED JULIO CUBE'S TESTIMONY REGARDING THE JAMBI 3 ROBBERIES

Next, appellant contends the trial court erred in admitting testimony from Julio Cube regarding two uncharged robberies at the Jambi 3 jewelry store. (AOB 89-111.) This claim is without merit. The trial court's ruling was correct because, under Evidence Code section 1101, subdivision (b), the circumstances of the Jambi 3 robberies were relevant to show a common design or plan, and intent.

A. Relevant Trial Proceedings

In an amended felony complaint filed on October 4, 1993, appellant was charged with two counts of second degree robbery involving Julio Cube. (7CT 1614-1622.) After the preliminary hearing, however, these counts were dismissed by Magistrate Judge Gregg Marcus. (8CT 1775.) Magistrate Marcus explained:

> . . . the Court is going to dismiss Count 20, that's the Jambi robbery, based on insufficient identification by Mr. Cube and his confusion and non-reporting, the fact that there may have been more than one incident and the Court seemed satisfied that Mr. Cube really could not identify [appellant].
>
> He thought so at one point in time and then confused the robberies to the point where I believe he was totally confused in his testimony.

(6CT 1465.)

Later, on July 12, 1994, defense counsel filed a Motion to Set Aside Information pursuant to section 995. (8CT 1767-1769.) Defense counsel filed another document on February 14, 1995, entitled, "Additional Explication of Issues Raised by Defendant's Motion to Set Aside Information (Penal Code Section 995)." (8CT 1783-1790.)

On April 4, 1995, Judge Judith M. Ashmann held a hearing on the motion. (1-10RT 25-50.) In deciding whether to dismiss Counts 20 and 21 (the Cube robberies), the court stated:

> I'm troubled by the fact that the magistrate seemed to be making a factual finding because he does say based on insufficient identification. To me, that's not just the ramblings of a magistrate judge which I – which I, as a magistrate, used to do at that time as well. So I'm not being critical. . . . [¶] That doesn't seem to be just the musings of the magistrate, but it really seems to be making a factual finding that the identification was insufficient.
>
> I'm concerned, but I also agree that it would be awfully coincidental that the gun turns up in his car, and there are all these other robberies he is identified as having committed.
>
> But I'm concerned about this one because it does look like the magistrate has made a factual finding.
>
> [¶]
>
> I think that – first of all, the evidence itself is weak, and secondly, the statement by the magistrate that it was – I think as to Counts 20 and 21 that the 995 should be granted, that those charges should not have been refiled.

(1-10RT 41-42, 44.)

Later, after the prosecutor indicated that she intended to call Julio Cube to testify about the events of the robberies and the gun that was stolen, the trial court held a hearing pursuant to Evidence Code section 402. (16RT 592.) At the hearing before Judge Ronald S. Coen, defense counsel argued that factual findings were made by Magistrate Marcus "that the identifications were not believeable," and as such, Cube's testimony should be excluded under Evidence Code section 352. (16RT 593-594.) Counsel explained that:

> . . . the People are bringing in evidence of two crimes which they cannot charge. And it is so prejudicial, so little probative to

> merely establish, if it does at all, that he got the gun. [¶] The problem I have is that the later evidence in the case which shows him with a gun and corroborates that evidence. And essentially what we have, we have two uncharged robberies which cannot be charged due to the magistrate's filing, which will be used obviously in a negative way and be extremely prejudicial.

(16RT 594-595.)

The prosecutor reminded the court that Cube had picked appellant out of a live lineup and photographic lineup and argued that Judge Ashman did not find Cube to be unbelievable. Rather, Judge Ashman dismissed the counts because there was insufficient evidence to support a conviction. (16RT 596.)

In admitting the evidence, the trial court ruled as follows:

> In this case Judge Ashmann is confusing the statement of the magistrate. The magistrate found an insufficient identification to hold [appellant] to answer as to that particular count. That is a legal ruling regardless of what Judge Ashmann termed it.
>
> Even if it were a factual finding, that would preclude the refiling of that count as it would be binding on all subsequent judges or all reviewing courts. However, that would not estop the presentation of evidence pursuant to Evidence Code section 1101, subdivision (b).
>
> However, my holding was that that was a legal ruling in any event, regardless of the outcome of the 995. As such, based upon People versus Ewoldt . . . such evidence will be allowed for purposes of intent and common design or plan.

(16RT 603-604.)

Following the court's ruling, Cube testified that on two different occasions appellant came into the Jambi 3 jewelry store where he worked and robbed him. During the first robbery, appellant stole a Walther handgun. (16RT 662-663, 666-667.)

The jury was later instructed in the use of Cube's testimony.

> Evidence has been introduced for the purpose of showing that the defendant committed a crime other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tend to show:
>
> A characteristic method, plan, or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged.
>
> The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged;
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose.

(9CT 2006-2007.)

B. The Trial Court Properly Admitted Cube's Testimony Regarding the Jambi 3 Robberies

Under Evidence Code section 1101, subdivision (a), evidence of a person's character or trait of character is generally inadmissible "when offered to prove his or her conduct on a specified occasion." Evidence Code section 1101, subdivision (b), however, clarifies that evidence of uncharged prior misconduct may be admissible if relevant to establish facts, other than criminal disposition, such as motive, opportunity, intent,

preparation, common plan or scheme, knowledge, identity, absence of mistake or accident, or whether the defendant believed a victim consented to a sex act. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402; *People v. Walker* (2006) 139 Cal.App.4th 782, 795-796.) Such evidence is admissible to prove identity, intent, or common design or plan where the prior uncharged misconduct is sufficiently similar to the charged conduct, with the least degree of similarity required to show intent, a greater degree of similarity to prove a common design or plan, and the greatest degree of similarity to show identity. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402; *People v. Walker*, *supra*, 139 Cal.App.3d at pp. 796, 803.)

In determining whether evidence of uncharged bad acts or conduct is admissible, the trial court must also determine whether the probative value of the act is substantially outweighed by the danger of undue prejudice, undue consumption of time, confusing the issues, or misleading the jury. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, citing Evid. Code, § 352.) The weighing process under Evidence Code section 352 depends upon the trial court's consideration of the facts and issues of each case, rather than upon mechanically automatic rules. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) Moreover, "'[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 958, quoting *People v. Karis* (1988) 46 Cal.3d 612, 638.)

Rather, the statute uses the word "in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." (*People v. Zapien*, *supra*, 4 Cal.4th at p. 958.) In other words, in applying the statute, "prejudicial" is not synonymous with "damaging." (*People v. Bolin* (1998) 18 Cal.4th 297, 320; *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) Evidence which has probative value must be excluded under Evidence

Code section 352 only if it is "undu[ly]" prejudicial despite its legitimate probative value. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 724 [if it "poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome'"].) "Painting a person faithfully is not, of itself, unfair." (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.) On appeal, a trial court's resolution of these issues is reviewed for an abuse of discretion. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.)

The common features of a prior act and current offense need not reveal any signature method to be relevant to show a common plan. (*People v. Kraft* (2000) 23 Cal.4th 978, 1031.) While the common features "must indicate the existence of a plan rather than a series of similar spontaneous acts, [] the plan thus revealed need not be distinctive or unusual." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403.)

Here, the evidence from the Jambi 3 robberies was sufficiently similar to the other charged robberies committed by appellant to show a common design or plan. In each case, a small retail establishment was targeted. Furthermore, the stores were in close proximity (most within a few blocks of each other) and the incidents occurred within a short time period. Additionally and significantly, the Walther handgun stolen during the first Jambi 3 robbery was used in the robbery-murders at Jack's Liquor and the Sun Valley Shell Station, and ultimately found in appellant's car. (26RT 1689-1691, 27RT 1827-1832.) The foregoing similarities were more than sufficient to show a common design or plan, intent, and even identity. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 393-394; see, e.g., *People v. Earley* (2004) 122 Cal.App.4th 542, 548 [finding that prior uncharged act of possession of marijuana, where defendant was found outside an apartment building with marijuana, and later charged act of possession of marijuana for sale, where defendant, who appeared to be intoxicated, was found outside the same apartment building with a much

larger quantity of marijuana, was part of common plan or design]; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1021-1022 [evidence that prior and charged offenses each involved plan to hit victim over head and take victim's wallet and keys in order to obtain money and car for trip to Colorado sufficient to admit prior offense evidence to show common design].)

Furthermore, the circumstances of the Jambi 3 robberies were also highly probative on the issue of intent. The prosecution was required to establish that appellant intended to rob Jack's Liquor and the Sun Valley Shell Station in order to prove both the robbery charges and the robbery-murder special circumstance allegations. Thus, the circumstances of the Jambi 3 robberies were crucial in demonstrating that appellant possessed a similar intent to rob when he entered Jack's Liquor and the Sun Valley Shell Station in a similar fashion. (See *People v. Denis* (1990) 224 Cal.App.3d 563, 567-568 [evidence of intent was central disputed issue in prosecution for attempted robbery and felony-murder and, therefore, evidence that defendant had participated in prior robberies with codefendant was admissible]; see also *People v. Haston* (1968) 69 Cal.2d 233, 249-250 [fact that prior robbery had been committed by same two perpetrators acting together provided great probative value in favor of admitting prior offense evidence]; *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1049 [that each robbery involved targeting lone woman in car at gunpoint, asking victim to get into car, then demanding money warranted admission of prior offense evidence on issue of intent].

Given the highly relevant nature of the Jambi 3 robbery evidence, the trial court properly determined that its probative value was not substantially outweighed by the danger of undue prejudice. Cube's testimony regarding the robberies was not unduly inflammatory, particularly in comparison to the heinous murders committed at Jack's Liquor and the Sun Valley Shell

Station. (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 405; see also *People v. Wade* (1996) 48 Cal.App.4th 460, 469 [the prejudicial effect inherent in evidence of prior offenses varies with the circumstances of each case, and the relative seriousness or inflammatory nature of the prior acts as compared to the charged offense is a factor to be considered].) The evidence also was not cumulative, confusing, or time-consuming. Thus, any risk of prejudice was minimal in relation to the strong probative value of the evidence. (See *People v. Ewoldt, supra*, 7 Cal.4th at pp. 405-406.)

Because the evidence was highly probative as to matters other than criminal propensity, and because the risk of any prejudice to appellant was slight, the trial court's decision to admit evidence of the Jambi 3 robberies to show common design, scheme, or plan did not constitute an abuse of discretion. The trial court rendered its ruling only after careful consideration and extensive argument by all counsel. Appellant's arguments should therefore be rejected.

C. Any Alleged Error Was Harmless

Regardless, even if the evidence was admitted erroneously, any such error was harmless, as appellant would not have obtained a more favorable verdict had the evidence been excluded. The erroneous admission of uncharged acts of misconduct is not cause for reversal unless there is a reasonable probability an outcome more favorable to the defendant would have resulted in the absence of the error. (*People v. Bradford, supra*, 15 Cal.4th at pp. 1323-1324; *People v. Walker, supra*, 139 Cal.App.4th at p. 808; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); see also Evid. Code, § 353, subd. (b).)

Here, evidence of appellant's guilt with respect to the other crimes was overwhelming. As set forth above, no fewer than 16 witnesses identified appellant as the perpetrator of the 10 robberies and murders.

(17RT 724-728, 769, 775-776; 18RT 822-824, 858, 860-861, 879-880; 19RT 966-968; 20RT 994-1001, 1031, 1062-1064, 1088-1090; 21RT 1176-1179, 1190-1191, 1193, 1203-1205; 22RT 1272-1275; 23RT 1377, 1379, 1381, 1422, 1430, 1475; 24RT 1513-1516, 1518, 1582-1584; 26RT 1700-1707, 1773, 1775-1776; 28RT 1915-1920, 1962.) In many instances, appellant was selected from photographic and live lineups, and later identified by witnesses in court. Additionally, appellant was found in possession of the Walther handgun taken from the first Jambi 3 robbery, which was later tied to two other crimes, and appellant's palm print was recovered from the crime scene at H&R Pawnshop. (22RT 1246-1248; 26RT 1689-1691; 27RT 1827-1832.) Accordingly, an outcome more favorable to appellant was not reasonably probable absent the admission of the Jambi 3 robbery evidence. (See *People v. Walker*, *supra*, 139 Cal.App.4th at p. 808.)

Appellant's claim of federal constitutional error must also fail because it is predicated entirely on his claim of state law error. As there was no error, his claim of federal constitutional error is meritless. (*People v. Carter* (2003) 30 Cal.4th 1166, 1196 ([finding that the "[d]efendant's claims of federal constitutional error, entirely dependent as they are on his claim of state law error, likewise must fail."].) In any event, any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of appellant's guilt and identity as the perpetrator. (See *Chapman v. California* (1967) 386 U.S. 18, 36 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*) ["[B]efore a federal constitutional error can be held harmless, the court must be able to declare that it was harmless beyond a reasonable doubt"].)

IV. THE TRIAL PROPERLY ADMITTED THE IDENTIFICATION TESTIMONY OF DETECTIVE OPPELT

Appellant contends the trial court erred in allowing Detective Michael Oppelt to testify that appellant appeared on the surveillance tapes of two different robberies because the detective's observations of appellant occurred *after* the crimes. (AOB 112-125.) Appellant's claims are without merit. The trial court was within its discretion to admit the testimony because it was rationally based on Detective Oppelt's perception and was helpful to the jury. Finally, any alleged error was harmless in light of overwhelming evidence of appellant's guilt.

A. Relevant Proceedings

During Detective Oppelt's testimony, the prosecutor began to ask questions regarding the identity of certain individuals depicted in a surveillance tape of the robbery at Valley Market. (26RT 1708-1709.) Prior to the detective's identification of a jacket appellant was wearing in the video, defense counsel objected, arguing that it appeared Detective Oppelt was giving "an opinion" and not an "identification." According to counsel, "the opinion, particularly of a police officer, in regard to that kind of testimony is inadmissible." (26RT 1709-1710.) He went on to add that "[a] police officer doesn't have any expertise in identification of individuals or of clothing. . . . So the mere opinion that that's the same jacket that's seen somewhere else seems to me to be just opinion testimony that is inadmissible." (26RT 1710.) Counsel also objected to any individual identification of appellant on the grounds that "the jury may conclude, and is likely to conclude, that as a police officer he might have more information than they have with regard to who is depicted on that videotape." (26RT 1711.)

In response, the trial court discussed three cases[36] he intended to rely upon in admitting the testimony and noted that it made no difference whether the person giving the identification was familiar with the individual by "prior contacts or subsequent contacts." (26RT 1711-1713.) The court also advised defense counsel that appellant could bring in his own witness to state that the person depicted on the video was not appellant. (26RT 1713.)

Defense counsel asserted that the cases did require "knowledge of the appearance of the individual at or before the time of the occurrence," and complained that he did not think "this meets on all fours the authority for offering lay opinion with regard to identification from a video." (26RT 1713-1716.) He also argued that allowing Detective Oppelt to identify appellant on the surveillance tape "will not be helpful to the trier of fact," but would prejudice appellant "very greatly." (26RT 1716.)

The court disagreed and ruled that once the prosecutor had laid the proper foundation, she could elicit testimony from Detective Oppelt identifying appellant on the surveillance tapes. (26RT 1716-1717.)

