SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. EDWARD CHARLES, III, Defendant and Appellant.	CAPITAL CASE Case No. S076337

SUPREME COURT
FILED
AUG 28 2009
Frederick K. Ohlrich Clerk
DEPUTY

Orange County Superior Court Case No. 94NF2611
The Honorable William R. Froeberg, Judge

RESPONDENT'S BRIEF

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
Adrianne S. Denault
Deputy Attorney General
PETER QUON, JR.
Supervising Deputy Attorney General
State Bar No. 77833
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2038
Fax: (619) 645-2271
Email: Peter.Quon@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

On April 10, 1995, an Information filed by the District Attorney of Orange County charged appellant, Edward Charles, III, of murdering his brother, Danny Charles (Count 1), his father, Edward Charles II (Count 2) and his mother, Dolores Charles (Count 3) with malice aforethought (Pen. Code, § 187, subd. (a)). A multiple murder special circumstance was alleged pursuant to Penal Code section 190.2, subdivision (a)(3). (1CT 191-192.) Charles pled not guilty to the charges and denied the special allegation. (1CT 201.)

On December 7, 1995, the jury and alternate jurors were sworn to try the case. (2CT 531-535.) On December 11, 1995, the prosecutor and defense counsel made opening statements to the jury and the jury trial commenced. (2CT 627-628.)

On January 9, 1996, the jury found Charles guilty of second degree murder of his brother Danny Charles (Count 1), of first degree murder of his father Edward Charles II (Count 2) and of second degree murder of his mother Dolores Charles (Count 3). The jury also found true the special allegation Charles committed multiple murders. (3RT 751-753-754, 762, 799-802.)

On January 11, 1996, Charles's penalty phase jury trial commenced. (3CT 828-829.) On January 25, 1996, a mistrial was declared because the jury could not reach a unanimous verdict. (3CT 869-874.) Eleven jurors favored a death verdict and one juror favored a life imprisonment verdict. (11RT 3426-3427.)

On March 20, 1996, jurors and alternate jurors were selected and sworn to re-try the penalty phase trial. This second penalty phase re-trial commenced that day. (3CT 1016-1017.) On April 2, 1996, the jury returned a death verdict. (3CT 1084; 4CT 1139-1140.)

On June 21, 1996, Charles filed a motion for new penalty phase trial based on the allegation a juror in the second penalty phase contacted a clergyman about Christians determining a death sentence in a trial. (4CT 1174-1183, 1290-1295 [supp. brf.].) The prosecutor opposed that motion. (4CT 1251-1258, 1267-1286 [supp. brf.].) On August 8, 1996, Charles's motion for a new penalty phase trial was granted. Charles's then counsel, the Orange County Public Defender, was relieved of representing Charles and new counsel was substituted. (4CT 1302-1304.)

On January 8, 1998, jurors and alternate jurors were selected and sworn to re-try the penalty phase trial a third time. (4CT 1364-1365.) This third penalty phase jury re-trial commenced on January 12, 1998. (4CT 1459; 5CT 1634-1635.) On January 29, 1998, a mistrial was declared because the jury could not reach a unanimous verdict. (5CT 1840-1841.) The jury foreperson told the court the split was eleven jurors to one juror. (5CT 1840; 29RT 3891.)

On March 6, 1998, the lower court ruled a fourth penalty phase jury trial would be allowed. (5CT 1847.) On July 24, 1998, the district attorney filed a Third Amended Notice of Evidence in Aggravation that evidence of Charles's May 4, 1995, assault on a fellow inmate, his December 1995 attempted threat to take an officer of the court hostage and his October 14, 1997, possession of contraband in jail, would also be presented in the pending penalty phase trial. (5CT 1849-1850.)

On October 14, 1998, jurors and alternate jurors were selected and sworn to re-try the penalty phase trial. (6CT 1863.) This fourth penalty phase jury re-trial commenced on October 15, 1998. (6CT 1864.) On October 29, 1998, the jury returned a death verdict. (6CT 1899, 1985, 1987-1988.)

On January 15, 1999, the trial court denied Charles's automatic Motion for Modification of Verdict. (6CT 2082.) That same day, the trial

court sentenced Charles to death. (6CT 2073-2078, 2079-2085 [statement of reasons].)

STATEMENT OF FACTS

A. Preliminary Statement

Edward Charles III was convicted of killing his father Edward Charles II, his mother Dolores Charles, and his younger brother Daniel Charles, in the evening of November 6, 1994, (Sunday), and early morning of November 7, 1994, (Monday) Charles's maternal grandfather, Bernard Severino, lived with Edward and Dolores in their Fullerton, California, residence. Daniel was a college student living away at school and Charles was living with his then-girlfriend's family in another part of Fullerton. On Sunday, Daniel was at the Fullerton home and planned to drive back to his college residence that night.

After killing his parents and younger brother, Charles put their bodies into the younger brother's car, drove the car to a high school parking lot in Los Angeles County and set the car on fire. He was arrested days later.

B. Facts

On Sunday, November 6, 1994, married couple Dolores Charles (hereafter "Dolores") and Edward Charles (hereafter "Edward") were living on Terraza Place in Fullerton, California. They had two grown sons; the older son, Edward Charles III (appellant), and the younger son, Daniel Charles (hereafter "Daniel").[1] (5RT 1409-1410.) Bernard Severino, Dolores's father, lived with Edward and Dolores. (5RT 1410.) At that time, Dolores was preparing a room at the back of the home for Charles to use once he resumed living in the residence. (5RT 1431-1432.)

---

[1] Because all the victims in this case share the same last name "Charles," to avoid confusion respondent will refer to each victim by first name.

Between 6:00 p.m. and 7:00 p.m. on Sunday, November 6, 1994, Dolores, Edward, Daniel and Severino had dinner together at the Fullerton residence. At trial, Severino could not remember if Charles was at the residence during dinner; Charles had a habit of coming and going from the home. (5RT 1411, 1434-1435.) Dinner lasted one-half hour and pasta and salad were served. (5RT 1412, 1433.) As was his normal routine after dinner, Severino went to his bedroom to relax; his room was on the opposite side of the residence from Dolores and Edward's bedroom. He remembered telling investigating Los Angeles Sheriff Sergeant Royer that Daniel left the residence to return to college at 8:00 p.m. Sunday and Charles left the residence a short time later. However, at trial, he admitted he did not see Daniel or Charles leave and did not know which grandson left first. He said he assumed Charles left after Daniel because he heard conversations elsewhere in the home. (5RT 1413-1414, 1435-1439.)[2]

With regard to the cars parked at the residence on Sunday, Severino remembered Dolores's dark colored Honda Accord car was parked in the driveway of the home that day. (5RT 1447.)

Severino said it was normal for Daniel to walk to Severino's room to say good-bye to him before Daniel left the residence; but on that day Daniel did not walk to his room or say good-bye to him. (5RT 1435.) No one

---

[2] At trial, Severino described to the jury his day time activity for that day: He left the residence he shared with Dolores and Edward, at 9:30 am, finished flying his model airplane at 2:00 p.m., got a snack on the way back to the home, arrived home at 2:30 p.m., went to his bedroom and watched golf on television, listened to Dolores's tell him that an opera singer was coming to the home that day to talk with and listen to Daniel sing, and went back to watching television until dinner was served. (5RT 1415-1417, 1432-1433.) He recalled Daniel's recital took about one-half hour. (5RT 1434.)

argued during dinner or that night, and he was not upset at anyone that evening. (5RT 1414-1415, 1439.)

Severino also said it was normal for Daniel to telephone Dolores from his college residence, to report that he had arrived safely. About 9:00 p.m., Dolores told Severino that she had not received a telephone call from Daniel that he arrived back at college. (5RT 1418, 1441-1442.) He recalled he last spoke to Dolores about 11:30 p.m. on November 6, 1994, while she was waiting for Daniel to telephone her; she was concerned that Daniel had not called home yet. (5RT 1418-1419, 1440.) Severino went to sleep after 11:30 p.m. and awoke early the next morning Monday (Nov. 7, 1994). (5RT 1419-1420.)

When Severino awoke about 5:30 a.m. on Monday, he took the family dog outside for a walk. When he got to the driveway to the home, he saw Dolores's car parked in the driveway and a three foot long trail of blood drops in front of the steps to the home. He did not see anyone else around. (5RT 1421-1422, 1445-1446.) He noticed Dolores's car was not parked in the place where she normally parked the car. (5RT 1445.) Daniel's car was not parked in the driveway. (5RT 1448.) Charles normally drove his girlfriend Tiffany's truck because Charles did not own a car; Severino did not remember seeing the truck parked at the house on Monday morning. (5RT 1447.)

Severino became concerned when Edward and Dolores did not return home by Monday evening. (5RT 1451.) Severino testified when Charles arrived at the home later that evening, Severino asked him about the whereabouts of Dolores and Edward. Charles responded that Daniel reported having clutch problems with his car and that Dolores and Edward went to pick Daniel up. Severino did not hear anyone talking about Daniel having a clutch problem with his car at the Sunday dinner, but could have heard some talk about a clutch problem a week earlier. (5RT 1424, 1448-

1449.) Severino remembered later telling an investigating sheriff's sergeant that Charles might have told Severino that Daniel had returned to the Fullerton home with Dolores and Edward after 11:30 p.m. on Sunday. (5RT 1424-1425, 1452-1453.) Severino did not remember any talk at Sunday's dinner about Daniel having clutch problems with his car. (5RT 1449.)

The last time Severino talked to Charles was at 6:00 p.m. Monday at the Fullerton residence. Charles refused Severino's offer to eat food that was saved from the Sunday dinner. Charles left the residence and told Severino that he was going to his friend's, Jeff, home. (5RT 1455.) Although Severino was concerned that Edward and Dolores were not home, at no time that evening did Severino talk to Charles about notifying police that Edward and Dolores were missing. (5RT 1453-1554.)

When Severino went into Dolores's and Edward's bedroom on Tuesday, (Nov. 8, 1994), he thought it strange only one pillow was on the bed. (5RT 1424.)

Severino denied killing Edward, Dolores or Daniel. He said he was not physically capable of killing them. (5RT 1429.)

James Burchit owned the gas station where Charles was an employee in November 1994. On Monday, November 7, 1994, Charles worked at the station from 8:00 a.m. to 4:00 p.m. That morning Charles arrived at work unshaven and appeared to have been up all night. Burchit knew that Charles had his own mechanics tools. (5RT 1489-1490.) Charles's grandfather, Severino, also knew that Charles had his own mechanics tools. (5RT 1450.)

Bryan Poor is a mechanic and was Charles's coworker at James Burchit's gas station in November 1994. Poor remembered that he was working at the station from 3:00 p.m. to 10:00 p.m. on Sunday, November 6, 1994. (5RT 1503.) At 9:50 p.m. that night, Charles drove up to the

station in a small light colored sedan. Poor had not previously seen Charles driving that car. Charles usually drove a blue colored Toyota 4Runner type vehicle. Charles told Poor the sedan belonged to Charles's girlfriend's mother and Charles was testing it. (5RT 1498-1499, 1512-1513.)

Poor saw Charles park the sedan in the dark southwest corner of the gas station which Poor thought to be unusual because employees normally parked their cars in the better lighted front of the gas station. Charles walked from where he parked the light colored sedan to where Poor was working. (5RT 1500.) Charles did nothing that made Poor think that Charles wanted to keep Poor away from the parked sedan. (5RT 1511.)

Poor said Charles seemed to be in a hurry. Poor did not recall seeing any blood on Charles or on Charles's clothing. (5RT 1512.) However, Poor explained he concentrated on the guy in the van parked in front of the gas station and was not checking on the way Charles was acting or on what he was wearing. (5RT 1511.)

Poor testified he witnessed, on a different occasion, Charles argue with Charles's girlfriend Tiffany, and saw Charles pin Tiffany against a wall and put his hand around her neck. Poor intervened by "bear hugging" Charles and walking Charles away from Tiffany. (5RT 1500-1501.)

About 9:30 p.m. on Sunday, November 6, Susan Poladian, Poladian's daughter and Gina Simms walked from Simms's Lakeside Drive home in Fullerton to Poladain's van which was parked against the curb in front of the home. The block on which Simms lives was around the corner from Terraza Place; the Charles's home was on Terraza Place. (5RT 1534-1535.) Poladian and Simms were one-half way down the home's driveway walking toward the street when they heard a muffled male voice moaning "help" coming from the trunk of a light blue or gray box-type Toyota-type, four door, small car parked across the street. (5RT 1518-1519, 1525-1527, 1535-1536, 1539, 1548-1549, 1552.) Simms was 21 feet away from the

parked car and heard the man moaning for "help" two times; the man sounded hurt. (5RT 1543-1544, 1553-1554.) Simms also heard the sound of a short conversation in which one of two or three speakers was male; she could not make out the words of the conversation nor did she know from where the conversation was coming. (5RT 1544-1546.) Poladian, her daughter, and Simms, rushed back into Simms's home and summoned police assistance by calling the "911" operator. The audio recording of that call was played for the jury. (5RT 1519, 1535, 1538; see 5RT 1553.)[3] When police arrived, the car was nowhere in sight. (5RT 1520.) No other cars were parked in the street. (5RT 1524.)

Poladian and Simms testified the car depicted in Exhibit 18 appeared to be the same car from which the man moaning "help" could be heard. (5RT 1521-1522, 1528, 1538, 1550-1551.) Poladian did not see a dark blue pickup truck parked in the area. (5RT 1529, 1531; Exhibit 19.)

About 6:10 a.m. on Monday, November 7, 1994, Jerry Kuhn, a neighbor to Dolores and Edward Charles, was in front of his Terraza Place home picking up his newspaper. He lived across the street, one house to the left of the Charles's home. He had known Dolores and Edward for 16 years. He also knew the Charles's sons, Charles and Daniel. (6RT 1557-1559.) Kuhn never saw Charles physically strike other family members, but in about 15 times over the past eight years he witnessed Charles engage in loud arguments with Dolores and Edward in the front yard about him mowing the lawn or doing things he did not want to do. (6RT 1584-1586.)

---

[3] The audio recording of Simms's telephone call to the emergency "911" operator was played to the jury. That recording was not reported by the court reporter. (5RT 1537-1538; Exhs. 23 [audio recording], 24 [transcript of recording].)

The last yelling incident occurred two months before, November 1994. (6RT 1587.)

On that morning, Kuhn saw Charles walk from the home towards a truck parked on the left side of the Charles's home where the driveway goes through. (6RT 1559, 1573.) Kuhn had seen Charles drive the truck in the past. (6RT 1568-1569.) A station wagon car was parked in front of the pickup truck; the front of the pickup truck was facing away from the street. (6RT 1580.) Kuhn did not see Daniel's car parked in the area. (6RT 1580.)

Kuhn saw that Charles was wearing a cut-off shirt, shorts, tennis shoes and fingerless gloves from which Charles's fingertips were visible. (6RT 1562-1563.) Kuhn saw Charles, who was carrying a rag or towel, stop behind the parked pickup truck, bend down, rub the driveway vigorously for 10 seconds with the rag, stand up and walk back to the Charles's home. (6RT 1560, 1571, 1573-1574.) Charles walked behind a dark colored Honda car that Kuhn recognized as Dolores's car that was parked in the driveway, knelt down alongside the car between the car's windshield and side mirror and stare in Kuhn's direction. (6RT 1561, 1565, 1567.) The car was not usually parked in the driveway that early in the morning. (6RT 1567.) Kuhn saw Charles bend down alongside the parked car and wipe something off the driveway with the same rag. Kuhn walked back into his home and, from inside, watched Charles walk from the parked car to the truck, briefly kneel behind the truck, look down, stood up and then toss the rag into the back of the truck. (6RT 1561-1562, 1575-1578, 1581.) Kuhn was not able to see if any red color was on the rag that Charles was using. (6RT 1573-1574, 1578-1579.)

Charles's girlfriend Tiffany's mother, Jeanne Bowen, testified Charles moved into Jeanne Bowen's home about October 20, 1994, and was living and sleeping in her home up to the early part of November 1994.

He did not sleep at her home on November 6 (Sunday) night. (6RT 1715, 1722.) At that time, Tiffany was living in Maryland. (6RT 1721.)

Mrs. Bowen recalled that Charles arrived at her home about 7:00 p.m. on November 7 (Monday) and shared a meal with her family. (6RT 1716-1717, 1723-1724.) He left the home at 8:00 p.m. and returned to the home at 9:00 p.m. He said he was tired and went into his bedroom. Mrs. Bowen next saw Charles a little after 10:00 p.m. that night when he walked out of his room. (6RT 1717-1719, 1725-1727, 1733-1734.) She also recalled after 10:00 p.m. a man who identified himself as "Rob" called the home and asked to speak to her son Ty. She did not recognize that man's voice to be Charles's voice. (6RT 1719, 1732.)

On November 6, 7, and 8, 1994, Mrs. Bowen owned two cars: a red colored Mustang car and a gold colored Maverick car. Both had automatic transmissions. Neither car was experiencing clutch problems. She did not give Charles permission to drive car on Sunday night (Nov. 6), or on Monday (Nov. 7). (6RT 1719-1720.) At that time, Charles was driving Tiffany's truck. (6RT 1720.)

Ty Bowen, Jeanne Bowen's adult son, testified around 9:00 p.m. on November 7, 1994 (Monday), he was on the roof of the family home putting up Christmas lights when Charles called out to him from the home's front lawn. (6RT 1739, 1741.) Charles asked Ty to drive him down to the gas station. (6RT 1741, 1758, 1760-1761.) Tiffany's truck, that Charles regularly used, was in the family home's driveway. (6RT 1742, 1755.) Ty drove Charles to the gas station, dropped him off at the station and returned to the family home. (6RT 1743.)

Later, after 10:00 p.m. on November 7 (Monday), while Ty was on the family home roof, Mrs. Bowen called Ty down from the roof to answer a telephone call from a person named "Rob." The only "Rob" Ty knew at that time was a person who would never call him. When Ty answered the

telephone call, Charles identified himself as the caller to Ty. Charles said he was watching a game at the soft ball field and wanted Ty to drive over and pick Charles up. Ty drove out to the softball field, met Charles and drove Charles back to the Bowen home. (6RT 1743-1744, 1764-1767, 1770, 1772.) Ty did not observe anything unusual about Charles's appearance or behavior when Ty picked him up from the ball fields. Nor did Ty smell gasoline emitting from Charles. (6RT 1774-1775, 1779.)

About 10:00 p.m. on Monday, November 7, 1994, (Monday) Los Angeles County Sheriff's Deputy James Rifilato was dispatched to investigate a car fire at El Camino High School in La Mirada in Los Angeles County. (5RT 1365-1366.) When he arrived at the school, he saw a smoldering gray, Honda Civic automobile in the school's parking lot. The deputy later found the car was registered to Dolores and Edward Charles. (5RT 1366-1368.) When he looked inside the car, he saw a man and woman laying on the rear passenger seat and both were badly burnt. The man and woman were unclothed, both were face up and laying in the same direction, the man's head was next to the woman's head, the man was on top of the woman and the man's back was against the woman's front torso. (5RT 1368-1370.) The man was later identified to be Edward and the woman was identified to be Dolores. (5RT 1383.)

Deputy Rifilato looked in the car's trunk and found a clothed male body lying on its side with knees bent. The body was less burnt than the two bodies in the interior of the car. (5RT 1376.) That body was later identified to be Daniel. (5RT 1382.)

About 11:00 p.m. on November 7, 1994, (Monday) arson-explosives expert Los Angeles County Sheriff's Deputy Robert Stevens and his partner investigated the burned Honda vehicle found in El Camino High School's parking lot in La Mirada. (6RT 1781-1782.) Deputy Stevens saw two bodies in the car's interior and a body in the car's trunk. He found three

areas where the fire was started by a flammable accelerant: on the ground between the driver's door and the left front tire; in the front seat area of the passenger compartment; and on or near the body in the trunk. (6RT 1783-1785, 1794-1796.) How carefully a person handles an accelerant will determine whether that person will later smell of that accelerant. (6RT 1786-1787.) Deputy Stevens opined gasoline was the flammable accelerant used to start the fires, but was not sure if other types of accelerant was actually used. (6RT 1783, 1792.)

About midnight on Monday, November 7, 1994, Los Angeles County coroner investigator Robert Fierro arrived in the high school parking lot and looked at the burnt Honda Civic with the bodies inside to initially determine the manner and cause of death of the three people. The bodies had not been moved prior to Fierro's arrival. (5RT 1378-1380.) He saw Edward lying on top of Dolores on the back seat of the charred car. (5RT 1380-1383.) Edward had injuries to his chest that were caused by the fire fighters putting out the car fire. (5RT 1384.)

Fierro saw that the male in the car trunk, Daniel, had head trauma. (5RT 1384.) He also saw several tee-shirts smelling of gasoline, under Daniel's body. (5RT 1385.)

At 6:15 a.m. on November 8, 1994, Los Angeles Sheriff's Sergeant Curt Royer, the lead detective in this case, spoke to Charles at Mrs. Bowen's home. To Royer's question of when he last saw his parents and brother, Charles responded he last saw them Sunday night when his brother left to return to college about 8:00 p.m. and Charles left the Charles's home shortly thereafter. Charles said after leaving the Charles's home, Charles arrived at and slept at the Bowen home that Sunday night. (8RT 2091-2093, 2136-2137.) He also said he slept at the Bowen home from 8:00 p.m. Monday until the sergeant awoke him that Tuesday morning. (8RT 2093.)

To Sergeant Royer's question asked why Charles's parents and brother were all in the same car, Charles responded his brother's car had clutch problems so his brother probably returned home and that his parents drove him to college. (8RT 2093.) When the Royer pointed out that Charles had not ask why the sergeant was questioning him about Charles's parents, Charles said, "[w]ell, why? What happened?" (8RT 2093.) When Royer told him that his parents and brother were found dead in a car, Charles responded that he had warned them not to go down to the college at night. (8RT 2093.) Charles dropped to the ground and, in Royers' opinion, pretended to cry and sob. Charles would not let Royer see his face, and after Royer told him that Royer knew he was faking, Charles stopped. In his law officer experience, Royer had notified about 500 people of deaths in their families and witnessed those survivor's reactions when they received that bad news. (8RT 2131-2134.)

Sergeant Royer talked to Charles a second time that day, in Charles's bedroom in the Bowen home, and confronted him that Mrs. Bowen said Charles did not sleep Sunday night at the Bowen home. Royer said Mrs. Bowen reported that Charles arrived at the Bowen home about 8:00 p.m. on Monday. Charles responded that he then remembered that he returned to the Charles's family home Sunday night, nobody was awake, he slept at the Charles's home and got up and left the next morning before anyone awoke. (8RT 2094, 2140.)[4]

At 5:30 p.m. on November 8, 1994, Philip Axelson received a telephone call from Charles who was sobbing. (6RT 1594, 1596, 1606, 1631-1632.) Axelson knew Charles and had been Charles's karate

---

[4] At some point in Sergeant Royer's conversation with appellant, appellant said he never called the police about his missing parents because he presumed his grandfather Severino would make that call. (8RT 2139.)

instructor for three years up to March 1994 when Charles stopped taking karate classes. (6RT 1589-1590, 1592, 1613-1614.) Based on Charles's study of karate, Charles was familiar with the "yin- yang" symbol, which in karate represents the positive and negative balance in nature. (6RT 1591.)

In the three years that Axelson taught Charles karate, Charles's karate skill rose to a professional level; the high green belt level. At that level of skill, Charles was able to use his feet to break two boards being held together and he could use his hands to break three boards being held together. (6RT 1592-1593.) At that skill level, Charles had broken up to five boards being held together; he was also capable of inflicting a severe blow to any part of another person's body. (6RT 1594.)

Axelson also taught Charles how to box. Axelson prepared Charles to compete in the Olympic trials boxing matches. (6RT 1646.)

Axelson was concerned that Charles had a killer instinct; he opined Charles could kill someone if he wanted to do so, and he lacked discipline to control that instinct. He needed to learn to have the discipline to control his killer instinct so that he would not kill someone. (6RT 1641, 1646-1648.) Axelson recalled Charles telling him how Charles would fight his brother and that Charles wanted to kill his brother. (6RT 1641.) Axelson never told investigating officers, prior to trial, about Charles's one or two comments about fighting Charles's brother and that Charles "would get so mad [Charles] just wanted to kill [his brother]." Axelson was not questioned about that aspect of Charles's trait prior to trial (6RT 1642.)

During Charles's November 8, 5:30 p.m. telephone call to Axelson, Charles told him, "Sensei [teacher] I have done a terrible thing." (6RT 1594, 1596, 1620.) To Axelson's inquiry about what he had done, Charles said, "I killed my family." (6RT 1597.) When Axelson asked him to repeat what he had just said, Charles responded, "I think I killed my family. I need to come down to talk to you right away." (6RT 1597-1599.)

Axelson dissuaded Charles from traveling to meet Axelson and ended the telephone call by Axelson saying he would call Charles back. Axelson called police and reported what Charles had said. (6RT 1601-1 602.)

Based on Axelson's relationship with Charles, Axelson knew Charles hated Charles's brother, Daniel, and Charles was concerned Daniel would become a homosexual due to Daniel's college studies in acting and opera. (6RT 1604.) Charles said only negative things about Charles's mother smoking, that she never attended his boxing matches and the fact she did not show him any motherly love. Charles's comments led Axelson to believe Charles was distant from his father. (6RT 1605, 1655-1656.) Charles never talked about killing his mother or father. (6RT 1644, 1656-1657.) Axelson said Charles's parents never attended Charles's karate matches. (6RT 1660.)

Axelson also taught Charles's brother, Daniel, karate. (6RT 1645.) However, Daniel took two summer karate classes from Axelson. (6RT 1653-1654.)

On November 8, 1994, between 3:00 a.m. and 4:00 a.m., Leann Pollaccia, who was homeless at the time, sorted through the contents of an uncovered trash dumptser, behind a business at 1889 West Commonwealth Avenue in Fullerton, looking for things to sell. (6RT 1671-1673, 1700.) Rain was drizzling at the time. (6RT 1701.) In the dumpster, she found several bloody towels, men's dark dress pants, two men's shirts, jeans, sandal-type women's shoes, men's loafer-type dress shoes, a 30 gallon plastic garbage can, blood and a large wrench (Exhibit 16) with a yin-yang symbol on it. (6RT 1674-1677, 1698-1700.) She recalled that most of the clothing she saw in the trash bin was wet and had a lot of blood on them. (6RT 1675, 1683, 1700, 1702.)

Pollaccia pulled out the wrench from the trash bin, put it into the trunk of her car, later showed it to her friends, saw dried blood and hair in

the head of the wrench and a week later, after hearing news reports about people being murdered with a blunt object and the suspected murderer being a mechanic, she put the wrench in a plastic bag with other items she retrieved from the trash dumpster (e.g., sunglasses, necklace) and gave the wrench and items to the Fullerton police. (6RT 1676-1681, 1702-1703.) She admitted she likely touched the head of the wrench prior to giving it to police. (6RT 1682-1683, 1703.) Although she acknowledged testifying at the preliminary hearing that another person may have touched the wrench handle before she bagged it and gave it to police, at trial she recalled she was the only one who touched the wrench. (6RT 1707-1709.)

Pollaccia also gave police a pair of blue jeans that she pulled from the trash bin and laundered. (6RT 1684.) When she found that pair of jeans, the pants had what she thought was a blood stain spattered on the legs of the pants. (6RT 1693-1694, 1697-1698.)

On November 8, 1994, Los Angeles County sheriff's criminalist Phil Teramoto was examining the Charles's burned car, which had been moved to a sheriff's lot, when he found a knife (Exhibit 20) in the trunk of the car. (7RT 1951.) He tested samples taken from the car's seats and two T-shirts and found each to have gasoline on them. (7RT 1951-1952, 1955.)

On November 10, 1994, Los Angeles County sheriff's criminalist, Heidi Robbins, went to the Charles's Fullerton residence to look for blood evidence. She took samples of blood evidence that she found in the home's foyer (17 RT 1859-1860), by the home's entrance (17RT 1859), in the master bedroom near and on a night stand, the computer desk in the bedroom, the headboard, on the wall above the headboard, and on the side of the bedroom's mattress and box spring (17RT 1860-1861). No blood was found on sheets of the bed, but blood was found underneath the sheets on the mattress. (17RT 1861.) She said that sparring gloves with blood on them (Exhibit 25) were found in the corner of the home's dining room.

(7RT 1858-1859.) No blood was found outside of the home; rain had fallen earlier that night. (17RT 1861, 1871.)

Criminalist Robbins submitted some samples of blood she collected in the home for DNA analysis. (7RT 1896-1897.) Based on that analysis, she determined the blood on the night stand was from Charles's father, Edward, and not from the two other victims. (7RT 1867, 1889.) She did not submit all blood samples found in the home for DNA analysis; she chose which blood evidence to submit for testing. (7RT 1866, 1889.)

