IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GEORGE LOPEZ CONTRERAS,

Defendant and Appellant.

S058019

CAPITAL CASE

Tulare County Superior Court No. 9637619
The Honorable Patrick J. O'Hara, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On November 3, 1995, appellant George Lopez Contreras was charged with capital murder in an information filed in the Tulare County Superior Court. Specifically, count I charged appellant with the premeditated murder of Saleh Bin Hassan (Pen. Code, § 187, subd. (a))[1/] and count II charged appellant with second degree robbery (§ 211).[2/] (II CT 300-304.) The special circumstance of murder committed during the commission of a robbery was alleged as to each defendant (§ 190.2, subd. (a)(17)). It was further alleged that appellant personally used a shotgun during the commission of both offenses (§§ 1203.06, 12022.5). (*Ibid.*) Finally, the district attorney alleged that appellant personally inflicted great bodily injury upon Hassan during commission of the offenses (§ 12022.7, subd. (a)). (*Ibid.*)

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1. Unless otherwise specified, all further statutory references are to the Penal Code.

2. Co-defendants Santos "Topo" Pasillas, Jose Gonzalez, and Louis Fernandez, were charged along with appellant in counts I and II. (II CT 300.) Appellant's trial was severed from that of his co-defendants following a motion by the defense on August 6, 1996. (I CT 11.)

On November 17, 1995, appellant was arraigned on the information, entered not guilty pleas, and denied the enhancements. (I CT 3.)

Jury selection for appellant's trial commenced on August 27, 1996. (I CT 14.) A jury was impaneled on September 17, 1996. (I CT 40.) Thereafter, appellant was convicted of all charges on September 26, 1996. (I CT 60-61; III CT 514-515.)

On September 30, 1996, the penalty phase of appellant's trial began. (I CT 62.) On October 4, 1996, the jury returned the death penalty verdict. (I CT 70; II CT 568.)

On December 11, 1996, after denying appellant's motion to modify the penalty, the trial court sentenced appellant to death for the premeditated murder of Saleh Bin Hassan. (I CT 76-78; III CT 598-601.) In addition, the court consecutively imposed the aggravated term of five years for robbery plus an additional sentence of 10 years for the firearm-use enhancement. (*Ibid.*)

This appeal was automatic from the final judgment imposing a verdict of death. (§ 1239, subd. (b).)

STATEMENT OF FACTS

Prosecution's Case-In-Chief

On December 29, 1994, a robbery occurred at the Casa Blanca Market, located at 2809 Road 156 in Farmersville. The victim, Saleh Bin Hassan, was pronounced dead at the scene of the crime. Hassan had bled to death from two gunshot wounds to the abdomen and chest. The prosecution charged appellant, Santos "Topo" Pasillas, Jose Gonzalez, and Louis Fernandez with the murder and robbery of Hassan.

Testimony Of Witness Jose "Lupe" Guadalupe Valencia[3]

In the early afternoon on December 29, 1994, appellant drove his van to Lupe's house in Farmersville and picked up Lupe and Lupe's sister's boyfriend, Jose Gonzalez. (V RT 1281-1283.) Appellant then drove Lupe and Jose to appellant's house in Visalia. (V RT 1283-1285, 1313.) Lupe and Jose stood with appellant in the front yard outside of his house for approximately 45 minutes. (V RT 1285, 1314.) Thereafter, the three men went to Santos Pasillas's apartment to visit him.[4] (V RT 1285.) After visiting for awhile, appellant, Lupe, and Jose left Topo's apartment and went to Louis Fernandez's house. (V RT 1286.) Appellant went inside Louis's house to talk to him while Lupe and Jose waited outside. (V RT 1286-1287.) After Louis and appellant exited the house, Louis drove appellant, Lupe, and Jose in Louis's car[5] back to Topo's apartment. (V RT 1287-1288.) Appellant went into Topo's apartment and came out with Topo and two "long guns."[6] (V RT 1288-1289.) Topo and appellant placed the guns in the back seat of Louis's car. (V RT 1289.) The five men then entered the vehicle as follows: Louis in the driver's seat, Lupe in the front passenger seat, and appellant, Topo, and Jose in the back seat. (V RT 1290.) Appellant, Topo, and Jose sat on top of the two guns as they rode to a store in Visalia. (V RT 1290-1291.) Lupe knew they were going to the

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3. Jose Guadalupe Valencia testified that he goes by the name "Lupe," and will hereafter be referred to as "Lupe." (V RT 1281.)

4. Santos Pasillas also goes by the nickname "Topo," and will hereafter be referred to as "Topo." (V RT 1285.)

5. Lupe identified a picture of Louis's car as the vehicle they used during the robbery at the Casa Blanca Market. (People's Exhibit No. 12 and 13; V RT 1310, 1312.)

6. Lupe did not know anything about guns, and therefore was unsure whether these two long guns were shotguns or rifles. (V RT 1289.)

store to rob it because they had guns with them. (V RT 1291-1292.) While in the car, appellant, Topo, and Jose put on pieces of cloth to cover the lower part of their faces. (V RT 1292-1293, 1326.) Lupe recalled that the three men tied the cloth around their faces like "they were putting on some masks." (V RT 1292, 1294.) The men were masked and ready when they got to the store in Visalia. (V RT 1294.) However, upon arriving at the store, they saw a lot of people outside, so they kept going. (V RT 1291, 1295.)

Thereafter, Louis drove to the Casa Blanca Market[7/] by Camp Linnell in Farmersville. (V RT 1295, 1297.) It was still daylight when they arrived, but the sun had begun to set. (V RT 1309.) Louis parked the vehicle and Topo exited to see if anyone was inside the store. (V RT 1295-1297.) Topo went to the pay phone located next to the store's doors and acted like he was going to use the phone. (V RT 1296.) Topo looked inside for 30 to 40 seconds to confirm that no one was inside the store. Then, he returned to the car to notify appellant and Jose that the store was empty. (V RT 1298.) Appellant and Jose then each grabbed a gun and went into the market. (*Ibid.*) About 20 seconds after they left the car, Lupe heard a loud gunshot. (V RT 1299.) Louis moved the car and made a U-turn around the back of the store. (*Ibid.*) Louis then stopped the car and appellant and Topo got in. (V RT 1300.)

Once all five men were in the vehicle, Louis drove them back to Visalia. (V RT 1301.) During the ride appellant mentioned, "I'll never forget the smile on his face." (V RT 1302.) Lupe recalled that appellant was smiling and in a "happyish mood" during the ride back to Topo's apartment. (V RT 1303.) Louis dropped off his four passengers at Topo's apartment and then drove off. (V RT 1304, 1334.) Topo stayed at his apartment while appellant drove Lupe

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7. At one point during the trial, Lupe refereed to the market they robbed in Farmersville as the "Casa Grande Market." (V RT 1295) He later identified a picture of the Casa Blanca Market as the market they robbed. (People's Exhibit No. 5, 6, and 11; V RT 1296-1297, 1311.)

and Jose to appellant's house in his van. (V RT 1304, 1308, 1334.) Appellant, Jose, and Lupe stayed outside appellant's house for about 45 minutes. (*Ibid.*)

Afterward, appellant drove Jose and Lupe back to Lupe's house in his van. (V RT 1304.) By the time Lupe got home, it was nighttime.[8] (*Ibid.*) Lupe talked to appellant about what had happened inside the Casa Blanca Market during the robbery and shooting. (V RT 1309.) Appellant indicated that he had gone inside the store and pointed his gun at the clerk, but the clerk pulled out a gun, so appellant shot him. (V RT 1309, 1316, 1349.) Lupe remembered that appellant had warned him, "If anybody says anything, I'll get them, too." (V RT 1310, 1356.)

Appellant tried to give Lupe a handgun when he dropped Lupe off at home.[9] (V RT 1304, 1350.) Lupe had never seen appellant with the handgun before. (V RT 1306.) Appellant explained he had taken the gun from the store clerk. (V RT 1350.) After Lupe refused to take the gun, appellant left. (V RT 1304-1306, 1355.)

Lupe also talked to Jose about what had happened inside the market. (V RT 1317.) Jose told Lupe that while they were in the store, the clerk had pulled out a gun and that Jose had tried to shoot the clerk, but his gun got jammed. (V RT 1306.) Jose also admitted that he had tried to open the cash register, but it would not open. (*Ibid.*) Jose bragged that he was able to take the clerk's wallet during the robbery, which Jose later used as his own wallet.[10] (V RT 1306-

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8. The parties stipulated that the sunset was at 4:51 p.m. on December 29, 1994. (VI RT 1768.)

9. Lupe identified the gun appellant tried to give him as the same gun registered to Hassan, which had been stolen during the robbery. (People's Exhibit No. 4; V RT 1305, 1350, 1585.)

10. Lupe identified Hassan's wallet that was stolen during the robbery as the same wallet that was later used by Jose. (People's Exhibit No. 16; V RT 1307.)

1307.)

After the shooting, Jose informed his girlfriend Yesenia Valencia that "they had killed a man" at the Casa Blanca Market. (V RT 1361-1362.) Jose admitted that he had gone to the store in order to rob it. (V RT 1366.) While Jose was telling Yesenia about what had happened at the store, he showed her a wallet that he had taken from the clerk.[11/] (V RT 1362-1363.)

Lupe did not go to the police after the shooting. (V RT 1340.) Lupe remarked that he was scared after the robbery and felt really bad after he read in the newspaper that the clerk had died. (V RT 1340.) As the months passed, thoughts about the shooting bothered him less frequently. (V RT 1342.) Then in August 1995, the police contacted Lupe and he gave a statement to Detective Guiterrez wherein Lupe explained what he knew about the Casa Blanca shooting. (V RT 1348-1350.)

Testimony and Police Statement Of Informant Artero Vallejo

Artero Vallejo knew appellant for two to three years prior to the shooting on December 29, 1994. (V RT 1367-1368.) Artero used to see appellant every day, or every other day, and they would talk, drink, and do drugs together. (V RT 1368, 1393.) Artero had been to appellant's house multiple times and knew appellant's brother, Fernando. (V RT 1391, 1393.) Artero also knew appellant had a son, but that the boy was not with appellant most of the time he saw him. (V RT 1395.)

On December 29, 1994, Artero worked from 3:00 p.m. until 11:00 or 11:30 p.m. at Poser Business Forms, which is located about 10 minutes from the Casa Blanca Market. (V RT 1451-1452, 1457.) Artero found out about the

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11. Hassan's wallet was found by Detective James Hilger of the Tulare County Sheriff's Department at Yesenia's house after Jose was arrested in August 1995. (V RT 1364.)

December 29 shooting after he got off work and went to Topo's apartment to "kickback." (V RT 1368-1369.) Appellant, Topo, Topo's girlfriend, and their kids were at the apartment when Artero arrived. (V RT 1369, 1490.) Topo told Artero that they had tried to "pull a little robbery and that it just didn't go right at that time." (V RT 1372.) Topo explained there was a shooting during the robbery and they did not get any money. (V RT 1372, 1508.) Artero recalled that Topo was excited to tell him about what had happened and that Topo admitted it was an "adrenaline rush." (V RT 1372.)

That night appellant admitted he had shot the clerk at the Casa Blanca Market. Artero recalled his conversation with appellant as follows:

> He [appellant] told me he was holding the shotgun with one hand. He told me - - he told me that they couldn't get no money out of the clerk. They couldn't - - that they were not able to find any money. They told me that he had told the clerk that he was going to shoot him, you know, if he did anything. And he told me that he ended up shooting him.
>
> He told me that after he shot him the first time, he said that he walked up to him, and looked at him and the clerk had a smile on his face and he told me that he told him, "I told you I was going to kill you," and he kicked him and he shot him again.

(V RT 1372-1373.) Artero remembered that appellant acted "like it was no big deal" and that appellant looked excited as he revealed that he had shot the clerk. (V RT 1373.) Appellant also showed Artero a .25 caliber handgun that he was carrying around in his jacket pocket. Appellant said he had taken the handgun from the clerk during the robbery.[12/] (People's Exhibit No. 4; V RT 1373-1374.) While at Topo's apartment, Artero heard about the shooting on the

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12. Artero later heard from Topo that appellant's brother was arrested while in possession of the clerk's handgun. (V RT 1507.) Visalia Police Officer Jeff McIntosh confirmed that he arrested appellant's brother, Fernando Lopez, when Fernando was found sitting in a stolen truck on January 9, 1995. (V RT 1515-1519.) Fernando had the clerk's handgun in his rear pants pocket. (*Ibid.*)

news. (V RT 1375.)

Appellant told Artero that he got the shotgun and rifle used in the shooting from "Shorty."[13/] (V RT 1498.) Artero was familiar with the shotgun appellant used during the robbery and had seen appellant with the gun sometime before the shooting. (V RT 1376, 1380.) Whenever guns were needed, the men would go to Shorty's house in Orosi to pick them up. (V RT 1380-1381, 1499.) In fact, one or two weeks prior to the Casa Blanca shooting, Artero had gone with appellant and Topo to pick up the shotgun and .22 caliber rifle. (V RT 1380.) Appellant told Artero that he had gone again to Shorty's to pick up the guns used at the Casa Blanca the night before the incident. (V RT 1499-1500.) Appellant also told Artero that the reason he picked up the weapons was because, "What they wanted to do is go and pull a little job, but they weren't sure where they were going to go." (V RT 1501.) Artero explained that "a little job" meant an armed robbery and that appellant had wanted to find a way to make some "quick cash." (V RT 1501-1502.)

Later that night, Jose and Louis came over to Topo's house where appellant and Artero were hanging out. (V RT 1376, 1490.) Jose talked to Artero about the shooting and told him how appellant had shot the clerk during the robbery. (V RT 1507-1508.) The five men then went to Louis's house. (V RT 1377, 1490.) Louis and Jose went in Louis's car, Artero went in his truck, and Topo and appellant went in either appellant's van or Artero's truck.[14/] (V RT 1377-1378.)

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13. "Shorty" or Jesus Manuel Fernandez testified at appellant's trial. His testimony will be discussed below.

14. Artero was shown a photo of Louis's car, which he identified as the same car Louis was driving when they went out to celebrate on the night of the robbery. (People's Exhibit No. 13; V RT 1379.) Artero remembered seeing appellant's van at Louis's house that night, but could not remember which vehicle Topo and appellant road in over to Louis's house. (V RT 1378.)

After hanging out at Topo's house, Jose, Artero, Topo, Louis, and appellant went to a local bar called The Break Room to celebrate the shooting. (V RT 1381-1382.) The men drank some beer and then left the bar to go to a party in Farmersville. (V RT 1382-1383.) While at the party, the five men continued to drink beer and started using "crank" or methamphetamine. (V RT 1383-1385.) Later that night, appellant, Artero, and Jose went to a second party while Louis and Topo went home. (V RT 1385.) After partying, Artero spent the night at Jose's house in Farmersville. (V RT 1396.) The following morning, appellant asked Artero for a ride home. (V RT 1397.) After which, Artero took appellant home.[15] (*Ibid.*)

Artero was arrested a couple of days after the Casa Blanca shooting on unrelated charges. (V RT 1386.) At the time of his arrest, Artero did not mention anything about the shooting. (*Ibid.*) Between January 1995 and August 1995, Artero entered a three-month live-in rehabilitation program. (V RT 1468.) After the shooting, Artero stopped socializing with appellant, Jose, Louis, and Topo. (V RT 1387-1388.) Artero remembered, "All of us just went apart after that incident." (V RT 1387.)

In August 1995, Artero was in the process of trying to change his life around. (V RT 1387, 1469.) One night Artero called the police while intoxicated. (V RT 1387.) Artero told the officers that he had some information about an unsolved shooting at a corner grocery store in Farmersville, but that he did not remember the name of the store. (V RT 1449, 1451.) Artero said he wanted some help on his warrants. (V RT 1460-1461; see also VI RT 1716.) The warrants that Artero had outstanding in August

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15. Appellant's van was breaking down a lot and Artero could not remember if appellant's van was running at the time. (V RT 1398-1399.) When questioned by defense counsel on whether appellant's van was running on December 29, Artero testified, " I remember it breaking down a couple of times, but I don't remember him ever asking for a ride." (V RT 1400.)

1995 were misdemeanor warrants. One of them was for Artero to attend an alcohol rehabilitation center as part of his sentence. (See VI RT 1726.). Another warrant was for Artero's failure to appear in a case resulting from his arrest in February 1994.[16] (V RT 1461.) Prior to turning himself in to the police, Artero had been selling drugs to Topo, Jose, appellant, and Louis and some of them owed Artero money. (V RT 1472.) Artero recalled, "We were all angry about who had what, drugs and this and that." (*Ibid.*)

On August 11, 1995, Artero gave a statement to Detective Hilger about the Casa Blanca shooting.[17] (VI RT 1710-1711.) Artero had been at work from 3:00 or 3:30 p.m. until 11:30 p.m. or midnight on December 29, 1994. (VI RT 1719-1720.) Artero told Detective Hilger that when he arrived at Topo's house after getting off work, Topo, Jose, appellant, and Topo's wife and children were at the residence. (VI RT 1711-1712.) First, Topo started talking about the shooting and then both he and appellant spoke about what happened. (VI RT 1725.) Artero recalled, "Santos [Topo], he always liked to talk. Santos told me, uh, first, about what they did, and George [appellant], uh, he was pretty proud of the whole thing, and uh, they were all proud of the whole thing." (*Ibid.*) Artero said that the shooting happened around 3:00 or 3:30 p.m. that afternoon. (VI RT 1719.) Artero also told Detective Hilger that the men were

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16. In February 1994, Artero was arrested and had a couple of 12-gauge shotgun shell casings in his jacket pocket. (V RT 1448, 1505.) Artero did not have a shotgun in his possession, but the officer found a shotgun nearby. (V RT 1506.) Artero was also arrested in April 1994 wearing a black Raiders jacket. (V RT 1404, 1448.) He gave away this jacket prior to December 1994, but did not give it to appellant. (V RT 1274-1275.)

17. Detective Hilger did not recall whether Artero specifically referred to the market by its name. After discussing the incident with him, Detective Hilger concluded the market shooting Artero was talking about was at the Casa Blanca Market because it was at the same location as the market Artero described. (VI RT 1717, 1719.)

all wearing jackets that night: Topo wore a Padres jacket, appellant wore a Raiders jacket, Jose wore a Pendleton jacket, and Louis wore a lightweight Members Only jacket.[18/] (VI RT 1721.)

Artero described the four men's roles in the robbery and shooting. He explained that appellant carried the shotgun into the store, Topo went in with the .22 caliber rifle, and that Jose went looking for the money. (V RT 1486.) Louis was waiting in the car as the get-away driver. (*Ibid.*) Artero believed there were four men and appellant's baby in the car during the robbery. (*Ibid.*) Louis was driving, Jose was the front passenger, and appellant, Topo, and the baby were in the back seat. (V RT 1495-1496.) Artero explained that he knew this because Topo had told him about appellant's son being in the car when they later talked about the shooting. (V RT 1483-1484.) Artero did not know Lupe and did not remember appellant, Jose, Louis, or Topo talking about anyone named "Lupe" being involved in the shooting. (V RT 1401-1402, 1486.) Artero told Detective Hilger that while the men were in the store looking for money, appellant looked away and Topo saw the clerk pull out a gun. (V RT 1487.) Topo yelled for appellant to watch out, and that the clerk had a gun. (*Ibid.*) Appellant then took the shotgun he was holding and shot the clerk. (*Ibid.*) Jose and Topo ran out of the store and jumped into the car while appellant stayed behind with the clerk. (*Ibid.*) Artero explained what he knew about appellant shooting the clerk,

> After he shot him the first time, walked up to him and told him you didn't think I was going to shoot you or thought I was kidding, type, and saw his smile on his face and he kicked him and shot him again, and then he went out the store.

(V RT 1488.) Once inside the get-away vehicle, Topo told Louis that appellant

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18. Appellant's wife, Claudia Contreras, testified that she never knew appellant to have a Raiders jacket. (VI RT 1728.) According to Claudia, appellant "really didn't wear a jacket," but that he did have a leather jacket decorated with colored world flags. (VI RT 1729.)

had been shot and they drove off. But Louis said he did not believe appellant got shot, so they made a U-turn and picked him up in front of the store. (V RT 1487-1488.)

Artero was released a couple of hours after giving his statement to the police. (V RT 1388-1389.) Two days after turning himself in to the police, Artero entered a court-ordered rehabilitation program for drugs and alcohol. (V RT 1389-1390.) Artero stated he was able to turn his life around after coming forward to the police in August 1995. (V RT 1482.)

Investigation Of The Casa Blanca Shooting

On December 29, 1994, at 3:27 p.m., Tulare County Sheriff's Deputy Scott O'Neill was dispatched to the Casa Blanca Market on the northwest corner of Avenue 288 and Road 156 in Visalia. (V RT 1567-1568, 1548.) Deputy O'Neill arrived at the store at 3:31 p.m. and witnesses outside directed him to the store clerk who was on the floor inside the store behind the cash register. (V RT 1568, 1570.) The clerk was already deceased and his body face down on the ground. (V RT 1568-1569.) Based on witness statements, Deputy O'Neill estimated the shooting occurred at 3:20 p.m. (V RT 1570.)

At 3:40 p.m., Deputy James Schwabenland responded to the Casa Blanca Market. (V RT 1548.) Deputy Schwabenland arrived at the store at 4:03 p.m. whereupon he took photographs of the crime scene, collected physical evidence, obtained measurements, and processed the scene.[19] (V RT 1548-1549.)

On December 30, 1994, at the Tulare County Sheriff's Coroner's Office, Dr. Leonard Miller performed the autopsy on the store clerk, Saleh Bin Hassan. (V RT 1425-1426.) Dr. Miller found external evidence of two gunshot

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19. The fingerprints collected at the scene were either unusable or did not match any of the suspects. (V RT 1556-1558.)

wounds, one on the left side of the abdomen and the other on the right side of the back. (V RT 1426-1427.) Both were shotgun wounds. (V RT 1427.) Hassan's cause of death was insanguination, bleeding to death due to the damage caused by the gunshot wounds. (V RT 1427, 1431.)

One of the witnesses present outside the Casa Blanca Market during the robbery and shooting was Amanda Garcia. Garcia had been shopping at the K-Mart in Visalia. (V RT 1522.) She left K-Mart at 3:00 p.m. and while driving home she was forced to stop when she encountered an orange car parked in the middle of the street, preventing other cars from passing. (V RT 1523.) The vehicle was pointed north in the direction of Highway 198.[20/] (V RT 1523-1524.) Two people were inside the vehicle, one in the driver's seat and one in the back seat. (V RT 1529, 1531.) Both passengers had their faces covered with black masks. (V RT 1529.) Garcia then saw two other people rush out of the Casa Blanca Market. (V RT 1524, 1526, 1528.) Both of these people were dressed in black and also had their faces covered with masks that left only their eyes visible. (V RT 1528.) One person had something in his hands that was about a foot long and shaped like a gun. (V RT 1526-1527.) He pointed the object toward Garcia, who was sitting in her car. (V RT 1527.) Both men then hopped inside the orange vehicle. (V RT 1526.) Whereupon the vehicle drove off, ran the stop sign, and turned left towards Highway 198. (V RT 1527.)

The weapons used during the shooting were owned by Jesus Manuel "Shorty" Fernandez. (V RT 1376, 1380-1381, 1499-1501.) Shorty owned a shotgun and a .22 caliber rifle that he used to go hunting. (V RT 1532.) Prior to the Casa Blanca shooting, Shorty had gone hunting with appellant on multiple occasions. (V RT 1533-1534.) Shorty had an arrangement with

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20. Garcia recognized a picture of Louis's car as the same vehicle she saw parked in the street that day. (People's Exhibit Nos. 13 and 14; V RT 1525.)

appellant where appellant could call him the night before, ask to use the guns, and Shorty would tell his wife to give the guns to appellant when he arrived. (V RT 1535.) According to Shorty, appellant borrowed the guns to go hunting. (V RT 1539.) In December 1994, around Christmas,[21] appellant and Topo came to Shorty's house in Orosi to borrow the shotgun and rifle. (V RT 1535-1537, 1543-1544.) Shorty's wife gave appellant and Topo the guns. (V RT 1538.) Appellant and Topo never returned either weapon and when Shorty asked where they were, appellant told him the guns had been stolen from a car. (V RT 1540.) Shorty never saw the guns again. (V RT 1538, 1541.)

About a week after the Casa Blanca shooting, on January 9, 1995, at approximately 11:30 a.m., Visalia Police Officer Jeff McIntosh responded to a call on the 100 block of Northeast 5th Street in Visalia. (V RT 1515-1516.) Officer McIntosh was called to investigate a stolen Mitsubishi Mighty Max pickup truck, which was parked at that location. (V RT 1516.) Upon arriving at the scene, Officer McIntosh found the stolen vehicle and found appellant's brother, Fernando Contreras Lopez, sitting inside the truck. (V RT 1516-1517.) Fernando lived at 102 Northeast 5th Street, next door to where the stolen truck was parked.[22] (*Ibid.*) In Fernando's right rear pants pocket, Officer McIntosh found a loaded .25 caliber semi-automatic handgun. (*Ibid.*) This was the same handgun that was stolen from store clerk during the robbery and shooting at the Casa Blanca Market a littler over a week earlier. (V RT 1518-1519.)

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21. Shorty testified that he gave the guns to appellant "right around Christmas" in 1994. (V RT 1536-1537.) Shorty's wife, Mariela Fernandez, recalled giving appellant the guns in November 1994. (V RT 1545.)

22. Visalia Police Officer Gary James testified that he was familiar with both appellant and Fernando. (V RT 1582-1583.) Based on his prior contacts, Officer James knew that appellant and Fernando lived at Court and Northwest 5th Street in Visalia in December 1994. (V RT 1583.)

Walter Cypert, Artero's shift supervisor at Poser Business Forms in Visalia, confirmed that Artero was at work during the time of the Casa Blanca shooting. (V RT 1573-1575.) Cypert explained that he supervised approximately 10 employees who worked at the production facility during the second shift. (V RT 1574.) Cypert stated that the company uses a punch card system and that he sees when each employee arrives and leaves work. (V RT 1575.) Artero's punch card, which was signed by Cypert, shows that Artero clocked in at 2:55 p.m. on December 29, 1994, and punched out at 11:03 p.m. that evening. (V RT 1576.) Cypert indicated that he has not experienced any problems with employees punching in for non-present employees. (V RT 1577.) Moreover, Artero worked as a support person and was needed to keep the machines running. (V RT 1576.) If Artero was absent or late Cypert said that he would have noticed because he would have needed to pull another employee off their machine to fulfill Artero's task. (V RT 1575-1576, 1579.)

Defense Case

Appellant presented an alibi defense that he could not have been involved in the Casa Blanca shooting because he was with his wife Claudia and son Marco at the time the shooting occurred picking up Claudia's sister Erika at the TransAmerica Financial Building in Visalia.

Witnesses To The Casa Blanca Market Shooting

Brian Northcutt lived in the Fermersville area about three-quarters of a block from the Casa Blanca Market. (VI RT 1588-1589.) He had been to the store a number of times and was friends with the store's owner. (VI RT 1589, 1593.) On December 29, 1994, Northcutt was sitting at his dining room table looking out the window, from which he could see the store, when he heard a couple of gunshots. (VI RT 1589.) Northcutt saw a man exit the store with a rifle in his hand, turn around, and go back into the store. (VI RT 1589-1590.)