Detective Oppelt eventually took the stand and testified that the jacket appearing on one of the robbers in the surveillance video at Valley Market bore similarities to the one appellant was wearing at the time of his arrest. In Detective Oppelt's opinion, the person in the video was, in fact, wearing the same jacket. (26RT 1742.) Based on his interactions with appellant following his arrest, Detective Oppelt further testified that he was "very" familiar with appellant's appearance and that, in his opinion, the individual wearing the jacket in the video was appellant. (26RT 1742-1743.)

After viewing a surveillance video from the Sun Valley Shell Station murder, Detective Oppelt testified that a car depicted in the video and

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[36] *People v. Ingle* (1986) 178 Cal.App.3d 505; *People v. Mixon* (1982) 129 Cal.App.3d 118; *People v. Perry* (1976) 60 Cal.App.3d 608.

present during the crime was similar to the one appellant was arrested in. (26RT 1749.) He further stated that a Raiders baseball cap worn by someone in the video was the same as the one found in this vehicle. (26RT 1752.) Detective Oppelt also identified a person in the video wearing the same jacket worn by appellant during the Valley Market robbery. (26RT 1755.)

B. The Trial Court Properly Admitted Detective Oppelt's Identification Testimony

Under Evidence Code section 800, a lay witness may testify to an opinion when it is "(a) [r]ationally based on the perception of the witness; and (b) [h]elpful to a clear understanding of his testimony." (Accord, *People v. Farnam* (2002) 28 Cal.4th 107, 153.) "[T]he identity of a person is a proper subject of nonexpert opinion [citations] . . . ." (*People v. Perry*, *supra*, 60 Cal.App.3d at p. 612; accord, *People v. Mixon*, *supra*, 129 Cal.App.3d at p. 127.) A trial court's admission of lay opinion testimony is reviewed for an abuse of discretion. (*Id.* at pp. 153-154; *People v. Medina* (1990) 51 Cal.3d 870, 887; *People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1609.)

At least two published cases have allowed police officers to give lay opinion testimony identifying the defendant as the perpetrator based on photographed or filmed images of the crime, and a third published case allowed identification testimony by a percipient witness who identified the defendant after watching a video recording made during the crime. First, in *People v. Perry*, *supra*, 60 Cal.App.3d 608, the Court of Appeal found that police officers could offer testimony identifying the defendant as the man depicted in a surveillance video. There, a robbery victim, who said that a film surveillance of the robbery was accurate, could not identify the defendant in live or photographic lineups. (*Id.* at pp. 610-611.) An officer

who was familiar with the defendant based on prior contacts identified the robber in the film as the defendant. (*Id.* at p. 610.) The defendant's parole officer similarly identified the robber in the film as the defendant. (*Id.* at p. 611.) After noting that identity was the proper subject of lay opinion, the Court of Appeal found that the identification testimony was properly admitted. (*Id.* at pp. 612-615.) The court noted that the witnesses had formed their opinions based on their prior contacts with the defendant, their awareness of the defendant's appearance the day of the crime, and their perception of the film. (*Id.* at p. 613.) The court also noted that the defendant had changed his appearance by the time of trial, and therefore, the witnesses' knowledge of the defendant's appearance at the time of the crime was evidence the jury would not otherwise have received. (*Ibid.*) Analogizing to testimony on handwriting comparison, the court also rejected a claim that the opinion testimony invaded the province of the jury, finding it was instead "submitted as an aid in the determination of the ultimate question of the identity of the culprit and the defendant's guilt or innocence." (*Id.* at p. 615.)

Second, in *People v. Mixon*, *supra*, 129 Cal.App.3d 118, police officers were permitted to testify that they recognized the defendant upon viewing photographs of the crime. There, after a robbery victim could not identify the defendant from mug shots, two officers identified the defendant from surveillance photographs taken during the robbery. (*Id.* at pp. 124-125.) As in *Perry*, the Court of Appeal noted that identity was a proper subject for lay opinion and found the testimony was properly admitted. (*Id.* at pp. 127-135.) The court summarized *Perry* as holding that there were two predicates for such identification testimony: "(1) that the witness testify from personal knowledge of the defendant's appearance at or before the time the photo was taken; and (2) that the testimony aid the trier of fact in determining the crucial identity issue." There was adequate personal knowledge by the two

officers since both had been acquainted with the defendant for a number of years and both had seen the defendant within two to three weeks prior to the robbery. (*Id.* at pp. 130-131.) The court also found the officers' testimony was helpful to the jury since the surveillance photograph was blurry and the defendant had changed his appearance from the time of arrest to the time of trial, even though a photograph of the defendant on the day of his arrest was also admitted. (*Id.* at p. 131.) Although the court acknowledged there was a possible prejudice from having law enforcement officers testify about prior contacts in other criminal investigations or contexts, the officers' testimony did not reveal such prejudicial details of the prior contacts. (*Id.* at pp. 132-134.) The court also rejected the holding of *United States v. Butcher* (9th Cir. 1977) 557 F.2d 666, 670, that officers' identification testimony should only be allowed when "'other adequate identification testimony is available to the prosecution.' [Citation.]" (*People v. Mixon, supra,* 129 Cal.App.3d at pp. 134-135.) Rather, the Court of Appeal found the quality of non-officer testimony should be weighed in exercising discretion:

> The trial courts, in weighing possible prejudice, must determine if the non-law enforcement testimony available is "adequate." The prosecution should not be forced to rely on testimony that is weak simply because it comes from an individual not involved in law enforcement. The trial judge maintains the discretion to determine if the prejudicial effect of the officer's testimony substantially outweighs its probative value (Evid. Code, § 352), and such a discretionary ruling will be overturned only if there is a clear abuse of discretion.

(*Ibid.*)

Finally, in *People v. Ingle, supra,* 178 Cal.App.3d 505, a man robbed a store and the police took possession of a videotape recording of the robbery made by one of the store's video surveillance cameras. (*Id.* at pp. 508-509.) The police showed the videotape to the store clerk who had been held up at gunpoint during the robbery. (*Ibid.*) After viewing the

videotape, the clerk selected the defendant's photograph from a photographic lineup. (*Id.* at p. 509.) The clerk subsequently identified the defendant as the robber both at the preliminary hearing and at trial. (*Ibid.*) Prior to trial, the defendant moved to exclude the clerk from making an in court identification on the ground that the videotape shown to the clerk had been impermissibly suggestive. (*Ibid.*) The trial court denied the motion. (*Ibid.*) On appeal, the defendant challenged the denial of the motion. The Court of Appeal observed that the "videotape recording of the robbery was independent evidence that the robbery occurred and of the perpetrator's identity." (*Id.* at p. 514.) But, it noted that the videotape's quality was "not sufficient to establish [the defendant's] identity conclusively." (*Ibid.*) "Under such circumstances," the appellate court concluded, "it was entirely appropriate for the trial court to permit the robbery victim to give opinion testimony, based upon her personal observations and perceptions at the time the robbery occurred, that the person portrayed as the robber in the videotape was the defendant. [Citation.]" (*Ibid.*, citing *People v. Mixon*, *supra*, 129 Cal.App.3d 118.) The appellate court found that the clerk's identification testimony satisfied *Perry* and *Mixon*. (*Ibid.*) Thus, it concluded that the trial court did not err when it admitted the identification testimony. (*Ibid.*)

C. The Trial Court Properly Exercised Its Discretion in Admitting Detective Oppelt's Lay Opinion Testimony

Here, as in *Perry* and *Mixon*, the trial court acted within its discretion when it allowed Detective Oppelt to offer his opinion regarding events and details on the surveillance tapes. Detective Oppelt's testimony was proper lay opinion testimony because it was (1) rationally based on his perception of the videotapes and (2) helpful to the understanding of his testimony. (See Evid. Code, § 800.)

First, it is important to note that the majority of Detective Oppelt's lay opinion testimony involved his identification of pieces of clothing seen on the videos – not an identification of appellant himself. For the most part, Detective Oppelt only offered his opinion regarding a jacket and baseball hat worn by one of the robbery participants. (26RT 1741-1743.) In fact, Detective Oppelt never specifically identified appellant in the Shell Station video; rather he discussed clothing and cars and described the events as they were taking place. (26RT 1749-1758.)

In any event, the testimony was admissible because it was based on Detective Oppelt's personal knowledge of appellant. Indeed, the detective testified that he had seen appellant "close to ten" times since his arrest and spent "collectively a couple of hours" with him. (26RT 1742-1743; see Evid. Code, § 800, subd. (a); *People v. Mixon*, *supra*, 129 Cal.App.3d at p. 128; *People v. Perry*, *supra*, 60 Cal.App.3d at p. 613.) Moreover, the testimony was helpful to the jury. As noted by appellant (AOB 112), the surveillance videos were of "very low quality." Detective Oppelt's testimony provided the jurors with an aid in interpreting what was seen on the surveillance tapes. (see Evid. Code, § 800, subd. (b); *People v. Perry*, *supra*, 60 Cal.App.3d at p. 615.) This is especially true as appellant had changed his appearance from the time of the crimes to the time of trial. (See 30RT 2181-2182 [prosecutor noting during closing argument that appellant had shaved his mustache, gained weight, and changed his hair].)

Appellant mistakenly contends that the detective's identification testimony was inadmissible because Detective Oppelt did not have personal contact with appellant prior to the recorded crimes, but rather met him in person only after the crime had occurred. (AOB 121-122.) He argues that *Mixon*, *Perry*, and *Ingle* each require that identification testimony of lay witnesses (like Detective Oppelt) be limited to those persons who had contact with the defendant prior to the crime. (*Ibid.*) Appellant's contention

is without merit. Although the non-percipient witnesses in *Perry* and *Mixon* identified the defendants from photographs and videos based on their contacts with the defendants prior to the crimes, *Perry* and *Mixon* should not be read as limiting the admissibility of identification testimony to only such circumstances.

As noted by the trial court, it would be illogical to find that Detective Oppelt could not give lay opinion testimony based on his personal knowledge of appellant simply because he obtained the knowledge after the crime. (26RT 1712-1713, 1717.) The important point was that Detective Oppelt saw appellant, in person, near the time of the crimes, not whether the observations occurred before the crime. Indeed, there was no suggestion that appellant had changed his appearance immediately after the crimes, such that knowledge of appellant's appearance prior to the crime would be essential. (Cf. *People v. Mixon*, *supra*, 129 Cal.App.3d at p. 131 [defendant had altered his appearance following his arrest and prior to trial]; *People v. Perry*, *supra*, 60 Cal.App.3d at p. 613 ["Evidence was introduced that defendant, prior to trial, had altered his appearance by shaving his mustache. The witnesses were able to apply their knowledge of his prior appearance to the subject in the film."].) Rather, appellant likely had the same appearance 24 hours after the Shell Station murder (when Detective Oppelt met him in person) as he did prior to the murder. (Cf. *People v. Mixon*, *supra*, 129 Cal.App.3d at pp. 130-131 [adequate foundation where officers had seen defendant two to three weeks prior to robbery].) Thus, because the identification was based on Detective Oppelt's personal knowledge, it was admissible. The issue of when he gained that knowledge – before versus after the crime – is a "'question of the degree of knowledge [that] goes to the weight rather than to the admissibility of the opinion.'" (*People v. Mixon*, *supra*, 129 Cal.App.3d at p. 128, quoting *People v. Perry*, *supra*, 60 Cal.App.3d at p. 613.)

Appellant also mistakenly contends that the trial court "ignored the limitation set forth in *United States v. Butcher*, *supra*, 557 F.2d 666, as adopted by the California Court of Appeal in *Mixon*, *supra*, 129 Cal.App.3d 118, 134: a police officer should not testify about identification unless no other identification testimony is available to the prosecution." (AOB 122.) Appellant's interpretation of *Mixon* as it pertains to the *Butcher* case is incorrect. Indeed, as stated above, the *Mixon* court rejected the portion of *Butcher* that stands "for the proposition that if nonlaw enforcement testimony is available, law enforcement identification testimony must be excluded." (*People v. Mixon*, *supra*, 129 Cal.App.3d at p. 134.) Rather, "[t]he trial courts, in weighing possible prejudice, must determine if the nonlaw enforcement testimony available is 'adequate.'" However, "[t]he prosecution should not be forced to rely on testimony that is weak simply because it comes from an individual not involved in law enforcement." (*Id.* at 134-135.)

In sum, the trial court reasonably exercised its discretion in finding Detective Oppelt's testimony accompanying the videotape was based on his own perception and was helpful to understanding the detective's testimony. Therefore, no error occurred.

D. Any Alleged Error Was Harmless

Even assuming the trial court erred in admitting Detective Oppelt's challenged lay opinion testimony, any alleged error was harmless as the evidence of appellant's guilt was overwhelming. (See *People v. Breverman* (1998) 19 Cal.4th 142, 172-173; *Watson*, *supra*, 46 Cal.2d at p. 836.) As set forth above, no fewer than 16 witnesses identified appellant as the perpetrator of the 10 robberies and murders. (17RT 724-728, 769, 775-776; 18RT 822-824, 858, 860-861, 879-880; 19RT 966-968; 20RT 994-1001, 1031, 1062-1064, 1088-1090; 21RT 1176-1179, 1190-1191, 1193, 1203-

1205; 22RT 1272-1275; 23RT 1377, 1379, 1381, 1422, 1430, 1475; 24RT 1513-1516, 1518, 1582-1584; 26RT 1700-1707, 1773, 1775-1776; 28RT 1915-1920, 1962.) Additionally, appellant was found in possession of the Walther handgun taken from the first Jambi 3 robbery, which was later tied to two other crimes, and appellant's palm print was recovered from the crime scene at H&R Pawnshop. (22RT 1246-1248; 26RT 1689-1691; 27RT 1827-1832.) Accordingly, an outcome more favorable to appellant was not reasonably probable absent the admission of the lay opinion testimony of Detective Oppelt. (See *People v. Breverman*, *supra*, 19 Cal.4th at pp. 172-173.) Appellant's claim must therefore be rejected.

V. APPELLANT FORFEITED HIS CONFRONTATION CLAUSE CLAIM; REGARDLESS, DR. CARPENTER'S TESTIMONY REGARDING AKHVERDIAN'S AUTOPSY AND INJURIES DID NOT VIOLATE APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

Citing *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, [129 S.Ct. 2527, 174 L.Ed.2d 314] (*Melendez-Diaz*), appellant contends his right to confrontation was violated when the prosecutor presented "the testimony of a medical examiner about the autopsy done on Norair Akhverdian when [the examiner] did not conduct the autopsy and relied upon a report and photographs done by another medical examiner who had never been cross-examined by [appellant]." (AOB 126-142.) Appellant's contention is without merit. First, appellant has forfeited this claim by failing to object at trial. Regardless, the Confrontation Clause does not preclude an expert opinion that relies, in part, upon another expert's observations. Finally, any error was harmless as there was independent evidence appellant shot and killed Akhverdian.

A. Background

During trial, the prosecutor offered the testimony of Dr. Eugene Carpenter, a medical examiner for the Los Angeles County Coroner's office. Dr. Carpenter testified that he had worked for the coroner's office for eight years and had performed "close to 4,000" autopsies. (26RT 1720.) During his testimony, Dr. Carpenter referred to photographs and an autopsy report prepared by Dr. Wegner, a certified forensic pathologist who had been employed by the coroner's office. At the time of trial, Dr. Wegner was deceased. (26RT 1723.)