Criminalist Robbins also examined the knife (Exhibit 20) that criminalist Teramoto found in the burned car trunk, found blood on both sides of the blade and determined the blood on the blade was consistent with being from Daniel and not from the two other victims. (7RT 1864-1867; 1951.) She examined the sparring gloves found in the home's dining room and determined the blood on those gloves was consistent as being from Charles and not from the three victims. (7RT 1866.) She also examined a 15-inch wrench (Exhibit 16) and determined the blood and tissue on that wrench was consistent with being from Daniel and not from the two other victims. (7RT 1867, 1892.) The tested blood samples were not a mixture of two or more persons' blood. (7RT 1894.)

On November 23, 1994, Orange County Deputy Sheriff Gene Hyatt, was in charge of the inmate module in the Orange County Jail in which Charles was a jail inmate. (7RT 1981-1983.) At that time, Charles used the jail's intercom system and told Deputy Hyatt that Charles wanted to talk to Hyatt. Hyatt walked to Charles's cell to talk to him. Upon reaching the cell, Charles, who appeared upset and agitated, told Hyatt that Charles was afraid of the charges and penalties and what Charles knew. Charles said he did not kill anybody, but that Charles's grandfather did the killing. (7RT 1985-1987, 2014-2016.) Charles explained on the night of the murders, his parents were bickering with Daniel, and Charles's grandfather was getting

upset. As a result, Charles left the home at 8:00 p.m. and went to his girlfriend's home before Daniel left the Charles's home. A (7RT 1987, 2016-2017.) Charles told Hyatt he returned to the Charles's home at 11:30 p.m. that night and found a bloody ball peen hammer in the kitchen, he found his dead mother, father and brother in his parent's bedroom and found his grandfather covered in blood in his grandfather's bedroom. Because Charles did not want his grandfather to go to jail, Charles decided to cover up the killings: Charles showered the blood from his grandfather, put his grandfather to bed and then began cleaning blood from the house. (7RT 1987-1988, 2020.)

Charles told Deputy Hyatt that he put the bodies on bedding, dragged the bodies to a car parked in the home's driveway and put the bodies in the car. Then he began cleaning the blood from the house. (7RT 1988, 2020-2022.) He then went to bed. Charles said the next morning he went to work at the gas station. After finishing work at the station, Charles said he went to his girlfriend's home, spoke to some friends and went back to the Charles's home at 5:00 p.m. (7RT 1989-1990.)

Charles told Deputy Hyatt after Charles arrived at the Charles's home at 5:00 p.m., he decided to get rid of the bodies. He had left the bodies in the car all day long. Taking plastic containers with gasoline, Charles drove the car with the bodies away from the home until, overcome by the smell of the dead bodies, he drove into a school parking lot. He said that before reaching the parking lot, he threw away the ball peen hammer and a letter opener in trash dumpsters. He said that he found the letter opener in his brother's back. He said he doused the bodies with gasoline, set the car ablaze and walked home. (7RT 1990-1992, 2023-2026, 2030.)

Los Angeles County sheriff's criminalist Steven Dowell testified the head part of the 15-inch wrench (Exh 16) that had pieces of Daniel's tissue and blood on it could not be ruled out as an instrument that caused the

fractures in Edward's skull. (7RT 1960.) He also opined the wrench could not be ruled out as causing the fractures in Daniel's skull and that part of the wrench could have made the marks that were found on a fragment of Daniel's skull. (7RT 1964-1967.)

Late in November 1994 Charles telephoned his grandfather, Severino, from jail. In one call, Charles told Severino, "Grandpa, I am a young man, you are an old man. You are 74 years old" and requested Severino take the blame for the underlying murders because Severino had lived his life and Severino could have committed the murders. (5RT 1426, 1428-1429.) Severino became angry and hung up. (5RT 1426.)

Although Severino hung up on him, Charles called back and told Severino, "you know, Tiffany is pregnant, you know, and I am concerned about her and everything." (5RT 1426, 1428) Severino hung up on him again. (5RT 1426.)

On December 7, 1994, Sergeant Royer took a multi-page hand drafted letter (Exhibit 1) from jail inmate Cezar Pincock. (8RT 2090, 2097.) Pincock called the sergeant to exchange the letter for the sergeant's help to get Pincock's sentence lowered in one case and for help in a case pending trial. (8RT 2105, 2108-2109.) The sergeant rejected Pincock's request for help and seized the letter as evidence in this case. (8RT 2110-2111.) The letter does not bear Charles's name or the date it was written. (8RT 2113-2114.) The letter also had a diagram of the layout of the Charles's home and furniture in the home (Exhibit 34). The furniture was accurately positioned in the diagram. (8RT 2095-2096, 2149.)

When Sergeant Royer learned of the bloody wrench (Exhibit 16) found by Pollaccia, Royer seized some of Charles's tools (Exhibit 21, 22 & 29). (8RT 2089.) While seizing those tools, the sergeant found Charles's telephone book (Exhibit 30) in the tool chest. (8RT 2089.)

Kimberly Speare testified she was Charles's girlfriend from June 1991 to June 1994 and with whom he lived for a year and one-half until January 1994. (6RT 1799-1800.) She is also familiar with Charles's handwriting and printing styles. (6RT 1803-1804.) She looked at a portion of Charles's telephone book (Exhibit 30), a multi-page letter (Exhibit 1), several letters written by Charles (Exhs. 31, 32 , 33)[5], and opined each bore his handwriting and printing styles. (6RT 1803-1805, 1809.)

Speare also identified the yin-yang symbol on the wrench (Exhibit 16) found by Pollaccia as a symbol that she and Charles engraved on all his mechanics tools before June 1994. (6RT 1801.) She identified the wrench as being from the set of tools (Exhibit 29) that she and he engraved with the symbol. (6RT 1802-1803.)

Tony Saavedra, a reporter with the Orange County Register newspaper, talked to Charles in a visiting booth in the Orange County jail about a multi-page hand drafted letter that described the circumstances of the three underlying murders (Exhibit 1). Saavedra interpreted Charles's conduct and responses to Saavedra's questions about the letter's contents as acknowledgment Charles wrote the letter. (7RT 2061-2062.)

Saavedra showed the first page of the letter to Charles through the glass in the booth and also read and showed, or referred to other pages in the letter to Charles. (7RT 2062-2063.) Saavedra asked Charles about specific parts of and passages in the multi-page letter. For example, he asked Charles about the term "monkey boots" appearing in the letter; Charles responded to the question. (7RT 2063.) He also asked Charles

---

[5] Exhibits 32 and 33 were two letters written by appellant to Jill Roberson while appellant was in jail charged with the underlying crimes. (7RT 1905.)

about the letter referring to a sweatshirt worn by Charles's brother and that sweatshirt belonging to Charles. (7RT 2063-2064.)

Saavedra also asked Charles about the letter referring to burning the bodies; Charles responded that it was like cremation. (7RT 2064.) Charles told Saavedra, "When people die they bury them or cremate them," and "[w]ell, I didn't have a dumpster--a dump truck in my backyard, so I couldn't bury them." Charles also told Saavedra, "[i]f I burned them, it could be cremating them and it would be looked at as a simple car-jacking or something." (7RT 2064-2065.) Saavedra also recalled Charles telling him that, as the car burned, Charles ran to a near-by baseball field and called his fiancée's brother for a ride home. (7RT 2065, 2077.)

Throughout Saavedra's conversation with Charles, Charles never denied writing the multi-page letter. (7RT 2064.) Charles never said he wrote the entire letter, nor did Saavedra show him every page of the letter. (7RT 2067.) One of Saavedra's purposes for talking to Charles about the letter was to confirm Charles was the author of the letter. (7RT 2066.)

Jill Roberson knew Charles prior to November 1994. Under direct examination by the prosecutor, Roberson testified that her earlier 1995 statement to a prosecutor's investigator that Charles was with her when the murders occurred, was a lie that she initiated but which Charles attempted to discourage. (7RT 1900-1903.) However, she also admitted telling a prosecutor's investigator in October 1995 that Charles asked her to lie for him by saying that they were together when the murders were committed. (7RT 1904-1905.)

Under defense counsel's cross examination, she explained she offered to be Charles's alibi witness when he suggested that he should find someone to be his alibi witness. She said when he later asked her to stop lying for him, she stopped telling people they were together when the

murders were committed. (7RT 1918-1921) She told the jury she was not lying at trial. (7RT 1946.)

Los Angeles County deputy medical examiner, Dr. Lisa Scheinin, performed autopsies on Dolores, Edward and Daniel Charles. (5RT 1389.) Dr. Scheinin found Daniel's front and upper part of his body was charred, he had two stab wounds to his back that were inflicted prior to his death and he had lacerations to his scalp and a large skull fracture to the front of his head that caused bruising to his brain. (5RT 1390-1391.) The hyoid bone in his neck was fractured; that fracture could have been caused by manual strangulation or by a blow to the side of his neck (5RT 1391-1392.) The doctor opined Daniel's death was caused by blunt force trauma to his skull and brain. (5RT 1395.) The doctor also opined the blunt force trauma was inflicted prior to Daniel's death, Daniel would have died soon after sustaining those impacts and he was already dead when he was burned. (5RT 1399-1400.)

Doctor Scheinin found Edward's body was severely charred and parts of his body were burned to the bone. He had several skull fractures to his left cheek bone, to the bridge of his nose and to the lower side of his left jaw. (5RT 1395-1397.) He had several fractured ribs. (5RT 1397) He also had a neck injury similar to, but more extensive than, Daniel's neck injury. (5RT 1397.) Due to the severity of the blows to his head and neck, Edward would not have lived more than an hour after sustaining those injuries. (5RT 1400-1401.) His death was caused by at least five blunt force impacts to his head and neck which were more severe than the impacts suffered by Daniel. (5RT 1398-1400.) The doctor opined Edward was already dead when he was burned. (5RT 1399.)

Doctor Scheinin found Dolores'ss body had severe charring of the front and upper part, she did not sustain head or skull trauma, but she had hemorrhaging at the hyoid bone and larynx area of her throat. That injury

to her throat was consistent with her being struck or strangled in that area of her throat. (5RT 1402.) The injuries to her throat were severe and would have caused her death within minutes. (5RT 1406.)

Doctor Scheinin opined Daniel's death occurred two hours after he had eaten because his stomach contents were easily identifiable. (5RT 1406.) The doctor did not find contents in Edward's and Dolores's stomachs. (5RT 1407.) The doctor opined if the three people ate dinner at the same time, the lack of contents in Edward's and Dolores's stomach indicated they were killed after Daniel was killed. The doctor noted that a person's stomach normally empties between two to six hours after the person eats. (5RT 1407-1408.)

C. Defense - Guilt Phase[6]

Charles did not testify in this case. (8RT 2373.)

Lori Korngiebel testified she and Daniel Charles were dating each other and that she and Daniel were to attend a performance at the college on Sunday (Nov. 6, 1994) night. She received a telephone message from him about 8:00 p.m. that night. She did not hear any arguing in the background of that message. She did not see him that night. (8RT 2319-2320, 2322.)

---

[6] In closing argument, defense counsel told the jury the prosecutor did not prove the multi-page letter (Exhibit 1) was written by Charles (9RT 2567, 2572, 2590), the letter was likely created by a jail inmate who intended to use the letter to bargain for a disposition of the inmate's pending case (9RT 2573-2575) and the letter contained significant factual inaccuracies when compared to facts discovered nor not discovered by sheriff's investigators (9RT 2576-2590). Counsel claimed Charles was upset and confused when Charles spoke to Deputy Hyatt and to Severino. (9RT 2597.) Counsel argued Jill Roberson was an alcoholic, had a reputation for lying and lied when she testified Charles initiated the plan she provide him with an alibi for the time of the murders. (9RT 2599-2609.)

She knew Dolores and Edward Charles and considered them extremely good people. (8RT 2322.)

Jennifer O'Brien and Kim Pearson worked at a business that shared the parking lot with James Burchit's gas station. They testified as they left work in their separate cars at about 9:30 p.m. on Monday (Nov. 7, 1994) each saw a dark colored truck drive into a parking lot. O'Brien recognized the truck belonged to Tiffany Bowen and that Charles was driving it. (8RT 2257-2259.) Pearson saw the driver of the truck was male and saw the truck speed through the parking lot, back into a far corner of the parking lot and park. That area of the parking lot was dark and a trash dumpster was in the corner where the truck parked. (8RT 2270-2271, 2274, 2277.)

On November 8, 1994, at 2:08 a.m., Fullerton police officer Benjamin Romero was present when Los Angeles sheriff deputies questioned Bernard Severino, at the Charles's home, about the Charles family members. (8RT 2364-2365.) The officer remembered Severino told the deputies he had not seen the Charles's family members since Sunday (Nov. 6, 1994) evening. After he was told by deputies that Dolores's, Edward's, and Daniel's bodies had been found, Severino became confused and had difficulty answering the deputies' questions about the Charles family members' whereabouts. (8RT 2365-2366, 2371-2372.)

Officer Romero said the reason he wrote into his report that the Charles home did not seem to be a crime scene was because the deputies looked around the home and commented that they did not see anything that appeared to pertain to this case. Romero did not see any blood in the house, nor did he attempt to search the home for blood evidence. (8RT 2370-2371.)

Writing and printed exemplars, Exhibit A and Exhibit B, were taken from Charles on September 6, 1995, and September 14, 1995, respectively, and those exemplars were analyzed by expert handwriting comparison

witness Richard Hatch. (8RT 2204, 2238, 2314-2315.) Hatch compared those exemplars with the multi-page letter (Exh 1) and concluded the printing on the exemplars was done by someone other than the person who did the printing on the multi-page letter. The printing on the multi-page letter was dissimilar to the printing on exemplar Exhibit A. (8RT 2212, 2223.) He also concluded one person printed the multi-page letter. (8RT 2215.) He said neither exemplar showed any indication that Charles was trying to fabricate his writing or printing. (8RT 2238.)

On cross examination, Hatch admitted the printing on the multi-page letter was more consistent with the printing in Charles's address book (Exhibit 30). He acknowledged several similarities existed between the address book and the multi-page letter. (8RT 2221-2222.) He admitted he only compared a photocopy of Exhibit 1 with the handwriting exemplars; he was never shown the original of Exhibit 1. (8RT 2227, 2230.) He was never shown any document that was printed or written by Charles prior to Charles's arrest in this case. (8RT 2231.)

Numerous witnesses testified they had never seen Charles act violently. Kimberly Speare said she never saw Charles physically strike any of his family members, she never witnessed him threaten to hurt or to kill his parents and, in his karate class, Charles was always under control. (8RT 1812, 1819.) Rob Aldrich[7] said he saw that Charles was empathetic towards, and was concerned for Mr. Charles's well being and Aldrich never heard Charles make threats against Charles's family or act violently

[7] Rob Aldrich was appellant's coworker at the gas station during the year prior to November 6, 1994. (8RT 2323-2324.)

towards anyone. (8RT 2347-2350, 2352.) Brian Beller[8] testified he has known Charles for six years, he knows Charles to be a caring person, he never heard Charles speak ill of Charles's family and he never saw Charles act violently towards another person. (8RT 2355, 2358-2359.) Brian Bangan[9] never heard Charles threaten Charles's family or other persons, but Bangan heard Charles lie about Charles earning a black belt in karate. (8RT 2392-2393, 2397.) Jason Snyder[10] testified he never saw Charles be violent with anyone, nor towards Charles's family and, when Charles argued with Edward Charles, Charles would walk away in a "huff." (8RT 2401-2403.)

Janina Herold[11] and Aldrich testified they personally knew Jill Roberson. Herold said Roberson was not a truthful person; Herold said she had seen Roberson convincingly lie to people three times and that Roberson lied to Roberson's husband. (8RT 2286-2287, 2296.) Aldrrich said Roberson was not a truthful person and was drunk the majority of time he saw her. (8RT 2324-2325.)

Jill Roberson's father, Dennis Brodhagen, testified that Roberson was a truthful person but when she lied to him, he said he easily saw through that lie. (8RT 2034.) He acknowledged earlier telling a defense investigator that Roberson lied "continuously" and that she believes her

---

[8] Brian Beller recruited appellant in the summer of 1989 to be an assistant coach for a youth soccer team in Fullerton. Appellant became a full coach for the team in 1990. (8RT 2356.)

[9] For several years Brian Bangan and appellant trained together in a karate class. (8RT 2391.)

[10] Jason Herold considered herself Jill Roberson's good friend for eight years up to July 1995. (8RT 2286-2287.)

[11] Janina Herold considered herself Jill Roberson's good friend for eight years up to July 1995. (8RT 2286-2287.)

own lies, but he explained his comments to the investigator referred only to Roberson's actions as to him. (8RT 2307-2308) He also acknowledged events when Roberson said something to him and he later found her statement was false. (8RT 2308.) He did not know of any time that Roberson lied to other people. (8RT 2305.) A defense investigator testified Brodhagen told the investigator that Roberson was a great liar and believed her own lies. (8RT 2317-2318.)

Mr. Brodhagen also testified he knew Roberson was an alcoholic since she was 14 years old to the time she last stayed with him in August 1995. (8RT 2303, 2309-2310.) Roberson was 27 years old at the time of the underlying trial. (8RT 2310.)

Mr. Brodhagen testified Roberson was at his home with her child on Sunday night (Nov. 6, 1994), and that she was not out with Charles that night. She never told him that she was out with Charles that evening. (8RT 2312.)

District Attorney Investigator Richard Christensen audio recorded his October 23, 1995, interview with Jill Roberson about her claim she was with Charles on November 6, 1994 (Sunday), when his parents and brother were killed. (8RT 2381-2382.) He admitted showing her letters by Charles to other women as a way of persuading her that Charles was simply using her. (8RT 2383.) She said she did not know the other women. (8RT 2386.)

D. Rebuttal

Sergeant Royer testified he saw the coroner remove the bodies from the burned car in the early morning Tuesday (Nov. 8, 1995), and he saw extensive wounds to Edward's and Daniel's heads. (8RT 2416-2417.) Based on the burned car's license plate number, Royer and Fullerton police officers went to the Charles home at 3:00 a.m. that morning. (8RT 2417-

2419.) At the home, Royer met and talked to Severino, who was worried about the whereabouts of Dolores, Edward and Daniel. (8RT 2420.)

Sergeant Royer said Severino had a hard time understanding the officers telling him that two male bodies and one female body were found in a burned out car. Severino did not have any problem telling the officers the people who lived in the home and the events of the past day. (8RT 2421-2422.) During the time Royer was talking to Severino, Royer did not see any blood in the home, any evidence of a struggle, nor evidence of a forced entry into or ransacking of the home. Royer did not see any indication the home would be a crime scene. (8RT 2423-2424.)

PENALTY PHASE

A. Preliminary Statement

As noted in respondent's Statement of the Case, *supra*, Charles's first penalty phase jury trial commenced on January 11, 1996, and a mistrial was declared on January 25, 1996, when the jury could not reach a unanimous verdict. (3CT 828-829, 869-874.) Eleven jurors favored a death verdict and one juror favored a life imprisonment verdict. (11RT 3426-3427.)

Charles's second penalty phase jury trial commenced on March 20, 1996, and it reached a death verdict on April 2, 1996. (3CT 1016-1017, 1084; 4CT 1139-1140.) However, the trial court reversed that verdict on August 8, 1996, after it ruled jury misconduct was committed. (4CT 1174-1183, 1290-1295 [Charles's motion]; 4CT 1251-1258, 1267-1286 [prosecutor's opposition].)

Charles's third penalty phase jury trial commenced on January 12, 1998, but a mistrial was declared on January 29, 1998, when the jury could not reach a unanimous verdict. (4CT 1459; 5CT 1634-1635; 5CT 1840-1841.) The jury foreman reported that the jury split was eleven jurors to one juror. (5CT 1840; 29RT 3891.)

Charles's fourth penalty phase jury trial commenced on October 15, 1998, and resulted in a death verdict on October 29, 1998. (6CT 1864, 1899, 1985, 1987-1988.)

1. Facts presented in fourth penalty phase trial[12]

Bernard Severino, Charles's grandfather who lived with Dolores and Edward at the Terraza Place residence in Fullerton, testified to the same evidence to which he testified in the guilt phase of trial. (32RT 4793, et. seq.) His testimony included the fact none of the family's three dogs barked between the time he went to sleep at 11:30 p.m. on Sunday (Nov. 6, 1994), and woke up at 5:00 a.m. on Monday (Nov. 7, 1994). (32RT 4801.)

When Severino woke at 5:00 a.m. Monday, he saw Dolores was not in her usual chair in the family room, only one pillow was on the bed in the master bedroom and blood stains were on the home's driveway (Exhibit 17) and thought Dolores had an accident. (32RT 4802; 33RT 4808.) He became concerned when he realized no one was home. (32RT 4803.) When he shared his concern with Charles later that day, Charles replied Dolores and Edward drove Daniel to college because Daniel's car had a clutch problem. (32RT 4804-4805.)

Severino also testified about the several telephone calls he received from Charles, who called from jail, asking Severino to tell police that Severino killed Dolores, Edward and Daniel. (33RT 4809-4810.) He also testified about Sergeant Royer talking to him at 3:00 a.m. on Tuesday (Nov. 8, 1994) about Dolores, Edward and Daniel being found in a car fire.

---

[12] The fourth penalty phase jury was presented evidence that had been presented by the parties in the guilt phase of trial. Respondent will summarize the penalty phase evidence that had previously been given in the guilt phase of trial and will set out in full the additional evidence presented under Penal Code section 190.3 (determination of penalty-aggravating and mitigating circumstances).

(33RT 4810-4811.) He also described Dolores, Edward and Daniel as a normal family, how each was a good person, and how their deaths altered his life. (33RT 4813-4816, 4822-4823.) Because Charles killed his daughter, son-in-law and grandson, he was angry at Charles. (33RT 4832.)

Charles lived with his girlfriend, Tiffany Bowen's family, for the month prior to committing the underlying crimes. Jeanne Bowen, the girlfriend's mother, said Charles was not at the Bowen family home Sunday (Nov. 6, 1994) and did not sleep at the home that night. (32RT 4649.)

James Burchit, the gas station owner who employed Charles as a mechanic, testified to the same facts that he testified about in the guilt phase of trial. (32RT 4620, et seq.) His penalty phase testimony included the fact Charles arrived at work at 8:00 a.m. Monday (Nov. 7, 1994) looking tired, and ended work at 5:00 p.m. (32RT 4621, 4626.) Charles's mechanic's tools, which he kept at the gas station, were later taken by sheriff's deputies. (32RT 4622.) Burchit said Charles was a good mechanic. (32RT 4622.)

Jerold Kuhn, the neighbor who lived across the street from the Charles's home, on Monday (Nov. 7, 1994), testified to the same evidence he gave in the guilt phase of trial. (32RT 4610, et. seq.) That included him seeing Charles at 6:10 a.m. on Monday morning wiping different parts of the Charles's home driveway with a rag, Charles seeing Kuhn watching him, and Charles crouching alongside Dolores's parked car and continuing to wipe parts of the driveway. (32RT 4611, 4614-4615, 4617.)

Jeanne Bowen and her adult son, Richard Bowen, testified to the same evidence as they had in the guilt phase of trial. (32RT 4640, et. seq [Richard Bowen]; 32RT 4648, et. seq. [Jeanne Bowen].) Their testimony included the fact Charles arrived at the Bowen home after 5:00 p.m. Monday (Nov. 7, 1994), Richard drove Charles to the gas station at which Charles was employed at 9:00 p.m. that night and Richard picked up

Charles from a nearby softball field at 10:00 p.m. that night and drove him back to the Bowen home. (32RT 4642, 4644, 4646, 4650.) Jeanne never gave Charles one of her cars to be fixed. (32RT 4651.)

Jill Roberson also testified to the same evidence she gave at the guilt phase of trial. (32RT 4775, et. seq.) Her testimony included the fact she suggested to Charles that she falsely tell investigators he was with her on Sunday (Nov. 6, 1994) night and that he agreed that she make that report to investigators. (32RT 4778, 4784-4785, 4787.) She also testified Charles asked her to tell others that he was with her on the night his parents and brother were killed. (32RT 4787.) She also agreed for the last three years Charles asked her not to lie for him in court. (32RT 4779, 4788.) Based on seeing his handwriting on gas station forms and in his hundreds of letters to her after his arrest, she said she was familiar with Charles's handwriting. She opined the writing of the multi-page letter (Exhibit 1) in this case was not Charles's handwriting. (32RT 4789-4791.)

Kimberly Speare also testified to the same evidence she gave at the guilt phase of trial. (32RT 4655, et. seq.) Her testimony included the fact she lived with Charles for one and one-half years up to June 1994, Charles's alcohol consumption increased in December 1993 and he began getting into more trouble. (32RT 4655-4656, 4663-4664.) She and Charles engraved all of his mechanic's tools with a yin-yang symbol. The wrench (Exhibit 16) found in this case belonged to Charles and bore that same symbol. (32RT 4658-4659.) She recognized Charles's phone book (Exhibit 30) and remembered seeing him write names and numbers in it. (32RT 4660-4661.)

Speares admitted before they broke up, she thought she would marry Charles. (32RT 4665-4666.) She said Charles was proud of his brother Daniel's theatrical accomplishments. (32RT 4670.) She saw Charles and Daniel viciously fight each other one time. (32RT 4670-4671.) She saw

Charles was close to his grandfather, Severino. (32RT 4679.) She also saw Charles had a strained relationship with his parents Dolores and Edward, but his talks with them, while spirited, were never violent. (32RT 4680, 4682.)

News reporter Tony Saavedra testified to the same evidence he gave in the guilt phase of this case. His penalty phase testimony included the fact he wrote a news article based on a multi-page hand drafted letter (Exhibit 1) written by Charles, and that Saavedra interviewed Charles in county jail about the contents of that letter. In that jail interview Saavedra showed Charles the letter and questioned him about parts of the letter. Charles never denied he wrote the letter and he expanded on parts of the letter that referred to "monkey boots," a B.U.M. sweat shirt worn by Daniel, a lost type written note and him burning the bodies. (32RT 4686-4692, 4694-4701.)

Los Angeles Sheriff's Sergeant Curtis Royer testified to the same evidence he presented in the guilt phase of this case. (See 33RT 4875, et seq.) He also testified the distance between the Charles residence and the gas station where Charles worked is one-quarter mile, 2.3 miles separates the Bowen residence and the softball fields, and six-tenths of a mile separates the high school parking lot from the softball fields. (33RT 4879.) He also testified Daniel's body was unclothed from the waist up and Daniel's forehead had a hole in it large enough to look inside his skull. A purple B.U.M. sweatshirt was also in the car trunk beneath Daniel's body and visible in a picture taken of that trunk area. (33RT 4880 [Exhibit 12].) He also saw that Delores' and Edward's naked bodies, both positioned face up on top of each other in the car's back seat, were very charred. (33RT 4881-4883.)

Sergeant Royer additionally testified he had two separate conversations with Charles about the deaths of his parents and brother. In

neither conversation did Charles ask the sergeant about the manner or the circumstances surrounding the discovery of their deaths. (33RT 4890)

Sergeant Royer additionally testified the multi-page hand drafted letter (Exhibit One.) he received from inmate Pinnock on December 7, 1994, contained accurate facts about the victims' death, but which were not put into police reports. For example, the diagrams in the letter contained accurate placement of household items, parked vehicles, a designation of an unlocked door and cobblestone in the foyer and outside vegetation that were not mentioned in police reports. (33RT 4896-4901.) The letter referred to Severino as "Gramps" and Charles was the only Charles family member who called Severino "gramps." (33RT 4901.) The letter also mentioned one pillow was on the bedroom bed, but Severino later revealed to Royer that Delores usually placed two pillows on the bed and it was unusual for only one pillow to be on the bed. (33RT 4901.) The letter noted the presence of white sheets and a light blue blanket; those items were on the bed, but were not described in police reports. (33RT 4902.)

Sergeant Royer also testified the December 1994 letter noted deputies seized the wrong gloves, which were gloves having only Charles's blood on them, but Royer did not know the seized gloves had only Charles's blood on them until he received a September 1995 DNA analysis of the gloves. (33RT 4902-4903.) Similarly, the letter noted blood in the Charles residence bedroom was Edward's blood, but Royer did not know the blood collected from the bedroom was only Edward's blood until he received the September 1995 DNA analysis. (33RT 4903-4904.)

Daniel's autopsy showed his skull had large fractures and his neck bones were fractured by compression or by a sharp blow. He was twice stabbed in his back and the knife (Exh 20) found in the trunk of the burned Honda could have been used to stab him. (32RT 4563-4567, 4570-4571, 4592-4593.) His skull fractures could have resulted from his head being hit

with a hammer or a wrench at least four times; his skull had marks consistent with a the wrench found in this case (Exhibit 16). (32RT 4605-4606.) Those blows to his head caused his death. (32RT 4566-4567.)

Dolores died due to strangulation. Her hyoid (neck) bones were fractured by compression or a sharp blow to her neck. (32RT 4573.)