Northcutt then heard another shot and saw the same man exit the store followed by a second man. (VI RT 1590.) Northcutt thought he heard a total of three shots, two shots before the first man exited the store and one shot after he returned. (VI RT 1592.) Northcutt was "pretty far away" and could not tell if the second man was carrying anything in his hands. (VI RT 1591.) The two man were dressed in dark clothing and appeared to have hoods on or something covering their heads. (VI RT 1592.) After exiting the store, the two men walked west on the north side of the road, then cut across the road and got into a car. (VI RT 1590.) Northcutt subsequently called 911.[23] (*Ibid.*) After calling the police, Northcutt walked over to the Casa Blanca Market. (VI RT 1595.) The police arrived three to four minutes later. (VI RT 1596.) Northcutt had already been to the market that day, 30 or 40 minutes prior to the shooting to pick up a pack of cigarettes, beer, and wine. (VI RT 1593.) Northcutt admitted, "I drink a little bit pretty often," and that he had been drinking before he witnesses the incident. (VI RT 1594.)

Later that day, Detective Hilger interviewed Northcutt at the police unit. (VI RT 1740.) Northcutt said he was at the Casa Blanca prior to the shooting to buy white port wine. (VI RT 1741.) Northcutt told Detective Hilger he believed he saw two weapons and that the second subject had a rifle, but that he was not sure. (VI RT 1741-1742.) Northcutt described the first subject as follows: possibly a Mexican adult male; in his 20's; 5'8" to 5'10" tall; wearing black sweat-type shirt with a hood and dark pants; and carrying a rifle with both hands. (VI RT 1743.) Northcutt described the second subject as also possibly a Mexican adult male wearing black clothing, but with a lighter colored hood. (VI RT 1744.)

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23. The parties stipulated that dispatch records reflected the first 911 call was received at 3:27 p.m. and the first deputy arrived on the scene at 3:31 p.m. (VI RT 1745.)

Another witness to the Casa Blanca shooting was Joel Mohr. Mohr was working on the motor of a truck when he heard a commotion at the Casa Blanca Market across the street. (VI RT 1597-1599.) Mohr looked up and saw one man come out of the store and yell to another man, "Come on, hurry up." (VI RT 1599-1601.) Mohr did not see the first man carrying anything, but saw the second man carrying what looked like a rifle. (VI RT 1600.) Mohr saw the second man hold the rifle towards the area where the cash register is located in the store and heard either one or two gunshots. (VI RT 1600, 1607-1609.) Then the second man then exited the store. (VI RT 1600.) The man with the rifle was wearing a dark blue jacket with red on the hood. (VI RT 1603.) Mohr did not notice what the other man was wearing. (*Ibid.*) According to Mohr, neither man was wearing a mask. (VI RT 1609-1610.) He saw both their faces, but explained, "I was so far away that I could never honestly say whether it was this person or that person."[24] (*Ibid.*)

Mohr remembered a copper mid-size car had been parked near the telephone outside the store with two men sitting in the front seat. (VI RT 1601-1603, 1610-1611.) The men in the car were wearing T-shirts and appeared to be older than the two men inside the store. (VI RT 1603-1604.) One of the men inside the car had a mustache and wavy hair.[25] (VI RT 1603.) As the two men exited the store, the car swung around and parked on the side of the road. (VI RT 1601.) The two men ran from the store to the car, hopped in, and the

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24. At trial, Mohr testified that he was 50 yards from the Casa Blanca when he heard the commotion. (VI RT 1598.) However, in his statement given to Detective Hureta on the day of the shooting, Mohr said he was 100 to 150 yards away. (VI RT 1605.) In a later statement to a defense investigator, Mohr said he was 80 to 100 yards away. (VI RT 1606.)

25. Mohr told Detective Huerta that the man with the mustache was the driver of the vehicle. (VI RT 1608.) In contrast, Mohr testified at trial that the man with the mustache was in the passenger seat (VI RT 1603), but later admitted he "could be mistaken as to where he was sitting." (VI RT 1608.)

car sped off. (VI RT 1602.) Mohr ran to try and see the car's license plate, but did not get a good look before it sped off. (*Ibid.*) Mohr then went into the Casa Blanca and found the store clerk lying on the ground. (VI RT 1602, 1604.) He appeared to be dead. (*Ibid.*) Mohr called 911 from the pay phone outside. (VI RT 1604, 1607.) The police arrived about 15 minutes later. (VI RT 1605.)

Appellant's Background

In December 1994, appellant was dating girlfriend Claudia Gutierrez Contreras.[26] (VI RT 1612-1613, 1691.) Claudia lived with her parents and sister Erika at 1050 West Dove Drive. (VI RT 1640-1641.) Appellant was living with his mother, Maria Contreras Lopez, and brother, Fernando, on Northeast 5th Street in Visalia. (VI RT 1704, 1708.) Appellant had a son from a prior relationship with Arcadia Hernandez, Mark Anthony "Marco" Contreras, who was born on December 16, 1993. (VI RT 1613, 1705, 1760.) Arcadia was pregnant with appellant's second child, Jasmine, in December 1994. (VI RT 1614, 1737.) According to Claudia, Marco stayed with appellant for about three weeks in December 1994, from around December 11 until sometime between December 30 and January 1, 1995.[27] (VI RT 1614-1615, 1704-1705.)

According to Claudia, appellant went to her house almost everyday during the month of December and would always bring Marco with him. (VI RT 1615, 1622, 1692, 1706.) Appellant had stopped working in the beginning of December and did not have another job during this time. (VI RT 1615,

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26. Appellant married Claudia while incarcerated, on November 7, 1995. (VI RT 1612.)

27. At trial, the defense presented two pictures, one of Marco (Defense Exhibit K), and one of Marco, appellant, and Claudia (Defense Exhibit L). (VI RT 1755-1756.) The pictures were taken in the Sequoia Mall sometime after Christmas in December 1994. (VI RT 1756.)

1706.) Appellant also did not have a running vehicle during December because his van had broke down "way before Christmas." (VI RT 1616, 1693, 1705-1706.) To get to Claudia's house appellant would either be dropped off or Claudia would pick him up in her car, a gray Oldsmobile Forenza. (VI RT 1616-1617, 1692, 1706-1707.) Claudia was working, but did not drive herself to work. (VI RT 1616-1617) Either her mother, godmother, other relative, or appellant would drop Claudia off and pick her up from work daily. (VI RT 1617, 1622.) After spending the day at Claudia's house appellant would usually go home between midnight and 1:00 a.m. (VI RT 1706-1707.)

Appellant's mother, Maria, testified that Marco stayed at her house for about three weeks in December 1994, from December 11th until the end of the month. (VI RT 1704.) Maria recalled that appellant took care of the baby himself. (VI RT 1705.) Maria reiterated what Claudia said about appellant not working or having a running van during December. (VI RT 1705-1706.) When asked about appellant's friends, Maria said she had never met Artero or Lupe. (VI RT 1702-1703.) She did know Jose, who came around the house "very often." (VI RT 1703.)

In the end of February 1995 or beginning of March 1995, appellant went to Las Vegas to find a job. (VI RT 1629-1630.) He came back to Visalia the week before his arrest in August 1995. (VI RT 1630.) After appellant was arrested, his brother Fernando told his mother, "I have a warrant for my arrest," and disappeared because according to Maria, "He drinks a lot." (VI RT 1708.)

Discovery of The TransAmerica Contract

In January 1996, about a year after the shooting and five months after appellant's arrest, Claudia was looking through some of her sister Patricia Murillo's papers and discovered a loan agreement between Patricia, Patricia's husband Raul Murillo, and the TransAmerica Financial Company. (VI RT 1618-1619, 1621-1622, 1637.) It turned out the contract was signed on

December 29, 1994, the same day as the Casa Blanca shooting. (VI RT 1618.) After finding the contract, Claudia went to appellant's attorney and "let him know what I had found." (VI RT 1637-1638.)

Following discovery of the contract, Claudia remembered that she had been with appellant when the Casa Blanca shooting occurred and thus "there's no way George could have been there." (VI RT 1633.) Claudia admitted, "[T]he only reason I remember is because of the contract." (VI RT 1634.) Claudia said she would not have known that December 29, 1994, was the day she went with appellant to pick up her sister Erika with appellant if it had not been for that contract. (*Ibid.*) After Claudia found the contract she showed it to Erika and told her, "Do you know what that date is?" (VI RT 1652.) Erika replied, "No." (*Ibid.*) Claudia explained, "That's the day that they were accusing George of committing this murder." (*Ibid.*) After seeing the contract, Erika remembered she saw Patricia go into the TransAmerica building one day while she was working there. (*Ibid.*)

Claudia also notified her mother Martina Gutierrez that the shooting was on the same date as the loan contract. (VI RT 1700.) Martina recalled that after they found the contract "then we started remembering everything." (*Ibid.*) Martina explained, "We didn't think that was an important date until this happened with this child, and then we found the contract and we started remembering." (*Ibid.*)

At the time the contract was discovered, Patricia was living in Mexico. (VI RT 1665, 1669.) Martina visited Patricia, told her that appellant had been arrested, and "that it was connected to the TransAmerica loan." (VI RT 1665.) Patricia recalled, "When she [Martina] started to give me the details about the date and about the loan, then I remembered that I had seen them." (VI RT 1665.)

The Alibi Defense

On December 29, 1994, Claudia was dropped off at work by her mother Martina and godmother.[28] (VI RT 1622, 1635, 1698.) Claudia clocked in at 9:02 a.m. (VI RT 1624.) When her shift was close to ending, appellant and Marco arrived to pick her up. (VI RT 1622.) Claudia clocked out at 3:36 p.m. and left with appellant and Marco. (VI RT 1623, 1624.) They went to Claudia's house where Martina was cooking dinner. (VI RT 1623.) Martina asked Claudia and appellant to pick up Claudia's sister Erika from work.[29] (VI RT 1623, 1699.)

Claudia, appellant, and Marco went to the TransAmerica Financial Building at 3130 West Main Street in Visalia to pick up Erika. (VI RT 1623, 1641.) Erika was working as a part-time receptionist at the accounting firm Hocking, Denton, and Palquist. (VI RT 1623, 1641, 1679.) When they arrived at the building, appellant and Claudia saw her sister Patricia and Patricia's husband Raul Murillo taking pictures of the family's Baretta. (VI RT 1623.) Claudia and appellant waived hello, but did not talk to Patricia and Raul who went back inside the building after taking pictures of the Baretta. (VI RT 1623, 1627, 1639.) About 15 to 20 minutes later, around 5:00 p.m., Erika came out and they all went back to the Gutierrez house. (VI RT 1623, 1627, 1644, 1696.) Thereafter, Claudia, appellant, Erika, and Erika's boyfriend watched television all evening. (VI RT 1627-1628, 1651.) Sometime between midnight

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28. In her statement to the defense investigator Claudia could not remember who had taken her to work on December 29, 1994, but after she found the TransAmerica contract "[i]t came together" and she remembered who took her to work that day. (VI RT 1636.)

29. According to Claudia, on days when she worked in the morning, she would pick up Erika in the afternoon. (VI RT 1631.) Claudia said that she and appellant picked up Erika together "a lot" and estimated the number to be more than 10 times. (VI RT 1632-1633.)

and 1:00 a.m. Claudia and Erika drove their boyfriends and Marco home. (VI RT 1628-1629, 1650, 1697.)

Patricia and Raul had gone to the TransAmerica building that afternoon to sign a loan contract to borrow money using the family car, a Baretta, as collateral.[30/] (VI RT 1620-1621, 1654, 1661-1663, 1687-1688, 1695.) Patricia and Raul went inside the building and spoke with loan officer Issac Perez. (VI RT 1663, 1675.) When they went outside to take pictures of the Baretta, Patricia and Raul saw Claudia and appellant sitting in Claudia's car. (VI RT 1664, 1689.) They waived hello, but did not speak to Claudia or appellant. (VI RT 1664.) Patricia and Raul then followed the loan officer back into the building to sign the papers. When they were finished, Claudia and appellant were gone. (*Ibid.*) Patricia did not see Erika at all that day. (VI RT 1664.) The following day, December 30, Patricia returned to the TransAmerica building to sign and pick up the loan check. (VI RT 1667.)

Erika worked for Hocking, Denton and Palmquist from December 1994 to January 1995 as part of a class she was taking for the Tulare County Organization for Vocational Education (TCOVE). (VI RT 1679, 1683.) Erika always got a ride to and from work because she did not have a driver's license. (VI RT 1680, 1693.) One of Erika's work duties was to type invoices. (VI RT 1681.) The room from which she typed had a window the faced the parking lot. (*Ibid.*) Erika recalled appellant came with Claudia to pick her up from work only one time.[31/] (VI RT 1645.) After Claudia told her about the TransAmerica

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30. Patricia testified she went at around 4:00 p.m. to sign the papers. (VI RT 1663.) Loan officer Issac Perez could not recall what time he met with Patricia and Raul because only the date, not the time, is documented. (VI RT 1677-1678.) Issac stated that he usually schedules loan closings for after 2:00 p.m, but has scheduled them before 2:00 p.m. on occasion. (VI RT 1677.)

31. Erika previously told a prosecution investigator that Claudia and appellant picked her up from work a lot. But at trial, Erika could only

contract, Erika knew the date appellant came with Claudia to pick her up must have been December 29. (VI RT 1645, 1647.) Erika recalled seeing Patricia and Raul from an office window while working that day. (*Ibid.*) Erika thought it was unusual for them to be at her building, but did not get their attention. (VI RT 1647, 1654.) About 15 to 20 minutes later, Erika looked out the window again and saw Claudia's Oldsmobile Forenz in the parking lot. (VI RT 1649.) Appellant was in the driver seat and Claudia in the passenger seat. (*Ibid.*) Erika did not see anyone else in the car until she got off work, walked up to the vehicle, and saw Marco in the back seat. (*Ibid.*)

Prosecution's Case-In-Rebuttal

Appellant has two children with Arcadia Hernandez, Marco and Jasmine. (VI RT 1732.) In December 1994, Arcadia lived with her fifteen-year-old sister Elisabeth at their mother's house. (VI RT 1732-1733.) Marco was living with them at their house for the entire month of December. (VI RT 1733.) Both Elisabeth and Arcadia, who was pregnant with Jasmine at the time, stayed home with Marco everyday. (VI RT 1735-1737.) During this time, appellant's mother visited Marco, but appellant never took or cared for his son. (VI RT 1734, 1767.) On December 16, Marco celebrated his first birthday at the Hernandez house; appellant was not at the birthday party. (VI RT 1733, 1738.) Arcadia recalled, "[I]n December, at that time we were splitting up and I was still mad at him. I remember I didn't let him see the baby for his birthday." (VI RT 1765.) For Christmas, appellant and his mom went to Alpaugh and they brought Marco presents, but they never took the baby. (VI RT 1767.) Arcadia confirmed, "The baby wasn't with George in '94. He was with me at my mom's house." (VI RT 1763.)

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remember one day appellant came to pick her up. (VI RT 1656-1657.) Martina said she would often send Claudia and appellant to pick up Erika from work. (VI RT 1699.)

PENALTY PHASE

Prosecution's Case-In-Aggravation

Victim Impact Evidence

Saleh Hassan was married to Alya Saed Hassan for thirty years before he was murdered while working at the Casa Blanca Market. (VII RT 1908.) The couple had three children, Jamal, Farhan, and Ali. (*Ibid.*) The youngest was only 10 years old when his father was murdered. (VII RT 1909.) Saleh worked 16 years and Alya worked two years in order to save up the money to buy the Casa Blanca Market. (*Ibid.*) The Hassan's had owned the market for eight years before Saleh was killed. (*Ibid.*) During those eight years Saleh worked at the store from approximately 7:00 a.m. until 10:00 p.m. daily. (*Ibid.*) The family lived in a trailer parked next to the store. (*Ibid.*)

Alya remarked that she will never remarry following her husband's murder. (VII RT 1910.) None of the family members had any grief counseling after Saleh was killed because Alya did not know the county offered mental health counseling services. (VII RT 1912.) Before the murder both Saleh and Alya worked, but after he was killed Alya had to apply for welfare to pay the family's bills. (VII RT 1911.) When asked how her living conditions had changed after Saleh was killed, Alya replied, "I'm trying to survive by supporting my kids, sending them to school." (VII RT 1910.)

Appellant's Prior Criminal Activity

In August 1994, appellant was in a relationship with Arcadia Hernandez, the mother of his two children. (VII RT 1913, 1955.) Arcadia was living with her mother and two sisters, Maria Elena Torres and Elisabeth Hernandez. (VII RT 1914, 1923.) On August 29, 1994, Maria and Elisabeth were watching baby Marco while Arcadia was working. (*Ibid.*) Appellant came to pick Marco up and take the baby back to his mother's house. (*Ibid.*) Appellant and Arcadia

had been fighting at the time and were mad at each other. (*Ibid.*) When Arcadia got home from work, Maria told her that appellant had come and taken Marco. (*Ibid.*)

Thereafter, Arcadia, Maria, Elisabeth, Maria's husband Ramon, Ramon's brother, Angel, and Maria's eight-month-old son went in a Thunderbird to pick up Marco at appellant's mother's house. (VII RT 1914-1915, 1923, 1926-1927.) Angel parked the Thunderbird at a park located near the house. (VII RT 1916.) Arcadia exited the vehicle and went to get Marco from the house, but appellant did not want to give her the baby. (VII RT 1916, 1923-1924.) Appellant and Arcadia exited the house and were arguing. (*Ibid.*) Elisabeth and Maria then left the vehicle, got Marco, and walked back toward the Thunderbird. (*Ibid.*) They got halfway to the vehicle before appellant came and took Marco back.[32/] (VII RT 1917.) Ramon remembered that appellant saw Angel and became suspicious. (VII RT 1928.) Appellant asked Ramon who the driver was, and Ramon told appellant it was his brother Angel. (*Ibid.*) Elisabeth ended up taking the baby back and then she and Maria got into the Thunderbird. (VII RT 1917, 1924.)

With Marco in the car the group was ready to leave, but Arcadia and appellant were still arguing in front of the house. (VII RT 1916, 1918, 1924.) Maria recalled, "They were arguing and stuff and then all of a sudden we just heard gunshots and then we turned around and it was George." (VII RT 1918.) Appellant was armed with a gun and Maria thought he shot up, but then saw the gun pointed at the vehicle. (*Ibid.*) Ramon saw appellant pull out a gun, point it at the Thunderbird and fire three to four shots. (VII RT 1928-1929, 1932.) Elisabeth saw appellant pull something out of his pants, saw appellant with a

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32. Maria testified that appellant came and took Marco back once, but Elisabeth could not recall him ever taking the baby back after she got him the first time. (VII RT 1917, 1924.)

gun and then heard multiple gunshots.[33] (VII RT 1925.) The vehicle was only seven to eight feet away from appellant when he shot at it. (VII RT 1929.) Arcadia screamed "leave," and Angel, the driver of the vehicle, sped off. (VII RT 1919.)

Angel stopped the car at a store to call the police. (VII RT 1919, 1925, 1931.) City of Visalia Police Officer James Rapozo responded to the call. (VII RT 1955.) Just prior to 10:00 p.m. Officer Rapozo went to North Court Street in Visalia to investigate a report of shots fired around the one thousand block on North Court Street. (VII RT 1956.) At the scene, Officer Rapozo found several people involved in the incident who said their vehicle had been shot at by somebody. (VII RT 1957.) Officer Rapozo found two expended shell casings from a .380 caliber handgun in the roadway in front of 1012 North Court Street. (VII RT 1958.) In the building at 1020 North Court, Officer Rapozo found two holes that appeared to have been made by those two bullets.[34] (VII RT 1963.) It was dark outside and none of the occupants noticed any damage to the vehicle at that time. (VII RT 1919, 1933, 1960.) After speaking to the officer, Angel dropped all the passengers off at the Hernandez house and drove home. (VII RT 1933.) The next day, Ramon's brother Manuel noticed a bullet hole in the Thunderbird's spoiler. (VII RT 1919-1921, 1930, 1932-1933.) No one ever reported finding the bullet hole to

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33. Maria referred to the gun as a "shotgun" at one point in her testimony. (VII RT 1918.) Elisabeth did not get a good look at the gun and was unable to identify what type of gun it was. (VII RT 1925.) Ramon testified appellant used a pistol or handgun. (VII RT 1929.)

34. On April 29, 1996, Officer Eric Grant, an investigator for the district attorney's office, took photographs of the Real Alternative Youth Organization building at 1012 North Court. (VII RT 1935-1936.) This was the site where the Officer Rapozo's report indicated he had found some bullet holes. (VII RT 1935.) Grant found a bullet hole in the front window, 23 to 24 inches from the ground. (VII RT 1937.)

the police. (VII RT 1922, 1932, 1963-1964.)

Defense Case-In-Mitigation

Appellant's Childhood

Appellant was born in Michoacun, Mexico on December 11, 1974. (VII RT 1970; III CT 605.) Appellant was one of 10 children born to Abundio Contreras and Maria Lopez. (VII RT 1973.) Appellant's mother was 13 years old and his father was 18 years old when they got married. (VII RT 1969.) Appellant's parents were together for his entire life and remained married at the time of trial. (VII RT 1968-1969.) During his childhood, appellant's father worked while his mother stayed home to take care of the children. (VII RT 1969.) The children from oldest to youngest are: Gloria, Erma, Pablo, Angelica, Fernando, Monica, Maria, appellant, Jamie and Juanita. (VII RT 1968, 1995.) The family lived in a small town and were neither rich nor poor. (VII RT 1967.) They always had food to eat and lived in a couple of different simple houses. (*Ibid.*)

A few days before he was born, appellant's father beat his mother very badly.[35/] (VII RT 1971.) Appellant's sister Angelica was nine or 10 years old when appellant was born. (VII RT 1969.) Angelica helped raise appellant and was like a second mother to him. (VII RT 1969-1970, 1975.) Appellant was a normal, healthy child. (VII RT 1972.) When appellant was four years old his brother Jamie was born and his sister Angelica, then 14 years old, moved by herself to Los Angeles. (VII RT 1973-1974.)

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35. Sometime between the ages 10 and 14 appellant found out that his mother was beaten before giving birth to him and appellant was angry at his father. (VII RT 1972.) According to his sister Angelica, learning about the incident made appellant believe his father did not love him. (VII RT 1998.) Although appellant's father was always in his life the two were never close. (VII RT 1983-1984.)

Appellant moved to the United States two years later, when he was six years old, with his parents and younger siblings. (VII RT 1967, 1974.) Appellant's mother and father settled down in Visalia, where they have remained ever since. (VII RT 1974, 1976-1977.) Appellant's parents only lived in two different houses in Visalia throughout his childhood. (VII RT 1977.) Angelica and appellant remained close and kept in contact even while Angelica was living in Los Angeles. (VII RT 1975.) Every week or couple of weeks Angelica would visit her family in Visalia. (VII RT 1974.) Angelica moved back in with her parents for about a year when she was 16 years old. (VII RT 1975.) During the year she was in Visalia, Angelica worked in a factory with her mother and other relatives. (VII RT 1977-1978.) After a year, Angelica went back to Los Angeles for work. (VII RT 1977.) Angelica would return to visit once or twice a month and remained very close to appellant. (VII RT 1978, 1980.) Appellant came to Los Angeles and lived with Angelica a couple of times. (VII RT 1979, 1984.)

According to Angelica, their father was never close or affectionate to any of the children. (VII RT 1983.) Appellant's father was a very hard worker and "has always been the provider for the house." (VII RT 1980, 1982.) Appellant's mother was always very affectionate and gentle. (VII RT 1981.) After coming to the United States, appellant's father found it difficult to accept his wife working in the factory, but knew the family needed the money. (*Ibid.*) Angelica recalled that her parents fought "over little things" and would argue frequently. (*Ibid.*) Their father occasionally hit their mother in front of the children. (VII RT 1982, 1998-1999.) Often the children, including appellant, would try and interfere in their parent's arguments. (*Ibid.*)

Louisa Duarte was neighbors with appellant's family since they moved to Visalia from Mexico. (VII RT 2001.) Louisa recalled that as a young boy appellant was eager to learn English and picked up the language basics very

well. (VII RT 2002.) Louisa opined that appellant and his siblings were very respectful and were "good kids." (*Ibid.*)

While growing up in North Visalia appellant frequented a youth facility called the Wittman Center, which was located about a block and a half from his house. (VII RT 1946.) The center is named after Tulare County Sheriff Bill Wittman. (VII RT 1940.) Sheriff Wittman worked with thousands of kids for around 20 years. (VII RT 1950-1951.) Over the years he saw both successes and failures. (VII RT 1951.) As a lieutenant, Sheriff Wittman participated in several youth programs in North Visalia. (VII RT 1941.) In 1986 he opened the 1,400-square-foot Wittman Center facility to provide a variety of activities for kids. (VII RT 1943, 1950.) The center helps mentor "at risk" kids from North Visalia, an area where drugs, poverty, prostitution, and gangs are rampant. (VII RT 1942, 1944, 1951.) Sheriff Wittman was often at the center and took the kids camping or on trips to the beach. (VII RT 1944.)

Sheriff Wittman testified that he had known appellant for over 10 years since meeting him at the center. (VII RT 1945.) Appellant used to come with his brother Jimmy and some other kids to play basketball or work out in the gym. (VII RT 1946.) Sheriff Wittman recalled that appellant appeared to be a good kid, was very likable, and had an outgoing personality. (*Ibid.*) Appellant never gave Sheriff Wittman any trouble and hung out with other kids that "were all about the same, about the same age, all seemed to be nice kids." (*Ibid.*) Sheriff Wittman had met appellant's sisters and mother, who he described as "very nice," but did not know appellant's family very well. (VII RT 1947.) Sheriff Wittman had also met appellant's older brother Fernando who Wittman described as a "bully-type" that had been arrested before. (VII RT 1948.) But, Sheriff Wittman never saw appellant bully anyone. (*Ibid.*) On one occasion, Sheriff Wittman took a few of the kids, including appellant, to his 40-acre ranch to work in his yard. (VII RT 1948-1949.) Sheriff Wittman

offered to pay the kids for their work, but they refused to take his money. (VII RT 1949.)

Even when appellant became a teenager he remained close with Angelica. (VII RT 1986.) Appellant would even introduce Angelica to his friends as his "mom." (*Ibid.*) Angelica has no children herself, but knows appellant's children well because their mother Maria is often caring for Marco and Jasmine. (VII RT 1989.) Angelica recalled that when Marco was born Arcadia "seemed not to care about the baby" because she was young and still wanted to hang out with her friends. (VII RT 1991.) At some point, Maria asked Arcadia whether she wanted to allow her to adopt Marco, but Arcadia told her no and that Marco was her baby. (*Ibid.*) Angelica recalled that appellant and Claudia spent a lot of time with Marco and took him wherever they went. (VII RT 1990, 1992.) Angelica opined that appellant was a very loving father. (VII RT 1990.)

After The Casa Blanca Shooting

After the Casa Blanca shooting, from 1995 to 1996, Angelica was a full-time student at the College of the Sequoias. (VII RT 1988.) She was the first one in her family to go to a university. (VII RT 1996.) Her sisters Maria and Monica went to San Joaquin Valley College, got medical assistant certificates, and work in medical clinics. (VII RT 1996-1997.) Both Maria and Monica are working on obtaining nursing degrees. (VII RT 1997.) At the time of appellant's trial, Angelica was working as an architect and electrical engineer trainer for the Federal Aviation Administration. (VII RT 1988.) Angelica admitted she had "hard times" herself and revealed, "I struggled a lot before getting to this point." (VII RT 1995.) Of her other siblings, Gloria has worked at the same job since she came to the United States, Erma has been a housewife, and Pablo has worked in construction. (VII RT 1995-1996.)