Dr. Carpenter testified that Dr. Wegner had concluded that Akhverdian died from a gunshot wound to the thorax abdomen. (26RT 1726.) Based on his review of photographs and x-rays of Akhverdian's body, Dr. Carpenter offered testimony about the entrance and exit wounds present on Akhverdian, and the trajectory of the bullet that killed Akhverdian. (26RT 1728-1730, 1735.) Dr. Carpenter also dispelled common misperceptions about the location of the heart in a human body and discussed how the bullet could have hit Akhverdian's heart. (26RT 1731-1734.)

Defense counsel did not object to Dr. Carpenter's testimony. (26RT 1719-1734.)

B. Appellant Has Forfeited This Claim by Failing to Object Below

A claim that the introduction of evidence violated a defendant's right to confrontation must be timely asserted at trial or it is forfeited on appeal. (See, e.g., *People v. Tafoya* (2007) 42 Cal.4th 147, 166; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn.19; *People v. Burgener*, *supra*, 29 Cal.4th at p. 869; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn.14.) *Melendez-Diaz* itself specifically addressed a defendant's obligation to

preserve review of Confrontation Clause issues, and held, "[t]he defendant *always* has the burden of raising his Confrontation Clause objection[.]" (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2541, italics in original.) *Melendez-Diaz* further held that "[t]he right to confrontation may, of course, be waived, including by failure to object to the offending evidence[.]" (*Id.* at p. 2534, fn.3.) "It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (*if the defendant objects*) be introduced live." (*Id.* at p. 2532, fn.1, first italics in original, second italics added.)

Here, it is undisputed that appellant failed to raise a Sixth Amendment objection to Dr. Carpenter's trial testimony. Despite this, appellant now claims that Dr. Carpenter's testimony on the autopsy performed by Dr. Wegner violated his Sixth Amendment right to confrontation. (AOB 126-142.) However, because appellant failed to object on this ground below, such claim is forfeited on appeal. (See, *People v. Tafoya*, *supra*, 42 Cal.4th at p. 166; *People v. Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1028, fn.19; *People v. Burgener*, *supra*, 29 Cal.4th at p. 869; *People v. Catlin*, *supra*, 26 Cal.4th at p. 138, fn.14.)

Regardless, assuming the issue has been preserved for appellate purposes, appellant's claim is without merit.

C. Appellant's Right to Confrontation Was Not Violated

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Crawford v. Washington* (2004) 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (*Crawford*), the United States Supreme Court held that the Sixth Amendment guarantees a defendant's right to confront those "who 'bear testimony'" against him.

Accordingly, the testimonial statements of a witness who does not appear at trial are inadmissible unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. (*Id.* at pp. 53-54.) Whether a statement is testimonial presents a question of law, which is reviewed de novo. (See *People v. Seijas* (2005) 36 Cal.4th 291, 304.)

In *People v. Geier* (2007) 41 Cal.4th 555, 596 (*Geier*), this Court reviewed *Crawford* and other confrontation clause cases to determine whether allowing the prosecution's DNA expert to testify based on another unavailable analyst's test results violated the Sixth Amendment. In holding such testimony was permissible because it was not based on testimonial statements, *Geier* explained that a hearsay statement is "testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Geier*, *supra*, 41 Cal.4th at p. 605.) Applying this test, this Court held that DNA testing reports do not meet the second criterion because they "constitute a contemporaneous recordation of observable events rather than the documentation of past events." (*Ibid.*)

This Court also concluded that, when analysts performing DNA testing contemporaneously record their actions, observations and test results, they are not acting to incriminate a defendant because their reports have the potential to be either inculpatory or exculpatory. Therefore, even though analysts may be working for the police and can reasonably anticipate that test results will be used at trial, they are not acting as accusatory witnesses making testimonial statements when they prepare their reports. (*Geier*, *supra*, 41 Cal.4th at pp. 605-607.) For these reasons, this Court held that the DNA testing report was not testimonial and that the admission of the report, even absent cross-examination of the analyst who prepared it, did not conflict with *Crawford* or violate the confrontation clause. (*Ibid.*)

Following *Geier*, the United States Supreme Court decided *Melendez-Diaz*, *supra*, 129 S.Ct. 2527, which held that the Sixth Amendment precluded admission into evidence of affidavits by government laboratory analysts as violating the confrontation clause. There, the trial court had admitted three notarized "certificates of analysis" stating that the results of forensic testing showed the substance seized from the defendant was in fact cocaine. (*Id.* at p. 2531.) In a five to four decision, the Court concluded the affidavits were testimonial statements because they were the functional equivalent of live, in-court testimony, "'made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial.'" (*Ibid.*) The Court also reasoned that the analysts were accusatory witnesses because the affidavits proved facts necessary to the prosecution's case. (*Id.* at pp. 2533-2534.) The Court concluded that confrontation was necessary for admission of the affidavits because the defendant "did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." (*Id.* at p 2537.)

The effect of *Melendez-Diaz* on *Geier* is currently pending before this Court.[37] In any event, *Geier* is controlling in the instant matter because it is distinguishable from *Melendez-Diaz*. In *Geier*, a witness subject to cross-examination was allowed to rely on DNA data in reports prepared by others and to offer expert opinion testimony regarding the data. (*Geier*,

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[37] See, e.g., *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted December 2, 2009, S176620; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted December 2, 2009, S177046; *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted December 2, 2009, S176213; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted December 2, 2009, S176886.

supra, 41 Cal.4th at pp. 606-607.) In *Melendez-Diaz*, on the other hand, the prosecution sought to admit an incriminating affidavit, where neither the author nor anyone connected with the author was subject to cross-examination. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2535.) Moreover, the affidavit was neither a business record nor was it prepared contemporaneously with the testing; rather, it was prepared approximately one week after the tests were performed, solely for use as evidence at trial. (*Ibid.*)

Here, the challenged testimony and autopsy report were akin to those in *Geier* and unlike the affidavits in *Melendez-Diaz*. As in *Geier*, Dr. Carpenter's testimony did not violate appellant's right to confrontation since Dr. Carpenter was available for cross-examination and provided expert testimony based on contemporaneously-recorded observations by Dr. Wegner. Dr. Carpenter described the manner in which Dr. Wegner – like all other medical examiners in the coroner's office – conducted autopsies during the regular course of business. (26RT 1721-1723.) Dr. Carpenter testified he reviewed Dr. Wegner's autopsy report; he offered both the conclusions memorialized in the report as well as his own opinions about the trajectory of the bullet that killed Akhverdian. He further testified about the standard testing procedures used to determine the presence of gunshot residue on a decedent and testified that Dr. Wegner's report indicated that no gun powder particles were observed on Akhverdian's clothing. (26RT 1723-1736.) For these reasons, *Melendez-Diaz* should not be extended beyond its facts to turn routine autopsy reports into testimonial statements implicating the Confrontation Clause. (See *Geier*, *supra*, 41 Cal .4th at p. 606 ["Preclusion of autopsy report because of unavailability of medical examiner would be 'a harsh and unnecessary result in light of the fact that autopsy reports generally make routine and descriptive observations of the physical body'"].) Indeed, in *Geier*, this

Court looked to other jurisdictions who have recognized the impracticality of deeming autopsy reports as inadmissible testimonial hearsay:

> In *State v. Lackey* (2005) 280 Kan. 190, 120 P.3d 332, the Kansas Supreme Court, joining those jurisdictions that have concluded that an autopsy report is not testimonial under *Crawford*, cited the practical considerations that militated against the contrary conclusion. "We believe the reason why these cases have not adopted the arguments and reasoning set forth by defendant is that it would have the effect of requiring the pathologist who performed the autopsy to testify in every criminal proceeding. If, as in this case, the medical examiner is deceased or otherwise unavailable, the State would be precluded from using the autopsy report in presenting its case, which could preclude the prosecution of a homicide case. We view this as a harsh and unnecessary result in light of the fact that autopsy reports generally make routine and descriptive observations of the physical body in an environment where the medical examiner would have little incentive to fabricate the result." (*Id.* at pp. 351-352; see also *People v. Durio* (N.Y.Sup.Ct.2005) 7 Misc.3d 729, 794 N.Y.S.2d 863, 869 ["[C]ourts cannot ignore the practical implications that would follow from treating autopsy reports as inadmissible testimonial hearsay in a homicide case . . . . The passage of time can easily lead to the unavailability of the examiner who prepared the autopsy report. Moreover, medical examiners who regularly perform hundreds of autopsies are unlikely to have any independent recollection of the autopsy at issue in a particular case and in testifying invariably rely entirely on the autopsy report . . . . Certainly it would be against society's interests to permit the unavailability of the medical examiner who prepared the report to preclude the prosecution of a homicide case"].)

(*Geier*, *supra*, 41 Cal.4th at pp. 601-602.)

On June 23, 2011, the United States Supreme Court issued its latest decision on the reach of the Sixth Amendment's Confrontation Clause in *Bullcoming v. New Mexico* (2011) __ U.S. __, [131 S.Ct. 2705, 180 L.Ed.2d 610] (*Bullcoming*). While the decision clarified some parts of the Supreme Court's jurisprudence on the admissibility of certain forensic

reports, it offered little guidance on the admissibility of expert opinion evidence based in part on results of tests conducted and observations recorded by others. Accordingly, the decision has little effect on this case.

In *Bullcoming*, the defendant was convicted of aggravated driving while intoxicated (DWI). (*Bullcoming*, *supra,* 131 S.Ct. at p. 2712.) At trial, the "[p]rincipal evidence" against him was a laboratory blood alcohol concentration (BAC) report generated by an analyst who had been placed on unpaid leave before trial and did not testify. (*Id.* at pp. 2709-2713.) Following his arrest, the defendant's blood sample was sent to a laboratory, where forensic analyst Curtis Caylor tested the sample. The laboratory generated a report that included a "certificate of analyst," completed and signed by Caylor, noting the sample's BAC level. Caylor's certificate also affirmed that the sample's seal was received intact, that the statements in the remaining sections of the report were correct, and that he had followed the proper procedures. (*Id.* at pp. 2710-2711.)

The trial court admitted Caylor's laboratory report as a business record during the testimony of forensic analyst Gerasimos Razatos, a state laboratory scientist who had neither observed nor reviewed Caylor's analysis. (*Bullcoming*, *supra*, 131 S.Ct. at pp. 2712.) The New Mexico Supreme Court held that the report introduced at trial qualified as testimonial in light of *Melendez-Diaz*. However, the state court further held that its admission did not violate the Confrontation Clause because Caylor was a "mere scrivener" and Razatos was a qualified expert who was available for cross-examination regarding the operation of the gas chromatograph machine, the results of the tests, and the laboratory's procedures. (*Bullcoming*, 131 S.Ct. at pp. 2712-2713.)

The U.S. Supreme Court framed the issue before it as follows: "Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to

prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2713.) The Court answered this question in the negative. Citing "controlling precedent," the Court held that, if an out-of-court statement is testimonial in nature, it generally may not be introduced against the accused unless the witness who made the statement testifies at trial. The Court reversed "[b]ecause the New Mexico Supreme Court permitted the testimonial statement of one witness, i.e., Caylor, to enter into evidence through the in-court testimony of a second person, i.e., Razatos." (*Id.* at p. 2713.) The Confrontation Clause, the Court added, "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." (*Id.* at p. 2716.) The Court later restated its conclusion this way: "In short, when the State elected to introduce Caylor's certification, Caylor became a witness Bullcoming had the right to confront." (*Ibid.*)

In reaching its holding, the five-vote majority opinion, authored by Justice Ginsburg, found that Caylor was not a "mere scrivener" who simply transcribed machine data into his report, since he also made a number of representations about how the test was conducted. (*Bullcoming*, *supra*, 131 S.Ct. at pp. 2714-2715.) The Supreme Court also indicated that the contemporaneous nature of such data recording was not significant. "Most witnesses, after all, testify to their observations of factual conditions or events, *e.g.*, 'the light was green," "the hour was noon.' Such witnesses may record, on the spot, what they observed." (*Id.* at p. 2714.) Noting that Caylor was on unpaid leave for undisclosed reasons, the Court added that if Caylor had testified, "Bullcoming's counsel could have asked questions

designed to reveal whether incompetence, evasiveness, or dishonesty accounted for Caylor's removal from his work station." (*Id.* at p. 2715.)

Significantly, the Court pointed out that the state "did not assert that Razatos had any 'independent opinion' concerning Bullcoming's BAC." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2716.) Thus, the Court drew a distinction between an expert offering an independent opinion based on results of tests he or she did not personally conduct and a witness serving as a mere conduit for results of tests he or she did not perform.

Moreover, Justice Ginsburg could muster only four votes for a footnote that defined "testimonial" as a statement having a "primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2714 fn. 6.[38]) Meanwhile, the five-vote majority opinion stated: "A document created solely for an 'evidentiary purpose,' *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as testimonial." (*Id.* at 2717.) Thus, it appears that a majority of the Court was willing to find Caylor's report "testimonial" only because it was created "solely" for law-enforcement purposes.

In addition, Justice Sotomayor, who joined the majority in the 5-4 decision, wrote a separate concurrence in part "to emphasize the limited reach of the Court's opinion." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2719.) Justice Sotomayor highlighted four scenarios neither presented for consideration nor resolved by the majority's opinion: (1) where the state has "suggested an alternative purpose, much less an alternate *primary* purpose, for the [forensic report]"; (2) where the person testifying "is a

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[38] Justices Scalia, Sotomayor and Kagan joined in that footnote, but Justice Thomas, who provided the fifth vote for other parts of the opinion, did not.

supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue"; (3) where "an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence"; and (4) where the state introduced only instrument-generated data instead of a testimonial report containing information beyond the raw data. (*Id.* at p. 2722, emphasis in original.)

As for the first scenario, Justice Sotomayor noted that New Mexico had not claimed that the BAC report was necessary to provide Bullcoming with medical treatment. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2722.) She pointed to three recent Supreme Court cases which stated that medical reports and statements of physicians are not testimonial. (*Ibid.*)

As for the second scenario, Justice Sotomayor noted that Razatos "conceded on cross-examination that he played no role in producing the BAC report and did not observe any portion of Caylor's conduct of the testing." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2722.) She also noted that the New Mexico Supreme Court "recognized Razatos' total lack of connection to the test at issue." (*Ibid.*) She added, "We need not address what degree of involvement is sufficient because here Razatos had no involvement whatsoever in the relevant test and report." (*Ibid.*)

As for the third scenario, Justice Sotomayor pointed out that "the State does not assert that Razatos offered an independent, expert opinion about Bullcoming's blood alcohol concentration." Instead, Razatos only read from the report that was introduced into evidence. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2722.) "We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." (*Ibid.*)

As for the fourth scenario, Justice Sotomayor noted that New Mexico had not attempted to introduce only instrument-generated results, such as a printout from the GCMS. Instead, New Mexico had elected to present a certification which contained those results and other statements regarding the procedures which Caylor used in handling the sample. Justice Sotomayor added, "[W]e do not decide whether . . . a State could introduce (assuming an adequate chain of custody foundation) raw data generated by a machine in conjunction with the testimony of an expert witness." (*Bullcoming*, *supra*, 131 S.Ct. at p. 2722.)