Edward died due to multiple blunt force trauma to his head and neck. His neck was fractured by compression or a sharp blow to his neck. (32RT 4573, 4577.) Parts of his skull had marks that could have been made by the wrench (Exhibit 16) found in this case. (32RT 4601-4602.)

Orange County Deputy Sheriff Frank Tomeo, working in the jail on May 5, 1995, watched Charles assault another inmate. Charles snuck up behind the inmate who was sitting, put his arm around the sitting inmate in a choke hold and drug the inmate backwards to a shower area. Charles dropped the inmate, who was unconscious, to the shower floor and returned to what he had been doing. The inmate required five stitches. (33RT 4847-4849.)

Orange County Deputy Sheriff James Gagen searched Charles's county jail cell on October 14, 1997. The deputy found two grinding disks, two hacksaw blades, and a nine-inch piece of metal hidden in Charles's cell. Charles was the only inmate who had access to his cell. (33RT 4853-4855.)

B. Defense-Penalty Phase

Charles did not testify in the penalty phase of trial. Jason Snyder (Charles's high school classmate), Robert Aldrich (Charles's coworker at the garage), John Bowen (Charles's girlfriend's father), Jeffrey Simeon (Charles's three month roommate in 1994), and Kathleen Main (mother of a youth soccer player coached by Charles), testified they knew Charles prior to the underlying crime and nothing he did prior to the murders warned them that he would commit the underlying crime. (34RT 4976 (Aldrich);

34RT 4989 (Bowen); 34RT 4991, 4993 (Snyder); 34RT 5006 (Simeon); 34RT 5035-5036 (Main).) Main and Bryan Beller, whose sons were on a soccer team coached by Charles in 1989 and 1990, agreed Charles inspired their respective sons and was respected by the players' parents. (34RT 5033-5034 (Main); 34RT 5043, 5046-5047 (Beller).)

Charles's maternal aunt, Roberta Prindiville, and cousin, Joanne Irene, testified despite knowing Charles killed his parents and brother, they wanted to maintain a relationship with Charles as did other members of Charles's extended family. (34RT 5061 (Prindiville), 5073-5074 (Irene).) Prindiville knew Charles did horrible things, but she did not want to know the details of the crimes; notwithstanding that fact, she said she loved Charles and would not abandon him. (34RT 5060.) Nothing Charles did prior to the murders warned them that he would commit the underlying crimes. (34RT 5064 (Prindiville), 5070-5071 (Irene).) Under cross examination, Irene admitted she last saw Charles in the late 1980's prior to him committing the underlying crime. (34RT 5076.)

Charles's former trial counsel Ron Klar, testified he obtained a court order allowing Charles permission to possess in jail legal documents pertaining to his case. (34RT 5019.) He also testified pursuant to the prosecutor's "mail cover" to the jail, all of Charles's non-legal mail was inspected and copied or read before it was sent out or received by Charles (34RT 5022.)

Under cross examination, attorney Klar admitted he customarily told all his clients, including Charles in this case, not to talk to anyone about the case without attorney Klar's permission. (34RT 5026-5027.) He acknowledged that Charles's November 23, 1994, conversation with Deputy Hyatt, in which Charles blamed his grandfather for the murders and admitted to cleaning up and removing the bodies, was an example of Charles ignoring attorney Klar's directions to not talk to anybody. (34RT

5027-5028.) He also agreed Charles ignored his direction to be a model inmate; he acknowledged Charles was cited for major and minor disciplinary violations while in jail. (34RT 5028-5029.)

Sentencing consultant Norman Morein testified Charles's automobile mechanic and computer user skills would be a valuable asset if he were sentenced to a life without possibility of parole (LWOP) term. He explained inmates perform most prison jobs and his skills are needed in many different prison jobs such as clerical work, record keeping and prison vehicle maintenance. By doing those tasks, the prison would not have to hire expensive outside employees. (34RT 4937-4939.) Under cross examination, he admitted LWOP prison inmates do not accrue good time credits against their life sentence. Thus, if Charles were a LWOP inmate, he could remain idle in prison without any incentive to work and no one would force him to work. (34RT 4940.)

Handwriting comparing expert William Hatch testified he compared Charles's printed exemplar (Exhibit A) to the hand printed part of the multi-page letter (Exhibit 1), but found too many dissimilarities between the two documents. As a result, he directed Charles to hand write the top paragraph on page two of Exhibit One and compared that new hand writing sample (Exhibit B) to Exhibit One. (34RT 4945, 4948-4951; see 34RT 4943 [Exhibit A], 5003 [Exhibit B].) He opined the person who hand drafted Exhibit One was not the same person who hand drafted Exhibits A and B, the known hand printed and written exemplars. (34RT 4951.)

Hatch agreed that comparing handwriting is not the same as comparing fingerprints, and is not an exact science. (34RT 4952, 4960.) Under cross examination he admitted earlier testifying the printing in Charles's telephone book found in Charles's tool chest (see 8RT 2089 [Exhibit 30]) was more similar to the printing in the multi-page handwritten letter (Exhibit 1) than the telephone book, was similar to Charles's hand

printed exemplar (Exhibit A). (34RT 4960.) He also admitted when he compared the hand printed exemplar to the multi-page letter, he did not consider, nor know, how long Charles possessed a copy of the multi-page letter before Charles was asked to fill out the hand printed exemplar cards. (34RT 4967.)

ARGUMENT

I. THE MULTI-PAGE HAND DRAFTED LETTER QUALIFIED AS CHARLES'S ADOPTIVE ADMISSION UNDER EVIDENCE CODE SECTION 1221 [ADOPTIVE ADMISSION] AND WAS PROPERLY ADMITTED INTO EVIDENCE; THE TRIAL COURT PROPERLY APPLIED THIS STATE'S SHIELD LAW

Charles contends his convictions should be reversed because the trial court improperly admitted prosecution Exhibit One, a 12-page hand drafted letter addressed to inmate Cezar Pinock, as Charles's adoptive admission of his crimes.[13] He argues the trial court erred because: 1) he never

---

[13] Exhibit One is the original legal size, 12-page hand drafted letter which the prosecutor introduced as being hand drafted by appellant and which appellant gave to inmate Cezar Pincock. (See 2CT 627.) Those legal size pages were copied in letter size format which resulted in the court, both counsel, and testifying witnesses, alternatively referring to Exhibit One as an "18 page" hand drafted letter. As the prosecutor explained to the trial court:

> Mr. Brent [prosecutor]: Your Honor, the letter that you have, your Honor, would probably be the 18 pages [referred to in the news article]. The problem is that the original - - on the copy the court has, it is not the exhibit. These are legal pieces of paper, so the bottom of some of the pages is then put at the top. You can see some of the smaller pages. [¶] If I could just confer with Mr. Klar [defense counsel].
>
> The Court: Please do.
>
> Mr. Brent: Your Honor, I think the easiest way - - because, what Mr. Klar, myself, and what I gave Mr. Saavedra was not - - was not the legal [sized] copy, I think Mr. Klar will stipulate that what I did give Mr. Saavedra was the 18-page copy similar to what the court has in front of it, but different than the exhibit.
>
> (5RT 1230.)

(continued...)

acknowledged he authored the letter; 2) the letter should have been excluded because it's chain of custody was not trustworthy; 3) he was never shown all the pages of the letter and therefore could not adoptively admit the entire letter; and 4) the newspaper reporter, who displayed several pages of the letter to him, did not specifically ask him about the contents of the letter. He concludes because defense counsel was prevented from questioning the news reporter, how the reporter displayed the letter to Charles, he was denied his constitutional right to due process (5th and 14th Amendment), confrontation (6th Amendment) and to reliable penalty determination (8th Amendment). (AOB 50-106.)

Charles is wrong. Following the pretrial hearing on the admissibility of the multi-page letter, the trial court properly admitted that hand drafted multi-page letter into evidence as his adoptive admission of the contents of that letter. The admission of that exhibit neither denied Charles his due process rights, right of confrontation, nor his right to a fair trial under the state or federal constitutions. Additionally, the trial court properly restricted defense counsel's pretrial cross examination of Orange County Register news reporter Tony Saavedra pursuant to California's news reporter shield law, and did not deny Charles his federal or state constitutional right to a fair trial.

Prior to trial, Charles filed a motion to exclude Exhibit One that was allegedly authored by Charles and given to inmate Cezar Pincock. Out of the jury's presence, the court and parties discussed the limits of the prosecutor and defense counsel questioning news reporter Tony Saavedra

---

(...continued)

Defense counsel stipulated to the prosecutor's description of Exhibit One. (5RT 1230.)

To avoid any confusion, respondent will refer to Exhibit One as "Exhibit One" or as a "multi-page letter."

concerning that letter since Saavedra showed and questioned Charles that letter during a jail interview and later wrote a published news article about Charles's responses to that letter. (5RT 1211-1213.) At that hearing, defense counsel and the prosecutor made the following stipulations concerning the letter: The original letter was seized by Los Angeles County Sheriff's Sergeant Royer from Los Angeles County Jail inmate Cezar Pincock; Orange County Register news reporter Tony Saavedra became aware of the letter's existence and cooperated with police by delaying writing and publishing a news article about the letter, after the Fullerton Police investigation concluded the prosecutor gave reporter Saavedra a copy of the letter and prosecutor did not request or suggest reporter Saavedra do anything with the copy of the letter. (5RT 1214-1216.)[14] Counsel also stipulated if questioned about the multi-page letter, a defense handwriting expert would opine Charles did not write the letter. (5RT 1217.)

Thereafter, reporter Saavedra testified out of the jury's presence that he authored a newspaper article (Exhibit 2) that was published on January 3, 1995, in the Orange County Register newspaper and contained excerpts from the multi-page letter. (5RT 1221.) He said he interviewed Charles at the Orange County Jail on January 2, 1995. (5RT 1222-1223.) He said his article statement, that Charles confirmed writing the hand drafted letter,

---

[14] Counsels stipulated: The original letter was taken by Sergeant Royer from jail inmate Cezar Pincock; Saavedra became aware of the letter's existence and cooperated with police by delaying writing a news article about the letter after a police investigation concluded; afterwards the prosecutor gave reporter Saavedra a copy of the letter; and prosecutor did not request or suggest reporter Saavedra do anything with the copy of the letter. (5RT 1214-1216.) Counsel also stipulated a defense handwriting expert would opine appellant did not write the letter.

was correct. (5RT 1223-1224, 1236-1238.)[15] He also confirmed Charles's statements published in the article in quotes were true and accurate. (5RT

---

[15] Reporter Saavedre explained his opinion that appellant "confirmed" some of the contents of the multi-page letter shown to him:

> By Mr. Klar [defense counsel]:
>
> Q: What does that word "confirmed" in the article mean when you wrote that?
>
> A. It meant that when I showed him the letter and passages or pages from the letter, and told him that I have a letter that he wrote and showed it to him, he did not -- not only did he not deny it, but passages that I brought up to him, either showed him, or read him, or referred to the letter and said, "you said it here", or "you wrote it here," he agreed with what was in the letter.
>
> And in some cases he elaborated on what was in the letter. And there were some passages or words or entries that I went over with him because I didn't understand what they -- what they were or what they meant. And he -- he described it to me, or he explained it to me.
>
> Q: So you specifically told him that he wrote the letter; is that correct? That's what you just told me?
>
> A: I believe I said, "I have a letter that you wrote."
>
> Q: And he never then said, "yes, I did," or "no, I didn't?"
>
> A: Correct.
>
> Q: Okay. So your gathering or your confirmation word in there that you confirm -- he confirms he wrote it, means that's based on your interpretation of your total conversation, right?
>
> A: Correct.

(continued...)

1224, 1231.) Saavedra explained, when he met with Charles at the jail, he held up against the glass partition some, but not all, of the pages of the multi-page letter to Charles, Charles did not deny writing the letter and Charles agreed with and sometimes elaborated on parts of the multi-page letter that Saavedra showed to him. (5RT 1233, 1235, 1237.)

Based on Charles looking at each page of the letter that Saavedra put up against the glass partition for him to read, Saavedra assumed Charles read those displayed pages. (5RT 1239-1240, 1242.) Saavedra did not ask Charles if Charles wrote any page of the multi-page letter that Saavedra showed to him. (5RT 1236-1237.) However, when Saavedra pointed to pages of the letter and commented that those pages were written by Charles, Charles never denied writing those pages. Saavedra did not remember the specific pages of the letter that he showed to Charles. (5RT 1242-1243, 1246-1247, 1252.)[16]

(...continued)

> Q: There is never a specific "yes" or "no, I didn't write it," or "I did write it," correct?
>
> A: Correct.
>
> Q: That's just information you gleaned from interviewing for the time period that you did that particular day?
>
> A: Correct.

(5RT 1236-1238.)

[16] Reporter Saavedra explained appellant never denied writing the parts of the letter that Saavedra pointed out to him as follows:

> Q [defense counsel Klar]: So the issue in your conversation wasn't who wrote it, it was just more of a find out what happened?

(continued...)

Saavedra further testified when he questioned Charles about pages of the letter, Charles commented on the contents of those pages. (5RT 1243.) For example, Saavedra asked Charles about a passage in the letter that Charles poured gasoline on the bodies and set them ablaze; Charles responded that he got rid of the bodies as if he were cremating them. (5RT 1244.) In another example Saavedra asked Charles about another passage in the letter that described Charles finding his brother's body with a wrench on top of the body; Charles responded he smelled blood and held his brother in his arms. (5RT 1244.) Saavedra asked him about another passage that described Charles finding a typed note and asked if Charles

---

(...continued)

> A [Saavedra]: That was very much an issue when I went there, and the way I was confirming it was by –
>
> Mr. Brent [prosecutor]: I am going to object. Which, the former or the latter was very much an issue?
>
> The Court: Sustained.
>
> By Mr. Klar: Q: Which was much an issue?
>
> A: Whether he wrote it or not.
>
> Q: Did you ever get an ultimate answer?
>
> A: I believe I did during the entire interview; specifically saying, "this letter you wrote," "you wrote here," "you said this here," and waiting for him to say, "no, I didn't," or waiting for him to disagree with what was in the letter, or waiting for him not to -- to say, "no, I didn't" -- "I didn't burn my parents," and instead, it was quite the opposite.
>
> (5RT 1246.)

kept the note.[17] Saavedra asked him about another passage mentioning "monkey boots" and Charles described the boots to Saavedra. (5RT 1245.)

Based on reporter Saavedra's testimony, counsels' stipulations and defense counsel's request that the court make its ruling based on the presented pretrial evidence (see 5RT 1260), the trial court found no evidence was presented that a person tampered with the letter, no evidence was presented establishing the chain of custody of the letter was unreliable, the multi-page letter used by reporter Saavedra when talking to Charles was a copy of the multi-page letter (Exhibit 1) received from Los Angeles sheriff's Sergeant Royer, the same person wrote the multi-pages of the letter and Charles never denied writing any page shown to him by reporter Saavedra. (5RT 1260-1261; see 8RT 2215 [defense handwriting expert Hatch opined a single person drafted the multi-page letter].) The trial court denied Charles's motion to exclude the multi-page letter and ruled it was admissible as Charles's "implied" admission. (5RT 1261-1262.)

In the guilt phase of trial, Saavedra testified that during his pretrial interview with Charles in jail, Charles acknowledged that he wrote the multi-page letter. (7RT 2061-2062.) Saavedra showed the first page of the letter to Charles through the glass partition in the jail's visitor booth and read or showed other pages from the letter to Charles and referred to other pages during his interview of Charles. (7RT 2062-2063.)

---

[17] In the pretrial hearing to exclude the multi-paged letter, reporter Saavedra did not testify what response, if any, appellant made to Saavedra's question about the typewritten note. (See 5RT 1245.) However, in trial, Saavedra testified when he asked appellant what appellant did with the typewritten note that he found from the unknown people who killed appellant's family, appellant responded that he did not have that typewritten note. (7RT 2066.)

At trial, Saavedra also testified in the interview Saavedra asked Charles what "[Charles] meant by monkey boots" as described in the letter because Saavedra was unfamiliar with those boots. Charles "responded" to Saavedra's question about monkey boots. (7RT 2063.)

Saavedra and Charles "talked about" "the sweatshirt" that the letter described being worn by Charles's brother. In response, Charles "talked about the sweatshirt being his." (7RT 2063-2064.)

At trial, Saavedra also testified when he wrote the newspaper article he included statements Charles made to him during the jail interview. During the interview, he pointed out passages in the letter referring to burning the bodies and when he asked Charles "how he could do that," Charles responded, "[w]hen people die they bury them or cremate them," and "[w]ell, I didn't have a dumpster -- a dump truck in my backyard, so I couldn't bury them." Charles also said, "[i]f I burned them, it could be cremating them and it would be looked at as a simple car-jacking or something." (7RT 2064-2065.) Charles told Saavedra that as the car burned, Charles ran to a near-by baseball field and called his fiancée's brother for a ride home. (7RT 2065, 2077.)

At trial, Saavedra testified throughout his conversation with Charles, Charles never denied writing the letter. (7RT 2064.) Saavedra never asked Charles if Charles wrote the entire letter, nor did Saavedra show him every page of the letter. (7RT 2067.) One of Saavedra's main purposes was to confirm Charles was the author of the multi-page letter. (7RT 2066.)

In the penalty phase of trial, Saavedra testified to the same evidence he gave in the guilt phase of this case. His testimony included the fact he wrote a news article based on Charles's multi-page hand printed letter and Charles's statements to him during the January 2 county jail interview. His testimony also included the fact he showed Charles the first page of the letter and showed and questioned him about other parts of the letter.

Saavedra testified that throughout the jail conversation Charles never denied writing the letter and that Charles expanded on parts of the letter that referred to "monkey boots", a B.U.M. sweatshirt worn by Daniel, a lost type written note and Charles burning the bodies. (32RT 4686-4692, 4694-4701.)

All relevant evidence is admissible at trial and the trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. (*People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167; see Evid. Code, § 351.) Relevant evidence includes all evidence having any tendency in reason to prove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) Under Evidence Code section 352, a trial court may exclude otherwise relevant evidence when its probative value is substantially outweighed by concerns of undue prejudice, confusion, or consumption of time. Evidence is substantially more prejudicial than probative if broadly stated, it poses an intolerable risk to the fairness of the proceedings, or the reliability of the outcome. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) On appeal, this Court reviews the trial court's rulings concerning the admissibility of the evidence for abuse of discretion. (*People v. Thornton* (2007) 41 Cal.4th 391, 444-445; *People v. Pollock* (2004) 32 Cal.4th 1153, 1171.)

Under Evidence Code section 1221, "[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." Thus, when a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response from that party to an action if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it. The party's silence, evasion, or equivocation may be considered tacit a

admission of the statements made in his presence. (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

There are only two requirements for the introduction of adoptive admissions: (1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement. (*People v. Combs* (2004) 34 Cal.4th 821, 843.) To warrant admissibility under section 1221, it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide. (*People v. Riel*, *supra*, 22 Cal.4th at pp. 1189-1190.)

A. Charles's Statements and Conduct in Response to Saavedra's Questions About Pages in the Letter Was Sufficient Evidence of Charles's Adoptive Admission of the Letter's Contents within the Meaning of Evidence Code Section 1221

Contrary to Charles's arguments, the hand drafted letter (Exhibit 1), was properly admitted into evidence as part of his adoptive admission under Evidence Code section 1221. Charles's words and conduct made in response to Saavedra questioning him about passages of the letter which Saavedra referred to as having been written by Charles, indicated Charles's adoption of, or his belief in, the truth of those passages. Further, the fact the trial court observed one person wrote all pages of that letter leads to the reasonable inference if Charles indicted he wrote the passages about which Saavedra questioned him, so too he wrote the other pages of the letter.

First, his argument, that the letter should not have been admitted because he never "acknowledged" to Saavedra or to anyone that he authored the letter, should be rejected. (See AOB 79-83.) Under the

circumstances of this case, Saavedra's accusatory statements to Charles and Charles's responses and reactions to Saavedra's statements are properly offered as Charles's implied or adoptive admission of the accusatory statement. (*People v. Riel, supra*, 22 Cal.4th at p. 1189, citing *People v. Preston* (1973) 9 Cal.3d 308, 313-314.) Section 1221 contemplates both equivocal and evasive responses because it includes a party's explicit acceptance of another's statement or accusation, or that party's acquiescence in the truth of the statement, or accusation by silence. (*People v. Castille* (2005) 129 Cal.App.4th 863, 876.) Further, for the adoptive admission exception to apply, it was not essential for Saavedra to directly accuse Charles of each criminal act set out in the multi-page letter. (*People v. Fauber* (1992) 2 Cal.4th 792, 852.)

As this Court recognizes, a typical example of an adoptive admission is the accusatory statement to a criminal defendant made by a person other than a law enforcement officer, and the defendant's conduct of silence, or his words or equivocal and evasive replies in response to the accusatory statement. With knowledge of the accusation, the defendant's conduct of silence or his words in the nature of evasive or equivocal replies lead reasonably to the inference that he believes the accusatory statement to be true. (*People v. Silva* (1988) 45 Cal.3d 604, 623-624.) Thus, in *Silva*, a murder case, this Court found the fact defendant smiled while listening to an accomplice describe their respective roles in the murder, to be sufficient evidence to be submitted to the jury as an adoptive admission under section 1221. (*Id.*, at p. 623; see also *People v. Medina* (1990) 51 Cal.3d 870, 891 [treating defendant's silence in response to sister's statement as adoptive admission did not unconstitutionally penalize defendant's right to remain silent].) Such is the case here.

The fact Charles did not explicitly tell reporter Saavedra that Charles authored the multi-page letter did not preclude the trial court from

reasonably concluding Charles's conduct, and words admitting passages of the letter was his admission to the rest of the letter since the court observed the letter was written by one person. Charles was responsive to and commented and elaborated on parts of the letter Saavedra showed him (5RT 1233, 1235, 1237), and throughout him talking to Charles about the letter, Charles never denied he authored the letter (5RT 1246-1247, 1252) or contradicted Saavedra's describing the passages as "this letter you wrote," "you wrote here," and "you said this here." (5RT 1246.) Bolstering the court's ruling admitting the letter is the fact Charles responded, commented and elaborated on passages of the letter Saavedra showed to him; Charles's words and conduct confirmed Charles authored the letter. (5RT 1223-1224.) Moreover, Charles did not testify at the pretrial hearing on his motion to exclude the letter from evidence and did not present evidence refuting Saavedra's observations of Charles's responsive conduct and statements to Saavedra's questions about selected passages of the letter.

Thus, even if Charles did not explicitly tell Saavedra that Charles authored the multi-page hand drafted letter, his statements, comments and conduct in response to Saavedra's questions about selected pages from the letter was a sufficient basis under Evidence Code section 1221 for the court to rule the letter to be admissible as his tacit adoptive admission of the contents of that letter shown to him by Saavedra. The court looked at the letter and concluded the multi-page letter was drafted by a single person bolstered the court's ruling. The fact the court received and considered Charles's expert handwriting expert opinion that Charles did not draft the letter, did not undermine the court's ruling; sufficient evidence was presented for the court to admit the letter into evidence so that the jury could decide if Charles drafted the letter. The fact Charles's handwriting expert later opined to the penalty jury that a single person drafted the letter,

shows the trial court's pretrial opinion a single person drafted the letter was not an unreasonable observation. (See 8RT 2215)

B. Charles is Barred From Objecting to Reporter Saavedra Opining to the Jury that Charles Authored the Multi-Page Letter Because He Did Not Timely Object to Saavedra Rendering That Opinion to the Guilt Phase Jury

Nor is there merit to Charles's claim that Saavedra's opinion, that Charles authored the multi-paged letter, was improperly admitted into evidence and usurped the guilt phase jury's responsibility to decide if Charles authored the letter. (See AOB 83-86.) At pretrial and at trial, Charles objected to the multi-page letter being admitted into evidence as his adoptive admission. However, at neither time did he object to Saavedra rendering an opinion that Charles acknowledged authoring the letter. (See 5RT 1255-1260.)

Although Charles concedes he did not object to Saavedra opining to the guilt phase jury that Charles authored the multi-paged letter, he contends his general objection to the letter being admitted into evidence necessarily included his objection to Saavedra opining that Charles wrote the letter and that this issue may be reviewed on appeal because it is an important matter of public policy which is based on undisputed facts. (AOB 84-86.) Contrary to Charles's contention, his failure to timely object to Saavedra testifying to his opinion Charles authored the letter to the guilt phase jury, bars him from raising this issue on appeal. Nor does this issue qualify as an exception to the timely objection rule on the basis it is an important public policy matter. Finally, even if considered on its merits, Charles's claim should be rejected because the jury was expressly instructed it was to decide if Charles authored the multi-paged letter and it had the authority to accept or reject all witnesses' opinions on the matter.

In the pretrial proceedings at which the trial court ruled the multi-page letter would be admitted into evidence, neither party argued Saavedra's opinion that Charles authored the letter, should be barred from evidence. (See 5RT 1221-1262.) Nor, prior to or after Saavedra testified that he believed Charles wrote the letter, did Charles object to that opinion being presented to the jury. (See 7RT 2045-2058 (pre-testimony colloquy by court and parties), 2061-2062 (Saavedra testified Charles "confirmed during the interview Friday that [the letter] was his writing")[18]). Thus, because Charles did not object to Saavedra testifying in the guilt phase, he thought the letter was written by Charles, Charles has forfeited this claim for purposes of appeal and his instant argument should be rejected on this basis.

Nor did the admission of Saavedra's guilt phase testimony, that he thought Charles wrote the letter, amount to a miscarriage of justice. Evidence Code section 353 provides:

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

---

[18] During Saavedra's guilt phase testimony, defense counsel objected to Saavedra's testimony that appellant "confirmed during the interview Friday that [the letter] was his writing," on the basis that statement was hearsay; appellant did not object on the basis the statement improperly presented an opinion or factual conclusion. The court overruled appellant's hearsay objection. (7RT 2061-2062.)

In accordance with Evidence Code section 353, appellate courts have consistently held that a defendant's failure to make a timely objection renders a claim of error on that ground not cognizable on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 433-434.)

The guilt phase jury was instructed that it was the exclusive judge to decide Saavedra's credibility and the weight to give his testimony after determining, among other factors, his ability to see or hear the matters about which he testified, his ability to remember those events, and his bias, interest or other motive. (9RT 2667-2669; 3CT 706-707 [CALJIC No. 2.20 (believability of witness)].) It was told it was the exclusive judge to determine if Charles made a statement, e.g., wrote the letter, which tended to prove his guilt irrespective of Saavedra's opinion that Charles drafted the letter. (9RT 2679; 3CT 723 [CALJIC No. 2.71 (admission)].) It was also told it was the exclusive judge to decide if Charles's responses and actions to Saavedra's questions about the letter were admissions and, if it decided his responses and actions were not admissions, the jury was to disregard the letter. It was also told the letter was not received for the purpose of proving its truth, but only as it supplied meaning to Charles's conduct. (9RT 2679-2681; 3CT 724 [CALJIC No. 2.71.5 (adoptive admission; "evidence of an accusatory statement is not received for the purpose of proving its truth" but to supply meaning to the accused's response)].) Finally, it was instructed it had exclusive authority to reject or accept a Saavedra's opinion Charles wrote the letter after determining Saavedra's ability to perceive matters pertaining to his testimony. (9RT 2675-2676; 3CT 716 [CALJIC No. 2.81 (opinion testimony of lay witness)].)[19] Based on those

---

[19] The jury was instructed with CALJIC No. 2.81 as follows:

(continued...)

instructions, and absent Charles presenting contrary authority, it must be presumed the jury understood it was not bound by Saavedra's opinion but by the law as instructed by the court to evaluate the evidence and draw its own conclusions about that evidence. It must be presumed the jury followed those instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436 [where the trial court properly instructed the jury on the law it must be presumed the jury followed those instructions].)

C. No Evidence Was Presented the Letter Was Altered Before it Was Seized by Sergeant Royer; the Trial Court's Inspection of the Letter Was a Sufficient Basis by Which the Court Could Conclude the Letter Was Hand Drafted by a Single Person

Similarly, Charles's argument that the letter should have been barred from evidence because the prosecutor failed to show the letter was unaltered before it was seized by Sergeant Royer from inmate Pincock should be rejected on the merits. (See AOB 70-77.) At Charles's pretrial motion to exclude the letter, no evidence was presented that someone had tampered with the letter. Rather, defense counsel argued to the court that because the letter was taken from inmate Pincock, it is implicit Pincock or some other inmate tampered with the letter. (5RT 1259-1260.)

(...continued)

> In determining the weight to be given to an opinion expressed by any witness who did not testify as an expert witness, you should consider his or her credibility, the extent of his or her opportunity to perceive the matters upon which his or her opinion is based, and the reasons, if any, given for it. You are not required to accept such an opinion, but should give it the weight, if any, to which you find it entitled.
>
> (9RT 2675-2676.)

