IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **DONALD RAY DEBOSE,** Defendant and Appellant.	S080837 **CAPITAL CASE**

Los Angeles County Superior Court No. YA035529
The Honorable James R. Brandlin, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

On February 16, 1999, the Los Angeles County District Attorney filed a seven-count amended information.[1/] Counts 1 through 3 and 6 through 7 charged crimes committed against Dannie Kim: murder (Pen. Code,[2/] § 187, subd. (a); count 1), second degree robbery (§ 211; count 2), arson causing great bodily injury (§ 451, subd. (a); count 3), and genital penetration by foreign object (§ 289, subd. (a); counts 6 and 7).[3/] Counts 4 and 5 charged crimes

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1. Appellant had previously filed Penal Code section 995 motions on June 22, 1998 (2CT 328-349) and on January 13, 1999 (2CT 389-406), which were denied on January 19, 1999 (2CT 407).

2. All further statutory references are to the Penal Code, unless otherwise indicated.

3. Codefendants Anthony Edward Flagg and Carl Lamont Higgins were also charged in the counts relating to crimes committed against Ms. Kim (counts one through three and six through seven). (2CT 450-458.) Higgins and Flagg were both found guilty of first degree murder (count 1) with the special circumstances of the commission of murder during arson and robbery found true, second degree robbery (count 2), and arson causing great bodily injury (count 3). (2CT Supp. III 299-301, 311-313.) The jury fixed the penalty for both Higgins and Flagg as to count 1 at life imprisonment without the possibility of parole. (2CT Supp. III 323-328.) Flagg and Higgins were both

committed against Vassiliai Dassopoulos: attempted willful, deliberate, and premeditated attempted murder (§§ 664/187, subd. (a); count 4) and second degree robbery (§ 211; count 5).[4/] (2CT 450-458.)

It was further alleged as to count 1 that the murder of Ms. Kim was committed while engaged in the commission of rape by instrument, arson, and robbery (§ 190.2, subd. (a)(17)). It was further alleged as to count 1 that Ms. Kim's murder was intentional and involved the infliction of torture (§ 190.2, subd. (a)(18).) (2CT 450-452.) Personal infliction of great bodily injury (§ 12022.7, subd. (a)) was alleged as to counts 2, 4, and 5. (2CT 452-455.) Personal use of a firearm (§ 12022.5, subd. (a)(1)) was alleged as to counts 1 through 7. (2CT 456.)

On February 16, 1999, appellant pled not guilty to the charges in the amended information and denied all special allegations. (2CT 448.)

On March 29, 1999, the cause was called for trial and jury selection commenced. (3CT 585.) On April 7, 1999, twelve jurors and five alternates were impaneled. (3CT 613.) On April 16, 1999, the court granted the People's motion to dismiss juror number 2 pursuant to section 1089. Alternate number 2 was seated as juror number 2. (3CT 625-626.) On April 23, 1999, the court granted the defense motion to excuse jurors number 2 and number 11.

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sentenced to state prison for the term of life without the possibility of parole plus 10 years. (2CT Supp. III 325-328.) Their non-capital convictions were affirmed (as modified) by the California Court of Appeal, Second Appellate District, Division Four in *People v. Flagg et al.*, No. B135685.

4. Derrick Gray had been charged by amended felony complaint in the counts relating to crimes committed against Ms. Dassopoulos (counts four and five). (1CT 7A-13.) On February 18, 1998, Gray moved to sever his trial from that of his codefendants. (1CT 32-40; 1CT Supp II 1-9.) On May 4, 1998, Gray pled guilty to one count of second degree robbery (§ 211) with a sentence of five years in state prison. (1CT Supp. II 20-21, 48-49, 53, 55, 207.)

Alternate jurors number 1 and number 4 were seated as number 2 and number 11 respectively. (3CT 639.)

On May 7, 1999, the jury commenced deliberations. (3CT 672.) On May 13, 1999, the jury found appellant guilty of first degree murder (count 1), second degree robbery (count 2), arson causing great bodily injury (count 3), willful, deliberate, and premeditated attempted murder (count 4), and second degree robbery (count 5). The jury found true the special circumstance allegations that Ms. Kim was murdered in the course of arson and in the course of robbery.[5/] Personal use of a firearm allegations were found true as to counts one, two, four, and five. Personal infliction of great bodily injury allegations were found true as to counts 2, 4, and 5. (3CT 680-684; 5CT 1000-1004.)

On May 20, 1999, juror number 4 was excused for financial hardship and alternate juror 5691 was seated as juror number 4. (3CT 822.)

On May 17, 1999, the penalty phase commenced. (3CT 805-806.) On June 1, 1999, the jury commenced deliberations. (3CT 832.) On June 3, 1999, the jury fixed the penalty for appellant at death. (3CT 836-837; 5CT 1005.)

On July 21, 1999, appellant's motion pursuant to section 190.4, subdivision (e), for modification of the verdict imposing the death penalty (4CT 930-937) was heard and denied (4CT 955-956). Appellant's motion for a new trial was also heard and denied. (4CT 956.)

On July 21, 1999, appellant was sentenced to death. (4CT 956-957.) Appellant was also sentenced to 10 years pursuant to section 12022.5, subdivision (a), to be served consecutive to the sentence in count 1. The following sentences were also imposed and ordered to run consecutively to the

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5. The jury was unable to reach a verdict as to counts 6 and 7 and as to the special circumstances that the murder was committed in the commission of rape by instrument and that the murder involved the infliction of torture. A mistrial was declared as to counts 6 and 7 and as to those two special circumstances. (3CT 68-681; 5CT 1004; 26 RT 3745-3756.)

sentence in count 1: (1) as to count 4, appellant was sentenced to life with the possibility of parole plus three years (§ 12022.7) and one year and eight months (§ 12022.5, subd. (a)); (2) as to count 2, appellant was sentenced to one year; (3) as to count 3, appellant was sentenced to nine years; and (4) as to count 5, appellant was sentenced to one year plus three years (§ 12022.7) and one year and eight months (§ 12022.5, subd. (a)).

Appellant was given credit for 660 days of presentence custody, including 574 actual days. (4CT 957-961.)

This appeal is automatic. (§ 1239.)

STATEMENT OF FACTS

I. GUILT PHASE EVIDENCE

A. Introduction

Appellant and several accomplices stalked at least two women in the Hollywood Park Casino in Inglewood and followed them from the casino.

First, appellant, Carl Higgins, and Anthony Flagg stalked Dannie Kim in the casino, watched her collect her winnings, and followed her from the parking garage. An eyewitness saw appellant and his two accomplices beat Kim in a location near the casino and fire three or four shots. Some of his observations were corroborated by other eyewitnesses. The car was set on fire and Kim was found, barely alive, severely burned in the trunk of the car.

Shortly after Kim and her car were set on fire, her cellular telephone and Visa credit card were used. Although Kim never spoke again, a Hollywood Park Casino chip found in the car led police to casino surveillance tapes from which they identified appellant and his accomplices as persons who were stalking Kim prior to her death.

A sexual assault examiner formed the opinion that Kim had been sexually assaulted. Kim's autopsy revealed that her clavicle was broken prior to death and that this was a separate injury from the gunshot wounds. The cause of her death was determined to be multiple gunshot wounds plus multiple thermal burns. The arson investigation revealed that the fire had been intentionally set.

Five days after Kim was attacked, appellant and another accomplice, Derrick Gray, stalked Vassiliki Dassopoulos through the Hollywood Park Casino, watched her cash out her chips, and followed her home to San Bernardino. After Dassopoulos pulled into her garage, appellant and Gray attacked her viciously, choking her, and eventually placing a gun against her head and firing a single shot into her head. Although suffering from permanent tongue and vocal cord injuries, Dassopoulos survived and, at trial, positively identified appellant as the person who shot her. Dassopoulos' credit card was used shortly after she was shot.

Three days after Dassopoulos was attacked, the police apprehended appellant in a car in the parking structure at the Hollywood Park Casino with Dassopoulos' Visa card in his possession. A gun was found under the front passenger seat of the car. A ballistics expert determined that the expended bullets and casings from both the Kim and Dassopoulos shootings were fired from that gun. A motel key in appellant's possession led police to Anthony Flagg, who lived two blocks from where Kim had been shot and set on fire.

Appellant presented an alibi defense. Higgins' defense consisted of impeachment of Lewis' eyewitness testimony. Flagg's defense consisted of expert gynecological testimony to rebut the sexual assault evidence and alibi evidence.

B. Prosecution

1. The Murder Of Dannie Kim

At about 5:15 a.m. on December 17, 1997, Willard Lewis and a prostitute known only as "Jasmine" parked on Osage Street in Inglewood, reclined the front seats all the way back, passed a crack pipe back and forth, and engaged in oral sex activities. When Lewis heard some arguing, he "peeped out" to see what was going on and saw an Asian woman and two men, who he later identified as appellant and Higgins.[6/] The woman kept saying over and over, "No, no, no." (9RT 1462-1468, 1502, 1534-1536.) One of the two men had the woman by her shoulder and she looked "kind of beat up in the face." The struggling went on for five to ten minutes. Lewis did not help the woman because he should not have "been out there" himself. (9RT 1468-1469.) Lewis saw appellant grab the woman by the arm and "like pulled her back towards him." The other man was "more or less blocking the way" so that the woman could not escape." Lewis also saw "a shadow of a person who [he] thought may have been a [third] person, leaned over in the car." (9RT 1469-1471, 1474, 1517, 1546.)

Lewis lay back down and then heard a door or trunk of a car slam and heard maybe three or four shots. Lewis believed it was a small caliber gun, perhaps a .38, a .380, or a .32. (9RT 1469, 1553.) When Lewis heard the gunshots, appellant was standing in the direction where the shots were coming from and appellant was "tucking something away." (9RT 1554.) After Lewis heard the gunshots, he looked out and saw the man who had fired the gun and

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6. At trial, Lewis positively identified both appellant and Higgins as the men he recognized from that night on Osage Street. (9RT 1502-1503, 1509.) Previously, on July 15, 1998, Detective Lawler had shown Lewis photographic six-pack lineups (Peo. Exh. Nos. 37 and 39) from which he positively identified appellant and Higgins. (9RT 1503-1506.)

another man walking off. (9RT 1471, 1502-1503.) At the time the shots were fired, Higgins "had started to leave from the vehicle." Lewis thought he heard Higgins say, "Come on, Don." The person who said, "Come on, Don," looked in the car at Lewis and made eye contact. (9RT 1472-1473, 1502, 1518.)

Lewis remained in the car for five or ten minutes and then, when he thought it was safe to leave, he drove around the corner. The prostitute who had been with him got out of the car and ran to a telephone to call "911." Lewis then circled around. When he came back about 20 minutes later, he saw the fire department at the scene. The convertible where the shooting had occurred was now burning. (7RT 1232; 9RT 1472, 1476-1477, 1525.)

At about 5 a.m. that morning, Rosemarie Howard, who lived on the west side of Osage, directly across the street from Kelso Elementary School, heard a "woman talking extremely loud outside." Howard could not understand what the woman was saying and, therefore, assumed she was speaking a foreign language. Howard did not hear any other voices. About five to ten minutes later, Howard heard "five shots" fired in rapid succession from the same direction that the woman's voice had come from. Howard grabbed her two sons and lay down on the floor "[b]ecause the shots were so close." (7RT 1225-1227, 1231, 1237-1238.) At about 5:45 a.m., or about 15 minutes after she heard the shots, Howard heard a "big boom" like an explosion. It shook her apartment building. She looked out her son's window and saw "real dark orange" smoke coming from the school. (7RT 1227, 1231, 1234.) Howard ran to the front of the green apartment building where she lived, banged on the door, and told the people inside to call "911" because a convertible was on fire. (7RT 1228-1229, 1231.)

Valerie Hutchinson taught at the elementary school across the street from Howard's apartment. As Hutchinson made a left turn onto Kelso from Osage, she saw a car parked on Osage and a person standing outside the car. (8RT

1297-1298, 1300-1301, 1305.) It struck Hutchinson as "peculiar" that there was someone there at that time of the morning. The person was outside of the car on the driver's side with the window open and was leaning into the car. He was leaning into the car at a 90-degree angle, bent at the waist and was wearing dark, baggy clothing, including dark pants and a dark jacket.[7] (8RT 1301-1303, 1312, 1315.) Hutchinson continued making a left turn onto Kelso, pulled into the parking lot, got her bags and papers together, and went inside the school. (8RT 1305.) Later, when Hutchinson saw a car on fire, she noted it was the same car that she had seen the man leaning into. (8RT 1321-1322.)

At about 6:25 a.m., when Inglewood Firefighter Albert Williams and other firefighters arrived on Osage Street, the flames from a blue Chrysler Le Baron on fire were eight to ten feet high and the smoke went up for a couple of hundred feet. The Le Baron was the only car parked on that side of the street. The interior of the car was a "total burn." (7RT 1250, 1252, 1254, 1263, 1279.) As the firefighters were getting ready to pull up their hoses, one of the firefighters noticed that there was someone in the trunk. Williams looked through the back seat, which had partially burned off, and saw some jeans and what appeared to be the buttocks of a person. Williams was not sure if the person was alive or dead so he "poked" the person and the person moved. He then poked again "to make certain" and got more movement. (7RT 1255, 1266.)

The firefighters worked with pry bars and axes and popped open the trunk. There was a woman inside whose hair was singed and whose face, gums, teeth, and throat were all blackened. She was in a fetal position, facing away from the back of the car. Her left buttocks were burned, primarily near

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7. At trial, Hutchinson was shown photographs of a jacket (Peo. Exh. No. 13) and of a pair of pants (Peo. Exh. No. 14) and she testified that the clothing depicted was similar to what the person she saw on Osage had been wearing. (8RT 1305.)

where the pocket would be. At least half of her buttocks had some burns on it. Her burns appeared to be in the areas closest to the top of the trunk and closest to the interior of the car. (7RT 1255, 1257-1259, 1267.) The victim had been breathing "straight black smoke." She had an "agonal gasp," which is "usually the last throes of somebody making it." (7RT 1256-1268.)

The paramedics removed the victim from the trunk and cut her clothing away. Although she had a pulse, the paramedics were unable to get a blood pressure reading. Her left leg and her entire left arm were black "[a]nd real white and had a crystally [sic] appearance, were real hard to the touch, almost like they were stuck in a contracted position." Her burns were thermal burns. It was more like convected heat than direct heat. Although the entire passenger area of the car had been charred down to the metal in the seats, it did not appear that the direct flame had gotten to the trunk. Paramedic Don Morelan noted the victim had gunshot wounds to her torso and to her left arm. (RT 1331-1336, 1338.) On the way to the hospital, the victim was completely unconscious, but breathing. She did not respond to verbal commands. While they were treating her, she began moving her arms about and her head back and forth, but her eyes were closed. (RT 1339-1341, 1351-1352, 1356.)

Firefighter Williams also saw one shell casing in the trunk up in a little track or channel. (7RT 1262.)

At the crime scene, Inglewood Police Detective Robert Pessis took a series of crime scene photographs, which showed, among other things, five expended cartridge casings (Peo. Exh. No. 28) and four expended projectiles, one in the trunk (Peo. Exh. No. 29B), one in the back of the trunk (Peo. Exh. No. 30A), one in the trunk, but submerged in liquid (Peo. Exh. No. 30B), and one on the seat in the rear passenger compartment (Peo. Exh. No. 29A). (7RT 1284-1285, 1287; 8RT 1384-1391, 1415-1419.)

Two gold rings, one of which contained a diamond solitaire, were found in some debris just south of the car, perhaps a foot or two away from the car. These rings appeared to be in some debris that had been removed from the rear of the car. The debris had been kind of molten and bound together and the investigators had picked through it to see if there was anything of value in it. (8RT 1428-1429.)

At some point, two attempts were made to lift fingerprints from the car, but a latent print found on the car lacked sufficient ridge details to compare to other prints. (8RT 1430.)

A Hollywood Park Casino chip was found in the right front passenger area of the victim's car. (8RT 1388-1390.)

From the vehicle's license plates, Detective Lawler determined there were two registered owners, Dannie Kim and Kenneth Klundt. (RT 2528.) Although Washington State's Department of Motor Vehicles faxed the detective copies of the driver's license photographs for Dannie Kim and Kenneth Kundt, Detective Lawler could not determine from the photograph if Dannie Kim was the woman found in the trunk of the car. (RT 2529.)

Dannie Kim had been visiting her sister, Miah Richey, in Los Angeles and had her car, a green Chrysler Le Baron, with her. (7RT 1206-1208.) At about 3 p.m. on December 16, 1997, Richey met her sister at the Hollywood Park Casino. (7RT 1207-1210.) Richey was not a gambler and would only go to the casino to watch her sister play. Kim played at the casino about four times a week during the time she stayed with her sister. That afternoon, Richey sat behind her sister for about two hours - - until about 5:30 or 6 p.m. Kim seemed to feel at that point that Richey was "bothering her" and asked her to go upstairs to play Bingo. (7RT at 1210, 1213, 1222-1223.) Between 3 and 5 p.m., Kim had about $1,000. At about 11 p.m., she had only 30 to 40 dollars left in her hand and was agitated. At about 11 p.m., Kim asked Richey "to go home" and

said she would be "right behind her." Richey left the casino and did not see her sister again that night. (7RT 1209-1211, 1221.)

On December 17, Richey noted her sister had not come home, but did not think it was significant because sometimes Kim would forget to call and would sometimes spend the entire night at the casino, particularly if she was having a good night. (7RT 1211-1212.) Richey tried to call her sister on the cellular telephone she had loaned her, but received no response. Richey also called the Commerce Casino in case her sister had gone there. (7RT 1214.) Kim's cellular telephone was not found at the crime scene. (18RT 2605-2606.)

During the evening hours of December 18, 1997, Detective Lawler met with Richey and Richey's husband and discussed with them the possibility that the victim might be Dannie Kim, Richey's sister. He showed them the driver's license photograph and the photograph of Dannie Kim from the hospital. (17RT 2536.) At the hospital, Richey could not recognize her sister because of the injuries. However, Richey had painted her sister's fingernails a few days before she disappeared and Richey recognized her sister's fingernails. The "[o]nly part [that] wasn't burned was the left side of [her] hands." (7RT 1218.)

At the hospital, Chris McClung, a registered nurse who had specialized training in sexual assault examinations, concluded that there was a strong possibility Kim had been sexually assaulted in the vaginal area. (14RT 2055-2062, 2078, 2096.) However, McClung could not determine to a certainty that Kim had been vaginally penetrated because of the copious vaginal drainage. McClung noted a possible healing abrasion and redness and swelling, but such redness and swelling could also be due to renal failure and infection. (14RT 2071-2073.) McClung formed the opinion that Kim had been rectally assaulted because she found a large tear in the 6:00 position and multiple tears at the 12:00, 3:00, and 8:00 positions. (14RT 2081, 2082, 2089.) Although 54 per

cent of Kim's body had been burned, there were no burns in the genitalia or anal areas. (14RT 2084, 2086, 2143-2146; 17RT 2452, 2496.)

Criminalist Don Johnson analyzed the sexual assault kit which McClung prepared as well as a pair of panties found on the victim. No semen was detected on any of the samples. However, such findings did not negate the possibility of intercourse as Kim had been washed by hospital personnel, the samples had been collected two days after she was attacked, a condom could have been used, the ejaculation could have been of a lower volume, Kim's body had been manipulated through medical care, and semen is less likely to be present in the rectum because of defecation and bacteria. (14RT 2140-2142; 15RT 2239-2243.) An examination of the car Kim had been found in showed possible blood and semen stains, but chemical tests for blood and semen proved negative. (15RT 2251-2252.)

Dr. Lee Boohacker performed an autopsy on Kim's body on December 28, 1997. Dr. Boohacker determined the cause of Kim's death was multiple gunshot wounds plus multiple thermal burns. He also determined that her injuries were consistent with her having been sexually assaulted both vaginally and rectally.[8/] (17RT 2459.) Dr. Boohacker removed one medium caliber missile with a copper jacket (Peo. Exh. No. 79) from Kim's left arm and located two entrance wounds, one in the back of her left shoulder and one at the top of the left shoulder towards the back of the upper arm, and one exit wound at the front of the left side of the chest. (17RT 2431, 2434, 2436-2437, 2440, 2442-2443.)

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8. On cross-examination, Dr. Boohacker stated he had never examined a live person for evidence of a sexual assault (17RT 2476) and that there was no evidence of acute inflammatory reaction in the rectal area (17RT 2485). The absence of such inflammatory reaction did not alter Dr. Boohacker's opinion of the sexual assault because there were tears of the anus and rectum and the decedent had been in the hospital for five to six days. (17RT 2497.) This appearance "is not inconsistent with five to six days." (17RT 2498.)

Dr. Boohacker determined that Kim's face, chest, and left arm were badly burned. The reddish color at the edge of the burned area indicated that she was alive when she was burned. (17RT 2443-2445.) There were also burn injuries to Kim's right arm, but the burn pattern indicated that the flame had been exposed to the left side of her body. (17RT 2448-2449.)