Angelica admitted that appellant has a temper (VII RT 1994), but insisted, "We know in our hearts that he didn't do it. And it is hard for us, for the family." (VII RT 1966.) Angelica also said her mother was very ill and did not sleep or eat. (VII RT 1966, 1987.) Angelica opined that it appeared her mother was "giving up on life." (VII RT 1987.)

Appellant's wife Claudia Contreras, who he met in the eighth grade, testified that she loves and cares for appellant and that they have "been together through a lot." (VII RT 2004-2005.) Claudia indicated she was proud to be appellant's wife in spite of everything. (*Ibid.*) Claudia also urged, "I'm going to be there for him through anything that happens because with him going to prison, I will be here for him." (VII RT 2006.) Claudia said she would maintain a relationship with appellant's children if allowed to do so. (*Ibid.*) When asked how she would handle appellant's death Claudia replied, "If he were put to death, I guess I could just say they could put me to death, too, because that's how I feel. If he's going to go I should go, too." (*Ibid.*)

Sheriff Wittman was shocked when he first found out that appellant was "in this serious trouble." (VII RT 1950, 1954.) The last time he had seen appellant was back in 1993. (VII RT 1952.) Sheriff Wittman never knew that appellant had negative contact with law enforcement, that he had been arrested, or that he had been on probation. (*Ibid.*) Sheriff Wittman admitted he has had experiences in the past where he thought someone was a good kid, but later found out they had engaged in criminal activity. (VII RT 1954.)

Prosecution Rebuttal

Appellant and Arcadia Hernandez's daughter Jasmine was born on February 4, 1995. (VII RT 2015.) Appellant was present when Jasmine was born, but the couple separated after her birth. (VII RT 2016.) Arcadia lived with her mother in Alpaugh after Jasmine was born. (*Ibid.*) From Jasmine's birth in February 1995 until appellant's arrest in August 1995, appellant saw his

daughter twice. (VII RT 2015.) Arcadia got some support from appellant's mother, but appellant never give Arcadia any money to support his two children. (VII RT 2015-2016.)

In October 1991, appellant was attending Midcounty Community School. (VII RT 2017-2018.) Appellant was on juvenile probation for having a pellet gun at school. (VII RT 2019.) As part of his probation he was ordered to complete a certain number of community service hours. (*Ibid.*) Deputy Probation Officer Jerry Speck helped supervise appellant at the community school. (VII RT 2017.) Officer Speck opined that appellant could be a very pleasant young man and was well liked at the school. (VII RT 2019.) Officer Speck recalled that appellant "did real well unless he was angry or got upset about something." (*Ibid.*)

One day, Officer Speck asked appellant to come out of class to complete some work in the kitchen at the community school. (VII RT 2017-2018.) Appellant had been playing a video game or doing something in the class that he did not want to stop doing. (VII RT 2018.) Appellant became upset. (*Ibid.*) Officer Speck informed appellant that the court had ordered him to complete the service hours. (*Ibid.*) Appellant refused to comply and became defiant. (*Ibid.*) As the situation escalated appellant became verbally loud and took a defiant stance. (VII RT 2018-2019.) Officer Speck gave appellant several opportunities to calm down, but he remained defiant. (*Ibid.*) Officer Speck also reminded appellant of the possible consequences of not calming down because he knew that appellant "sometimes has a tendency, when he's angry, to have trouble doing that." (VII RT 2019.) Officer Speck ended up taking appellant into custody for violating his probation by refusing to do his community service hours. (VII RT 2018.) Appellant was placed under arrest and transported to juvenile hall. (*Ibid.*)

Defense Sur-Rebuttal

Victor de Vaca, one of appellant's teachers from Green Acres Middle School, testified that appellant was "pretty much a typical student." (VII RT 2020-2021.) At one point, Victor had gone to a breakfast that was a school reward for appellant. (VII RT 2022.) Victor recalled that appellant seemed respectful, but also knew that appellant was involved in a couple of fights. (*Ibid.*) Victor remembered having to take appellant home after a couple of fights, but it was nothing he considered abnormal. (VII RT 2022-2023.) When asked whether he liked appellant Victor replied, "I like them all." (*Ibid.*)

ARGUMENT

GUILT PHASE ISSUES

On September 26, 1996, the jury found appellant guilty as charged of first degree felony murder (count I) and robbery (count II). (II CT 514-515; VII RT 1895.) In association with count I, the jury found true the special circumstance that the murder was committed in the course of a robbery and the special allegation that appellant personally used a firearm in the commission of the murder. (*Ibid.*) In association with count II, the jury found true the special allegation that appellant personally used a firearm in the commission of the robbery. (*Ibid.*)

I.

THE TRIAL COURT CONDUCTED AN ADEQUATE JURY VOIR DIRE

Appellant contends that he was denied his constitutional rights to due process and a fair, impartial and unbiased jury because the trial court did not conduct an adequate general voir dire of the prospective jurors. (AOB 26, 30-40.) Appellant also argues the court's failure to conduct a general, collective voir dire on general legal principles violated his Eight Amendment right to reliable verdicts in a capital case. (AOB 27.) Accordingly, appellant alleges reversal of his guilt verdict and penalty judgment is required. (AOB 26, 40-42.) On the contrary, the trial court conducted a sufficient inquiry to ascertain whether each prospective juror had any bias or prejudice that would affect his or her ability of making a fair determination of the issues. Therefore, appellant's contention is meritless.

A. Background

On August 27, 1996, jury selection began for appellant's trial. (I CT 14; I RT 100.) After excusing a number of prospective jurors for hardship, the trial

court discussed the jury selection process with the remaining jurors. (V RT 141-146.) The court advised:

> In the first phase of trial, the issue to be decided is whether the defendant is guilty or not guilty of the crimes he is accused of committing. If the jury is convinced beyond a reasonable doubt the defendant is guilty of murder in the first degree, and that the special circumstance of murder in the commission of a robbery is true, then the trial will go into a second phase.

(I RT 143-144.) The court also reminded the jurors that both the People and the defendant have a right to have the case tried by fair-minded, even-handed jurors that will abide by the law. (I RT 144.) The court then briefly discussed the purpose of the juror questionnaire. (I RT 145.) The court explained that after each juror filled out the questionnaire, a schedule would be arranged where five jurors would be called into the courtroom each hour to explore the issues addressed in the questionnaire. (I RT 146.) The court also informed the jurors that both attorneys and the court will ask questions during the sequestered meetings "about additional areas concerning your ability to be fair and impartial jurors in this case." (*Ibid.*) Afterwards, each prospective juror was given a 14-page juror questionnaire to fill out, which asked 86 questions.[36/] (I RT 147, 192.)

Between the two panels, a total of 137 prospective jurors filled out the questionnaire. (I RT 194.)[37/] The questionnaire asked jurors about their background, education, personal circumstances, employment, marital status, children, child rearing practices, family background, administration of justice

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36. On August 28, 1996, the court went through the same advisements with the second panel of prospective jurors before handing them the questionnaire to fill out prior to the individual questioning sessions. (I RT 150-193.)

37. Copies of the Juror Questionnaires filled out by each prospective juror are contained in the Clerk's Transcript on Appeal Amended Juror Questionnaires, which will hereafter be referred to as "Juror Questionnaire CT."

experience, affiliations and interests, drugs, publicity, views on the death penalty, bias, and on whether they knew any of the witnesses or court personnel. (See Juror Questionnaire CT 1-210 [questionnaires for the sitting and alternate jurors].) Jurors were asked whether they had formed or expressed any opinion as to the guilt or innocence of appellant. (Question No. 64; Juror Questionnaire CT 8, 22, 36, 50, 64, 78, 92, 106, 120, 134, 148, 162.) The jurors were asked on the topic of burden or proof and presumption of innocence, "Do you believe that a defendant in a criminal case should have to prove he or she is not guilty?" (Question No. 79; Juror Questionnaire CT 11, 25, 39, 53, 67, 81, 95, 109, 123, 137, 151, 165.) Question number 79 also informed jurors that the United States and California Constitutions give every defendant in every criminal case the privilege not to testify at his or her trial and that the law requires each juror shall not hold the fact that a defendant does not testify against him or her. (*Ibid.*) The questionnaire then inquired whether each juror agreed with the law, was able to follow this law, and whether they believed a defendant must testify before he or she can be found not guilty. (*Ibid.*) Finally, jurors were asked, "Is there any reason (even if you must tell the Court in private) that you feel you may be biased in this case?" (Question No. 85; Juror Questionnaire CT 12, 26, 40, 54, 68, 82, 96, 110, 124, 138, 152, 166.)

On September 5, 1996, the individual juror interviews began. (I RT 196.) The court started almost every sequestered voir dire session with an advisement on the burden of proof and requirement that the jury find appellant guilty beyond a reasonable doubt. (See I RT 206 [Juror No. 3], 310 [Juror No. 5]; II RT 408 [Juror No. 1], 463 [Juror No. 9]; III RT 622 [Juror No. 8], 687 [Alternate Juror No. 1], 721 [Alternate Juror No. 3], 750 [Juror No. 7]; IV RT 893 [Juror No. 11], 947 [Juror No. 10], 1068 [Juror No. 2], 1075 [Juror No. 6], 1108 [Alternate Juror No. 2], and 1114 [Juror No. 12].) The trial court made further inquiry on these concepts when necessary. (IV RT 863-864, 1011-1012,

1084-1085.) Where concerns arose about whether a juror could understand and apply these basic legal concepts, the court explained the concepts in further detail and made sure each juror would apply these basic legal concepts in appellant's case. (IV RT 864, 1012, 1086.)

Defense counsel and the deputy district attorney were given ample opportunity to question each juror on the standard of proof and on the reasonable doubt standard. Defense counsel questioned the following prospective jurors on these topics: J. Garvin (I RT 379); P. Betts (II RT 424-425); D. Kelly (II RT 498-501); B. Cosart (II RT 554-555); A. Fulleylove (II RT 559-561); E. Baskovich (II RT 569-570); J. Rico (II RT 589); K. Yasuda (III RT 671-673); E. Goodman (III RT 738); K. Haggard (III RT 780); D. Bigelow (IV RT 865-867); D. Kennedy (IV RT 925-927); R. Marin (IV RT 1016-1018); L. Bowron (IV RT 1031); L. Byars (IV RT 1129); J. Rangel (IV RT 1148-1150); E. Brennan (IV RT 1160-1161); and J. Baker (IV RT 1196-1197). The prosecutor also questioned the following jurors on these concepts: J. Garvin (I RT 385); R. Ross (III RT 620-621); K. Haggard (III RT 780-781); D. Kennedy (IV RT 927-928); and R. Marin (IV RT 1016-1018).

Of the jurors who were questioned on these fundamental legal concepts, three jurors were excused for cause because they were unable to assure the court that they could follow these legal principles: D. Kelly (II RT 498-503); B. Cosart (II RT 554-555); and D. Kennedy (IV RT 925-928). Prospective juror D. Kelly was questioned extensively by defense counsel on her belief that a defendant must prove his innocence. (II RT 498-503.) Defense counsel explained, "[T]he rule in a criminal case [is] that the prosecution has the burden of proof. They must prove their case beyond a reasonable doubt," and asked Kelly, "If the law said to you that you would have to give a defendant the benefit of any reasonable doubt, could you actually follow the law and actually require that the prosecutor had proven the case beyond a reasonable doubt, even

if you don't hear from the defendant?" (II RT 498, 501.) The court then explained the concepts of burden of proof, presumption of innocence, and reasonable doubt. (II RT 501-503.) After explaining these basic concepts, the court excused juror D. Kelly for cause because she was unable to assure she would be able to apply these general principles. (II RT 503.)

Furthermore, a couple of the jurors that sat on appellant's jury (Juror No. 4 and Alternate Jurors Nos. 1 and 2) were questioned during their interviews on the legal concepts on standard of proof, reasonable doubt, and presumption of innocence. After discussing her prior jury service, defense counsel asked juror number 4, "Do you recall that, that the defendant must receive the benefit of any reasonable doubt?" (IV RT 1039.) Juror number replied, "Yes." (*Ibid.*) Defense counsel then explained, "That's the same thing in this case. This is a criminal case," and inquired, "You understand the prosecutor has to prove this case beyond a reasonable doubt?" (IV RT 1039-1040.) Juror number 4 against replied, "Yes," and assured counsel she did not believe she had a problem with these concepts. (IV RT 1040.) Defense counsel also asked juror number 4 about whether she understood that a defendant has a constitutional right not to testify and juror number 4 assured counsel she did not have a problem with this concept either. (IV RT 1041.) Thereafter, defense counsel again told juror number 4 "the prosecution has to prove its case beyond a reasonable doubt, with the defendant not being required to produce anything, you don't have a problem with that?" (IV RT 1042.) Juror number 4 guaranteed counsel once against that she could follow this rule. (*Ibid.*)

Alternate juror number 1 was asked by defense counsel about her beliefs on whether a criminal defendant should have to prove he or she is not guilty, as asked in question 79 on the questionnaire. (III RT 692-693.) Alternate juror number 2 was asked by defense counsel about his response to question 79, whether he believed a defendant in a criminal case should have to prove that he

is not guilty. (IV RT 1112.) Alternate juror number 2's response had been,"Yes," and he explained, "Because prosecution is trying to prove he/she is guilty and he/she should be able to defend himself/herself as best as possible." (Juror Questionnaire CT 193.) Defense counsel asked alternate juror number 2 a number of questions during his interview to insure that he knew that a defendant does not have to put on any evidence and that the burden is on the prosecution to prove the defendant's built beyond a reasonable doubt. (IV RT 1112-1113.)

The jurors were also questioned during the individual interviews on their ability to follow the court's instructions. (See I RT 301-302 [E. Mauvis], 325 [G. Gilbert], 340 [R. Sasaki], 349 [S. Mohar], 366-371 [J. Lindsey], 375-376 [J. Garvin]; II RT 588-590 [J. Rico]; III RT 778-780 [K. Haggard]; IV RT 916 [T. Peer], 952 [Juror No. 10]; 985-987 [D. Luiz], and 1096-1097 [J. Baker].)

Where relevant, the court, prosecutor, and defense counsel questioned jurors about their prior jury service. Defense counsel questioned juror L. Williams about her prior jury service asking her, "In [question] 39, your prior jury experience, you indicated that you actually enjoyed the one-day chance to be part of the system. Glad it was fairly straight forward. I'm just curious about what you would mean by straight forward?" (I RT 269.) Williams explained her prior service was on a DUI case and "it was fairly obvious that we had to rule one way on one thing and that they did not prove beyond a reasonable doubt the other part." (I RT 269-270.) Throughout the rest of the interviews defense counsel asked similar questions about the following jurors prior service: H. Robello (I RT 287-288); R. See (II RT 454-455); J. Mellow (II RT 505); J. Rico (II RT 587-588); R. Browne (II RT 596); T. Culotta (III RT 663-664); R. Pittenger (III RT 701); B. Lee (III RT 716-717); Juror No. 7 (III RT 752); K. Haggard (III RT 773); L. Ruddick (III RT 797); P. Replogle (IV RT 857); M. Morales (IV RT 873); Juror No. 11 (IV RT 896-897); Juror No.

10 (IV RT 949); R. Santellan (IV RT 969-970); Juror No. 4 (IV RT 1039); N. Volosin (IV RT 1062-1063); E. Dunn (IV RT 1096); Juror No. 12 (IV RT 1117-1118); L. Byars (IV RT 1127-1128); and J. Rangel (IV RT 1147-1148). The prosecutor questioned one juror on her prior jury service, K. Pena. (III RT 810.)

After sequestered voir dire was completed defense counsel requested additional general voir dire on the burden of proof and presumption of innocence. (IV RT 1224.) The court told counsel, "We did a voir dire. I don't know why I need to do any more." (*Ibid.*) Despite its hesitation, the court agreed to read CALJIC No. 0.50 to the prospective jurors and find out if any of them had problems following the general law on reasonable doubt and burden of proof. (IV RT 1225.)

When jury selection resumed, the court informed the prospective jurors that the "next thing I want to briefly go over, and I think I talked to most of you during your individual sessions, is the burden of proof here." (V RT 1227-1228.) The court advised the jurors as follows:

> The defendant has pleaded not guilty to these charges. Therefore, some of us have brought up the fact that the defendant needs to prove his innocence because you want to hear both sides and weight.
>
> But, in a criminal trial, the burden of proof is on the prosecuting agency. It is on the district attorney's office, representing the People. The People have to prove this case beyond a reasonable doubt. The defendant has no burden to prove anything.
>
> I want you to, as we go through this, remember that the People have the burden of proving this case beyond a reasonable doubt. And the purpose of this trial, as in any criminal trial, is to prove the People have proved their case beyond a reasonable doubt. And if you have found, at the end of the case, you think the People have proved their case beyond a reasonable doubt, you vote guilty. And if you have not been proved or don't feel that the proof has been satisfactorily shown, then you vote not guilty. This is the case. I just want to make sure we are all clear on that.

(V RT 1228-1229.) After the court was finished advising the prospective jurors, defense counsel never requested a more specific advisement or any additional voir dire on the subject. Instead, the attorneys began exercising their peremptory challenges following the court's final advisement on the jury selection process. (V RT 1229-1231.) The defense exercised seven peremptory challenges. (V RT 1231-1240.) The People exercised nine peremptory challenges. (*Ibid.*) Thereafter, the 12 selected jurors were sown to try appellant's case and the guilt phase of the trial commenced. (V RT 1240.)

B. Discussion

Appellant contends that the trial court failed to conduct an adequate voir dire regarding "essential legal concepts designed to probe potential bias." (AOB 30.) Specifically, he claims the court erred in failing to conduct a collective voir dire on general legal principles. (AOB 27.) As a result, appellant claims his constitutional rights to due process, a fair trial with an impartial jury, and a reliable guilt verdict and capital sentencing were violated and that his guilty verdict and penalty judgment must be reversed. (AOB 30-42.) Appellant's contention is meritless.

Preliminarily, because appellant failed to object or suggest modifications to the questionnaire, he has forfeited any challenge to any other aspect of its contents. (*People v. Avena* (1996) 13 Cal.4th 394, 413.) Moreover, appellant's claim that the trial court inadequately examined prospective jurors for bias and prejudice is waived by his failure to challenge the jurors for cause or with a peremptory. (*People v. Hart* (1999) 20 Cal.4th 546, 589.) In any event, on the merits, no basis for reversal appears.

The goal of voir dire is to find 12 fair-minded jurors who will impartially evaluate the case. (*People v. Hoyos* (2007) 41 Cal.4th 872, 907, fn. 19.) The right to voir dire the jury is not constitutional, but is a means to achieve the end of an impartial jury. (*People v. Chatman* (2006) 38 Cal.4th 344, 536; *People*

v. Robinson (2005) 37 Cal.4th 592, 613.) Voir dire performs a critical function in assuring the criminal defendant that his or her Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. (*People v. Bolden* (2002) 29 Cal.4th 515, 538.) There is no constitutional right to any particular manner of conducting the voir dire and selecting a jury so long as such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries are not transgressed. (*Robinson,* at p. 613.)

The trial court has a duty to restrict voir dire within reasonable bounds to expedite the trial. (*People v. Avila* (2006) 38 Cal.4th 491, 536.) Trial judges are advised to closely follow the language and formulae for voir dire recommended by the Judicial Council to ensure that all appropriate areas of inquiry are covered in an appropriate manner. (*People v. Bolden, supra,* 29 Cal.4th at p. 538.) Standard 4.30 of the California Standards of Judicial Administration applies in all criminal cases and provides, "The trial judge's examination of prospective jurors in criminal cases should include the areas of inquiry listed below and any other matters affecting their qualifications to serve as jurors in the case." The enumerated topics include the following: physical and time constraints affecting prospective jury service; bias, prejudice, and beliefs affecting jury service; juror acquaintance with the defendant, defense counsel, the prosecutor, and prospective witnesses; prior knowledge of the case; financial or personal interest in the outcome of the case; prior jury service; criminal victimization of a prospective juror or a person in a significant personal relationship with the prospective juror; and criminal investigation of a prospective juror or a person in a significant personal relationship with the prospective juror. (Cal. Stds. Jud. Admin., § 4.30(b).)

As to reasonable doubt, Standard 4.30(b) states in pertinent part:

> (15) The fact that the defendant is in court for trial, or that charges have been made against (him)(her), is no evidence whatever of (his)(her) guilt. The jurors are to consider only evidence properly received in the courtroom in determining whether the defendant's guilt has been proved beyond a reasonable doubt. The defendant has entered a plea of ''not guilty,'' which is a complete denial, making it necessary for the People, acting through the district attorney, to prove beyond a reasonable doubt the case against defendant. If the evidence does not convince you of the truth of the charges beyond a reasonable doubt, the defendant is entitled to a verdict of not guilty.

Group voir dire may be determined to be impracticable when, in a given case, it is shown to result in actual, rather than merely potential, bias. (*People v. Vieira* (2005) 35 Cal.4th 264, 287.)

This Court has recognized that the trial court is in the best position to assess the amount of voir dire required to ferret out latent prejudice and to judge the responses. (*People v. Robinson, supra,* 37 Cal.4th at p. 617.) This is because the trial court is in the unique position to assess demeanor, tone, and credibility first-hand factors of critical importance in determining the attitude and qualifications of potential jurors. (*Uttecht v. Brown* (2007) 551 U.S. 1, 127 S.Ct. 2218, 2224; *People v. DePriest* (2007) 42 Cal.4th 1, 21.) Accordingly, the trial court is given wide latitude to determine how to conduct the voir dire. (*Mu'Min v. Virginia* (1991) 500 U.S. 415, 424; *People v. Tafoya* (2007) 42 Cal.4th 147, 168.) The trial judge's exercise of discretion in conducting voir dire is entitled to "considerable deference" on appeal. (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 189; *DePriest,* at pp. 20-21; *People v. Ramos* (1997) 15 Cal.4th 1133, 1157; *People v. Wash* (1993) 6 Cal.4th 215, 253; *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1313). The failure to ask specific questions is reversed only for abuse of discretion, which is found if the questioning is not reasonably sufficient to test the jury for bias or partiality. (*People v. Cardenas* (1997) 53 Cal.App.4th 240, 247; *People v. Chaney* (1991)

234 Cal.App.3d 853, 861, citing *United States v. Jones* (9th Cir. 1983) 722 F.2d 528, 529; *United States v. Baldwin* (9th Cir. 1979) 607 F.2d 1295, 1297.) Finally, "Unless the voir dire conducted by the court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal. [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 661.)

Here, appellant has failed to make the requisite showing. Even if appellant's claim is properly before the Court, the general voir dire was adequate. As noted above, appellant used only seven peremptories against prospective jurors. (V RT 1231-1240.) "The failure to exhaust peremptory challenges is 'a strong indication "that the jurors were fair, and that the defense itself so concluded."'" (*People v. Robinson, supra,* 37 Cal.4th at p. 619, citation omitted.) Here, appellant makes no claim that any of the chosen jurors were actually biased against him. "'A party's failure to exercise available peremptory challenges indicates relative satisfaction with the unchallenged jurors. Having so indicated in this case, defendant cannot reasonably claim error.'" (*People v. Hart, supra*, 20 Cal.4th at p. 589, citing *People v. Morris* (1991) 53 Cal.3d 152, 185.)

Appellant also acknowledges that "the court then had the prospective jurors complete a 14-page juror questionnaire that asked 86 questions," and that "the court did not restrict counsel voir dire" (AOB 27, 38). However, appellant claims that "nothing in the record suggests that counsel was advised that he should examine the jurors regarding all aspects of bias because the court was not intending to conduct any general voir dire." (AOB 39.) Appellant's claim overlooks the court's stated purpose in having the jurors fill out such a lengthy questionnaire. The court explained prior to the individual interviews:

> The purpose for the questionnaires, it has been our experience that if the jurors take the time to fill out the questionnaires fully and completely and to the best of their ability, then what we're going to do,

> I'm going to have then xeroxed and give a copy to the district attorney and a copy to the defense attorney and then they'll have the opportunity to study those questionnaires. And once we get you in for the questioning session, the attorneys are going to know most of the issues that they are going to cover anyway, so the questionnaires makes it go much more quicky and smoothly.

(I RT 147.) Thus, it was clear from the beginning of jury selection that the voir dire would not be lengthy because the questionnaires had provided the attorneys with most of the relevant information they needed regarding the prospective jurors. After the questionnaires were filled out by the jurors and reviewed by counsel, both sides were allowed to conduct voir dire on any proper subject. Moreover, the court repeatedly emphasized the concepts of reasonable doubt and burden of proof. (See I RT 206 [Juror No. 3], 310 [Juror No. 5]; II RT 408 [Juror No. 1], 463 [Juror No. 9]; III RT 622 [Juror No. 8], 687 [Alternate Juror No. 1], 721 [Alternate Juror No. 3], 750 [Juror No. 7]; IV RT 893 [Juror No. 11], 947 [Juror No. 10], 1068 [Juror No. 2], 1075 [Juror No. 6], 1108 [Alternate Juror No. 2], and 1114 [Juror No. 12].) During the interviews, the court and counsel were given amply opportunity to question the jurors on these concepts where they felt probing was necessary. (I RT 379, 385; II RT 424-425, 498-501, 554-555, 559-561, 569-570, 589; III RT 620-621, 671-673, 738, 780-781; IV RT 863-867, 925-928, 1011-1012, 1016-1018, 1031, 1084-1086, 1129, 1148-1150, 1160-1161, 1196-1197.)

Furthermore, as this Court stated in *Holt*:

> Here, unlike *Mu'Min*, the inquiry was not conducted by the judge alone. Both sides were afforded unlimited opportunity to inquire further into the views of the prospective jurors and to probe for possible hidden bias and took advantage of that opportunity. The voir dire conducted in this case covered substantially all of the areas of inquiry in the Standards, and followed the completion by each prospective juror of a questionnaire that covered an even broader range of topics. Those inquiries were supplemented by additional questioning of the jurors by counsel. Unless the voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair,

the manner in which voir dire is conducted is not a basis for reversal [Citiation].

(*People v. Holt, supra*, 15 Cal.4th at p. 661.) The trial court here placed "reasonable limits" on voir dire questioning which was within the "judge's sound discretion." (Cal. Code of Civ. Proc., § 222.5.) The court could reasonably conclude that it was sufficient to inform the jurors of the general legal principles both before they filled out their questionnaires (I RT 143-144), and following the sequestered questioning sessions (V RT 1227-1229). Moreover, the questionnaire itself asked jurors whether they thought a criminal defendant should have to prove he or she is not guilty. (Question No. 79; Juror Questionnaire CT 11, 25, 39, 53, 67, 81, 95, 109, 123, 137, 151, 165.) The court and counsel were freely able to question the jurors about their ability to hold the prosecution to its burden of proof. Finally, there is no indication here that any prospective juror was unaware of, or unable to apply, the of the concepts of reasonable doubt, burden of proof, and the presumption of innocence. The court need not question the jury on legal principles unless they are so controversial that they are likely to invoke strong resistance to their application. (See *People v. Johnson* (1989) 47 Cal.3d 1194, 1224-1225.) Again, there is nothing in the record which shows that the jury here would have problems applying these general legal principles to appellant's case.

Even if the voir dire examination was flawed, appellant has failed to demonstrate any reversible error. The right to voir dire is not a constitutional right, but is a means to achieve the end of an impartial jury. (*People v. Chatman, supra,* 38 Cal.4th at p. 536; *People v. Robinson, supra,* 37 Cal.4th at p. 613.) In the present case, when viewing the voir dire record as a whole, appellant has failed to show that the voir dire was inadequate and that the resulting trial was fundamentally unfair. (*People v. Stewart* (2004) 33 Cal.4th 425, 458.) Here, the voir dire on general legal principles was covered by the court's general advisements, the jury questionnaire, and in the sequestered voir

dire interviews. The trial judge exercised its discretion in conducting voir dire in a manner that did not cause a miscarriage of justice. Nothing in the record establishes that the jury did not constitute a fair and impartial jury, or that the jury-selection process prejudiced appellant in any way. Reversal of the judgment is required only if the voir dire was "so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair." (*People v. Holt, supra,* 15 Cal.4th at p. 661; See also *Robinson*, at p. 621; *People v. Bolden, supra,* 29 Cal.4th at p. 538.) As appellant has failed to make such a showing here, any error does not warrant reversal.