The lower court's pretrial ruling that the multi-page letter was admissible as part of Charles's adoptive admission, was made after it heard reporter Saavedra's testimony, considered counsels' stipulations and defense counsel's request the court make its ruling based on that presented evidence. (5RT 1260) Before ruling on the letter's admissibility, the court also observed that it looked at the multi-page letter and was of the opinion that one person wrote all the pages. (5RT 1258-1259.) In rejecting Charles's motion without prejudice to renew the motion if new evidence on the issue were discovered, the court also observed Charles had only presented factually unsupported speculation that someone had tampered with the letter. (5RT 1260.)

On appeal, Charles does not invite this Court's attention to any part of the pretrial hearing of evidence being presented that the letter was a product of tampering. Due to the absence of evidence of tampering, the record shows a reasonable certainty the letter was not a product of tampering. The court's conclusion was bolstered by its unrefuted observation a single person drafted the letter. (5RT 1258-1259; see 8RT 2215 [in guilt phase testimony defense handwriting expert Hatch opined a single person drafted the multi-page letter].)

In a chain of custody claim, the burden on the party offering the evidence is to show to the trial court's satisfaction that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. (*People v. Catlin* (2001) 26 Cal.4th 81, 134.) The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. While a perfect chain of custody is desirable, gaps will not result in the exclusion of the evidence, so long as the links offered connect the evidence with the

case and raise no serious questions of tampering. (*Id.*, at p. 134, citing Méndez, Cal. Evidence (1993) § 13.05, p. 237.) This Court also noted, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight. (*People v. Catlin, supra*, 26 Cal.4th at p. 134; see also *People v. Lucas* (1995) 12 Cal.4th 415, 444.) A trial court's admission of evidence is reviewed for abuse of discretion only. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1061.) Here, the trial court did not abuse its discretion.

Defense counsel's suggestion to the lower court, that seizure of the multi-page letter from inmate Pincock was a sufficient basis to infer Pincock or another inmate tampered with the letter, constitutes bare speculation under *Catlin* and *Lucas*. The court implicitly considered defense counsel's proffer that a defense expert witness opined Charles did not write the letter, however, the proffered expert testimony did not include an opinion someone had tampered with the letter. Neither the prosecutor nor defense counsel presented inmate Pincock to testify in that pretrial proceeding nor did those counsel enter a stipulation to what he would have testified with respect to the letter. Neither prosecutor nor defense counsel indicated or complained of being prevented from presenting Pincock's testimony at that pretrial hearing.

The fact Saavedra testified Charles looked at, responsively answered Saavedra's questions about particular pages pointed out to him in the letter; at all times while being shown pages from the letter Charles responsively commented or expanded on those pages and never denied writing or knowing the substance of those pages. The court's observation, that the multi-paged letter appeared to have been drafted by a single person, also supports its reasonable inference if Charles read the first page of the letter and never denied drafting that page nor other passages of the letter shown to him by Saavedra, so too Charles drafted the remaining pages of the

letter. Each of these preceding factors supports the court's conclusion the letter was not the product of tampering.

Because only the barest speculation, that the letter had been tampered with, was offered at the pretrial hearing on Charles's motion to exclude the letter, the lower court properly admitted the letter for the guilt phase jury's consideration. That jury was instructed it was the exclusive judge in determining if Charles authored the multi-page letter and, if so, what portions of the letter he authored. Moreover, it was instructed even if it decided Charles authored parts of or the entire multi-page letter, the jury should view his oral admission with caution. (9RT 2679; 3CT 723 [CALJIC No. 2.71 (admission defined)].) Charles has not invited this Court's attention to any part of the record showing the jury failed to abide with the preceding instructions. The lower court did not abuse its discretion when it ruled the multi-page letter could be admitted as evidence of Charles's admission to the underlying crimes.

D. The Fact Charles Did Not Deny Writing Each Page of the Letter Did Not Preclude the Court From Admitting the Entire Letter into Evidence as Charles's Adoptive Admission

Similarly, this Court should reject Charles's claim the letter should not have been admitted into evidence because he did not deny writing each page of the letter. (AOB 77-79.) Sufficient evidence was presented that Charles had ample opportunity to deny writing any part of the letter shown to him by Saavedra. Further, because the letter was written by a single person, Charles's denial he wrote any page or part of a page of the letter would have constituted his denial to all pages of the letter.

The court's ruling to allow the letter into evidence, pursuant to Evidence Code section 1221, is supported by the fact Saavedra testified that he showed Charles the multi-page letter and announced to Charles that it was a "letter you wrote," and Charles never refuted Saavedra's description

of that letter. (5RT 1237.) Nor did Charles contradict Saavedra describing several passages and pages of the letter shown to Charles as "this letter you wrote," "you wrote here," and "you said this here." (5RT 1246.) Moreover, throughout the interview Charles was responsive to, commented and elaborated on parts of the letter Saavedra showed him. (5RT 1233, 1235, 1237.) Throughout the interview about passages in the letter, Charles never denied he authored the letter or claimed he had no knowledge about the letter. (5RT 1246-1247, 1252.) The lower court looked at the multi-page letter and opined a single person wrote all pages of that letter. (5RT 1258.) A reliable factual basis was presented upon which the court could reasonably conclude Charles knew the contents of the letter. Under these circumstances, the court's conclusion, if Charles wrote the passages and pages shown to him by Saavedra, Charles wrote the entire letter, was not unreasonable.

Nor does Charles's claim that the lower court improperly failed to require the prosecutor to show that Charles made a point-by-point denial of the contents of the letter, undermine the preceding analysis. (See AOB 78-79.) His reliance on *People v. Simmons* (1946) 28 Cal.2d 699, in support of that claim is misplaced because *Simmons* is factually distinguishable; that case addressed a defendant's refusal to respond to a witness' written accusation handed to him by police that the defendant shot and killed the victim. The court there concluded a defendant's silence in the presence of arresting officers' accusations is conducive to the defendant's welfare. (*Id.*, 28 Cal.2d at pp. 712-713.)

Likewise, his reliance on *People v. Spencer* (1947) 78 Cal.App.2d 652, is misplaced because that case is factually distinguishable. That case involved the court's analysis of a defendant's silence in light of an officer prompting a co-defendant to describe to the officer and the defendant the defendant's involvement in a robbery. There too, the court concluded the

defendant could not be reasonably expected to spontaneously respond to the co-defendant's statements. (*Id.*, 78 Cal.App.2d at pp. 657-658.)

Nor does *People v. Sanders* (1977) 75 Cal.App.3d 501, support Charles's claim. There, the defendant was prosecuted for murder on the theory she hired others to kill the victim. When interrogated by the police, the defendant denied wanting the victim killed or soliciting it, but did make statements implicating her involvement in the murder. The court in that case held that the tape recording and transcript of the interrogation should have been edited because it was essentially a long narrative of multiple facts by the officer that reasonably could not be admitted or denied on a point-by-point basis. (*Id.*, 75 Cal.App.3d at pp. 507-508.)

In contrast to *Simmons, Spencer and Sanders*, Saavedra's questions to Charles about the contents of the multi-page letter were made as a long narrative of multiple facts that could not be reasonably denied or admitted on a point-by-point basis. Rather, Saavedra testified he questioned Charles about the letter's contents and waited for Charles's answers or responses. Through this question and answer method, Charles could have, at any time, told Saavedra that he did not write the letter or did not know about the letter's contents; either answer would have been sufficient to constitute Charles's denial of the letter's contents and for the lower court to preclude the admission of the letter into evidence. The fact Charles did neither requires his instant claim be rejected.

E. The Fact Charles Was Not Shown All Pages of the Multi-Page Letter Did Not Preclude the Trial Court from Ruling His Responses and Conduct to the Passages and Pages Shown to Him Was an Adoptive Admission of the Entire Letter

Charles's argument that the lower court abused its discretion by admitting the multi-page letter into evidence because he never acknowledged drafting each page of the letter, should be rejected. (AOB

79-83.) Charles was shown and responsively commented and expanded upon pages from the letter, he never denied drafting nor knowing the substance of those pages and the court's independent examination of the letter that it was drafted by one person, were sufficient facts supporting the court's conclusion Charles drafted all pages of the letter.

Saavedra's pretrial testimony was that Charles never denied writing any of the pages shown to him by Saavedra nor did he deny knowing about passages in the letter about which Saavedra questioned him. (5RT 1235, 1237.) Rather, when Saavedra showed him pages from the letter, Charles agreed with the contents of passages or pages that Saavedra pointed out by say to him "you [Charles] said it here", or "you [Charles] wrote it here." In other instances, Charles elaborated on the contents of pages Saavedra showed to him. With regard to passages, words or entries in the letter that Saavedra did not understand, Charles described, explained, or clarified those matters to Saavedra. (5RT 1237.)

The only two requirements for the admission of hearsay statements under the adoptive admission exception are the party must have knowledge of the contents of the hearsay statement, and having such knowledge the party must have used words or conduct indicating his adoption of or his belief in the truth of that hearsay statement. (*People v. Fauber* (1992) 2 Cal.4th 792, 852; accord, *People v. Preston* (1973) 9 Cal.3d 308, 314.) Here, Charles's responsive answers, comments, and explanations to Saavedra's questions about matters appearing on the pages and in the passages of the multi-paged letter, none of which he denied drafting or knowing about, was ample evidence he drafted those parts of the letter. The fact the lower court examined the letter and concluded one person had drafted the letter reasonably supports the court's conclusion Charles drafted all pages of the letter. The fact Charles did not deny writing or claim he had no knowledge about any of those pages and matters in the letter and,

instead, gave affirmative responses to Saavedra's questions about those matters was ample evidence he knew and understood those matters and believed the truth of those matters.

Consequently, irrespective of Saavedra not asking Charles if Charles drafted each page of the letter at issue and Charles not acknowledging to Saavedra that he drafted each page and each passage contained in the multi-page letter, ample evidence was presented that Charels drafted the letter and, through his words and conduct in response to Saavedra's questions about the pages and passages in the letter, indicated his adoption of or his belief in the truth of the matters in that hearsay letter.

F. California's News Person Shield Law Did Not Deprive Charles of a Fair Trial

Nor, contrary to Charles's claim, did the lower court limiting defense counsel's cross examination of reporter Saavedra pursuant to the newsperson Shield Law (hereafter "Shield Law") unconstitutionally deprive Charles of a fair trial. (See AOB 87-99.) The court's limitation of defense counsel's examination of Saavedra did not improperly prevent counsel from cross examining Saavedra about unpublished information concerning Saavedra's and Charles's conversation, or require Charles to forfeit his 5th Amendment right to remain silent to preserve his right to a fair trial. (AOB 96-97.)

Charles's complaint that the court's application of the Shield Law denied his right to due process because it unfairly limited his impeachment of Saavedra, should be rejected on the merits. The court did not abuse its discretion by applying the Shield Law in this case and Charles's right to due process was not violated since Charles retained the right to testify and rebut Saavedra's testimony but did not do so. The fact Charles did not

testify to rebut Saavedra's opinion should not inure to Charles's benefit; Charles was a viable witness to rebut Saavedra's opinion, but chose not to place his own credibility at issue by testifying. Nor does any part of the underlying record show he was prevented from exercising that right.

Article I, section 2, subdivision (b) of the California Constitution provides, in pertinent part,

> A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication...shall not be adjudged in contempt...for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

The news person's exemption from being adjudged in contempt by judicial, legislative or other body having the power to issue subpoenas, for refusing to disclose news sources is also mirrored in Evidence Code section 1070, subdivision (a) [refusal to disclose news source].

The Shield Law provides absolute rather than qualified protection in immunizing a newsperson from contempt for not revealing unpublished information. (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 890.) Since contempt is generally the only effective remedy against a nonparty witness, the California enactments, Article I, section 2, subdivision (b), and Evidence Code section 1070, grant such witnesses virtually absolute protection against compelled disclosure. (*Id.,* at pp. 890-891.) That protection provides an immunity from being adjudged in contempt; it does not create a privilege. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 797, fn. 6.) To qualify for Shield Law protection, the newsperson must establish he is one of the types of persons enumerated in the law, that the information was obtained or prepared in gathering, receiving or processing

of information for communication to the public, and that the entire information gathered by the newsperson has not been disseminated to the public by the newsperson. (*Id.* at p. 805, fn. 17; see *People v. Vasco* (2005) 131 Cal.App.4th 137, 152.)

Here, the lower court found Saavedra was entitled to protection under the Shield Law. Neither counsel disputed Saavedra was a news reporter when he talked to Charles about the letter at issue here. The information Saavedra received, by talking to Charles and contemporaneously showing Charles pages and passages from the letter, was gathered according to Saavedra's intent and purpose to disseminate that information in a public news article. Evidence was presented that substantial information gathered by Saavedra from Charles was not disseminated to the public. Consequently, the lower court properly found the Shield Law applicable in this case.

Once established, the Shield Law may be overcome only by a countervailing federal constitutional right. (*Miller v. Superior Court, supra,* 21 Cal.4th at p. 897.) A defendant's constitutional right to a fair trial may displace the newsperson's Shield Law immunity if the defendant meets the burden of demonstrating nondisclosure of unpublished information would deprive him of his right to a fair trial. (*Delaney v. Superior Court, supra,* 50 Cal.3d at p. 805.) To meet this burden, defendant must show a reasonable possibility the unpublished information will materially assist his defense. (*Id.,* at p. 809.) In *Delaney* this Court emphasized the requested unpublished information need not lead to the defendant's exoneration. For example, a defendant's right to a fair trial includes disclosure of evidence that may establish an imperfect defense, a lesser included or lesser related offense, or a lesser degree of the same crime, impeach a prosecution witness or, in capital cases, establish mitigating circumstances. (*Ibid.*)

While a defendant's showing need not be detailed or specific, it must rest on more than mere speculation. (*Ibid.*)

Here, Charles wanted to extensively cross examine Saavedra about unpublished information, including the circumstances of Saavedra showing and questioning Charles about the letter, to impeach Saavedra's opinion that the letter was drafted by Charles. (AOB 98-99.) Charles contends a successful impeachment of Saavedra's opinion might have weakened the court's confidence in its ruling that the letter was written by Charles and that Charles's responsive comments and the letter were admissible as his adoptive admissions. Charles concludes the exclusion of the letter would have assisted Charles's defense.

However, even if Charles had successfully showed the Shield Law interfered with his right to a fair trial, he was not automatically entitled to exposing and examining Saavedra's unpublished information. In resolving conflicting constitutional rights, the trial court must proceed to the second stage of the inquiry and balance the defendant's and newsperson's respective interests. (*Delaney v. Superior Court, supra,* 50 Cal.3d at p. 809.) In balancing those interests, the court must consider: (a) whether the unpublished information is confidential or sensitive so that disclosure might threaten the newsperson's access to future sources; (b) the interests protected by the shield law and whether other circumstances demonstrate no adverse consequences to disclosure, as when the defendant is the source of information; (c) the importance of the information to the defendant; and (d) whether there is an alternative source for the unpublished information. (*Id.*, at pp. 810-811.) However, this Court noted the relative importance of the preceding factors will vary from case to case and declined to hold, in the abstract, that any factor or combination of factors would be determinative in all cases. (*Id.*, at 813.)

Applying *Delaney's* preceding criteria to this case shows that although Charles was seeking unpublished information, Charles had provided to Saavedra, and on that basis Charles would be less concerned about disclosure of that unpublished information, one criteria militated against disclosure of that unpublished information. (See 7RT 2078-2079.)[20] Allowing Charles unfettered authorization to cross examine Saavedra about unpublished information concerning the reporter's questions to Charles about the letter and the reporter's recollection of Charles's reactions to those questions would have significantly affected Saavedra's future ability to gather news. The court's order that the reporter answer all Charles's questions irrespective of the Shield Law would have undermined the reporter's ability to persuade future news sources of the reporter's ability to protect the news source's confidentiality; a news person's ability to gather news is the primary purpose of the Shield Law. (*See Delaney v. Superior Court y, supra,* 50 Cal.3d at p. 810, citing in part Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Primary Elec., *supra,* p. 19.)

Additionally, the fact Charles was an alternative source of that unpublished information militated against disclosure of the unpublished information. Nothing prevented Charles from testifying about his conversation with Saavedra to refute the factual basis of the reporter's opinion that Charles wrote the letter. The jury was instructed that it had exclusive authority to reject a lay witness' opinion if it decided the extent of his opportunity to perceive the matters upon which his opinion is based, and the reasons for that opinion were not worthy of belief. (See fn. 18,

---

[20] Saavedra's guilt phase testimony disclosed he also talked to Bernard Severino, appellant's grandfather, as a third source of information for the news article. (7RT 2078-2079.)

supra; 9RT 2675-2676; 3CT 716.) By Charles testifying the reporter's opinion was factually erroneous, the jury may have had a sufficient basis to reject the reporter's opinion and conclude Charles did not write the letter here at issue.

Charles's claim the trial court abused its discretion by admitting into evidence, as an adoptive admission, his hand drafted multi-page letter and his reactions and comments to reporter Saavedra should be denied. In light of the facts presented here, the court's ruling Charles's pretrial comments and reactions to Saavedra as the reporter showed him the letter and the contents of the letter were admissible as adoptive admissions under Evidence Code section 1221, was proper. Based on Charles's comments and explanations, reactions to the reporter as Charles was shown pages and passages from the letter, and based on the court's observation a single person drafted the letter, the court could reasonably conclude Charles wrote the letter irrespective of Charles never expressly telling the reporter that Charles drafted the letter. Charles's arguments to the contrary should be rejected.

II. CHARLES CLAIM OF PROSECUTOR ERROR IN THE GUILT PHASE SHOULD BE REJECTED

Charles next argues the prosecutor committed reversible error on three different occasions. He explains the prosecutor erred by: 1) presenting the multi-page handwritten letter into evidence; 2) improperly commenting Charles economically benefitted by murdering his parents and brother; and 3) criticized the defense theory. He claims singularly or cumulatively, those alleged errors require his conviction be reversed. (AOB 106-143.) Charles is wrong. (See RB, Arg. I, *supra*)

Charles has not shown the alleged errors by the prosecutor either infected the trial with such unfairness as to render the subsequent conviction a denial of due process, or involved deceptive or reprehensible

methods employed to persuade the trier of fact. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)

First, Charles contends that the prosecutor erred by introducing the multi-page letter into evidence notwithstanding the fact the prosecutor knew parts of the letter were untrue. In support of his claim, Charles cites to matters in the letter that were inconsistent with the facts later discovered by investigating officers; he reasons those inconsistencies were numerous enough to render the entire letter false. He concludes because the letter contained false information, the prosecutor erred by offering the letter into evidence and requires his guilty verdict be reversed. (AOB 116-128.)

Under California law, a prosecutor commits reversible misconduct if he makes use of deceptive or reprehensible methods when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. (*People v. Riggs* (2008) 44 Cal.4th 248, 298.) Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action so infected the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Dykes* (2009) 46 Cal.4th 731, citing in part *People v. Crew* (2003) 31 Cal.4th 822, 839.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

Contrary to Charles's argument, no error was committed by the prosecutor proffering the multi-page letter into evidence because the jury was fully informed the letter was seized by investigating officers from an inmate and there were inconsistencies between parts of the letter and

evidence discovered by police. The prosecutor did not use deceptive or reprehensible methods when attempting to persuade the trial court and the jury that Charles wrote the letter and the letter contained facts about the underlying murders that only the actual murderer would know. Finally, the fact the letter contained matters that were inconsistent with evidence of the murders later discovered by law enforcement officers does not demonstrate the letter contained false information.

This Court's *Avila* decision is instructional for the proposition that evidence proffered by a prosecutor that is inconsistent with other evidence does not demonstrate the proffered evidence was false or that the prosecutor knew the proffered evidence was false. The defendant in *Avila* argued the prosecutor committed error by relying on the victim's false testimony when arguing to the jury what evidence it could rely on in finding the defendant intended to kill the victim. (*People v. Avila* (2009) 46 Cal.4th 680, 94 Cal.Rptr.3d 699, 732.) The defendant claimed the victim's trial testimony was false because it was inconsistent with the victim's preliminary hearing testimony and with the victim's statement to an officer. (*Id.*, at pp. 732-733.)

In rejecting the defendant's claim, this Court held any inconsistency between the victim's pretrial statements and trial statement did not ineluctably demonstrate the victim's trial testimony was false or that the prosecutor knew it was false. (*People v. Avila*, *supra*, 94 Cal.Rptr.3d at p. 733, citing *People v. Riel* (2000) 22 Cal.4th 1153, 1211-1212 [the prosecutor is not responsible for a witness's erroneous testimony so long as he provided discovery contradicting that testimony and the defendant was given the opportunity to point out the discrepancy to the jury].) As this Court's *Riel* decision explains, although attorneys may not present evidence they know to be false or assist in perpetrating known frauds on the court, they may ethically present evidence that they suspect, but do not personally

know, is false. (*People v. Riel, supra*, 22 Cal.4th at p. 1217.) Consequently, criminal defense attorneys sometimes have to present evidence that is incredible and that, not being naive, they might personally disbelieve. Presenting incredible evidence may raise difficult tactical decisions - if counsel finds evidence incredible the fact finder may also - but, as long as counsel has no specific undisclosed factual knowledge of its falsity, it does not raise an ethical problem. (*People v. Riel, supra*, 22 Cal.4th at p. 1217.) In claiming the prosecutor presented false evidence to the trier of fact the defendant must show, by a preponderance of the evidence that false evidence was adduced at his trial, and that such testimony may have affected the outcome of the trial. The defendant does not have to prove the false testimony was perjurious or that the prosecution knew of its falsity. (*People v. Marshall* (1996) 13 Cal.4th 799, 830, citing *In re Hall* (1981) 30 Cal.3d 408, 424 , and *In re Wright* (1978) 78 Cal.App.3d 788, 809.)

Below and under defense counsel's cross examination, lead investigator Sergeant Royer testified there were inconsistencies between matters set out in the multi-page letter and what police investigation discovered. (8RT 2114-2128.)[21] Under the prosecutor's questioning,

---

[21] Sergeant Royer testified before the guilt phase jury that inconsistencies existed between matters described in the multi-page letter and what police located: The letter described a wrench was in the truck and a wood handled knife was in the trunk, but no wrench was found in a truck and a wood-handled knife was found in the car trunk. (8RT 2114.) The letter indicated "monkey boots" were involved in the case, but no boots were found. The letter described a hammer was involved in the case, but no hammer was found by police. (8RT 2118.) The letter described a wrench was on top of Daniel's body in the car trunk, but no wrench was found on top of Daniel's body. The letter described threatening typed notes ordering appellant to "clean up," but no typed notes were found. (8RT 2119.) The letter contained the statement "I" got home at 11:30 p.m.,

(continued...)

Royer testified that many matters described in the letter were accurate. (8RT 2149-2153.)[22] The fact the multi-page letter contained matters inconsistent and consistent with discovered evidence by law enforcement does not demonstrate the matters described in the letter were false.

In order to perfect his claim that the prosecutor erred by presenting false evidence, Charles has the burden to prove by a preponderance the matters described in the letter were false and those matters may have affected the outcome of his trial. (*People v. Marshall*, *supra*, 13 Cal.4th at p. 830; see *In re Imbler* (1963) 60 Cal.2d 554, 560.) While Charles showed the jury below that several of the matters described in the letter were inconsistent with evidence found or not found by law enforcement, he has

---

(...continued)
found the bodies and started cleaning up, but Severino told officers Severino was up at 11:30 p.m. talking to Delores. (8RT 2119-2120.) The letter contained the statement Jeanne Bowen remembered hearing a car start up, but Bowen never told officers that she heard a car start up. (8RT 2121.) The letter contained the statement that bloody clothes were put into trash bags, but Royer never saw bloody trash bags. (8RT 2122-2123.) The letter contained the statement that all bags were put into a blue trash can, but Royer never found a trash can containing bloody clothes. (8RT 2123.) The letter contained the statement tapes from the glove compartment were thrown to the floor, but Royer did not see tapes in the burned vehicle. (8RT 2124.) The letter mentioned working gloves, but Royer only found sparing and boxing gloves. (8RT 2125.)

[22] Sergeant Royer testified before the guilt phase jury that the multi-page letter consisted of a diagram that accurately diagramed the rooms in the Charles resident and the placement of furniture in those rooms (8RT 2149). The letter accurately set forth the following: Police had taken the wrong gloves involved in the case (8RT 2150); the description of blankets and a pillow on a bed (8RT 2150-2151); Severino was 74 years old (8RT 2151); gray stone covered the Charles's residence foyer (8RT 2151); the blood in the bedroom of the residence was Edward's blood. (8RT 2152); and the letter contained an accurate diagram of the exterior of the home and depicted the position of a truck that was labeled "my truck" (8RT 2152).

not shown which, if any, of those matters were false. His failure to make such a showing, by a preponderance of the evidence, undermines his claim the prosecutor committed reversible error.

Moreover, Charles has not shown that the prosecutor's introduction of that multi-page letter at trial was a deceptive or reprehensible act designed to persuade the court or the jury and, absent that conduct, it is reasonably probable that an outcome more favorable to the defendant would have resulted. (*People v. Dykes*, *supra*, 46 Cal.4th 731.) Here, the prosecutor provided defense counsel with a copy of the multi-page letter prior to trial commencing thereby providing counsel with opportunity to attack the letter's foundation and admissibility and to rebut the letter's credibility in trial.

During trial, the prosecutor presented the jury with evidence about how Sergeant Royer seized the letter from a jail inmate who attempted to use the letter as barter for a favorable outcome in his criminal cases. During trial, the jury heard testimony that several matters described in the letter were inconsistent with evidence found or not found by law enforcement officers who investigated this case. The jury also heard testimony that many matters described in the letter were consistent with evidence found by officers. The jury also heard Charles's handwriting expert opine the multi-page letter was not written by Charles, and Charles's former girlfriend opine that the letter was written by Charles.

Because the prosecutor revealed to the jury the circumstances about how the letter was obtained, the witnesses' differing opinion about Charles writing the letter, and that many matters in the letter were both consistent and inconsistent with evidence discovered by officers, Charles cannot show the prosecutor engaged in deceptive or reprehensible conduct to persuade the court or the jury. Charles's instant claim the prosecutor erred by introducing the multi-page letter into evidence should be rejected.

Next, Charles is barred from complaining about the prosecutor's closing remark, that Charles was the sole heir to the family property, as a basis for reversing his conviction because Charles did not ask the jury to be admonished to disregard that remark. To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm. (*People v. Davis* (2009) 46 Cal.4th 539, 612, citing *People v. Tafoya* (2007) 42 Cal.4th 147, 176; *People v. Stanley* (2006) 39 Cal.4th 913, 952.)

Here, in rebuttal argument the prosecutor remarked that by Charles killing his family, Charles became "the sole heir to a beautiful home in a nice neighborhood in Orange County" Charles was the "sole heir" to the family estate. Defense counsel objected to the remark on the basis no evidence was presented Charles was the sole heir to the family residence. The court sustained counsel's objection on that basis. Counsel did not ask the jury to be admonished concerning the prosecutor's comment. (9RT 2637-2638.)

Because Charles did not request the jury be admonished concerning the prosecutor's remark that Charles was the sole heir to the family home, he may not raise this complaint for the first time on appeal. Under these circumstances and at Charles's request the jury be admonished, the court could easily have admonished the jury to disregard the prosecutor's remark and to remind the jury that an attorneys' argument is not evidence. Charles's failure to make a timely objection, make known the basis of his objection and request an appropriate admonishment be given to the jury to disregard the prosecutor's comment, bars him from raising this issue for the first time on appeal. (*People v. Brown* (2003) 31 Cal.4th 518, 553.)

Even if this Court addressed the merits of Charles's case, reversal of his conviction is not warranted. The prosecutor's remark at issue here was

partially responsive to defense counsel's closing remark that Charles had no motive to kill his family and constituted fair comment on the evidence. A prosecutor is given wide latitude to vigorously argue his case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence. (*People v. Dykes*, *supra*, 46 Cal.4th 731, citing *People v. Ledesma* (2006) 39 Cal.4th 641, 726.)

Below, in defense counsel's closing argument, he told the jury, in part, Charles had no motive to kill his family, "[n]o jealousy, no hate, no greed, no nothing," and added, "[i]t is not to say that those things don't exist, but when you start talking about them rising to the level of murder -- not one, not two, but three murders -- there is no motive that rises to that level." (9RT 2517-2518.)

In response to defense counsel's comment, the prosecutor later retorted, "[c]onsider also the fact that by killing the family, Mr. Charles becomes the sole heir to a beautiful home . . . and probable assets."[23]

---

[23] The part of the prosecutor's rebuttal argument at issue here is contained in the following colloquy:

> Prosecutor: . . . Now, there is nothing -- there wasn't a piece of paper found in Mr. Charles's handwriting that said, "I killed my parents because of this or that." There is nothing like that, but we have heard of a lot of different things, sort of some undercurrents going on in the family.
>
> Consider also the fact that by killing the family, Mr. Charles becomes the sole heir to a beautiful home in a nice neighborhood in Orange County –
>
> Mr. Klar [defense counsel]: Objection. There is no evidence
>
> Mr. Brent [prosecutor]: -- and probable assets.