Kim's clavicle was fractured into a lot of little pieces, but this injury was not associated in any way with the bullet wounds. (17RT 2449-2450.) Dr. Boohacker observed a videotape of Kim from the casino from the early morning before she was attacked and he determined that the movements she made were not consistent with the comminuted fracture he later found in her clavicle. (17RT 2467, 2469-2470.)

Dr. Boohacker found five irregular tears at different angles in Kim's anus and rectum. He opined that a large foreign object could have produced all five wounds or they could have been caused by repeated injuries by a blunt force object. The possibility that these injuries were caused by a rectal thermometer was "extremely remote, almost impossible." (17RT 2543-2456.) Dr. Boohacker also noted Kim's vulva and labia majora were "quite swollen" and that there were two superficial vaginal tears consistent with blunt force such as that caused by a penis or other foreign object. (17RT 2457-2458.)

Los Angeles County Deputy Sheriff Michael Cofield, an arson and bomb expert, examined Kim's car and determined that the fire originated "[k]ind of in the floorboard area, kind of on maybe where the seats were. The center console." (8RT 1361-1362, 1366, 1368.) When Deputy Cofield lifted up the plastic vinyl cover on the dashboard, he "immediately at that point got a real strong odor of gasoline." (8RT 1369-1370.) In his opinion, it was an intentionally set fire and the fire was caused by the introduction of an ignition source such as heat, an open flame, a match, or something burning to the vapors of flammable fluid, which appeared to have been gasoline. There was no way

this fire could have been an accidental fire. The smell of the gasoline was "really strong" in the right front passenger floorboard area. (8RT 1371-1373.) Deputy Cofield also determined that there had been no fire in the engine compartment because the firewall that separates the passenger compartment from the engine was not burned, the top of the battery, which is plastic, was not burned or melted, and there was nothing in the gas line which had been interrupted or broken. (8RT 1374-1375.)

Because Detectives Harkins and Lawler discovered a partially burned $5 Hollywood Park poker chip (Peo. Exh. No. 8) on the right front floorboard of the vehicle, their investigation led them to the Hollywood Park Casino. They met with Dan Stegemann of the casino's security and he assisted them in viewing casino surveillance videotapes to locate a female Asian patron who was at that casino either on December 17, 1997, or during the night-time hours on the evening of December 16, 1997. (12RT 1912-1913; 17RT 2533.) The Hollywood Park Casino had a new state-of-the-art security system with a camera over every gaming table in the entire casino in addition to "pan-and-tilt cameras" in the bubble in casino ceiling. These cameras can move around up and down and can zoom in on individuals, zoom in on cards, and can actually zoom in close enough to see the serial number on a bill laid on a table from about 20 feet away. (18RT 2635-2638.)

When the surveillance personnel identified Kim and backtracked her locations within the casino, the surveillance personnel found individuals who either came near her, encountered her, or had some connection with her, and their movements were then traced. (19RT 2699-2701.) The tapes showed that, on December 16, 1997, at 10:57 p.m., Kim drove into the VIP parking lot and entered the casino through the VIP entrance. From 11:08 p.m. to 12:21 a.m., Kim played at poker tables in the VIP area. (19RT 2709-2711.) At 2:34 a.m., the car driven by the suspects -- appellant, Higgins, and Flagg -- entered gate

four and went into the west parking lot. All three suspects walked together up the south ramp towards the casino. Suspect one (appellant) had a navy blue coat or jacket with a white collar. Suspect two (Flagg) had a shaved head and a long black jacket. Suspect three (Higgins) walked in the middle of the three and he had a brown jacket on. (19RT 2712-2714.) The entire time the three suspects were in the casino, Kim was at poker table 13. None of the three suspects gambled while they were in the casino. (19RT 2721; 20RT 2830-2831, 2864-2865.)

At 3 a.m., appellant and his accomplices seemed to hone in on Kim. Appellant walked up the aisle inside the "Pegasus" or "VIP" area and, at one point, Kim, who was seated at table 13, was half a table length away from appellant, who faced in Kim's direction. Five minutes later, appellant left the Pegasus area and met both Flagg and Higgins at the "Big Board." (19RT 2726.) Flagg then got up and walked over to the Pegasus area. He went directly to Kim's table (table 13) and stood and watched the game. He remained standing there, watching for seven minutes until 3:15 a.m. At 3:10 a.m., Kim appeared to be ready to quit playing. She took a rack of yellow chips and exchanged them with another player for $500. (19RT 2727-2728.) At 3:15 a.m., Flagg walked out of the Pegasus area and down to the Big Board. Two minutes later, at 3:17 a.m., Higgins left the Big Board area and walked to poker table 33. At 3:27 a.m., Kim won two rather large Poker hands back to back and "raked" in several hundreds of dollars. (19RT 2729.)

At 3:33 a.m., Flagg went to poker table 43 and appellant walked across to poker table 45 and went south to the south security entrance where he met Higgins at poker table 33. Flagg seemed to watch a game at poker table 43, but he turned around and took a look at the game where Kim was playing. At 3:41 a.m., appellant and Flagg were at poker table 33. (19RT 2730-2731.) At 3:47 a.m., Flagg turned around and looked towards Kim a couple of additional

times. In the surveillance tape, his body could be seen physically turning and his head turning in the direction of Kim who was only 15 feet away. (19RT 2732.)

At 3:47 a.m., Kim "racked" up her chips apparently in preparation to leave. Kim then left the table and walked over to the Pegasus cage where she cashed out. While Kim was cashing out, all three suspects met. They were less than 100 feet from Kim. (19RT 2732-2734.) While Kim waited in the cash-out line, she held several racks of chips. There are 100 chips in a rack. The yellow chips are $5 each. A rack of yellow chips would be worth $500. She had four racks not completely full. (19RT 2738.) Kim also had $500 in purple chips and had two white chips, worth $100 each. At one point in the transaction at the cash-out window, it appeared that the cashier asked Kim if she wanted the cashier to change all the chips. Kim put her hand out and the cashier gave Kim back one $5 yellow chip and one $1 blue chip. (19RT 2740-2742.) At 3:50 a.m., as Kim was receiving her money, appellant and Flagg got up and left the Big Board area. Kim reached in and retrieved her $1,900. The chip later found in the car trunk with Kim appeared to be a burnt Hollywood Casino $5 chip. (19RT 2743-2744.)

Appellant, Flagg, and Higgins left the south casino doors as Kim left the casino through the VIP doors.[9/] A minute after Kim's car backed out of a parking spot in the VIP lot, the suspects' car left the west parking lot. (17RT 2543-2544; 19RT 2745, 2747-2749, 2752.) Kim's car left the VIP area and headed toward gate 4. (19RT 2759.) The suspects's car "rolled" through a stop sign and followed Kim's car with a taxicab between them. Cameras on Century

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9. Approximately three people left from another door. One of these individuals was wearing a navy coat with a light or tan collar. Later, Detective Lawler identified this person as appellant. The second person was later identified as Flagg. The third person was wearing a brown coat with white shoes and was later identified as Higgins. (17RT 2543-2544.)

Boulevard then showed a van go by, Kim's car go by, a taxicab pass Kim's car, and the suspect's vehicle following. (19RT 2760-2761.) Detective Lawler sent composite photographs from the videotapes to various law enforcement agencies around the county in an attempt to identify the three suspects. (17RT 2548-2549.)

Credit card records revealed that Kim's Bank of America Visa card was used at a card reader built into a gas pump at the Texaco Gas Station located at the intersection of Manchester and Crenshaw at 6:03 a.m. and at 6:04 a.m. on December 17, 1997. The authorization for both transactions attempted at the card reader was declined because the card-user did not input the personal identification number ("PIN") required to use the card. The records indicated that someone tried to purchase one dollar's worth of gas with the card. When a card has been stolen or counterfeited, the thief will often test it by trying to purchase one dollar's worth of gas. The records also indicated that two additional attempts were made to use the credit card at a Mobil station. (12RT 1839-1843, 1848-1855.)

AirTouch Cellular records indicated the cellular telephone Kim had in her possession the evening she was assaulted ((818) 421-5815) was called at 2:23 p.m. on December 16, 1997, from Richey's cellular telephone ((818) 426-6807) for 55 seconds and then used at 5:22 a.m. to make an outgoing call to (213) 853-1252, which is the number for time information. Typically, when someone has recently acquired a cellular telephone, they might call the number for time to verify that the cellular telephone works. If the call is completed, then the telephone is usable. (16RT 2361-2363.) At 5:32 a.m., several uncompleted calls were attempted through the Hobart Cell Site located at 4376 South Western in Los Angeles. These incomplete calls were relayed to cell site 157, located on the 3700 block of Century Boulevard. (16RT 2372-2374.) In

particular, the call was relayed to the north-facing side of the Inglewood Cell Site. (16RT 2375-2379.)

Testimony was also presented with regard to how eyewitness Lewis' account of the attack on Kim came to light. Lewis actually did not tell anyone what he had seen until April 1998. At that point, Lewis was in county jail and going up to Bible study when he saw the person, later identified as Higgins, who had said, "Come on, Don." Higgins gave Lewis "a real strange look." Lewis remembered Higgins's face, but was not sure whether Higgins had seen him or not. Lewis was concerned about the situation because he had never said anything and he could still remember that lady plead for her life. (9RT 1476.) Lewis discussed the matter with the chaplain, Minister Stephen Moss, telling the minister what he had witnessed. With Lewis' permission, Moss eventually reported the information to Detective Lawler. (9RT 1477-1478, 1529, 1568, 1572-1575, 1578.)

Although Lewis was in jail facing a third-strike case, his decision to talk to the authorities was not because of his pending case.[10/] (9RT 1478.) Lewis believed that the person he recognized, Higgins, had seen him at the time of the

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10. Lewis admitted in direct testimony that he was in custody for a petty theft with a prior case and that he had pled in that case. (9RT 1460.) When Lewis pled to his pending case, the trial court stated that "the court is going to strike a strike regardless if the defendant ever testifies as a witness or cooperates." The trial court also explained to Lewis that it had "already indicated to counsel before [the court] ever heard that the defendant may [] potentially be a material witness, that [the court] was considering striking a strike, and that [the court] believed that a sentence somewhere in the range of approximately ten years" and that a sentence of nine years appeared to be appropriate "based on the facts of the case. Namely, the age of the prior conviction, and the de minimis value of the loss." The plea bargain had nothing to do with the instant case. When prosecutor Jennings took the plea, he advised Lewis that the District Attorney's Office would not give Lewis any deal. Prosecutor Jennings told Lewis that his office still saw Lewis's case as a three-strike case and that Lewis was looking at 25 years to life. (9RT 1549, 1550-1551,1565.)

shooting. (9RT 1497.) On July 15, 1998, Lewis was shown a photographic six-pack by Detective Lawler from which he identified appellant as the person he had seen grabbing the Asian woman.[11/] (9RT 1504-1505.)

2. The Robbery Of Vassiliki Dassopoulos

At about 7 p.m. on December 22, 1997, just five days after the Kim incident, Vassiliki Dassopoulos, a professional card player, went to the Hollywood Park Casino by herself. She parked in the special VIP parking lot and entered the casino through the VIP door. Dassopoulos went directly to the area of the casino where they play the "bigger games." (11RT 1748-1749.) Dassopoulos had $4,000 when she arrived at the casino and had $4,725 when she finished playing. (11RT 1750-1753.) At 4:40 a.m., when Dassopoulos finished playing, she went to the special Pegasus window to cash out $2,025 and then she put the money in a black leather purse with a gold strap.[12/] (11RT 1752-1753.) She then proceeded to the parking lot, where she got in her car, a blue Toyota Corolla, and headed home. (11RT 1757.) Dassopoulos took the 105 Freeway to the northbound 605 Freeway and then took the 10 Freeway eastbound. She got off the 10 Freeway at the Archibald exit in San Bernardino. (11RT 1758.)

It was still dark when Dassopoulos reached her home. She used an automatic garage door opener to open her garage. When she stopped her car and turned off her headlights, she saw something in her peripheral vision, "like

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11. At a break during Lewis' testimony at trial, appellant said, "Smoke you" to Lewis. Appellant was looking directly at Lewis when he said this. (9RT 1501, 1584-1585.)

12. The casino surveillance tape showed Dassopoulos bringing her chips to the cashier's cage at 4:40 a.m. (11RT 1755.) Although Dassopoulos only cashed out $2,025 worth of chips, she had $4,725 in her possession when she was robbed. She had arrived at the casino with $4,000 and had won $725. (11RT 1799, 1808.)

a body." A person, who she identified at trial as appellant,[13] grabbed at her car door and she was unable to shut it. There was a struggle and Dassopoulos panicked. She slammed on her car horn and appellant acted "more vicious" as a result. (11RT 1759-1761, 1769-1770.) After appellant first got her out of the car, she got back in. Then, appellant grabbed her head with both hands and dragged her "like he was going to disconnect [her] head." Appellant then took out a gun from his left waistband area.[14] (11RT 1762-1763, 1765-1766.)

Appellant was wearing a dark jacket, possibly brown. It was not a suit jacket. It was a "sporty thing" with a zipper. He had a knitted cap on his head and possibly a T-shirt and jeans. (11RT 1766; 12RT 1801.) At some point in the struggle, appellant got control of Dassopoulos's purse. (11RT 1769.) Dassopoulos struggled and tried to avoid getting shot. She was constantly moving so appellant would not be able to aim in a particular place to hurt her badly. She felt him at her back. Appellant used his left hand and arm across her neck like a choke hold and his right hand against her right neck area behind the ear, pressing up against her skull. Appellant placed the gun against her head and shot her in the head. (11RT 1767-1769.)

After she heard the "bang," Dassopoulos felt that "[t]he whole world was coming down" and that her head felt like "a thousand pounds." Everything was spinning around her. She grabbed the car to try to hold on, but she could not find her balance. She fell to the floor and passed out. She tried to get up, but she could not even raise her head up. She crawled to the garage door and

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13. At trial, Dassopoulos was asked to look around and tell the prosecutor if she saw her attacker in the courtroom. She immediately pointed to appellant and said, "That's him with the braids." (11RT 1769-1770.)

14. At trial, Dassopoulos was shown a gun (Peo. Exh. No. 26), which she said was about the same size as the gun which appellant used. (11RT 1765.)

managed to stick her head out. She hoped someone would pass by and see here. She was face-down and bleeding quite a bit. (11RT 1770-1773.)

Eventually, paramedics arrived and she was taken by helicopter to San Bernardino County Hospital. A bullet had gone through the back of her head an inch behind her right ear and passed through her head to the left side of her cheek about an inch behind the left corner of her mouth where her lips meet. As a result of her injuries, Dassopoulos no longer can drink without using a straw and her tongue now has paralysis. Because of her injuries, she lost her right vocal cord and, at the time of trial, could only speak in a low voice. (11RT 1773-1774, 1756-1757.)

Bank of America records showed that at 4:10 a.m. and at 6:32 a.m. on December 23, 1997, transactions were made with Dassopoulos's credit card first at a Unocal gas station located near the intersection of the 5 and the 10 Freeways and then later at a Unocal station located at 8616 South Western Avenue. (12RT 1856-1860; 16RT 2347-2354.)

At the crime scene, Investigator William Townley observed a shell casing on the garage floor near Dassopoulos's car. An expended round was found on the driver's side floor mat. (11RT 1735, 1738-1739, 1742-1743.)

On December 23, 1997, Hollywood Park Casino Security Chief Stegemann informed Detective Lawler that, during the early morning hours of December 23, 1997, there had been a follow-home robbery to San Bernardino County, specifically to Rancho Cucamonga. Upon further review of the casino videotapes, a fourth suspect was discovered. This suspect was wearing a brown jacket and was later identified as Derrick Grey. (17RT 2549, 2579-2580.)

As he did with Kim, Stegemann prepared composite videos of Dassopoulos's activities in the casino. These composite videos revealed that, at 7:22 p.m., Dassopoulos walked into the casino through the VIP entrance and that, at 9:16 p.m., the exact same car that had followed Kim from the casino

entered gate four. This car had the same body shape and style as well as the same wheel covers and the same gray tone in the black and white video as the car that had followed Kim from the casino. Stegemann opined that this car was a Ford Taurus and was probably red or burgundy. This car continued into the west parking lot and appellant then walked out of the west parking lot followed by Grey. They went to the Pegasus area of the casino. (19RT 2771-2776.)

At 4:11 a.m., as the suspects entered the casino floor, Dassopoulos was still at the poker table. She had three and one-half racks of chips, almost $2,000 worth, in front of her. Appellant walked by Dassoupolus. Grey took a seat at an empty table. At 4:13 a.m., appellant stood behind Grey and they both looked over towards Dassopoulos's game. It is common for a gambler to gamble with stacks or multiple racks of chips in front of them. Some gamblers do it to intimidate new players coming to the table. Dassopoulos's reputation as a player was that of a "tough" player. (19RT 2776-2777, 2779-2781.)

At 4:14 a.m., appellant left the Pegasus area. Grey remained seated and looking directly towards Dassopoulos's game. (19RT 2781.) At about 4:24 a.m., appellant looked toward the Pegasus area as he talked to a security guard. Appellant and Grey then both entered the men's restroom. Appellant left the restroom and headed into the Pegasus area surrounded by the pony wall. (RT 2783-2785.) He stopped at another table, but could very easily have been looking toward Dassopoulos. At 4:27 a.m., the casino floor-man tapped appellant on the shoulder and they walked off. Generally, casino floor-men are trained to ask nonplayers to either sign up for a game or leave the gaming area. Grey left the men's restroom, walked behind the Big Board, crossed back over, and walked up to appellant as appellant spoke with the floor-man. Appellant and Grey then went over to a "dead game" or table where no game is being played and sat down. (19RT 2786-2788.)

At 4:33 a.m., appellant and Grey exchanged a few words and appellant immediately walked back over to the Pegasus area. Dassopoulos was still gambling. She then began the process of standing up and racking up her chips. She picked up the chips not already in racks and placed them into racks to carry them over to the cage. (19RT 2790.) At 4:40 a.m., Dassopoulos went to the Pegasus window with four or five racks. The cashier unstacked the racks. There were four racks of yellow, worth $500 each, for a total of $2,000. She also had four $5 chips and five $1 chips. (19RT 2791.)

At 4:41 a.m., Dassopoulos walked away from the window with her cash. Appellant then walked out the south door and appeared to be looking for Dassopoulos. Appellant could have gone out to a landing to see if Dassopoulos was walking down a ramp. Appellant walked back inside a few seconds later. (19RT 2792-2795.)

It turned out that instead of immediately leaving the Pegasus cage and going out of the doors as Kim did, Dassopoulos walked down the main aisle-way of the casino and headed to the women's restroom. At 4:42 a.m., Dassopoulos came out of the restroom and, at the same time, appellant came walking back inside. (19RT 2793-2795.) Dassopoulos then headed out the VIP doors. Appellant said something to Grey, who had been playing a video game, and they both immediately headed out the south doors. At 4:47 a.m. it appeared appellant was skipping down the ramp "just like a happy little child." (19RT 2794-2796.)

Then, a vehicle came out of the west parking lot. Grey got into the vehicle. (19RT 2797.) The suspects's car headed toward gate four and then backed up and headed back toward the west parking lot. A few seconds later, Dassopoulos's car came out of the VIP parking lot, entered gate 4, and turned right on Century. The suspects' car reappeared and followed in the direction of Dassopoulos's car. (19RT 2798.)

3. The Arrests Of Appellant, Flagg, And Higgins

On December 25, 1997, Detectives Harkins and Lawler received information leading them to believe the suspects involved in Kim's murder and the attempted murder of Dassopoulos were at the Hollywood Park Casino. They had set up surveillance in the hope of catching the suspects returning to the casino a third time. (12RT 1901-1902.) Detective Lawler and Lieutenant McBride had asked Officer James Hernandez to monitor the casino in the surveillance room and look for a suspect who they believed frequented the casino: appellant. (10RT 1628-1629.)

As soon as appellant walked in the casino, he was identified by Officer Hernandez and Officer Brian Spencer. Detective Lawler suggested Officer Hernandez go out to the parking lot to look for the red vehicle that had been involved in the crimes against Kim and Dassopoulos. Officer Hernandez found the red vehicle (see Peo. Exh. No. 25E) and waited to see who would approach the car. (10RT 1631-1633.) Shondel Jones left the casino, got in the passenger side of the red car, and remained there from about 1 a.m. until about 4 a.m. (10RT 1637-1639; 18RT 2585.) At that point, appellant went to the car and the officers apprehended both of them.[15/] (10RT 1639; 18RT 2585-2586.) Appellant was in the driver's seat and Jones in the front passenger seat. (18RT 2593.)

When appellant was arrested, he had the following items in his possession: a Visa card with Dassopoulos's name embossed on it that had been in her purse when she was shot; a black wallet; some motel keys; another key; a cellular telephone; and United States currency. (10RT 1623; 11RT 1775;

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15. Los Angeles County Jail records (Peo. Exh. No. 82) showed that Shondel Jones was in custody from November 1, 1997, to December 23, 1997, which meant that Jones was not a suspect in either the crimes committed against Kim or Dassopoulos. (18RT 2587-2588.)