1. *Bullcoming* Has Little Effect on This Case

a. The Autopsy Report Was Unrelated to Generating Evidence for Prosecution

Here, the primary purpose of the autopsy report prepared by Dr. Wegner was unrelated to any criminal proceeding. Autopsy reports are prepared for specific medical purposes, set forth by state law, that exist independently of any law enforcement accusatory function. (See *Noguchi v. Civil Service Commission* (1986) 187 Cal.App.3d 1521, 1529.) Accordingly, the fundamental reason an autopsy is generated is to medically "develop . . . accurate and adequate information about the death of each and every human being, whenever possible." (*People v. Roehler* (1985) 167 Cal.App.3d 353, 374.) This purpose far exceeds the much narrower and incidental function of detecting evidence of a crime. Even the secondary reasons for collecting data at autopsies similarly do not relate exclusively to the criminal justice system, but rather, "range from beliefs about the fundamental dignity of man to such practical concerns as control of disease, the keeping of statistics, and of course, the detection of negligent or intentional wrongdoing." (*Ibid.*) As another court observed, "'a medical examiner, although often called a forensic expert, bears more

similarity to a treating physician than he does to one who is merely rendering an opinion for use in the trial of a case.'" (*Manocchio v. Moran* (1st Cir. 1990) 919 F.2d 770, 777, quoting *State v. Manocchio* (R.I. 1985) 497 A.2d 1, 7.)

As Justice Sotomayor noted, the *Bullcoming* opinion did not consider a scenario where the state contends that an alternate, or even primary, purpose for a report is unrelated to generating evidence for a subsequent prosecution. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2722.) In the present case, the autopsy report was not prepared for the sole or even primary purpose of providing prima facie evidence of the charged offense at trial, unlike the laboratory report in *Bullcoming* or the certificates in *Melendez-Diaz*. It was instead prepared in the regular course of business for the coroner's department during a routine medical examination following a death. (See 26RT 1723.) Thus, the primary purpose of the autopsy was unrelated to any criminal proceeding. Accordingly, because there was an alternate purpose for the report, the events in the instant case are not covered by the *Bullcoming* holding.

b. Dr. Carpenter Rendered an Independent Opinion

As previously noted, the U.S. Supreme Court in *Bullcoming* found it significant that testifying witness Razatos had no "independent opinion" regarding the defendant's blood-alcohol content. (*Bullcoming*, *supra*, 131 S.Ct. at p. 2716.) Justice Sotomayor emphasized that "this is not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence." (*Ibid.*) The converse is true here.

At trial, Dr. Carpenter described not only Dr. Wegner's opinion regarding Akhverdian's cause of death, but also his own opinion of the trajectory of the bullet that killed Akhverdian and an explanation as to

how the bullet could have reached Akhverdian's heart. (26RT 1728-1735.) He based this opinion on the autopsy report prepared by Dr. Wegner and photographs taken during the autopsy. (26RT 1728-1731, 1735.) Thus, Dr. Carpenter rendered an independent opinion based on his expertise as applied to the underlying facts. In other words, unlike Razatos, Dr. Carpenter did not serve as a mere conduit for the testimonial statements of another person.

Respondent expects that appellant will emphasize language in *Bullcoming* stating that the "surrogate testimony" of Razatos prevented the defendant from testing the credibility and proficiency of Caylor. (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2715 & fn. 7.) However, this language regarding Caylor's credibility was based on the premise that the information in his report was testimonial. For the reasons discussed above, Dr. Wegner's autopsy report was not testimonial, for it was not generated for the sole purpose of aiding the prosecution of appellant. Further, because Dr. Carpenter was not a mere conduit for the contents of Dr. Wegner's report, but rather rendered an independent expert opinion, Dr. Wegner's credibility was not as important to the jury as was Caylor's.

Finally, it bears repeating that, if this Court were to rule that the prosecution must call the examining pathologist in all cases where an autopsy report is used to support an expert opinion on the cause of death, prosecutions could be imperiled in other cases where the examining pathologist was unavailable due to retirement, relocation, illness or death.[39]

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[39] This Court has granted review in two other cases involving the admission of autopsy test results without testimony from the examining pathologist. (See *People v. Anunciation*, review granted March 18, 2010, S179423 and *People v. Thompson*, review granted Feb. 16, 2011, S188661.)

c. Although *Bullcoming* Undermines a Rationale in *Geier*, It Does Not Invalidate the Result

Respondent acknowledges that, to the extent *Geier* concluded that inherent differences between scientific observations and lay-witness recollections preclude scientific evidence from ever being "testimonial," the holding of *Bullcoming* is to the contrary. But this does not necessarily mean that the evidence in the forensic reports in *Geier* was testimonial or that, even if it were, the expert's testimony based on those reports violated the Confrontation Clause. A nearly identical issue is now pending before the U.S. Supreme Court in *Williams v. Illinois* (2010) 238 Ill.2d 125, 939 N.E.2d 268, *cert granted* June 28, 2011 (No. 10-8505). Meanwhile, the instant case presents an issue never reached in *Geier*: whether an expert witness may provide an opinion based in part on a report prepared by a non-testifying analyst.

d. The Impact of *Bullcoming* on *Geier*

As noted above, the U.S. Supreme Court in *Bullcoming* decided that the prosecution could not introduce the results of Caylor's BAC report as evidence of those results – as opposed to the basis for an independent expert opinion – without calling him as a witness. The Court explained that, for purposes of the Confrontation Clause, a statement can be testimonial even if it reflects observations recorded "on the spot." (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2714.) The Supreme Court rejected the argument that, because Caylor's recording of the data did not involve any interpretation or the exercise of judgment, admission of the test results from the gas chromatograph machine did not violate the Confrontation Clause. The Court noted that Caylor's certification included more than an instrument-generated number, and that the reliability of a testimonial report

drawn from such instrument-generated data "did not overcome the Sixth Amendment bar." (*Id.* at p. 2715.)

These statements potentially undermine this Court's rationale for concluding that the DNA test report in *Geier* was necessarily non-testimonial, even if admitted as evidence of its contents. The Supreme Court implicitly rejected the proposition that statements are not testimonial simply because they are recorded contemporaneously in a scientific setting. The Supreme Court also rejected any notion that scientific test results are immune from the demands of the Confrontation Clause because they rely on factual observations rather than on interpretation or the exercise of independent judgment. (See *Bullcoming*, *supra*, 131 S.Ct. at p. 2715 ["[T]he comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar."].) And nothing in the Court's opinion suggests that scientific evidence is not testimonial because it is not inherently incriminating.

However, there are key differences between the circumstances in *Bullcoming* and *Geier*. Unlike Razatos, the testifying witness in *Geier* supervised the analyst who conducted the testing, reviewed and cosigned the DNA report in the case, as well as two follow-up letters to the investigating police agency, and rendered an independent opinion on the evidence. (See *Geier*, *supra*, 41 Cal.4th at pp. 594-596.) Moreover, in *Geier* the accusatory DNA match evidence was "reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, [the lab director]." (*Id.* at p. 607.) As such, the original analyst's report did not assume evidentiary value as did the report in *Bullcoming*. "As an expert witness," noted this Court in *Geier*, "[the DNA expert] was free to rely on [the testing analyst's] report in forming her own opinions regarding the DNA match." (*Id.* at p. 608, fn. 13.) Thus,

the witness in *Geier* was providing evidence of the DNA test results as an independent expert, and not as a mere conduit for another person's scientific conclusions. Under these circumstances, the witness's testimony fell outside the narrow holding in *Bullcoming*.

Accordingly, while the relevant portion of the rationale of *Geier* has been undermined, the result can be justified on other grounds.

e. Potential Impact of *Williams v. Illinois*

An alternate justification for the result in *Geier* may well emerge in another case now pending in the U.S. Supreme Court. Five days after issuing its opinion in *Bullcoming*, the Court granted certiorari in *Williams v. Illinois*, *supra*, 939 N.E.2d 268. That case presents the following question: "Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts, violates the Confrontation Clause."

Williams presents facts more closely analogous to those in *Geier* than did *Bullcoming*. In *Williams*, semen samples collected from a rape victim were sent to a Cellmark laboratory in Maryland for analysis. The resulting DNA profile matched the defendant's DNA profile, which had been placed in a DNA database after he was arrested for an unrelated offense. (*Williams v. Illinois*, *supra*, 939 N.E.2d at pp. 270-271.) At trial, the prosecution called Sandra Lambatos, a forensic biologist from the Illinois State Police (ISP) laboratory. She described how DNA testing works and the standards that Cellmark had in place to perform DNA analysis for the ISP. (*Id.* at pp. 271-272.) She then offered an independent expert opinion about the DNA match itself, concluding that the semen from the victim's vaginal swab was a match to the defendant, and providing probability statistics for the match. (*Id.* at p. 272.) Lambatos explained that she

reviewed Cellmark's DNA report as well as supporting data – including machine-generated diagrams (electropherograms) indicating the presence of particular alleles – to arrive at her conclusion. (*Ibid.*) The Cellmark report was not introduced into evidence and Lambatos did not read the contents of the report into evidence. (*Ibid.*)

The Illinois Supreme Court held that Lambatos' reliance on the Cellmark DNA report to support her expert opinion did not violate the Confrontation Clause. (*Williams v. Illinois*, *supra*, 939 N.E.2d at p. 279.) The state court reasoned that the contents of the report were not testimonial statements admitted for their truth, but only "to show the underlying facts and data Lambatos used before rendering an expert opinion in the case." (*Ibid.*) The court explained: "The evidence against the defendant was Lambatos' opinion, not Cellmark's report, and the testimony was introduced live on the witness stand." (*Ibid.*)

Given that both *Williams* and *Geier* involve the admission of expert testimony, through an independent expert witness rather than by way of an absent analyst's report, the U.S. Supreme Court's ruling in *Williams* should establish whether experts may rely on testimonial hearsay in forming their opinions without violating the Confrontation Clause.

D. Any Alleged Error Was Harmless

Even if this Court were to conclude that the admission of Dr. Carpenter's testimony violated the Confrontation Clause, any alleged error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

Here, the autopsy report's conclusion that Akhverdian died of a gunshot wound (and Dr. Carpenter's recitation of it) did not prejudice appellant because it was supported by independent evidence. Indeed, a witness to the murder (Rassam) testified that he saw appellant shoot

Akhverdian. (28RT 1910-1911, 1945, 1948.) Furthermore, the shooting was recorded by a surveillance camera. (24RT 1533, 1564; 26RT 1745, 1752-1758.) Moreover, there was no dispute as to Akhverdian's cause of death.

With little explanation, appellant argues that "the prosecution cannot meet that [harmless error] test because it cannot assure that the verdict in this case was not attributed to the error in admitting through the testimony of Dr. Carpenter the autopsy report and photographs done by Dr. Wegner." (AOB 141.) Not so. Indeed, it is difficult to imagine that Dr. Carpenter's testimony had any effect on the jury's verdict in this case. The evidence of appellant's guilt was overwhelming. As noted above, an eyewitness identified appellant as the shooter, and the crime was recorded by a surveillance camera. (24RT 1533, 1564; 26RT 1745, 1752-1758; 28RT 1910-1911, 1945, 1948.) Moreover, an expended shell casing and bullet found at the murder scene matched the Walther handgun taken from the Jambi 3 robbery and later recovered in appellant's car. (27RT 1826-1828.)

In light of this evidence, the admission of Dr. Carpenter's testimony was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

VI. THERE WAS NO PROSECUTORIAL MISCONDUCT

Next, appellant contends that "the prosecutor committed misconduct in her closing argument to the jury at the guilt phase." Specifically, appellant claims the prosecutor "committed serious misconduct by articulating a theme which appealed solely to the passions and emotions of the jurors and asked them to consider improper factors in their guilt phase determinations." (AOB 143-153.) Appellant's contentions are without merit.

A. Background

In his Opening Brief, appellant cites to the following portions of the prosecutor's closing argument, which he finds objectionable:

> In Julio Cube's robbery, the case we are going to discuss later. Same thing with Mr. Cube, the violence in that case is so unnecessary. I don't know whether you noticed but that Mr. Cube was disabled. He had one hand that was disfigured. He was a man of only five feet four inches tall. He was a man of 110 pounds. And the robber came back twice, once sticking a knife in his belly as he says, and the other time sticking a gun in his neck. [¶] Examples of excessive violence in this case. Unnecessary cruelty towards the victims.

(30RT 2148-2149.)

Defense counsel objected to these statements, stating:

> I believe this argument is simply appealing to the passion of the jury. It's not relevant to any of the other points that the People have to prove or to argue. Whether it is more or less violent has nothing to do with whether [appellant] is guilty of this. And to go on at length just simply describing the atrocity and violence, this argument is improper appealing to the passions of the jury.

(30RT 2149.) The trial court overruled the objection, finding the statements to be "proper argument." (30 RT 2149.)

Further, according to appellant, "the prosecution continued to use emotional and ultimately irrelevant terms to describe the evidence presented about the charged crimes." (AOB 144.) Such examples include:

1. Noting that "two women who were victims of two different charged robberies were 'women working alone,' and that the robbers took money from their purses as well as money belonging to the businesses." (AOB 144; 30RT 2150.)

2. With respect to the robbery at the H&R Pawn Shop, rhetorically asking the jurors: "What really was the hurry? Was it necessary to use so

much force and so much violence in that particular robbery?" (30RT 2150.)

3. In describing appellant's actions at the Hollywood Shell Station and Valley Market:

> You see a very assaultive robber, not just show the gun or open his jacket and say give me the money. You see him reaching over, pointing at these people, gesturing, posturing with such arrogance, with such arrogance he robs these people.

(30RT 2151.)

4. Telling the jury that appellant had "an attitude, a strut about him as he robs people. It is excessive . . . . I mean he turns what could be a rather routine robbery into a very frightening and intimidating experience." (31RT 2181.)

5. Commenting on the shooting of Armenian in the back of the neck: "That demonstrates just how cruel [appellant] was. It seems to me if you are after the money do you really need to shoot a person in the back?" (30RT 2151.)

6. Characterizing the videotape of the Akhverdian shooting as "pathetic," and telling the jury that Akhverdian

> is doing everything right. If you were to give classes on what happens if a robber comes in, you would say whatever you do don't fight the guy, don't make any moves, don't scare him. And you see Mr. Akhverdian on this videotape. And even though you don't have any sound you can tell from looking at his arms and hands he is holding them down. He is gesturing like this. He is just about offering the cash register with his hand. He is not interfering at all with the movement of the money.

(30RT 2151-2152.)

7. Finally, asking the jurors "to imagine what Akhverdian was thinking after the robber took the money from the cash register." (AOB 145.)

> And this guy [Akhverdian], see how pathetic this is, this guy stands there and he is probably thinking okay, it's over. I have done things right. The robber is leaving, he is going over the table and he turns and he shoots this man. . . . [¶] What could Mr. Akhverdian have done to cause a person to do that?

(30RT 2152.)

Defense counsel did not object to these portions of closing argument. (See 30RT 2150-2152; 31RT 2181.)

B. Appellant Has Waived Any Claim Regarding Prosecutorial Misconduct

Appellant has waived his right to challenge any statements made by the prosecutor because, as he concedes (AOB 144 fn 45), his trial counsel did not interpose a timely objection to most of the alleged misconduct he now complains of, and did not request an admonition at trial.

Generally, to preserve a claim of prosecutorial misconduct for appellate purposes, a defendant must make a specific and timely objection to the alleged misconduct and request a curative admonition. The only exception to this general rule is where an admonition would not have cured the harm resulting from the prosecutor's misconduct. (*People v. Clair* (1992) 2 Cal.4th 629, 662; *People v. Price* (1991) 1 Cal.4th 324, 447.) Even then, however, reversal for prosecutorial misconduct is not a proper remedy, unless the defendant establishes prejudice. (*People v. Bolton* (1979) 23 Cal.3d 208, 214.)