(continued...)

(9RT 2637-2638.) Defense counsel immediately objected that no evidence Charles was the sole heir to the Charles estate had been presented and that the prosecutor's comment "misstated" the evidence. The court sustained counsel's objection on that basis. Counsel did not ask the jury to be admonished concerning the prosecutor's comment. (9RT 2637-2638.)

The prosecutor's single remark that Charles may have benefitted by killing his family is not reversible error because the remark was a reasonable inference to be drawn from the evidence and also indirectly rebutted defense counsel's closing comment that Charles had no motive to kill his family and no evidence was presented Charles harbored jealousy, hatred, or greed towards his family. (See 9RT 2517-2518.) The trial evidence showed that the members of Charles's immediate family members were Delores, Edward, and Daniel. A reasonable inference could be drawn from this fact is that Charles was the sole surviving member of the family and, if he successfully diverted suspicion for committing the murders from himself, he might have been the sole heir to the family residence. That Charles stood to economically benefit from the underlying murders was a reasonable interpretation of the evidence.

(...continued)

Mr. Klar: Objection, your Honor. There is absolutely no evidence of him being sole heir. That misstates it.

The Court: Sustained.

Mr. Klar: Thank you.

Mr. Brent: Consider the fact of all the possibilities. . . .

(9RT 2637-2638.)

Additionally, it is significant that defense counsel objected to the prosecutor's remark on the basis the prosecutor "misstated" the evidence that Charles was the sole heir to the Charles's estate. The court sustained Charles's objection on that basis. (9RT 2637-2638.) The fact defense counsel did not request then, or later, that the court declare a mistrial or ask that the prosecutor be cited for misconduct based on that brief comment, raises the reasonable inference defense counsel did not consider the prosecutor's remark to be a deceptive or reprehensible attempt to persuade the jury. (See *People v. Hill, supra,* 17 Cal.4th at p. 819.)

Even where a defendant shows prosecutorial misconduct occurred, reversal is not required unless the defendant can show he suffered prejudice. (*People v. Arias* (1996) 13 Cal.4th 92, 161.) Error with respect to prosecutorial misconduct is evaluated under the standards enunciated in *Chapman v. California,* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], to the extent federal constitutional rights were implicated, and under *People v. Watson* (1956) 46 Cal.2d 818, 836, to the extent only state law issues were involved.

The federal standard is implicated where the prosecutor's conduct renders the trial so fundamentally unfair that due process is violated. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1216; *People v. Harris* (1989) 47 Cal.3d 1047, 1084.) The state standard applies where the prosecutor uses deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Gionis, supra,* at p. 1215; see also *People v. Roldan* (2005) 35 Cal.4th 646, 719.)

Here, evidence that Charles committed the underlying murders was overwhelming. By his own statements and conduct, Charles admitted many intimate details of the murders described in the multi-page letter that were unknown to the sheriff when the letter was seized from inmate Pincock, but were discovered in later sheriff investigations. Charles's post-murder

statements to Deputy Hyatt about the murders unsuccessfully attempted to deflect culpability for the murders to his grandfather. Charles approved of his former coworker, Jill Roberson, fabricating an alibi for him. Charles telephoned his grandfather in an unsuccessful attempt to persuade the grandfather to accept the blame for the murders.

Moreover, when a claim of misconduct is based on the prosecutor's comments before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Friend* (2009) __ Cal.4th __[97 Cal.Rptr.3d 1, 28] citing in part *People v. Smithey* (1999) 20 Cal.4th 936, 960.) Here, the jury was instructed statements made by the attorneys during trial are not evidence. (9RT 2662; 6CT 1904 [CALJIC No. 1.02 - statements of counsel not evidence].) Charles relies only on speculation that the jury latched onto, and based its guilty verdicts on that single comment. (See AOB 130.) Absent Charles inviting this Court's attention to a part of the record showing the jury's verdicts rested on the prosecutor's comment to the exclusion of the other incriminating evidence, it must be presumed that the guilt phase jury followed the court's instructions, including abiding with the admonition that attorneys' statements are not evidence. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

Thus, the prosecutor's single comment about Charles becoming the sole heir of the family residence by murdering his family, was harmless under *Chapman* and *Watson*. Charles cannot show that comment rendered the trial so fundamentally unfair that his due process right was violated, nor can he show the comment was a part of the prosecutor's deceptive or reprehensible tactic to attempt to persuade either the court or the jury. Further, evidence of his guilt was overwhelming and he cannot establish he would have achieved a more favorable result absent the prosecutor's brief comment. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v.*

Zurinaga (2007) 148 Cal.App.4th 1248, 1260.) Charles's arguments to the contrary should be rejected.

Lastly, because Charles never objected to the prosecutor's criticism of the defense theory of the case, he has forfeited this claim and may not raise it for the first time on appeal. (See AOB 132-134.) A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant made an assignment of misconduct below and requested that the jury be admonished to disregard the impropriety. (*People v. Dykes*, *supra*, 46 Cal.4th 731, citing *People v. Stanley, supra,* 39 Cal.4th at p. 952.) Defense objection may be excused if it would have been futile or an admonition would not have cured the harm. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.)

Even if Charles's claim is addressed on the merits, reversal is not warranted because the prosecutor's characterization of the defense theory in this case, that the defense made "chicken salad out of you know what," is not reprehensible conduct warranting reversal of the guilty verdict. A prosecutor engages in misconduct by impugning the integrity of defense counsel. (*People v. Bell* (1989) 49 Cal.3d 502, 538.) However, the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account without impugning defense counsel's honesty and integrity. (*People v. Farnam* (2002) 28 Cal.4th 107, 171; *People v. Bemore* (2000) 22 Cal.4th 809, 846 [prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account].)

In this case, the prosecutor's characterization at issue did not suggest that the defense was based on fabricated evidence, nor was it a personal attack upon counsel or counsel's credibility. (*People v. Dykes*, *supra*, 46 Cal.4th 731, referring to *People v. Zambrano* (2007) 41 Cal.4th 1082, 1154, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390,

421, fn. 22.) Nor did the characterization focus the jury's attention on irrelevant matters and divert the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences pertaining to that evidence. (*People v. Dykes*, *supra*, 46 Cal.4th 731, citing, *People v. Bemore* (2000) 22 Cal.4th 809, 846.) Rather, the prosecutor's comment was simply a colloquial comment that the defense case being presented to the jury had no substance worthy of the jury's consideration or belief. Because the prosecutor's comment was a fair comment that the defense case lacked credible evidence and not a disparagement of defense counsel or counsel's credibility, the prosecutor did not commit error by making that comment.

Charles's preceding claims, that the prosecutor's errs requires Charles's conviction be reversed, should be rejected. The prosecutor's introduction of the multi-page letter into evidence was not a deceptive or reprehensible act designed to persuade the court or the jury. Nor did the prosecutor's single remark Charles was the sole heir to the Charles residence constitute error and, even if error, it was harmless because the jury was instructed attorney's arguments were not evidence. Finally, the prosecutor's comment about the defense theory was not error because attorneys are allowed to criticize an opposing counsel's theories of the case so long as that criticism does not disparage opposing counsel or counsel's credibility.

III. CALJIC NO. 2.51 IS NOT CONSTITUTIONALLY INFIRM AND WAS PROPERLY GIVEN TO THE GUILT PHASE JURY

Charles next argues the lower court erred by instructing the guilt phase jury with CALJIC No. 2.51 (hereafter "No. 2.51") because that instruction improperly told the jury that Charles had to prove he had no motive to kill in order to demonstrate his innocence, and the instruction improperly failed to tell the jury proof of motive alone was not adequate to

prove his guilt. He contends despite not objecting to the court giving No. 2.51 to the jury, he has not forfeited his right to challenge this issue on appeal; he reasons because this instructional error claim affects his substantial rights, it may be reviewed on the merits notwithstanding his forfeiture. Additionally, he acknowledges this Court has rejected a similar argument in cases as *People v. Cleveland* (2004) 32 Cal.4th 704, and *People v. Frye* (1998) 18 Cal.4th 894, but insists past rulings on this issue should be reconsidered in light of the facts and circumstances of this case. He asks that his conviction be reversed on this claim. (AOB 144-149.)

Because No. 2.51 implicates Charles's substantial rights, this issue may be reviewed on the merits notwithstanding Charles's failure to timely object to the court instructing the jury with it. Next, nothing about this case reveals any flaw in the court's earlier decisions rejecting those defendants' claims that No. 2.51 is constitutionally infirm. Because Charles presents no legal justification for this Court's reconsideration of its earlier decisions concerning No. 2.51, his instant argument should be rejected.

Prior to instructing the guilt phase jury below, the court and counsel discussed the instructions to be given the jury. (8RT 2431, et seq.) Among those instructions was No. 2.51 which the court told both counsel it would be giving the jury; the prosecutor nor defense counsel discussed the instruction or the court's decision to give that instruction, nor did defense counsel object to that instruction being read to the jury. (8RT 2442; see 3CT 714.) When the instruction was eventually read to the jury, Charles did not object to the instruction. (9RT 2673.)[24]

---

[24] The guilt phase jury was instructed with CALJIC No. 2.51 as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of

(continued...)

Generally, failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) Ascertaining whether claimed instructional error affected the defendant's substantial rights necessarily requires an examination of the merits of the claim to determine whether the asserted error was prejudicial. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087, citing *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

This Court has previously ruled a similar claim, questioning whether the motive instruction (CALJIC No. 2.51) shifts the prosecution's burden of proof to imply a defendant had to prove his innocence, does implicate a defendant's substantial rights. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1134 citing *People v. Cleveland, supra*, 32 Cal.4th at p. 750 [CALJIC No. 2.51 did not shift the burden of proof; it merely told the jury it may consider the presence or absence of motive].) Consequently, Charles's instant claim is cognizable on appeal notwithstanding he failed to timely object to the instruction being charged to the jury.

Charles's instant issue should be rejected on its merits. In *Richardson* this Court rejected a claim similar to Charles's challenge. There, the defendant claimed references to "innocence" in several given jury instructions given at his trial, which included CALJIC No. 2.51, unconstitutionally shifted the burden of proof by suggesting defendant was

---

(...continued)

> motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will, therefore, give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(9RT 2673.)

required to prove his innocence rather than the prosecution meeting its burden to prove him guilty beyond a reasonable doubt. (*People v. Richardson* (2008) 43 Cal.4th 959, 1018-1019.) This Court responded that claim had been rejected in its prior decisions where numerous other instructions were given, e.g., CALJIC Nos. 2.90 [presumption of innocence], 8.71 [doubt whether first or second degree murder], 8.80 [special circumstances-introduction], that directed the jury to convict only on the prosecution proving the defendant guilty beyond a reasonable doubt. This Court concluded in those circumstances there was no reasonable likelihood the jury would have understood the challenged instructions to have required a shifting of the burden of proof. (*Id.*, at p. 1019, citing *People v. Snow* (2003) 30 Cal.4th 43, 97 [CALJIC No. 2.51 "leaves little conceptual room for the idea that motive could establish *all* the elements of murder"], and *People v. Frye* (1998) 18 Cal.4th 894, 957-958 [trial court's instruction that "[a]bsence of motive may tend to establish innocence" did not shift burden of proof where jury was instructed with CALJIC No. 2.90 [reasonable doubt].)

Similarly, in *Wilson*, this Court rejected the defendant's constitutional challenge to No. 2.51 which was given in that case and, with minor difference, mirrored the instruction in this case. In *Wilson*, the defendant contended, among other challenges, No. 2.51 unconstitutionally allowed the jury to determine guilt on motive alone and unconstitutionally shifted the burden of proof to imply that defendant had to prove his own innocence. (*People v. Wilson* (2008) 43 Cal.4th 1, 22.) In rejecting those claims, this Court observed that No. 2.51 did not include instructions on the prosecution's burden of proof and the reasonable doubt standard and that instruction did not undercut other instructions that correctly informed the jury that the prosecution had the burden of proving guilt beyond a

reasonable doubt. (*Id.*, at p. 22, citing *People v. Kelly,* (2007) 42 Cal.4th at p. 792, which quotes *People v. Cleveland, supra,* 32 Cal.4th at p. 750.)

In *Wilson*, this Court also rejected the defendant's claim that CALJIC No. 2.51, and other specific instructions challenged by the defendant in that case, unconstitutionally lowered the requisite standard of proof. Instead, this Court held that No. 2.51 is unobjectionable when it is accompanied by the usual instructions on reasonable doubt, the presumption of innocence, and the People's burden of proof. (*People v. Wilson*, *supra*, 43 Cal.4th at p. 23.)

Nothing about this case provides a rational reason for this Court to reconsider its earlier decisions that No. 2.51 does not shift the burden of proving Charles's guilt away from the prosecutor when other usual instructions are also given. Like in those prior cases, No. 2.51 given here cannot be reasonably read as requiring Charles to prove he had no motive; rather the instruction guides the jury on what weight to give motive evidence if it determines such evidence exists.

Nor does the instruction undercut other given instructions that correctly informed the jury the prosecutor had the exclusive burden to prove Charles's guilt beyond a reasonable doubt. Besides No. 2.51, the lower court also instructed the guilt phase jury with a series of instructions stressing it was exclusively the prosecutor's burden to prove Charles guilty beyond a reasonable doubt: The jury was charged with CALJIC Nos. 2.90 [presumption of innocence] (9RT 2676; 3CT 719 ["People" have burden to prove guilt]), 8.71 [doubt whether first or second degree murder] (9RT 2688; 3CT 736 [defendant to be given benefit of doubt]), and 8.80.1 [special circumstances-introduction] (9RT 2688-2689; 3CT 737 ["People have the burden of proving the truth of a special circumstance"]). Moreover, the prosecutor repeatedly reminded the jury that he had the burden to prove Charles guilty beyond a reasonable doubt before the jury

could convict Charles of the underlying crimes. (9RT 2476, 2479, 2511, 2636.)

Absent Charles's showing to the contrary, the jury is presumed to have followed all of the court's instructions. (*People v. Carter* (2005) 36 Cal.4th 1114, 1176-1177.) Charles has not demonstrated the guilt phase jury here disregarded the several instructions that the prosecutor had the burden to prove him guilty before the jury could convict Charles of the underlying crimes.

In summary, No. 2.51, given in this case is not constitutionally infirm. The instruction cannot be reasonably read as requiring Charles to prove the absence of motive in order to demonstrate his innocence. Nor can the instruction be reasonably interpreted as suggesting that the jury could find him guilty based only on proof that he had a motive to commit the underlying murders. Finally, Charles does not present any rational reason why this Court should reconsider its earlier decisions that No. 2.51 does not shift the burden of proof; it properly tells the jury that "motive" is not an element of the underlying charged crimes and the jury may attribute appropriate weight to the presence or absence of motive. Charles's arguments to the contrary should be rejected.

IV. THE JURY WAS PROPERLY INSTRUCTED WITH CALJIC NOS. 2.04 [FABRICATION OF EVIDENCE], 2.05 [OTHER'S FABRICATION OF EVIDENCE] AND 2.06 [SUPPRESSION OF EVIDENCE]

Next, Charles argues his conviction should be reversed because the trial court erred by instructing the jury with CALJIC Nos. 2.04 (hereafter "No. 2.04"), 2.05 (hereafter "No. 2.05"), and 2.06 (hereafter "No. 2.06"). He reasons Nos. 2.04 and 2.05 improperly allowed the jury to make inferences from predicate facts despite the fact no proof was presented Charles knew or authorized those predicate facts. As to No. 2.06, Charles claims no fact was presented that justified that instruction be given.

Finally, while acknowledging this Court's earlier decisions to the contrary, he concludes each instruction was impermissibly argumentative because each singled out evidence favorable to the prosecution, invited the jury's consideration whether that evidence showed consciousness of guilt and lessened the prosecutor's burden to prove Charles's guilt beyond a reasonable doubt. (AOB 150-163.) Charles's claims should be rejected.

With respect to CALJIC Nos. 2.04 and 2.05, Charles concedes he did not object to the lower court giving those instructions to the jury. (AOB 151 fn. 29.) Accordingly, he is barred from challenging those instructions for the first time on appeal. Even if his claim is reviewed on the merits, it must be rejected because he expressly agreed with the court the two instructions were proper under the facts of this case. Moreover, the two instructions are proper statements of the law and were applicable to the evidence that he attempted to persuade his grandfather, Bernard, Severino, and, to recruit inmate Pincock to find a third person willing to falsely confess to the murders (No. 2.04) and to evidence he suggested and encouraged his former coworker, Jill Roberson, to fabricate an alibi for him that she told to at least five people (No. 2.05).

Charles's challenge to CALJIC No. 2.06, to which he timely objected below, should be rejected on the merits because it is a correct statement of the law and it was applicable to the fact that Charles put evidence of the crime in a dumpster and set on fire the car containing his deceased family's bodies. The instruction is not argumentative.

As presented in Argument III, *supra*, a defendant's failure to object to instructional error forfeits the issue on appeal unless the error affects the defendant's substantial rights. Review for instructional error is necessarily governed by article VI, section 13 of the California Constitution, which bars a judgment of criminal conviction from being set aside unless an examination of the record establishes that the error has created a

miscarriage of justice. A "miscarriage of justice" has been construed to apply to incorrect, ambiguous, conflicting, or wrongly omitted instructions. (*People v. Breverman* (1998) 19 Cal.4th 142, 173.) Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim - at least to the extent of ascertaining whether the asserted error, if in fact found to be error, resulted in prejudice. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087, citing *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

The giving of Nos. 2.04 and 2.05 did not affect Charles's substantial rights to a fair trial. Rather, those instructions were given to protect Charles. No. 2.04, applicable to evidence, Charles urged Severino to falsely admit committing the underlying murders and to evidence Charles suggested to Roberson to fabricate an alibi for Charles, admonished the jury that even if it found that evidence true, that evidence was not sufficient, alone, to prove Charles's guilt for the underlying murders (see 9RT 2677).[25] Similarly, No. 2.05, applicable to evidence, e.g., the multi-page letter, Charles urging inmate Pincock to find a person willing to admit committing the murders, admonished the jury that even if that evidence were true, that evidence was not sufficient by itself to prove Charles's guilt (see 9RT

---

[25] The jury was instructed with CALJIC No. 2.04 as follows:

> If you find that a defendant attempted to persuade a witness to testify falsely, such conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.

(9RT 2677; see 3CT 720.)

2678).[26] (*See People v. Najera* (2008) 43 Cal.4th 1132, 1139 [Nos. 2.04, 2.05 and 2.06 admonish jury that evidence of consciousness of guilt alone is not sufficient to prove guilt].) Thus, because Nos. 2.04 and 2.05 did not involve Charles's substantial rights to a fair trial, he is barred from challenging the instructions for the first time on appeal.

Even if considered on the merits, Charles's argument should be rejected because he expressly agreed with the court the two instructions were proper under the facts of this case. In the course of deciding which instructions to give the jury, the lower court told both counsel that, absent counsels' objections, it intended to give the jury instructions which the evidence seemed to require and those intended instructions included Nos. 2.04 and 2.05. In part response to the court's expressed intention to give those and other instructions, defense counsel replied, "I understand the instructions are proper on 2.04 and [2.05], because they deal with fabricating efforts and those deal with the letters and things like that." (8RT 2432.)

Where defense counsel intentionally caused the trial court to err, Charles cannot be heard to complain on appeal. It also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake. In

---

[26] The jury was instructed with CALJIC No. 2.05 as follows:

> If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized such effort. If you find defendant authorized that effort, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.
>
> (9RT 2678; see 3CT 721.)

cases involving an action affirmatively taken by defense counsel, this Court has found an implied tactical purpose to be sufficient to invoke the invited error rule. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135 [defendant who expressly agrees to an instruction is barred from challenging instruction on appeal under the doctrine of invited error].) Such is the case here.

Defense counsel's agreement with the court's assessment, that the evidence in this case justified giving Nos. 2.04 and 2.05, bars Charles from challenging the giving of those instructions on appeal. Charles's argument to the contrary should be rejected.

Independent of defense counsel's agreement with the court that Nos. 2.04 and 2.05 were proper instructions in this case, the presented evidence also justified the instructions. It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. (*People v. Carmen* (1951) 36 Cal.2d 768, 773.) A trial court properly instructs the jury with CALJIC No. 2.04 if there is some evidence in the record which, if believed by the jury, permits an inference of consciousness of guilt. (*People v. Hart* (1999) 20 Cal.4th 546, 620.) The inference of guilt suggested by CALJIC No. 2.04 is a permissive one. (Cf. *People v. Rankin* (1992) 9 Cal.App.4th 430, 436.) The instruction applies to situations where a defendant attempts to induce a witness to lie for him in a judicial proceeding or otherwise tries to fabricate evidence when a trial or prosecution is pending. (*People v. Jackson* (1996) 13 Cal.4th 1164,1225.)

Here, the jury could reasonably find Charles's attempt to persuade others to fabricate exculpatory evidence for his benefit was within the meaning of No. 2.04. The first incident was Charles's telephone call from jail to his grandfather, Severino, while Charles was in custody charged with

the underlying murders. In that telephone call, he asked Severino to take the blame for the underlying murders because Charles was a young man and Severino was an old man and had lived his life, and because Charles's girlfriend was pregnant and Charles wanted to take care of her. (5RT 1426, 1428-1429.) Severino did not confess to committing the underlying murders; he denied committing the underlying murders and pointed out to the jury that he was not physically capable of murdering the victims. (5RT 1429.)

The next incident was Charles's attempt, in the multi-paged letter (Exhibit 1) seized by Sergeant Royer from inmate Pincock on December 7, 1994, to persuade inmate Pincock to find a person willing to fabricate an alibi for Charles. (8RT 2090; see 1CT 138-139.) The prosecutor read portions of it to the jury as part of his opening statement (5RT 1307 et. seq.) A passage of that letter read to the jury contained Charles's directions to Pincock to find a woman who would say she met and stayed with Charles from 7:30 p.m. Sunday (Nov. 6, 1994) to 7:30 a.m. Monday (Nov. 7, 1994). (5RT 1314-1316.) Another passage in that letter read to the jury directed Pincock to find a person willing to enter the Charles home and to be caught in the home by police. (5RT 1315.) The multi-page letter was later admitted into evidence and the jury was allowed to read that exhibit before closing arguments. (8RT 2175-2176, 2191-2192.)

With respect to that multi-paged letter, reporter Saavedra testified at no time when he showed Charles the first page and several other pages of the letter did Charles disclaim knowing the contents of the letter, nor did Charles deny drafting the letter. In fact, Charles gave responsive comments and answers to and expanded upon Saavedra's questions about pages and passages in the letter. (See Respond. Arg. I, supra.)

As Sergeant Royer testified, many facts contained in that multi-paged letter were not reported in police reports and were sometimes later

discovered in the course of law enforcement investigation. Examples of matters contained in the letter but not appearing in police reports or discovered post-December 1994 were numerous. A passage in the letter stated gloves found at the victims' home were not the "right" gloves; Sergeant Royer did not know the gloves he seized from the home soon after the murder was discovered were not the right gloves until the following September 1995 after blood testing of evidence was completed. (8RT 2150.) A passage in the letter reported the blankets on a bed in the home were light blue and blood in the bedroom would be Edward's blood; the color of blankets on the bed were not in any police report but a picture taken of the scene depicted a light blue blanket on the bed and police did not know the source of blood in the bedroom until the following September 1995. (8RT 2150, 2151.) The sketch of the Charles's residence attached to the letter showed an unlocked door to the residence; that fact was not contained in any police report. (8RT 2151.) The significance of the preceding facts about the letter, is that the jury, once it resolved that Charles wrote the letter, could reasonably conclude that Charles deliberately pursued Pincock to procure a witness to fabricate false evidence to be presented to police or at trial for Charles's benefit.

Thus, ample evidence was provided that Charles deliberately urged Severino and Pincock to testify falsely or to fabricate evidence, e.g., provide a false alibi, pertaining to Charles's conduct and whereabouts on the night the underlying murders were committed. From those two circumstances, the jury could reasonably infer Charles deliberately attempted to use Severino and did use Roberson to divert guilt for the murders away from him; the jury was properly instructed with No. 2.04 that his actions were a result of his consciousness of guilt.

A similar conclusion should result with respect to the jury being instructed with No. 2 .05. That instruction is appropriate when the record

establishes that defendant authorized the effort of a third person to procure false or fabricated evidence for the defendant's benefit. (See *People v. Hannon* (1977) 19 Cal.3d 588, 600 [evidence defendant authorized the attempt of the third person to suppress testimony is admissible against defendant]; *People v. Terry* (1962) 57 Cal.2d 538, 565-566.) The defendant's authorization may be established by circumstantial evidence. (*People v. Terry*, *supra*, 57 Cal.2d at p. 566.) Mere opportunity alone does not constitute circumstantial evidence. (*Ibid.; People v. Williams* (1997) 16 Cal.4th 153, 200-201.) Likewise, evidence of a personal relationship alone is insufficient to establish that defendant authorized false testimony. (*People v. Terry*, *supra*, 57 Cal.2d at p. 566.)

Here, evidence was presented Charles encouraged his former coworker, Roberson, to provide him with a false alibi for the time the underlying murders were committed. Under the prosecutor's direct examination, Roberson testified her early 1995 statement to a prosecutor's investigator that Charles was with her when the murders were committed, was a lie that she planned and which Charles attempted to discourage. (7RT 1900-1903.) However, she also admitted that she truthfully told a prosecutor's investigator in October 1995 that Charles asked her to lie for him by telling "the world" that they were together when the murders were committed. (7RT 1904-1905.)

Under defense counsel's cross examination, Roberson explained she offered to be Charles's alibi witness when he commented that he should find someone to be his alibi witness; he accepted her offer to provide that alibi. She said when he later asked her to stop lying for him, she stopped lying to people that she and Charles were together when the murders were committed. (7RT 1918-1922.) She admitted to counsel that, until Charles told her to stop lying for him, she told at least five people, including

defense counsel and the defense investigator, that she and Charles were together when the murders occurred. (7RT 1915-1917)

Under the preceding facts, the jury could conclude that Charles deliberately encouraged Roberson, who was in love with him and willing to do anything to help him (7RT 1924), to create a false alibi for him and his encouragement resulted from his consciousness of guilt. Because the jury could reach that reasonable conclusion, the court properly gave No. 2.05 to preclude the jury from relying exclusively on proof of his consciousness of guilt to find him guilty of the underlying murders.

Nor are Nos. 2.04 and 2.05 argumentative. This Court has stated that instructions such as Nos. 2.04 and 2.05 make clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, while also clarifying that such activity was not itself sufficient to prove a defendant's guilt, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. (*People v. Jackson, supra,* 13 Cal.4th at p. 1224.)

Even if the instructions were improperly given, they were harmless. This Court approved the use of No. 2.04, and found it to be a common sense instruction that admonishes the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. (*People v. Holloway* (2004) 33 Cal.4th 96, 142.) By logical extension, the closely related No. 2.05, which also cautions the jury against overreliance on such evidence, is a similarly valid and common sense instruction under *Holloway.*

Charles lodged a timely objection to No. 2.06 being charged to the jury. Below, defense counsel explained his objection was based on the fact the jury's primary issue to resolve was to determine whether Charles or

another person murdered the victims and not the identity of the murderer. Counsel reasoned the court's instructing the jury with No. 2.06 would distract the jury's focus from that primary issue. (8RT 2432-2433.)[27]

In response to defense counsel's objection, the prosecutor pointed out evidence linking Charles to committing the crime had been presented and included the discovery of Charles's mechanic's wrench (Exhibit 16) with Daniel's blood being found in a dumpster, Charles's statement to custodial deputy Hyatt that he covered up the murders by washing blood off Severino, cleaning blood from the house, throwing a bloody ball peen hammer and letter opener into trash dumpsters and burning the bodies, and Charles hand drafted passages in the multi-paged letter about disposing of evidence of the murder in dumpsters and burning the bodies. The prosecutor added that the preceding evidence was proof of Charles's effort

---

[27] Defense counsel explained his objection to the jury being charged with CALJIC No. 2.06 as follows:

> Mr. Klar (defense counsel): . . . When it comes down to [CALJIC No.] 2.06, though, you are talking about suppressing evidence. And I don't -- maybe we are missing something, but I don't remember in this trial anyone trying to suppress evidence. I know the defendant supposedly put things in dumpsters and did that, but this is an I.D. case -- not an I.D. case, a who-done-it case. So when you are dealing with who did it, that's the whole issue. If you have an instruction that says a defendant is attempting to suppress evidence, it detracts from that defense. I don't see any evidence of this defendant or – actually suppressing evidence. I understand the fabrication evidence and the other instructions. I don't know if Mr. Davis [the prosecutor] has more comments. I am having trouble articulating some of my feelings, but that's where I am concerned, and I don't see any evidence of suppression.