18RT 2593-2594.) A .380 auto caliber semiautomatic Davis pistol was also found under the right front passenger seat in the car. (12RT 1905, 1914.) A baseball cap and a handkerchief were found on the right front floorboard; a black knit cap was found in the trunk; and a blue jacket was found in the car. (12RT 1904, 1918; 17RT 2559-2560, 2562-2563.)

The orange motel key found in appellant's position turned out to be for a motel room appellant had rented. (9RT 1597-1599, 1603-1604, 1616-1617. 1619; 18RT 2576-2577.) Motel telephone records showed a call had been made from that room to Flagg's apartment in Inglewood. Officer Castanon was instructed to put together a surveillance team and watch the address. (18RT 2577-2578.) Flagg was thereafter arrested in front of his apartment. (16RT 2386.) The apartment was two blocks away from Kelso Elementary School. This distance was about a two-minute walk. (16RT 2393.) At Flagg's home, a black leather jacket and some pants were found and the jacket was seized because it matched one of the coats worn by the suspects on December 17, 1997. (12RT 1910-1912.) Higgins was subsequently identified and arrested. (16RT 2512, 2514-2515.)

On January 8, 1998, Detective Kopasz showed Dassopoulos a photographic six-pack, from which she identified appellant. (11RT 1775-1777; 12RT 1812-1814.) Dassopoulos did not identify anyone right away and was confused by the hairstyles because her assailant had worn a "beanie cap." Therefore, the detective used a yellow Post-It note to simulate a beanie cap and Dassopoulos picked appellant's photograph because of the eyes. (12RT 1803-1806, 1815.) Dassopoulos was also shown a photographic six-pack containing Derrick Grey's photograph, but she did not identify him. (12RT 1810, 1817, 1821.) Dassopoulos did not view a live line-up at the county jail as she could not even stand as a result of the injuries she sustained. (12RT 1807.)

At some point, Detective Harkins went to Derrick Grey's house and found a brown leather jacket. This jacket matched the clothing Grey could be seen in the surveillance tape wearing at the casino. (12RT 1927-1928, 1930.)

4. Ballistics Evidence

Los Angeles County Sheriff's Department Firearms Examiner Richard Catalani test-fired the .380 auto caliber semiautomatic pistol found in the car with appellant and compared test-fired bullets from that gun with the expended .380 auto caliber bullet and casing (Peo. Exh. No. 52) found in connection with the Dassopoulos shooting. He concluded that the expended cartridge case could have been fired in the Davis pistol and that the bullet was "positively fired from that Davis pistol, and that pistol only." (12RT 1871, 1873, 1878-1880.)

Catalani also compared the test-fired bullets with the ballistics evidence from the Kim case. Catalani determined that the three expended .380 auto caliber bullets (Peo. Exh. No. 29B, 30A, & 30B) found at the crime scene and the bullet that the coroner removed from Kim (Peo. Exh. No. 79) were fired from the Davis pistol found with appellant and from that pistol only.[16] Of the five expended cartridge casings found at the crime scene (Peo. Exh. No. 28), Catalini determined that three were definitely fired from that pistol and two could have been fired from that pistol. (12RT 1882-1888.)

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16. One of the items that appeared to be a projectile (Peo. Exh. No. 29A) was a molten piece of copper-colored metal that did not look like a typical bullet. It had no comparison value. (12RT 1884.)

C. Defense Evidence

1. Appellant's Evidence

Appellant presented an alibi defense with regard to the crimes committed against Kim.[17/]

Terri Casey, testified that, at 4:30 a.m. on December 17, 1997, she was at 96th and Budlong Streets in Los Angeles when she received a page from appellant. After receiving the page, she went to 135th and Prairie Streets in Hawthorne to pick him up and, at about 5 a.m., she dropped him off at his home on 58th Street. There was no one else with him when she picked him up. (20RT 2909-2915, 2918, 2924, 2937.)

At some point thereafter, most likely after New Year's, Casey learned that appellant had been accused of participating in a crime which occurred on December 17, 1997. When she learned of the date involved, she thought that appellant "couldn't have done it, because [she] picked him up that night." (20RT 2915-2917.) Casey spoke with appellant's first lawyer, Mark Clark (20RT 2917), but never contacted the Inglewood Police Department (20RT 2928). On March 9, 1999, Defense Investigator Joe Brown interviewed Casey. (20RT 2919.) When shown at trial her statement to the investigator in which she had stated she did not remember the date of the incident, Casey stated that the statement was not accurate. (20RT 2922.)

2. Evidence Presented By Codefendants Flagg And Higgins

Higgins's defense focused on impeaching the testimony of eyewitness Lewis. Although Lewis told his attorney that he was a witness to a murder, he did not provide any details or even the date it happened. (21RT 2968-2970.) Lewis had a new attorney when he pled guilty. Although he did not tell that

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17. He did not present any alibi with regard to the crimes committed against Dassopoulos.

new attorney about witnessing a murder, he did ask if he could have his sentence reduced if he testified he witnessed a murder. (21RT 2974-2975.) Lewis testified in this case on April 30, 1999, and the last day to modify his sentence under Penal Code section 1170(d), was May 28, 1999. Lewis intended to ask the court to reduce his sentence downward from nine years based on his testimony. (21RT 2978-2980.) Lewis did not know anything about section 1170(d) until his attorney told him about the procedure. Although in 1992 he had filed a pro per section 1170(d) motion from prison, the 1992 motion was merely a form Lewis filled out. (21RT 2981-2982, 2985, 2997-2998.)

On January 27, 1998, Corrections Agent Erskine Richmond forwarded a report concerning the crime to Higgins who was housed in the same cell in Men's Central Jail with Lewis from May 4th to May 14th, 1998. Inmates are allowed to keep documentation in their cells and there is no place to lock up documents in the cell. (21RT 3003-3013, 3025-3030.)

At around 7:30 a.m. on December 17, 1997, Lewis reported to work at Cabot, Lodge, and Associates in West Los Angeles. All his work that day was done over the telephone and he did not leave his office. (21RT 2970-2971.) Stephanie Boyce a co-worker, testified that Lewis was only a sales agent, not a senior financial negotiator, that Lewis was compensated strictly by commission, that Lewis worked there for only three months, that during the time he worked there, Lewis would often "disappear" for days, that Lewis and his wife had been evicted from their residence, and that Lewis did not have a car in December. (21RT 3118-3134.)

Flagg's defense consisted of the testimony of a gynecologist to rebut the evidence of sexual assault. After reviewing the records, Dr. Fuller concluded that "[t]he evidence does not bear out a sexual assault." Dr. Fuller noted Kim's temperature was taken rectally four times and inserting a rectal thermometer can

cause an injury to the rectum. Just spreading the cheeks in someone like Kim who sustained terrible damage to her skin, he explained, can crack the skin and break the skin. Dr. Fuller also attributed Kim's rectal and vaginal injuries to the wiping away of blood by a nurse. Further, Dr. Fuller attributed vaginal tears to the use of a catheter. Dr. Fuller explained that a broken clavicle can be caused by trauma and, in particular, it could be caused by someone thrashing about in a trunk. (21RT 3047, 3050-3051, 3054-3058, 3061-3063, 3073.)

However, the following testimony belied Dr. Fuller's findings: (1) less than one per cent of Dr. Fuller's practice consisted of treating or observing sexual assault victims; (2) on cross-examination, Dr. Fuller conceded the treating physicians did not note any burn in the genitalia area; (3) Dr. Fuller never personally observed Kim; (4) Dr. Fuller never observed enlargements of the photographs of the victim; (5) Dr. Fuller only attended one hour of class regarding sexual assault and that was on child sexual assault; (6) Dr. Fuller's entire practice was basically focused on ob/gyn; (7) Dr. Fuller retired in 1995 until a few months before trial; (8) Dr. Fuller was not a proctologist; and (9) Dr. Fuller did not specialize in burns or fractures. (21RT 3077, 3086-3087, 3091-3092, 3094-3095.)

Flagg also presented an eyewitness and an alibi witness. Carolyn Jackson, who was in a custody drug treatment program at the time of trial, lived on Osage between Kelso and La Brea. On the morning of the car fire, she saw a "tall figure" walk away from or pass the car when it went up in flames, this "tall figure" was light-complected and wore a blue jacket and tan pants, and she thought she saw this person walking earlier with a "short and stubby" woman. (22RT 3154-3158, 3161-3164.)

Flagg's mother recalled that, at 5:00, 5:15, or 5:30 a.m., she became aware Flagg was in the house because he has a post-nasal drip in the morning. She kept hearing him make that noise and she wanted to get up and tell him to

please blow his nose. Flagg's mother decided to get up because she had been hearing him for a while, but, by the time she got up, she heard Flagg get up and go to the bathroom where he blew his nose. She left her bedroom only when she heard "the shots and all the excitement." She heard the helicopters that morning and she watched the news later that day and saw the burning car on the news. (22RT 3181-3186.)

However, on December 17, 1997, Officer Ishibashi obtained a statement from Flagg's mother at the crime scene. She told Officer Ishibashi that she saw a Black man walking away from the green Chrysler Le Baron. She said that a few moments later she saw the explosion. (RT 3197-3199.) At trial, Flagg's mother also conceded her son was the person in the black leather jacket and the dark pants described as suspect number two in the casino surveillance video. (RT 3250.)

D. Rebuttal

Defense Investigator Joe Brown interviewed Casey concerning a statement by appellant that Casey had picked him up at a certain location and had transported him to another location. When she was interviewed, Casey did not recall the date when this transporting took place. Casey did recall that the time she transported appellant was the same date that an Asian woman was "killed at a casino." Brown also asked Casey if she knew a woman named Tonica Harris because appellant had stated that he was at Tonica Harris's house. Casey told Brown that appellant had paged her from Harris's house, but that he left that location before she picked him up at 135th Street and Prairie Avenue. (23RT 3282-3284.)

Tonica Harris knew appellant. Appellant went to Harris's house once in December 1997. It was a Saturday. She was certain that it was a Saturday because she worked on Saturdays. He arrived before she went to work. It was early in the morning. Harris had to be at work at 8 a.m. that day. Consequently,

appellant arrived about 10 to 15 minutes or perhaps 20 minutes before it was time for Harris to go to work. The court took judicial notice that December 17, 1997, was a Wednesday. (23RT 3290-3293.)

According to Detective Lawler, who had been a police officer for over 25 years, the Inglewood Police Department, unlike the Los Angeles Police Department, did not provide air coverage for crime scenes. When the Inglewood Police Department does need air coverage, they utilize the Los Angeles County Sheriff's Department's Air Bureau. (23RT 3293-3294.) On December 17, 1997, the only helicopters that responded to the crime scene were news station helicopters. (23RT 3295.) When Detective Lawler arrived at the crime scene at 7:30 a.m., there were no helicopters present. Eventually, some helicopters arrived. Detective Lawler was at the crime scene for several hours. (23RT 3297.) The helicopters were not there very long. (23RT 3298.)

II. Penalty Phase Evidence

A. Aggravating Evidence

The prosecution presented evidence in aggravation regarding appellant. In 1994, after gunshots were heard, appellant fled from the police while carrying a loaded firearm. On two separate occasions in 1998 and 1999, appellant was found to be in possession of a shank while in jail and, in 1998, appellant was involved in an altercation with another inmate in jail. The prosecution presented victim impact testimony by Kim's family members. The jury also heard aggravating evidence regarding appellant's two codefendants.

1. Appellant's Additional Acts Of Violence

At about 10:45 p.m. on March 30, 1994, Los Angeles Police Sergeant Joseph Sanchez was on patrol at Manchester and Main Streets in Los Angeles with his partner, Officer Jeff Childs, in a marked black-and-white patrol car.

Just as they were coming up on that intersection, Sergeant Sanchez heard approximately five to seven gunshots. It sounded like the shots were coming from the west. Looking in that direction, Sergeant Sanchez saw two Black men on the south side of the street about 50 feet away running westbound. Sergeant Sanchez turned onto Manchester and one of the men, identified at trial as appellant, began running northbound across the street. Appellant appeared to have something in his hands. Believing appellant was the one who fired the shots, Sergeant Sanchez pursued him. Appellant tried to scale a fence, but was unable to do so. Appellant then walked to a trash dumpster and bent down and discarded something underneath the dumpster before hiding behind the dumpster. Underneath the dumpster Sergeant Sanchez then found a loaded .25-caliber semi-automatic handgun. The gunfire he had heard earlier was consistent with a small caliber handgun. When arrested, appellant gave a false name. (27RT 3877, 3879-3886, 3893-3896.)

On June 29, 1998, sheriff's deputies in the county jail heard appellant and inmate Patrick Griggs involved in a confrontation. During the confrontation, Griggs told appellant, "Just drop it, fool, and we can do it." After the two were separated, Griggs told a deputy, "That guy has a shank. I'm going to defend myself." A six-and-one-half inch long wooden shank that appeared to have been made from a broom handle was discovered in appellant's waistband area. It is common knowledge in the jail that weapons are not allowed. (27RT 3857-3861, 3864-3866, 3870-3871.)

On September 2, 1998, sheriff's deputies at the county jail heard a commotion and witnessed appellant and Griggs, face-to-face in a combative stance. (27RT 3848-3851, 3854, 3874-3876.) Griggs had a bump to the side of his head and scratches to his neck. (27RT 3851.)

On February 12, 1999, a sheriff's deputy, performing a random search for weapons and other contraband, searched appellant's single-man cell and

discovered underneath appellant's mattress: "[a] silver piece of metal, sharpened to one end, wrapped with a piece of white cloth as a handle." (27RT 3837-3840.)

2. Victim Impact Evidence

Kim's husband, her sister, and her brother testified with regard to victim impact evidence.

Kim's husband, Bruce Galbreath, first met Kim in Oregon and she gave up her job to move to Utah with him. They married on June 20, 1995. In December 1997, Galbreath, who worked as a long-haul truck driver, was at a truck stop in Florida when he was told his wife had been shot. Galbreath did not receive any details until he changed planes in Atlanta and was told that his wife had been shot three to five times, stuffed in the trunk of a car, and the car had been set on fire. At the hospital, Galbreath could "barely recognize" his wife. He remained with her at the hospital "[t]he whole time." After her funeral, Galbreath could not function to do his job. (32RT 4535-4544.)

Kim's brother, Han Kim, testified that Dannie Kim had been the only sibling that he grew up with as their younger sister, Miah Richey, stayed with their mother after their parents divorced. Han Kim moved to the United States when he was 29 years old because his sisters were already living here. Shortly before she died, Dannie Kim gave Han some money and told him to "use it when [he] really need[s] it." At the hospital, Han Kim did not recognize his sister because of the extensive burns. When the doctors informed him that they had to amputate his sister's leg, he prayed that she would die instead. Since her death, Han Kim has been "constantly worried." (32RT 4546-4554.)

Dannie Kim's younger sister, Miah Richey, prepared a four-page written statement to read to the jury (Peo. Exh. No. 142. That statement was originally 20 pages in length. Richey "prayed that [she] would wake up from this nightmare to realize that it was only a dream." To her, her sister's death was a

"cruel reality [that] breaks [her] heart and soul." Richey noted that Kim left behind two children, Nicholas and Jessica, photographs of whom were shown to the jury. Nicholas received counseling as a result of his mother's murder. (32RT 4556-4559.)

Richey explained to the jury that Kim's family had just celebrated her birthday without Kim for the second year and that Kim had been murdered three days before Christmas and Kim never got to open her presents. In the hospital, Richey "watched her [sister] hang onto life, but five days of pure hell, she couldn't hang on any more." Richey held "her [sister's] - - badly damaged body as she got cold, and [she] - - felt her bullet wounds to remember. [Richey] can still smell her burnt body, and it still haunts [Richey] with countless nightmares." Since her sister's death, Richey "can barely breathe, barely survive each day, or just find a reason to hang on." After burying her sister, Richey "lost faith in life and God. [She] fell into deep depression, and it nearly caused (sic) [her] life. [She] has been dying slowly and painfully each day since [she] lost her." Richey was "completely lost" and "was not able to return to work, or conduct the simple tasks of every-day life." Richey "was not able to function without medication, and was so fearful of the world that [she] couldn't even take a single step outside of [her] own house." Richey described her sister as "the most tender, soft-hearted person you'd ever meet. She would give anything and everything within her power to whoever was in need." (32RT 4561-4563.)

B. Mitigating Evidence[18/]

Appellant's mother, Kimberley Ashley, who gave birth to appellant when she was 14 years old, testified that appellant was not the same person the

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18. The jury also heard mitigating evidence as to codefendants Flagg and Higgins.

jury saw in the courtroom, that appellant is a caring person who helped her out around the house, and that he was a "real fun joking, laughing person." According to appellant's mother, he was a regular churchgoer and took care of other people's children. Appellant's mother stated that "nobody's perfect" and appellant "doesn't deserve to die for what he's been accused of doing." (33RT 4592-4595.)

Appellant's mother stated that he "always made good grades in school," but also acknowledged that appellant got kicked out of two, and possibly three, junior high schools. (33RT 4597, 4605-4606.) Appellant's mother also conceded that he had wanted his mother to lie to probation authorities about appellant getting fired from a video store job. (33RT 4607.)

Appellant's sister, 18-year-old Irene Broomfield, testified that appellant used to buy her son pampers and milk. (33RT 4620-4621.) On cross-examination, she denied laughing in court while the victim's family was testifying. (33RT 4622.)

Sylvia Thornton, who lived near appellant's mother, had known appellant since he was about 11 or 12 years old. Appellant would help wheel her handicapped son around. He was always laughing. Thornton never saw appellant disrespect his mother. (33RT 4610-4613.) Thornton stated she saw appellant from April 1994 to April 1997. (33RT 4614-4615.)

Eighteen-year-old Mariah Mack went to school with appellant's sister, Irene. Mack knew appellant as "a sweet person" who "loves his family." Mack had never seen appellant "get violent" around his family or disrespect his mother. Mack testified she had known appellant for about five years, including throughout 1994, 1995, 1996, and 1997. (33RT 4625-4629.) It was stipulated, however, that appellant was in the custody of the California Youth Authority from June 1994 until April 1997. (33RT 4630.)

Appellant's stepfather, Tony Broomfield, who sustained a felony conviction for robbery about 17 years prior to trial, described appellant as "a very bright young man" who respected his mother. Broomfield did not believe appellant committed the crimes he had been convicted of committing and blamed the convictions on appellant being a young Black man. (33RT 4635-4638.)

Sixteen-year-old Bryan Harris had known appellant for three years and used to go to the gym with him. Harris described appellant as someone who was always joking and laughing and as someone who was always respectful to his parents. (33RT 4646-4649.) On cross-examination, Harris acknowledged that he did not know a lot of people who appellant "hung out" with. (33RT 4653.)

Appellant's second cousin, Billy Ashley, lived a few blocks away from appellant's mother. Ashley described appellant as a "joker" and a hard worker. Ashley did not know appellant to be a violent person. (33RT 4655-4660.) Ashley, however, did not know who appellant "hung out" with. (33RT 4660, 4665.)

ARGUMENT

I.

IT APPEARS THAT THE ARSON-MURDER SPECIAL CIRCUMSTANCE MUST BE STRICKEN

Appellant contends there is insufficient evidence to support the special circumstance of arson murder. (AOB 49-56.) From a review of the record and applicable law, it appears the striking of the arson-murder special circumstance finding is required for the reason that in this case the arson was not the arson of an inhabited structure or inhabited property.

A defendant is only subject to death or life without the possibility of parole if a murder special circumstance enumerated in Penal Code section 190.2 is found to be true. The arson-murder special circumstance requires the "[a]rson [to be] in violation of subdivision (b) of Section 451." (§ 190.2, subd. (a)(17)(H).) That provision, in turn, provides: "Arson that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for three, five, or eight years." (§ 451, subd. (b).) The term "inhabited" for this purpose in pertinent part "means currently being used for dwelling purposes whether occupied or not." (§ 450, subd. (d).) In *People v. Clark* (1990) 50 Cal.3d 583, at page 606, footnote 13, this Court pointed out "[t]he arson special circumstance thus applies only to arson of an inhabited structure or inhabited property."

Here, the evidence establishes that Kim was dumped in the trunk of her car in preparation of her death and destruction of her body through the arson of her car. No evidence was produced that she used her car for dwelling purposes.[19/] Consequently, the arson special circumstance did not apply here.[20/]

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19. Count III charged a violation of subdivision (a) of section 451, not subdivision (b). Subdivision (a) only requires that the arson cause great bodily injury, not that it be of an inhabited structure or property. Thus, count III was

Appellant also argues that the penalty verdict must be reversed because the jury was told, pursuant to CALJIC No. 8.85, that it could consider the arson-murder special circumstance as a factor in aggravation. (AOB 54-56.) However, as appellant acknowledges, the United States Supreme Court addressed this issue in *Brown v. Sanders* (2006) 546 U.S. 212 [126 S.Ct. 884, 163 L.Ed.2d 723], and determined that an invalidated sentencing factor does not render a sentence unconstitutional if "one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Id.* at p. 220, emphasis in original.)