Here, appellant's trial counsel could have objected and requested that the trial court admonish the jury not to give any consideration to the prosecutor's comments. Such an admonition would have eliminated any

harm. (*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1333-1335 [finding that an objection and admonishment would have cured any resulting harm]; *People v. Green* (1980) 27 Cal.3d 1, 34-35 [eight instances of asserted prosecutorial misconduct in closing argument, including partial misstatement of the law of reasonable doubt and expression of disbelief of defendant's alibi, all curable by admonition].) However, because appellant failed to object to any alleged prosecutorial misconduct, he has waived his right to bring such claim here. (See *People v. Clair*, *supra*, 2 Cal.4th at p. 662; *People v. Price*, *supra*, 1 Cal.4th at p. 447.)

Appellant contends that defense counsel did not raise any further objections to the prosecutor's argument "because it would have been futile." (AOB 144 fn 45.) Not so. Indeed, the basis for counsel's first objection was different than the basis for the claims now raised here, and further objections should have been interposed to preserve them on appeal.

C. Prosecutorial Misconduct Did Not Occur

Assuming appellant has not waived his right to bring this challenge, no misconduct occurred.

The California Supreme Court has summarized the standards for evaluating prosecutorial misconduct as follows:

> A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.

(*People v. Morales* (2001) 25 Cal.4th 34, 44.)

When the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that

the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) The focus is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor. (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Carter*, *supra*, 30 Cal.4th at p. 1207.)

Passionate oratory is not the equivalent of prosecutorial misconduct. In general, a prosecutor is given wide latitude to argue his or her case. Prosecutorial argument may be vigorous, so long as it amounts to fair comment on the evidence, including reasonable inferences or deductions that may be drawn therefrom. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Williams* (1997) 16 Cal.4th 153, 221.) That being said, "'[i]t is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." [Citation.]'" (*People v. Redd* (2010) 48 Cal.4th 691, 742.) "It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial." (*People v. Fields* (1983) 35 Cal.3d 329, 362.) The burden of proof is on the defendant to show the existence of such misconduct. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427-432; *People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v Gionis* (1995) 9 Cal.4th 1196, 1214-1215; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

1. Use of "Irrelevant Terms to Describe the Evidence Presented" and Comments on Physical Traits of Victims

Appellant complains that the prosecutor committed misconduct by using "irrelevant terms to describe the evidence presented." (AOB 144.) Appellant also challenges the prosecutor's reference to Julio Cube's

physical "disabilities." (AOB 143, 148.) Appellant's contentions are without merit.

A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) "Prosecutors 'are allowed a wide range of descriptive comment and the use of epithets which are reasonably warranted by the evidence' [citation], as long as the comments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury [citation]." (*People v. Farnam, supra,* 28 Cal.4th at p. 168 [prosecutor's comments during opening statement, in prosecution for capital murder, rape, and sodomy committed against elderly woman, referring to defendant as "monstrous," "cold-blooded," vicious, and a "predator," and calling the evidence "horrifying" and "more horrifying than your worst nightmare," represented fair comment]; see also *People v. Leonard* (2007) 40 Cal.4th 1370, 1407 [prosecutor's description of defendant as "odd," "strange," and "a very cunning individual" who is "much like an animal" deemed proper].)

Here, the prosecutor's statements "were no more than fair comment" on what the evidence showed. (See *People v. Farnam*, *supra*, 28 Cal.4th at p. 168.) There was nothing "inflammatory" about pointing out to the jury that two of appellant's victims were women who were working alone at the time of the robberies or that appellant used force and violence in accomplishing his crimes. These were facts established by the evidence. The prosecutor's description of appellant as having an "attitude" and a "strut about him," was equally proper. Such statements fell within the prosecutor's permitted "wide range of descriptive comment." (See *ibid.*) Likewise, the prosecutor was not improperly appealing to the sympathy or passions of the jury by referencing Cube's physical condition. Rather, the prosecutor was pointing out that Cube shared a common characteristic with several of appellant's victims – they were particularly vulnerable at the time

of the robberies. Such statements were nothing more than "fair comment" on the evidence. (See *People v. Wharton*, *supra*, 53 Cal.3d at p. 567.) Moreover, in light of the record, the comments were neither deceptive nor reprehensible. (See *People v. Farnam*, *supra*, 28 Cal.4th at p. 168.) Nor were they so unfair as to deny appellant due process. (See *People v. Morales*, *supra*, 25 Cal.4th at p. 44.)

Regardless, any alleged error was harmless. Indeed, there is no reasonable probability that a result more favorable to defendant would have been reached in the absence of the misconduct. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 [applying *Watson* harmless-error standard to prosecutorial misconduct claim].) Here, evidence of appellant's guilt with respect to the other crimes was overwhelming. As set forth above, no fewer than 16 witnesses identified appellant as the perpetrator of the 10 robberies and murders. (17RT 724-728, 769, 775-776; 18RT 822-824, 858, 860-861, 879-880; 19RT 966-968; 20RT 994-1001, 1031, 1062-1064, 1088-1090; 21RT 1176-1179, 1190-1191, 1193, 1203-1205; 22RT 1272-1275; 23RT 1377, 1379, 1381, 1422, 1430, 1475; 24RT 1513-1516, 1518, 1582-1584; 26RT 1700-1707, 1773, 1775-1776; 28RT 1915-1920, 1962.) Additionally, appellant was found in possession of the Walther handgun taken from the first Jambi 3 robbery, which was later tied to two other crimes, and appellant's palm print was recovered from the crime scene at H&R Pawnshop. (22RT 1246-1248; 26RT 1689-1691; 27RT 1827-1832.) Accordingly, an outcome more favorable to appellant was not reasonably probable absent the alleged prosecutorial misconduct. (See *People v. Stansbury*, *supra*, 4 Cal.4th at p. 1057.)

Appellant's claim of federal constitutional error must also fail because it is predicated entirely on his claim of state law error. As there was no error, his claim of federal constitutional error is meritless. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1196.) In any event, any error was harmless

beyond a reasonable doubt in light of the overwhelming evidence of appellant's guilt and identity as the perpetrator. (See *Chapman*, *supra*, 386 U.S. at p. 36.)

2. Comments on Akhverdian's Thoughts During the Robbery

Appellant further challenges the prosecutor's comments on Akhverdian's thoughts during the robbery. (AOB 145, 148.) This challenge is also without merit.

"During the guilt phase of a capital trial, it is misconduct for a prosecutor to appeal to the passions of the jurors by urging them to imagine the suffering of the victim. 'We have settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt.'" (*People v. Jackson* (2009) 45 Cal.4th 662, 691, quoting *People v. Stansbury*, *supra*, 4 Cal.4th at p. 1057; accord, e.g., *People v. Mendoza* (2007) 42 Cal.4th 686, 704; *People v. Leonard*, *supra*, 40 Cal.4th at p. 1406; *People v. Arias* (1996) 13 Cal.4th 92, 160; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250; see *People v. Millwee*, *supra*, 18 Cal.4th at p. 137.)

Here, appellant misconstrues the prosecutor's statements during closing argument. Contrary to appellant's contentions, the prosecutor did not invite the jury to imagine Akhverdian's suffering in the final moments of his life. (See 30RT 2152.) There is, in fact, no mention of Akhverdian's suffering or any comment of pain he may have endured as a result of being shot by appellant. Rather, the prosecutor made the statements to emphasize the callousness and brutality of appellant's crime. Indeed, she noted that despite the fact that Akhverdian complied with appellant's requests, appellant nevertheless shot him. The statements were not made to

garner sympathy for the victim, but rather, to remind the jury of the heinous nature of appellant's acts.

Regardless, no prejudice can be found. Indeed, the statements made by the prosecutor in the instant matter pale in comparison to the statements found to be non-prejudicial in *People v. Stansbury*, *supra*, 4 Cal.4th 1017. There, the prosecutor improperly appealed to the passions of the jury in urging them to consider the suffering of a 10-year-old girl who was raped and murdered:

> Under what we are dealing with here, we are dealing with a 10-year old child who was taken from her home, taken to a place she had never been, experiencing things she had no idea how to deal with. [¶] She was degraded, violated, raped, evidence of oral sex. [¶] *Think what she must have been thinking in her last moments of consciousness during the assault.* [¶] *Think of how she might have begged or pleaded or cried.* All of those falling on deaf ears, deaf ears for one purpose and one purpose only, the pleasure of the perpetrator.

(*People v. Stansbury*, *supra*, 4 Cal.4th at pp. 1056-1057, italics added.)

This Court found no prejudice to the defendant when viewing these statements in context. (*People v. Stansbury*, *supra*, 4 Cal.4th at p. 1057.) A similar result is compelled here. Any improper statements by the prosecutor were but a short part of an otherwise scrupulous argument about the facts of the case. (See 30RT 2147-31RT 2196.) Moreover, as previously argued, the evidence of appellant's guilt was overwhelming. (17RT 724-728, 769, 775-776; 18RT 822-824, 858, 860-861, 879-880; 19RT 966-968; 20RT 994-1001, 1031, 1062-1064, 1088-1090; 21RT 1176-1179, 1190-1191, 1193, 1203-1205; 22RT 1246-1248, 1272-1275; 23RT 1377, 1379, 1381, 1422, 1430, 1475; 24RT 1513-1516, 1518, 1582-1584; 26RT 1689-1691, 1700-1707, 1773, 1775-1776; 27RT 1827-1832; 28RT 1915-1920, 1962.) There is no reasonable probability that a result more favorable to appellant would have been reached in the absence of the

misconduct. (See *People v. Leonard*, *supra*, 40 Cal.4th at p. 1407 [prosecutor's "passing remark" could not have prejudiced defendant, given the overwhelming evidence of guilt]; *People v. Stansbury*, *supra*, 4 Cal.4th at p. 1057.)

Furthermore, the trial court instructed the jury not to let sympathy influence its decision (31RT 2297; 9CT 1989-1990; CALJIC No. 1.00) and cautioned the jury that the attorneys' remarks were not evidence (31RT 2298; 9CT 1992; CALJIC No. 1.02). It must be presumed the jury heeded these instructions and disregarded any improper comments by the prosecutor. (*People v. Clair*, *supra*, 2 Cal.4th at p. 663.)

For all these reasons, there was no prosecutorial misconduct, and appellant's contentions must be rejected.

VII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING APPELLANT'S FLIGHT

Appellant contends the trial court erred in instructing the jury with CALJIC No. 2.52 regarding his flight after the crimes. (AOB 154-169.) Specifically, he attacks the instruction as facially invalid under federal constitutional and state law, making three distinct arguments: (1) the instruction "improperly duplicate[d] the circumstantial evidence instruction" (AOB 156-159); (2) the instruction was "impermissibly partisan and argumentative" (AOB 159-163); and (3) the instruction improperly permitted the jury to "draw an irrational and unjust inference about [his] guilt" (AOB 163-168). Appellant further attacks the instruction as applied to himself, arguing that CALJIC No. 2.52 improperly permitted the jury to infer "he was guilty of various robberies which had occurred weeks before that chase." (AOB 168-169.) Appellant's challenges must be rejected.

A. Background

During the jury instruction conference, defense counsel objected to CALJIC No. 2.52:

> Well, the only flight that is conceivably, I mean, other than the obvious leaving the scene of the perpetrator, which I don't think constitutes flight, would be the allegations that [appellant] failed to stop immediately when the investigating police attempted to pull him over. This is removed in time and place from the alleged events so as to suggest that it has limited relevance to the actual events.

(29RT 2035.)

The trial court disagreed and reminded defense counsel that "a flight instruction is proper whenever evidence of the circumstances of [appellant's] departure from the crime scene, or his usual environs, logically permits the inference that his movements [were] motivated by guilty knowledge. The fact that there exists an alternative interpretation does not preclude a flight instruction as the flight instruction leave to the jury which inference is more reasonable." (29RT 2035-2036.)

Later, the trial court instructed the jury with CALJIC No. 2.52 as follows:

> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(9CT 2011; 31RT 2310.)

B. CALJIC No. 2.52 Is Not Improperly Duplicative of Other Instructions

Appellant asserts that CALJIC No. 2.52 was duplicative of instructions given on circumstantial evidence, and therefore was improper in this case. (AOB 156-159.) Not so. "[A] trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. [Citation.]" (*People v. Gurule* (2002) 28 Cal.4th 557, 659; see also *People v. Griffin* (2004) 33 Cal.4th 536, 591 [trial court need not give duplicative instructions]; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 277 [trial court may refuse an accurate instruction if it is duplicative].) However, an instruction regarding a defendant's flight is mandated under section 1127c[40] whenever "evidence of flight of a defendant is relied upon as tending to show guilt. . . ." (§ 1127c.) This Court has found that the instruction is not unnecessarily duplicative, but has observed that a flight instruction such as CALJIC No. 2.52, "is proper whenever evidence of the circumstances of defendant's departure from the crime scene or his usual environs, . . . logically permits an inference that his movement was motivated by guilty knowledge." (*People v. Lucas* (1995) 12 Cal.4th 415, 470, quoting *People v. Turner* (1990) 50 Cal.3d 668, 694; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

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[40] Section 1127c provides:

> In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows:
>
> The flight of a person immediately after the commission of a crime . . . is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to decide.

Here, the jury was instructed on circumstantial evidence in CALJIC Nos. 2.00[41] and 2.01[42], as well as flight in CALJIC No. 2.52. (See 9CT

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[41] CALJIC No. 2.00, as given, states:

> Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact.
>
> Evidence is either direct or circumstantial.
>
> Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact.
>
> Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.
>
> An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.
>
> It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

(9CT 1994; 31RT 2299-2300.)

[42] CALJIC No. 2.01, as given, states:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that [appellant] is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or

(continued...)

1994-1995, 2011; 31RT 2299-2301, 2310.) The flight instruction was not duplicative of the other instructions, inasmuch as it specifically "'made clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior.'" (*People v. Boyette, supra,* 29 Cal.4th at pp. 438-439, quoting *People v. Jackson* (1996) 13 Cal.4th 1164, 1224.) As further explained, "The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]" (*Ibid.*) Moreover, appellant's argument necessarily concedes that any duplication was necessarily harmless, as the jury would have already been instructed with the general principles regarding consciousness of guilt as embodied in CALJIC Nos. 2.00 and 2.01, and was further instructed to not draw any inference based on any "rule, direction or idea" that is repeated in the instructions. (See 9CT 1991; 31RT 2297-2298

(...continued)

> circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, once of which points to [appellant's] guilt and the other to his innocence, and reject that interpretation that points to his guilt.
>
> If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(9CT 1995; 31RT 2300-2301.)

(CALJIC No. 1.01).) Thus, appellant's challenge to CALJIC No. 2.52 as duplicative must be rejected.