In sum, the general voir dire conducted by the trial court was adequate. Appellant had ample opportunity to inquire into all subjects about which he now complains. "If defendant felt the court's voir dire was inadequate, he could have probed more deeply when given the opportunity to question each prospective juror." (*People v. Holt, supra*, 15 Cal.4th at p. 663.) Appellant's claims fail to establish error, let alone reversible error. Accordingly, his contentions should be rejected.

II.

THE COURT PROPERLY INSTRUCTED THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION ALLEGED A VIOLATION OF SECTION 187, WHICH DEFINES ALL FORMS OF MURDER, AND THUS SPECIFICATION OF THE DEGREE OR FACTS NECESSARY TO DETERMINE THE DEGREE WAS UNNECESSARY

Appellant's second contention is that the trial court erred in instructing the jury on first degree premeditated murder and first degree felony murder in violation of section 189 because the information charged him with only second degree malice murder in violation of section 187.[38] (AOB 43-50.) Accordingly, appellant argues his rights to due process, trial by jury, and a fair trial were violated (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17), and his first degree murder conviction must thereby be reversed. (AOB 49-50.) Appellant's argument is contrary to this Court's clearly established precedent and therefore must be rejected as unmeritorious.

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38. Section 187 provides in relevant part that, "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Section 189 defines the degrees of murder as follows:

> All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

The information charged appellant in count I with the murder in violation of section 187, subdivision (a). (II CT 300-301.) The information alleged that appellant "did willfully, unlawfully, and with malice aforethought murder SALEH BIN HASSAN, a human being." (II CT 301.) The information also alleged the special circumstance that the murder was committed by appellant while he "was engaged in the commission of the crime of ROBBERY, within the meaning of Penal Code section 190.2(a)(17)." (*Ibid.*)

The jury was instructed that appellant was accused in count I of the information of having committed the crime of murder, a violation of section 187, and that "[e]very person who unlawfully kills a human being during the commission or attempted commission of robbery is guilty of the crime of murder in violation of Section 187 of the Penal Code." (CALJIC No. 8.10; II CT 452; VI RT 1784.) The jury was also instructed:

> The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime.
>
> The specific intent to commit robbery and the commission or attempted commission of such a crime must be proved beyond a reasonable doubt.

(CALJIC No. 8.21; II CT 453; VI RT 1784-1785.) The jury convicted appellant of first degree felony murder. (II CT 514; VII RT 1895.)

Appellant argues it was error to instruct the jury on first degree murder because the information charged him only with murder in violation of section 187, subdivision (a), which he characterizes as a statute defining second degree murder. Accordingly, appellant claims the court lacked jurisdiction to try him for first degree murder. (AOB 43.) Appellant recognizes that this Court has repeatedly held that an information charging murder in violation of section 187 is sufficient to support a first degree murder conviction. (AOB 45-46.) Despite

this Court's previous findings to the contrary, appellant claims the rationale of these cases is irreconcilable with the holding of *People v. Dillon* (1983) 34 Cal.3d 441, 472. (AOB 46.)

This Court has long held that an indictment or information for murder is not required to state the degree of murder charged since an indictment or information for murder charges all offenses necessarily included in that crime. (*People v. Kelly* (2007) 42 Cal.4th 763, 791-792; *People v. Carey* (2007) 41 Cal.4th 109, 131-132; *People v. Geier* (2007) 41 Cal.4th 555, 591; *People v. Hughes* (2002) 27 Cal.4th 287, 369; *People v. Golston* (1962) 58 Cal.2d 535, 539; *People v. Mendez* (1945) 27 Cal.2d 20, 23-24.) A defendant can properly be convicted of felony murder if simply charged with murder, defined as killing another with malice aforethought. (*People v. Witt* (1915) 170 Cal. 104, 107-108.) Appellant here was charged with murder and was convicted of the same. Therefore, under *Witt*, his conviction for murder, even under a felony murder theory, is proper.

In *Dillon*, a case relied upon by appellant, the defendant challenged the constitutionality of the felony murder doctrine, stating that it relieved the duty of the prosecutor to prove malice beyond a reasonable doubt by creating a presumption of malice. (*People v. Dillon, supra*, 34 Cal.3d at p. 472.) This Court ruled that malice was not an element of felony murder, so that malice did not need to be proven at all. (*Id.* at pp. 475-476.) Thus, this Court noted, "[T]he two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all." (*Id.* at pp. 476-477, fn. omitted.) *Dillon* held that section 189 is a codification of the first degree felony-murder rule. (*Id.* at pp. 471-472.) Because there is only a

single statutory offense of first degree murder (see, e.g., *People v. Geier, supra*, 41 Cal.4th at p. 591), appellant reasons that the relevant statute must be section 189, not section 187, which he construes as a definition of second degree murder.

This Court recently addressed the very issued raised by appellant here. (*People v. Harris* (2008) 43 Cal.4th 1269.) In *Harris*, the defendant argued the trial court erred in instructing the jury on first degree murder because the information charged him only with murder in violation of section 187, subdivision (a), which he characterized as a statute defining second degree murder. Accordingly, the defendant claimed the court lacked jurisdiction to try him for first degree murder. (*Id.* at p. 1294.) As appellant admits in his brief, the defendant in *Harris* also recognized that this Court has repeatedly held that an information charging murder in violation of section 187 is sufficient to support a first degree murder conviction. (*People v. Hughes, supra,* 27 Cal.4th at p. 369, citing cases; see also *People v. Geier, supra*, 41 Cal.4th at p. 591; *People v. Carey, supra,* 41 Cal.4th at pp. 131-132.) Despite these opposite holdings, both Harris and appellant claim the rationale of these cases is irreconcilable with the holding of *Dillon*. (AOB 46; *Harris,* at p. 1294.)

In *Harris*, this Court hold that the defendant misread both *Dillon* and the statutes, sections 187 and 189, reasoning:

> *Dillon* made it clear that section 189 serves both a degree-fixing function and the function of establishing the offense of first degree felony murder. It defines second degree murder as well as first degree murder. Section 187 also includes both degrees of murder in a more general formulation. Thus, an information charging murder in the terms of section 187 is sufficient to charge murder in any degree.

(*People v. Harris, supra*, 43 Cal.4th at p. 1294, citations omitted.) Appellant has provided no basis upon which this Court should disregard its prior rulings finding that an accusatory pleasing charging a defendant with murder does not need to specify the theory of murder upon which the prosecution intends to rely.

Accordingly, appellant's argument that the trial court erred in instructing the jury on first degree murder based on the alleged charging deficiency lacks merit.

Appellant also asserts that the information failed to allege all the facts necessary to justify the death penalty, making it defective under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476. (AOB 48.) This claim too is unmeritorious because the information included special circumstance allegations that fully supported the penalty verdict. (II CT 301; *People v. Harris, supra*, 43 Cal.4th at p. 1295.)

In sum, the information charged appellant with murder in violation of section 187, subdivision (a), and alleged the special circumstance that the murder was committed during the course of a robbery. As discussed above, a defendant may be convicted of first degree murder where the information charged murder under section 187. Accordingly, appellant's argument that the trial court erred in instructing the jury on first degree murder should be rejected.

III.

THE COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE DEFENSE'S REQUEST TO ADMIT LUPE'S REPORT CARDS

Appellant contends the trial court improperly restricted defense counsel's ability to impeach witness Lupe Valencia's credibility with his school report cards. Appellant alleges that such error was prejudicial and violated his Sixth, Eighth and Fourteenth Amendment rights, and that as a result his guilt convictions, special circumstance finding and death judgment should be reversed. (AOB 51-63.) The trial court properly found that the report cards were not relevant and dealt with a collateral matter. (V RT 1344-1345, 1359.) Accordingly, its decision to limit defense counsel's impeachment to exclude admission of the report cards was proper and certainly did not rise to the level of federal constitutional error.

A. Background

On cross-examination, defense counsel asked Lupe Valencia about whether he was upset after the night of the Casa Blanca shooting. (V RT 1340.) Lupe testified he was scared and bothered by the fact that a man was killed that afternoon. (*Ibid.*) Lupe said he never had an experience like that before, but that he never thought about telling the police or anyone about what had happened. (*Ibid.*) Lupe went back to school at Exeter High School after Christmas break, in January 1995. (*Ibid.*) Lupe said he had problems concentrating and he "didn't do good with my grades or anything." (V RT 1341.) When asked whether he did better or worse than before the shooting, Lupe indicated that he did "a little worse." (*Ibid.*) Lupe said he did not feel any pressure to come forward and that there was no talk about what would happen if the they got caught. (V RT 1342.) As the months passed, the shooting bothered Lupe less. (*Ibid.*) Defense counsel inquired, "And so then did you

start getting to where you did better in school? (*Ibid.*) Lupe agreed that after a couple of months, "Yeah. I could concentrate more." (*Ibid.*)

In August 1995, Lupe gave a statement to the police. (V RT 1343.) Lupe replied that it was not hard to tell the police what had happened. (*Ibid.*) Lupe admitted that he felt better and that he could concentrate better after giving his statement. Defense counsel then asked, "And so you were doing better in school?" Lupe acknowledged, "Yeah." (*Ibid.*) Defense counsel then began to question Lupe on his school report cards. (*Ibid.*)

The prosecutor requested a side bar whereupon defense counsel argued that Lupe's report cards showed he received grades inconsistent with his testimony. (V RT 1344.) Defense counsel said he wanted to present the report cards and ask Lupe what happened to cause his grades to go from failing from August 1994 to January 1995, then to passing from January 1995 to August 1995, and then back to failing from August 1995 until January 1996. (*Ibid.*) The prosecutor objected arguing that Lupe's grades were irrelevant and that, "We don't know what else is happening in his life, either. He testified as to how he felt about it. I don't know how relevant that is." (*Ibid.*) The court determined:

> It is irrelevant what his grades were. It has no basis on any rationale basis to tell whether or not he was feeling good or bad because of this incident. It is way, way out. And also, it is impeachment on collateral issues, so I'm not going to allow it.

(V RT 1344-1345.)

Despite the court's refusal to admit the report cards, defense counsel continued to cross-examine Lupe on his school record and how it may have related to his feelings. Defense counsel engaged in the following inquisition:

> Q. Lupe, is it possible that from the time that the incident happened until the time that you actually told the police what happened, that you were not really bothered too much and you were not distressed about what happened, because you really weren't there, you were not really at the little market the day that the incident happened?

A. No

Q. Okay. And is it possible that from the time you told the police that you were out there, that you were involved, that from that time or the next period of time that you were in school, that you were really bothered and distressed because you had actually claimed to be involved in that incident when you really weren't?

A. No

(V RT 1345.)

Thereafter, the court held a bench conference wherein defense counsel again argued that he should be able to use Lupe's report cards to impeach his testimony on his grades. (V RT 1358.) Defense counsel proposed that he could use the report cards to show that Lupe's grades got better after the shooting and then got worse after he gave his statement to the police. (*Ibid.*) He wanted to use this testimony to prove that "young people have problems with school, that's one of the ways it shows when a problem's going on in their life." (*Ibid.*) Defense counsel attested it would not take a lot of time and that he simply wanted to ask Lupe to "explain why his grades actually went up from the time of the incident until he told the police about this, and then instead of what would be relief and doing better then, as he said, doing even better in school, that his grades dramatically dropped in school thereafter." (*Ibid.*)

In opposition, the prosecutor pointed out that Lupe's grades are not relevant. (V RT 1359.) Additionally, there was no other evidence as to what else was going on in Lupe's life during this time. (*Ibid.*) The prosecutor noted, "We certainly don't know what his family life is or what he is going through or whether he had the flu all semester. I think the relevance is not present and I don't think anything [exists] to substantiate counsel's personal theories." (*Ibid.*)

In response, defense counsel proposed that he would not even have to bring Lupe back to the stand, but merely would offer the report cards into evidence. (V RT 1359.) The court replied,

> It isn't going to come it. It is pop psychology. It has no relevance to anything. The only other issue is you asked him questions about his grades which were, in fact, incorrect, but that would be impeachment on collateral issues. It simply has no relevance. I don't think I even have to bring in 352 because it is simply not relevant.

(*Ibid.*)

B. Argument

Appellant claims that the trial court abused its discretion in excluding Lupe's report cards, which he alleges were relevant to impeach Lupe and were not on a collateral matter because they helped show bias and helped prove Lupe was not involved in the shooting. (AOB 52-56.) Appellant claims that exclusion of the report cards violated his federal constitutional rights to confront and cross examine witnesses, compulsory process, due process and reliable guilt and penalty verdicts under the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 56-60.) Finally, appellant contends the verdict was prejudiced because of the alleged improper exclusion of Lupe's report cards. (AOB 60-63.) Appellant's contentions are meritless.

Preliminarily, appellant claims the court's ruling was error under the United States Constitution as well as the Evidence Code. However, at trial appellant failed to make a sufficient objection that the court's refusal to admit the evidence would violate his federal constitutional right to due process. (V RT 1344-1345, 1358-1359.) Therefore, appellant has waived his constitutional challenge because "'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.'" (*People v. Gordon* (1990) 50 Cal.3d 1223, citing *People v. Rogers* (1978) 21 Cal.3d 542, 548.)

Evidence Code section 210 provides, "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay

declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evidence leading only to speculative inferences is irrelevant. (*People v. Morrison* (2004) 34 Cal.4th 698, 711; *People v. Kraft* (2000) 23 Cal.4th 978, 1035; see also *People v. Stitely* (2005) 35 Cal.4th 514, 549-550 ["Speculative inferences are, of course, irrelevant"].) The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 14.) A finding as to the admissibility of evidence is left to the sound discretion of the trial court and will not be disturbed unless it constitutes a manifest abuse of discretion. (*People v. Harrison* (2005) 35 Cal.4th 208, 230; *People v. Cole* (2004) 33 Cal.4th 1158, 1198; *People v. Kipp* (2001) 26 Cal.4th 1100, 1123.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Here, the trial court did not abuse its discretion in finding that Lupe's report cards, showing he did not testify accurately on cross-examination about his grades the year after the Casa Blanca shooting, were inadmissible under Evidence Code section 210. (V RT 1344-1345, 1359.) The evidence was irrelevant. Whether Lupe's grades went up or down after the shooting is not a fact of consequence in appellant's murder trial and it had no bearing on any contested issue in the case.

Defense counsel questioned Lupe on his grades following the shooting to try and show that: (1) his grades got better after the shooting, which defense counsel argued showed Lupe was not upset, and (2) his grades got worse in the fall of 1995, after he gave his statement to the police, would counsel argued proved that Lupe was "really bothered and distressed" because he had claimed to be involved in that incident when he really was not. (V RT 1345, 1358.)

The trial court correctly concluded, "It is pop psychology. It has no relevance to anything." (V RT 1359.) The issue of Lupe's grades was brought up for the first time on cross-examination. (V RT 1340.) Despite the court's refusal to admit the report cards, defense counsel was still able to cross-examine Lupe on the topic of his school performance. (V RT 1340-1343, 1345.) Defense counsel was also able to present his theory that Lupe's scholastic performance showed he was upset or bothered at times, which allegedly showed whether or not he was lying about being at the Casa Blanca during the shooting. (V RT 1345.)

Contrary to appellant's assertions, the report cards were not relevant to prove or disprove any disputed fact of consequence in appellant's murder trial. Defense counsel's argument that Lupe's grades got better after the shooting because he was not involved, and got worse after he allegedly lied to the police in August 1995, is entirely speculative. There was no evidence presented about Lupe's family situation, educational background, or about what was going on in his life during this time. He may have been unmotivated one semester and motivated the other, he may have been busy with sports or extracurricular activities, he may have had an illness or death in the family. Lupe may have taken more difficult classes in the fall semester of 1995. Point being, it was of no consequence to the determination of appellant's guilt for murder where or why Lupe got better grades in school one semester than the other.

Moreover, even if the report cards were admitted they would have added nothing to the defense's argument, which was clearly presented to the jury, that Lupe was not at the Casa Blanca on the night of the shooting and therefore had fabricated his testimony. (V RT 1345; VI RT 1825-1826, 1839, 1869, 1874.)

Appellant also contends the report cards were relevant to show Lupe "was untruthful in a way that suggested a bias or motive to help the prosecution's case." (AOB 54, 56.) Appellant is mistaken. The argument that

Lupe deliberately misrepresented his school performance to bolster the prosecution's case is not supported by the record. The prosecutor never mentioned Lupe's grades during direct examination. She also never proposed that Lupe's school performance had any relevance to whether he was or was not at the Casa Blanca during the shooting. Lupe's testimony about his school performance was elicited entirely by the defense. Moreover, there is nothing in the record to indicate that Lupe purposely testified incorrectly about his grades "to support his theory that he was involved in the crime." (AOB 56.) It is quite possible that he simply did not remember what his grades were in 1995 because it had nothing to do with his testimony on the Casa Blanca shooting.

Appellant alleges Lupe's grades, in fact, were more supportive of the defense theory that he was not at the shooting. (AOB 56.) This is not the case. Lupe's good school performance after the crime could have indicated that he had been involved and wanted to "lay low" while the police searched for suspects. Lupe may have thought that getting passing grades made him less likely to be a suspect, and thus put extra effort into his school work. Lupe's poor school performance after he gave his statement could have indicated that he was nervous about being a "snitch" and was afraid to attend classes. Thus, there are equally reasonable conflicting interpretations of what Lupe's grades may have indicated. This ambiguity support's the trial court's conclusion that defense counsel's "pop psychology" theory was not relevant.

Since the report cards were not relevant, the court properly declined to engaged in the balancing analysis under Evidence Code section 352, which provides an exception to the rule that all relevant evidence is admissible, stating, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue

prejudice, of confusing the issues, or of misleading the jury." While it is questionable whether this evidence would have presented any serious prejudice to the People's case, in light of its negligible relevance, its exclusion under Evidence Code section 352 would not have been an abuse of discretion.

Even if this Court finds that appellant did not waive his constitutional claims under *People v. Gordon* (1990) 50 Cal.3d 1223, 1240, the exclusion of the report cards did not violate appellant's constitutional right to confront and cross-examine witnesses. (AOB 56-60.) Appellant correctly points out that a defendant has a right to confront the witnesses against him. (AOB 56-57.) "The confrontation clause, however, does not guarantee unbounded scope in cross-examination." (*United States v. Lo* (9th Cir. 2000) 231 F.3d 471, 482.) Appellant's confrontation rights were not violated because he was allowed to examine Lupe's credibility extensively at trial. (V RT 1312-1347, 1351-1356.) In fact, despite the court's ruling excluding the report cards, defense counsel still asked, "Lupe, is it possible that from the time that the incident happened until the time that you actually told the police what happened, that you were not really bothered too much and you were not distressed about what happened, because you really weren't there, you were not really at the little market the day that the incident happened?" (V RT 1345.) When Lupe replied, "No," counsel probed, "And is it possible that from the time you told the police that you were out there, that you were involved, that from that time or the next period of time that you were in school, that you were really bothered and distressed because you had actually claimed to be involved in that incident when you really weren't?" (*Ibid.*) These questions demonstrated to the jury the defense's argument that Lupe's grades indicated whether he was lying about being at the Casa Blanca. The record demonstrates that counsel was able to question Lupe on the topic of his grades. He simply was not allowed to bring in the report cards. The court's decision to exclude the report cards, and thus limit cross-

examination on the topic of Lupe's grades, did not violate appellant's confrontation rights because the court did not limit *relevant* testimony, the court's ruling did not prejudice appellant, and the ruling did not deny the jury sufficient information to appraise the biases and motivations of the witnesses.

Finally, assuming, but not conceding error occurred, it was harmless. Error in determining whether evidence is admissible as relevant evidence is subject to harmless error analysis of whether it is reasonably probable the jury would have reached a different result absent the error.[39] (*People v. Scheid, supra*, 16 Cal.4th at p. 21, citing *People v. Watson, supra*, 46 Cal.2d at p. 836.) As found by the trial court, the report cards were "simply not relevant." (V RT 1359.) And in any event, even after the trial court's exclusion of the report cards, defense counsel was still able to present his argument that Lupe's grades indicated he was not at the Casa Blanca shooting. (V RT 1345.) Defense counsel was able to impeach Lupe and otherwise attack his credibility. (See V RT 1312-1346, 1351-1356.) In fact, even without the report cards, defense counsel impeached Lupe on his school performance and its alleged relation to his behavior outside the classroom. (V RT 1345-1347.)

Additionally, the prosecution's case did not rely merely on Lupe's testimony. The prosecution also presented the testimony of informant Artero Vallejo, who appellant told he had shot the store clerk at the Casa Blanca the night of the incident. (V RT 1372-1373, 1487.) The prosecution presented the

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39. Although appellant claims the standard of review is the "harmless beyond a reasonable doubt" standard prescribed in *Chapman v. California* (1967) 386 U.S. 18, 24 (AOB 60), this Court has held the application of ordinary rules of evidence does not implicate the federal Constitution, and thus allegations of error are reviewed under the "reasonable probability" standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Marks* (2003) 31 Cal.4th 197, 226-227; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125; *People v. Fudge* (1994) 7 Cal.4th 1075, 1103.) And in any event, any error was harmless beyond a reasonable doubt. (*Chapman*, at p. 24.)

clerk's handgun, which was stolen during the robbery, shown by appellant to Lupe and Artero, and found in appellant's brother's possession a little over a week after the shooting. (V RT 1304-1305, 1350, 1373-1374, 1507, 1516-1519, 1585.) A witness at the scene, Alicia Garcia, identified Louis's car as the same vehicle she saw parked in the street outside the Casa Blanca during the robbery. (V RT 1525.) Garcia saw two people in the car, then saw two other people run out of the store with what looked like a gun and get into the car before it sped away. (V RT 1522-1526.) "Shorty" testified that he had loaned appellant his shotgun and rifle sometime in December 1994 and the weapons were never returned. (V RT 1535-1540.) These were the same weapons used during the Casa Blanca shooting. (V RT 1376, 1380-1381, 1499-1501.) In light of the overwhelming evidence of appellant's guilt, there is no reasonable probability that he would have obtained a more favorable result absent the alleged evidentiary error in not admitting Lupe's report cards.

There is no merit to appellant's assertion that the jury question asking for a read-back of Lupe's testimony, combined with the length of deliberations, demonstrated that the case was very close. (AOB 62.) The strength of the prosecution's proof at trial is a matter for judicial assessment and that assessment turns on the state of the evidence, not the time it took one jury to convict appellant. (See *Strickland v. Washington* (1983) 466 U.S. 668, 695 ["[t]he assessment of prejudice . . . should not depend on the idiosyncracies of the particular decisionmaker"]; *Harrington v. California* (1969) 395 U.S. 250, 254 [alleged prejudice must be based on court's own reading of the record and on what seems to have been the probable impact on the minds of an average jury]; *Schneble v. Florida* (1972) 405 U.S. 427, 431-432 [same]; *People v. Avena, supra,* 13 Cal.4th at pp. 435-436 [rejecting assumption that the length of penalty deliberations indicates the jury had difficulty with the penalty decision]; *People v. Brown* (1985) 40 Cal.3d 512, 535 [rejecting proposition

that long jury deliberations indicate prejudice and noting "the jury may simply have sifted the evidence with special care"].)

It is not possible to explain the length of deliberations with any certainty. Here the jury deliberated about eight hours from September 14, 1996, until September 26, 1996, before reaching a verdict on the guilt phase. (I CT 57-61.) This does not appear to be an excessively lengthy deliberations period based on the record. Respondent recognizes that in some cases this Court has inferred a close case from lengthy deliberations. (See, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 907; *People v. Rucker* (1980) 26 Cal.3d 368, 391.) But had the jury returned a verdict more quickly, appellant would no doubt have argued that the quickness of the verdict demonstrated that the deliberation process was short-circuited by the prejudicial evidence. Accordingly, factors such as the length of deliberations and number of jury queries are not a reliable indicator of the closeness of a case, and surely are no substitute for the independent and objective review of the evidence required for any sensible application of the harmless error rule.

In sum, the trial court properly refused the defense's request to admit Lupe's report cards into evidence to impeach his testimony about his school performance for the two semesters after the shooting. And even if Lupe's report cards should have been admitted, it is not reasonably probable appellant would have obtained a more favorable verdict with the report cards in evidence. Reversal is not required.

IV.

APPELLANT'S DEATH SENTENCE IS NOT A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND DOES NOT VIOLATE INTERNATIONAL LAW

Appellant's fourth contention is that California law, which does not require the prosecution to prove the killer had a culpable mental state with regard to the murder before a death sentence may be imposed, violates: (1) the proportionality requirement of the Eighth Amendment, and (2) international human rights law governing the use of the death penalty. (AOB 64-79.) As appellant acknowledges, this Court has repeatedly held that to sentence a defendant to death for a felony murder that does not require an intent to kill does not violate the Eighth or Fourteenth Amendments to the federal Constitution. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1147.) As such, appellant has presented no valid claim that his sentence violates international law. Respondent submits this Court has previously resolved this issue, and appellant fails to show any need to revisit it anew.[40/]

This Court has long held that the felony-murder special circumstance does not require that the murder be committed with express malice, premeditation, and deliberation. (*People v. Visciotti* (1992) 2 Cal.4th 1, 62.) *Visciotti* rejected a similar claim by the defendant that the trial court erred in failing to instruct the jury that a specific intent to kill is a necessary element of a felony-murder special circumstance. (*Ibid.*) The defendant argued that the jury must expressly find that the murder was committed with express malice, premeditation, and deliberation. (*Ibid.*) In rejecting Visciotti's claim, this

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40. Respondent notes that this issue would more appropriately be placed with the penalty phase issues, however, it was presented under the guilt phase issues in appellant's opening brief. For consistency, Respondent is answering the issues in the order they were presented in the opening brief.

Court relied on its prior decision in *Anderson*, in which it held that intent to kill is not necessary if a defendant convicted of first degree murder personally killed the victim. (*People v. Anderson, supra,* 43 Cal.3d at p. 1147.) This Court also noted that, "It is also well established that the felony-murder special circumstances (§ 190.2, subd. (a)(17)) are not limited to premeditated and deliberate murders, and that such a requirement is not mandated by the Eighth Amendment or other constitutional considerations." (*Visciotti,* at p. 62, citation omitted.)

First degree felony murder encompasses a wide range of possible mental states, including not only deliberate and premeditated murder, but also "unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident." (*People v. Dillon, supra,* 34 Cal.3d at p. 477.) Under the felony-murder doctrine, a defendant who kills accidentally may nevertheless be convicted of murder in the first degree. (*People v. Coefield* (1951) 37 Cal.2d 865, 868.) Put another way,

> When one enters a place with a deadly weapon for the purpose of committing robbery, [as appellant did here], malice is shown by the nature of the attempted crime, and the law fixes upon the offender the intent which makes any killing in the perpetration of or attempt to perpetrate the robbery a murder of the first degree.

(*Coefield,* at pp. 868-869; see *People v. Dickey* (2005) 35 Cal.4th 884, 901; *People v. Dennis* (1998) 17 Cal.4th 468, 516; *People v. Johnson* (1993) 6 Cal. 4th 1, 44-45; *People v. Jennings* (1988) 46 Cal.3d 963, 979; *People v. Anderson, supra,* 43 Cal.3d at pp. 1138-1139.)