The Court in *Brown v. Sanders* explained that in California the sentencing factors include "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding." (546 U.S. at p. 222.) Thus, the court explained, the jury's consideration of invalid eligibility factors in the weighing process does not produce constitutional error because all of the facts and circumstances admissible to establish the arson-murder special circumstance "were also properly adduced as aggravating facts bearing upon the 'circumstances of the crime' sentencing factor. They were properly considered whether or not they bore upon the invalided eligibility factor[]." (*Id.* at p. 224, citing *People v. Sanders* (1990) 51 Cal.3d 471, at page 521. Here, unquestionably, the arson was a fact bearing upon the circumstances of the crime. Therefore, the jury properly considered the facts surrounding the arson

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nevertheless properly imposed.

20. Appellant argues that respondent is bound by its concession of the arson-murder special circumstance in codefendant Flagg and Higgins' non-capital Court of Appeal case. (AOB 52-54.) This argument is immaterial in view of Respondent's position. In any event, a concession in one appeal in an intermediate court does not bind a party in a separate appeal case of another defendant in a different court and appellant has not provided any authority explicitly addressing such a point.

even if the arson-special circumstances was not a valid death-eligibility factor.

Appellant attempts to distinguish *Brown v. Sanders* by the fact that there were four special circumstances in that case, of which two had been found invalid, and here there were two special circumstances, one of which appears to be invalid. (AOB 55.) The *Brown v. Sanders* court, however, did not base its decision on the fact that two special circumstances, rather than one, were valid. Instead, it based its decision on the fact that, like here, the facts underlying the invalid special circumstances were valid considerations for the jury as circumstances of the present crimes.

Appellant also argues that *Brown v. Sanders* is inapplicable because "the evidence in aggravation against appellant was not as strong as that introduced against the co-defendants, both of whom received a sentence of LWOP." (AOB 55.) *Brown v. Sanders*, however, does not urge a comparison of aggravating evidence between co-defendants.

Moreover, appellant is simply incorrect. Appellant's aggravating evidence, including the circumstances of the present crimes, fully supported a harsher sentence than that of his codefendants. Even though appellant had no prior record, neither Flagg nor Higgins were involved in the offenses against Ms. Dassopoulos, who appellant followed to her home in San Bernardino, viciously attacked, choking her, and eventually placing a gun against her head and firing a single shot into her head. Also, strong evidence was presented that appellant was the perpetrator who actually shot Ms. Kim. Lewis testified that, when he heard the gunshots, appellant was standing in the direction where the shots were coming from and appellant was "tucking something away." (9RT 1554; see also 35RT 4944 [prosecution arguing in closing that appellant "is the shooter"], 4945 [prosecutor arguing: "Not only was he involved, he's the shooter. He's the person who took the gun and shot Dannie Kim"].)

There was nothing disproportionate about appellant receiving a harsher sentence than his cohorts. Indeed, even appellant's own counsel stated during the penalty phase that, if the jury would give death to any one defendant, it would be appellant. (36RT 5078.) Appellant's counsel conceded at sentencing that his client probably received the harsher sentence because he "had all the appearances of a ringleader" and because he was the shooter. (36RT 5144.) Therefore, appellant's individualized culpability in these crimes warrants the penalty imposed here.

II.

ASSUMING THE ARSON-MURDER SPECIAL CIRCUMSTANCE IS APPLICABLE HERE, THE ARSON WAS NOT INCIDENTAL TO THE MURDER

Appellant further argues that the merger doctrine prohibits the application of the arson-murder special circumstance. (AOB 56-62.) Because the arson-murder special circumstance must be struck as inapplicable here (see Arg. I, *ante*), there appears to be no need to address appellant's argument regarding the merger doctrine as it applied to the arson-murder special circumstance. Nevertheless, in the event this Court reaches a different conclusion than respondent as to the applicability of the arson-murder special circumstance, respondent sets forth the following analysis.

This Court considered this issue in *People v. Mendoza* (2000) 24 Cal.4th 130. In *Mendoza*, this court explained the *"Green* rule":

> A felony-murder special circumstance, such as arson murder, may be alleged when the murder occurs during the commission of the felony, not when the felony occurs during the commission of a murder. (*People v. Marshall, supra*, 15 Cal.4th at p. 41, 61 Cal.Rptr.2d 84, 931 P.2d 262; *People v. Green* (1980) 27 Cal.3d 1, 59-62, 164 Cal.Rptr. 1, 609 P.2d 468.) Thus, to prove a felony-murder special-circumstance allegation,

the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely incidental to an intended murder. (*People v. Clark* (1990) 50 Cal.3d 583, 608, 268 Cal.Rptr. 399, 789 P.2d 127.)

(*People v. Mendoza*, *supra*, 24 Cal.4th at p. 182.)

In *Mendoza*, this Court concluded that *Green* was "inapplicable because [the] defendant set the fire with concurrent intents to kill [the victim] and to destroy evidence of other crimes." (*Id.* at p. 183.) This Court explained that:

"Concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance. (*People v. Clark*, *supra*, 50 Cal.3d at pp. 608-609, 268 Cal.Rptr. 399, 789 P.2d 127.) It is when the underlying felony is merely incidental to a murder that we apply the rule of *Green*, *supra*, 27 Cal.3d 1, 164 Cal.Rptr. 1, 609 P.2d 468." (*People v. Raley*, *supra*, at p. 903, 8 Cal.Rptr.2d 678, 830 P.2d 712.)

(*People v. Mendoza*, *supra*, 24 Cal.4th at p. 183.)

In *Mendoza*, this Court "conclude[d] the evidence [wa]s sufficient to establish that defendant started the fire with 'independent, albeit, concurrent goals.' (*People v. Clark*, *supra*, 50 Cal.3d at p. 609, 268 Cal.Rptr. 399, 789 P.2d 127.)" (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 183.) This Court explained:

The testimony of arson investigator Anthony Jakubowski supports the conclusion that [the] defendant committed the arson not just to kill the victim, but also as a means of concealing the rape or avoiding detection. Jakubowski testified the fire was started when a water-soluble flammable liquid was poured over the bed and distributed throughout the room and then ignited with an open flame. This testimony supports the conclusion that [the] defendant harbored independent, albeit, concurrent goals. He intended not only to kill the victim, but also to

destroy evidence of the rape (such as the victim's torn clothing or bruises on her body) as well as evidence of his presence (such as fingerprints).

(*Id.* at pp. 183-184.)

Just as in *Mendoza*, the evidence in the instant case supports the conclusion that appellant and the codefendants committed the arson not just to kill Ms. Kim, but also as a means of concealing sexual assaults upon her, a means of concealing their robbery of her, avoiding detection, and/or as a means of inflicting additional pain and suffering upon her independent of any intent to kill her. Here, the jury reasonably could have concluded that she was alive when appellant and his cohorts set the car on fire. The evidence in this case supports the conclusion that appellant and the codefendants harbored independent, albeit concurrent, goals of killing the victim, torturing the victim, and destroying evidence. The arson was clearly not incidental to the murder.

Moreover, there are other cases where this Court has concluded that testimony supporting independent, concurrent goals is sufficient to support special circumstances.

In *People v. Barnett* (1998) 17 Cal.4th 1044, this Court explained: "concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (*Id.* at p. 1157, citing *People v. Raley* (1992) 2 Cal.4th 870, 903.) The *Barnett* court explained that, "[a]lthough the jurors heard evidence that [the] defendant had threatened to kill [his victim] even before the two confronted each other on the day of the murder, they were not bound to find that [the] defendant's sole intent from the beginning of the confrontation was to kill him." (*Id.*) Indeed, there was, this Court stated, evidence the defendant had considered letting his victim leave at various points and evidence that the defendant may have wanted initially to have the victim left wounded and exposed to the elements for a couple of days. (*Id.* at p. 1159.)

"From such evidence a reasonable juror could infer that [the] defendant had not finally decided [the victim's] fate at the time of the asportation, so that the kidnapping could not be said to be 'merely incidental' to the murder." (*Id.*, citing *People v. Raley*, *supra*, 2 Cal.4th at p. 902.) Thus, "there was substantial evidence to support the jury's determination that [the] defendant murdered [the victim] to advance the kidnappings, to facilitate his escape, or to avoid detection. That defendant may have had concurrent intent, that is, consisting of both an intent to kill and an intent to commit an independent felony, does not invalidate the felony- murder special circumstance." (*Id.*)

Similarly, in *People v. Raley*, *supra*, 2 Cal.4th 870, this Court explained that "[t]he jury was not bound to accept the prosecutor's argument that defendant's plan from the beginning was to kill his victims." (*Id.* at p. 902.) In *Raley*, the "defendant did not immediately dispose of his victims once he had them in the trunk of his car, but brought them to his home" and "may have been undecided as to their fate at that point." Thus, the court concluded that "[i]t could reasonably be inferred that defendant formed the intent to kill after the asportation" and "that the kidnaping could not be said to be merely incidental to the murder." (*Id.* at p. 903.)

In the instant case, as in *Raley*, appellant and his accomplices did not immediately kill Kim when they first accosted her. Their overriding purpose was not merely to kill her. Indeed, the fact they stalked her through the casino and watched as she cashed out almost $2,000 worth of chips leads to the conclusion that their primary purpose initially was robbery and the arson was to help conceal evidence of the robbery and other crimes they committed against her. As in *Raley*, it could be inferred here appellant and his codefendants formed the intent to kill after transporting Kim to Osage Street, robbing, and sexually assaulting her, so the arson could not be said to be merely incidental to the murder. Indeed, since her death could have been accomplished

by shooting her alone, it is clear the arson was intended to cause Kim additional pain and torture prior to her death and to cause destruction of evidence.

In his opening brief, appellant cites to both *People v. Oliver* (1985) 168 Cal.App.3d 920 [merger doctrine did not apply where defendant threw Molotov cocktail into ex-girlfriend's house because he could have intended either murder or only to cause destruction] and to *People v. Clark, supra*, 50 Cal.3d 583 [merger doctrine did not apply where defendant ignited gasoline causing an occupied house to burn because he could have had an independent felonious purpose other than murder]. (AOB 61.) Appellant attempts to distinguish the instant case based on the fact that Kim's car was set on fire after she was shot and placed in the trunk. (AOB 61-62.)

However, as noted earlier, the evidence here supports the conclusion that appellant and his cohorts could have also committed the arson as a means of concealing sexual assaults on her, as a means of concealing their robbery of her, or simply as a means of inflicting additional pain and suffering on her independent of any intent to kill her. After shooting her several times at close-range, it hardly seems that appellant and his accomplices believed that burning her alive was necessary to effectuate her death.

Consequently, substantial evidence supports the conclusion the arson and the murder had independent although concurrent goals.

III.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO REMOVE JUROR NUMBER TWO (JUROR 5646)

Appellant contends the trial court committed prejudicial error when it dismissed juror number two. (AOB 62-80.) This contention lacks merit.

A. Relevant Proceedings

On April 12, 1999, a Monday and the first day of trial testimony and in the presence of counsel, the court asked an individual who apparently was using a tape recorder, to approach and identify herself. After she stated her name was Kimeko Campbell, the court admonished her that taping of court proceedings was not allowed unless approved in advance by the judge based on a specific petition for that purpose. When asked if she were "an interested party, friend, relative, [or] member of the press[,]" Ms. Campbell responded she was "just [a] spectator." (7RT 1245-1246.)

On April 16, 1999, Flagg's counsel informed the court that he found out at the conclusion of court proceedings the previous day that Ms. Campbell's father was dating one of the jurors and "[s]he is friends with, or has been friends with [Flagg's] family." He stated that during the course of the trial, Ms. Campbell purposefully sat on a side of the courtroom away from where Flagg's family was because she did not want the jurors to see her around or interacting with the family. In the morning, he asked Ms. Campbell if she knew the juror, who "is the nurse, the Black female that's at the top, two down from the left[,]" i.e., juror two who was also juror number 5646. Ms. Campbell responded that "she may have met her one time a long time ago, but she doesn't know her. They haven't spoken, haven't made eye contact since she's been here in the court, or in the hallway." He added that in response to further inquiry, Ms. Campbell explained she was present, "because she's writing a story for class about this case." Ms. Campbell rejected his request to leave. (11RT 1650-1651.)

The prosecutor asked the court to excuse juror two, because, although today Campbell was on the other side of the courtroom, he had seen Campbell previously sitting with some of Flagg's family and when he approached the family members, "they told [him] they were the ones who reminded [him] she

was also present in the preliminary hearing, with the Flagg family." The prosecutor urged the court to remove juror two for cause, because of potential bias arising from the fact Ms. Campbell was someone close to Flagg and her father was dating the juror. (11RT 1651-1652.)

Flagg's attorney opposed the excusal of juror two, because Ms. Campbell had indicated she did not really know juror two and juror two did not know her; they had not made any contact with one another; and although she may have seen juror two a long time ago, she did not really know her and did not speak to her. (11RT 1652.)

In chambers, the court conducted the following inquiry of juror two. When asked if she recognized anyone in the audience section of the courtroom, juror two responded, "Just one person." She added, "Her name is Kim. She's doing a project, or something for school." When asked about their relationship, juror two stated she was dating Ms. Campbell's father and that they had dated for "a little over a year." Although she denied discussing the case with Campbell, juror two admitted she had seen her "five times," including two at her father's house and three times since the trial began. She further denied knowing what Ms. Campbell's interest in the case really was. Juror two also believed it was just coincidental that she saw Ms. Campbell in the courtroom. She indicated that Ms. Campbell had been interested in the case prior to jury selection. Juror two explained that she did not call attention to Ms. Campbell's presence to the court, because "it was never an issue, you know, of trying to communicate with her, or her trying to communicate with me." (11RT 1653-1655.)

When asked how she knew Ms. Campbell had been to court prior to proceedings, juror two responded, "Because she did say that she had been following the case" and on Monday, April 12, during a conversation together, Ms. Campbell explained to juror two in response to her inquiry that she was in

court, because she was doing a class project and had been following the case since its inception. Juror two admitted she saw Ms. Campbell's father "usually every weekend." (11RT 1656-1657.)

The court then conducted an in-chambers inquiry of Ms. Campbell. When asked whether she might know a juror on the case, Ms. Campbell denied knowing juror two but admitted having seen her once at her father's house. She identified herself as being "self-employed as a writer" and stated that she had an unsold "script with the writer's guild[.]" She explained that this was the first trial she ever attended and that she had been present since the preliminary hearings the previous year. She was interested in "this particular case[,]" because it was "close to [her] house originally[.]" She denied, however, she had "a major interest" in the case or that she was "affiliated with anyone" involved. It was just that she found the case interesting, because she had "never been to a murder trial." (11RT 1660-1662.)

The court inquired whether she had any contact with the victim's family members, family members of any defendant, the attorneys, or any law enforcement officers. Ms. Campbell first stated that last year she met a girl at the preliminary hearing whose first name was "Tynesha" but she did not know her last name. She denied actually interviewing Tynesha and stated she "was just talking" and that since "she's been here with me, so I really don't have to ask her anything. [¶] She's been here -- at the preliminary, and she's been here. I know just as much as anybody else really." (11RT 1663.)

When asked what Tynesha's relationship, if any, was to the case, Ms. Campbell responded, "I'm not sure. I don't think she has a relationship to the case." However, when asked if she knew what Tynesha's interest in the case was, Ms. Campbell acknowledged that Tynesha's "boyfriend, or ex-boyfriend is one of the guys there." She clarified that by "guys," she meant the

defendants. She admitted that she had met Tynesha at the preliminary hearing. (11RT 1663-1664.)

When the court asked if she had "any relationship with Tynesha as a friend, or anything else," Ms. Campbell acknowledged, "Actually *she's my niece.*" In response to the prosecutor's inquiry about how close they were, Ms. Campbell responded, "We're not--distant. We'll -- *she's my niece.* I speak with her frequently" and that she had baby-sat Tynesha a couple of times. She also admitted living only 15 minutes away from her. (11RT 1664-1666, emphasis added.)

During a follow-up inquiry of juror two, the prosecutor asked if she knew someone named "Tynesha" and for the name of the person juror two was dating. Juror two denied knowing a "Tynesha" and stated she was dating "Ernie Campbell." She denied knowing any of his children other than Ms. Campbell but admitted knowing he had stepchildren. She did know, however, Ms. Campbell and her father had a close relationship. (11RT 1669-1670.)

When asked by the court whether she could be fair and objective if she knew *her boyfriend's granddaughter or stepgranddaughter was dating a defendant*, juror two responded, "Absolutely. I don't even know them." She added that she did not "know any of the other family" and she did not "have any feelings towards any of them except the father." (11RT 1673.)

The court then asked if she would "feel awkward if [she] ma[d]e a decision one way, and it negatively impacts somebody," i.e., regarding a defendant's guilt or innocence or imposition of LWOP or death as punishment, and whether she would be "thinking in the back of [her] mind gosh, you know, this is my boyfriend's granddaughter's boyfriend. Or it's my boyfriend's . . . step-granddaughter's boyfriend." Juror two responded she would not feel awkward for the reasons that she had to allow her "conscience be [her] guide" and she only knew Ms. Campbell by sight. (11RT 1674.) She added,

They might know me, or might know that, you know, that I've done this. But -- I'll have to deal with that at a later date, after -- you know, after the fact. [¶] And I don't think I will really have to deal with it too much. I don't think it's going to, you know, be -- they're going to hold anything against me, whatever decision I make on the case. You know. [¶] I mean, they have to understand that this is what had to be done, whatever way it goes.

(11RT 1675.) "I feel comfortable making the decision," juror two added. (11RT 1675.)

The prosecutor brought up the fact that Detective Lawler had reported that the victim's sister, Miah Richey, had said that, during a trial break, she heard juror two making a comment that "it's a shame having murders at casinos." The prosecutor stated that he clearly believed the juror was biased as she was dating someone who is related to the case. (11RT 1677.) Juror two denied making such a comment. (11RT 1678-1679.) Richey testified that she heard juror two lean over and start "telling everyone about casino" and that juror two "was saying casino being there, there's a [sic] murders happening around there" and that "casinos, and this is - - causes murders around the people, blah, blah, blah." (11RT 1681.) Juror six, who Richey said juror two had been conversing with, did not recall such a conversation. (11RT 1690-1691.)

After Campbell testified her father had only one natural child (her) (11RT 1694), the prosecutor then argued that Tynesha Coleman, who was on Flagg's witness list, had been apparently in the courtroom of the majority of the proceedings and she had an ongoing relationship with Flagg. He pointed out that Ms. Campbell was "very close" to her father, juror two's boyfriend, and "only natural child." He argued that in order to gain the allegiance of her boyfriend's daughter, juror two would be biased in her decision. He urged that

juror two should be discharged for cause, because, despite her claims otherwise in-camera, juror two was biased, because she had to sit in judgment of someone who was dating a person who was related to the man with whom juror two had an ongoing relationship. (11RT 1696-1698.)

Appellant's counsel argued juror two was clearly unbiased and reminded the court that she said she could be fair. (11RT 1698-1699.) Flagg's counsel chastised the prosecutor for asking the court to "presume bias based on relationship." (11RT 1699.) He subsequently informed the court Tynesha was the mother of Flagg's child: "She was - - she is the mother of his baby." (11RT 1703.)

The prosecutor argued juror two herself realized bias was involved, because she tried to avoid eye contact with Ms. Campbell once she realized her presence. He reminded the court Ms. Campbell sat with Flagg's girlfriend during the preliminary hearing and had contact with her during the breaks and that juror two acknowledged there was a consequence to her sitting as a juror based on her statement to the effect "'well, I will have to deal with that later[.]'" (11RT 1701-1703.)

The court expressed its concern juror two had not brought to its attention her relationship with Ms. Campbell although juror two was "so concerned with the presence of [Ms.] Campbell in the courtroom, that she doesn't even make eye contact with her, even though the distance from juror seat number 2 to the area where the witness, Ms. Campbell, was seated in court is probably no more than 20 feet away[.]" The court opined that it did not make sense that juror two would not even look at Ms. Campbell if she thought there was nothing improper with her presence there and if she was concerned about her presence, it did not make sense that juror two would not alert the court. The other thing that did not make sense to the court was juror two's response to the court's inquiry about whether she would feel uncomfortable about deciding the guilt

or innocence or punishment of a defendant who was dating the granddaughter or stepgranddaughter of her boyfriend. Juror two's response was she was "absolutely comfortable." (11RT 1705-1706.)

Flagg's counsel argued this was simply "a coincidence that nobody could have predicted" and urged that juror two probably just considered Ms. Campbell's presence to be a coincidence rather than anything sinister. (11RT 1708.)