C. CALJIC No. 2.52 Is Not Unfairly Partisan and Argumentative

Appellant further argues that CALJIC No. 2.52 was improperly given because the instruction was "impermissibly partisan and argumentative." AOB 159-163.) Appellant's argument is without merit. As noted by numerous courts, the instruction does not "invite" the jury to draw any inference. Rather, it simply states that: (1) evidence of flight alone is not sufficient to establish guilt and (2) it may be considered along with all other evidence. Thus, the instruction simply confirms the inference that the jury would naturally draw from the admission of evidence of flight, i.e., that it can be considered in evaluating guilt. (*People v. Visciotti* (1992) 2 Cal.4th 1, 61; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1182; *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181; *People v. Jackson*, *supra*, 13 Cal.4th at p. 1224.) In other words, CALJIC No. 2.52 does "not assume that flight was established," but leaves to the jury the factual determination of whether flight occurred and what inference should be drawn from such flight. (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 61.) Accordingly, appellant's argument regarding the allegedly partisan and argumentative nature of the instruction must be rejected. (*People v. Jurado* (2006) 38 Cal.4th 32, 125-126; see also *People v. Benavides* (2005) 35 Cal.4th 69, 100; *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Kipp* (1998) 18 Cal.4th 349, 375.)

D. CALJIC No. 2.52 Did Not Permit the Jury to Draw Irrational and Unjust Inferences of Guilt

Appellant also attacks the court's instruction with CALJIC No. 2.52 by arguing that the instruction permitted the jury to draw "an irrational and unjust inference about [his] guilt." (AOB 163-168.) CALJIC No. 2.52,

however, permits no such irrational inferences. To determine whether a jury instruction creates an impermissible inference, the "threshold inquiry" is to determine whether the challenged portion of the instruction creates a mandatory presumption or merely a permissive inference.

> A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissible inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.

(*Francis v. Franklin* (1985) 471 U.S. 307, 313-315 [105 S.Ct. 1965, 1971, 85 L.Ed.2d 344].) Mandatory presumptions violate the Due Process Clause if they "relieve the State of the burden of persuasion on an element of the offense," whereas a permissive inference creates a constitutional violation "only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*Ibid.*) Instruction on a permissive inference is invalid only if there is "no rational way the jury could draw the permitted inference. [Citations.]" (*People v. Pensinger*, *supra*, 52 Cal.3d at pp. 1243-1244.) "A reasonable inference . . . 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work.' [Citations.]" (*People v. Morris* (1988) 46 Cal.3d 1, 21, disapproved on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.)

CALJIC No. 2.52 "permits a jury to infer, if it so chooses, that the flight of a defendant immediately after the commission of a crime indicates a consciousness of guilt." (*People v. Mendoza*, *supra*, 24 Cal.4th at pp. 180-181.) The flight instruction does not alter the prosecution's burden, but simply informs the jury that it may use the fact of a defendant's flight, along with all the other evidence, to determine guilt, giving the fact of flight the weight the jury deems appropriate. (*Ibid.*)

> "A reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.' The instruction[] advise[s] the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution[s] that such evidence is not sufficient to establish guilt . . . . The instruction[] do[es] not address the defendant's mental state at the time of the offense and do[es] not direct or compel the drawing of impermissible inferences in regard thereto."

(*People v. Bolin*, *supra*, 18 Cal.4th at p. 327, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 871; see also *People v. Pensinger*, *supra*, 52 Cal.3d at pp. 1243-1244 [instruction that jury may infer consciousness of guilt from flight creates proper permissive inference].) Thus, the instruction did not encourage the jury to infer appellant's legal guilt from evidence of his flight.

> On the contrary, the[] instruction[] "made clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior."

(*People v. Bolin*, *supra*, 18 Cal.4th at p. 327, quoting *People v. Jackson*, *supra*, 13 Cal.4th at p. 1224; see also *People v. Pensinger*, *supra*, 52 Cal.3d at pp. 1243-1244.) Hence, CALJIC No. 2.52, as given, embodied a reasonable and permissive inference, and "the flight instruction d[id] not violate due process." (*People v. Mendoza*, *supra*, 24 Cal.4th at pp. 180-181.) Appellant's argument regarding permissive irrational inferences with respect to CALJIC No. 2.52 must be rejected.

E. CALJIC No. 2.52 Was Appropriate As Applied to Appellant

"A flight instruction is proper whenever evidence of the circumstances of defendant's departure from the crime scene or his usual

environs, or of his escape from custody after arrest, logically permits an inference that his movement was motivated by guilty knowledge." (*People v. Turner*, *supra*, 50 Cal.3d at p. 694.)

> "'Flight requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.'" [Citations.] "Mere return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt [citations], but the circumstances of departure from the crime scene may sometimes do so." [Citation.]

(*People v. Bradford*, *supra*, 14 Cal.4th at p. 1055; *People v. Smithey* (1999) 20 Cal.4th 936, 982.) The instruction does not require that the defendant know criminal charges have been filed, nor does it require "a defined temporal period within which the flight must be commenced, nor resistance upon arrest." (*People v. Carter*, *supra*, 36 Cal.4th at p. 1182; see also *People v. Mason* (1991) 52 Cal.3d 909, 941.) For example, in *People v. Mason*, *supra*, 52 Cal.3d 909, this Court rejected a defendant's claim that the trial court erred in instructing the jury regarding flight when the alleged flight occurred four weeks after a murder:

> Defendant's flight took place on January 6, 1981, only four weeks after, and in the same jurisdiction as, the murder of Dorothy Lang. Defendant argues that his flight was so remote from the charged offenses that it "was of marginal probative value, if any." Common sense, however, suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave as multiple murders after only a few weeks. Nor do our decisions create inflexible rules about the required proximity between crime and flight. Instead, the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt. In *People v. Santo* (1954) 43 Cal.2d 319, for example, we held that the trial court properly admitted evidence of flight occurring more than a month after the charged

murder because the facts fairly supported that inference. [Fn. omitted.] (43 Cal.2d at pp. 327-330, 273 P.2d 249.)"

(*People v. Mason*, *supra*, 52 Cal.3d at pp. 941-942.)

Here, the flight instruction was required under section 1127c based on evidence of appellant's flight, despite any intervening time period between the various robberies and appellant's police chase. Indeed, appellant's act of failing to yield to police officers, and only stopping after striking a curb and hitting a pole (25RT 1626, 1631-1635), shows that he sought to avoid arrest, especially given the fact that a gun used in the crimes, duct tape, and clothing similar to that used in the robberies were found in the car he was driving, which matched the description of the car used in the crimes. Hence, such evidence sufficiently supported the flight instruction in the case. The mere fact his arrest and apprehension occurred approximately one month after some of the robberies did not negate the applicability of the flight instruction, as appellant's actions demonstrated continued flight from both his prior robberies and murders. (See *People v. Mason*, *supra*, 52 Cal.3d at pp. 941-942.) For these reasons, CALJIC No. 2.52 was applicable in this case and properly given.

F. Any Error in Instruction With CALJIC No. 2.52 Was Harmless

Even assuming that the flight instruction was given in error, it was necessarily harmless. Any error in instruction with CALJIC No. 2.52 warrants reversal only it is reasonably probably the defendant would have obtained a more favorable result in absence of the instruction. (See *People v. Turner*, *supra*, 50 Cal.3d at p. 695 [applying *Watson* harmless error standard of prejudice when court instructed jury under CALJIC No. 2.52].) Here, no such reasonable probability exists. First, the instruction itself created little possibility of prejudice. "The purpose of

the flight instruction is to protect the defendant from the jury's simply assuming guilt from flight." (*People v. Han* (2000) 78 Cal.App.4th 797, 808.) CALJIC No. 2.52's cautionary nature benefitted appellant, "'admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]'" (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 438-439; see *People v. Henderson* (2003) 110 Cal.App.4th 737, 742.)

Moreover, CALJIC No. 2.52 assumed neither the guilt nor the flight of appellant. (*People v. Escobar* (1996) 48 Cal.App.4th 999, 1029, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 923-925; see also *People v. Carter*, *supra*, 36 Cal.4th at pp. 1182-1183; *People v. Visciotti*, *supra*, 2 Cal.4th at p. 61.) "Alternative explanations for flight conduct go to the weight of the evidence, which is a matter for the jury, not the court, to decide. [Citations.]" (*People v. Rhodes* (1989) 209 Cal.App.3d 1471, 1477.) Accordingly, the instruction was harmless, as it protected appellant from unwarranted assumptions concerning his flight and left to the jury the determination of whether flight occurred and any inferences to be extrapolated from such flight. (See 9CT 2057 [CALJIC No. 17.31 instruction advising jury to disregard any instruction "which applies to facts determined by you not to exist"].)

Furthermore, the instruction was nonprejudicial in light of the extremely strong evidence of guilt in this case, rendering appellant's consciousness of guilt undisputed. Appellant argues that "the jurors could have believed that [he] was the victim of mistaken identity[,]" and that "CALJIC No. 2.52 directed the jurors away from this interpretation of the evidence . . . ." (AOB 168.) Appellant's argument is belied by the record. Indeed, as previously discussed, more than 16 witnesses identified appellant as the perpetrator of the various robberies and murders, some of appellant's crimes were captured on surveillance video, and appellant was

found in possession of a handgun taken from a prior robbery that matched shell casings from one of the murder scenes. (17RT 724-728, 769, 775-776; 18RT 822-824, 858, 860-861, 879-880; 19RT 966-968; 20RT 994-1001, 1031, 1062-1064, 1088-1090; 21RT 1176-1179, 1190-1191, 1193, 1203-1205; 22RT 1246-1248, 1272-1275; 23RT 1377, 1379, 1381, 1422, 1430, 1475; 24RT 1513-1516, 1518, 1582-1584; 26RT 1689-1691, 1700-1707, 1773, 1775-1776; 27RT 1827-1832; 28RT 1915-1920, 1962.) Accordingly, even assuming the flight instruction was unwarranted, there was no reasonable probability appellant would have obtained a more favorable result in the absence of the instruction. Thus, reversal is not required in this case, and appellant's argument must be rejected.

VIII. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A CONTINUANCE

Next, appellant contends the trial court abused its discretion and "violated [his] rights to a fair trial, effective assistance of counsel, a reliable penalty determination and due process" when it "refused to grant [his] motion for a continuance of the commencement of the penalty phase as requested." (AOB 170-178.) Appellant's contention is without merit. Under the circumstances, the trial court acted well within its broad discretion in denying appellant's request for a continuance at the penalty phase. Moreover, even assuming the trial court erred in refusing the continuance, any alleged error was harmless.

A. Background

At the conclusion of the guilt phase of appellant's trial, defense counsel filed a motion to continue the penalty phase. The crux of the motion was that defense counsel needed additional time to investigate two potential prosecution witnesses. (10CT 2280-2292.) At the hearing on the motion, defense counsel argued that there was a "vast amount of material"

he needed to review "in order to do an appropriate job" with respect with witness Bryan Soh. (33RT 2417.) Soh's testimony concerned an incident wherein appellant and another inmate attacked and robbed Soh while in jail. (33RT 2408-2409.) According to counsel, however, Soh had a history of mental health issues, including dishonesty, as well as "a pattern of manipulation, denying and blaming others." (33RT 2417.)

Defense counsel also stated that he needed additional time to investigate potential prosecution witness Christopher Anders, who had also been robbed by appellant while in jail. According to counsel, Anders was "attempting to negotiate a deal with the District Attorney's Office in exchange for his testimony in [a capital] case." (33RT 2423.) Defense counsel further noted that he was concerned that there may be a "conflict of interest with regard to what Mr. Anders' then attorney was doing or saying on his behalf." (33RT 2425.)

When questioned by the trial court as to how much time he needed to investigate these matters, defense counsel stated that "two to three weeks would be a reasonable period of time in order to obtain all of the materials with regard to both situations and to pursue investigation with regard to witnesses that are disclosed with regard to those situations." (33RT 2426.)

The prosecutor "strenuously" opposed the motion to continue, arguing that defense counsel was given the names of these potential witnesses three months prior and had sufficient opportunity to conduct any necessary investigation. (33RT 2427-2431.)

The trial court denied the motion for a continuance, stating,

> At this time I do not find good cause to continue the matter. What I am going to do at this time, we are going to proceed with other motions. I may preclude the testimony of the witnesses Soh and Anders. We will go forward with the trial.
>
> I find that you are adequately representing your client under both U.S. and state constitutions. But I will go forward

with the other matter we have before us before I make a final determination regarding Anders and Soh.

(33RT 2434.)

Later, the trial court determined that Soh would not be allowed to testify, but that Deputy Jeffrey Hutchinson would be able to offer testimony regarding the "incident." (33RT 2445.) With respect to Anders, after learning that there were no "promises of leniency," and that Anders had had a jury trial and was already convicted and sentenced, the trial court determined that Anders would be able to testify. (33RT 2447-2449.)

B. The Trial Court Did Not Abuse Its Discretion in Denying Appellant's Request for a Continuance

A criminal trial may be continued only for good cause (§ 1050, subd. (e)), and a trial court has broad discretion in handling such a request. (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) "The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked." (*People v. Beames* (2007) 40 Cal.4th 907, 290; see also *People v. Beeler* (1995) 9 Cal.4th 953, 1003.) Under this state law standard, discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. (See *People v. Jones* (1998) 17 Cal.4th 279, 318; *People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.) In limited circumstances, the denial of a continuance may be so arbitrary as to deny due process. (See *People v. Frye* (1998) 18 Cal.4th 894, 1013.) However, not every denial of a request for more time can be said to violate due process, even if the party seeking the continuance thereby fails to offer evidence. (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589 [84 S.Ct. 841, 11 L.Ed.2d 921].)

> Although "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality[,] . . . [t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." [Citation.] Instead, "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." [Citations.]

(*People v. Beames*, *supra*, 40 Cal.4th at p. 921.)

In considering a motion for continuance in the midst of trial, a court considers "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." (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1037; *People v. Barnett* (1998) 17 Cal.4th 1044, 1126; *People v. Zapien*, *supra*, 4 Cal.4th at p. 972.)

Here, appellant has not met his burden of establishing an abuse of discretion and demonstrating that the trial court acted arbitrarily in managing the proceedings. First, contrary to appellant's argument, defense counsel had ample time to investigate the two penalty phase witnesses. As acknowledged by defense counsel, disclosure of the incidents involving witnesses Soh and Anders was made by the prosecutor on April 1, 1996, three months before the start of the penalty phase portion of appellant's trial. (33RT 2419.) Anders' rap sheet was provided to defense counsel approximately one week before the penalty phase trial, and Soh's mental health records were received approximately four days prior. (33RT 2421-2422.)

Regardless, appellant has failed to demonstrate that substantial justice would have been accomplished had the continuance been granted. Indeed, one of the two witnesses defense counsel needed time to investigate, Soh, was precluded from testifying. Furthermore, the potential "conflict of

interest" surrounding Anders was cleared at the time of the hearing on the continuance motion. For this reason alone, appellant's motion was all but moot, and there was little likelihood any benefit would result from the requested continuance. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1037.)

In light of the above, it cannot be said that the trial court's denial of appellant's motion for a continuance was an abuse of discretion. Certainly, there has been no showing that such ruling "exceed[ed] the bounds of reason, all circumstances being considered." (See *People v. Jones*, *supra*, 17 Cal.4th at p. 318.)

For this reason, contrary to appellant's assertion, no violation of any of his federal constitutional rights resulted from the trial court's denial of a continuance. In that there was no abuse of discretion or error under state law, there is consequently no basis for appellant's asserted claims of error under the federal Constitution. (*People v. Roybal* (1998) 19 Cal.4th 481, 506, fn. 2 ["The superior court did not abuse its discretion; there is thus no predicate error on which to base the constitutional claims"]; see also *People v. Osband* (1996) 13 Cal.4th 622, 727-728; *People v. Memro* (1995) 11 Cal.4th 786, 886.) As explained above, "it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." (*Ungar v. Sarafite*, *supra*, 376 U.S. at p. 589.) Indeed, "'[g]iven the deference necessarily due a state trial judge in regard to the denial or granting of continuances,' the court's ruling denying a continuance does not support a claim of error under the federal Constitution." (*People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1039-1040, quoting *Ungar v. Sarafite*, *supra*, 376 U.S. at p. 591; accord *People v. Howard* (1992) 1 Cal.4th 1132, 1172.)