This Court has repeatedly upheld its decision that specific intent to kill is not an element of the felony-murder (robbery) special circumstance and that the felony-murder statute does not violate the Equal Protection Clause. (*People v. Stanley* (2006) 39 Cal.4th 913, 958; *People v. Kennedy* (2005) 36 Cal.4th 595, 640; *People v. Dickey, supra,* 35 Cal.4th at p. 901; *People v. Anderson, supra,* 43 Cal.3d at pp. 1146-1147.)

As to the actual killer in a felony murder, the federal Constitution does not prohibit reliance on an unintentional killing in the course of specified felonies as the basis for death eligibility. (*People v. Anderson, supra,* 43 Cal.3d at pp. 1140, 1146; see *Tison v. Arizona* (1987) 481 U.S. 137, 157-158 ["the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result"].)

This Court's holding in *Anderson* is in complete accord with the decisions of the United States Supreme Court. In *Tison*, the United States Supreme Court held a robbery-based felony murder could support imposition of the death penalty, notwithstanding lack of intent to kill. *Tison* was concerned with whether imposition of the death penalty on an accomplice to a felony murder who neither killed nor intended to kill the victim would violate the Eighth or Fourteenth Amendments. The Supreme Court held that major participation in the felony committed, combined with reckless indifference to human life, was sufficient to support imposition of the death penalty even as to an accomplice to a felony murder who neither killed nor intended to kill the victim. (*Tison v. Arizona, supra,* 481 U.S. at p. 158.) In reaching this conclusion, the Court noted that "some nonintentional murderers may be among the most dangerous and inhumane of all," including those who participate in the commission of dangerous felonies "utterly indifferent" to the fact that their desire to consummate the felony "may have the unintended consequence of killing the victim" as well as achieving the ends of the felony. (*Id.* at p. 157; see also *Cabana v. Bullock* (1986) 474 U.S. 376, 386.)

The statutory language in section 190.2, subdivision (d), was derived from *Tison*. This section permits imposition of the death penalty for a

defendant who is *not* the actual killer, but is an accomplice to a felony murder and acts with "reckless indifference to human life and as a major participant" in the underlying felony. (*People v. Estrada* (1995) 11 Cal.4th 568, 575.) "Evidence that the defendant is the actual killer and guilty of felony murder, however, establishes 'a degree of culpability sufficient under the Eighth Amendment to permit defendant's execution.'" (*People v. Smithey* (1999) 20 Cal.4th 936, 1016, quoting *People v. Hayes* (1990) 52 Cal.3d 577, 632; *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1037.)

The jury was instructed on the element of intent as follows: "If you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true." (VI RT 1785.) Here, intent to kill was not an element of the felony-murder special circumstance because appellant was the person who shot and killed the clerk at the Casa Blanca Market. (See, e.g., *People v. Visciotti, supra,* 2 Cal.4th at p. 62; *People v. Belmontes* (1988) 45 Cal.3d 744, 794-795.)

Moreover, the record contains abundant evidence that appellant both killed and intended to kill the store clerk at the Casa Blanca Market. The jury's verdict is supported by the following evidence of appellant's guilt: appellant picked up the shotgun and rifle used in the robbery from his friend "Shorty" before the day of the "job" (V RT 1376, 1380-1381, 1499-1502, 1535-1537); appellant drove around in the early afternoon on the day of the robbery to round up his friends (V RT 1281-1289); appellant entered the Casa Blanca Market armed with a shotgun to rob the clerk (V RT 1298, 1486); and appellant shot the clerk while inside the store after he could not get any money (V RT 1299, 1309, 1316, 1349, 1372-1373, 1487, 1507-1508). Appellant's accomplice Jose stole the clerk's wallet, which he later used as his own wallet. (V RT 1306-1307, 1362-1364.) Appellant stole the clerk's gun during the course of the

robbery and shooting. (V RT 1304-1305, 1350, 1373-1374, 1585.) They tried to give this gun to Lupe when he dropped him off at home, but Lupe refused to take it. (V RT 1304-1306, 1350, 1585.) Later that night, appellant showed the gun off to his friends as he bragged about the shooting. (V RT 1373-1374.) About a week after the shooting the clerk's gun was found in appellant's brother's possession when he was arrested. (V RT 1507, 1516-1519.)

The prosecution also presented substantial evidence of appellant's intent to kill the clerk at the Casa Blanca Market. After shooting the store clerk, Lupe recalled that appellant was in a "happyish mood" and remarked during the ride home, "I'll never forget the smile on his [the store clerk's] face." (V RT 1302-1303.) Later that night, appellant bragged to his friend Artero that during the robbery he had warned the clerk he was going to shoot him if he did anything. (V RT 1372.) Appellant gloated that after he had shot the clerk once, he walked up the him, and looked at him lying on the floor. (V RT 1372-1373.) Appellant saw what he thought was a smile on the clerk's face, so he told the clerk, "I told you I was going to kill you," and then kicked the clerk and shot him a second time. (*Ibid.*) Artero remembered that appellant acted like shooting the clerk "was no big deal" and had looked excited as he reveled that he had shot someone during the robbery. (V RT 1373.) Later that night, appellant went out to celebrate the shooting with his friends for a night of partying, drinking, and recreational drug use. (V RT 1381-1397.) Thus, even if proof of intent was required, such evidence was present in the case at bar.

Finally, appellant contends, "California law making a defendant death-eligible for felony murder *simpliciter* violates international law." (AOB 79.) Once again, appellant raises an argument that this Court has repeatedly and consistently rejected. (See, e.g., *People v. Zamudio* (2008) 43 Cal.4th 327, 373; *People v. Harris, supra,* 43 Cal.4th at p. 1323; *People v. Bonilla* (2007) 41 Cal.4th 313, 360.) To the extent appellant alleges violations of the International

Covenant on Civil and Political Rights (ICCPR) (AOB 76-77, 79), which he alleges incorporates the Universal Declaration of Human Rights, his claim lacks merit, even assuming he has standing to invoke this covenant. "'International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements.'" (*People v. Brown* (2004) 33 Cal.4th 382, 404; *People v. Ramirez* (2006) 39 Cal.4th 398, 479; *People v. Boyer* (2006) 38 Cal.4th 412, 489-490; *People v. Blair* (2005) 36 Cal.4th 686, 755; *People v. Harris* (2005) 37 Cal.4th 310, 366; *People v. Cornwell* (2005) 37 Cal.4th 50, 106; *People v. Turner* (2004) 34 Cal.4th 406, 439-440.) As this Court has explained:

> [Defendant's] argument that "the use of capital punishment 'as *regular punishment* for substantial numbers of crimes' violates international norms of human decency and hence the Eighth Amendment to the United States Constitution fails, at the outset, because California does not employ capital punishment in such a manner. The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9; 1239, subd. (b).)" [Citation.]

(*Bonilla*, at p. 360.) Appellant provides no persuasive reason why this Court should reexamine its decision. Accordingly, appellant has no basis for his claim of international law violations.

Appellant's contention that the People had to prove mens rea, and that his death sentence imposed for felony murder violates the proportionality requirement of the Eighth Amendment and violates international law must fail. Because appellant has failed to present sufficient reasons to warrant a reversal of this Court's prior holdings, his claim of error should be rejected.

V.

THE JURY WAS ADEQUATELY INSTRUCTED IN THE EVALUATION OF WITNESS CREDIBILITY

Appellant's fifth contention is that the trial court gave incomplete and insufficient jury instructions, which "tipped the scales in favor of the prosecution witnesses," and prejudicially denied appellant his rights to a fair jury trial, due process, and a reliable penalty determination. (U.S. Const., 6th, 8th, & 14th Amends.) Specifically, he claims the court erred in instructing the jury with an incomplete version of CALJIC No. 2.20 and by failing to instruct with CALJIC No. 2.27. (AOB 80-87.) On the contrary, the court properly instructed the jury and did not bolster the credibility of the prosecution's witnesses. Accordingly, appellant's claim of constitutional error is without merit.

A. The Court Properly Instructed The Jury With CALJIC No. 2.20

Appellant first contends that the court erred in failing to specifically instruct the jury that, in considering a witnesses's credibility, they could consider the witness's past criminal conduct amounting to a misdemeanor when it listed those facts that the jury could consider to assess the believability of witnesses (CALJIC No. 2.20). (AOB 80-82.) Respondent disagrees.

First, appellant did not suggest a special instruction or complain the court's instructions were incomplete. The court provided the jury with the standard instructions regarding the credibility of witnesses (CALJIC Nos. 2.13, 2.20, 2.21.1, 2.21.2, 2.22). (II CT 430-434; VI RT 1775-1778.) The trial court instructed the jury about its responsibility to assess the believability of each witness who testified and the weight to be given to his or her testimony. CALJIC No. 2.20 told jurors, "In determining the believability of a witness you may consider anything that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of

the following . . ." (II CT 431; VI RT 1776.) The list of criteria that the jury could consider when making its credibility assessment did not specifically list "past criminal conduct amounting to a misdemeanor." If appellant believed the fact that jurors could consider the specific circumstance of prior misdemeanor conduct merited specific mention, he should have proffered such a modified instruction to the trial court. Where a defendant "believed the instructions were incomplete or needed elaboration, it was his obligation to request additional or clarifying instructions. [Citation.]" (*People v. Dennis, supra,* 17 Cal.4th at p. 514.) Failure to do so waives the claim of instructional error on appeal. (*Ibid.*)

Even if appellant has not waived this issue by failure to object below, he has stated no grounds to support his claim of instructional error. The absence of an instruction regarding a particular factor in the evaluation of a witness's testimony does not establish that the jury was inadequately instructed where other, albeit more general, instructions for evaluating testimony are given to the jury. (*People v. Wader* (1993) 5 Cal.4th 610, 644-645.) Such is the case here.

In *People v. Rogers* (2006) 39 Cal.4th 826, this Court addressed and rejected a claim very similar to that raised by appellant here.[41] In *Rogers*, the defendant argued that the guilt phase instructions on witness credibility were incomplete because in giving CALJIC No. 2.20 the trial court deleted the final three factors: character or reputation for untruthfulness, prior admissions of lying, and prior felony convictions. (*Id.* at p. 904.) Defendant argued these factors were crucial in evaluating the credibility of two witnesses and he was therefore prejudiced when the trial court failed to instruct with the full version of CALJIC No. 2.20. This Court rejected the defendant's argument finding that any error was harmless. (*Ibid.*) This Court reasoned that: (1) there was no evidence of the first two factors-character or reputation for untruthfulness, or

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41. Respondent notes that while *Rogers* is a penalty phase case, its reasoning is equally applicable here.

a prior admission of untruthfulness-regarding either witness, and (2) although the jury never was instructed to consider prior felony convictions in evaluating credibility, both witnesses were examined and cross-examined on their criminal histories and their possible motives for testifying against defendant. Accordingly, this Court found, "There is no reasonable possibility the outcome of the penalty phase would have differed had the jury been instructed expressly to consider felony convictions in evaluating credibility." (*Ibid.*; see also *People v. Riggs* (2008) 44 Cal.4th 248, 315.)

Similarly, although the jury here was not specifically instructed to consider prior criminal conduct amounting to a misdemeanor, Artero Vallejo was examined and cross-examined on his criminal history and his possible motives for testifying against appellant. (V RT 1386-1390, 1448-1449, 1461-1473, 1505-1506.)

Moreover, while the jury was not specifically instructed that in considering Artero's credibility they could consider his past criminal conduct amounting to a misdemeanor, it was instructed that it could consider "anything that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witnesses." (CALJIC No. 2.20; II CT 431; VI RT 1776.) The jury was also instructed that it could consider a witness's prior inconsistent statements "not only for the purpose of testing the credibility of the witness but also as evidence of the truth of the facts as stated by the witness on that former occasion." (CALJIC No. 2.13; II CT 430; VI RT 1775.) The jury was further instructed that "[d]iscrepancies in a witness's testimony or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited," that, "[a] witness who is willfully false in one material part of his or her testimony is to be distrusted in others," and that the "final test" in evaluating testimony is "the convincing force of the evidence." (CALJIC Nos. 2.21.1, 2.21.2, and 2.22; II CT 432-434; VI RT 1776-1778.)

Viewing the instructions as a whole, the record supports the conclusion that the court did not err in failing to specifically instruct the jury that it could consider past criminal conduct of a witness amounting to a misdemeanor.

Even if the court's instructions were inadequate in this case, such an error would not support a reversal of the judgment, unless, in light of the entire record, that the inadequacy was prejudicial to the outcome of the trial. (*People v. Fudge*, *supra*, 7 Cal.4th at p. 1110.) Before citing a nonexclusive list of specific examples of evidence bearing on witness credibility, the trial court advised the jury that it could consider any evidence that had any tendency in reason to prove or disprove the truthfulness of any witness's testimony. (II CT 431; VI RT 1776.) There was nothing that precluded the jury from considering Artero's misdemeanor misconduct.

Although the court did not "focus the jury's intention on Vallejo's untrustworthiness and unreliability because of his past criminal conduct" (AOB 82), defense counsel repeatedly emphasized Artero's prior criminal history in closing argument. (VI RT 1857-1859.) Defense counsel urged the jurors to remember that Artero's criminal past arguing, "But then you got another problem, earlier in the year that, he's found in some circumstance with, next, with a 12-gauge shotgun. And he says, of course, he's not in possession of it. But he was charged with it. He said a felony, and he didn't know it was a misdemeanor." (VI RT 1858.) Defense counsel explained that Artero was found with shotgun shells in his coat pocket and a billy club in his car. (*Ibid.*) Counsel remarked, "A 12-gauge shotgun. Is that a coincidence?" (VI RT 1859.) Counsel gave a detailed recital of Artero's criminal affairs and then suggested that Artero came forward to authorities to get help with his outstanding warrants and because they men involved in the Casa Blanca shooting owed him money for drugs. (VI RT 1859-1860.) Counsel discussed witness credibility remarking, "And you take many things into consideration.

Bias, interest, or motive. Well, of course these guys do. Artero and Lupe? Lots of different biases and motives. They were accomplices. They were involved in this." (VI RT 1874.) Defense counsel warned the jurors, "You have to look searchingly. You have to scrutinize closely what these two people have said in order that you can know whether or not to rely on anything that they have said in this courtroom." (VI RT 1825.) Under these circumstances, the failure to list misdemeanor misconduct as a specific criterion when citing the CALJIC No. 2.20 factors was not prejudicial.

In sum, even if the court erred in failing to specifically instruct the jurors to consider a witnesses's misdemeanor criminal conduct, nothing precluded the jury for considering such evidence and defense counsel argued at length on the topic. Thus, it is not reasonably probable that the jurors would have reached a different verdict had they been so instructed.

B. The Court Did Not Err In Failing To Give CALJIC No. 2.27

Appellant also asserts that the trial court should have instructed the jury with the pinpoint instruction on the sufficiency of the testimony of one witness embodied in CALJIC No. 2.27. (AOB 82-85.) Appellant speculates that the omission of CALJIC No. 2.27 resulted in prejudicial error since his conviction was based on the credibility of a two "highly suspect" witnesses and "no physical evidence implicated appellant in the charged murder." (AOB 83-84.) The trial court had no sua sponte duty to give this instruction, and in any event, appellant has failed to show any resulting prejudice.

CALJIC No. 2.27 provides:

> You should give the [uncorroborated] testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact [whose testimony about that fact does not require corroboration] is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends.

(Brackets in original.)

CALJIC No. 2.27 focuses on how the jury should evaluate a fact proved solely by the testimony of a single witness. "It is given with other instructions advising the jury how to engage in the fact-finding process." (*People v. Gammage* (1992) 2 Cal.4th 693, 700, emphasis omitted.)

Preliminarily, as with appellant's preceding instructional error argument, he did not request amplification of the jury instructions with CALJIC No. 2.27. As such, he has waived his claim of instructional error on appeal. (*People v. Dennis, supra,* 17 Cal.4th at p. 514.)

Even if the issue is not waived, appellant has failed to show error. This Court has stated that an instruction such as CALJIC No. 2.27 should be given in all cases in which corroboration is not required. (*People v. Gammage, supra,* 2 Cal.4th at p. 696; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884-885, in accord; see also *People v. Turner* (1990) 50 Cal.3d 668, 696.) "There are only a few crimes for which a conviction cannot be obtained on the sole testimony of a single witness. In these cases . . . jurors are instructed on the need for corroboration." (*People v. Adams* (1986) 186 Cal.App.3d 75, 80, disapproved on another ground in *Gammage,* at pp. 701-702.) A conviction for the crimes of murder and robbery can be obtained on the testimony of a single witness. A trial on a charge of murder and robbery is thus a "criminal case in which no corroborating evidence is required," and an instruction along the lines of CALJIC No. 2.27 "should be given." (*Rincon-Pineda*, at p. 885.) Nevertheless, in cases where corroboration existed, courts have found no error when the trial court did not instruct the jury pursuant to CALJIC No. 2.27. (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1023; *People v. Haslouer* (1978) 79 Cal.App.3d 818, 832-833.)

Here, the jury was instructed with CALJIC No. 3.16, which informed them, "If the crime of murder and robbery was committed by anyone, the

witness, Jose Guadalupe Valencia [Lupe] was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration." (II CT 448; VI RT 1783.) The jury was also instructed to give an accomplice's testimony "the weight to which you find it to be entitled after examining it with care and caution and in light of all the evidence in the case." (II CT 449; VI RT 1783.) Thus, although conviction for murder and robbery can be obtained on the testimony of a single witness, corroboration was required to support Lupe's testimony about the murder and robbery.

Appellant's conviction did not rest on the testimony of one witness and evidence in corroboration was presented at trial. The prosecution's case did not rely solely on the testimony of accomplice Lupe Valencia and informant Artero Vallejo. Both Lupe's and Artero's testimony about the robbery and shooting at the Casa Blanca Market was corroborated by eyewitnesses Amanda Garcia.[42/] (V RT 1523-1528.) Witnesses Jesus Manuel "Shorty" Fernandez and his wife Mariela Fernandez corroborated the testimony about how appellant acquired the weapons used during the shooting, and confirmed that Shorty had loaned these weapons to appellant sometime in December 1994. (V RT 1376, 1380-1381, 1499-1501, 1535-1537, 1545.) Artero's shift supervisor confirmed Artero's alibi that he was at work during the shooting. (V RT 1573-1575.) Finally, Arcadia Hernandez's testimony helped discredit appellant's alibi defense that he had been taking care of their son Marco when the shooting had occurred.

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42. Defense witnesses Brian Northcutt and Joel Mohr also testified about seeing the men involved in the robbery and shooting. (VI RT 1589-1590, 1599-1611, 1741-1744.) Northcutt saw two man exit the Casa Blanca, both armed with weapons, and heard multiple shots fired. (VI RT 1589-1590, 1741-1742.) Mohr also saw two men exiting the market, but only saw one weapon, a rifle. (VI RT 1600-1603.) Mohr heard shots fired (VI RT 1607-1609), saw two men sitting in a car waiting outside the store (VI RT 1601-1603, 1610-1611), and then saw the two men from the store flee to the waiting car and drive off (VI RT 1602).

(VI RT 1763-1767.)

Moreover, the testimony of these witnesses was corroborated in all material respects by physical evidence tying appellant to the murder and robbery. The first piece of physical evidence tying appellant to the crimes was the clerk's handgun, which was stolen during the robbery. Appellant told Lupe he had taken the gun from the clerk, and had tried to give the gun to Lupe when he dropped Lupe at home after the robbery, but Lupe refused to take it. (V RT 1304-1306, 1350.) At trial, Lupe identified the clerk's handgun as the same weapon appellant showed him the night of the shooting. (V RT 1305, 1350, 1585.) Later that night, when appellant and his friends went out to celebrate the shooting, appellant showed off the clerk's handgun as he excitedly told his friends that he had taken it from the clerk during the robbery. (V RT 1373-1374.) The clerk's handgun was found about a week after the Casa Blanca shooting in appellant's brother's possession. (V RT 1506-1507, 1515-1519.) Appellant and his brother Fernando had been living together at the time. (V RT 1582-1583.) Fernando had been sitting in a stolen pickup truck next door to his and appellant's house when he was arrested with the clerk's handgun in his rear pant's pocket. (V RT 1516-1517.)

Another piece of physical evidence that tied appellant to the murder was the weapons used in the crime. Lupe testified that appellant and Jose each took one of the two guns into the Casa Blanca during the robbery. (V RT 1288-1289, 1298.) Lupe had heard a gunshot while appellant and Jose were inside the store. (V RT 1299.) Artero testified that appellant admitted he used a shotgun to shoot the clerk after "they couldn't get no money out of [him]." (V RT 1372.) Artero was familiar with the shotgun appellant used during the robbery and had seen appellant with the weapon sometime prior to the shooting. (V RT 1376, 1380.) Artero revealed that anytime their group needed guns they would go to Shorty's house to pick them up. (V RT 1380-1381, 1499.) Shorty

confirmed that he owned the two guns used during the Casa Blanca shooting and that he had loaned them to appellant before the robbery. (V RT 1376, 1380-1381, 1499-1501, 1535-1538, 1543-1544.) After giving appellant the guns before the Casa Blanca shooting, they were never returned. (V RT 1538-1541.)

The clerk's stolen wallet is yet another piece of physical evidence corroborating the testimony that appellant and Jose were responsible for the Casa Blanca Market shooting and robbery. Lupe testified that Jose boasted that he had taken the clerk's wallet during the robbery. (V RT 1306-1307.) Lupe's testimony was corroborated by Jose's girlfriend, Yesenia Valencia, who remembered Jose showing her the wallet that he had taken from the clerk. (V RT 1362-1362.) Yesenia recalled that Jose had used that wallet as his own after stealing it from the clerk during the robbery. (V RT 1306-1307, 1364.) Lupe's testimony was also corroborated by the fact that the clerk's wallet was found by Detective Hilger in Jose's residence. (V RT 1364.)

Finally, Louis's car was identified by witness Amanda Garcia as the same vehicle she saw parked in the street in front of the Casa Blanca Market during the time of the shooting. (V RT 1525.) Garcia recalled seeing two people sitting in the vehicle with masks covering their faces. (V RT 1529-1531.) She saw two other people rush out of the store carrying an object shaped like a gun. (V RT 1524-1528.) Garcia's testimony helped prove the accuracy of Lupe's and Artero's testimony that Louis's vehicle was used during the shooting. (V RT 1310, 1312, 1379.)

Thus, although there was no videotape of the crime or fingerprints tying appellant to the Casa Blanca Market, there was physical evidence that corroborated the testimony of the prosecution witnesses. Indeed, given the corroboration, the jury would have disregarded an instruction pursuant to

CALJIC No. 2.27. As such, any error was also necessarily harmless.[43]

Appellant contends that omission of the specific instruction that testimony by one witness is sufficient to prove any fact and that they "should carefully review all the evidence upon which the proof of that fact depends" constituted prejudicial error. (AOB 85, 87.) Review of the instructions as a whole suggests that any error is clearly harmless (see *People v. Gammage, supra*, 2 Cal.4th at pp. 701-702 [failure to give CALJIC No. 2.27 was harmless error]; *People v. Adams, supra*, 186 Cal.App.3d at pp. 79-81 [same]); under the instant circumstances, it is not reasonably probable that the jury was misled about the prosecution's burden of proof or that a result more favorable to defendant would have been reached in the absence of the error. (*People v. Montiel* (1993) 5 Cal.4th 877, 941; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

In *Rincon-Pineda,* this Court noted, "It is well established that the error in failing to give the cautionary instruction is not prejudicial per se. The circumstances of each case must be reviewed on appeal to determine whether failure to give the instruction was prejudicial." (*People v. Rincon-Pineda, supra*, 14 Cal.3d at p. 872, citations omitted.) Appellate courts must, "look to the entire charge rather than merely one part, to determine whether error occurred." (*People v. Chavez* (1985) 39 Cal.3d 823, 830.)

When the instructions here are considered as a whole, as they must be, any error was harmless because CALJIC No. 2.27 was duplicative and unnecessary. CALJIC No. 2.27 contains two sentences. The first informs the

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43. Appellant's argument that the absence of CALJIC No. 3.20 "reinforced the need for instruction with CALJIC No. 2.27" is meritless. As appellant notes, such a cautionary instruction should be given upon request regarding an in-custody informant. (AOB 84.) Here, none of the prosecution witnesses were in-custody informants and such an instruction was never requested by the defense. (II CT 418.) As such, this contention is meritless.

jury that the testimony of but one witness may be sufficient to prove any fact. The second sentences warns, however, that before any such fact maybe found to be proven by a single witness, a careful review of the witness' testimony is required. Here, the disputed issue was the credibility of the testimony by informant, Artero Vallejo, and accomplice, Lupe Valencia. In that regard, the jury was given CALJIC No. 2.20 about relevant considerations in determining the believability of a witness in which they were told in detail about how to evaluate truthfulness, perception, demeanor, bias, inconsistency, and recall. (II CT 431; VI RT 1776.) The court instructed the jury on discrepancies in testimony (CALJIC No. 2.21.1) and a witness who is willfully false (CALJIC No. 2.21.2). The jury was also instructed as to how to weigh conflicting testimony (CALJIC No. 2.22) and were told, inter alia, not to decide based on the number of witnesses but rather upon the relative convincing force of the testimony. (II CT 434; VI RT 1777-1778.) The jury was given CALJIC No. 2.90, which addressed the presumption of innocence and the People's burden to prove the appellant's guilt as the perpetrator beyond a reasonable doubt. (II CT 440; VI RT 1780.) The jury received extensive instructions which made clear that the prosecution had the burden of proving every element of any criminal offense beyond a reasonable doubt. Given the court's other instructions on witness credibility, it was not reasonably likely that jury error resulted from the omission of CALJIC No. 2.27. (See *Boyde v. California* (1990) 494 U.S. 370, 381.)

Any error has been waived. Moreover, even if there was error, it nevertheless was harmless in this case.

VI.

THE INSTRUCTIONS GIVEN BY THE COURT DID NOT UNDERMINE OR DILUTE THE REASONABLE DOUBT REQUIREMENT

Appellant contends that several standard jury instructions drawn from CALJIC and given here lowered the requisite standard of proof beyond a reasonable doubt. He cites specifically those instructions pertaining to: (1) circumstantial evidence (CALJIC Nos. 2.90 [presumption of innocence, reasonable doubt, and burden of proof], 2.01 [sufficiency of circumstantial evidence generally], 8.83 [sufficiency of circumstantial evidence to prove a special circumstance], and 8.83.1 [sufficiency of circumstantial evidence to prove mental state]), and (2) witness credibility and weight of the evidence (CALJIC Nos. 1.00 [respective duty of judge and jury], 2.21.1 [discrepancies in testimony], and 2.22 [weighing conflicting testimony]). (AOB 88-96.) Appellant has failed to show instructional error.

At trial, appellant did not object to these instructions. Notwithstanding his failure to do so, appellant's claim is cognizable on appeal to the extent it implicates his substantial rights. (§ 1259; see *People v. Gray* (2005) 37 Cal.4th 168, 235 [notwithstanding a failure to object at trial, a defendant may raise on appeal an instructional error claim that affects his substantial rights].)