The court ruled:

> This is not a subjective standard. This is an objective standard, based on the facts produced in this court. . . . The court makes a determination of good cause that the juror [two] is unable to perform her duty as a juror. This is an objective standard. The mere fact that the juror may indicate that she still feels comfortable is not the end of the discussion, or the end of the question. The question is whether or not the court is satisfied on an objective standard that she can perform her duty as a juror, based upon the relationship between this juror and Ms. Campbell, and Ms. Campbell and Tynesha Coleman and the defendant. I'm not satisfied that this juror can perform her services as a juror. The court finds good cause under . . . section 1089. Juror number 2 is going to be discharged.

(11RT 1708-1709.)

B. The Trial Court Did Not Abuse Its Discretion Under Section 1089

The trial court's decision was proper. Section 1089 provides in relevant part:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty, or if a juror

requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

In reviewing a trial court's decision either to retain or discharge a juror, reviewing courts use the deferential "abuse of discretion" standard. (*People v. Williams* (2001) 25 Cal.4th 441, 447-448; *People v. Cleveland* (2001) 25 Cal.4th 466, 473; *People v. Earp* (1999) 20 Cal.4th 826, 892, citing *People v. Lucas* (1995) 12 Cal.4th 415, 489; *People v. Beeler* (1995) 9 Cal.4th 953, 975.) The reviewing court will "uphold the decision unless it '"falls outside the bounds of reason."'" (*People v. Earp*, *supra*, 20 Cal.4th at p. 892, quoting *People v. Kipp*, *supra*, 18 Cal.4th 349, 371, quoting *People v. De Santis* (1992) 2 Cal.4th 1198, 1226.)

However, it is important to note while many courts have considered the matter, "few have disturbed a trial court's decision to discharge a juror for good cause." (*People v. Bell* (1998) 61 Cal.App.4th 282, 287.) "The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence. " (*People v. Holt* (1997) 15 Cal.4th 619, 659, citing *People v. Beeler* (1995) 9 Cal.4th 953, 975, 989.)

The trial court "must make a reasonable inquiry to determine whether the person in question is able to perform the duties of a juror." (*People v. Millwee* (1998) 61 Cal.App.4th 282, 287, citing *People v. Burgener* (1986) 41 Cal.3d 505, 519.) "If the answer is in the negative, the inability to perform those duties must be shown on the record to be a 'demonstrable reality.'" (*People v. Millwee*, *supra*, 61 Cal.App.4th at p. 287, citing *People v. Holt* (1997) 15 Cal.4th 619, 659.) "Except where bias is clearly apparent from the record, the trial judge is in the best position to assess the state of mind of a juror or

potential juror on voir dire examination." (*People v. McPeters* (1992) 2 Cal.4th 1148, 1175, citing *People v. Morris* (1991) 53 Cal.3d 152, 186, fn. 4 [disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1], *People v. Johnson* (1989) 47 Cal.3d 1194, 1224.)

For example, "[a] sitting juror's actual bias, which would have supported a challenge for cause, renders him 'unable to perform his duty' and thus subject to discharge. . . ." (*People v. Keenan* (1988) 46 Cal.3d 478, 532.) Similarly, in the context of peremptory challenges, a negative experience with the criminal justice system on the part of a prospective juror or a relative qualifies as a specific bias reason for excusal of a juror. (See, e.g., *People v. Turner* (1994) 8 Cal.4th 137, 171; *People v. Johnson* (1989) 47 Cal.3d 1194, 1215-1216; *People v. Wheeler* (1978) 22 Cal.3d 258, 277, fn.; *People v. Buckley* (1997) 53 Cal.App.4th 658, 668; *People v. Allen* (1989) 212 Cal.App.3d 306, 312.)

Here, the record contains ample evidence to support the trial court's determination of juror two's inability to fulfill her duties "as a demonstrable reality." The trial court was entitled to find actual bias on the part of juror two based on her relationship to Ms. Campbell, who was apparently present daily during the trial and exerted an indirect if not direct negative influence over juror two.

The record does not reflect the extent to which Ms. Campbell intended to influence juror two. Nonetheless, it supports the inference that Ms. Campbell's presence was not simply that of a disinterested "spectator" or someone who was simply writing a story as a school project. The record is also clear that Ms. Campbell had three contacts with juror two during the trial.

The explanation for Ms. Campbell's presence in the courtroom did not ring true. She told juror two that she was there as part of a school class project.

She told the court, however, that she was "self-employed as a writer" and that she was present because she thought it was "just interesting."

Ms. Campbell's initial statement was that "she may have met [juror two] one time a long time ago, but she doesn't know her. They haven't spoken, haven't made eye contact since she's been here in the court, or in the hallway." (11RT 1650-1651.) *Juror two*, however, *stated that she had seen* Ms. Campbell "four times," including twice at the house of her father, whom *juror two* had been dating for about a year, and *three times since trial started.* (11RT 1654, emphasis added.) Also, Ms. Campbell, whom juror two referred to as "Kim," explained her presence to juror two as having to do with "a project, or something for school." (11RT 1654.)

Although Ms. Campbell did not have a direct relationship with Flagg, she had on at least one occasion sat with the Flagg family members in court and was the aunt of Tynesha Coleman, who was Flagg's girlfriend and the mother of his child and whom Flagg listed as a witness. Also, Ms. Campbell concealed her relationship with Tynesha until asked specifically by the court about such relationship. Initially, Ms. Campbell told the court that she met Tynesha for the first time at the preliminary hearing the previous year and did not know her last name. Upon further inquiry, however, she conceded that Tynesha was her niece; that she spoke frequently with her and had babysat her in the past; and that Tynesha's natural last name was Coleman. (11RT 1663-1666.)

The trial court was also entitled to infer that Ms. Campbell in fact had already exerted a negative influence on juror two's ability to perform her duties in light of juror two's failure to disclose her relationship with Ms. Campbell, the daughter of juror two's steady boyfriend of about a year, and based on juror two's less than candid responses to the inquiries regarding their relationship.

This case sharply contrasts with *People v. Ray* (1996) 13 Cal.4th 313, where a juror passed a note to the court stating that the daughter of the victim

was a senior at the high school where the juror worked, but that the juror and the daughter had never talked about the case. This Court found no evidence of juror bias, noting nothing in the note indicated the juror had developed special feelings toward the victim's family or that he had worked with the victim's child at school, the juror and the daughter were not personally acquainted with one another, and the juror volunteered the information to the trial court. (*Id.* at pp. 342-343.)

Here, in contrast, the more the court delved into the matter, the more it became apparent there was an entire web of connections between the juror in question, Campbell, and Flagg. Moreover, neither the juror in question nor Campbell had come forward with this information and Campbell attempted to disguise the fact her niece was dating Flagg by initially claiming she had just met Tynesha Coleman at the preliminary hearing.

People v. McPeters, *supra*, 2 Cal.4th 1148, is similarly distinguishable. In *McPeters*, a juror stated he had learned he might be acquainted with the victim's husband. (*Id.* at p. 1174.) The juror revealed he was in the process of buying a house, that the victim's husband might be the seller's real estate agent, and that he had met and spoken with the agent on at least three occasions at the agent's office. The prosecutor confirmed the victim's husband was in the real estate business and there was no dispute that he was the agent representing the seller in the residential purchase transaction to which the juror was a party. (*Id.*)

The *McPeters* court reasoned that, "[i]n the context of voir dire examination, it is conceivable a juror might not immediately remember the name of a real estate agent with whom he had recently dealt or recognize the agent's name on a long list of witnesses." (2 Cal.4th at p. 1175.) The court noted that, notwithstanding his contact with the victim's husband, which in any event was brief and not naturally or inevitably productive of bias, the juror

affirmed his belief he could be fair and impartial and that the juror's candid disclosure of the contact even before the trial began further supports his determination to be a fair and impartial juror. (*Id.*)

The instant case is entirely unlike *McPeters*. Here, there was no "candid disclosure of the contact" before the trial began. Instead, the court was required to repeatedly delve into the matter before finding out there were connections between the juror in question and Flagg. The juror did not immediately come forward with the information she knew someone who had been in the courtroom who was friendly with Flagg's family. Moreover, the spectator in question, Campbell, tried to disguise the fact she had a connection with Flagg by claiming she had just met Tynesha Coleman, who turned out to be Campbell's niece. Also, unlike the situation in *McPeters*, the event connecting the juror here (a lengthy dating relationship with someone whose granddaughter was dating one of the defendants) was one which was naturally or inevitably productive of bias.

In *People v. Green* (1995) 31 Cal.App.4th 1001, as here, the trial court found the juror in question was unable to perform her duties as a demonstrable reality. In *Green*, as here, "the trial court found reason to suspect that [the juror] had had [sic] contact with members of defendant's family." (*Id.* at p. 1012.) In *Green*, the Court of Appeal concurred the "suspicion [was] amply supported by the evidence that [the juror] rode the bus with [the] defendant's mother and sister, she could identify family members in the audience, and that she exchanged smiles and knowing glances with those same people." (*Id.*)

Here, too, the juror in question had contact with the defendant's family or, at the very least, people associated with the defendant's family. In *Green*, the Court of Appeal noted that the juror's "contact called into question her ability to render a fair and unbiased verdict, but because [the juror] gave false denials to the court, the court was unable to ascertain the extent, nature, or

effect of the contact." (31 Cal.App.4th at p. 1012.) However, "[t]he trial court was entitled to infer from [the juror's] untruthfulness that [she] had in fact lost her impartiality and, hence, was unable to perform her duty as a juror." (*Id.*, citing *In re Hitchings* (1993) 6 Cal.4th 97, 119-121.)

Here, too, the juror in question's contact called into question her ability to render a fair and unbiased verdict, but because the juror and Campbell gave false denials to the court, the court was unable to ascertain the extent, nature, or effect of the contact. Here, too, the trial court was entitled to infer from the juror's untruthfulness that she had in fact lost her impartiality and, hence, was unable to perform her duty as a juror.[21/]

Contrary to appellant's assertions, the trial court here did not simply "presume the worst." (AOB 75.) Rather, the problem here was that there was a lack of candid disclosure to the court of the contact and the connections between juror two, Ms. Campbell, Ms. Coleman, and Flagg. The court was forced to repeatedly delve into the matter because the persons involved were not forthcoming. Indeed, it is quite significant that Ms. Campbell tried to disguise her connection to Ms. Coleman, first claiming that she had just met Ms. Coleman and then admitting that Ms. Campbell was her niece. There were simply too many connections here and too great a lack of forthrightness among the persons involved for the court to ignore it.

Indeed, in *People v. Halsey* (1993) 12 Cal.App.4th 885, the Court of Appeal listed, among other instances, the following examples of good cause to discharge a juror: (1) "juror worked in same office as defendant's brother, their

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21. Interestingly, the trial record appears to show that the juror at issue remained in the courtroom throughout the remainder of the trial. At one point later in the proceedings, the prosecutor requested the court order "that one juror who was excused from this jury earlier not to come in anymore. [¶] I've noticed that during the course of the trial, she's been very emotional. And she was out there, hangs out with the jurors." (16RT 2305.)

desks 25 feet apart" (citing *People v. Abbott* (1956) 47 Cal.2d 362, 303); (2) "juror worked with defendant's father for twelve years and lived next door to defendant's sister" (citing *People v. Taylor* (1961) 189 Cal.App.2d 490); and (3) "over the weekend juror observed defendant join her church" (citing *People v. Hecker* (1990) 219 Cal.App.3d 1238). (*People v. Halsey*, *supra*, 12 Cal.App.4th at pp. 892-893.) Thus, it is clear juror interaction with members of a defendant's family has been considered a demonstrable reality that a juror is unable to perform his or her duties.

In view of the foregoing, the trial court properly discharged juror two for actual bias and the trial court's discretionary ruling under section 1089 is supported by substantial evidence from the record and "as a demonstrable reality."

C. The Trial Court's Dismissal Of Juror Two Did Not Violate Appellant's Constitutional Rights

The trial court's dismissal of juror two did not violate appellant's constitutional rights. As appellant concedes (AOB 76), the Ninth Circuit has held that California's procedures under section 1089 are constitutional under both the Sixth and Fourteenth Amendments to the United States Constitution. (*Miller v. Stagner* (9th Cir. 1985) 757 F.2d 988, 995; see also *Perez v. Marshall* (9th Cir. 1997) 119 F.3d 1422, 1426 [reaffirming the holding of *Miller v. Stagner*: "Because we decided in *Miller* that section 1089 is facially valid under the Sixth Amendment, we need only decide whether its application in the circumstances of this case violated Perez's Sixth Amendment rights"].)

Appellant nevertheless argues, relying on Judge Nelson's dissent in *Perez v. Marshall*, 119 F.3d at page 1429, that, even if the section 1089 procedure has been deemed constitutional, its application may still violate the Sixth and Fourteenth Amendments if, in fact, the dismissal of the juror was improper. (AOB 76.) Of course, even a decision by a Ninth Circuit majority

would not be binding on this Court because decisions of intermediate federal appellate courts, while they may be of persuasive value, are not binding on state courts, even when they interpret federal law. (*People v. Zapien* (1993) 4 Cal.4th 929, 989.) Clearly, a dissenting opinion by a lone Ninth Circuit Judge is not binding on this Court.

In any event, the *Perez* decision is factually distinguishable from the instant case. Judge Nelson's primary concern in her dissent was that the trial judge knew "that the dismissed juror [was] the lone holdout." (*Perez v. Marshall, supra*, 119 F.3d at p. 1428 [Judge Nelson, diss.].) Judge Nelson found that, in such a situation, the dismissal of the lone holdout juror was akin to an "*Allen* charge."[22/] (*Id.* at pp. 1428-1429 [Judge Nelson, diss.].) Here, juror two was not dismissed during deliberations. She was dismissed early in the trial. She was not the lone holdout juror and there is no reasonable argument that her dismissal was effectively an "*Allen* charge" to the remaining

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22. In *United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, 1265, fn. 1, the Ninth Circuit explained:

> The term "Allen charge" is the generic name for a class of supplemental jury instructions given when jurors are apparently deadlocked; the name derives from the first Supreme Court approval of such an instruction in *Allen v. United States*, 164 U.S. 492, 501-02, 17 S.Ct. 154, 157-58, 41 L.Ed. 528 (1896). In their mildest form, these instructions carry reminders of the importance of securing a verdict and ask jurors to reconsider potentially unreasonable positions. In their stronger forms, these charges have been referred to as "dynamite charges," because of their ability to "blast" a verdict out of a deadlocked jury. The charge has also been called the "third degree instruction," "the shotgun instruction," and "the nitroglycerin charge." See Marcus, *The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to be Permanently Defused?*, 43 Mo.L.Rev. 613, 615 (1978).

jurors. Thus, even if Judge Nelson's dissent were binding authority, which it clearly is not, it would not be controlling here.

Appellant also argues, pursuant to *Sanders v. Lamarque* (9th Cir. 2004) 357 F.3d 943, at page 949, that the trial court cannot constitutionally dismiss a juror on the basis of implied bias except in exceptional or extraordinary cases. (AOB 76.) However, *Sanders* is not binding on this Court. (*People v. Zapien*, *supra*, 4 Cal.4th at p. 989.) In any event, it is distinguishable from this case because *Sanders*, like *Perez v. Marshall*, concerned the trial court's dismissal of a "lone holdout juror" and the entire opinion in *Sanders* is focused on concerns unique to the "protection of lone holdout jurors from coercion." (*Sanders v. Lamarque*, *supra*, 357 F.3d at p. 944.) The *Sanders* court concluded that "the trial court committed constitutional error when, after learning that the juror was unpersuaded by the government's case, it dismissed the lone holdout juror." (*Id.* at p. 948.) Such was not the case here as juror two was dismissed early in the trial, not during deliberations.

Appellant also relies on this Court's opinion in *People v. Barnwell* (2007) 41 Cal.4th 1038. (AOB 77-78) His reliance is misplaced. First of all, contrary to appellant's assertions, the "demonstrable reality test" is not one that a trial court must perform. It is, instead, a standard "to be applied in review of juror removal cases." (*Id.* at p. 1052.)

Moreover, as discussed earlier, the trial court's decision is demonstrated by a record that supports its decision by a demonstrable reality in that its "conclusion is manifestly supported by evidence on which the court actually relied." (*People v. Barnwell*, *supra*, 41 Cal.4th at p. 1053.) The explanation for Ms. Campbell's presence in the courtroom did not ring true. Juror two and Ms. Campbell were inconsistent in reporting their contact during trial. Ms. Campbell had sat with Flagg's family members in court and was the aunt of Flagg's girlfriend, who was the mother of Flagg's child. Juror two nevertheless

failed on her own to disclose this relationship and was less than candid when asked about the relationship.

Although appellant argues that there is no evidence juror two ever discussed the case with Ms. Campbell (AOB 78), the trial court was entitled to infer from the connections between juror two, Ms. Campbell, and Ms. Coleman that there was a real inappropriateness that existed whether or not they ever directly talked about the case.

Also, appellant's reliance on juror two's voir dire answers (AOB 78-79) is misplaced as juror two was never asked in voir dire if she was dating someone whose granddaughter was dating one of the defendants. In *Sanders v. Lamarque*, *supra*, 357 F.3d at page 949, unlike this case, the dismissed juror's voir dire was relevant because it went directly to the concerns that prompted the juror's dismissal. Indeed, in *Sanders v. Lamarque*, the trial court dismissed the juror specifically because she "deliberately withheld important information on voir dire." (*Id.* at p. 951.)

Citing *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392], appellant next argues that the allegedly improper discharge of juror two undermines the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense. (AOB 79.) *Beck*, however, is a decision regarding the failure of a trial court to provide a lesser included offense option, not a decision regarding dismissal of a juror. (*Id.* at p. 643.) Therefore, *Beck* is not applicable here.

Appellant also argues that, if there were error in the juror excusal at issue here, automatic reversal is required under *Sanders v. Lamarque*, *supra*, 357 F.3d 943. (AOB 80.) Alternatively, appellant argues that, even under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], reversal is required. (AOB 80.)

However, the rule is that a trial court's error requires reversal only if it is reasonably probable that a result more favorable to the defendant would have been reached but for the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Wims* (1995) 10 Cal.4th 293, 315.) Here, juror two was dismissed prior to deliberations. Thus, she was not the lone holdout juror and there is no reason to believe that, even assuming the trial court improperly excused her, the result would have been more favorable to appellant.

IV.

THE TRIAL COURT PROPERLY ADMITTED WILLARD LEWIS' TESTIMONY THAT HE HEARD A CO-DEFENDANT AT THE SCENE IDENTIFY APPELLANT

Lewis testified that, after he heard the gunshots, he looked up and saw two men, one who had fired the gun and one who was walking off. When asked if he heard the men say anything toward each other, Lewis stated: "I thought I heard one gentleman say 'Come on, Don.'" Appellant's counsel objected solely on hearsay grounds and that objection was overruled. (9RT 1471-1472.)

Appellant now contends Lewis' testimony regarding the statement "Come on, Don" constituted inadmissible hearsay (AOB 82-83), violated the Confrontation Clause under *People v. Aranda* (1965) 63 Cal.2d 518, 530-531, *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476], *Lilly v. Virginia* (1999) 527 U.S. 116 [119 S.Ct. 1887, 144 L.Ed.2d 117] and that line of cases (AOB 83-90), and violated the Confrontation Clause under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (AOB 90-92). Finally, appellant asserts that the *Bruton* error was not harmless under *Chapman v. California, supra*, 386 U.S. 18, 24. (AOB 92-95.) The trial court, however, properly admitted the statement under state evidentiary rules as it fell within several well-recognized exceptions to the hearsay rule. Appellant waived any federal constitutional claims by failing to object on such

grounds at trial. In any event, as the statement was nontestimonial in nature, it did not violate the Confrontation Clause.

A. The Trial Court Did Not Abuse Its Discretion In Denying Appellant's Hearsay Objection As The Statement In Question Was Admissible Under Several Separate Exceptions To The Hearsay Rule

The trial court properly overruled appellant's hearsay objection as the statement in question was admissible under several exceptions to the hearsay rule, including the exception for excited utterances and the exception for statements made in furtherance of a conspiracy..

The statement ("Come on, Don") made by Higgins (see 9RT 1502-1503, 1509 [Lewis identifying appellant and Higgins from the crime scene] was admissible as an excited utterance. Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

This Court has explained the excited utterance exception to the hearsay rule as follows:

> [T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief. [¶] The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . not the nature of the statement but the mental state of the speaker. The nature of the utterance - how long it was made after the startling incident and whether the speaker blurted it out, for example-

may be important, but solely as an indicator of the mental state of the declarant. (*People v. Farmer* (1989) 47 Cal.3d 888, 903-904, disapproved on other grounds by *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6, 94 Cal.Rptr.2d 396, 996 P.2d 46.) The decision to admit evidence under Evidence Code section 1240 is reviewed for abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.)

Here, the statement in question was made immediately after the shooting. (9RT 1472, 1502-1503, 1509.) The speaker, Higgins, blurted it out without time for reflection. (*People v. Raley* (1992) 2 Cal.4th 870, 892-893, citing *People v. Farmer*, *supra*, 47 Cal.3d at pp. 903-904.) Thus, the statement was made in the stress of nervous excitement and Higgins' reflective faculties were stilled. (*People v. Poggi* (1988) 45 Cal.3d 306, 318; *People v. Farmer*, *supra*, 47 Cal.3d at pp. 903-904.) The utterance at issue here was the instinctive and uninhibited expression of Higgins' actual impressions and belief that he was speaking to "Don" and that, after the shots were fired, "Don" needed to move away from the shooting victim and get going so that they could avoid discovery.