Finally, even assuming the trial court abused its discretion and thereby erred in denying appellant's request for a continuance at the penalty phase,

appellant has failed to show any resulting prejudice. (See *People v. Ochoa*, *supra*, 19 Cal.4th at p. 479 [the reasonable possibility standard for assessing penalty phase errors is "the same in substance and effect" as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24].) As noted above, the trial court precluded Soh from testifying and the conflict of interest surrounding Anders was resolved at the time of the hearing on the motion. Under these circumstances, it is plain that even if the trial court had continued the penalty trial, it would have had absolutely no effect on the jury's penalty verdict. Any assumed error would consequently have to be deemed utterly harmless.

Accordingly, appellant's contention must be rejected.

IX. THE USE OF UNCHARGED OFFENSES AS EVIDENCE IN AGGRAVATION WAS CONSTITUTIONAL

Next, appellant contends that "[t]he use of uncharged jailhouse [ ] disputes among inmates as factor (b) aggravating evidence unconstitutionally skewed the sentence-selection in favor of a death." (AOB 179-188.) Respondent disagrees.

This Court has long held that admitting evidence of uncharged offenses in the penalty phase does not violate due process or the Eighth Amendment's guarantee of a reliable penalty verdict. (*People v. Gallegos* (1990) 52 Cal.3d 115, 194 [rejecting due process, Eighth Amendment reliability, and equal protection objections to factor (b) evidence]; see also *People v. Morrison* (2004) 34 Cal.4th 698, 729 [consideration of factor (b) evidence "is not unconstitutional and does not render a death sentence unreliable"]; *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1054 [declining to revisit whether consideration of factor (b) evidence renders the "death sentence unreliable and violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal Constitution"].) This Court has also repeatedly

rejected the claim that due process rights are infringed when the same jury that convicted a capital defendant subsequently determines the truth or falsity of previously unadjudicated aggravating charges. (See, e.g., *People v. Johnson* (1992) 3 Cal.4th 1183, 1244; *People v. Balderas* (1985) 41 Cal.3d 144, 204-205.)

Appellant acknowledges such precedent and admits to presenting this claim "for possible federal habeas corpus review . . . ." (AOB 185.) Accordingly, because appellant offers no compelling reason as to why this Court should reconsider its prior decisions, appellant's claim must be rejected.

X. THE TRIAL COURT PROPERLY REFUSED APPELLANT'S REQUESTED INSTRUCTIONS REGARDING MERCY

Appellant next contends that the trial court violated his state and federal constitutional rights by refusing to give several of his requested instructions explaining the role mercy could play in determining the appropriate sentence. (AOB 189-196.) Appellant's contention is without merit and, as acknowledged by appellant, has been repeatedly rejected by this Court.

In the penalty phase of appellant's trial, defense counsel proposed several jury instructions about the place of mercy in the jury's deliberations at the penalty phase. (10CT 2352, 2363.) The trial court refused to give the proposed instructions. (40RT 3224, 3226.) Instead, the jury was given several relevant instructions regarding what they could consider in determining the appropriate penalty. For example, the jury was instructed pursuant to CALJIC No. 8.85 regarding the factors to be guided by in determining the appropriate penalty. Specifically, factor (k) provided as follows:

> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle.

(10CT 2330; 41RT 3347.)

The jury was also instructed pursuant to CALJIC No. 8.88 that "[y]ou are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." (10CT 2340; 41RT 3353.)

This Court has repeatedly held that the giving of these two instructions (CALJIC Nos. 8.85 and 8.88) are sufficient, in and of themselves, to convey to the jury that they may consider mercy and compassion for the defendant in determining the appropriate penalty. (See *People v. Ervine* (2009) 47 Cal.4th 745, 801-803; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 226; *People v. Panah* (2005) 35 Cal.4th 395, 497; *People v. Griffin, supra,* 33 Cal.4th at pp. 590-91; *People v. Brown* (2003) 31 Cal.4th 518, 569-570; *People v. Lewis* (2001) 26 Cal.4th 334, 393; *People v. Benson* (1990) 52 Cal.3d 754, 808-809.) Appellant acknowledges these prior decisions, but asks this Court to "reconsider." (AOB 190.)

As noted by this Court:

> [W]e have held that "'a jury told it may sympathetically consider all mitigating evidence need not also be expressly instructed it may exercise mercy.'" Because defendant's jury had been instructed in the language of section 190.3, factor (k), we must assume the jury already understood it could consider mercy and compassion; accordingly, the trial court did not err in refusing the proposed mercy instruction.

(*People v. Brown, supra*, 31 Cal.4th at p. 570, citations omitted.)

The same is true in the instant case. Here, the trial court instructed the jury with both CALJIC Nos. 8.85 and 8.88. For this reason, the trial court properly refused appellant's additional instructions on the role of mercy in the penalty determination, and appellant's contention must be rejected. (See *People v. Ervine*, *supra*, 47 Cal.4th at pp. 801-803; *People v. Whisenhunt*, *supra*, 44 Cal.4th at p. 226; *People v. Panah*, *supra*, 35 Cal.4th at p. 497; *People v. Griffin*, *supra*, 33 Cal.4th at pp. 590-91; *People v. Brown*, *supra*, 31 Cal.4th at pp. 569-570.)

XI. THE TRIAL COURT PROPERLY ALLOWED DEPUTY HUTCHINSON TO TESTIFY ABOUT AN INCIDENT INVOLVING BRYAN SOH AND APPELLANT

Next, appellant contends "[t]he trial judge erred in allowing [Deputy] Hutchinson to testify about hearsay statements made by Bryan Soh regarding an incident in the county jail involving appellant." (AOB 197-209.) Appellant's contention is without merit. Soh's nontestimonial statements to Deputy Hutchinson were properly admitted as spontaneous statements and did not violate appellant's confrontation rights.

A. Background

After denying appellant's motion to continue (see Argument VIII above), the trial court ruled that Soh would not be permitted to testify. (33RT 2445.) It did, however, allow Deputy Hutchinson to testify about his observations of the incident, as well as statements made to him by Soh. (33RT 2445.) At the hearing on defense counsel's objection to the admission of the evidence as "spontaneous statements," Deputy Hutchinson testified that on June 27, 1994, he was supervising inmates at the North County Correctional Facility. (33RT 2485.) While working in the inmate "day room," Deputy Hutchinson saw Soh approached by appellant and another inmate, Bryant. (33RT 2487-2488.) Soh "looked frightened" as

the two men were talking to him. At one point, Soh "slouch[ed] down," reached into his pocket, and handed "something" to the men. As he did this, his expression "drop[ped]." Appellant and Bryant then left the day room, but were quickly stopped by the deputy. (33RT 2488.)

Deputy Hutchinson had the two men stand 10 feet away from each other and face a wall. He then went back into the day room to talk to Soh. At this point, only a "few seconds" had elapsed from the time of the incident. Soh told the deputy that appellant and Bryant "made [him] give 'em all [his] money." He further stated that he did so because he thought they were going to "beat the crap out of him." (33RT 2490.) When Deputy Hutchinson returned to appellant and Bryant, he found a $20 bill crumpled up in a small ball near appellant's foot. Soh identified the money as his. (33RT 2490-2491.) During his conversations with Deputy Hutchinson, Soh appeared upset, as demonstrated by his "angry facial expression." (33RT 2491-2492.)

Following such testimony, the prosecutor advised the court that she intended to introduce Soh's statements to Deputy Hutchinson as spontaneous statements under Evidence Code section 1240. (33RT 2507.) Defense counsel objected, noting that such statements were not "contemporaneous" with the events they were describing and were not "spontaneous" because they followed questioning by the deputy. (33RT 2508-2512.) The trial court allowed the introduction of the statements, finding that "neither questioning nor passage of time removes the spontaneity nature of a spontaneous statement." (33RT 2515-2517.)

B. Soh's Statements to Deputy Hutchinson Were Properly Admitted As Spontaneous Statements

A hearsay exception exists for a statement which purports to narrate, describe, or explain an event perceived by the declarant, provided the

statement was made "spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) "A 'spontaneous utterance[ ]' is considered trustworthy, and admissible at trial despite its hearsay character, because 'in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief.'" (*People v. Clark* (2011) 52 Cal.4th 856, 925, quoting *People v. Farmer* (1989) 47 Cal.3d 888, 903.)

"For admission of a spontaneous statement, (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." (*People v. Clark*, *supra*, 52 Cal.4th at p. 925, internal quotation marks and citations omitted.) Whether the statement was made before there was "time to contrive and misrepresent" is informed by a number of factors, including the passage of time between the startling occurrence and the statement, whether the statement was a response to questioning, and the declarant's emotional state and physical condition. (*People v. Lynch* (2010) 50 Cal.4th 693, 751-752; *People v. Raley* (1992) 2 Cal.4th 870, 894.) A trial court's ruling admitting a statement as spontaneous is reviewed for an abuse of discretion. (*People v. Ledesma* (2006) 39 Cal.4th 641, 708.)

Substantial evidence supports the trial court's conclusion that Soh's statements to Deputy Hutchinson qualified as spontaneous statements. Deputy Hutchinson spoke with Soh "seconds" after he gave appellant and Bryant his money, after fearing he would have the "crap" beat out of him. According to Deputy Hutchinson, Soh was still upset about the events

and had an "angry expression." This jailhouse robbery was startling enough to Soh to render his statements about appellant and Bryant, made while still "was under the stress of excitement caused by such perception," "spontaneous and unreflecting." (See *People v. Clark*, *supra*, 52 Cal.4th at p. 925; Evid. Code, § 1240.)

Appellant argues that such statements "were not made at a time when he was under the stress of his encounter with [appellant] and Bryant." (AOB 203.) His assertions, however, fail to establish that the trial court exceeded the bounds of reason in finding the hearsay exception to be applicable. Less than one minute had passed between a very stressful event and the challenged statements. This amount of time compares favorably with other cases finding statements to be spontaneous. (See, e.g., *People v. Brown, supra,* 31 Cal.4th at p. 541 [statement made two and one-half hours after crime was spontaneous]; *People v. Smith* (2005) 135 Cal.App.4th 914, 923 [statement made three to six hours after crime was spontaneous].) Moreover, the requirement is for a *spontaneous* declaration, not an *instantaneous* one. (*People v. Riva* (2003) 112 Cal.App.4th 981, 995.) A lapse of time between the event and the declarations does not deprive the statements of spontaneity if it appears that they were made under the stress of excitement while the reflective powers were still in abeyance. (*People v. Brown*, *supra*, 31 Cal.4th at p. 541; see also *People v. Gutierrez* (2009) 45 Cal.4th 789, 810 ["[t]he amount of time that passes between a startling event and subsequent declaration is not dispositive, but will be scrutinized, along with other factors, to determine if the speaker's mental state remains excited."].)

Furthermore, the fact that Soh's statements followed questioning by Deputy Hutchinson makes them no less "spontaneous." Indeed, "that a statement is made in response to questioning is one factor suggesting the answer may be the product of deliberation, but it does not ipso facto

deprive the statement of spontaneity. An answer to a simple inquiry can be spontaneous. (*People v. Farmer*, *supra*, 47 Cal.3d at p. 904.) For example, general questions such as, "What happened?," do not show a lack of spontaneity if the victim was still under the stress of the stressful event. (*People v. Poggi* (1988) 45 Cal.3d 306, 319-320.) Here, the record does not suggest the deputy's questions were suggestive, nor were Soh's responses self-serving. (See *ibid.*)

For all these reasons, Soh's statements to Deputy Hutchinson were properly admitted as spontaneous statements.

C. Soh's Statements to Deputy Hutchinson Were Nontestimonial

Appellant further challenges the introduction of Soh's statements to Deputy Hutchinson on the ground that they violated his Sixth Amendment right to confront the witnesses against him. (AOB 204-209.) This contention is without merit as Soh's statements were nontestimonial within the meaning of the Confrontation Clause.

The Sixth Amendment provides that a criminal defendant has the right to confront adverse witnesses. (U.S. Const., 6th Amend.; see Cal. Const., art. I, § 15.) The Sixth Amendment's Confrontation Clause precludes the admission of "testimonial" hearsay statements unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross examine the declarant regarding those statements. (*Crawford*, *supra*, 541 U.S. at pp. 53-54; *Davis v. Washington* (2006) 547 U.S. 813, 822 [126 S.Ct. 2266, 165 L.Ed.2d 224] (*Davis*).)

In *Crawford*, the Supreme Court declined to provide a comprehensive definition of "testimonial," but explained that, at a minimum, the term applied to prior testimony (at a preliminary hearing, grand jury, or trial) and to police interrogations. (*Crawford, supra*, 541 U.S. at p. 68.) The Court also did not provide a comprehensive definition of "interrogation," but held

that statements given knowingly in response to structured police questioning qualified under any definition of the term. (*Id.* at p. 53, fn. 4.)

In *Davis*, after stating that it did not intend to provide an exhaustive classification of statements in response to police interrogations as testimonial or nontestimonial, the Supreme Court further explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

(*Davis, supra*, 547 U.S. at p. 522.)

In *People v. Cage* (2007) 40 Cal.4th 965, this Court held that as to testimonial statements,

> the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with statements, made with some formality, which, *viewed objectively*, are for the *primary purpose* of establishing or proving facts for possible use in a criminal trial.

(*Id.* at p. 984, fn. 14 [italics in original].)

Cage "derive[d]" from *Davis* "several basic principles" for determining the character of a statement as testimonial or nontestimonial:

> First . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony - to establish or prove some past fact for possible use

> in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined "objectively," considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.

(*People v. Cage*, *supra*, 40 Cal.4th at p. 984, fns. omitted.)

Considering the principles set forth in *Cage*, *Davis*, and *Crawford*, Soh's statements were nontestimonial. In viewing the totality of the circumstances, the primary purpose of Deputy Hutchinson's conversation with Soh was to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial. Deputy Hutchinson spoke with Soh in order to appropriately assess and respond to the ongoing situation involving appellant and Bryant, since it was unclear to him as to what had been said, what Soh had handed over, and why Soh appeared frightened.As the primary purpose of obtaining Soh's statements was to "apprehend" the suspects in an emergency situation, the statements were nontestimonial. (See *People v. Brenn* (2007) 152 Cal.App.4th 166, 177-178 [information declarant gave to 911 dispatcher was nontestimonial because it was important to helping police formulate an appropriate response to an emergency rather than for primary purpose of making a case against the defendant at trial]; *People v. Corella* (2004) 122 Cal.App.4th 461, 469 [preliminary questions asked at crime scene shortly after it occurred do not rise to level of "interrogation" for *Crawford* purposes].)

The possibility that Soh's statements might later be used in court does not preclude a finding that the statements were nontestimonial. (See *People v. Cage*, *supra*, 40 Cal.4th at p. 984, fn. 14.) Indeed, as *Davis* reasoned, initial inquiries by police may often produce nontestimonial statements. (*Davis*, *supra*, 547 U.S. at p. 832.)