(8RT 2432-2433.)

to obliterate evidence linking him to the murders and was also proof of the killer's mental state. (8RT 2433-2434, 2438.) After hearing arguments by counsel and the prosecutor, the court found sufficient evidence was presented justifying the giving of 2.06 and overruled the objection. (8RT 2438-2440.)[28] The jury was instructed with No. 2.06. (9RT 2678-2679.)[29]

---

[28] The court's colloquy with counsel immediately preceding its ruling to give No. 2.06 was as follows:

> The Court: But this instruction [No. 2.06] deals with what a defendant does after the crime's committed –
>
> Mr. Brent: Right.
>
> The Court: -- in order to deflect suspicion from himself.
>
> Mr. Brent: It is broader than I was making it, but I was focusing on the murder weapon and getting rid of that as, you know, the direct link.
>
> The Court: What are you going to argue about?
>
> Mr. Brent: All of that. I am going to argue it all. I mean, everything the court has talked about. I mean, everything that links to a cover-up, everything that was done after the actual killings that I can tie the defendant to show cover-up to make him look more guilty. I am going to be arguing. I am. There is no doubt.
>
> The Court: Then I think the instruction is appropriate.
>
> Mr. Brent: All right.
>
> The Court: Because the word "suppress" is self-defined in the instruction as including destruction of evidence and concealing evidence. So it doesn't mean anything more than that. Either concealing or destroying it. Clearly, when you throw stuff in a dumpster, you know the logical place you

(continued...)

As noted earlier in this brief, before a jury is instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference. (*People v. Carmen, supra,* 36 Cal.2d at p. 773.) Whether any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law. In order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by

---

(...continued)

> expect that to go is to the dump to be buried forever. When you burn bodies, you expect them to not be identifiable. Things like that seem to me sufficient to justify the instruction. I would point out to you, Mr. Klar, that this doesn't suggest that the court is finding anything, because it starts out by saying, "if you find;" namely, the jury. "if you find that a defendant attempted to suppress evidence, then you may consider it as a consciousness" -- "showing a consciousness of guilt.", but it is really for the benefit of the defendant, because then it goes on and points out that that's not enough by itself to prove that he is guilty.
>
> Mr. Klar: Okay.

(8RT 2438-2440.)

[29] The jury was instructed with CALJIC No. 2.06 as follows:

> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by destroying evidence or by concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(9RT 2678-2679; 3CT 722.)

the jury, will sufficiently support the suggested inference. (*People v. Hart, supra,* 20 Cal.4th at p. 620, citing, *People v. Hannon* (1977) 19 Cal.3d 588, 597.)

To support an inference that the defendant attempted to suppress evidence, the record need not establish that evidence actually was destroyed. (*People v. Hart, supra,* 20 Cal.4th at pp. 620-621, referring to *People v. Rodrigues, supra,* 8 Cal.4th 1060, 1139-1140 [CALJIC No. 2.06 properly given – circumstantial evidence suggested defendant threw a knife from a motor vehicle, although the knife subsequently was recovered], *People v. Breaux* (1991) 1 Cal.4th 281, 304, fn 7 [CALJIC No. 2.06 properly given – evidence presented defendant substituted license plates on the victim's car postoffense], *People v. Cooper* (1991) 53 Cal.3d 771, 797-798, 833 [rejected defendant's claim CALJIC No. 2.06 was improper absent a showing that he was aware that the items he destroyed constituted evidence notwithstanding defendant admitted throwing his prison clothes and shoes into the ocean], and *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1290, 1296-1297 [CALJIC No. 2.06 properly given - circumstantial evidence indicated defendant threw murder weapon into a gutter, where pieces of a rifle were located in nearby storm drain catch basin].) Additionally, this Court has found a defendant's effort to destroy physical evidence before judicial proceedings have begun, supports the giving of No. 2.06. (*People v. Wilson* (2005) 36 Cal.4th 309, 330; *People v. Coffman* (2004) 34 Cal.4th 1, 102-103.)

The record shows ample evidence that Charles suppressed, or attempted to suppress, evidence of the crime before judicial proceedings commenced was presented warranting the giving of No. 2.06. Charles admitted to custodial deputy Hyatt after Charles returned home Sunday night (Nov. 6, 1994) and finding a bloody hammer in the kitchen, his dead parents and brother in a bedroom and his grandfather covered in blood,

Charles showered the blood from his grandfather, cleaned blood from the house, dragged the bodies to a family car, threw away the bloody hammer and knife into trash dumpsters and set the car and bodies on fire. (7RT 1987-1988, 1990-1992, 2020-2026, 2030.)

Additionally, Leann Pollaccia, while searching through trash dumpsters behind a Fullerton business, found several bloody towels, men's dark dress pants, two men's shirts, jeans, sandal-type women's shoes, men's loafer-type dress shoes, a 30 gallon plastic garbage can and Charles's bloody wrench (Exhibit 16) with a yin-yang symbol on it; most of the clothing in the dumpster had a lot of blood on them. (6RT 1674-1677, 1683, 1698-1700, 1702.)

From the preceding facts, whether Charles disposed of the murder evidence to protect his grandfather from criminal prosecution or for some other reasons was for the jury to decide. Because the jury could reasonably infer he disposed of that evidence as a result of his consciousness of guilt and intent to destroy any evidence connecting him to the murders, the jury was properly admonished with No. 2.06 that proof of Charles's consciousness of guilt was not a sufficient basis, by itself, to find him guilty of the underlying murders.

Nor is No. 2.06 argumentative. This Court repeatedly has rejected the argument that No. 2.06 constitutes an improper pinpoint instruction that violates a defendant's right to due process by lowering the prosecution's burden of proof. (See, *People v. Wilson, supra,* 36 Cal.4th at p. 330; *People v. Valdez* (2004) 32 Cal.4th 73, 138; *People v. Jackson, supra,* 13 Cal.4th at pp. 1223-1224.)

In summation, Charles's argument his convictions should be reversed because the trial court erred by instructing the jury with Nos. 2.04, 2.05 and 2.06, should be rejected. The lower court's decision to give Nos. 2.04 and 2.05 should be affirmed because Charles failed to object that those

instructions be given to the jury, defense counsel agreed with the court the facts of this case warranted those instructions being given and because the facts of this case warranted the instructions be given. Similarly, the court's decision to give No. 2.06 was proper where Charles's disposal of murder evidence reasonably supported the inference that he did so to destroy inculpatory evidence linking him to the murders. His arguments to the contrary should be rejected.

V. TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN GIVING CALJIC NO. 2.71.5 [ADOPTIVE ADMISSION]

Charles next argues the lower court erred by giving CALJIC No. 2.71.5 (hereafter "No. 2.71.5") because no evidence in the case supported that instruction being given and it caused the jury to give undue consideration to the multi-page letter and to his reaction and comments to Saavedra's questions about that letter. (AOB 164-172.) He also contends since No. 2.71.5 is a cautionary instruction for his benefit, his express waiver of that instruction at trial should have barred the trial court from giving that instruction over his objection. He observes while this Court has decided there is no sua sponte duty for the trial court to give No. 2.71.5, this court has yet to decide whether the instruction may be given over a defendant's objection. (See AOB 167.) He concludes the court erred by giving that instruction over his objection and the error was prejudicial and violated his due process rights. (AOB 164-172.) Charles is wrong.

Sufficient evidence was presented at trial warranting No. 2.71.5 be given to the jury. The lower court reasonably concluded reporter Saavedra's interview with and questioning of Charles about the multi-page letter was an accusatory meeting. Because the lower court's conclusion was a reasonable interpretation of the evidence, its decision to give No. 2.71.5 was not an abuse of its discretion. Moreover, Charles's argument has been addressed by this Court's decisions in *People v. Carter* (2003) 30

Cal.4th 1166, and *People v. Richardson* (2008) 43 Cal.4th 959, which hold a defendant may not preclude No. 2.71.5 being given to a jury where sufficient evidence supports the giving of that instruction.

Below, defense counsel objected to No. 2.71.5 being read to the jury. Counsel explained to the court that No. 2.71.5 is applicable to circumstances involving a defendant being accused of some wrong doing which would naturally cause the defendant to refute the accusation. Counsel observed because Saavedra never accused Charles of any wrong doing, nothing in Saavedra's interview with Charles would have naturally caused Charles to refute Saavedra's questions. Counsel concluded because Saavedra merely questioned Charles about the contents of the multi-page letter in general conversation circumstance that would not have caused Charles to deny any of Saavedra's questions. (8RT 2443-2444.)[30]

---

[30] Defense counsel explained his objection to the court's plan to instruct the jury with CALJIC No. 2.71.5 as follows:

> Mr. Klar (defense counsel): Okay. We don't think this is an adoptive admission. That's the big objection. So, obviously, the instruction would not apply. There has to be an occasion when "the defendant, under conditions which reasonably afforded him an opportunity to reply, failed to make a denial in the face of an accusation expressly directly" -- probably should be "directed," but--oh, no, "expressed directly to him."
>
> Now, our contention is that there was never an accusation by Tony Saavedra, the Register reporter, to him at all, confronted at all. The conversation was kind of in the form of he assumed he had written it, he asked him--or talked to him in this kind of sense, "here you wrote this," "over here I will show you this," and then they would talk.
>
> There was never an accusation, "you wrote this, didn't you," and he says, "let's just talk about the letter, I don't want to answer that," or just remains quiet. That was never the case.

(continued...)

After listening to argument by the prosecutor and defense counsel the trial court overruled counsel's objection and explained Saavedra's reason for talking to Charles was to investigate Charles's involvement in the underlying murders and Charles understood Saavedra's purpose for talking to him was to conduct that investigation. The court reasoned the manner by which Saavedra showed and questioned Charles about the contents of the multi-page letter and about Charles's involvement in the events described in the letter was sufficiently accusatory and would have prompted Charles to deny drafting the letter or to claim ignorance of the letter's contents. The court concluded Charles's failure to do either when confronted by Saavedra constituted Charles's adoptive admission which warranted No. 2.71.5 being given to the jury. (8RT 2446-2447.)[31]

(...continued)

(8RT 2443-2444.)

[31] The lower court ruled Saavedra's questioning appellant about the letter's contents describing appellant's involvement in the underlying murders and failure to refute or claim ignorance about the matters contained in the letter was an adoptive admission of the letter's contents as follows:

> The Court: I think it should be given. It's another one that starts out by saying, "if you should find," referring to the jury. So it is a factual question whether or not the defendant was in a situation with the register reporter where he was being accused of being connected with the crime.
>
> It seems to me, clearly, that's the only reason the reporter was there and the defendant knew that. And, you know, he is holding up a writing to the glass which he is implying was written by the defendant, and the defendant's failure to immediately say, "I don't know anything about that," you know, "where did you get that," "that's somebody else's" or something. I mean, that would be the -- the failure to do that, it seems to me, is an adoptive admission. At least, the jury could so find under the circumstances.

(continued...)

The court thereafter instructed the jury with No. 2.71.5. (9RT 2679-2681; 3CT 724.)[32] The court also instructed the jury with CALJIC No. 2.71 (admission defined) that the jury was the exclusive judge of whether

---

(...continued)

> I have never seen a case reversed because this instruction was given, I have only seen them reversed because it wasn't given. It is really designed to protect the defendant, I think, by making sure that the jury doesn't place too much emphasis on that single item of evidence.
>
> So I will overrule the objection on that, also, and give that.

(8RT 2446-2447.)

[32] The jury was instructed with CALJIC No. 2.71.5 as follows:

> If you should find from the evidence that there was an occasion when the defendant, one; under conditions which reasonably afforded him an opportunity to reply; two; failed to make a denial in the face of an accusation expressly directed to him or in his presence charging him with the crime for which such defendant now is on trial, or tending to connect him with its commission; and three; that he heard the accusation and understood its nature, then the circumstance of his silence and conduct on that occasion may be considered against him as indicating an admission that the accusation thus made was true. Evidence of such an accusatory statement is not received for the purpose of proving its truth, but only as it supplies meaning to the silence and conduct of the accused in the face of it. Unless you find that the defendant's silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement.

(9RT 2679-2681; 3CT 724.)

Charles wrote the letter notwithstanding Saavedra's opinion Charles authored the multi-page letter. (9RT 2679; 3CT 723.)[33]

Here, Saavedra's conversation with Charles about the contents of the multi-page letter was confrontational and accusatory. Saavedra testified a main reason he talked to Charles about the letter was to determine if Charles authored the letter. (7RT 2066.) In order to make that determination, Saavedra held up the first page of the letter for Charles to read and told him "you said here" or "you wrote here" and then asked him question about the letter. Charles responded to Saavedra's questions. (7RT 2073.) Saavedra also held up many parts of the letter for Charles to see and told Charles, "you said here" or "you wrote here" while referring to those parts. (7RT 2063, 2073.) Charles responded to all of Saavedra's questions; throughout the interview Charles never denied that he drafted the letter. (7RT 2073.)

At one point in the interview Saavedra pointed out that a part of the letter said "the persons should get caught doing M." Saavedra told Charles that Saavedra interpreted that passage to mean that "you (Charles) wanted your grandfather killed," or "it is murder." Charles denied that he wanted his grandfather killed. (7RT 2065.)

---

[33] The jury was instructed with CALJIC No. 2.71 [admission-defined] as follows:

> An admission is a statement made by the defendant other than at his trial, which does not by itself acknowledge his guilt of the crimes for which such defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. You are the exclusive judges as to whether the defendant made an admission, and if so, whether such statement is true in whole or in part.

(9RT 2679.)

Based on Charles's actions and response of "embracing the contents" and acknowledging the contents of the pages and passages from the letter shown to him, Saavedra opined Charles wrote the letter. (7RT 2068-2069.) Saavedra's opinion was confirmed by the fact Charles never denied authoring the letter. Nor did Charles appear ignorant about the contents of the letter; Charles talked "about a lot of the things" in the letter. (7RT 2069.)

Contrary to Charles's claim that this Court has not decided whether No. 2.71.5 may be given to a jury over a defendant's objection, this Court's decisions in *People v. Carter*, *supra*, 30 Cal.4th 1166, and *People v. Richardson*, *supra*, 43 Cal.4th 959, hold a defendant may not preclude No. 2.71.5 being given to a jury by objecting to the instruction.

When read together *Carter* and *Richardson* hold when the presented evidence warrants the jury being instructed on the law of adoptive admission, No. 2.71.5 may be given to the jury over a defendant's objection.

As this Court explained in *Carter*, under CALJIC No. 2.71.5, adoptive admissions require certain foundational facts. Trial courts may instruct on the matter if they think it best to do so. But, as the Evidence Code makes clear, courts are required to so instruct only at a defendant's request. When the court admits evidence subject to the existence of preliminary facts, it "[*m*]*ay, and on request shall,* instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." (*People v. Carter*, *supra*, 30 Cal.4th at p. 1198, referring to Evid. Code, § 403, subd. (c)(1) [determination of foundational fact].) "On its own terms, [section 403] makes it discretionary for the trial court to give an instruction regarding a preliminary fact unless the party makes a request." (*People v.*

Carter, *supra*, 30 Cal.4th at p. 1198, citing *People v. Lewis* (2001) 26 Cal.4th 334, 362.)

The significance of the preceding authority is that Charles's suggestion, that a defendant may preclude a court from giving No. 2.71.5 by timely objecting to the instruction, is contrary to this Court's *Carter* decision. Rather, *Carter* stands for the following propositions: 1) absent a request by the defendant that No. 2.71.5 be given to the jury, a trial court has no sua sponte duty to give the instruction; 2) if the defendant requests No.2.71.5 be given to the jury the trial court shall give that instruction; and 3) if the evidence warrants such an instruction, the trial court has the discretion to give No. 2.71.5 to the jury. *Carter* does not expressly address whether a defendant's objection to the court giving No. 2.71.5 or a defendant's waiver of that instruction precludes a trial court from giving that instruction. However, *Carter* makes clear if evidence subject to the existence of preliminary facts is admitted, the trial court may, in its discretion, give No. 2.71.5.

In *Richardson*, a death penalty case, the defendant was convicted of felonymurder of the child victim and several sex crimes upon the same victim. (*People v. Richardson, supra,* 43 Cal.4th at pp. 970-971.) Pertinent to the instant issue, this Court addressed, in part, the defendant's claim that the trial court improperly gave the jury No. 2.71.5 over his objection and thereby violated his due process rights. (*Id.*, 43 Cal.4th at p. 1020.) When it overruled his objection to No. 2.71.5, the trial court characterized the defendant's verbal responses to police, which were the factual basis for giving the instruction, as false, evasive and contradictory when confronted by the accusation that he participated in the murder. (*Id.*, 43 Cal.4th at pp. 1020-1021.)

On review, this Court observed that No. 2.71.5 is a standard instruction on adoptive admissions which allows the jury to assess a

defendant's failure to deny an accusation or a defendant's false, evasive, or contradictory statements in the face of an accusation as an admission of the truth of the accusation under circumstances where the defendant reasonably had an opportunity to reply and heard and understood the nature of the accusation. (*People v. Richardson*, *supra*, 43 Cal.4th at p. 1020.) This Court agreed with the trial court's view that, after being accused of murdering the victim, many of defendant's verbal responses to officers were false, evasive and contradictory. (*Id.*, 43 Cal.4th at pp. 1020-1021.) Recognizing that the jury was instructed with No. 2.71.5, and also instructed that the jury alone was to decide whether the defendant made an admission and to view with caution evidence of such admission (see CALJIC No. 2.71), this Court concluded No. 2.71.5 was appropriately given and did not violate any of the defendant's constitutional rights. (*Id.*, 43 Cal.4th at p. 1021, referring to *People v. Fauber* (1992) 2 Cal.4th 792, 852 [given the inferences "that the defendant heard and understood [an unavailable witness's] statements and had the opportunity to deny them, and that he chose to remain silent except for an evasive and equivocal statement," the statements were "properly allowed as adoptive admissions"].)

Together, the *Carter* and *Richardson* decisions hold that a defendant's objection to No. 2.71.5 being given to the jury does not bar the giving of that instruction when evidence admitted warranting the instruction of the jury on the law of adoptive admissions.

In the instant case the trial court assessed Saavedra's interview of Charles in jail to be an accusatory meeting which warranted No. 2.71.5 being read to the jury. As the trial court observed, Saavedra's only purpose for meeting Charles was to confirm Charles's culpability for the murder described in the letter. The court determined that Charles's failure to deny writing the letter or saying anything suggesting Charles was ignorant of the

letter's contents rendered Charles's responses and statements to Saavedra's questions to be an adoptive admission which should be determined by the jury. Moreover, the court decided No. 2.71.5 should be given so that the jury did not place too much emphasis on the letter and Charles's responses to Saavedra's questions about the letter. On those preceding reasons, the trial court overruled Charles's objection to No. 2.71.5 being read to the jury. (8RT 2447.) (8RT 2446-2447.) When the court later read No. 2.71.5 to the jury, it also read No. 2.71 which instructed that the jury alone was to decide whether the defendant made an admission and to view with caution evidence of such admission. (9RT 2679; 3CT 723 [CALJIC No. 2.71].)

Just as this Court's *Richardson* decision found No. 2.71.5 was appropriately given in that case and did not violate any of the defendant's constitutional rights (see *People v. Richardson*, *supra*, 43 Cal.4th at p. 1021), so too should this Court find No. 2.71.5 was appropriately given in this case and did not violate any of Charles's constitutional rights.

Nor were No. 2.71 and 2.71.5 argumentative as claimed by Charles. (See AOB 160-161.) The jury was instructed it was the exclusive judge of whether Charles made any admission and, if so, whether his admission was true in whole or in part. Moreover, the jury was told to view his admission with caution. (9RT 2679; 3CT 723 [CALJIC No. 2.71].) Further the jury was told it was the exclusive judge to decide if Charles's responses and actions to Saavedra's questions about the letter were admissions and, if his responses and actions did not indicate an admission, they were to disregard the letter. They were also told the letter was <u>not</u> received for the purpose of proving its truth, but only as it supplied meaning to Charles's conduct. (9RT 2679-2681; 3CT 724 [CALJIC No. 2.71.5].)

Nor does Charles's reliance on *People v. Towey* (2001) 92 Cal.App.4th 880, 884, and *People v. Maury* (2003) 30 Cal.4th 342, 394, for the proposition a defendant's objection to the giving of an instruction

designed for the defendant's benefit should bar that instruction being given to the jury, undermine respondent's preceding analysis. (See AOB 168.) Neither *Towey* nor *Maury* discuss a defendant's authority to prevent a trial court from instructing the jury with No. 2.71.5 even if evidence subject to the existence of preliminary facts is admitted at trial.

In *Towey,* the reviewing court addressed whether a defendant's personal consent was required to forego use of standard jury instructions CALJIC No. 2.60 [defendant not testifying-no inference of guilt] and 2.61 [defendant may rely on evidence], relating to defendant's right not to testify. That reviewing court concluded the right to have the jury instructed using Nos. 2.60 and 2.61 is not a "fundamental right of a personal nature" that requires an express personal waiver by a defendant; the decision to waive those instructions from being given was a tactical matter that could be exercised by defense counsel. (*People v. Towey, supra*, 92 Cal.App.4th at p. 884.)

In *Maury*, this Court addressed, in part the defendant's complaint the trial court failed to sua sponte limit the jury's consideration of defendant's two murder charges when it decided his third murder charge. This Court found the trial court had no duty to give such a limiting instruction on cross-admissible evidence in a trial involving multiple crimes. This Court also rejected the defendant's claim that his counsel was ineffective for failing to request a limiting instruction because a reasonable attorney may have tactically decided not to request a limiting instruction to prevent the jury from thinking the evidence of the other two murders was relatively strong. (*People v. Maury, supra*, 30 Cal.4th at p. 394.)

Accordingly, neither *Towey* nor *Maury* addressed the issue of whether a defendant has the authority to preclude a trial court from giving the jury a cautionary instruction, such as No. 2.71.5, even if evidence justifying that instruction is admitted into evidence. Charles's suggestion claim, that his

objection to that instruction should have barred it from being to the jury, should be rejected.

Finally, Charles's claim he was prejudiced by No. 2.71.5 being erroneously given because the instruction unfairly focused the jury's attention on the letter elevated the letter's contents to the equivalent of being his confession should be rejected. (See AOB 169-172.) As respondent has noted above, the admission of Charles's responses and actions to Saavedra's questions about the multi-page letter was but one of many pieces of evidence proving Charles committed the underlying murders. Other equally strong evidence that Charles murdered his family includes Charles's November 8, 1994, 5:30 p.m., telephone call to his karate instructor Philip Axelson, in which Charles said "Sensei I have done a terrible thing" (6RT 1594, 1596, 1620), "I killed my family" and "I think I killed my family" (6RT 1597-1599). Additional equally strong evidence that Charles murdered his family was found by Leann Pollaccia on November 8, 1994, when she discovered bloody towels and women and men's shoes and clothes, a 30 gallon plastic garbage can, blood and Charles's large engraved wrench with Daniel's blood embedded in the wrench mechanism (Exhibit 16). (6RT 1674-1677, 1683, 1698-1700, 1702.) Equally incriminating is Charles's late November 1994 telephone call to his grandfather, Bernard Severino, in a failed request that Severino take blame for the murders because Charles is "a young man" who needed to care for Charles's pregnant girlfriend and Severino is "an old man" who has lived his life. (5RT 1426, 1428-1429.) Also incriminating is Charles's November 23, 1994, statement to Deputy Sheriff Gene Hyatt denying he killed his family, but admitting he cleaned the blood from the house at 11:30 p.m. on November 6, 1994 (7RT 1987-1988, 2020) and disposed of murder evidence including incinerating his family's lifeless bodies, because he did not want his grandfather, who Charles claimed committed the

murders, to go to jail (7RT 1990-1992, 2023-2026, 2030). Incriminating evidence also included Charles's November 8, lie to investigating Sergeant Royer that he left the Charles residence late Sunday (Nov. 6, 1994) night and slept at his girlfriend's parents' home until Monday morning (8RT 2091-2093, 2136-2137) and that Charles never asked why the sergeant was asking about Charles's parents and brother until Sergeant Royer commented on Charles's lack of curiosity (8RT 2093).

In summary, the fact reporter Saavedra's interview questioning Charles about the multi-page letter was accusatory and Charles's responses and statements to those questions was prima facie proof of Charles's adoptive admission of the letter's contents, the trial court had ample factual reason to instruct the jury with No. 2.71.5 (jury determination of adoptive admission). Charles's objection to that instruction being given to the jury was properly overruled by the trial court in light of the admitted evidence.

VI. THE COURT DID NOT ABUSE ITS DISCRETION BY CONDUCTING A FOURTH PENALTY PHASE TRIAL; CHARLES, WHO IS CONVICTED OF THREE MURDERS, WAS NOT SUBJECTED TO VERACIOUS HARASSMENT

Charles argues his penalty phase verdict of death should be reversed and he be sentenced to life without possibility of parole because the trial court, Judge William Froeberg, presiding, abused its discretion under Penal Code sections 1385 and 1387 by allowing and scheduling a fourth penalty phase trial. He reasons those sections required the court to balance Charles's constitutional right to due process, and not to be harassed by a series of re-trials, against society's right to justice. He contends that after the third failed penalty phase trial the trial court should have concluded that justice would have been achieved by not conducting a fourth penalty trial and sentencing Charles to life in prison without possibility of parole. He concludes the court abused its discretion by conducting a fourth penalty phase trial. (AOB 173-188.)

Charles is wrong. His analysis gives *de minimis* consideration to the fact the lower court expressly exercised its discretion and explained to the prosecutor and defense attorney each factor it weighed in deciding to schedule the underlying penalty trial. (29RT 3923-3925; see fn. 36, *infra.*) It is noteworthy the defense counsel did not take issue with any factor considered by the court.

Moreover, Charles attributes little significance to the fact he is convicted of three murders, mistrial was declared in two prior penalty trials after each jury deadlocked with eleven votes for death to one vote[34], the third penalty death verdict was reversed because of juror misconduct[35] and all penalty phase evidence was presented in a two day trial. Under these circumstances, the lower court did not abuse its discretion by scheduling the underlying penalty trial and the factors in this case supported the court's decision: The court fairly balanced Charles's constitutional right to due process against society's right to prosecute crimes.

---

[34] Appellant's first penalty trial, presided over by Judge Everett Dickey, commenced on January 11, 1996, and a mistrial was declared on January 25, 1996 when the jury could not reach a unanimous verdict. (3CT 828-829, 869-874.) Eleven jurors favored a death verdict and one juror favored a life imprisonment verdict. (11RT 3426-3427.)

His third penalty trial, presided over by Judge William Froeberg, commenced on January 12, 1998, but a mistrial was declared on January 29, 1998, when the jury could not reach a unanimous verdict. (4CT 1459; 5CT 1634-1635; 5CT 1840-1841.) The jury foreman reported that the jury split was eleven jurors to one juror. (5CT 1840; 29RT 3891.)

[35] Appellant's second penalty trial, presided over by Judge Everett Dickey, commenced on March 20, 1996, and it reached a death verdict on April 2, 1996. (3CT 1016-1017, 1084; 4CT 1139-1140; 19RT 2053-2056.) However, the trial court reversed that verdict on August 8, 1996, after it ruled jury misconduct was committed. (4CT 1174-1183, 1290-1295 [appellant's motion]; 4CT 1251-1258, 1267-1286 [prosecutor's opposition].)

On February 6, 1998, two weeks after mistrial was declared in the third penalty trial, the prosecutor notified the trial court and defense counsel that the district attorney wanted a fourth penalty trial scheduled in this case. (29RT 2898.) One month later, on March 6, 1998, after doing its own research on the prosecutor's motion requesting a fourth penalty trial be scheduled, the lower court heard argument from the prosecutor and defense counsel pertaining to that motion and granted the prosecutor's motion to schedule another penalty trial. The lower court told counsel it was exercising its discretion under Penal Code section 190.3 and *People v. Borousk* (1972) 24 Cal.App.3d 147, 159, fn. 19 [in deciding whether to dismiss a case under Penal Code section 1385 the court may consider the number of jurors voting to convict], in granting the motion. The court explained it balanced Charles's constitutional right against society's right to fair prosecution of crime by considering the nature of the underlying murders, weighing the evidence, considering possible harassment to and burden on Charles, the likelihood additional evidence would be presented, the fact 34 of 36 penalty trial jurors who heard the case voted for imposition of the death penalty, the fact Charles had not committed prior crimes and the fact Charles would not be prejudiced by litigating a fourth penalty trial. The court told counsel it did not consider economic factors of the case because courts have a duty to provide both parties a proper forum to try the issues. (29RT 3923-3925.)[36]

---

[36] The lower court granted the prosecutor's motion to impanel a fourth penalty jury as follows:

> The Court: In determining whether to permit the People to retry the penalty phase of this trial, the court is called upon to exercise its discretion under Penal Code section 190.4. In the absence of any controlling case law, the court is limited by what the Supreme Court has labeled the amorphous concept of "in furtherance of justice." This

(continued...)