Furthermore, the statement at issue was admissible as an exception to the hearsay rule under Evidence Code section 1223, which provides that:

> Evidence of a statement offered against a party is not inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and [¶] (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

A conspiracy is an agreement between individuals to commit a crime, accompanied by an overt act in furtherance of the conspiracy. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 64.) There must be evidence independent of the coconspirator's statements sufficient to support an inference that a conspiracy existed. (*People v. Herrera, supra*, 83 Cal.App.4th at pp. 64-65; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1134-1135.) The conduct, relationship, interests, and activities of the alleged conspirators may be considered in drawing that inference. (*People v. Rodrigues,* 8 Cal.4th at p. 1135.) Here, Higgins was participating in a conspiracy with appellant and Flagg to rob, sexually assault, and murder Kim and the statement at issue ("Come on, Don") was made during the time that Higgins was participating in the conspiracy. Indeed, it was made at the crime scene itself. Therefore, Higgins' statement to appellant was admissible under this exception. Also, as noted above, substantial indicia of reliability were present in that Higgins blurted it out without time for reflection.

Therefore, the trial court did not abuse its discretion in admitting the statement because the trial court could have found that the statement fell within one of these exceptions to the hearsay rule.

B. Even Assuming The Statement Constituted Inadmissible Hearsay, Any Error In Admitting It Was Harmless

Even assuming that the trial court abused its discretion in overruling appellant's hearsay objection, any such error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

First, the statement was made spontaneously to an accomplice shortly after the shooting had occurred and thus contains substantial indicia of reliability.

Second, the presence of appellant at the crime scene was corroborated by: (1) Lewis' in-court identification of appellant (9RT 1502-1503, 1509); (2)

appellant's appearance on the casino videotapes as he was stalking Kim through the casino (17RT 2543-2544; 19RT 2699-2701, 2709-2714, 2721, 2726-2734, 2743-2745, 2747-2749, 2752; 20RT 2830-3831, 2864-2865); (3) videotape of appellant and his accomplices following Kim from the casino parking lot (19RT 2760-2761); (4) the link to the casino by the casino chip found in the right front passenger area of Kim's car (8RT 1430; 12RT 1912-1913; 17RT 2533); (5) the ballistics evidence showing that, when he was arrested, appellant had in his possession the precise gun used to shoot both Kim and Dassopoulos (12RT 1871, 1873, 1878-1880, 1882-1888); (6) appellant's participation in a similar follow-home attack on Dassopoulos less than a week later in which he used the same methods to stalk Dassopoulos through the casino and follow her home (11RT 1748-1753, 1757-1766, 1769-1770, 1775-1777; 12RT 1812-1814; 19RT 2771-2777, 2779-2781, 2783-2788, 2790-2798); (7) appellant's arrest while at the casino days after the attack on Dassopoulos in the same car used in the stalking of Kim and Dassoupolus and in possession of Dassoupolus's Visa card and a loaded gun (10RT 1623, 1628-1629, 1631-1633, 1637-1639; 11RT 1775; 12RT 1901-1902, 1905, 1914; 18RT 2585-2586, 2593-2594).

Consequently, even if the trial court erred by admitting the hearsay statement ("Come on, Don"), such an assumed error was harmless. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

C. Appellant Waived Any Claim That The Admission Of The Statement Violated His Federal Constitutional Rights By Failing To Object On That Basis In The Trial Court

As to appellant's remaining arguments regarding the statement Lewis overheard, the rule is that, in order to preserve an *Aranda -Bruton* claim or a Confrontation Clause challenge, the defendant must make a specific and timely objection on that basis in the trial court. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1044; *People v. Bolin* (1998) 18 Cal.4th 297, 320.) At trial, appellant's

only objection was on state-evidentiary rules regarding hearsay, not on federal constitutional grounds. (9RT 1471-1472.) Consequently, his federal constitutional claims regarding the statement have not been preserved for appeal. (See *People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. 6.)

D. Even Assuming Appellant's Confrontation Clause Claims Were Preserved, The Admission Of The Statement Did Not Violate The Confrontation Clause As It Was Clearly Nontestimonial

Even assuming appellant's Confrontation Clause claims were preserved, as the Confrontation Clause applies only to *testimonial hearsay,* the primary question is whether the challenged statements were "testimonial." "Under *Crawford,* . . . the Confrontation Clause has no application to [out-of-court, *non* testimonial statements not subject to cross-examination] and therefore permits their admission even if they lack indicia of reliability." (*Whorton v. Bockting* (2007) 549 U.S. 406, __ [127 S.Ct. 1173, 1183, 167 L.Ed.2d 1].) "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." (*Davis v. Washington* (2006) 547 U.S. 813, 821 [126 S.Ct. 2266, 165 L.Ed.2d 224].)

In *Davis v. Washington, supra,* 547 U.S. 813, the High Court explained the meaning of "testimonial hearsay":

> "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accuser - in other words, those who 'bear testimony.' 1 N. Webster, An American Dictionary of the English Language (1828). 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Ibid.* An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."

(*Davis*, 547 U.S. at pp. 823-824, quoting *Crawford v. Washington*, 541 U.S. at p. 51.) Indeed, "[a] limitation so clearly reflected in the text of the constitutional provision must fairly be said to mark out not merely its 'core,' but its perimeter." (*Davis*, 547 U.S. at p. 824.)

The statements in *Davis* were made during a 911 call. The United States Supreme Court concluded that these statements were nontestimonial because a 911 call "is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." (*Davis v. Washington, supra,* 547 U.S. at p. 827.) "[The caller] simply was not acting as a *witness*; she was not *testifying*. What she said was not 'a weaker substitute for live testimony' at trial. . . ." (*Id.* at p. 828.)

The United States Supreme Court has not yet even considered or decided "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" (*Davis v. Washington,* 547 U.S. at p. 823, fn. 2.) However, in *People v. Cage* (2007) 40 Cal.4th 965, this Court considered the issue of whether a statement to a person unaffiliated with law enforcement was testimonial. In *Cage,* the victim had made a statement to a physician about the offense. This Court concluded that the statement was nontestimonial. "Objectively viewed," this Court explained, "the primary purpose of the question, and the answer, was not to establish or prove past facts for possible criminal use, but to help Dr. Russell deal with the immediate medical situation he faced." (*Id.* at p. 986.) "Moreover, the context of the conversation had none of the formality or solemnity that characterizes testimony by witnesses." It lacked structured questioning by law enforcement authorities and there was no evidence that the doctor was acting as a police agent and the doctor made no effort to record or memorialize the statements for later legal use. (*Cage,* at p. 987.)

Under *Davis* and *Cage,* the statement made by Higgins was nontestimonial. Clearly, Higgins was not acting "as a *witness*" (*Davis v. Washington, supra,* 547 U.S. at p. 828), and there was no formality or solemnity that typically characterizes testimony by witnesses. (*People v. Cage, supra,* 40 Cal.4th at p. 987.) The statement Lewis heard Higgins or the other accomplice (Flagg) make clearly was non-testimonial as the speaker was not questioned at all by any law enforcement official. (*Compare Crawford*, 541 U.S. at 53 [statement involved a "recorded statement, knowingly given in response to structured police questioning"]; *see United States v. Saget,* 377 F.3d 223, 229 (2d Cir. 2004) [holding that a declarant's statements to an individual that the declarant does not know to be an informant "do not constitute testimony within the meaning of *Crawford* "]; *United States v. Feliz,* 467 F.3d 227, 231 (2d Cir. 2006) [observing that "the Confrontation Clause simply has no application to nontestimonial statements").)

Here, Higgins was acting as a criminal in this setting, not as a law enforcement agent, and was urging his fellow criminal to flee the scene of the crime and not linger any longer so as to avoid detection. No "structured questioning" obviously occurred and none of the three accomplices made any effort to "record or memorialize [Higgins'] statement[] for later use." (*People v. Cage, supra*, 40 Cal.4th at p. 987.)

Indeed, it was clear that the "primary purpose" of the statement was *not* to establish past facts for use in a criminal prosecution, but to arrange for flight from the crime scene after the shooting took place. (*People v. Cage, supra*, 40 Cal.4th at pp. 986-987.) The statement by an accomplice, which obviously was not the subject of any interrogation or, indeed, *any* police questioning, bears no resemblance whatsoever to the inquisitorial abuses that gave rise to the Confrontation Clause. Thus, because the statement was not testimonial, its

admission did not violate the Confrontation Clause under *Crawford v. Washington,* 541 U.S. 36.

Moreover, because the statement at issue is nontestimonial, it is also admissible under *Bruton v. United States,* 391 U.S. 123. (*See United States v. Williams,* 506 F.3d 151, 156 (2d Cir.2007) [holding that the district court did not err by admitting one defendant's self-inculpatory, out-of-court, nontestimonial statement that also implicated a co-defendant because "the Confrontation Clause simply has no application to nontestimonial statements"].) Where a statement is nontestimonial in nature, the Confrontation Clause is not implicated, and an analysis under *Bruton* is not necessary. (*Crawford v. Washington, supra,* 541 U.S. at p. 51. ["An offhand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted."]; *see also United States v. Taylor*, 509 F.3d 839, 850-51 (7th Cir. 2007) [no *Bruton* argument to admission of a nontestimonial statement because "hearsay evidence that is nontestimonial is not subject to the Confrontation Clause"].) The only requirements that must be met in order to admit a nontestimonial hearsay statement are set forth in state-law evidentiary rules, not the Confrontation Clause. (*United States v. Williams, supra*, 506 F.3d at p. 156.)

Crawford did not alter the *Bruton* analysis. However, any Confrontation Clause analysis *only* applies to testimonial statements, not nontestimonial statements. Indeed, *Bruton*, and the cases following it, *Richardson*, *Gray*, and *Lilly*, all involved confessions given to police, which were clearly testimonial statements under the *Crawford* analysis. (*Lilly v. Virginia, supra*, 527 U.S. at p. 120 [question involved admission of nontestifying defendant's entire confession made to police after arrest]; *Gray v. Maryland* (1998) 523 U.S. 185, 188 [118 S.Ct. 1151, 140 L.Ed.2d 294] [codefendant gave confession to

police]; *Richardson v. Marsh* (1987) 481 U.S. 200, 206 [107 S.Ct. 1702, 95 L.Ed.2d 176] [confession given to police shortly after arrest]; *Bruton v. United States*, *supra*, 391 U.S. 123 [confession obtained during interrogation at city jail].) Those cases did not involve statements blurted out at the crime scene such as Higgins' statement.

Specifically, Higgins' statement did not violate the Confrontation Clause because it was made in furtherance of a conspiracy. Although "*Bruton* held generally that the admission of an incriminating statement by non-testifying co-defendant at a joint trial violates the defendant's rights under the Confrontation Clause," *"Bruton,* however, does not preclude the admission of otherwise admissible statements by a co-conspirator." (*United States v. Singh* (8th Cir. 2007) 494 F.3d 653, 658, citing *United States v. Mickelson* (8th Cir.2004) 378 F.3d 810, 819 ["However, when the statements are those of a co-conspirator and are admissible under Federal Rule of Evidence 801(d)(2)(E), the Sixth Amendment and *Bruton* are not implicated."].)

This is because:

> [C]o-conspirators' statements made in furtherance of a conspiracy and admitted [under the hearsay exception for co-conspirator's statements] are generally non-testimonial and, therefore, do not violate the Confrontation Clause as interpreted by the Supreme Court. *See Crawford v. Washington*, 541 U.S. 36, 51-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (providing examples of statements that are testimonial in nature); *see also United States v. Lee*, 374 F.3d 637, 644 (8th Cir. 2004) (applying *Crawford* and stating, "In contrast to these examples, casual statements to an acquaintance are not testimonial. Nor are statements to a conconspirator or business records testimonial.") (internal citation omitted.)

(*United States v. Singh*, *supra*, 494 F.3d at pp. 658-659; see also *United States v. Faulkner* (10th Cir. 2006) 439 F.3d 1221, 1225 [the conclusion that co-conspirator statements are not testimonial was "well-supported by *Crawford.*"]; *United States v. Hansen,* (1st Cir. 2006) 434 F.3d 92, 100; *United States v. Martinez* (6th Cir. 2005) 430 F.3d 317, 329; *United States v. Robinson* (5th Cir. 2004) 367 F.3d 278, 292 n. 20; *United States v. Reyes* (8th Cir. 2004) 362 F.3d 536, 540 n. 4.).

For all of these reasons, the statement overheard by Lewis was nontestimonial and therefore were not subject to the Confrontation Clause.

Accordingly, even had appellant made a Confrontation Clause objection at trial, the trial court would not have erred in overruling Confrontation Clause objections to the admission of this evidence.

E. Even Assuming The Admission Of The Statement Constituted Federal Constitutional Error, Such Error Was Harmless

"Confrontation Clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705." (*People v. Geier* (2007) 41 Cal.4th 555, 608, citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674].) The test is whether "'the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.'" (*People v. Geier*, *supra*, 41 Cal.4th at p. 608, quoting *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 681.) "The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" (*People v. Geier*, *supra*, 41 Cal.4th at p. 608, quoting *Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 144 L.Ed.2d 35].)

Here the answer is a resounding "yes." As set forth earlier with regard to the alleged state-law error in admitting the statement "Come on, Don," Even without the statement, the presence of appellant at the crime scene was

demonstrated by: (1) Lewis' in-court identification of appellant; (2) appellant's appearance on the casino videotapes as he was stalking Kim through the casino; (3) videotape of appellant and his accomplices following Kim from the casino parking lot; (4) the link to the casino by the casino chip found in the right front passenger area of Kim's car; (5) the ballistics evidence showing that, when he was arrested, appellant had in his possession the precise gun used to shoot both Kim and Dassopoulos; (6) appellant's participation in a similar follow-home attack on Dassopoulos less than a week later in which he used the same methods to stalk Dassopoulos through the casino and follow her home; and (7) appellant's arrest while at the casino days after the attack on Dassopoulos in the same car used in the stalking of Kim and Dassoupolus and in possession of Dassoupolus' Visa card and a loaded gun. Given all of this evidence identifying appellant as one of the perpetrators in the attack on Kim, the brief crime scene statement by Higgins could be said to have relatively little or no effect on the jury's verdict. Indeed, as appellant points out (AOB 94), the prosecution told the jury in closing argument that appellant's conviction was not dependent on Lewis' testimony (24RT 3499.)

Consequently, even if the trial court erred by admitting the hearsay statement ("Come on, Don"), such an assumed error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

V.

THE TRIAL COURT WAS NOT REQUIRED TO SUA SPONTE INSTRUCT THE JURY WITH A CAUTIONARY INSTRUCTION REGARDING HIGGINS' EXCITED UTTERANCE AT THE CRIME SCENE

Appellant contends the trial court committed prejudicial error by failing to sua sponte instruct the jury with a cautionary instruction regarding Higgins' excited utterance at the crime scene ("Come on, Don"). (AOB 95-104.) Appellant notes in the introduction to this argument the discussions in the trial

court regarding CALJIC Nos. 2.07, 2.08, and 2.09. (AOB 95-99.) Appellant does not provide the language of the precise instruction he now for the first time claims the trial court should have given sua sponte, but points to CALJIC Nos. 2.70 and 2.71 as examples of such an instruction. (AOB 99-102.) Appellant also asserts that, because appellant did not have an opportunity to cross-examine Higgins, the omission of a cautionary instruction violated appellant's Sixth Amendment rights. (AOB 102-103.) Respondent disagrees with appellant.

A. Proceedings At Trial

At trial, Lewis testified that, after he heard the gunshots, he looked up and saw two men, one who had fired the gun and one who was walking off. When asked if he heard the men say anything toward each other, Lewis stated: "I thought I heard one gentleman say, 'Come on, Don." At the point in trial when Lewis so testified, appellant's counsel made a hearsay objection, which was overruled. (9RT 1471-1472.) Lewis identified appellant and Higgins as the two persons he saw at the crime scene and Higgins as the person who made the statement. (9RT 1502-1503, 1509.)

At a discussion on instructions, the trial court noted that CALJIC No. 2.08 did not appear to apply.[23/] The prosecution agreed and asked to withdraw it. None of the defendants objected to it being withdrawn. (13RT 1994.)

At a second instructional conference, the court raised the issue of CALJIC No. 2.08, noting again that it did not appear to apply and that CALJIC No. 2.07 seemed to be more appropriate to address a statement allegedly made in court by appellant to Mr. Lewis. (23RT 3328, 3332.) CALJIC No. 2.07 was given to the jury.[24/] (3CT 695.)

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23. CALJIC No. 2.08, as proposed, provided:

> Evidence has been received of a statement made by a defendant *after his arrest.*
>
> At the time the evidence of this statement was received you were instructed that it could not be considered by you against the other defendants.
>
> Do not consider the evidence of this statement against the other defendants.

(3CT 783, emphasis added.)

The trial court's decision not to give CALJIC No. 2.08 was proper as that instruction was not applicable to a statement made at the crime scene. CALJIC No. 2.08, by its own language, clearly applies only to statements made by a defendant "*after his arrest.*" As the statement in question was not made after Higgins' arrest, the instruction simply was not applicable. Moreover, CALJIC No. 2.08 does not apply to Higgins' excited utterance because, as discussed at length in the previous argument, it was admissible against all three defendants. Therefore, the language in CALJIC No. 2.08 limiting its use against other defendants was simply not applicable here and the trial court had no sua sponte duty to instruct the jury with CALJIC No. 2.08.

24. CALJIC No. 2.07, as given, provided:

> Evidence has been admitted against one or more of the defendants, and not admitted against the others.
>
> At the time this evidence was admitted you were instructed that it could not be considered by you against the other defendants.
>
> Do not consider this evidence against the other defendants.

(3CT 695.)

There was no request ever made to instruct the jury with any other cautionary instruction with regard to the statement Lewis heard Higgins make and, in particular, there was no request for either CALJIC No. 2.70 or 2.71.

CALJIC No. 2.70 provides:

> A confession is a statement made by a defendant in which [he] [she] is on trial. In order to constitute a confession, the statement must acknowledge participation in the crime[s] as well as the required [criminal intent] [state of mind].
>
> An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made a confession [or an admission], and if so, whether that statement is true in whole or in part.

[Evidence of [an oral confession] [or] [an oral admission] of the defendant not made in court should be viewed with caution.]

CALJIC No. 2.71 is similar, but lacks the focus on confessions found in CALJIC No. 2.70. It provides:

> An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] 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 that statement is true in whole or in part.
>
> [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]

B. Applicable Law And Legal Analysis

Appellant argues that the trial court erred in not giving an instruction similar to either CALJIC No. 2.70 or 2.71 because of the general rule that a court must instruct the jury to view with caution evidence of a criminal defendant's oral admissions. (AOB 99-102.) A trial court has a sua sponte duty to instruct the jury that it must view evidence of a defendant's oral admissions with caution and that this duty applies broadly to inculpatory oral statements made by the defendant before, during, or after the crime. (*People v. Carpenter* (1997) 15 Cal.4th 312, 392-393 (superseded by statute on other grounds as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106); *People v. Garceau* (1993) 6 Cal.4th 140, 194; *People v. Lang* (1989) 49 Cal.3d 991, 1021.)

However, neither CALJIC No. 2.70 nor 2.71 were applicable here because the statement at issue ("Come on, Don") was not a confession or an admission. A confession is "a complete and express acknowledgement of the crime charged." (*People v. Morse* (1969) 70 Cal.2d 711, 721.) This statement was not a statement that completely and expressly acknowledged the crime charged and, thus, was not a confession.

An admission is any extrajudicial statement, whether inculpatory or exculpatory, tending to prove guilt when considered with the rest of the evidence. (*People v. Garceau, supra,* 6 Cal.4th at p. 183; *People v. Malone* (2003) 112 Cal.App.4th 1241, 1243; CALJIC No. 2.71.) The statement did not inculpate Higgins. The statement did not admit Higgins' presence at the crime scene. It was not an acknowledgement of Higgins' own guilt. Instead, it only admitted the presence of someone named "Don" at the crime scene. Therefore, even when this statement ("Come on, Don") is considered with other evidence, even though it might tend to prove appellant's guilt by placing someone named "Don" at the crime scene, it did not tend to prove Higgins' guilt. Therefore, the

trial court had no sua sponte duty to instruct the jury to view the statement with caution as to appellant.