A. The Jury Was Properly Instructed With CALJIC Nos. 2.90, 2.01, 8.83, And 8.83.1

First, appellant argues that CALJIC Nos. 2.01, 8.83, and 8.83.1 were contrary to the "beyond a reasonable doubt" principle (CALJIC No. 2.90) and misled the jury into believing it could convict him if he "reasonably appeared" to be guilty, even if they entertained a reasonable doubt regarding his guilt. He complains specifically of language common to these three instructions stating that if one interpretation of the evidence "appears to you to be reasonable and

the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (AOB 89-90.) Second, appellant characterizes these instructions as creating "an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory interpretation." (AOB 91.) Appellant argues that these instructions implied that a defendant was required to present, at the very least, a "reasonable" defense to the prosecution's case. (AOB 91-92.) Based on these two claims, appellant contends that his constitutional rights to due process, trial by jury, and a reliable capital trial were violated (U.S. Const., 6th, 8th, &14th Amends.; Cal. Const., art. I, §§ 7 & 15-17) and that his resulting conviction must be reversed. (AOB 90, 98-99.)

As defendant concedes, this Court has in the past rejected similar arguments. (*People v. Rundle* (2008) 43 Cal.4th 76, 154-155; *People v. Brasure* (2008) 42 Cal.4th 1037, 1059; *People v. Carey, supra,* 41 Cal.4th at pp. 130-131; *People v. Carter* (2005) 36 Cal.4th 1114, 1188; *People v. Nakahara* (2003) 30 Cal.4th 705, 714; *People v. Maury* (2003) 30 Cal.4th 342, 428; *People v. Crew* (2003) 31 Cal.4th 822, 847; *People v. Hughes, supra,* 27 Cal.4th at pp. 346-348.)[44/] Appellant offers no persuasive reason why this Court should reconsider its prior decisions rejecting the claims of instructional error raised.

"'It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1491, citing *People v. Burgener*

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44. This Court has also rejected the claim that CALJIC Nos. 2.02 and 2.90, when given together, erode the reasonable doubt standard of proof. (*People v. Cook* (2006) 39 Cal.4th 566, 601; *People v. Navarette* (2003) 30 Cal.4th 458, 501.)

(1986) 41 Cal.3d 505, 538, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 746.)

Appellant urges reconsideration of those holdings. (AOB 96-98.) This Court should decline that invitation, as those holdings were legally sound and established a well-reasoned line of unbroken authority on which litigants have a right to rely. Indeed, if appellant's arguments are correct, then it would follow that one of the most fundamental aspects of the CALJIC system is constitutionally flawed.

The court here gave a series of related instructions (CALJIC Nos. 2.01, 8.83, 8.83.1; II CT 426, 457-459; VI RT 1774, 1786-1788) that essentially told the jurors they had a duty to accept the reasonable interpretation of the evidence and reject the unreasonable interpretation.

The jury was also instructed with CALJIC No. 2.90, telling the jury that the defendant 'is presumed to be innocent' and that the prosecution bears "the burden of proving [him] guilty beyond a reasonable doubt."

Appellant submits, "The Court's analysis is flawed." (AOB 97.) However, he offers no new or persuasive reasons for why this Court should now find the circumstantial evidence instructions to be unconstitutional. Accordingly, this claim fails.

B. The Jury Was Properly Instructed With CALJIC Nos. 1.00, 2.21.1, 2.21.2, And 2.22

Appellant further contends that CALJIC Nos. 1.00 (respective duties of judge and jury), 2.21.1 (discrepancies in testimony), 2.21.2 (willfully false witnesses), and 2.22 (weighing conflicting testimony) "in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence." (AOB 93; II CT 420, 432-434; VI RT 1770-1771, 1776-1778.) He claims that the instructions replaced the reasonable doubt standard with the preponderance of the evidence test "thus vitiating the

constitutional protections that forbid convicting a capital defendant on any lesser standard of proof." (*Ibid.*) He further claims that CALJIC No. 2.01 violated his constitutional rights as enumerated in section A of his argument by improperly informing the jurors that they were to decide "between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt." (*Ibid.*)

As with his preceding claim of instructional error, appellant acknowledges that "this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here." (AOB 96.) Nonetheless, he urges this Court to "reconsider" its prior rulings that have upheld these "defective instructions." (*Ibid.*)

Appellant complains that the trial court's instruction with CALJIC No. 1.00 (II CT 420; VI RT 1770-1771) informed the jury that "pity for or prejudice against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, 'and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent.'" (AOB 93.) Appellant contends that CALJIC Nos. 1.00 and 2.01 diluted the prosecution's burden of proof. However, as conceded by appellant, this Court has rejected similar arguments. (*People v. Nakahara, supra,* 30 Cal.4th at p. 714, citing *People v. Frye* (1998) 18 Cal.4th 894, 957-958.)

Indeed, the trial court's reference to "innocence" in these instructions did not lessen the prosecution's burden. As demonstrated *supra,* the court instructed with the presumption of innocence and the prosecution's burden to prove appellant guilty beyond a reasonable doubt. (II CT 440; VI RT 1780.) Moreover, numerous instructions set forth the prosecution's standard of proof and defense counsel's argument further explained that requirement to the jury. (II CT 426, 436, 451, 453-454, 457-458, 464; VI RT 1774, 1778, 1784-1785,

1787, 1790, 1819, 1824-1825, 1863, 1869.)

In *People v. Crew, supra,* 31 Cal.4th 822, this Court addressed very similar challenges to CALJIC Nos. 1.00, 2.01, 2.51, and 2.52, because of their use of the terms "guilt" and "innocence." (*Id.* at p. 847.) The appellant in *Crew*, argued that this language "relieved the prosecution of its burden of proof by implying that the issue was one of guilt or *innocence* instead of whether there was or was not a reasonable doubt about defendant's guilt. (*Id.* at pp. 847-848.) This Court rejected the argument, explaining:

> Challenges to the wording of jury instructions are resolved by determining whether there is a reasonable likelihood that the jury misapplied or misconstrued the instructions. [Citation.] Here, it is not reasonably likely that the jury would have misapplied or misconstrued the challenged instructions, one of which expressly reiterates that defendant's guilt must be established beyond a reasonable doubt. (CALJIC No. 2.01.) The instructions in question use the word "innocence" to mean evidence less than that required to establish guilt, not to mean the defendant must establish guilt, or that the prosecution has any burden other than proof beyond a reasonable doubt. Here, the jury was repeatedly instructed on the proper burden of proof.

(*Id.* at p. 848.)

Appellant also complains that CALJIC No. 2.22[45] informed jurors that their "ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party." (AOB 95.) He contends that this instruction replaced the "proof beyond a reasonable doubt" standard with a lesser standard. (*Ibid.*)

However, when this instruction is considered with CALJIC Nos. 1.01 and 2.90, "'[I]t is apparent that the jury was instructed to weigh the relative convincing force of the evidence (CALJIC No. 2.22) only as part of the process

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45. CALJIC No. 2.22 instructed, in relevant part, "The final test is not in the relative number of witnesses but in the convincing force of the evidence." (II CT 434; VI RT 1777-1778.)

of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt.'" (*People v. Maury, supra,* 30 Cal.4th at p. 429, citing *People v. Clay* (1984) 153 Cal.App.3d 433, 462-462; *People v. Salas* (1975) 51 Cal.App.3d 151, 157.)

Appellant challenges CALJIC No. 2.21.1[46] (discrepancies in testimony) as one of the instructions that "individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense 'beyond a reasonable doubt.'" (AOB 96.) This claim is barred under the invited error doctrine since appellant affirmatively requested the challenged instruction, and did not object to the giving of CALJIC No. 2.21. (II CT 418.) (*People v. Prieto* (2003) 30 Cal.4th 226, 264-265.) Even if it were not barred, this contention is foreclosed by *People v. Rundle, supra,* 43 Cal.4th at pp. 154-155, and *People v. Brasure, supra*, 42 Cal.4th at p. 1059, wherein this Court rejected the same claims as those made by appellant. And in any event, nothing in the instruction implicates, let alone varies, the burden of proof of the prosecution. Moreover, nothing in the instruction suggested that appellant had the burden of proof on any issue. The instruction merely informed the jury regarding how to weigh conflicting testimony.

Pointing to CALJIC No. 2.21.2, appellant claims that this instruction also lessened the burden of proof. (AOB 93-95.) CALJIC No. 2.21.2 allows

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46. CALJIC No. 2.21.1 instructed:
Discrepancies in a witness's testimony or between his or her testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. (II CT 432; VI RT 1776-1777.)

the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." (II CT 433; VI RT 1777.) This instruction was also specifically requested by appellant at trial, and thus, his claim is barred under the invited error doctrine. (*People v. Prieto, supra*, 30 Cal.4th at pp. 264-265.) Even if it were not barred, this Court has previously rejected the contention that CALJIC No. 2.21.2 lowers the beyond-a-reasonable-doubt burden of proof. (*People v. Rundle, supra,* 43 Cal.4th at pp. 154-155; *People v. Brasure, supra*, 42 Cal.4th at p. 1059; *People v. Crew, supra,* 31 Cal.4th at pp. 847-848.) Appellant offers no reason to reconsider these decisions.

Appellant contends that CALJIC No. 2.22 effectively replaced the beyond-a-reasonable-doubt burden of proof with the lesser preponderance-of-the-evidence burden of proof in directing the jury to determine each factual issue in the case by deciding which witnesses were most convincing, regardless of the number of witnesses who testified to a particular version of events. (AOB 93, 95.) Again, this Court has previously rejected this argument. (*People v. Rundle, supra,* 43 Cal.4th at pp. 154-155; *People v. Brasure, supra*, 42 Cal.4th at p. 1059; *People v. Crew, supra,* 31 Cal.4th at pp. 847-848; *People v. Maury, supra,* 30 Cal.4th at pp. 428-429.)

In any event, it is not reasonably likely that the jury understood the instructions to allow conviction of appellant based on a standard of proof less than beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The court instructed pursuant to CALJIC No. 2.90 on the presumption of innocence and the burden placed on the prosecution to prove the charges beyond a reasonable doubt. (II CT 440; VI RT 1780.) The court also mentioned the "beyond a reasonable doubt" standard in seven other jury instructions: CALJIC Nos. 2.01 (II CT 426); 2.61 (II CT 436); 4.50 (II CT

451); 8.21 (II CT 453); 8.80.1 (II CT 454); 8.83 (II CT 457-458); and 17.19 (II CT 464). Additionally, during closing argument defense counsel further explained that the People had to prove appellant was guilty beyond a reasonable doubt and that appellant was presumed innocent. (VI RT 1819, 1824-1825, 1863, 1869.) On balance, viewing the instructions as a whole, and in light of the record at trial, it is not reasonably likely the jury was misled by the challenged instructions with regard to its obligation to find each element of the charged crimes beyond a reasonable doubt. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1073, fn. 3; *People v. Davis* (1995) 10 Cal.4th 463, 521-522; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.)

In sum, based on the foregoing, none of the challenged instructions lessened the prosecution's burden of proof. Indeed, the instructions as a whole adequately informed the jury of the prosecution's burden to prove appellant guilty beyond a reasonable doubt, and did not suggest or imply that appellant had to produce evidence of innocence or that he could be convicted without proof of guilt beyond a reasonable doubt. Consequently, appellant has provided no basis for this Court to reconsider its prior decisions upholding the validity of these pattern jury instructions. Appellant's contentions are without merit and should be rejected.

PENALTY PHASE ISSUES

VII.

THE COURT'S FAILURE TO REINSTRUCT THE PENALTY JURY WITH APPLICABLE GUILT PHASE INSTRUCTIONS WAS HARMLESS ERROR

Appellant contends the trial court erred in failing to instruct the jury during the penalty phase with CALJIC No. 2.20 on witness credibility, CALJIC No. 2.22 on weighing conflicting testimony, and CALJIC Nos. 2.00 and 2.01 on direct and circumstantial evidence and the sufficiency of circumstantial evidence. Appellant claims the court's failure to give these instructions resulted in prejudicial error that warrants reversal of the penalty phase verdict. (AOB 100-113.) Respondent submits that while the trial court's failure to reinstruct with the applicable guilt phase instructions was error, it was harmless error.

A. Background

During the penalty phase, the prosecution presented evidence in aggravation involving a shooting that occurred four months prior to the Casa Blanca shooting. In August 1994, appellant was in a relationship with Arcadia Hernandez, the mother of his children, Marco and Jasmine. (VII RT 1913, 1955.) On August 29, 1994, Arcadia, her sisters Maria and Elisabeth, Maria's husband Ramon, Ramon's brother Angel, and Maria's eight-month-old son went in a Thunderbird to pick up Marco at appellant's mother's house. (VII RT 1914-1915, 1923, 1926-1927.) Arcadia and appellant got into an argument because he did not want to give her the baby. (VII RT 1916, 1923.) Elisabeth and Maria exited the vehicle, obtained Marco, and got back into the Thunderbird. (VII RT 1916-1917, 1924.) Meanwhile, Arcadia and appellant continued to argue in front of the house. (VII RT 1916, 1918, 1924.) At some point, appellant saw Angel, the driver of the vehicle, and became "suspicious." (VII RT 1928.) Appellant asked Ramon who the driver was and Ramon told

appellant it was his brother. (*Ibid.*) Thereafter, appellant shot at the Thunderbird, which had five adults and two infants inside.[47] (VII RT 1918-1919, 1925, 1928-1932.) The vehicle was only seven to eight feet away from appellant when he shot at it. (VII RT 1929.) Arcadia screamed, "leave," and the family sped off in the Thunderbird. (VII RT 1919.) They stopped at a store to call the police. (VII RT 1919, 1925, 1931, 1955-1957.) Visalia Police Officer James Rapozo responded to the call and found two expended shell casings from a .380 caliber handgun in the roadway in front of 1012 North Court Street. (VII RT 1955-1958.) In the building at 1020 North Court, Officer Rapozo found two holes that appeared to have been made by those two bullets. (VII RT 1937, 1963.) The next day, Ramon's brother Manuel, owner of the Thunderbird, noticed a bullet hole in the vehicle's spoiler. (VII RT 1919-1922, 1930, 1932-1933.)

Following the presentation of evidence in mitigation and aggravation, the prosecution requested a number of instructions, many of which were later withdrawn. (II CT 516-523; VII RT 2025.) CALJIC Nos. 2.00, 2.01, 2.20, and 2.22 were all requested by the prosecution. (II CT 516-523.) As to CALJIC No. 2.22 (weighing conflicting testimony), which was requested and later withdrawn, the trial court noted, "I think the reason the district attorney gave

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47. The testimony about the type of firearm appellant used and the direction he fired his weapon varied somewhat. Elisabeth heard appellant arguing with Arcadia and recalled, "He got mad and started shooting at the car where his son was at." (VII RT 1924.) Elisabeth saw appellant with a gun and then heard multiple gunshots. (VII RT 1924-1925.) Elisabeth did not get a good look at the gun and was unable to identify what type of gun it was, but remembered seeing appellant pull something out of his pants before hearing the shots. (VII RT 1925.) Maria thought appellant had shot up, but also saw the gun pointed at the vehicle. (VII RT 1918.) Maria referred to the gun as a "shotgun" at one point in her testimony. (*Ibid.*) Ramon testified appellant used a pistol or handgun. (VII RT 1929.) Ramon saw appellant pull out a gun, point it at the Thunderbird and fire three to four shots. (VII RT 1928-1929, 1932.)

that is for the underlying 245 that you are attempting to prove up, but I think it would be a little bit confusing, because, it being in the penalty phase, I don't think it is necessary. I think it could be confusing." (VII RT 2026.)

Defense counsel also submitted a list of requested penalty phase instructions. (II CT 524; VII RT 2027.) After going through the defense's requested instructions, the trial court announced:

> Before we go, I still am having a problem with these general instructions. [¶] For example, 2.01, "However a finding of guilt as to any crime may not be based upon circumstantial evidence." I don't know why we need this - - these things. If you can - - I don't want to roll over a request, but I don't know - - I mean, I've given 2.00, I've given 2.01, I've given 2.20, and I don't know why I need to specifically give those three instructions again, to the exclusion of other instructions defining crimes.

(VII RT 2035.) The prosecutor replied, "I don't have a problem with that per se," and proposed that instead the court could simply remind the jury to consider the instructions previously given when determining the reasonable doubt factor. (VII RT 2035-2036.) The court explained its main concern was to avoid jury confusion as to "what its duties are with regard to the criminal activity as opposed to the penalty" decision. (VII RT 2036.) The court asked defense counsel if he had any suggestions and defense counsel recommended, "I don't want to see the jury confused, either. But I do want them to realize that this is aggravated or has an independent status here, and it does have to be viewed independently." (*Ibid.*)

The court then suggested:

> Would it be appropriate for me, when I get to the aggravator, to indicate that this - - this particular factor, of whether or not the defendant committed an assault with a firearm, must be proved beyond a reasonable doubt, like any other crime, in order to determine whether the defendant committed this offense, all the previous instructions having to do with proof of a crime would be applicable.

(VII RT 2036.) Defense counsel and the prosecutor both agreed that would be

satisfactory. (VII RT 2036-2037.) The court then eliminated CALJIC Nos. 2.00, 2.01, and 2.20 from the list of jury instructions and wrote up a summary explaining "what factors to use in determining whether the defendant committed the aggravating offense of an assault with a firearm." (VII RT 2037-2038.) The court reasoned, "If I say that those instructions - - the previous instructions apply to the 245, my concern is that the jurors will think that they do not apply to the penalty phase, and that's not necessarily true. We've already instructed them on the law, and I don't think we need to instruct it again, and I think it may be confusing if I do anything other than what I've done." (VII RT 2038.)

Thereafter, the jury was instructed with CALJIC Nos. 8.84 and 8.84.1, which advised, "You will now be instructed as to all of the law that applies to the penalty phase of this trial" and told them, "Disregard all other instructions given to you in other phases of this trial." (II CT 527; VII RT 2039-2040.) The jury was instructed with CALJIC No. 8.85, which listed the factors to be considered during the penalty phase based on section 190.3. (II CT 529-531; VII RT 2040-2042.) Factor (b) (§ 190.3, subd. (b); CALJIC No. 8.85, subd. (b)) informed the jurors to consider, "[T]he presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence." (VII RT 2041.)

The jury was instructed with CALJIC No. 8.87 on the proof beyond a reasonable doubt standard as to the assault with a firearm allegation. The jury was told:

> Before a juror may consider any such criminal act as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did, in fact, commit such criminal act. . . .

If any juror is convinced beyond reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation.

If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(II CT 532; VII RT 2042.) The jury was then given the definition of assault (CALJIC No. 9.00), the elements the prosecution was required to prove in order for appellant have violated section 245(a)(2) (CALJIC Nos. 9.02 and 3.30), and on the presumption of innocence, burden of proof, and reasonable doubt standard (CALJIC No. 2.90). (VII RT 2043-2044.)

B. Argument

At the conclusion of the penalty phase, the trial court instructed the jury with CALJIC No. 8.84.1, which provides, 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.

(VII RT 2039-2040.) The court proceeded to instruct the jury with CALJIC No. 8.85, enumerating the factors for the jury's consideration in determining appellant's penalty, a modified No. 8.87, requiring proof beyond a reasonable doubt for every example of other criminal activity offered in aggravation and defining the burden of proof beyond a reasonable doubt, and a modified No. 8.88, setting forth the concluding instructions for the penalty phase. (II CT 529-532, 538-540; VII RT 2040-2046.)

The court did not, however, instruct the jury with applicable evidentiary instructions from CALJIC Nos. 1.00 through 2.22. Omitted were some of the instructions this Court has held are required in all criminal cases, such as CALJIC No. 2.20 on the credibility of a witness and No. 2.22 on weighing

conflicting testimony. (*People v. Carter* (2003) 30 Cal.4th 1166, 1219; *People v. Rincon-Pineda, supra,* 14 Cal.3d at p. 884.) Appellant contends the court's failure to give these standard evidentiary instructions violated his right to a fair, reliable, and evenhanded capital-sentencing determination under the Eighth and Fourteenth Amendments to the federal Constitution and article I, sections 7, 15, and 17 of the California Constitution, and requires reversal of the death judgment. (AOB 100-113.) Respondent submits that reversal of the death verdict is not required because the error committed by the court was clearly harmless.

Trial courts are "strongly urge[d] to ensure penalty phase juries are properly instructed on evidentiary matters. 'The cost in time of providing such instructions is minimal, and the potential for prejudice in their absence surely justified doing so.'" (*People v. Moon* (2005) 37 Cal.4th 1, 37, fn. 7, quoting *People v. Carter, supra,* 30 Cal.4th at p. 1222.) Normally, a court must instruct the jury on general principles of law that are closely and openly connected with the facts and necessary for the jury's understanding of the case, even absent a request from the defendant. (*Carter*, at p. 1219.) Thus, if a court instructs the jury at the penalty phase not to refer to instructions given at the guilt phase, it later must provide the jury with those instructions applicable to the evaluation of evidence at the penalty phase. (*Moon*, at p. 37.) Accordingly, it was error for the court here not to reinstruct the jury on the general principles regarding witness credibility and weighing conflicting testimony (CALJIC Nos. 2.20 and 2.22). (*Ibid.*; See also *People v. Lewis, supra*, 43 Cal.4th at p. 535.)

Nevertheless, this Court has repeatedly found that it is harmless error not to instruct a penalty-phase jury on evidentiary matters, after instructing the jury to disregard guilt-phase instructions, where the defendant fails to demonstrate a reasonable likelihood that the instructions given in the case precluded the sentencing jury from considering any constitutionally relevant mitigating

evidence. (*People v. Brasure*, *supra*, 42 Cal.4th at pp. 1073-1074; *People v. Lewis, supra* 43 Cal.4th at p. 535; *People v. Wilson* (2008) 43 Cal.4th 1, 28-30; *People v. Loker* (2008) 44 Cal.4th 691, 745-746; *People v. Moon*, *supra*, 37 Cal.4th at p. 39; *People v. Carter*, *supra*, 30 Cal.4th at p. 1221.)

The instant case is similar to *People v. Carter*, *supra,* 30 Cal.4th 1166, where the trial court, as it did in here, instructed the penalty jury to disregard the earlier instructions, but failed to instruct with the standard evidentiary instructions. (*Id.* at pp. 1218-1219.) While this Court found the trial court's omission to be error, it found such error to be harmless under both federal and state law. Specifically, it found that the defendant failed to definitively demonstrate how the omission of the applicable evidentiary instructions prejudiced him; the Court found appellant's assertions of error to be nothing more than speculation. (*Id.* at pp. 1220-1222.)

The same is true here. While appellant generalizes that the absence of the evidentiary instructions permitted the jury "to accept the witnesses' testimony at face value without considering their bias, motivation, expertise, reasonableness, or conflicting statements," he fails to demonstrate that had jury been properly instructed, they would not have found the assault proven beyond a reasonable doubt, and would therefore not have sentenced him to death. (AOB 105-108.) Nor can he because the trial court's failure to reinstruct was harmless under either the state "reasonable possibility" standard for penalty phase error (*People v. Brown* (1988) 46 Cal.3d 432, 446-448), or the "harmless beyond a reasonable doubt" standard for federal constitutional error (*Chapman v. California, supra*, 386 U.S. at p. 24). (*People v. Carter, supra*, 30 Cal.4th at pp. 1221-1222.)

Here, while the prosecution introduced evidence of appellant's prior criminal activity, the jury was given the elements of the alleged criminal assault and expressly told that they could not consider the incident as an aggravating

circumstance unless they found beyond a reasonable doubt that the criminal activity had occurred. (II CT 532-537; VII RT 2042-2044.) The jury was instructed on the definition of assault (CALJIC No. 9.00), the elements the prosecution was required to prove in order for appellant have violated section 245(a)(2) (CALJIC Nos. 9.02 and 3.30), and on the presumption of innocence, burden of proof, and reasonable doubt (CALJIC No. 2.90). (VII RT 2043-2044). The jury was warned that before it could consider the assault with a firearm as an aggravating circumstance, it must first be satisfied beyond a reasonable doubt that appellant committed such criminal act. (VII RT 2042.) The jury was ordered that if they are not convinced beyond a reasonable doubt, they could not consider the evidence of the incident for any purpose. (VII RT 2043.) Thus, it is not reasonably possible that re-instruction with the applicable guilt phase instructions would have affected the penalty verdict.

Although the court did not re-instruct on witness credibility (CALJIC No. 2.20), weighing conflicting testimony (CALJIC No. 2.22), direct and circumstantial evidence (CALJIC No. 2.00), and the sufficiency of circumstantial evidence (CALJIC No. 2.01), the jury was made aware that the instructions given during the guilt phase applied to deciding whether appellant committed the assault with a firearm offense. The prosecutor explained in closing argument:

> You have to consider totally different factors in this case than you did at the earlier guilt case. The only factors that are in common is assault with a firearm. And you use basically the same guidelines that the Judge had informed you of at the guilt phase in order to determine whether or not you find that that occurred beyond a reasonable doubt. And it is only at that point that you will be able to use that in this pattern, the factors that you are to consider at a later time.

(VII RT 2046-2047.) During closing argument defense counsel discussed the conflicting testimony about the shooting and reminded jurors, "You have to find that incident proved beyond a reasonable doubt" in order to consider it as

an aggravating factor. (VII RT 2066.)

Moreover, the evidence of appellant's guilt regarding the assault with a firearm incident was overwhelming. The prosecution presented the testimony of three eyewitnesses to the August 1994 incident wherein appellant shot at a vehicle that had five adults and two infants inside. Each of these witnesses saw appellant fighting with his girlfriend Arcadia and then saw him shoot at the vehicle while it was only seven to eight feet away and loaded with occupants. (VII RT 1918-1919, 1925, 1928-1932.) A bullet hole was found in the vehicle's spoiler the following day. (VII RT 1919-1922, 1930, 1932-1933.) The shooting was reported to the police even though appellant was never charged with any offense relating to the incident. (VII RT 1919, 1925, 1931, 1955-1957.) In a building nearby, the investigating officer found two bullet holes in the building and found two expended shell casings from a .380 calabur handgun in the street. (VII RT 1955-1958, 1963.) The defense did not present any witnesses that testified about the August 1994 incident.[48/] Thus, the only conflicting testimony the jurors had to weigh was the minor inconsistencies presented in the testimony of the prosecution's three eyewitnesses, Maria Torres, Elisabeth Hernandez, and Ramon Torres. Additionally, the jury was well aware of the potential bias or interest of these witnesses as they were

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48. Testimony of defense witness Angelica, appellant's sister, confirmed that appellant has a temper (VII RT 1994), and that there was tension between appellant's family and Arcadia (VII RT 1990-1992). Angelica indicated that Arcadia would pick up the babies at appellant's mother's house and then drop them off after picking up her welfare check. (VII RT 1992.) Angelica testified that appellant and Arcadia "were always arguing." (VII RT 1991.) In fact, Angelica revealed that appellant's mother Maria asked to adopt Marco since the baby spent a lot of time at their house, but that Arcadia said, "[N]o." (VII RT 1991.) Thus, although no defense witness testified about the August 1994 shooting, appellant's sister's testimony is consistent with the testimony about the aggravating incident wherein appellant got into an argument with Arcadia that led to him shoot at her vehicle as she took off with their baby.

related to the mother of appellant's two children, Arcadia, who also testified against appellant. (VII RT 2015-2016.)

Nothing in the record indicates that any of the jurors were confused about what constituted direct and circumstantial evidence or about the sufficiency of circumstantial evidence, as these two concepts were explained during the guilt phase. (II CT 425-427; VII RT 1773-1774.) Although circumstantial evidence of appellant's unadjudicated crime was introduced at the penalty phase, he fails to suggest how the jury, lacking CALJIC Nos. 2.00 and 2.01, might have misunderstood or misused that evidence. Moreover, the assault with a firearm crime was proven predominately by eyewitness testimony. Since the case was not substantially based on circumstantial evidence, appellant was not entitled to circumstantial evidence instructions. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 582; *People v. Marquez* (1992) 1 Cal.4th 553, 577.)