(...continued)

requires the court to balance the constitutional rights of the defendant with the interests of society as represented by the People. It also necessitates an examination of the nature of the offense, a weighing of the evidence, consideration of the possible harassment and burdens imposed upon the defendant, and the likelihood that additional evidence will be presented at trial.

Appellate courts have recognized that society has a legitimate interest in the fair prosecution of crimes properly alleged and that an arbitrary denial of that right, without a showing of detriment to the defendant, is an abuse of discretion.

I do not feel that economic considerations are properly before this court. It is the decision of the district attorney to allocate public resources. If either the People or the defendant request a trial by jury, it is the constitutional duty of the courts to provide the proper forum.

The appellate court in a case called *People v. Borousk*, which is B-O-R-O-U-S-K, 24 Cal.App. 3d, 147, page 159, has indicated that, "it is meaningful for the trial judge to determine how many jurors voted guilty, how many voted not guilty in anticipation of being called upon to rule on a motion to dismiss after a mistrial."

In light of that direction, this court has noted that the first jury voted eleven to one for the death penalty, the second jury voted twelve zero for the death penalty, and the third jury voted eleven to one for the death penalty. Thus, 34 out of the 36 jurors who have heard the case have voted for the death penalty.

This court has also considered and weighed the evidence admitted at the penalty phase of the trial. Of the factors under 190.3 on which evidence was produced, the only significant evidence of mitigation was the fact that Mr. Charles had not participated in any previous criminal conduct.

The facts surrounding the murders speak for themselves. This court does not make a determination of the appropriate sentence for Mr. Charles at this time, but only determines that there is substantial evidence on which a jury could base a verdict of death.

(continued...)

Contrary to Charles's claim, the lower court fully considered all pertinent factors when it exercised its discretion to conduct the underlying penalty trial. Under Penal Code section 190.4, subdivision (b) [special circumstance finding; penalty hearing] (hereafter "section 190.4(b)") if the penalty phase jury in a special circumstances trial is unable to reach a unanimous verdict on the penalty to impose, the trial court must dismiss the jury and impanel a new jury to decide the penalty to impose. If the new penalty jury is unable to reach a unanimous verdict, the trial court is to exercise its discretion to "either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole." (Pen. Code, § 190.4, subd. (b).)[37] Significantly, section 190.4(b)

(...continued)

> There has been no representation that there will be new or additional evidence presented at retrial.
>
> Other than the obvious, there does not appear to be any prejudice that will be suffered by the defendant if the penalty phase is retried. He is not going anywhere. He will either receive the death penalty or be in prison for the rest of his life.
>
> It is this court's determination that legally there is no justification to deny the people's request to retry the penalty phase of this case. While a retrial may be time-consuming and costly, under the circumstances of this case, the economic decision is left to the executive branch of government. That is not to say that the People have an unlimited right to retry the defendant until it reaches the ultimate verdict. In the words of Mick Jagger, "this could be the last time."

(29RT 3923-3925.)

[37] Penal Code section 190.4, subdivision (b), provides:

> (b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the

(continued...)

does not limit the number of times the trial court, when faced with a jury unable to reach a unanimous penalty verdict, may exercise its discretion to impanel a new penalty jury. Rather, the statute directs that the court exercise of its discretion to make that decision.

As this Court observed in *Belmontes,* in the context of a trial court responding to a penalty jury's question about not being able to unanimously agree on a penalty, section 190.4(b) provides if the jury is unable to agree on a penalty the court must impanel a new jury. If the second jury becomes deadlocked, the court in its discretion may impanel a third jury or impose a sentence of life imprisonment without parole. This Court also noted that the People may elect to forego a second or third penalty phase retrial and assent to the accused being sentenced to a life imprisonment without the possibility of parole. (*People v. Belmontes* (1988) 45 Cal.3d 744, 813-814.) The initially sworn penalty jury rendered a death verdict in *Belmontes*. (*Id.*, at p. 760.) This Court did not state or suggest the trial court abuses its discretion by impaneling more than three penalty juries nor should such a limit be imposed.

(...continued)

> defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.
>
> If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. <u>If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole</u>.

(Pen. Code, § 190.4, emphasis added.)

A trial court's decision pursuant to section 190.4 is subject to an abuse of discretion standard of review. (*People v. Kraft* (2000) 23 Cal.4th 978, 1069, citing *People v. Lucas* (1995) 12 Cal.4th 415, 482-483.) Under the abuse of discretion standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004, citing *People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) The trial court's decision pursuant to section 190.4(b) in this case was not arbitrary, capricious, or patently absurd and it did not result in a manifest miscarriage of justice.

The trial court explained to both parties it reached its decision to grant the prosecutor's motion to impanel the penalty jury below by weighing Charles's right to due process and to be free of harassment by the prosecutor against society's right to have all crimes prosecuted. The factors it considered were numerous and supported its ruling. Of the 36 jurors who listened to the penalty evidence, 34 of those jurors voted that death was the appropriate punishment. That the death verdict rendered in the second penalty trial was reversed by the trial court because of juror misconduct does not negate the fact that, if the court limited its consideration to the two penalty jury conclusions not tainted by juror misconduct, 22 of those 24 jurors who heard the penalty evidence voted that death was an appropriate punishment. (29RT 3924.)

Moreover, the court observed that, presumably based on it presiding over the guilt phase and the then most recent penalty trial, no new evidence will be presented in a subsequent penalty trial and substantial evidence will be presented at a new penalty trial upon which the jury could base a death verdict. (29RT 3925.) Neither counsel disagreed with the court's

assessment that substantial evidence has been presented that would support a jury's death verdict.

The court also correctly observed that, in light of the preceding facts, Charles would not be prejudiced by the commencement of a fourth penalty trial since his three murder convictions precludes him from being freed from jail. (29RT 3925.) Charles's defense counsel also observed Charles's conviction for committing three brutal murders ensured his long time incarceration. (29RT 3911, 3913.)

Finally, the court noted the single mitigating factor applicable to Charles's case is that Charles has no criminal history. (29RT 3924.) Defense counsel did not highlight Charles's lack of criminal conduct as a mitigating factor nor did counsel object to the court using that factor in deciding to impanel the underlying penalty jury. Instead, counsel noted Charles's family members, who are also the victims' family members, testified they did not want any more deaths in the family and that testimony could only be interpreted as the family not wanting the death penalty imposed in this case. (29RT 3918.)

The factors considered by the court as the basis for deciding to allow the underlying penalty trial support the court's decision. The court expressly acknowledged its responsibility to weigh Charles's right to a due process and not to be harassed by endless prosecution efforts to secure a death verdict against society's right to have crimes prosecuted. The court did not rely on factually unsupported speculation when it weighed those two rights. The court's decision allowing the underlying penalty trial was not an abuse of discretion.

Charles's reliance on Penal Code section 1385 [dismissal of action in furtherance of justice] (hereafter "section 1385"), for the proposition that the trial court here improperly weighed applicable factors and wrongly impaneled the fourth penalty jury, does not undermine respondent's

conclusion. (See AOB 177-180.) Section 1385 is a general statute applicable to a trial court's authority to dismiss criminal actions in the furtherance of justice and does not specifically address a trial court's impaneling of a penalty phase jury. However, cases discussing factors a trial court should consider in deciding what constitutes "furtherance of justice" are instructive to assessing the trial court's exercise of its discretion in this case.

A trial court's power to dismiss an action in furtherance of justice has been part of California's statutory law since the first session of the Legislature in 1850. This power was codified as section 1385 of the Penal Code in 1872 and remained substantially unchanged until 1986 when the existing statutory language was designated subdivision (a) and a new subdivision (b) was added limiting the trial court's power to strike a prior conviction under certain circumstances. (*People v. Williams* (1981) 30 Cal.3d 470, 478; *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045.) In *Williams*, this Court observed the underlying purpose of section 1385 gives a trial judge wide discretion to individualize the treatment of the accused:

> Mandatory, arbitrary, or rigid sentencing procedures invariably lead to unjust results. Society receives maximum protection when the penalty, treatment, or disposition of the offender is tailored to the individual case. Only the trial judge has the knowledge, ability, and tools at hand to properly individualize the treatment of the offender. Subject always to legislative control and appellate review, trial courts should be afforded maximum leeway in fitting the punishment to the offender.

(*People v. Williams*, *supra*, 30 Cal.3d at p. 482, citing *People v. Dorsey* (1972) 28 Cal.App.3d 15, 18.) The *Williams* court noted that "[s]ection 1385 has been construed to provide judicial power to dismiss or strike – within the court's discretion–allegations which, if proven, would enhance punishment for alleged criminal conduct." (*People v. Williams*, *supra*, 30

Cal.3d at p. 483, citing *People v. Tanner* (1979) 24 Cal.3d 514, 518.) The *Williams* court also recognized the purpose behind section 1385 were earlier set out in *People v. Superior Court* (*Howard*) (1968) 69 Cal.2d 491, 505 ["furtherance of justice" best served by allowing trial judge exercise of discretion] and *People v. Dorsey, supra,* 28 Cal.App.3d 15, 18 [imposition of sentence and exercise of sentencing discretion are fundamentally and inherently judicial functions]. (*People v. Williams*, *supra*, 30 Cal.3d at p. 482.)

The *Howard* court noted "furtherance of justice" is achieved as follows:

> In our opinion, the standard of furtherance of justice will best be served if we recognize discretion in the trial judge, who viewed the witnesses and heard the conflicting testimony, to dismiss on the basis of the reasons he has set forth rather than severely limit such discretion to cases where the evidence is insufficient as a matter of law.
>
> A determination whether to dismiss in the interests of justice after a verdict involves a balancing of many factors, including the weighing of the evidence indicative of guilt or innocence, the nature of the crime involved, the fact that the defendant has or has not been incarcerated in prison awaiting trial and the length of such incarceration, the possible harassment and burdens imposed upon the defendant by a retrial, and the likelihood, if any, that additional evidence will be presented upon a retrial.

(*Howard*, *supra,* 69 Cal.2d at p. 505.)

Applying the *Howard* factors to this case demonstrates the lower court did not abuse its discretion by impaneling the underlying fourth penalty jury. Charles's convictions for the three underlying murders resulted in his continued incarceration and he would not have been released even if the subsequent penalty trial had not been scheduled. Based on the past penalty trials and the prosecutor stating no new aggravating evidence would be presented it was reasonable for the court to conclude all penalty

phase evidence could be presented to a newly impaneled jury in two days. Further, the fact 22 of 24 prior penalty phase jurors, who were not tainted by juror misconduct, heard the penalty evidence and rendered death verdicts refuted Charles's claim prosecution evidence in aggravation would unlikely result in a unanimous jury verdict. Conversely, those factors weighed in favor of a penalty jury being impaneled.

Finally, Charles's reliance on Penal Code section 1387 [dismissal bars prosecution-exceptions] (hereafter "section 1387") for the proposition the lower court was precluded from impaneling a subsequent penalty jury is not applicable to this case nor are the cases discussing that section instructive to determining if the lower court abused its discretion by impaneling the most recent penalty jury. Section 1387 is a legislative response to protect against successive dismissals and refilings of accusatory pleadings. As this Court noted in an earlier case, until 1975, public interest in prosecuting felonies was so intense that, while a one-dismissal rule applied to misdemeanors, felony charges could be refiled ad infinitum. (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1019.) However, in 1975, section 1387 was amended to add the felony "two dismissal" limit. (*Burris v. Superior Court, supra,* 34 Cal.4th at p. 1019; Stats.1975, ch. 1069, § 1, p. 2615.) Felony prosecutions are now generally subject to a two-dismissal rule which provide two previous dismissals of charges for the same offense will bar a new felony charge. (*Burris v. Superior Court, supra,* 34 Cal.4th at p. 1019.)

Section 1387 is not applicable to assessing the trial court's exercise of discretion to impanel a new penalty jury in this case. Charges filed against Charles would not be decided by a penalty jury because he was already convicted of three murders and those charges would not be refiled against him. Charles's speedy trial rights were not at issue since the court and both counsel each agreed they were ready to commence a penalty trial if the

court decided to impanel a new penalty jury. Forum shopping was not at issue since neither the prosecutor nor defense counsel requested the case be assigned to a new judge if a subsequent penalty jury was impaneled. Impaneling a subsequent penalty jury would not have been harassment of Charles's due process rights since his convictions for the three underlying murders resulted in his continued incarceration and he would not have been released in any event.

The preceding authority shows the trial court did not abuse its discretion by impaneling a new penalty jury pursuant to section 190.4(b). The factors the court weighed when deciding to impanel a penalty jury were appropriate under the *Howard* decision for assessing "furtherance of justice." Those factors considered by the court weighed in favor of a fourth penalty trial. The lower court's decision was not an arbitrary, capricious, or patently absurd nor designed to harass Charles.

VII. THE TRIAL COURT PROPERLY PRECLUDED CHARLES'S WITNESSES FROM TESTIFYING THE DEATH PENALTY SHOULD NOT BE IMPOSED IN THIS CASE

Charles next argues his death verdict should be set aside because the trial court improperly barred two of his penalty phase witnesses, his aunt and his cousin, both who are also the victims' family relatives, from testifying that the death penalty should not be imposed in this case. He reasons his aunt's and his cousin's testimony, wherein the death penalty should not be imposed, was admissible as relevant mitigation testimony about is character (see AOB 194-196) and as admissible execution impact evidence (see AOB 196-208). He concludes the trial court's error, precluding his witness' testimony about the punishment to impose, requires his death verdict be set aside and, presumably, a life sentence without possibility of parole be imposed. (AOB 209.)

Charles is wrong. The lower court properly barred Charles's relatives from testifying that they opposed Charles being sentenced to death. This Court has repeated, held in past capital cases, that it is defendant's background and character, and not the distress of his or her family caused by the impact of a defendant's execution, that is relevant under Penal Code section 190.3. Thus, a jury is not to consider any impact of an execution on a defendant's family as a mitigation factor.

In October 20, 1998, prior to the fourth penalty trial commencing, the prosecutor filed a *in limine* motion requesting Charles's family members be barred from testifying about the affect of Charles being executed would have on those family members. (6CT 1872- 1886.) On October 26, 1998, the trial court conducted a hearing on the motion. (34RT 4923.)

As defense counsel observed to Judge Froeberg, then presiding over the penalty trial, an agreement between the prosecutor and defense counsel, that defense penalty witnesses not testify that life imprisonment without possibility of parole should be imposed upon Charles, was based on Judge Everett Dickey's earlier ruling to that effect.[38] The prosecutor agreed with

---

[38] Defense counsel explained Judge Dickey's earlier ruling pertaining to appellant's penalty witnesses testifying that appellant should not be executed was as follows:

> Mr. Schwartzberg (defense attorney): We started this trial with the understanding that judge dickey's -- I'm sorry, your honor, that Judge Dickey's ruling would be the ruling here, but I've read those transcripts over that he's complaining about, Mr. Brent's complaining about, and I don't see a violation of the rule.
>
> Judge Dickey in his ruling acknowledged that the family would be allowed to testify about their feelings about how the impact of the loss of Mr. Charles would have on their

(continued...)

defense counsel's recital of Judge Dickey's March 20, 1996, ruling based on Judge Dickey's legal research, that Charles's family witnesses could testify about the impact that Charles's loss would have on their lives, about his character and his family relationships, but could not testify about an appropriate sentence to impose. (34RT 4923-4925; see 6CT 1874-1875 [Exhibit A of DA motion transcript excerpt of Judge Dickey's order excluding witnesses' or someone else's opinions on punishment to impose]); see 15RT 1099-1102.)

In Judge Dickey's March 20, 1996, ruling, the judge considered *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720], and *People v. Sanders* (1995) 11 Cal.4th 475, as its basis for ruling that penalty trial witnesses' or someone else's opinion about the appropriate punishment to impose are barred but nothing else is excluded. (15RT 1099.)[39] Based on the preceding cases, Judge Dickey ruled, among other

---

(...continued)

> life, their future desires to be--to meet with him, to see him. That's what they testified to.
>
> Judge Dickey also recognized that anyone with--I'm being somewhat flip, but anybody with a relatively low I.Q. would be able to figure out from the testimony that the ultimate conclusion is that they don't want him to be executed, but there's not a single time when a witness said, "it is our family's desire that Eddie not be executed." those are the magic words that Judge Dickey said would not be allowed, and none of those witnesses ever testified to them.

(34RT 4923-4924.)

[39] See *Payne v. Tennessee, supra,* 501 U.S. at pp. 824-825 [states may determine whether victim impact evidence will be admissible in capital case sentencing proceedings].

(continued...)

reasons, witness opinions on the sentence to impose should not be admitted in a penalty trial because those opinions do not focus on the defendant's character, record or circumstances of the offense or any other proper mitigating or aggravating factors. (15RT 1100-1101.) The judge noted that Charles's penalty witnesses would be free to testify about their feelings for Charles, the good aspects of his character, his family relationships and the fact they would like to have a relationship with him in the future even though he is in prison. Under that criteria, Charles's witnesses can indicate that they do not want Charles executed without having to give an opinion on the punishment to impose. (15RT 1101-1102.) The prosecutor nor Charles's then counsel, Mr. Klar, objected to nor questioned Judge Dickey's ruling. (15RT 1102.)

In the October 1998 in limine hearing, after hearing argument from both counsel and considering Judge Dickey's earlier ruling barring opinion testimony about the sentence to be imposed, Judge Froeberg adopted Judge Dickey's earlier decision as his own and barred Charles's family members from testifying about which sentence should be imposed. (34RT 4928-4929.)[40] With respect to the prosecutor's concern about a family member

---

(...continued)

See *People v. Sanders*, *supra*, 11 Cal.4th at p. 546 [impact of defendant's execution on his family may be excluded because irrelevant to defendant's character, record or individual personality].

[40] Judge Froeberg's decision to adhere to Judge Dickey's earlier ruling barring appellant's family members from testifying about which sentence to impose was as follows:

> The Court: Well, obviously it's a very fine line. I'm going to adhere, as we have all done so, to Judge Dickey's prior rulings. I guess the ultimate solution is that if there is some testimony that any of the relatives are recommending
>
> (continued...)

witness giving an opinion about what sentence to impose, the court said if such opinion were uttered by a witness, the jury would be admonished to disregard the opinion. (34RT 4932-4933.)[41]

Roberta Prindiville (Charles's maternal aunt) and Joanne Irene (Charles's cousin) testified despite knowing Charles killed his parents and brother, they wanted to maintain a relationship with Charles as did other members of Charles's extended family. (34RT 5061 (Prindiville), 5073-5074 (Irene).) Prindiville did not want to know the details of the crimes and she knew Charles did a horrible thing; notwithstanding her knowledge, she did not want to abandon him. (34RT 5060.) Nothing Charles did prior to the murders warned them that he would commit the underlying crimes. (34RT 5064 (Prindiville), 5070-5071 (Irene).) Under cross examination

---

(...continued)

> life over execution, that a court admonishment would be in order, but I'm not sure there's much to do otherwise.

(34RT 4929.)

[41] Judge Froeberg told counsel if appellant's family members gave their opinion about punishment to impose, the court would order the jury to disregard the opinion:

> The Court: I don't know what else to do. I don't think I should be in a position of putting words in their mouth, but if they're nonresponsive to the question and they're outside the court's directive, then the remedy is to admonish the jury to disregard it.
>
> To summarize, I feel, based on the representations of Mr. Goethals [defense counsel] that the witnesses have been instructed not to render an opinion as to the appropriate punishment, I will hold them to that and make the proper admonishments when necessary when called upon.

(34RT 4933.)

Irene admitted, prior to the underlying crimes, the last time she saw Charles was in the late 1980's. (34RT 5076.)

This Court recently reiterated that the impact of a defendant's execution on his family may not be considered by the jury in mitigation. (*People v. Bennett* (2009) 45 Cal.4th 577, 601, citing *People v. Smith* (2005) 35 Cal.4th 334, 366-367, *People v. Smithey* (1999) 20 Cal.4th 936, 1000, and *People v. Ochoa* (1998) 19 Cal.4th 353, 454-456.) The reason for this rule is that execution-impact evidence is irrelevant under Penal Code section 190.3 because it does not concern a defendant's own circumstances but rather asks the jury to spare the defendant's life based on the effect his execution would have on his family. (*People v. Bennett, supra*, 45 Cal.4th at p. 602, citing *Payne v. Tennessee, supra,* 501 U.S. at p. 822.)

In *Ochoa,* this Court explained it is a defendant's background and character, and "not the distress of his or her family," that is relevant under Penal Code section 190.3 [death penalty aggravating and mitigating considerations]. (*People v. Bennett, supra,* 45 Cal.4th at p. 601, citing *People v. Ochoa, supra,* 19 Cal.4th at p. 456.) This Court noted the difference between evidence that a defendant is loved by family members or others, and that these individuals want him or her to live and evidence about whether the defendant's family deserves to suffer the pain of having a family member executed. The former constitutes permissible indirect evidence of a defendant's character while the latter improperly asks the jury to spare the defendant's life because it believes that the impact of the execution would be devastating to other members of the defendant's family. (*Ibid.*)

Here, Judge Froeberg properly barred Charles's family witnesses from giving their opinion about the sentence to be imposed. He did not blindly adopt Judge Dickey's earlier ruling. Rather, he considered Judge Dickey's

reasons for that ruling (34RT 4928) and noted although Charles's witnesses were barred from testifying about the sentence to be imposed in this case, those witnesses would be allowed to tell the jury their feelings about the defendant, the good things about his character and his relationships with them and the fact that they want to be able to have some relationship with him in the future even though he is in prison. (34RT 4928.) Judge Froeberg's ruling is consistent with this Court's holding a witness' testimony of a defendant's character is admissible in the penalty trial but testimony about the impact of an execution on that witness is not admissible. (*People v. Ochoa, supra,* 19 Cal.4th at p. 456 [evidence defendant's family will suffer if defendant executed not admissible] and *People v. Smith*, *supra*, 35 Cal.4th at p. 367 [testimony about impact of execution on witness not admissible].)

Even if Judge Froeberg's ruling that barred Charles's family member witnesses from testifying the death penalty should not be imposed was error, any resulting err was harmless beyond a reasonable doubt. (See *People v. Lewis* (2006) 39 Cal.4th 970, 1058 [setting forth standard of review]; *People v. Stanley* (1995) 10 Cal.4th 764, 826 [same].) Charles's and the victims' two family members Prindiville and Irene testified they and the other members of Charles's and the victims' family wanted and were prepared to maintain their relationship with Charles into the future and wanted to be able to talk to him despite the horrible crimes he committed. Charles's aunt, Roberta Prindiville, testified she knew the horrible crimes Charles had committed, but she still loved and supported him. (34RT 5060, 5066.) She said she wanted to maintain a relationship with Charles and to communicate with him presently and "in the future" because he was a family member whom she would not abandon. She told the jury she wanted her children to have the opportunity to maintain a relationship with Charles. (34RT 5061.) She told the jury that the rest of

Charles's family supported Prindiville's desire to maintain a relationship and be able to talk to Charles in the future. (34RT 5067.)

Charles's cousin, Irene, told the jury despite knowing about Charles's convictions for the underlying murders she wanted to support him because she loves him. (34RT 5070-5073.) She also wanted to maintain future relationships with Charles because he is a family member, he is still a part of her life, she feels close to him and she loves him. (34RT 5073, 5075, 5077.) She told the jury that her husband and her cousin in New York, who is Delores' sister, agreed with Irene that they should support Charles and wanted to maintain a relationship with him in the future. (34RT 5074-5075.)

Prindiville's and Irene's testimony made clear to the penalty jury that, despite Charles murdering their family members, they did not want Charles to be executed, but to be allowed to live so that they and the rest of the victims' family members could continue their relationship with him and talk to him in the future. They explained their, and the other family members', desire that he not be executed was rooted in Charles being a part of their lives since he was born and their continued love for him.

In summary, Judge Froeberg's ruling barring Charles's family members from asking the jury not to impose a death verdict was an application of this Court's past decisions that a defendant's penalty witnesses may testify to his background and character but may not opine about the penalty to impose. Moreover, even being barred from giving their opinions about the appropriate sentence to impose in this case, Charles's family members, Prindiville and Irene, testified about Charles's character and background, their continued love for him despite him committing the horrible murders, that they continued to love him and unequivocally imparted to the jury that neither they, nor the family

members for whom they spoke, wanted the death penalty imposed in this case. Charles's arguments to the contrary should be rejected.

VIII. CALJIC NO. 8.88 [DEFINING PENALTY PHASE JURY'S SENTENCING DISCRETION] IS CONSTITUTIONALLY SOUND

Next, Charles acknowledges this Court has previously ruled CALJIC No. 8.88 [penalty phase-concluding instructions] (hereafter "No. 8.88") to be an appropriate instruction but urges the propriety of the instruction be reconsidered because the instruction: 1) allowed the jury to choose the penalty based on an impermissibly vague and ambiguous standard of review (AOB 210-212); (2) did not require the jury to decide if the death penalty was the appropriate punishment (AOB 212-215); and (3) did not inform the jury Charles had no burden to prove the death penalty was inappropriate (AOB 215-216). He concludes the preceding deficiencies render the instruction unconstitutional under state and federal constitutions. (AOB 216-217.)

Charles concedes that this Court has addressed the preceding issues in earlier cases and found No. 8.88 to be an appropriate instruction that does not violate a defendant's state or federal constitutional rights. (AOB 210, referring to *People v. Duncan* (1991) 53 Cal.3d 955.) Further, his failure to object to an instruction in the trial court waives any claim of error unless the claimed error affected his substantial rights, i.e., resulted in a miscarriage of justice, making it reasonably probable he would have obtained a more favorable result in the absence of error. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249, citing in part Pen. Code, § 1259 (appeal by defendant; instructions not objected to), and *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) Contrary to his instant argument, he does not present any plausible reason for this Court to reconsider its prior decisions upholding the constitutionality of No. 8.88.

Prior to the defense resting its case in the underlying fourth penalty trial, the court and counsel discussed instructions to give the penalty jury. Among the instructions the court indicated it would give the penalty jury was No.8.88. At that time neither the prosecutor nor defense counsel objected to the jury being given that instruction. (35RT 5081.) However, responding to the court's request for comments about its plan to also give CALJIC No. 17.50 to instruct the jury to select a foreperson and reach a unanimous decision, defense counsel reminded the court the defense was preserving its "arguments that were previously made" but did not comment that counsel, was or had, specifically objected to No. 8.88 or No. 17.50. (35RT 5081.) The appellate record of the third penalty trial immediately preceding the underlying fourth penalty trial shows defense counsel did not object to the court instructing the third penalty jury with No. 8.88. (See 28RT 3679.) CALJIC No. 8.88 was read to the fourth penalty jury without objection by either counsel. (35RT 5104-5105; see 6CT 1925-1926.)[42]

---

[42] The penalty jury here was instructed with CALJIC No. 8.88 as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances on which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition, or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating

(continued...)

A. Because Charles Did Not Object to CALJIC No. 8.88 Being Read to the Penalty Jury, He Has Forfeited the Instant Challenge to that Instruction

Respondent recognizes this Court has previously held a defendant's failure to object to No. 8.88 being given to a jury will not preclude the defendant from challenging the instruction for the first time on appeal because the instruction implicates the defendant's substantial rights. (*People v. Watson* (2008) 43 Cal.4th 652, 702, citing Penal Code, § 1259, and referring to *People v. Gray, supra,* 37 Cal.4th at p. 235.) Notwithstanding that fact, Charles's failure to timely object to No. 8.88 being read to the penalty jury below should constitute his forfeiture of this issue. His failure to object to the instruction being given unfairly precluded the prosecutor and the lower court from making a record for this Court's review showing why that instruction was properly read to the jury.

(...continued)

> circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors that you are permitted to consider. In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

(35RT 5104-5105.)

B. CALJIC No. 8.88 Does Not Contain an Impermissibly Vague and Ambiguous Standard of Review

Contrary to Charles's claim, No. 8.88 does not set out an impermissible or vague standard of review for the penalty jury to apply in deciding to impose an appropriate judgment. (See AOB 210-212.) This Court has repeatedly held the standard of review in that instruction, holding that the jury "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" is not inadequate or misleading. (*People v. Millwee* (1998) 18 Cal.4th 96, 163.) This Court explained by advising the jury that a death verdict should be returned only if aggravation is "so substantial in comparison with" mitigation that death is "warranted," the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty. (*People v. Arias* (1996) 13 Cal.4th 92, 171; accord *People v. Ochoa* (2001) 26 Cal.4th 398, 452, *People v. Gurule* (2002) 28 Cal.4th 557, 662.)

Moreover, this Court explained in *People v. Breaux* (1991) 1 Cal.4th 281, its examination of almost identical language in former CALJIC No. 8.84.2 (1986 rev.)[43], showed the instructions as a whole adequately conveyed to the penalty jury the appropriate manner of performing its task, and that the instruction concerning the weighing of aggravating and mitigating circumstances informed the jury that it may return a death

---

[43] The pertinent part of former CALJIC No. 8.84.2 that this Court reviewed in *Breaux* read as follows:

"To return a judgment of death, each of you must be persuaded that the aggravating factors are so substantial in comparison with the mitigating factors that it warrants death instead of life in prison without parole."