Moreover, the only purpose a cautionary instruction serves is to assist the jury in determining if the statement was in fact made. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 393.) As explained in *People v. Bemis* (1949) 33 Cal.2d 395, 399, even well-intentioned witnesses "'are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used.'" Further, unscrupulous witnesses may "'torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself.'" (*Ibid.*)

There is, consequently, no need for a cautionary instruction when the statement at issue, unlike an admission, was admitted under a hearsay exception requiring independent indicia of reliability. Here, the statement at issue here ("Come on, Don") was not admitted as to appellant as a party admission. Rather, it was admissible as an excited utterance or as a statement made in furtherance of a conspiracy, both exceptions to the hearsay rule that require a finding of indicia of reliability. Here, Higgins blurted out the statement without time for reflection and a spontaneous expression of his belief that he was speaking to "Don." Moreover, the statement was made in furtherance of a conspiracy as it expressed a desire for "Don" to get going and leave the crime scene. As such, unlike a statement admitted as a confession or party admission, no cautionary instruction was required as the statement contained underlying indicia of reliability.

Thus, neither CALJIC No. 2.70 nor CALJIC No. 2.71 was required here as to appellant because the statement at issue was not an admission by appellant himself. Rather, it was admissible as to appellant as an excited utterance by another at the crime scene or as a statement made in furtherance of a conspiracy.

Appellant further argues that the alleged failure to instruct sua sponte with a cautionary instruction as to admissions violated appellant's Sixth, Eighth, and Fourteenth Amendment rights. (AOB 102-104.) However, "[m]ere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution." (*People v. Carpenter, supra*, 15 Cal.4th at p. 393, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 71-75 [112 S.Ct. 475, 116 L.Ed.2d 385].) "Failure to give the cautionary instruction is not one of the "very narrow[]" categories of error that makes the trial fundamentally unfair." (*People v. Carpenter, supra*, 15 Cal.4th at p. 393, quoting *Estelle v. McGuire, supra*, 502 U.S. at p. 73, internal quotation marks omitted.)

C. Even Assuming The Trial Court Erred In Not Giving A Cautionary Instruction, Such Error Was Harmless

Even assuming that the court should have instructed the jury not to consider Higgins' out-of-court statement for any purpose in assessing appellant's guilt, any error in this regard was harmless under the *Watson* standard.[25/] (*People v. Watson, supra*, 46 Cal.2d at p. 836.) The testimony that Higgins made the statement "Come on, Don" was uncontradicted. It consisted of two simple words and there was no evidence that the statement was not made, that it was fabricated, or that it was inaccurately remembered or reported. (*People v. Carpenter, supra*, 15 Cal.4th at p. 393.)

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25. The *Chapman* standard (*Chapman v. California, supra*, 386 U.S. at p. 24) does not apply here as state-law instructional error does not violate the United States Constitution. (*People v. Carpenter, supra*, 15 Cal.4th at p. 393.) Even assuming that standard applied here, any error in failing to sua sponte instruct the jury to view the statement with caution was harmless beyond a reasonable doubt for the reasons stated in the main text with regard to the state-law harmless error analysis.

"Moreover, the court fully instructed the jury on judging the credibility of a witness, thus providing guidance on how to determine whether to credit the testimony." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 393.) The jury was given CALJIC No. 2.20, which instructed the jury on factors to consider in evaluating the believability of a witness, including the extent of the opportunity of the witness to see or hear the events, the character and quality of the testimony, the demeanor and manner of the witness, inconsistent statements by the witness, and prior felony convictions of the witness. (3CT 701.) The jury was also instructed with CALJIC No. 2.21.1, which instructed on how to evaluate discrepancies in testimony. (3CT 702.) CALJIC No. 2.21.2, which was given to the jury, instructed that "[a] witness who is willfully false in one material part of his testimony, is to be distrusted in others." The instruction also informed the jury that it could "reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars. (3CT 703.) CALJIC No. 2.22 guided the jury on how to weigh conflicting testimony. (3CT 704.) The jury was also given CALJIC No. 2.23, which instructed the jury regarding witnesses such as Lewis who have been convicted of a felony and the effect that felony could have on the witness' believability. (3CT 705.)

Moreover, the jury was fully cautioned about all shortcomings in Lewis's credibility by both the prosecution's closing argument and the extensive closing arguments of the three defense attorneys (appellant's counsel, Higgins' counsel, and Flagg's counsel). Indeed, this jury was repeatedly told not to trust Mr. Lewis' testimony.

The prosecution began talking about Lewis in closing argument by reminding the jury that Lewis was "a convicted felon. That's right. Yes, he was a crack head. Yes, he was facing 25 years to life. And yes, he shared a cell

with [appellant] Higgins." (24RT 3496.) The prosecution also reminded the jury that Lewis "wanted a deal." (24RT 3497.) The prosecution also stated in argument: "See, Willard Lewis is a career criminal. Willard Lewis is a drug addict. And because of that, defense wants you to disbelieve him." (24RT 3500.) Clearly, the prosecution did not "pull any punches" when it came to telling the jury that Lewis was of low character. The prosecution did not attempt to portray Lewis as a saint.

Appellant's attorney spent most of his argument attacking Lewis's credibility. He told the jury:

> Well, let's look at Willard Lewis. Willard Lewis, he's a thief. Been convicted two times for robbery. Been convicted seven or eight times for petty theft. Been convicted of possession of drugs.
>
> And we know he's got a great job. He works for Cabbott, Lodge; right? That's what he told us. He makes between 3,500 and $5,600 a month. And the good guy that he is, what he does, takes this money, goes home, gives it to his wife, because the rest of the money he needs for his drugs.
>
> He'll go out and steal. That's what he told us. Looked you right in the face, told you that. What else did he tell you? Left home 5:00 that morning with cocaine. Just happened to have extra on him. What he did, told his public defender that he bought two rocks for 20 dollars.
>
> Well, which is it?

(24RT 3523-3524.)

Appellant's attorney went on to stress to the jury that Lewis' corroborating witness was a prostitute named "Jasmine" who no one ever located. "Well," he explained, "that's because you don't have a Jasmine. You can't find a Jasmine, because there never was a Jasmine." (24RT 3524.)

Appellant's attorney then pointed out that it did not make sense that Lewis would wait around for ten minutes after hearing a gunshot when he was doing drugs and consorting with a prostitute. (24RT 3524.) Appellant's attorney pointed out that Lewis never stopped and told any police officers or fire officials that he witnessed the events and that "[t]he only time he comes and tells anybody is when he wants to work out a deal for himself. That's the only time." (24RT 3525.)

Appellant's attorney also pointed out that, under Penal Code section 1170, subdivision (d), the court still retained jurisdiction to resentence Lewis and that, "if you convict my client, he's going to say 'I helped convict Mr. Donald Debose. I deserve my time to be reduced." (24RT 3526.) "That's why he's coming in and telling you what he's telling you," counsel explained, "because he wants to get his nine-year sentence reduced." (24RT 3527.) Appellant's attorney then went line by line through much of Lewis's testimony, pointing out inconsistencies. (24RT 3527-3528, 3530-3532, 3533-3535.)

In Higgins's closing argument, Lewis's credibility was similarly attacked. First, Higgins's counsel pointed out that Lewis did not come forward with his account until seven months after the crime. (25RT 3562-3563.) Higgins's counsel, too, repeatedly described Lewis for the jury as a "crackhead." (25RT 3565.) He also described Lewis as a "con man" or a "confidence man." (25RT 3565.) Higgins's counsel argued that, even though neither the judge nor the prosecutor in Lewis's case promised Lewis anything in return for his testimony, Lewis must have lied because Lewis thought he was "going to gain an advantage, whether he hears promises or not." (25RT 3566.) Higgins's counsel then proceeded to list for the jury all the facts Lewis testified to which were impeached by testimony from defense witnesses. (25RT 3569-3570.) Higgins's counsel methodically and systematically walked the jury through a timeline of facts about Lewis. (25RT 3572-3581.)

Flagg's counsel then took his turn attacking Lewis's testimony. (25RT 3604 et seq.) Flagg's counsel argued to the jury that, during the prosecution case, Lewis seemed to be telling the truth, but his testimony was impeached by the defense case. (25RT 3604.) Flagg's counsel pointed out inconsistencies in Lewis's testimony. (25RT 3605-3608.)

Additionally, the other properly admitted evidence of guilt was overwhelming, and giving the limiting instruction would not have affected the outcome. "The statement was also insignificant relative to the other evidence." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 393.) As noted earlier, even without the statement ("Come on, Don"), the presence of appellant at the crime scene was demonstrated by: (1) Lewis' in-court identification of appellant; (2) appellant's appearance on the casino videotapes as he was stalking Kim through the casino; (3) videotape of appellant and his accomplices following Kim from the casino parking lot; (4) the link to the casino by the casino chip found in the right front passenger area of Kim's car; (5) the ballistics evidence showing that, when he was arrested, appellant had in his possession the precise gun used to shoot both Kim and Dassopoulos; (6) appellant's participation in a similar follow-home attack on Dassopoulos less than a week later in which he used the same methods to stalk Dassopoulos through the casino and follow her home; and (7) appellant's arrest while at the casino days after the attack on Dassopoulos in the same car used in the stalking of Kim and Dassopoulus and in possession of Dassopoulus's Visa card and a loaded gun.

Consequently, even if the trial court erred in not sua sponte providing a limiting instruction with regard to Lewis' testimony regarding Higgins' out-of-court statement ("Come on, Don"), there is no reasonable probability the error was prejudicial and, indeed, any such error was harmless beyond a reasonable doubt.

VI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT A ROBBERY IS STILL IN PROGRESS FOR PURPOSES OF THE FELONY MURDER RULE AS LONG AS THE PURSUERS ARE ATTEMPTING TO CAPTURE THE ROBBER

Appellant contends the trial committed prejudicial error by instructing the jury that a robbery is still in progress for purposes of the felony murder rule so long as (1) the pursuers are attempting to capture the robber or regain the stolen property, and (2) have continued control over the victim. Appellant asserts this alleged error violated his rights under the Sixth, Eighth, and Fourteenth Amendments. (AOB 104-111.) Respondent disagrees.

A. Proceedings At Trial

At trial, codefendant Flagg proposed three special instructions defining when felony murder ended with the underlying felonies of unlawful penetration by a foreign object and arson. (3CT 779-781.) The court noted at an instructional conference that the three special instructions were all basically the same and that there did not seem to be supporting legal authority for any of them. (23RT 3380.) Flagg's counsel explained that there "must be at some point when those crimes end" and "the jury needs to be instructed on when they do end." (23RT 3380.)

The court asked if it was logical that the endpoint would be when the defendants reach a place of temporary safety. (23RT 3380.) When Flagg's counsel proffered that robbery is the only crime that is ongoing, the court disagreed, explaining that a robbery ends when an individual has dominion and control over property, but there is a "public policy of strict liability for homicides which occur during the course of the robbery, extend that out so it

even includes flight." (23RT 3380-3381.) The court opined that the same public policy under the felony murder rule would also apply to arson even though it is not theft-related. (23RT 3381.)

The following day the court provided counsel with a revised version of CALJIC No. 8.21.1 (24RT 3390):

> For the purposes of determining whether an unlawful killing has occurred during the commission or attempted commission of a robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time.
>
> A robbery is still in progress after the original taking of physical possession of the stolen property while the perpetrator is in possession of the stolen property and fleeing in an attempt to escape.
>
> Likewise, it is still in progress so long as immediate pursuers are attempting to capture the perpetrator or to regain the stolen property.
>
> A robbery is complete when the perpetrator has eluded any pursuers, has reached a place of temporary safety, and is in unchallenged possession of the stolen property after having effected an escape with such property.
>
> A perpetrator has not reached a place of temporary safety if the continued control over the victim places the perpetrator's safety in jeopardy. A perpetrator's safety is in jeopardy if at any unguarded moment, the victim might have managed to escape or signal for help.

(24RT 3437-3438; 3CT 732.)

Flagg's counsel objected to the language in the final paragraph that could, for instance, extend the crime for up to a year. Flagg's counsel also objected on the basis that "there is no evidence in this case that would support a jury's finding of that language," "no evidence that this victim had any

opportunity to escape or signal for help," and no evidence "of any immediate pursuers pursuing the defendant." (24RT 3391-3392.) Appellant's counsel joined in the objections. (24RT 3392.) The prosecution noted only that the instruction was a correct statement of the law and the court's duty was to inform the jury of what legal principles apply to this case. (24RT 3393.)

The court indicated for the record that it was relying on *People v. Carter* (1993) 19 Cal.App.4th 1236, 1251-1253, and that it had crafted language from *Carter* at page 1252 regarding issues of temporary safety and whether continued control over the victim places the perpetrator's safety in jeopardy. The court noted it also took language from *People v. Stankewitz* (1990) 51 Cal.3d 72, 101, to the effect that jeopardy continues for a suspect as long as in an unguarded moment the victim might have managed to escape or signal for help. The court also noted it had relied on *People v. Fields* (1983) 35 Cal.3d 329, 366-368. The objections were overruled. (24RT 3394.)

B. Applicable Law And Legal Analysis

It is well established that, even without a request, the trial court must instruct on the general principles of law applicable to a case, which are the principles commonly connected with the facts adduced at trial and necessary for the jury's understanding of the case. (*People v. Young* (2005) 34 Cal.4th 1149, 1200.) In this regard, the trial court must give instructions on every theory of the case supported by substantial evidence. (*Ibid.*) If a jury instruction is ambiguous or conflicting, the reviewing court inquires whether there is a reasonable likelihood the jury misunderstood and misapplied the instruction. (*People v. Smithey* (1999) 20 Cal.4th 936, 963.) Significantly, the correctness or incorrectness of a jury instruction is to be determined from the entire charge of the court, not merely from a consideration of the parts of an instruction or a particular instruction. (*People v. Young*, *supra*, 34 Cal.4th at p. 1202.)

Here, there is no reasonable likelihood that the jury would have misunderstood CALJIC No. 8.21.1. The trial court's instructions on robbery felony-murder constituted correct statements of law and, thus, were properly given. This Court has explained that:

> "it is settled that the crime of robbery is not confined to the act of taking property from victims. The nature of the crime is such that a robber's escape with his loot is just as important to the execution of the crime as obtaining possession of the loot in the first place. Thus, the crime of robbery is not complete until the robber has won his way to a place of temporary safety."

(*People v. Fierro* (1991) 1 Cal.4th 173, 226, quoting *People v. Carroll* (1970) 1 Cal.3d 581, 585.)

As this Court explained in *People v. Stankewitz*, *supra*, 51 Cal.3d 72, so long as a defendant holds the robbery victim, the defendant's "safety [is] continuously in jeopardy." (*Id.* at p. 101.) At any point while the victim is held, "in any unguarded moment, the victim might have managed to escape or signal for help." (*Id.*, citing *People v. Fields*, 35 Cal.3d at p. 367.) In this particular case, until the victim was forced into the trunk of the car, shot, and set on fire, "[t]here was never a moment when [the] defendant[s] could reasonably be said to have reached a place of temporary safety." (*People v. Stankewitz*, *supra*, 51 Cal.3d at p. 101.) At any point, the victim here could have managed to escape or signal for help since she was being held in full public view on a public street rather than in a secure location away from prying eyes. Moreover, the crimes were also linked by the fact that the motive for the killing may have been to prevent the victim of the robbery and sexual assaults from identifying the perpetrators. (*Ibid.*)

Appellant nevertheless asserts that the third paragraph of the instruction regarding the robber eluding any pursuers was inapplicable here because "there

was no evidence that [appellant] was ever pursued." He claims that this portion of the instruction constitutes strict liability when a defendant does not know he is being pursued and that, therefore, it does not serve the deterrent purpose of the felony-murder rule. (AOB 106-108.)

Appellant is mistaken. The jury here was given the standard instruction, CALJIC No. 1.01, which informed the jury: "Do not single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of the others." (3CT 688.) In CALJIC No. 8.21.1, the eluding pursuers portion of paragraph three is only one portion of the paragraph. Not only must a perpetrator elude all pursuers, but he must also reach a place of temporary safety. (24RT 3438; 3CT 732.) Moreover, the jury was instructed not to view paragraph three in isolation (3CT 688) and thus were instructed to understand it was to be read in conjunction with paragraph four, which defines "temporary safety" in terms of whether the continued control over the victim places the perpetrator's safety in jeopardy. (24RT 3438; 3CT 732.)

The critical concept in CALJIC No. 8.21.1 is whether the perpetrator has reached a place of temporary safety, not whether there were any pursuers. (*People v. Salas* (1972) 7 Cal.3d 812, 823-824.) A reasonable juror reading this instruction as a whole would have concluded that the perpetrator was liable if he did not reach a place of temporary safety without regard to any pursuit. "[A] fleeing robber's failure to reach a place of temporary safety is alone sufficient to establish the continuity of the robbery within the felony-murder rule." (*Id.* at p. 824, citing *People v. Ketchel* (1963) 59 Cal.2d 503, 524.)

In any event, since there was no evidence of any pursuers in this case, even if the portion of the third paragraph discussing pursuers was inapplicable,

appellant cannot have been prejudiced by its inclusion. Thus, it is immaterial for the purposes of this case whether a perpetrator is unaware he is being pursued.

Appellant further argues that the instruction is flawed because it requires a subjective, rather than an objective, standard in determining the reasonableness of a defendant's expectations regarding a pursuit. (AOB 107-108.) Since there was, in fact, no pursuit in this case, it is rather immaterial whether an objective or subjective standard were applied. Moreover, contrary to appellant's assertions, CALJIC No. 8.21.1 does not mandate a subjective standard be used and appellant fails to point to where in the instruction such a standard is required.

Furthermore,

> [t]he black letter law announced in the relevant cases states the rule in terms of whether the defendant actually reached a place of temporary safety, rather than whether the defendant believed that he or she reached such a safe location. (See *People v. Milan, supra,* 9 Cal.3d at p. 195, 107 Cal.Rptr. 68, 507 P.2d 956 [robbery incomplete until robber "has won his way to a place of temporary safety"]; *People v. Laursen, supra,* 8 Cal.3d at p. 200, fn. 6, 104 Cal.Rptr. 425, 501 P.2d 1145 [robbery does not terminate "until the robber reaches a location of temporary safety"]; *People v. Salas, supra,* 7 Cal.3d at p. 822, 103 Cal.Rptr. 431, 500 P.2d 7 [robbery was not complete "as the robbers had not won their way to a ''place of temporary safety'"]; *People v. Boss, supra,* 210 Cal. at p. 250, 290 P. 881 [robbery incomplete until robbers have "won their way even momentarily to a place of temporary safety"]; see *People v. Fuller, supra,* 86 Cal.App.3d at p. 623, 150 Cal.Rptr. 515 [burglary continues during flight "as long as the felon has not reached a 'place of temporary safety.'"].) This conclusion is also consistent with the

standard jury instructions on the completion of the crime of robbery. (See CALJIC No. 9.44 (5th ed.1988) [robbery is complete when the perpetrator "has reached a place of temporary safety"].)

(*People v. Johnson* (1992) 5 Cal.App.4th 552, 560.) "'[T]emporary safety is not tested based on the subjective impressions' of the defendant but on 'an objective measure of safety following the initial taking.'" (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1292.)

Appellant also claims that CALJIC No. 8.21.1 violated his right to due process because the specific intent to commit robbery does not linger after the taking is complete and CALJIC No. 8.21.1 fails to distinguish a separate mental state for an uncompleted robbery. (AOB 108-109.) This argument lacks merit as the only mental state required for robbery is the intent to rob. As discussed above, a defendant's beliefs regarding whether he has reached a place of temporary safety are not determinative of the duration of the underlying felony. Rather, the question is whether he actually has reached a place of temporary safety.

Appellant next argues that the trial court's instruction that a perpetrator has not reached a place of safety if his continued control over the victim places him in jeopardy was argumentative and created an impermissible mandatory presumption. Specifically, appellant complains that the instruction is argumentative because it uses the term "is in jeopardy" rather than "may be in jeopardy." (AOB 109-110.)

The instruction was not argumentative. In *People v. Wright* (1988) 45 Cal.3d 1126, this Court condemned special instructions that "'would invite the jury to draw inferences favorable to the defendant from specified items of evidence on a disputed question of fact'" because such instructions are argumentative and therefore belong in the argument of counsel and not in the charge to the jury. (*Id.* at p. 1135.) However, this Court held that it is proper

to give a special instruction on a matter critical to the defense, or in other words, an instruction which "pinpoints" the theory of the defendant's case. (*Id.* at p. 1137.) Such an instruction should focus the jury's attention on the relevant factors supported by the evidence, but the instruction should not take a position as to the impact of the factors, nor should it imply that any particular conclusions be drawn from specific items of evidence. (*Id.* at pp. 1137, 1141.)