> *Davis* now confirms that the proper focus is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. Instead, we are concerned with statements, made with some formality, which, viewed objectively, are for the primary purpose of establishing or proving facts for possible use in a criminal trial.

(*People v. Cage*, *supra*, 40 Cal.4th at p. 984, fn. 14.)

Accordingly, for all these reasons, Soh's statements were nontestimonial, and appellant suffered no violation of his confrontation rights.

D. Any Alleged Error Was Harmless

Regardless, any alleged error in admitting Soh's statements to Deputy Hutchinson was harmless.

The erroneous admission of hearsay evidence is prejudicial and requires reversal only where it is reasonably probable that the jury would have reached a result more favorable to the defendant in absence of the error. (*People v. Harris* (2005) 37 Cal.4th 310, 336.) The erroneous admission of a testimonial statement in violation of *Crawford* requires reversal unless the error is harmless beyond a reasonable doubt. (*People v. Cage*, *supra*, 40 Cal.4th at pp. 991-994.)

Here, any error in the admission of Soh's statement was harmless under either standard. Given the circumstances of the charged offenses, including the nature of the two murders, coupled with the other aggravating evidence offered against appellant, it is unlikely the jury would have

returned a sentence of life without the possible of parole had Deputy Hutchinson's testimony regarding the theft of Soh's $20 not been offered into evidence. Indeed, the jury had already determined that appellant had committed two first degree murders and sixteen robberies. In addition, the prosecution offered evidence of appellant's prior crimes and other violent behavior. For this reason, any alleged error was necessarily harmless.

XII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY DURING THE PENALTY PHASE WITH APPLICABLE EVIDENTIARY PRINCIPLES

Appellant also argues that his "death sentence must be reversed because the trial court erred by failing to instruct the jury in the penalty phase with critical guidelines on how the jury should evaluate the evidence." (AOB 210-218.) Respondent disagrees.

A. Background

In the penalty phase of appellant's trial, the trial court instructed the jurors with relevant instructions, including CALJIC No. 8.84.1. (10CT 2317; 41RT 3336-3337.) That instruction provided, in relevant part: "You will now be instructed as to all of the law that applies to the penalty phase of this trial. [¶] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial."

The trial court did not re-instruct with other instructions such as CALJIC Nos. 2.00, 2.01, and 2.09. (10CT 2316-2341; 41RT 3336-3354.)

B. Applicable Law

This Court has held that failure to re-instruct on applicable evidentiary principles after instructing the jury with CALJIC No. 8.84.1 is error. (*People v. Moon* (2005) 37 Cal.4th 1, 37; but see *People v. Carter*, *supra*,

30 Cal.4th at pp. 1219-1220 [noting that a rule that evidentiary instructions need be given only upon request in the penalty phase would be a logical extension of case law but resolving case on other grounds].) Such error is subject to harmless error review. (*People v. Moon*, *supra*, 37 Cal.4th at p. 37; *People v. Carter*, *supra*, 30 Cal.4th at pp. 1220-1222.) The relevant inquiry is whether it is likely that the omitted instructions affected the jury's evaluation of the evidence. (*People v. Moon*, *supra*, 37 Cal.4th at p. 38-39.) The standard of review is whether there is a "reasonable likelihood" the instructions precluded the jury from considering constitutionally relevant evidence. (*Ibid.*)

Here, appellant contends the trial court erred in failing to instruct the jury with "fundamental legal principles" such as CALJIC No. 2.00 regarding circumstantial evidence, CALJIC No. 2.01 regarding the sufficiency of circumstantial evidence, and CALJIC No. 2.09 regarding the presumption of innocence, reasonable doubt, and the burden of proof. (AOB 212-213.) Specifically, appellant claims:

> [I]n the instant case, the prosecutor called a number of witnesses to testify about the prior convictions and the prior alleged violent criminal activity of [appellant]. This evidence required the jury to consider and evaluate, inter alia, circumstantial evidence, but the jurors were not instructed on how to assess this evidence.

(AOB 214-215.) Not so. Indeed, contrary to appellant's assertions, the jury was instructed with applicable evidentiary principles, such as statements of counsel (CALJIC No. 1.02), credibility of witnesses (CALJIC No. 2.20), and principles guiding evaluation of expert testimony (CALJIC No. 2.80. (See 10CT 2315-2341.) Notably, the jury was also instructed with CALJIC Nos. 8.86 and 8.87, which advised that evidence of other crimes and other criminal activity needed to be proven beyond a reasonable doubt. (10CT 2331-2332.) Moreover, as acknowledged by appellant

(AOB 216), "California law does not require that a reasonable doubt standard be used during any party of the penalty phase, except as to proof of prior criminality. [ ]" (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].)

Accordingly, the trial court did not commit instructional error in failing to instruct the penalty phase jury with CALJIC Nos. 2.00, 2.01, and 2.09.

C. Harmless Error

Regardless, any alleged error was harmless in that there is no "reasonable likelihood" the instructions precluded the jury from considering constitutionally relevant evidence. (*People v. Moon*, *supra*, 37 Cal.4th at p. 38-39.)

Appellant contends that "findings critical to the penalty determination were made without adequate legal guidance." He further argues that "there is a reasonable likelihood that at least some of the jurors accepted alleged aggravating evidence and may have rejected mitigation evidence because of the lack of complete and adequate instructions." (AOB 218.) These contentions are not supported by the record and are purely speculative. Indeed, a similar argument was rejected by this Court in *People v. Moon*, *supra*, 37 Cal.4th at page 39, when it refuted the defendant's argument that the instructions left the jury "free to make a standardless assessment of the evidence presented at both phases of the trial when determining [his] sentence." In so doing, this Court called the argument "pure speculation." (*Ibid.*)

Here, as explained above, the trial court did instruct the jury on applicable legal principles during the penalty phase. (See 10CT 2315-

2341.) The jury was told that, "[i]n determining which penalty is to be imposed on the defendant, you shall consider all the evidence which has been received during any part of the trial of this case." (10CT 2329.) They were further instructed to "assign" "weights" and "value" to the applicable aggravating and mitigating factors in making this determination. (10CT 2340.) In addition, with respect to appellant's prior convictions and other criminal activity, the jurors were instructed that such evidence needed to be proven beyond a reasonable doubt. (10CT 2331-2332.)

The jurors presumably had the common sense to accomplish this task. (See *United States v. Scheffer* (1998) 523 U.S. 303, 313 [118 S.Ct. 1261, 140 L.Ed.2d 413] ["Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.'"]; *Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [jurors "presumed to be intelligent" and "capable of properly assessing the evidence" since "'[a] juror is not some kind of dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box'"].) Thus, "[t]here is no realistic possibility that jurors were misled about how to evaluate the testimony of penalty phase witnesses, or that the absence of [certain] general instructions at the penalty phase induced arbitrary and capricious deliberations." (*People v. Melton* (1988) 44 Cal.3d 713, 758 [absence of guilt-phase instructions did not deprive jury of framework for evaluating evidence due, in part, to instructions described above].)

Moreover, the nature of the evidence presented during the penalty phase was relatively straightforward and familiar to the jury. The prosecution presented evidence that appellant had suffered one prior robbery conviction through eyewitness testimony and documents and

also offered testimony detailing appellant's violent conduct following his incarceration for the instant crimes. (34RT 2613-35RT 2697; 36RT 2707-2726.)

Based on the foregoing, the failure to re-issue the three instructions did not confuse the jurors as to how to evaluate the evidence or cause them to misuse the evidence. Appellant has not pointed to any evidence in the record that shows the contrary. (AOB 210-218.) (See *People v. Carter*, *supra*, 30 Cal.4th at pp. 1220-1222 [jury did not express any confusion or uncertainty, or request clarification on how to evaluate evidence]; *People v. Holt* (1997) 15 Cal.4th 619, 685 [jury "surely" would have requested further instruction had it been confused].) In the absence of anything in the record indicating the jury was confused or misled by the court's failure to reinstruct with those three CALJIC instructions, appellant's argument must be rejected. (See *People v. Danielson* (1992) 3 Cal.4th 691, 722; *People v. Hamilton* (1988) 46 Cal.3d 123, 153 ["Having reviewed the record of the penalty phase in its entirety, we are of the opinion that in the absence of the claimed [instructional] error the outcome would have been the same."].)

Accordingly, no prejudice resulted from the omission of the three guilt-phase instructions, and appellant's argument must be rejected.

XIII. THERE WAS NO CUMULATIVE ERROR AT THE GUILT AND PENALTY PHASES THAT REQUIRES REVERSAL OF THE DEATH JUDGMENT

Appellant contends the cumulative effect of the errors at the guilt and penalty phases resulted in a death verdict which requires reversal. (AOB 219-222.) Respondent disagrees because there was no error, and, to the extent there was error, appellant has failed to demonstrate prejudice.

Whether considered individually or for their cumulative effect, the alleged errors in the instant matter could not have affected the outcome of the trial. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692;

People v. Ochoa, *supra*, 26 Cal.4th at pp. 447, 458; *People v. Catlin*, *supra*, 26 Cal.4th at p. 180.) A capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham, supra,* 25 Cal.4th at p. 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219.) The record shows appellant received a fair trial. His claims of cumulative error should, therefore, be rejected.

XIV. CALIFORNIA'S DEATH PENALTY LAW COMPORTS WITH THE UNITED STATES CONSTITUTION

Finally, appellant raises a variety of constitutional challenges to California's capital punishment system, recognizing that this Court "has consistently rejected cogently phrased arguments pointing out these deficiencies," but wishing to preserve the claims for federal review. (AOB 223-241.) Because appellant presents nothing new or significant that would call into question this Court's earlier holdings, respondent addresses each claim summarily. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank, supra,* 16 Cal.4th at pp. 1255-1256.)

First, appellant contends that section 190.2 is unconstitutional because it contains so many special circumstances that it fails to perform the narrowing function required by the Eighth Amendment and to provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (AOB 223-224; Argument 14(A).) This contention has been rejected by the United States Supreme Court (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29]) and by this Court (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.)

This Court has previously determined that section 190.3, factor (a), which permits the jury to consider circumstances of the crime, does not result in the arbitrary or capricious imposition of death (See AOB 224-225;

Argument 14(B)). (*People v. Martinez* (2010) 47 Cal.4th 911, 967; *People v. Hamilton* (2009) 45 Cal.4th 863, 960.)

This Court has also repeatedly rejected appellant's claims of statutory and instructional error regarding "the appropriate burden of proof" in death penalty cases. First, a capital-sentencing jury is not required to find that aggravating factors outweigh mitigating factors beyond a reasonable doubt (see AOB 226-227; Argument 14(C)(1)). (*People v. Sapp* (2003) 31 Cal.4th 240, 316-317; *People v. Jones* (2003) 30 Cal.4th 1084, 1126-1127; *People v. Holt, supra,* 15 Cal.4th at pp. 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) Nothing in the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], or *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] compels a different result than previously reached by this court. (*People v. Mendoza, supra,* 42 Cal.4th at p. 707; *People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Ward* (2005) 36 Cal.4th 186, 221.)

The law does not require that a capital-sentencing jury be given burden of proof or standard of proof instructions for finding the existence of aggravating factors, finding that aggravating factors outweigh mitigating factors, finding that death is the appropriate penalty, or be instructed on a "presumption of life" (AOB 228-229, 234-235, 238-239; Arguments 14(C)(2), 14(C)(8), 14(C)(11). (*People v. Martinez, supra,* 47 Cal.4th at p. 967; *People v. Hamilton, supra,* 45 Cal.4th at p. 960; *People v. Prieto* (2003) 30 Cal.4th 226, 271; *People v. Welch, supra,* 20 Cal.4th at p. 767, quoting *People v. Sanchez* (1995) 12 Cal.4th 1, 81 ["Unlike the determination of guilt, 'the sentencing function is inherently moral and

normative, not factual' [citation] and thus 'not susceptible to a burden-of-proof quantification.'"].)

This Court has previously rejected arguments that a capital-sentencing jury must find aggravating factors or unadjudicated criminal activity unanimously (AOB 229-231; Arguments 14(C)(3)(a)) and 14(C)(3)(b), and nothing in *Apprendi*, *Ring*, *Blakely*, or *Cunningham* compels a different result than previously reached by this court. (*People v. Ward*, *supra,* 36 Cal.4th at pp. 221-222; *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Morisson, supra,* 34 Cal.4th at p. 731; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

This Court has previously rejected the argument that the phrase "so substantial" in CALJIC No. 8.88 is impermissibly vague (AOB 232; Argument 14(C)(4)). (*People v. Carter*, *supra*, 30 Cal.4th at p. 1226.)

The law does not require a trial court to delete inapplicable sentencing factors from CALJIC No. 8.85 (AOB 232; Argument 14(C)(5)). (*People v. Taylor* (2001) 26 Cal.4th 1155, 1179-1180.)

This Court has previously rejected the argument that a capital-sentencing jury must be told that certain factors enumerated in CALJIC No. 8.85 are relevant only as mitigating factors (AOB 233; Argument 14(C)(6)). (*People v. Farnam*, *supra*, 28 Cal.4th at p. 191.)

This Court has also repeatedly held that a lingering doubt instruction "'"is required neither by state nor federal law [citation], and . . . that this concept is sufficiently covered in CALJIC No. 8.85. [Citations.]'" (AOB 233-234; Argument 14(C)(7).) (*People v. Zamudio* (2008) 43 Cal.4th 327, 370 quoting *Geier*, *supra*, 41 Cal.4th at p. 615.)

This Court has previously rejected the argument that CALJIC No. 8.88 impermissibly fails to inform the jury that it must return a sentence of life without parole if it determines that the aggravating factors do not

outweigh the mitigating factors (AOB 235-236; Argument 14(C)(9)). (*People v. Catlin*, *supra*, 26 Cal.4th at p. 174.)

This Court has previously rejected the argument that a capital-sentencing jury must be instructed as to burden of proof and unanimity with respect to mitigating factors (AOB 236-238; Argument 14(C)(10)). (*People v. Lewis* (2008) 43 Cal.4th 415, 534; *People v. Rodgers* (2006) 39 Cal.4th 826, 897.)

The law does not require a capital-sentencing jury to return written findings (AOB 239; Argument 14(D). (*People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Inter-case proportionality review is not required to render California's death penalty constitutional (AOB 239-240; Argument 14(E). (*People v. Martinez*, *supra*, 47 Cal.4th at p. 967; *People v. Hamilton*, *supra*, 45 Cal.4th at p. 960; *People v. Watson* (2008) 43 Cal.4th 652, 704.)

This Court has previously rejected the argument that California's capital-punishment system violates the Equal Protection Clause (AOB 240; Argument 14(F)). (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.)

And finally, this Court has previously rejected the argument that California's capital-punishment system unconstitutionally violates international norms (AOB 240-241; Argument 14(H)). (*People v. Snow*, *supra*, 30 Cal.4th at p. 43.)

Appellant provides no compelling argument as to why these issues should be revisited. Accordingly, they should all be summarily rejected.

CONCLUSION

Accordingly, respondent respectfully asks that the judgment of conviction and sentence of death be affirmed.

Dated: May 24, 2012

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 46,465 words.

Dated: May 24, 2012

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DECLARATION OF SERVICE BY U.S. MAIL

CAPITAL CASE

Case Name: ***People v. Richard Leon*** Number: **S056766**

I declare:

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

On May 24, 2012, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 24, 2012, at Los Angeles, California.

Virginia Gow
Declarant

Signature

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