The record has ample evidence supporting the jury's decision to impose the death penalty. The August 1994 shooting was not the only circumstance where appellant had previously exhibited his violent tendencies. Testimony also showed that in October 1991, appellant was on juvenile probation for having a pellet gun at school. (VII RT 2019.) At the time, appellant was attending the Midcounty Community School where he was supervised by Deputy Probation Officer Jerry Speck. (VII RT 2017-2018.) Officer Speck recalled that appellant "did real well unless he was angry or got upset about something." (VII RT 2019.) Officer Speck revealed one such instance where appellant got angry after being asked to do some work in the kitchen. (VII RT 2017-2018.) Appellant refused to comply with Officer Speck's requests and became defiant. (VII RT 2018.) As the situation escalated, appellant became verbally loud and took a defiant stance. (VII RT 2018-2019.) Officer Speck told appellant to calm down, but he remained defiant. (*Ibid.*) Officer Speck

was aware of appellant's violent tendencies and his difficulty calming down when he's angry. (VII RT 2019.) After refusing the calm down, appellant was arrested for violating his probation and transported to juvenile hall. (VII RT 2018.) One of appellant's middle school teachers also testified about appellant's prior violent entanglements and recalled having to take appellant home after a couple of fights at school. (VII RT 2022-2023.) This evidence of appellant's prior misconduct was presented in aggravation and supports the jury's penalty decision.

The victim impact evidence also supports the jury's decision to impose the death penalty. The victim, Saleh Hassan, left behind a wife and three children. (VII RT 1908-1909.) Saleh's wife, Alya Hassan, testified that she had been married to Saleh for 30 years and that she would never remarry after he was murdered. (VII RT 1908, 1910.) Alya told the jury how her husband had worked in the farms for 16 years to save up the money to purchase the Casa Blanca Market as a family business. (VII RT 1909.) She mentioned how Saleh used to work in the store from 7:00 in the morning until 10:00 at night. (*Ibid.*) The family resided in the trailer parked next to the store before Saleh was murdered. (*Ibid.*) After the shooting, the family had to apply for welfare benefits in order to pay the bills. (VII RT 1911.)

The circumstances of the offense were also aggravating. Appellant was a major participant in the crime, being one of the two men who entered the Casa Blanca Market to rob the clerk. (V RT 1298-1299.) Appellant shot Hassan for failing to hand over money right away. As the clerk lay on the floor bleeding to death, appellant went over to Hassan, kicked him, and shot him again. (V RT 1372-1373.) Afterwards, appellant was in a "happyish mood" during the ride back to the apartment and spent the night celebrating the shooting. (V RT 1302-1303, 1381-1382.) During the ride appellant boasted, "I'll never forget the smile on his face." (V RT 1302.) Artero told the jury that appellant acted

"like it was no big deal" and that appellant had looked excited as he bragged about shooting the clerk. (V RT 1373.) As the prosecutor aptly put, "[T]he only purpose for doing that is cold-blooded murder and cruelty. . . . He was on the floor. He was mortally wounded at that time. The only reason to shoot him the second time was to kill him. And the only reason to kill him was for personal satisfaction." (VII RT 2048.)

Appellant, in mitigation, presented the testimony of friends and relatives that provided the jury with information about his life from childhood. There is nothing in the record to indicate that the jury misunderstood or misused the penalty phase evidence because of the omitted instructions.

Accordingly, while it was error for the court not to reinstruct the jury with the applicable guilt phase instructions, it was harmless because there was no possibility that the instructions given in this case precluded the jury from considering any constitutionally relevant mitigating evidence. Thus, under either federal or state standards of review, no prejudicial error occurred. (*People v. Moon*, *supra*, 37 Cal.4th at pp. 35-39; *People v. Carter, supra,* 30 Cal.4th at pp. 1221-1222.) Therefore, appellant's constitutional claim seeking reversal of the penalty phase verdict should be rejected.

VIII.

THE COURT PROPERLY INSTRUCTED THE JURY ON ITS SENTENCING DISCRETION PURSUANT TO CALJIC NO. 8.88 AND PROPERLY REFUSED THE SPECIAL PENALTY PHASE INSTRUCTIONS PROPOSED BY THE DEFENSE

Appellant contends the trial court's refusal to give the ten specially-tailored instructions requested by the defense deprived him of his rights to due process, a fair trial by jury, and fair and reliable guilt and penalty determinations. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 7, 15.) (AOB 114-134.) Appellant has failed to show error.

A. Background

Defense counsel requested ten special instructions. Six of these instructions pinpointed aspects of mitigation under section 190.3 (CALJIC No. 8.85, subdivision (k)): defense special instruction (hereafter "DSI") # 1 on the effect of execution on a defendant's family and friends, DSI # 2 on defendant's potential for rehabilitation, DSI # 3 on mercy, DSI # 4 on lingering doubt, and DSI # 5 on absence of prior felony conviction.[49/] The defense also requested special instructions that a defendant has a constitutional right not to testify at the penalty phase (DSI # 7), that death is the most severe penalty (DSI # 8), that jurors must not consider deterrence or monetary cost (DSI # 9), and a modified CALJIC No. 8.88 instruction.[50/] (II CT 524, 528, 542-546, 548-549.)

As to DSI # 7, to which the People did not object, the trial court decided it was an "appropriate instruction upon request." (VII RT 2026-2027.) As to

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49. As the defense correctly notes, DSI # 6 is not in the record. (AOB 115.) Appellant makes no argument regarding this instruction.

50. The language of each requested instruction is set forth in the arguments below.

the remaining requests, the court declared, "My inclination is not to give any other instructions." (VII RT 2027.) The court then heard defense counsel's arguments supporting each requested instruction and the prosecution's argument in response. (VII RT 2027-2038.) Following the presentation of argument, the court refused to give the remaining instructions. (*Ibid.*)

B. The Court Properly Refused To Instruct The Jury With A Modified Version Of CALJIC No. 8.88

Appellant contends various aspects of CALJIC No. 8.88 violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution and corresponding provisions of the California Constitution. (AOB 115-123.) Because similar challenges to this instruction have been repeatedly rejected by this Court, appellant's contention likewise should be rejected.

CALJIC No. 8.88 provides, in relevant part, "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (II CT 538-539; VII RT 2044-2046.) Appellant contends that the trial court erred, in violation of his constitutional rights, when it refused a defense instruction that would have modified CALJIC No. 8.88 to inform the jury that:

> To return a judgment of death, each of you must be persuaded that the aggravating circumstances outweigh the mitigating circumstances and that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that death is the appropriate penalty instead of life without the possibility of parole.

(AOB 115-116; II CT 547; VII RT 2032.) He contends that the court's refusal to give the modified version of CALJIC No. 8.88 allowed the jury to "impose a death judgment without first determining that death was the appropriate penalty as required by state law," and that the death judgment was therefore

"constitutionally unreliable" and must be reversed. (AOB 123.) Respondent entirely disagrees.

Appellant claims the instruction is impermissibly vague in that it states that to return a verdict of death, each juror must be persuaded the aggravating circumstances are "so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." More specifically, appellant contends the instruction's use of the phrase "so substantial" is impermissibly vague, directionless, and impossible to quantify. (AOB 118.) This contention has been previously rejected by this Court and appellant offers no persuasive reason for reconsideration of the prior rulings. (*People v. Tafoya, supra,* 42 Cal.4th at p. 189; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 124; *People v. Carter, supra,* 30 Cal.4th at p. 1226; *People v. Boyette* (2002) 29 Cal.4th 381, 465; *People v. Breaux* (1991) 1 Cal.4th 281, 315-316.)

Appellant further argues that the instruction told the jurors they could return a judgment of death if persuaded the aggravating circumstances were so substantial in comparison to the mitigating circumstances that it "warrants" death, and that the use of the word "warrants" did not inform them they could return a verdict of death only if they found that penalty was appropriate, not merely authorized. (AOB 121-122.) This claim has been previously rejected (see *People v. Carey, supra,* 41 Cal.4th at p. 137; *People v. Perry* (2006) 38 Cal.4th 302, 320; *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Boyette*, *supra*, 29 Cal.4th at p. 465), and should be rejected in this case, especially since the trial court below expressly informed the jury that "[i]n weighing the various circumstances you determine under the relevant evidence which penalty is *justified and appropriate* by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (II CT 539; VII RT 2045-2046, emphasis added.) Thus, the instruction is

correct because it clearly "admonished the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty." (*Perry*, at p. 320, quoting *People v. Arias* (1996) 13 Cal.4th 92, 171.) Accordingly, no error, constitutional or otherwise, occurred.

In sum, the trial court properly rejected the inaccurate instruction proposed by the defense. As the trial court here correctly concluded, "8.88 has withstood a number of appeals, and I'm going to give 8.88 as it is given." (VII RT 2033.) Therefore, appellant's contrary contention must be summarily rejected under this Court's controlling precedent.

C. The Court Did Not Have A Duty To Instruct That Death Was The Most Severe Penalty Or That Jurors Could Not Consider Cost Or Deterrence In Deciding Penalty

Appellant next contends the trial court erred in refusing to specifically instruct the jury that death was the most severe of the two available penalties (DSI # 8) and that, in deciding the penalty, they could not consider the deterrent effect or monetary cost of the two options (DSI # 9). (AOB 123-126.) Appellant has failed to show error.

This Court has explained that the standard CALJIC penalty phase instructions "'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Gurule* (2002) 28 Cal.4th 557, 659, quoting *People v. Barnett* (1998) 17 Cal.4th 1044, 1176-1177; see also *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1192; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 593; *People v. Raley* (1992) 2 Cal.4th 870, 919-920.) Moreover, the general rule is that a trial court may refuse a proffered instruction if it is an incorrect statement of law, is argumentative, or is duplicative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) Instructions should also be refused if they might confuse the jury. (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.)

In this case, CALJIC Nos. 8.85 and 8.88 fully and accurately conveyed to the jurors the applicable law governing their task in the penalty phase. CALJIC No. 8.85 enumerated the factors the jury were to consider in reaching its decision regarding penalty. (II CT 529-531; VII RT 2040-2042.) CALJIC No. 8.88 expressly instructed the jury to "consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances," and further cautioned the jury not to engage in a "mere mechanical counting of factors." (II CT 538-540; VII RT 2044-2046.) Additionally, CALJIC No. 8.84.1 instructed the jury that it must neither be influenced by bias nor prejudice against appellant, nor swayed by public opinion or public feelings. (II CT 527; VII RT 2039-2040.) These instructions adequately informed the jurors of their sentencing responsibilities.

1. Defense Special Instruction # 8 That Death Is The Most Severe Penalty Was Properly Refused

Defense counsel requested DSI # 8, which told the jury:

> Some of you expressed the view during jury selection that the punishment of life in prison without possibility of parole was actually worse than the death penalty.
>
> You are instructed that death is qualitatively different from all other punishment and is the ultimate penalty in the sense of the most severe penalty the law can impose. Society's next most serious punishment is life in prison without possibility of parole.
>
> It would be a violation of your duty, as jurors, if you were to fix the penalty at death with a view that you were thereby imposing the less severe of the two available penalties.

(II CT 524, 548.) In support of this instruction, defense counsel argued that DSI # 8 dealt with "a position that was taken by quite a number of jurors" and that they could become confused and consequentially end up picking "a worse penalty thinking that they are picking a lesser penalty." (VII RT 2033-2034.) The prosecutor replied, "I think common understanding would instruct the jury

that death is obviously the worst penalty of the two alternatives, and I don't believe there's any legal authority to further elaborate on that." (VII RT 2034.) The court reasoned that CALJIC No. 8.88 instructs the jury, "[T]o return a judgment of death you must be persuaded the aggravating factors are so substantial in comparison of mitigating factors that it warrants death instead of life without parole," and concluded, "So that takes care of that." (*Ibid.*)

In support of his argument that the jury should have been instructed that death was the most severe penalty, appellant cites the jury questionnaire responses of juror number 2 (Juror Questionnaire CT 24) and juror number 9 (Juror Questionnaire CT 122). (AOB 123.) The questionnaire asked prospective jurors, "What are your current thoughts or feelings about life without the possibility of parole as a reasonable alternative for murder of the first degree with special circumstances?" Juror number 2 replied, "I would not want to spend the rest of my life in prison without the hope of ever getting out." (Juror Questionnaire CT 24.) Juror number 9 indicated, "In general, I believe it may be the more cruel punishment but so much depends on each individual circumstance." (Juror Questionnaire CT 122.) These isolated remarks do not show the need for a specific instruction that death is the "most severe penalty."

Juror number 2 was specifically asked by the court during voir dire, "You indicated here that you wouldn't want to spend the rest of your life in prison without hope of ever getting out." (IV RT 1069.) Juror number 2 explained, "That's a personal view for myself." (*Ibid.*) The court then inquired, "Would you still consider the penalty if we got that far of imposing life imprisonment without the possibility of parole?" (*Ibid.*) Juror number 2 acknowledged, "That's something I would consider." (*Ibid.*) Thus, based on the record, juror number 2 did not express disagreement with the sentiment that death is the most severe penalty, but instead, merely conveyed that he personally would not want to spend the rest of his life in prison.

Juror number 9's questionnaire responses also do not show the need for a special jury instruction. Question number 72 asked, "What do you think are the main reasons to have a death penalty?" Juror number 9 replied, "It is the ultimate punishment for the ultimate crime." (Juror Questionnaire CT 122.) This response shows that although Juror number 9 may have felt that life in prison was "the more cruel punishment" he was nevertheless aware that the death penalty was the "ultimate punishment."

Finally, defense counsel mentioned at the end of his closing argument:

> With life without possibility of parole, George will die in prison. That's a punishment. Some thought it might be more severe than the death penalty. But the fact of it is, obviously, death is considered the more severe penalty in our system.

(VII RT 2096.) Nothing in the record suggested that the jury imposed the death penalty believing it was the less severe of the two penalties.

In sum, DSI # 8 defining the death penalty as the "ultimate penalty" was unnecessary and properly rejected by the court. (See *People v. Cook* (2007) 40 Cal.4th 1334, 1363.) Appellant's claim thereby is without merit.

2. Defense Special Instruction # 9 On Deterrence And Monetary Cost Of The Penalties Was Properly Refused

Defendant argues the trial court prejudicially erred and violated his state and federal constitutional rights in refusing to give DSI # 9, which told the jury, "In deciding whether death of life imprisonment without the possibility of parole is the appropriate sentence, you may not consider for any reason whatsoever the deterrent or non-deterrent effect of the death penalty or the monetary cost to the state of execution or of maintaining a prisoner for life." (II CT 524, 549.) Defense counsel argued DSI # 9 was necessary to address "a position that came up numerous times with the jury selection." (VII RT 2034.) The prosecutor cited two cases in support of her opposition, *People v. Thomson* (1988) 45 Cal.3d 86, 131-132, and *People v. Wharton* (1991) 53 Cal.3d 522,

599. (VII RT 2035.) She pointed out that, "[T]he jury is going to be instructed in the balance of the instruction as to exactly what they are to consider, and I believe that's a sufficient instruction." (*Ibid.*) The court agreed and declined to give DSI # 9. (*Ibid.*)

Here, neither party raised the issue of either the cost or the deterrent effect of the death penalty. Accordingly, DSI # 9 was unnecessary. (*People v. Zamudio, supra* 43 Cal.4th at p. 371; *People v. San Nicolas* (2004) 34 Cal.4th 614, 671-672; *People v. Brown* (2003) 31 Cal.4th 518, 566; *People v. Ochoa* (2001) 26 Cal.4th 398, 455-456; *People v. Welch* (1999) 20 Cal.4th 701, 765; *People v. Hines* (1997) 15 Cal.4th 997, 1066-1067; *People v. Wharton, supra,* 53 Cal.3d at p. 599; *People v. Benson* (1990) 52 Cal.3d 754, 806-807; *People v. Thompson* (1988) 45 Cal.3d 86, 131-132.)

Appellant claims that DSI # 9 was necessary because it was "proposed in response to concerns expressed during jury selection." (AOB 125.) The questionnaire asked prospective jurors, "What value do you believe that this punishment [the death penalty] has for society?" and, "What do you think are the main reasons to have a death penalty?" (Juror Questionnaire CT 24, 66, 94, 108, 122.) Although multiple jurors replied to these questions indicating that the death penalty provides a deterrent effect, neither the court, defense counsel, nor the prosecutor questioned any of these jurors on their responses about the deterrent effect or cost of the death penalty. Deterrence was not an issue at trial. The jury was presented with neither evidence nor argument by either side on the issue of the deterrent or nondeterrent value of the death penalty. Accordingly, the juror's responses on their questionnaires provided no basis for the proposed instruction. Therefore, the court properly refused to give DSI # 9.

D. The Court Did Not Have A Duty To Give The Six Requested Pinpoint Instructions On Aspects Of Mitigation Under Factor (k)

The trial court gave the jury standard penalty phase jury instructions, including CALJIC No. 8.84 (Penalty Trial--Introductory), No. 8.84.1 (Duty of Jury-Penalty Proceeding), No. 8.85 (Penalty Trial-Factors for Consideration), and No. 8.88 (Penalty Trial-Concluding Instruction). (II CT 526-527, 529-531, 538-540; VII RT 2039-2042, 2044-2046.) The court declined appellant's request to give the jury six instructions (DSI # 1-6) that pinpointed aspects of mitigation under factor (k) (CALJIC No. 8.85, subd. (k)). Appellant contends that in failing to do so, the court violated his rights to due process and a reliable verdict. (U.S. Const., 8th and 14th Amends.; Cal. Const., art. I §§ 7, 15.) (AOB 127-133.) Appellant's contention is without merit. Indeed, pursuant to *Zant v. Stephens* (1983) 462 U.S. 862, 890-891, the court does not need to instruct jurors on any specific aggravating or mitigating factors at all.

1. Defense Special Instruction # 1 On The Effect Of Execution On Defendant's Family And Friends Was Properly Refused

Defense counsel requested DSI # 1, which told the jury, "Such factors as the effect of defendant's execution on his family and friends is properly considered under the 'character and background' category of this instruction." (II CT 524, 542.) In support of this instruction, defense counsel argued:

> My position on that, your Honor, is this: That this is Factor K, that is covered under anything that extenuates or anything - - anything or other aspect of defendant's character or record that defendant offers a sentence less than death.
>
> And that - - the fact that we put on evidence, extensive evidence concerning the family members and the people that would be affected by the defendant - - being put to death, unless the jury knows that that at least is what that Factor K is talking about. Basically they can simply put it aside and ignore it if they want to, as though there's no legal force binding. There isn't anything except counsel just arguing, and they don't have to take it seriously. That's my position on the Factor K.

(VII RT 2027-2028.) In response, the prosecutor argued, "I think that by giving an instruction, gives it unwarranted exaggeration. I think that, obviously, argument can resolve whatever issues are there. I'm sure the jury - - I know the jury will be instructed as to the factors and I'm sure that Counsel will point out what qualifies them to what factors." (VII RT 2028.) The court refused the instruction. (*Ibid.*)

DSI # 1, along with multiple other instructions requested by appellant, attempted to highlight selected portions of the evidence that were favorable to the defense. As such, these instructions were properly rejected as argumentative. (*People v. Cox* (1991) 53 Cal.3d 618, 678, fn. 21 ["[A] court may properly refuse an instruction that is argumentative or that single[s] out only a partial list of potential mitigating factors for the jury's consideration," citations omitted.].)

Moreover, during closing argument defense counsel repeatedly emphasized the effect of appellant's execution on his family. Showing pictures of appellant's family, defense counsel declared, "This is George's kids. There's other people involved. These are kids. They carry George in them. Claudia, look at this. Another life that's involved. It just goes on and on." (VII RT 2072.) Counsel posed to jurors the question, "Marco should grow up with the only memory that he has of his only father is that he was executed?" (VII RT 2089.) Counsel also discussed the effect on appellant's mother suggesting, "She's given up hope. She's a diabetic. Doesn't want to take her medication. Tragic. What we do, it affects everybody." (VII RT 2089.) Finally, counsel specifically told the jury that the effect on appellant's family could be considered under factor (k), declaring, "[C]onsidering the effects of your decision, relatives, et cetera, of George, is a factor to consider under K." (VII RT 2095.)

For the above reasons, appellant's claim that the trial court erred in failing to pinpoint the effect of appellant's execution on his family and friends should be rejected.

2. Defense Special Instruction # 2 On Appellant's Potential For Rehabilitation Was Properly Refused

Defense counsel requested DSI # 2, which told the jury, "You are instructed that in determining the appropriate penalty for defendant, you may consider as a circumstance in mitigation the defendant's potential for rehabilitation and leading a useful and meaningful life while incarcerated." (II CT 524, 543.) In support of this instruction, defense counsel argued:

> I think that, again, has got to be Factor K, that if they find redeeming value based on the evidence that we presented, then that definitely pertains directly to the words, you know, character - - defendant's character or record as a basis for a sentence less than death. A direct connection to rehabilitation and leading a useful life during incarceration, whether he had a potential for that. And I can't see how the jury would feel that they really are authorized or warranted by law to consider that.

(VII RT 2028.) The prosecutor responded, "I don't think there's any evidence of what his life would be while incarcerated or anything of that nature that shows that it would be any different than just a straight argument record." (VII RT 2029.) The court denied DSI # 2 remarking, "I'm of the opinion that we have the instructions here, at least to this point, tested and tried and I tend to stay with them. For that reason, and the reasons stated by the People, I'm going to deny that instruction and reject it." (*Ibid.*)

Thereafter, defense counsel argued that the requested pinpoint instructions were a "safety precaution" to make sure "that the jury's discretion will not be unbridled in imposing the death penalty." (VII RT 2030.) The court responded that it understood counsel's argument, but that it was still going to deny the pinpoint instructions because "what we're doing is highlighting

different factors and giving it weight based upon my highlighting, which I think is inappropriate." (*Ibid.*) The court also reasoned, "[T]he factors that's listed are the factors within the law, and I think it is appropriate to tell those factors, and . . . the jury can give whatever weight they believe to be entitled." (VII RT 2030-2031.)

Despite the court's refusal to give DSI # 2, defense counsel still pinpointed the possibility of rehabilitation in closing argument. Counsel suggested to the jurors who were convinced of appellant's guilt that appellant should still "be allowed to repent, to actually experience the type of conversion and regeneration that can produce something positive out of his life, even if it is only to become a source of encouragement or good to his only children?" (VII RT 2090.) Defense counsel argued that appellant "had good in him in the past" and proposed, "[T]hen is it out of the question that he can rehabilitate from whatever that part of him could be that allowed him to do something like this?" (*Ibid.*) Thus, based on the record, appellant's rehabilitative potential was brought to the jury's attention to be considered under factor (k) as "any sympathetic or other aspect of the defendant's character or record as a basis for a sentence less than death." (CALJIC No. 8.85, subdivision (k); VII RT 2042.)

As with many of the other instructions requested by the defense, DSI # 2 did nothing more than highlight the defense's theory that appellant's potential for rehabilitation was a mitigating factor. (See, e.g., *Ayers v. Belmontes* (2006) 549 U.S. 7; *Boyd v. California, supra,* 494 U.S. 370; *People v. Catlin* (2001) 26 Cal.4th 81, 172-174; *People v. Earp* (1999) 20 Cal.4th 826, 886; *People v. Noguera* (1992) 4 Cal.4th 599, 648.) As such, it was properly rejected as both argumentative and covered by other instructions.

3. Defense Special Instruction # 3 On Mercy Was Properly Refused

Defense counsel requested DSI # 3, which told the jury, "In determining

whether to sentence the defendant to life imprisonment without the possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant." (II CT 524, 544.) In support of this instruction, defense counsel presented the same argument as with DSI #1 and #2, that # 3 was appropriate to pinpoint aspects of mitigation under factor (k). (VII RT 2031.) In response, the prosecutor cited two cases supporting her opposition, *People v. Nicolaus* (1991) 54 Cal.3d 551, and *People v. Clark* (1992) 3 Cal.4th 41. (*Ibid.*) Thereafter, the court rejected the instruction. (VII RT 2032.)

Appellant contends that the trial court erred when it declined to give a special instruction on mercy. This Court has rejected this claim on numerous occasions consistently holding that the trial court does not have to give such an instruction (*People v. Champion* (1995) 9 Cal.4th 879, 943), and that such instruction is "duplicative of an instruction given by the trial court that the jury could consider '[a]ny 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 aspects of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.'" (*People v. Hines, supra,* 15 Cal.4th at pp. 1068-1069; see also *People v. Wallace* (2008) 44 Cal.4th 1032, 1089-1090.) Appellant's argument provides no reason for this Court not to apply these principles equally in the case at bar.

This Court has repeatedly held that the giving of 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. As noted in *People v. Brown, supra,* 31 Cal.4th 518:

> [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.

(*Id.* at p. 570, citations omitted.)

Likewise, in *People v. Panah* (2005) 35 Cal.4th 395, this Court held that when the type of instructions given above (CALJIC Nos. 8.85 and 8.88) are provided to the jury "no additional instruction [is] required":

> In *Bolin*, "the trial court gave the standard instruction to take into account 'any other circumstance which extenuates the gravity of the crime even thought it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.' The court also told the jury 'to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.' No additional instruction was required." (*Bolin*, at p. 344.) Substantially the same instructions were given here.

(*Panah*, at p. 497, quoting *People v. Bolin* (1998) 18 Cal.4th 297, 344.)

The same is true in the instant case. Here, the trial court instructed with both CALJIC No. 8.85, which told the jury to consider "any sympathetic or other aspect of defendant's character or record as a basis for a sentence less than death," and CALJIC No. 8.88, which told the jury it was "free to assign whatever moral or sympathetic value [it] deem[s] appropriate to each and all of the various factors [it is] permitted to consider." (II CT 531, 539; VII RT 2042, 2045.) When a court instructs the jury with CALJIC Nos. 8.85 and 8.88, it need not give a specific instruction on mercy, even if requested. (*People v. Hughes, supra,* 27 Cal.4th at p. 403; *People v. Wader, supra,* 5 Cal.4th at p. 663.) These instructions adequately inform the jury that it may exercise mercy even though the word "mercy" was not specifically mentioned or defined.

Additionally, defense counsel told the jury in closing argument it could exercise mercy toward appellant. (VII RT 2086 ["[M]ercy sometimes can excuse, mercy sometimes means turning the other way"], 2088 ["Mercy and justice go together"].) And at the end of closing argument, defense counsel

gave a lengthy discussion on mercy:

> Mercy, the values that I'm getting at, punishment, mercy, compassion, humanity and life. Mercy, I didn't put it on here, but let me say that I believe the real definition of mercy is the power that is granted to a fallen one to redeem themselves and make their atonement. That's mercy. That's true mercy. And then compassion is the caring within our human family for the fact of a fallen one. Serious.

(VII RT 2097.)

In sum, the jury was instructed with CALJIC Nos. 8.85 and 8.88 and defense counsel argued, without objection, that the jury could exercise mercy and thus sentence appellant to life without possibility of parole. Accordingly, there is no reason to believe the jury was misled about its obligation to take into account mercy or any of appellant's mitigating evidence in making its penalty determination. (*California v. Brown* (1986) 479 U.S. 538; *People v. Hughes, supra,* 27 Cal.4th at p. 403.) Appellant's claim of error should be rejected.

4. Defense Special Instruction # 4 On Lingering Doubt Was Properly Refused

Defense counsel requested DSI # 4, which told the jury, "The adjudication of guilt is not infallible and any lingering doubts you may entertain on the question of guilt may be considered by you in determining the appropriate penalty." (II CT 524, 545.) In support of this instruction, defense counsel argued that DSI # 4 was appropriate to pinpoint aspects of mitigation under factor (k). (VII RT 2031.) In response, the prosecutor presented two cases supporting her opposition, *People v. De Santis* (1992) 2 Cal.4th 1198, and *People v. Rodrigues, supra*, 8 Cal.4th 1060. (VII RT 2031-2032.) Thereafter, the court rejected the instruction. (VII RT 2032.)