(*People v. Breaux, supra*, 1 Cal.4th at p. 315, referring to CALJIC No. 8.84.2.)

verdict only if aggravating circumstances predominate and death is the appropriate verdict. This Court concluded that language in 8.84.2 properly described the weighing process as a metaphor for the juror's personal determination that death is the appropriate penalty under all of the circumstances. (*People v. Page* (2008) 44 Cal.4th 1, 56, citing *People v. Breaux, supra,* 1 Cal.4th at p. 316.)

This Court has also observed, under No. 8.88 a jury is free to return a life verdict even if aggravation outweighs mitigation. But the jury is not free to return a life verdict regardless of the evidence. If aggravating circumstances are so substantial in comparison with mitigating circumstances as to warrant the death penalty, then death is the appropriate penalty. (*People v. Smith* (2005) 35 Cal.4th 334, 370, citing *People v. Arias* (1996) 13 Cal.4th 92, 171.)

Charles's reliance on *Stringer v. Black* (1992) 503 U.S. 222, [112 S.Ct. 1130, 117 L.Ed.2d 367], for the proposition that the term "so substantial" is too amorphous to properly guide a jury's determination does not compel a different result. In *Black* the court generally held, in addition to other findings, that if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion. (*Stringer v. Black, supra,* 503 U.S. at p. 235.) The *Black* decision did not address the standard of review in No. 8.88 nor did it identify or specifically refer to the term "so substantial" as found in No. 8.88 as too amorphous to guide a jury in deciding to impose a death verdict.

C. CALJIC No. 8.88 Properly Required the Jury to Decide if the Death Penalty Was the Appropriate Punishment

Similarly, Charles's complaint, that No. 8.88 is unconstitutional because it directs the jury to impose a death verdict when that verdict is "warranted" and fails to caution the jury not to impose that verdict unless it

is appropriate (see AOB 212-215), has been previously decided and rejected by this Court. As this Court found in earlier cases raising the same issue, Charles's complaint is flawed because Charles focuses upon specific terms of the instruction and ignores the instruction as a whole. In response to past defendants' complaints that No. 8.88 improperly directs a jury to impose a death verdict when "warranted", this Court noted that No. 8.88 also informs the jury that:

> [t]he weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

(*People v. Page*, *supra*, 44 Cal.4th at p. 56, citing CALJIC No. 8.88.) As this Court earlier explained, by advising that a death verdict should be returned only if aggravation is so substantial in comparison with mitigation that death is "warranted," the instruction clearly admonishes the jury to determine whether the balance of aggravation and mitigation makes death the appropriate penalty. (*People v. Perry* (2006) 38 Cal.4th 302, 320, citing *People v. Arias* (1996) 13 Cal.4th 92, 171.) The above provision of No. 8.88 addressed by this Court in *Page* is identical to the provision read to the jury in this case. (35RT 5104-5105; see fn. 42, *supra*.)

In light of the jury being instructed to impose the "appropriate" sentence after weighing aggravating and mitigating factors, and because this Court has consistently held the term "warrant" appearing in No. 8.88 does not direct the jury to mechanically decide the penalty to impose, Charles's instant argument should be rejected. This Court should conclude, as it has in numerous past cases, that the words used in No. 8.88

are essential to avoid reducing the penalty decision to a mere mechanical calculation. (*People v. Perry* (2006) 38 Cal.4th 302, 320, citing *People v. Smith, supra,* 35 Cal.4th at p. 369, *People v. Brown* (1985) 40 Cal.3d 512, 541.)

Consequently, CALJIC 8.88 given here is constitutionally sufficient. (See *People v. Butler* (2009) __ Cal.4th __ (S055501), referring to *People v. Lindberg* (2008) 45 Cal.4th 1, 52, and *People v. Moon* (2005) 37 Cal.4th 1, 42-43.)

D. CALJIC No. 8.88 Informed the Jury Charles Had No Burden to Prove the Death Penalty Was Inappropriate

Similarly, Charles's claim, that No. 8.88 is constitutionally defective because it did not instruct the jury that Charles had no burden to prove the death penalty was an inappropriate punishment (see AOB 215-216), has been rejected by this Court in numerous cases. (*People v. Watson* (2008) 43 Cal.4th 652, 702, citing *People v. Medina, supra,* 11 Cal.4th at p. 782.)

As this Court has explained, at the penalty phase each juror must determine, through the weighing process, which of the two alternative penalties is the more appropriate. Because it is implicit in the sentencing instructions that the determination of penalty is essentially moral and normative, and therefore different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. (*People v. Morgan* (2007) 42 Cal.4th 593, 626; *People v. Hayes* (1990) 52 Cal.3d 577, 643, citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 779, and referring to *People v. Williams* (1988) 44 Cal.3d 883, 960.)

Because there is no burden of proof requirement at the penalty trial, No. 8.88 is not constitutionally defective for allegedly failing to instruct the jury that Charles had no burden to prove the death penalty was an inappropriate punishment.

Charles's several challenges to No. 8.88, given below, should be rejected because he failed to timely object to the instruction being read to the penalty jury. Notwithstanding his forfeiture of this issue, this Court has repeatedly found No. 8.88 is constitutionally sound and properly instructs the penalty jury on its duty to consider the aggravating and mitigating evidence and to impose a death verdict only if that punishment is appropriate under all circumstances. Charles's argument to the contrary should be rejected.

IX. CHARLES'S CHALLENGE, THAT HIS DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE THE METHOD OF EXECUTION IS BY LETHAL INJECTION, IS NOT COGNIZABLE ON APPEAL

Charles next argues because he will be executed by lethal injection, that method of execution is cruel and unusual punishment under the Eighth and 14th Amendment and renders the imposition of his death sentence unconstitutional so it must be reversed. He explains in part, the United States Supreme Court's decision in *Baze v. Rees* (2008) __ U.S. __, __ [S.Ct. __ (2008 LEXIS 2476)], holding that lethal injection per se does not violate the 8th Amendment, left open the question of whether lethal injection as applied may violate the 8th Amendment. (AOB 218-221.) Alleged imperfections and illegalities in the execution process that may or may not exist when a death sentence is implemented are premature. (*People v. Boyer* (2006) 38 Cal.4th 412, 485.)

As this Court held in *Dykes*, a challenge to this state's method of execution is not cognizable on appeal because alleged imperfections in the method of execution do not affect the validity of the death judgment itself and a defendant's attack on asserted illegalities in the execution process that may or may not exist when his death sentence is carried out is premature. (*People v. Dykes* (2009) 46 Cal.4th 731, 820, citing *People v. Abilez* (2007) 41 Cal.4th 472, 536, and referring to *Baze v. Rees* (2008) __ U.S. __, 128

[S.Ct. 1520, 170 L.Ed.2d 420] [holding Kentucky's three-drug protocol for lethal injection, a protocol that is identical to California's, does not violate the 8th Amendment]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 833-834.)

Thus, review of Charles's belated claim that death by lethal injection violates his 8th Amendment right to be free of cruel and unusual punishment should be rejected. The claim does not challenge his convictions for the three underlying murders, nor the jury's decision that death is the appropriate punishment in this case. As this Court has done in past cases raising a similar claim, this issue should be rejected.

X. DELAY BETWEEN SENTENCING AND EXECUTION DOES NOT VIOLATE THE 8TH AMENDMENT'S PROSCRIPTION OF CRUEL AND UNUSUAL PUNISHMENT

Charles next claims that the time delay between his sentence and his execution will result in his emotional and mental suffering which requires his death verdict be set aside and a sentence of life imprisonment without possibility of parole be imposed. Charles contends the time delay causing his suffering, violates the norms of civilized society and is cruel and unusual punishment under the 8th Amendment. He acknowledges this Court has rejected this issue in past cases. (AOB 222-241.)

Contrary to Charles's argument, this Court has repeatedly held that delay transpiring between a capital defendant's sentencing and the execution of his punishment, whether in the appointment of counsel on appeal or in processing the appeal, or both, does not inflict cruel or unusual punishment within the meaning of the state or federal Constitutions. (*People v. Salcido* (2008) 44 Cal.4th 93, 166; *People v. Richardson* (2008) 43 Cal.4th 959, 1037.) Thus, just as this Court has done in the past when addressing an issue similar to this one, so too should this Court reject Charles's instant claim.

As this Court explained, deterrence and retribution are legitimate purposes of punishment. (*Gregg v. Georgia* (1976) 428 U.S. 153, 183 [96 S.Ct. 2909, 2323-2930, 49 L.Ed.2d 859]; *People v. Roberts* (1992) 2 Cal.4th 271, 316.) The delay between a capital defendant's sentence and the execution of that sentence does not prevent the fulfillment of either goal.

As this Court has held numerous times, the delay transpiring between Charles's sentencing and the execution of his punishment does not inflict cruel or unusual punishment within the meaning of the state or federal Constitutions; execution notwithstanding delay associated with his appeal furthers both the deterrent and retributive functions of the death penalty law.

XI. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED TO CHARLES'S CASE, DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Charles contends that California's death penalty, as interpreted by this Court and applied to Charles's case, violates the United States Constitution. He alleges numerous aspects of the death penalty sentencing scheme, alone or in combination, violate the federal Constitution. (AOB 242-281.) As Charles concedes (see AOB 242), most of these claims have been raised and rejected by this Court in prior capital appeals.

Because Charles fails to raise new or significant legal authority that would cause this Court to depart from its earlier holdings, his claims should be rejected. (*People v. Williams* (2008) 43 Cal.4th 584, 648. [defendant's challenge to various aspects of California's capital sentencing scheme, alone or in combination, rejected by this Court in similar challenges; absent persuasive reason for reconsideration, this Court would decline to do so]; *People v. Abilez* (2007) 41 Cal.4th 472, 533 [same].) Contrary to Charles's claim this Court has only considered the alleged defects in isolation and has

addressed the scheme as required by *Kansas v. Marsh* (2006) 548 U.S. 163, 179, 126 S.Ct. 2516, 2527 fn. 6, 165 L.Ed.2d 429 (see AOB 242), this Court's earlier decisions have clearly addressed the alleged defects "alone or in combination." (*People v. Williams*, *supra*, 43 Cal.4th at 648-650; *People v. Abilez*, *supra*, 41 Cal.4th at p. 472.)

A. Charles's Death Verdict Is Valid Because Penal Code Section 190.2 Is Not Impermissibly Broad (AOB 244-246)

Charles contends the failure of California's death penalty law to meaningfully distinguish murders in which the death penalty is imposed from those in which it is not imposed, requires reversal of the death judgment. He argues his death sentence is invalid because section 190.2 is impermissibly broad and fails to narrow the class of persons eligible for the death penalty. (AOB 244-246.)

This Court has repeatedly held Penal Code section 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the 8th Amendment. (*People v. Zamudio* (2008) 43 Cal.4th 327, 373; see *People v. Farley* (2009) __Cal.3d__, (S024833).) As this Court explained in *People v. Bacigalupo* (1993) 6 Cal.4th 457, the United States Supreme Court recognized the difference between the "narrowing" and "selection" aspects of capital sentencing by describing "narrowing" as pertaining to a state's "legislative definition" of the circumstances placing a defendant within the class of persons eligible for the death penalty. (*People v. Bacigalupo, supra,* 6 Cal.4th at p. 465, citing *Zant v. Stephens* (1983) 462 U.S. 862, 878, 103 [S.Ct. 2733, 77 L.Ed.2d 235], and *Godfrey v. Georgia* (1980) 446 U.S. 420, 428, 100 [S.Ct. 1759, 64 L.Ed.2d 398].)

In light of the preceding analysis, Charles's challenge to the constitutionality of section 190.2 should be rejected.

B. Section 190.3, Factor (a), Is Not Impermissibly Overbroad

Charles next contends the death penalty is invalid because section 190.3, factor (a), applied here, allows arbitrary and capricious imposition of death in violation of the 5th, 6th, 8th, and 14th Amendments to the United States Constitution.[44] (AOB 246-248.) He explains factor (a) has been applied in such a "wanton and freakish" manner that almost all features of every murder have been found to be "aggravating" within the meaning of the statute. (AOB 246-248.) The issue is without merit.

In *Tuilaepa v. California*, the United States Supreme Court held the sentencing factors set forth in section 190.3, particularly factors (a) (circumstances of the capital crime), (b) (other violent criminal activity), (c) (prior felony convictions), and (i) (defendant's age), are not impermissibly vague. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975- 980, [114 S.Ct. 2630, 2636-2639, 129 L.Ed.2d 750]; see also *People v. Box* (2000) 23 Cal.4th 1153, 1217; *People v. Turner* (1994) 8 Cal.4th 137, 207-208.)

This Court has repeatedly held, Section 190.3, factor (a) is not overbroad, nor does it allow for arbitrary and capricious imposition of the death penalty in violation of the 8th Amendment. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1141, citing *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 975-976, and referring to *People v. Williams* (2008) 43 Cal.4th 584, 648.)

---

[44] Section 190.3, factor (a), states:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

In light of the preceding authority, Charles presents no credible reason for this Court to revisit this issue and his argument should be rejected.

C. Application of California's Death Penalty Statute Does Not Result in Arbitrary and Capricious Sentencing; it Ensures Defendants' Right to a Just Jury Determination

Charles also contends California's death penalty statute contains no safeguards to prevent a jury from arbitrarily imposing a death verdict. He concludes without appropriate safeguards in place, his death verdict violates the 6th, 8th, and 14th Amendments of the federal Constitution. (AOB 249-275.) He raises seven sub-claims in support of this claim. As presented below, those claims are without merit.

1. The United States Constitution does not compel the imposition of a beyond a reasonable doubt standard of proof in connection with the penalty phase; the penalty jury does not need to agree unanimously as to any particular aggravating factor.

Charles asserts his death sentence violates the 6th, 8th, and 14th Amendments because: (1) his death sentence was not premised on findings beyond a reasonable doubt by a unanimous jury that aggravating factors outweighed mitigating factors, thereby violating his constitutional right to a just jury (AOB 250-253); and (2) the due process and the cruel and unusual punishment clauses of the United States Constitution require that the jury in a capital case be instructed that they may impose a death sentence only if they were persuaded beyond a reasonable doubt that existing aggravating factors outweigh the mitigating factors and that death was the appropriate penalty (AOB 253-261). This Court has repeatedly rejected Charles's claims in prior decisions.

Unlike the determination of guilt, the sentencing function is inherently moral and normative, not functional, and thus not susceptible to *any*

burden-of-proof qualification. (*People v. Bonilla*, (2007) 41 Cal.4th at p. 313; *People v. Burgener, supra,* 29 Cal.4th at pp. 884-885; *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Welch*, *supra*, 20 Cal.4th at p. 767.) Accordingly, this Court has repeatedly rejected claims identical to Charles's regarding a burden of proof at the penalty phase. (*People v. Abilez, supra*, 41 Cal.4th at p. 533; *People v. Smith*, *supra*, 40 Cal.4th at p. 526; *People v. Sapp* (2003) 31 Cal.4th 240, 316-317; *People v. Welch, supra,* 20 Cal.4th at pp. 767-768; *People v. Holt*, (1997) 15 Cal.4th at pp. pp. 683-684 [jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty].)

Moreover, California's death penalty law does not violate the 6th, 8th, and 14th Amendments by failing to require unanimous jury agreement on any particular aggravating factor when deciding the punishment to impose. Neither the federal nor the state Constitutions require the jury to agree unanimously as to aggravating factors when deciding the punishment to impose. (*People v. Williams*, *supra*, 43 Cal.4th at p. 648; *People v. Abilez*, *supra*, 41 Cal.4th at p. 533; *People v. Carey*, *supra*, 41 Cal.4th at p. 135; *People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255; *People v. Osband* (1996) 13 Cal.4th 622, 710.)

Notwithstanding, the preceding decisions of this Court, Charles argues that this Court's decisions are invalid in light of the high court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, [120 S.Ct. 2328, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Cunningham* (AOB 156-168.)

Nor does the death verdict in this case run afoul of *Blakely*, *Apprendi, Rice,* or *Cunningham* on the basis the death penalty statute and instructions do not assign a burden of proof for the jury's review for finding aggravating and mitigating circumstances, or because they do not require

the state to prove beyond a reasonable doubt that an aggravating factor exists (except for other unadjudicated violent criminal activity), that aggravating factors outweigh the mitigating factors, or that death is the appropriate penalty. (*People v. Rogers* (2009) 46 Cal.4th 1136, citing *People v. Parson* (2008) 44 Cal.4th 332, 370, and *People v. Whisenhunt* (2008) 44 Cal.4th 174, 227.) Nothing in *Blakely*, *Apprendi, Rice,* or *Cunningham* compels otherwise. (*People v. Rogers*, *supra*, 46 Cal.4th 1136.)

2. The due process and cruel and unusual punishment clauses of the state and federal Constitution do not mandate a penalty jury, but may only impose a death verdict after finding, beyond a reasonable doubt, the aggravating circumstances outweigh the mitigating circumstances.

Charles contends that the due process and cruel and unusual punishment provisions of the state and federal Constitutions require that a penalty phase jury be instructed that it must find beyond a reasonable doubt that the factors in aggravation outweigh the factors in mitigation in order to impose the death penalty. (AOB 262-265.) Charles is wrong.

This Court has repeatedly considered and rejected this issue and has concluded neither the cruel and unusual punishment clause of the 8th Amendment, nor the due process clause of the 14th Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753, citing in part *People v. Griffin, supra,* 33 Cal.4th at pp. 593-594.) Accordingly, the trial court was not required to instruct the jury as to any burden of proof or persuasion at the penalty phase. (*People v. Blair, supra,* 36 Cal.4th at p. 753, citing *People v. Carpenter, supra,* 15 Cal.4th at pp. 417-418.)

Charles does not provide this Court with any new authority requiring the Court's reconsideration of this issue.

3. The United States Constitution does not require a penalty phase jury base to make written findings regarding aggravating factors before imposing a death verdict.

Charles next argues the trial court's failure to require written or other specific findings by the jury regarding aggravating factors deprived him of his 8th Amendment right to meaningful appellate review. (AOB 265-268.) As Charles acknowledges this Court has repeatedly rejected this claim. (AOB 266; *People v. Farley* (2009) __Cal.4th__ (S024833), citing *People v. Stevens* (2007) 41 Cal.4th 182, 212.)

Charles does not provide this Court with any new authority requiring the Court's reconsideration of this issue.

4. Inter-case proportionality review is not required to ensure a death judgment, is not arbitrarily, discriminatorily, or disproportionately imposed.

Charles next argues because the state's death penalty statute does not provide for a comparative proportionality review, no assurance can be made that an imposed death verdict is proportionate and reliable. (AOB 268-270.)

The absence of intercase proportionality review by either the trial court or on appeal does not violate the 5th, 6th, 8th, or 14th Amendment. (*People v. Farley, supra,* 46 Cal.4th 1053 (S024833), citing *Pulley v. Harris* (1984) 465 U.S. 37, 50-51, [104 S.Ct. 871, 79 L.Ed.2d 29], and *Cox, supra,* 30 Cal.4th at p. 970.) Nor does the circumstance that intercase proportionality review is conducted in noncapital cases cause the death penalty statute to violate defendant's right to equal protection and due process. (*People v. Farley, supra,* 46 Cal.4th 1053 (S024833).) Capital and noncapital defendants are not similarly situated and therefore may be

treated differently without violating constitutional guarantees of equal protection of the laws or due process of law. (*Ibid.*)

5. The trial court properly admitted unadjudicated evidence, that Charles possessed contraband in his cell, and that Charles placed an inmate into a headlock, into the penalty phase evidence.

Charles next argues the trial court improperly allowed unadjudicated evidence, that he possessed contraband in his jail cell and that he put an inmate into a headlock, in the penalty phase pursuant to Penal Code section 190.3, factor (b). He reasons the admission of that evidence violated the decisions in *U.S. v. Booker* (2005) 543 U.S. 220, *Blakely v. Washington, supra*, 542 U.S. 296, *Apprendi v. New Jersey, supra*, 530 U.S. 466, and *Ring v. Arizona, supra*, 536 U.S. 584, because those cases hold findings prerequisite to a death verdict must be decided by the penalty jury beyond a reasonable doubt. He concludes his death verdict must be reduced on this basis. (AOB 270-271.) As this Court held in previous cases raising the same issue, there is no requirement under the 8th or 14th Amendments that a jury find the existence of unadjudicated criminal activity under section 190.3, factor (b), unanimously or beyond a reasonable doubt. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) This Court also found the United States Supreme Court's *Blakely, Apprendi,* and *Ring* decisions interpreting the 6th Amendment's guarantee of a jury trial do not compel a different result. (*People v. Blair, supra*, 36 Cal.4th at p. 753, citing *People v. Morrison* (2004) 34 Cal.4th 698, 731.)

Nor does Charles's reliance on *Booker* alter the preceding conclusion. (*People v. Friend, supra,* 47 Cal.4th at p. 89.)

6. The list of potential mitigating factors in Penal Code section 190.3, factors (d) and (g), are proper and do not limit a penalty jury's consideration of qualifying evidence.

Charles's claim that the terms "extreme" and "substantial," appearing in section 190.3, factors (d) and (g), improperly restrict a jury's consideration of qualifying evidence. (AOB 271.) This Court has repeatedly rejected this same claim. As explained in the *Farley* decision, the use of the words "extreme" in Penal code section 190.3, factors (d) and (g), and "substantial" in factor (g), does not render those factors unconstitutionally vague, arbitrary, or capricious, nor does it act as a barrier to the consideration of mitigating evidence or violate the 5th, 6th, 8th, or 14th Amendments. (*People v. Farley* (2009) __Cal.4th__ (S024833); *People v. Hawthorne* (2009) 46 Cal.4th 67, 104; *People v. Bunyard* (2009) 45 Cal.4th 836, 861; *People v. Smith, supra*, 30 Cal.4th 581, 642.)

7. Charles forfeited his challenge of the "whether or not" terminology in Penal Code Section 190.3 by not objecting to the jury being instructed with CALJIC No. 8.85 [penalty-factors to consider]; Penal Code section 190.3 properly allows the jury to weight applicable mitigating and aggravating evidence; the trial court was not required to identify mitigating evidence for the jury.

Charles next argues the jury was improperly instructed on the law pertaining to weighing the aggravating and mitigating evidence pursuant to Penal Code section 190.3, factors (d), (e), (f), (g), (h) and (j), (hereafter "section 190.3") because the phrase "whether or not" embodied in section 190.3 and in CALJIC No. 8.85 (hereafter "No. 8.85") and which was instructed to the jury, improperly allowed the jury unbridled authority to decide the absence of mitigating evidence to be an aggravating factor and consider otherwise mitigating evidence, e.g., evidence establishing mental defect, as an aggravating factor. (AOB 272-275.)

Preliminarily, Charles is barred from raising this issue for the first time on appeal. Charles did not object to the penalty jury being instructed with No. 8.85 when the lower court and counsel discussed the proposed penalty trial instructions. (35RT 5079-5081, 5085-5086.) Nor did Charles object to No. 8.85 prior to the court reading that instruction to the jury. (35RT 5100-5101; see 6CT 1923-1924 [CALJIC No. 8.85].) Because he never objected to No. 8.85 being read to the jury, nor does the claimed instructional error affect his substantial rights, Charles is barred from raising this issue for the first time on appeal. (*People v. Anderson, supra,* 152 Cal.App.4th at p. 927, citing *People v. Watson*, *supra*, 46 Cal.2d 818.)

Even if this issue is addressed on the merits, this Court has repeatedly addressed and rejected this same argument in other cases. (*People v. Harris* (2008) 43 Cal.4th 1269, 1321, referring to *People v. Tafoya* (2007) 42 Cal.4th 147, 198, and *People v. Gray* (2005) 37 Cal.4th 168, 236.) He does not provide this Court with any new authority requiring the Court's reconsideration of this issue.

D. California's Sentencing Scheme Does Not Violate the Equal Protection Clause of the Constitution

Charles next claims that "California's capital sentencing scheme violates the equal protection clause." (AOB 275-278.) This Court has previously rejected this claim and should do so here. (*People v. Jackson* (2009) 45 Cal.4th 662, 701.)

Moreover, capital and noncapital defendants are not similarly situated and thus may be treated differently without offending equal protection principles. (*People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Smith*, *supra*, 35 Cal.4th at p.374; see also *People v. Johnson* (1992) 3 Cal.4th 1183, 1242-1243.)

E. California's Use of the Death Penalty Does Not Violate International Law and Does Not Violate the 8th and 14th Amendments

Charles argues that the death penalty is contrary to international norms of human decency because it is used as a regular punishment for substantial numbers of crimes. He explains because the law of international nations, e.g., the International Covenant on Civil and Political Rights (ICCPR) which limits the death penalty to the most serious crimes, recognize the impropriety of capital punishment, this state's death penalty law is unconstitutional because international law is part of our law. He asks for his death verdict be set aside. (AOB 278-281.)

This Court has repeatedly rejected this and similar arguments and particularly the contention that the death penalty violates international law, evolving international norms of decency, or the ICCPR. (See *People v. Turner* (2004) 34 Cal.4th 406, 439-440; *People v. Brown* (2004) 33 Cal.4th 382, 403-404.) Moreover, this Court has held the use of the death penalty in California does not violate international norms where, as here, the sentence of death is rendered in accordance with state and federal constitutional and statutory requirements. *(People v. Perry, supra,* 38 Cal. at p. 322; *People v. Brown, supra,* 33 Cal.4th at pp. 403-404; see also *People v. Smith* (2005) 35 Cal.4th 334, 375; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Charles has not presented any legal authority justifying departure from this solid line of precedent.

XII. BECAUSE THERE WERE NO GUILT OR PENALTY PHASE ERRORS, OR ANY SUCH ERROR WAS HARMLESS, CHARLES'S TRIAL DID NOT SUFFER FROM CUMULATIVE ERROR

Charles contends that reversal is required based on the cumulative effect of errors that undermined the fundamental fairness of the trial and the reliability of the death judgment. (AOB 282-286.) Charles's claim of cumulative error should be rejected.

As set forth above, several of Charles's claims were forfeited due to his failure to object below. However, even when the merits of the issues are considered, there are no multiple errors and, to the extent there was error, Charles has failed to demonstrate prejudice. (See *People v. Sapp*, *supra*, 31 Cal.4th at p. 316 ["We have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial. We reach the same conclusion with respect to the cumulative effect of any assumed errors."]; *People v. Seaton*, *supra*, 26 Cal.4th at p. 692 ["The few minor errors, considered singly or cumulatively, were harmless."].) Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Brasure*, *supra*, 42 Cal.4th at p. 1074 ["We have concluded no prejudice arose from any of these possible errors, and we can discern no cumulative or synergistic effect arising from them."]; *People v. Boyette*, *supra*, 29 Cal.4th at pp. 467-468.) Even a capital defendant is entitled to only a fair trial, not a perfect one. (*People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219.)

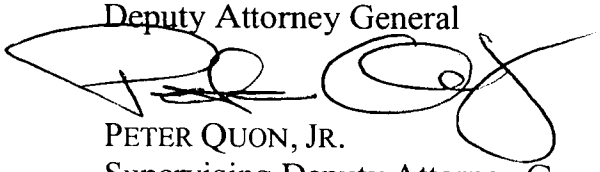
CONCLUSION

As presented above, Charles received a fair trial. Nothing more is required. This Court should, therefore, reject Charles's claim of cumulative error in the penalty phase trial.

Dated: August 28, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
ADRIANNE S. DENAULT
Deputy Attorney General



PETER QUON, JR.
Supervising Deputy Attorney General
Attorneys for Respondent

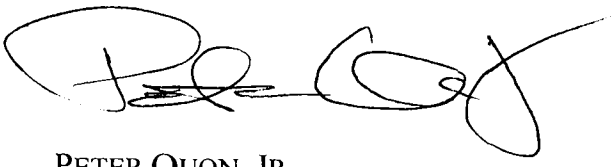
PQ:lr
SD1999XS0002
70208150.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Brief uses a 13 point Times New Roman font and contains 39,545 words.

Dated: August 28, 2009

EDMUND G. BROWN JR.
Attorney General of California



PETER QUON, JR.
Supervising Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Edward Charles, III**
No.: **S076337**

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 August 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 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

R. Clayton Seaman, Jr., Esq.
P.O. Box 12008
Prescott, AZ 86304-2008
Counsel for Appellant Edward Charles, III
(2 copies)

County of Orange
Central Justice Center
Superior Court of California
700 Civic Center Drive West

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3672

Governor's Office
Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92702-1994

Clerk of the Court of Appeal
4th Appellate District, Div. 3
P.O. Box 22055
Santa Ana, CA 92702

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 August 28, 2009, at San Diego, California.

Laura Ruiz
Declarant

Signature

SD1999XS0002
70208991.doc