Appellant argues the trial court prejudicially erred and violated his state and federal constitutional rights in denying his request for a lingering doubt instruction. (AOB 130.) This Court has 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.]" (*People v. Geier, supra*, 41 Cal.4th at p. 615; see also *People v. Bonilla, supra,* 41 Cal.4th at p. 357; *People v. Demetrulias* (2006) 39 Cal.4th 1, 42; *People v. Gray, supra,* 37 Cal.4th at pp. 231-232; *People v. Brown, supra*, 31 Cal.4th at p. 567; *People v. Lawley* (2002) 27 Cal.4th 102; *People v. Rodrigues, supra*, 8 Cal.4th at p. 1187; *People v. Berryman, supra,* 6 Cal.4th at p. 1104.)

Accordingly, the lingering doubt instruction DSI # 4 was unnecessary in the present case. The trial court already instructed the jury that in making its penalty determination, it could consider "the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true," and "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." (CALJIC No. 8.85; II CT 529-531; VII RT 2040-2042; see also *People v. Brown, supra*, 31 Cal 4th at p. 567; *People v. Demetrulias, supra*, 39 Cal.4th at p. 42; *People v. Gray, supra*, 37 Cal.4th at p. 232; *People v. Hines, supra,* 15 Cal.4th at p. 1068.) "These instructions sufficiently encompassed the concept of 'lingering doubt,' and the trial court was under no duty to give a more specific instruction. [Citations.]" (*Hines*, at p. 1068; see also *Brown,* at p. 568.)

Furthermore, the record demonstrates that the jury was well aware that they could consider their doubts concerning appellant's guilt at the penalty phase of the trial. Defense counsel first brought up the concept of "lingering doubt" during his penalty phase opening argument. In his opening remarks, counsel argued,

> There is one thing, though, that will come up during the second phase, and it is legal. It is allowable. That is a concept that's known as

> lingering doubt. I will - - in one way or another, I will remind all of you concerning the fact that you may - - that you may have a lingering doubt, some may have a lingering doubt . . .

(VII RT 1905.) Then during closing argument counsel argued that the jury could consider any "lingering doubt" about whether death was an appropriate penalty for appellant:

> That it is possible that even though there be enough evidence that is satisfactory to you, persuade you beyond a reasonable doubt of the guilt of the crime, yet, on the other hand, it is not certain enough, it does not rise to the level of a certainty that you would demand before you could put somebody to death. That's the seriousness. And to those people I speak to and say that if you had reservations, if you were hesitating, lingering doubt is now a reality, it now becomes an important feature.

(VII RT 2091-2092; see *People v. Hines, supra*, 15 Cal.4th at p. 1068 [the court permitted defendant to argue mitigating factor of lingering doubt even though it denied instruction on same].) Thus, contrary to appellant's assertion, the trial court did not remove the matter of "lingering doubt" from the jury's consideration. (See AOB 131.)

In sum, the trial court was not required to instruct on "lingering doubt." The topic of "lingering doubt" was properly encompassed in other jury instructions and was emphasized during argument by the defense. Thus, the jury was allowed to consider, as a mitigating factor, any "lingering doubt" they may have had over appellant's guilt. Accordingly, the court did not err in refusing to give DSI # 4, the requested lingering doubt instruction, and appellant's argument to this point must be rejected.

5. Defense Special Instruction # 5 On Absence Of A Prior Felony Conviction Was Properly Refused

Defense counsel requested DSI # 5, which told the jury, "There has been no evidence presented that defendant has been convicted of any prior felony. This circumstance should therefore be viewed as a circumstance in mitigation." (II CT 524, 546.) Defense counsel argued that the instruction was appropriate

to pinpoint aspects of mitigation under factor (k). (VII RT 2031.) The court rejected the instruction. (VII RT 2032.)

As with the preceding instructions, DSI # 5 was properly denied as argumentative in that it attempted to "'single[s] out only a partial list of potential mitigating factors for the jury's consideration.'" (*People v. Cox, supra,* 53 Cal.3d at p. 678, fn. 21, citing *People v. Howard* (1988) 44 Cal.3d. 375, 442.) DSI # 5 was also duplicative because the jury was instructed that it shall consider "the presence or absence of any prior felony conviction." (CALJIC No. 8.85, subdivision (c); II CT 529; VII RT 2041; see *People v. Gurule, supra*, 28 Cal.4th at p. 659.) Finally, although the instruction pointing out that appellant did not have any prior felony convictions was refused, defense counsel was not prohibited from emphasizing this point during closing argument. In fact, defense counsel succinctly told the jury during closing argument, "That's mitigation, no prior felony convictions. That's been proved [*sic*]." (VII RT 2094.) The prosecutor also mentioned CALJIC No. 8.85, subdivision (c), during closing argument noting, "You have no evidence of any prior felony convictions and you can attach the weight you feel is appropriate to that particular factor." (VII RT 2052.) As such, appellant's argument that the court erred in failing to give DSI # 5 is also meritless.

6. Conclusion

The trial court properly rejected the defense's six proposed special instructions which would have "pinpointed" his theory of mitigation by referring to, among other things, his potential for rehabilitation, absence of prior felony convictions, and the effect of execution on his family and friends. As discussed, the pattern instructions given were sufficient to define for the jury the concepts of aggravation and mitigation.

Appellant's "pinpoint" instructions were patently argumentative and, among other things, "would have usurped the jury's proper role as fact finder

at the penalty phase." (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1159.) A capital defendant is not entitled to argumentative instructions in the penalty phase. (*Ibid.*) Although instructions pinpointing the *theory* of the defense might be appropriate, a defendant is not entitled to instructions that simply recite facts favorable to him. (*People v. Benson, supra,* 52 Cal.3d at pp. 805-806.)

Each of the rejected special penalty instructions was duplicative of standard instructions, argumentative, or otherwise properly refused. As to those decisions of this Court, which appellant acknowledges but asks be revisited or reconsidered, he fails to offer any persuasive reason why this Court should deviate from its prior holdings. This conclusion is not altered by a "preliminary" empirical study cited by appellant. (AOB 131-132.) As this Court succinctly noted in a similar context,

> The presumption that the jurors in this case understood and followed the [ ] instruction supplied to them is not rebutted by empirical assertions to the contrary based on research that is not part of the present record and has not been subject to cross examination.

(*People v. Welch, supra,* 20 Cal.4th at p. 773.) Accordingly, appellant's offered study is inconsequential.

In sum, the CALJIC jury penalty phase instructions "'are adequate to inform the jurors of their sentencing responsibilities in compliance with federal and state constitutional standards.'" (*People v. Gurule, supra,* 28 Cal.4th at p. 659, citing *People v. Barnett, supra*, 17 Cal.4th at pp. 1176-1177.) As such, appellant's argument that the trial court erred in refusing his proposed penalty phase instructions is without merit and his claim should be denied.

IX.

CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONAL

Appellant makes several instructional and constitutional challenges to California's death penalty statute pursuant to the procedure set out in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304. (AOB 135-154.) These claims all have been previously rejected by this Court. Because appellant offers no compelling reason for reconsideration, his claims should likewise be rejected.[51/]

A. The Special Circumstances In Section 190.2 Are Not Overbroad And Properly Narrow The Class Of Death Eligible Offenders

Appellant's first constitutional challenge is based on his argument that California's death penalty statute, section 190.2, does not "meaningfully narrow" the pool of murderers eligible for the death penalty. (AOB 135-136.) Appellant acknowledges this Court has rejected previous challenges to the constitutionality of the statute, but urges this Court to reconsider its decision in *People v. Stanley* (1995) 10 Cal.4th 764, 842, and strike down California's death penalty statute.

The Supreme Court has found that California's requirement of a special circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53.) The Supreme Court explained the Eighth Amendment requirements in the context of California's statute in *Tuilaepa v. California* (1994) 512 U.S. 967:

> Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decision-making process: the

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51. To the extent appellant asserts alleged statutory errors not objected to at trial, the issue is waived on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589.) Similarly, any complaints relating to instructions which were not erroneous, but inadequate, are waived unless appellant requested clarifying or amplifying language. (*People v. Lewis* (2001) 25 Cal.4th 610, 666.)

> eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague.

(*Id.* at pp. 971-922, citations omitted.)

California's statutory scheme fulfills the narrowing requirement in two ways. First, special circumstances define and limit those murders which are death-eligible. (§ 190.2.) Before a defendant can become death-eligible, he must be convicted of first degree murder, and at least one special circumstance must be found true beyond a reasonable doubt. The latter requirement, the United States Supreme Court has held, adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris, supra,* 465 U.S. at p. 53.) Second, the jury's discretion is narrowed and channeled by the list of aggravating circumstances in the selection phase. (§ 190.3.)

Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by appellant that California's death penalty law contains so many special circumstances that it fails to perform the narrowing function required under the Eighth Amendment or that the statutory categories have been construed in an unduly expansive manner. (*People v. Wallace, supra,* 44 Cal.4th at p. 1097; *People v. Loker, supra,* 44 Cal.4th at p. 755; *People v. Smith* (2007) 40 Cal.4th 483, 525-526; *People v. Burgener* (2003) 29 Cal.4th 833, 884; *People v. Lewis* (2001) 26 Cal.4th 334, 393-394; *People v. Frye, supra,* 18 Cal.4th at p. 1029; *People v. Arias, supra*, 13 Cal.4th at pp. 186-187; *People*

v. Crittenden, supra, 9 Cal.4th at pp. 154-156; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 468.)

In sum, this Court has repeatedly upheld the constitutionality of section 190.2 in response to challenges it fails to adequately narrow the class of death eligible murderers. Given the well-settled authority contrary to appellant's position, the argument must again be rejected.

B. Application Of Section 190.3 Did Not Violate Appellant's Constitutional Rights

Appellant argues that instructing the jury on the sentencing factors of section 190.3, subdivision (a), which directs the jury to consider as aggravation the "circumstances of the crime," resulted in the prosecutor arguing that the jury could weigh in aggravation "almost every conceivable circumstance of the crime." (AOB 136.) Appellant contends that California's capital sentencing scheme, which does not limit the circumstances that can be characterized as "aggravating," violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 137.)

The Supreme Court has held that instructing a jury to consider the circumstances of a crime under section 190.3, subdivision (a), does not violate the Eighth Amendment. (*Tuilaepa v. California, supra*, 512 U.S. at p. 976.) Furthermore, as appellant acknowledges, this Court has repeatedly rejected the argument that allowing the jury to consider the circumstances of the crime as a factor in aggravation results in arbitrary and capricious application of the death penalty. (*People v. Wallace, supra,* 44 Cal.4th at p. 1097; *People v. Loker, supra*, 44 Cal.4th at p. 755; *People v. Salcido* (2008) 44 Cal.4th 93, 165; *People v. Kennedy, supra,* 36 Cal.4th at p. 641; *People v. Smith, supra,* 35 Cal.4th at p. 373; *People v. Brown, supra,* 33 Cal.4th at p. 401.) Accordingly, as appellant has given no basis for reconsideration of these prior holdings, his claim should be rejected.

C. The Use Of Appellant's Unadjudicated Criminal Activity As An Aggravating Factor Was Constitutional

Appellant urges the use of unadjudicated criminal activity as aggravation under section 190.3, subdivision (b), (CALCJIC No. 8.85, factor (b)) for a crime for which he was never charged and convicted, violates rights of due process, fair trial, and a reliable penalty determination guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments. Appellant also alleges that "because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated" his equal protection rights. (AOB 137-139.)

This Court has previously held that the jury "may properly consider evidence of unadjudicated criminal activity involving force or violence under factor (b) of section 190.3 and need not make a unanimous finding on factor (b) evidence. (*People v. Anderson, supra,* 25 Cal.4th at p. 584.) Furthermore, this Court recently rejected a claim nearly identical to the one raised here, finding:

> [T]here is no requirement that California's death penalty sentencing scheme provide for intercase proportionality review. And since capital defendants are not similarly situated to noncapital defendants, the death penalty law does not violate equal protection by denying capital defendants certain procedural rights given to noncapital defendants. Hence, the jury may consider unadjudicated offenses under section 190.3, factor (b) as aggravating factors without violating the defendants rights to trial, confrontation, an impartial and unanimous jury, due process, or a reliable penalty determination.

(*People v. Cruz* (2008) 44 Cal.4th 636, 681, citations omitted; see also *People v. Loker, supra,* 44 Cal.4th at p. 756; *People v. Stevens* (2007) 41 Cal.4th 182, 212; *People v. Jenkins* (2000) 22 Cal.4th 900, 1054.) Thus, contrary to appellant's claim, the use of unadjudicated criminal activity during the penalty phase is permissible, and did not violate his constitutional rights.

D. California's Death Penalty Statute And Accompanying Jury Instructions Set Out The Appropriate Burden Of Proof

Appellant raises a variety of constitutional challenges to California's death penalty statute and accompanying instructions, all of which have been previously rejected by this Court. (AOB 139-150.) Because appellant offers no compelling reason for reconsideration, these claims should likewise be rejected.

This Court has rejected appellant's claims, namely that the proof beyond a reasonable doubt standard is required for finding the existence of an aggravating circumstance (*People v. Snow* (2003) 30 Cal.4th 43, 126), that aggravating circumstances outweigh mitigating ones (*ibid.*), and that death is the appropriate punishment (*People v. Box* (2000) 23 Cal.4th 1153, 1216; *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418).

Appellant claims the California death penalty statute unconstitutionally fails to define the burden of proof on whether an aggravating circumstance exists, whether the aggravating factors outweigh the mitigating factors, and whether death is the appropriate penalty. (AOB 141.) This claim has been previously rejected by this Court. (*People v. Maury, supra,* 30 Cal.4th at p. 440.) Insofar as appellant contends that the Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona* (2002) 536 U.S. 584, and *Apprendi v. New Jersey, supra,* 530 U.S. 466, compel a different conclusion (see AOB 139-140), this Court has squarely rejected this argument. (*People v. Salcido, supra,* 44 Cal.4th at p. 167; *People v. Ward* (2005) 36 Cal.4th 186, 221; *People v. Morrison, supra*, 34 Cal.4th at pp. 730-731.)

Appellant also argues that the penalty phase instructions violated his constitutional rights because they did not require the jury to unanimously agree as to the aggravating factors. (AOB 142-144.) This Court, however, has

repeatedly held that juror unanimity is not required for the aggravating factors. (*People v. Panah, supra,* 35 Cal.4th at p. 499; *People v. Horning* (2004) 34 Cal.4th 871, 913; *People v. Brown, supra*, 33 Cal.4th at p. 402.) Recent decisions by the Supreme Court in *Ring* and *Apprendi* have not changed this conclusion.[52/] (*People v. Stitely* (2005) 35 Cal.4th 514, 573; *Panah,* at p. 499; *People v. Morrison, supra,* 34 Cal.4th at p. 730; *People v. Griffin* (2004) 33 Cal.4th 536, 595; *Brown,* at p. 402.) The failure to require unanimous agreement on the aggravating factors does not lead to an unreliable sentencing determination that violates the Eighth Amendment. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1246; *People v. Raley, supra*, 2 Cal.4th at p. 910.)

Appellant's argument that the jury was required to unanimously find any unadjudicated crimes had been proven beyond a reasonable doubt, and should have been instructed in that regard (AOB 144), has been routinely rejected by this Court. (*People v. Ward, supra,* 36 Cal.4th at pp. 221-222; *People v. Prieto, supra*, 30 Cal.4th at p. 276; *People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Insofar as appellant contends that *Ring* and *Apprendi* compel a different conclusion (see AOB 144), appellant is mistaken. This Court has found that *Ring* and *Apprendi* do not affect California's death penalty law. (*People v. Salcido, supra,* 44 Cal.4th at p. 167; *People v. Smith* (2003) 30 Cal.4th 581, 642.)

Appellant argues that use of the phrase "so substantial" in section 190.3, subdivision (g), was error in that is caused the penalty determination to turn on an impermissibly vague and ambiguous standard. (AOB 145.) This claim has

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52. In the recent case *Oregon v. Ice* (2009) __ U.S. __, 2009 WL 77896 (January 14, 2009), the Supreme Court held that a jury determination is not required for imposing consecutive sentences within the meaning of *Ring, Apprendi, Blakely*, and *Cunningham*. Historical practice and respect for state sovereignty do not support applying these cases to the jury's choice between life and death.

been previously rejected by this Court and should be rejected here. (*People v. Smith, supra,* 30 Cal.4th at p. 642.) CALJIC No. 8.88 is not unconstitutionally vague in using the "so substantial" standard for comparing mitigating and aggravating circumstances. (*People v. Geier, supra,* 41 Cal.4th at p. 619.) The instruction's use of the phrase "so substantial" in connection with the mitigating circumstances did not suggest the jury was powerless to return a life sentence even if it found the mitigating factors outweighed the aggravating ones. (*People v. Boyette, supra,* 29 Cal.4th at p. 465.)

Appellant's allegation that the jury should have been instructed that the central determination is whether death is the appropriate punishment (AOB 146) has also been previously rejected by this Court (*People v. Boyette, supra*, 29 Cal.4th at p. 465) and should be rejected here. As discussed in Argument VIII, subsection B, CALJIC No. 8.88 is not unconstitutional because it requires the jury to decide whether the death penalty is "warranted" rather than "appropriate." (*People v. Carey, supra,* 41 Cal.4th at p. 137.)

Despite appellant's argument to the contrary (AOB 147), CALJIC No. 8.88 is not unconstitutional for failing to advise the jury that if the mitigating circumstances outweigh those in aggravation, it is required to return a sentence of life without the possibility of parole. (*People v. Geier, supra,* 41 Cal.4th at p. 619; *People v. Moon, supra*, 37 Cal.4th at p. 42.)

Insofar as appellant contends the jury should have been instructed on some standard of proof to guide its decisions on whether to impose the death penalty (AOB 148), this claim has been rejected in prior decisions of this Court, and should be rejected here. (*People v. Blair, supra,* 36 Cal.4th at p. 753; *People v. Box, supra*, 23 Cal.4th at p. 1216; *People v. Carpenter, supra*, 15 Cal.4th at pp. 417-418.) It is also not unconstitutional in failing to inform the jury that it need not be unanimous before any juror can rely on a mitigating circumstance. (*People v. Coddington* (2000) 23 Cal.4th 529, 641.)

Finally, appellant's contention that the trial court should have instructed the jury that there is a "presumption of life" at the penalty phase of the trial, analogous to the presumption of innocence at the guilt trial (AOB 149), has been repeatedly rejected by this Court. (*People v. Avila, supra,* 38 Cal.4th at p. 615; *People v. Perry, supra,* 38 Cal.4th at p. 321; *People v. Maury, supra,* 30 Cal.4th at p. 440; *People v. Kipp, supra,* 26 Cal.4th at p. 1137.)

For the foregoing reasons, appellant's challenge to California's death penalty procedures should be rejected.

E. The Jury Was Not Required To Make Any Written Findings During The Penalty Phase

Appellant contends the failure under California law to require that the jury make written findings violated his constitutional rights. (AOB 150.) This Court has previously held that written findings on aggravating factors used as a basis for imposing the death penalty are not constitutionally required. (*People v. Snow*, *supra*, 30 Cal.4th at p. 126; *People v. Kraft, supra,* 23 Cal.4th at p. 1078; *People v. Williams* (1997) 16 Cal.4th 153, 276.) Accordingly, this claim should be rejected.

F. Jury Instruction On The Mitigating And Aggravating Factors In Section 190.3 Was Constitutional

Appellant argues that the use of "restrictive" adjectives such as "extreme" and "substantial" in CALJIC No. 8.85 violated his constitutional rights by acting as barriers to the consideration of mitigation. (AOB 150-151.) This Court has previously held that, "CALJIC No. 8.85 is not unconstitutional for using 'restrictive adjectives' such as 'extreme' and 'substantial.'" (*People v. Moon, supra,* 37 Cal.4th at p. 42, citing *People v. Weaver* (2001) 26 Cal.4th 876, 993; see also *People v. Perry, supra,* 38 Cal.4th at p. 319; *People v. Lewis*, *supra*, 26 Cal.4th at p. 395; see also *Blystone v. Pennsylvania* (1990) 494 U.S. 299.)

Appellant next argues that the failure to delete inapplicable statutory sentencing factors, in the list of mitigating factors from section 190.3, in CALJIC No. 8.85 acted as a barrier to the consideration of mitigating evidence in violation of the Sixth, Eighth, and Fourteenth Amendments. (AOB 151.) This claim has been previously rejected by this Court and should be rejected here. (*People v. Watson* (2008) 43 Cal.4th 652, 701; *People v. Zamudio, supra,* 43 Cal.4th at p. 372; *People v. Perry, supra*, 38 Cal.4th at p. 319 *People v. Dickey, supra,* 35 Cal.4th at p. 928.)

Finally, appellant contends the failure to instruct that on which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending on the jury's appraisal of the evidence violated his rights under the Eighth and Fourteenth Amendments. (AOB 151-153.) This Court has previously rejected this argument finding, "Although some of the statutory factors are inherently only aggravating or mitigating, because this is self-evident, the court need not identify which is which." (*People v. Carpenter, supra*, 15 Cal.4th at p. 420, citations omitted; see also *People Moon, supra*, 37 Cal.4th at p. 41, citing *People v. Willaims, supra*, 16 Cal.4th at pp. 268-269; see also *Tuilaepa v. California, supra,* 512 U.S. at pp. 976-979.) Appellant offers no compelling reason for this Court to reconsider its previous decisions upholding the constitutionality of CALJIC No. 8.85.

G. Intercase Proportionality Review Is Not Constitutionally Required

Appellant claims that California's failure to conduct intercase proportionality review of death sentences violates his Eighth and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment. (AOB 153.) This Court has previously rejected the claim that such review is required. (*People v. Abilez* (2007) 41 Cal.4th 472,

People v. Prieto, supra, 30 Cal.4th at p. 276; *People v. Snow, supra,* 30 Cal.4th at pp. 126-127; *People v. Kipp, supra,* 26 Cal.4th at p. 1139; see also *Pulley v. Harris, supra,* 465 U.S. 37.) Insofar as appellant argues the lack of intercase proportionality review in capital cases amounts to a violation of equal protection, this Court has previously rejected this claim and should do so here. (*People v. Moon, supra,* 37 Cal.4th at p. 48; *People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Cox* (2003) 30 Cal.4th 916, 970.) Appellant's claim should likewise be rejected.

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

Appellant contends the alleged absence of procedural protections resulted in a denial of equal protection, because, according to appellant, those safeguards are provided to non-capital defendants. (AOB 153-154.) On the contrary, California's death penalty law does not deny equal protection because a different method of determining penalty is used in capital and non-capital cases. (*People v. Williams* (2008) 43 Cal.4th 584, 650; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Smith, supra,* 35 Cal.4th at p. 374.) That certain noncapital sentencing proceedings may require jury unanimity or proof beyond a reasonable doubt does not mean the death penalty statute violates the equal protection clause of the Fourteenth Amendment. (*People v. Hoyos, supra,* 41 Cal.4th at p. 926; see also *People v. Rogers, supra,* 39 Cal.4th at p. 893.)

I. Appellant's Death Sentence Does Not Violate International Law

Appellant claims his sentence violates international law. (AOB 154.) This Court has repeatedly held that international law does not prohibit a death sentence rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Lewis, supra,* 43 Cal.4th at p. 539; *People v. Perry, supra,* 38 Cal.4th at p. 322; *People v. Boyer, supra,* 38 Cal.4th at pp.

489-490.) Because has failed to show that either state or federal law was violated, this Court need not consider his claim of international law violations. (*People v. Hoyos*, *supra* 41 Cal.4th at 925; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.)

Morever, appellant fails to demonstrate standing to invoke the jurisdiction of international law in this proceeding because the principles of international law apply to disputes between sovereign governments, not individuals. (*Hanoch Tel-Oren v. Libyan Arab Republic* (D.C. 1981) 517 F.Supp. 542, 545-547.) Appellant does not have standing to raise claims that his conviction and sentence resulted from violations of international treaties. Article VI, section 2, of the United States Constitution provides, in pertinent part, that the Constitution, the laws of the United States, and all treaties made under the authority of the United States are the supreme law of the land. Under general principles of international law, individuals have no standing to challenge violation of international treaties in absence of a protest by the sovereign involved. (*Matta-Ballesteros v. Henman* (7th Cir. 1990) 896 F.2d 255, 259; *United States ex rel. Lujan v. Gengler* (2d Cir. 1975) 510 F.2d 62, 67.)

International law does not compel the elimination of capital punishment in California. (*People v. Snow*, *supra*, 30 Cal.4th at p. 127; *People v. Hillhouse, supra,* 27 Cal.4th at p. 511; *People v. Jenkins, supra,* 22 Cal.4th at p. 1055; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In *Ghent*, this Court held that international authorities similar to those now invoked by appellant do not compel elimination of the death penalty and do not have any effect upon domestic law unless they are either self-executing or implemented by Congress. (*Hillhouse,* at p. 511; *Ghent*, at p. 779.) Appellant's argument that this Court should reconsider its previous decisions in light of *Roper v. Simmons* (2005) 543 U.S. 551, 554 is misplaced. (AOB 154.) As appellant notes, *Roper* cited

international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles. Appellant was not a juvenile when he killed Saleh Hassan in December 1994, thus reconsideration based on *Roper* is not warranted.

In sum, appellant has failed to state a cause of action under international law for the simple reason his claims of constitutional violations asserted throughout the appeal are without merit. Further, this Court is not a substitute for international tribunals and, in any event, American federal courts carry the ultimate authority and responsibility for interpreting and applying the American Constitution to constitutional issues raised by federal and state statutory or judicial law. Finally, this Court's earlier decisions preclude relief.

For all the foregoing reasons, appellant's challenges to the death penalty, if reviewable, are meritless.

X.

NO CUMULATIVE ERROR UNDERMINED THE OVERALL FAIRNESS OF EITHER GUILT OR PENALTY PHASES

Appellant's final argument is that the cumulation of error infected both phases of his trial, and that the end result of many errors reinforcing the prejudice of the other errors was a fundamental denial of due process and a miscarriage of justice. (AOB 155-157.) However, as detailed throughout Respondent's Brief, each of these supposed errors were either substantively meritless or entirely harmless. Thus, whether considered individually or for their cumulative effect, there is no "reasonably probability" that the alleged errors affected the outcome of the penalty phase. (*People v. Jones* (2003) 30 Cal.4th 1084, 1117; see also *People v. Watson, supra,* 43 Cal.4th at p. 704 ["Whether considered independently or together, any errors or assumed errors are nonprejudicial and do not undermine defendant's conviction or sentence."]; *People v. Carter, supra,* 36 Cal.4th at pp. 1212-1213 ["Having determined that defendant's trial was nearly devoid of any error, and that to the extent any error was committed it was clearly harmless, we conclude that defendant's contention as to cumulative error lacks merit."].).) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Stewart, supra,* 33 Cal.4th at pp. 521-522.) Accordingly, appellant's claim of cumulative error must be rejected.

CONCLUSION

For the foregoing reasons, respondent respectfully asks this Court to affirm appellant's judgment of conviction and the penalty of death.

Dated: January 27, 2009

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 42,631 words.

Dated: January 27, 2009

Respectively submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

CHRISTINA HITOMIT
Deputy Attorney General

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Contreras*** No.: **S058019**

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 January 28, 2009, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 28, 2009, at Sacramento, California.

_____
Declarant