As explained by the Court of Appeal in *People v. Carter*, *supra*, 19 Cal.App.4th 1236:

> Here, the instruction given informed the jury that it should consider whether the robber's continued control over the victim placed the robber in continued jeopardy. "There was no reference to specific evidence, and the instruction was phrased to emphasize the jury's duty to determine as a matter of fact whether the control affected the robber's safety. (Cf. *People v. Farmer* (1989) 47 Cal.3d 888, 913-914 [254 Cal.Rptr. 508, 765 P.2d 940] [disapproving instructions which would have related reasonable doubt instructions to specific and contested evidentiary facts].) Contrary to defendant's assertion, there is no part of the instruction which implies that defendant's continued control *should* be a basis for the finding he had not reached a place of temporary safety. We conclude the instruction is not argumentative. [Footnote.]
>
> For the same reasons, we are not persuaded by defendant's claim the instruction required the jury to presume no place of temporary safety had been reached so long as [the victim] was a captive. (See, e.g., *People v. Frye* (1992) 7 Cal.App.4th 1148, 1160 [10 Cal.Rptr.2d 217]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523 [61 L.Ed.2d 39, 50, 99 S.Ct. 2450].) The instruction explicitly directed the jury to find that a place of temporary safety had not been reached *if* [the victim's] captivity posed a continued threat to defendant's safety. In short, it instructed the

jury to reach a legal conclusion based on its assessment of the facts. It did not direct the jury to presume a fact in issue, nor did it shift the burden of proof to defendant. Accordingly, we reject the challenge to the instruction, and do not reach defendant's arguments intended to demonstrate prejudice.

(*Id.* at p. 1253.)

Even assuming that the instruction constituted error for the reasons suggested by appellant, he was not thereby prejudiced. (*People v. Watson*, *supra*, 46 Cal.2d 818, 836.) First, appellant argues that he was prejudiced by the instruction because any items taken from Kim could have been removed after the killing. (AOB 110.) However, since Kim was killed by a combination of gunshots wounds and burning, it is inconceivable that the items were taken from her after she was placed in the trunk and set on fire. Moreover, she did not expire until five days later. (17RT 2461.) Second, appellant argues that the items could have been taken from Kim hours before she was killed and that the robbery was completed at that point. (AOB 110.) Appellant, however, misses the point of the temporary safety rule which provides that a robbery is not concluded while the victim could possibly escape or signal for help. Third, appellant argues that the instruction was prejudicial because the defendants, after robbing Ms. Kim, but before killing her, reached a place of temporary safety. (AOB 110.) However, whether or not Osage Street was a place of temporary safety was an issue for the jury to determine. Consequently, the fact that the jury could so conclude does not mean appellant was prejudiced by the instruction.

Considering the instruction as a whole (*People v. Young*, *supra*, 34 Cal.4th at p. 1202.), CALJIC No. 8.21.1 did not remove from jury consideration any element of the offense. There were no pursuers. Consequently, the jury would not have focused on the question of any pursuit

or would have resolved any issues concerning it in appellant's favor. The jury would have understood that, as long as appellant had not reached a place of temporary safety, the robbery was ongoing.

VII.

AS THERE WERE NO GUILT PHASE ERRORS, THERE WAS NO CUMULATIVE ERROR

Appellant contends the cumulative effect of the alleged guilt phase errors requires reversal of the guilt judgment. (AOB 111-112.) However, as argued above, there occurred no errors to accumulate any weight. Simply stated, there are no multiple errors to accumulate. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1165; *People v. Hinton* (2006) 37 Cal.4th 839, 913; *People v. Jablonski* (2006) 37 Cal.4th 774, 837; *People v. Panah* (2005) 35 Cal.4th 395, 501; *People v. Burgener* (2003) 29 Cal.4th 833, 884.) Even a capital defendant is entitled to only a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219.) The record shows appellant received a fair trial. Nothing more is required. This Court should, therefore, reject appellant's claim of cumulative error.

VIII.

THE TRIAL COURT PROPERLY REFUSED TO DECLARE A MISTRIAL AFTER THE JURY INITIALLY INDICATED IT WAS DEADLOCKED DURING THE PENALTY PHASE DELIBERATIONS

Appellant asserts that, by insisting on further deliberations and refusing to declare a mistrial after the penalty jury declared that it was deadlocked, the

trial court violated his rights under state law as well as his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 113-121.) Respondent disagrees.

A. Proceedings At Trial

On June 2, 1999, during the penalty phase deliberations, the jury sent the court a note asking the following:

> We, the jury in above-entitled action, request the following:
>
> If the jury deadlocks on the verdicts and penalty phase, what would happen?
>
> Would (1) the defendant's [sic] be tried all over again?
>
> (2) Would defendant's [sic] be tried over again in penalty phase only with different jury?
>
> (3) Would defendants get the lesser degree sentence automatically of life without possibility of parole?

(3CT 842; see also 36RT 5068.)

The court initially responded in writing and without objection: "This is not an appropriate factor for your consideration. You are ordered to disregard this consideration. The court cannot answer this question." (3CT 842; see also 36RT 5070.)

After further deliberations, the court informed counsel that the jury foreperson had indicated the jurors were deadlocked. The prosecutor opined the jury had not yet had an opportunity to sufficiently deliberate. Appellant's counsel disagreed, noting the jury had deliberated for several days in the guilt phase and that, by the time the penalty phase started, most of the jurors had probably made up their minds. The court decided it would bring the jury out

and talk to the jurors. The court opined the amount of time the jurors had spent deliberating was minimal given the length of the trial. (36RT 5071-5073.)

When the jury was brought out, the court inquired as to how many votes had been taken. The foreperson indicated about five ballots had been taken as to appellant, about five as to Flagg, and one as to Higgins. The foreperson indicated there had been no changes as to appellant in the last two ballots and that further deliberations would not assist the jury. (36RT 5075.) The jurors were polled as to whether further instructions or re-reading of testimony would assist them. (36RT 5076-5077.)

Appellant's counsel requested a mistrial and argued that, if the jury would only give death to one defendant, it would be appellant. (36RT 5077-5078.) The court suggested it might recess for the day and ask the jurors to come back the next day when they were fresh. The court also noted the jurors had been hearing this case for two months and only deliberating for a day and a half. (36RT 5079.) The court then told the jury to take a recess and return the next morning to continue discussions. The court told the jury that, "if it's apparent to you after a period of time that those discussions are fruitless, and there's nothing else that the court is going to be able to do to assist you in reaching a decision, then so be it." (36RT 5080.)

The next afternoon, the jury reached verdicts as to all three defendants. The verdicts fixed appellant's penalty at death and fixed the penalty of life without parole for Flagg and Higgins. (36RT 5083, 5088-5089.)

Later, the court mentioned to counsel that one of the jurors (juror number five) told the court he needed to know the answer to the question the jury had sent out. (36RT 5100.) It appeared to the court that juror five was troubled by that question, but the court told him that the court could not discuss it with him since the case was not over. (36RT 5101.)

B. Applicable Law And Legal Analysis

Appellant argues that section 1140 required the trial court to declare a mistrial when the jury declared themselves deadlocked. (AOB 115-116.) Section 1140 provides:

> Except as provided by law, the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

The determination of whether to declare a hung jury or order further deliberations rests in the trial court's sound discretion. (*People v. Bell* (2007) 40 Cal.4th 582, 616; *People v. Proctor* (1992) 4 Cal.4th 499, 539; *People v. Rodriguez* (1986) 42 Cal.3d 730, 775.) Moreover,

> [¶] Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived "'as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.'"

(*People v. Bell, supra*, 40 Cal.4th at p. 616, quoting *People v. Proctor, supra*, 4 Cal.4th at p. 539, internal citations omitted.)

Inquiry into the possibility of agreement is not a prerequisite to a denial of a motion for mistrial. (*People v. Bell, supra*, 40 Cal.4th at pp. 616-617, citing *People v. Rodriguez, supra*, 42 Cal.3d at p. 777.) Although, when faced

with a deadlocked jury, a court must act carefully to avoid its actions being viewed as coercive, "a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) Also, denial of mistrial is appropriate where the jury has only deliberated for ten hours or fourteen hours. (*People v. Bell*, *supra*, 40 Cal.4th at p. 617.)

Here, the trial court did nothing coercive. It only inquired of the jurors whether there was any further instruction or re-reading of testimony that would be helpful. (36RT 5076-5077.) As it was the end of the day, the court merely asked the jurors to recess until the next morning and continue discussions. The court told the jurors that, if they found further discussions to fruitless and there was nothing else the court could do to assist them in reaching a decision, "then so be it." (36RT 5080.) The court did not urge the jurors to reach agreement. It did not give additional coercive instructions. No *Allen* charge was given.[26/] The jurors were not given any reminders of the importance of securing a verdict nor asked to reconsider potentially unreasonable positions. The remarks from the court showed absolutely no preference for a particular verdict. The procedure utilized here was entirely neutral.

Nevertheless, appellant asserts that the trial court acted improperly by not inquiring into the jury's numerical division. Appellant, however, fails to cite to any authority *requiring* such inquiry. (AOB 117-119.) Although the discretion to inquire into a jury's numerical division in the event of a deadlock has been expressly approved in California (*People v. Breaux* (1991) 1 Cal.4th 281, 319), it appears to be a discretionary act under section 1140, rather than a mandatory action.

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26. The term "*Allen* charge" is discussed at length in footnote 19, *infra*.

Appellant also argues that the trial court's request that the jurors come back the next morning could have been coercive if there were only one or two holdout jurors. (AOB 118.) However, since it was not announced in open court what the numerical division of the jury was, it cannot be concluded that the court's request to the jury to come back the next morning was intended to coerce any holdout jurors. Indeed, the trial court expressly told the jurors that their deliberations could prove "fruitless" and, if that were the case, then "so be it." (36RT 5080.) Thus, the jury was clearly given the option of returning the next day and informing the court it was still deadlocked. The court did not require the jurors to reach agreement. "No improper coercion occurred here. The trial court made no coercive remarks and exerted no undue pressure on [any] minority juror to change his vote." (*People v. Sheldon* (1989) 48 Cal.3d 935, 959, citing *People v. Rodriguez, supra*, 42 Cal.3d at p. 775.)

Relying on *United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, and other intermediate federal appellate cases, appellant further argues his constitutional rights were violated because the trial court was required to and did not remind the jurors of their duty and obligation not to surrender conscientiously held beliefs simply to secure a verdict. (AOB 120.) However, the Ninth Circuit in *Mason* only required such an admonition when the trial court gives the jury an "*Allen* charge" to counterbalance the excesses of that charge. (*Id.* at pp. 1267-1268; *see also United States v. Beattie* (9th Cir. 1980) 613 F.2d 762, 765 [requiring reminder as part of *Allen* charge]; *Sullivan v. United States* (9th Cir. 1969) 414 F.2d 714, 718 [noting that "the Allen instruction given here sufficiently reminded each of the jurors of his obligation to give ultimate controlling weight to his own conscientiously held opinion."].)

Here, however, no *Allen* charge was given. The jurors were not reminded of the importance of securing a verdict nor asked to reconsider potentially unreasonable positions. The jurors were merely asked to return the

next morning and, if possible, discuss the matter further. Significantly, the jury here was told that, if they found further discussions to be fruitless, "then so be it." (36RT 5080.)

Relying on *Quong Duck v. United States* (9th Cir. 1923) 293 F. 563, 564, appellant argues that requiring the jury to continue deliberations impliedly communicated the trial court's desire for a unanimous verdict. (AOB 120.) That case, however, is easily distinguishable from the instant case because, in *Quong Duck*, the trial court told the jury it did not understand why a verdict had not been "'promptly rendered'" and that the court hoped the jurors would "'compose'" their differences because "'[t]here ought to be a verdict reached in this case.'" (*Id.* at p. 564.) The trial court here never told the jury that a verdict should have been promptly rendered, never told the jury that they should compose their differences, and never said that "there ought to be a verdict reached in this case." Rather, as noted earlier, the trial court here left open the possibility that the jurors might not reach a verdict when they reconvened in the morning. (36RT 5080.)

Consequently, appellant's constitutional rights were not violated by the trial court's request that the jury return the following morning and attempt to further deliberate.

IX.

APPELLANT WAIVED HIS CLAIM REGARDING THE TRIAL COURT'S REFUSAL TO ANSWER THE PENALTY JURY'S QUESTION AND, EVEN IF THE CLAIM IS NOT WAIVED, THE TRIAL COURT PROPERLY REFUSED TO ANSWER THE JURY QUESTION REGARDING WHAT WOULD HAPPEN IF THEY COULD NOT REACH A VERDICT

Appellant contends the trial court erred by refusing to answer the penalty jury's question as to what would happen if they could not reach a verdict.[27] (AOB 121-128.) This claim is waived because, although the defendants requested a mistrial before the court declared how it was going to admonish the jurors, neither appellant nor his codefendants objected to the court's proposed admonition to the jury to go home and resume deliberations in the morning (36RT 5079-5080). (See *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1193 [finding claim of error waived in regard to response to jury question when defendants consented to court's admonition to the jury]; *People v. Cooper* (1991) 53 Cal.3d 771, 847 [where the defendant did not suggest at trial the elaboration he now urges in response to the jury's question, the issue may not be raised on appeal].)

Moreover, there is no merit to this contention. The trial court properly refused to answer the jury question regarding what would happen if they could not reach a verdict. Indeed, this Court:

> addressed this precise issue in *People v. Belmontes* (1988) 45 Cal.3d 744, 248 Cal.Rptr. 126, 755 P.2d 310, explaining that an instruction setting forth the consequences of a hung jury "would have the potential

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27. The proceedings at trial regarding the jury question, the discussion regarding the jury's question, and the court's response are set forth at length in the preceding argument. (Arg. VII, *infra*.)

for unduly confusing and misguiding the jury in their proper role and function in the penalty determination process. Penalty phase juries are presently instructed that their proper task is to decide between a sentence of death and life without the possibility of parole. Any further instruction along the lines suggested herein could well serve to lessen or diminish that obligation in the jurors' eyes." (*Id.* at p. 814, 248 Cal.Rptr. 126, 755 P.2d 310.)

(*People v. Gurule* (2002) 28 Cal.4th 557, 648.) Also, this Court has stated that the court is not required to instruct a jury that it has a "third option" - a choice to deliver no verdict. (*People v. Kimble* (1988) 44 Cal.3d 480, 515 & fn. 23.)

Appellant nevertheless argues that a violation of section 1138, which requires a trial court to answer jury questions, becomes federal constitutional error when the trial court fails to clarify the law for the jury.[28] (AOB 124-125.) Section 1138, however, does not apply here. It only applies where there is a "disagreement between [the jurors] as to the testimony, or if they desire to be informed on any point of law arising in the case." (§ 1138.) The consequences of a hung jury are not disagreement as to testimony or a desire to be informed on points of law arising out of the case. The consequences of a hung jury are court procedures which are immaterial to the jury's task in determining the appropriate penalty.

Appellant also argues that the trial court was obligated to respond to the question because "the jurors may well have thought that the entire guilt and

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28. Section 1138 provides:

After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.

penalty phase would have to be retried and thus voted for death for that very reason." (AOB 126.) Contrary to appellant's assertions, this case is like *People v. Rodrigues* (1991) 53 Cal.3d 771, where the jury requested to be told what would happen if they deadlocked. (*Id.* at pp. 846-847.) This Court held in *Rodrigues* that the contention lacks merit because "[t]he court is not required to 'educate the jury on the legal consequences of a possible deadlock.'" (*Id.* at p. 847, quoting *People v. Bell* (1989) 49 Cal.3d 502, 552-553.)

Appellant also asserts that the failure of the trial court to answer the jury question violated his Sixth, Eighth and Fourteenth Amendment rights. He argues that, because his federal constitutional rights were thereby violated, the "reasonable possibility" standard applies to measure prejudice. (AOB 127-128.) Assuming that the court erred, "[a] violation of section 1138 does not warrant reversal unless prejudice is shown." (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97, citing *People v. Kageler* (1973) 32 Cal.App.3d 738, 746.) Reversal is not required if the court is satisfied beyond a reasonable doubt that the error did not contribute to the verdicts. (*People v. Chagolla* (1983) 144 Cal.App.3d 422, 432; *People v. Vinson* (1981) 121 Cal.App.3d 80, 85.) Here, given the overwhelming evidence that appellant was the mastermind and the actual shooter in both the murder of Kim and the attempted murder of Dassopoulos, it can be concluded beyond a reasonable doubt that instruction on the consequences of a hung jury would not have resulted in a verdict of life without the possibility of parole.

X.

THE TRIAL COURT DID NOT IMPROPERLY RESTRICT DEATH QUALIFICATION VOIR DIRE OF THE JURY

Appellant contends the trial court prejudicially erred in restricting the death qualification voir dire of the jury, thereby violating appellant's Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and his rights under the California Constitution. (AOB 128-141.) Specifically, appellant asserts that "[t]he constitutional requirement that prospective jurors in a death penalty case be questioned on whether their views on the death penalty would interfere with their ability to be impartial is not discharged by general questioning about the juror's overall ability to be fair and impartial." (AOB 134, citing *Morgan v. Illinois* (1992) 504 U.S. 719, 731 [112 S.Ct. 2222, 119 L.Ed.2d 492].) Appellant complains that the trial court improperly restricted his counsel's questioning of prospective jurors to what was charged in the information. (AOB 134.)

In support of his contention, appellant points only to his counsel's voir dire of prospective juror 6265. (AOB 129-132.) During that questioning, counsel asked prospective juror 6265, based on what little he knew about the case then, what would he say, "guilty or not guilty." Recognizing that there is a presumption of innocence, the prospective juror said "Not guilty." (4RT 723-724.) Appellant's counsel then asked, "How about the penalty phase?" At sidebar, the court indicated it was concerned with asking prospective jurors "to prejudge what the potential decision would be in a death penalty case, based on the allegations alone." Appellant's counsel agreed that it would be improper to ask a juror to prejudge. The court noted that the only thing counsel could do was ask whether or not the prospective juror had an open mind as to either of the possibilities. Counsel proffered that he believed he could go into the facts

of the case and ask whether, based on these facts, the prospective juror would automatically vote death. (4RT 723-725.) The court disagreed, explaining that the prospective jurors could be asked about whether, with the general allegations in mind, they would automatically vote one way or another, but that it would be inappropriate to ask the prospective jurors to prejudge which factors they would find aggravating or mitigating. (4RT 725.)

Appellant concedes that his counsel was allowed to ask the prospective jurors about some specific facts such as whether they would automatically vote for death based on the fact that a woman was put in the trunk of a car alive and burned and whether they would automatically vote for death based on the murder of Ms. Kim and attempted murder of Ms. Dassopoulos. (AOB 139, citing 4RT 729, 741-742.) However, he asserts that such questioning did not "alleviate the error." (AOB 139.)

This Court has explained that:

> either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence.

(*People v. Coffman* (2004) 34 Cal.4th 1, 47, quoting *People v. Cash* (2002) 28 Cal.4th 703, 720-721.)

However, this Court has noted that:

> "[D]eath-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective

> jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. [Citation.] In deciding where to strike the balance in a particular case, trial courts have considerable discretion."

(*People v. Coffman*, *supra*, 34 Cal.4th at p. 47, quoting *People v. Cash*, *supra*, 28 Cal.4th at pp. 721-722.)

In *People v. Cash*, *supra*, 28 Cal.4th 703, penalty phase aggravating evidence included the fact that, as a juvenile, the defendant had killed his elderly grandparents. (*Id.* at p. 717.) Those murders were not alleged as a special circumstance. (*Id.* at p. 714.) In voir dire, defense counsel wanted to ask prospective jurors whether they could return a verdict of life without parole for a defendant who had killed more than one person, without revealing that the defendant had killed his grandparents. (*Id.* at p. 719.) The trial court prohibited such questioning because the prior murders were not expressly alleged in the charging document: "'You cannot ask anything about the facts that are not charged in the Information, period. You can't raise one mitigating factor, nor can [the prosecutor] raise one aggravating [factor] that is not charged in the Information . . . . You cannot go past the Information.'" (*Ibid.*) This Court held that, because the "defendant's guilt of a prior murder (specifically, the prior murders of his grandparents) was a general fact or circumstance that was present in the case and that could cause some jurors invariably to vote for the death penalty," defense counsel should have been allowed to inquire. (*Id.* at p. 721.)

Appellant asserts that, in the instant case, just as in *Cash*, "the trial court improperly restricted defense counsel from inquiring regarding any general facts not expressly pleaded in the information." (AOB 139.) However, the trial court here never made such a ruling. The trial court here never told appellant's counsel that he could only voir dire on the facts pled in the information. (4RT

724-725.) Rather, the court expressed concern that appellant's counsel was going to start questioning jurors whether they would vote for death or life in prison specifically with regard to each allegation. (4RT 724-725.) The court pointed out that it would be improper to ask a prospective juror to prejudge the penalty based on each circumstance, but that it would be appropriate to ask prospective jurors if they would keep an open mind with respect to the penalty no matter which aggravating factors were presented. (4RT 725.) Here, appellant's counsel had been asking the prospective juror how he would vote on penalty based on what he knew about this particular case rather than with regard to the allegations in general.

People v. Jenkins (2000) 22 Cal.4th 900, is on point here, not *People v. Cash*, *supra*, 28 Cal.4th 703. In *Jenkins*, this Court explained that "'[t]he *Witherspoon- Witt* [citations] voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract . . . . [Citations.] The inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination.'" (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 991, quoting *People v. Clark*, *supra*, 50 Cal.3d at p. 597.) Thus, in *Jenkins*, this Court found that "'[t]here was no error in ruling that questions related to the jurors' attitudes toward evidence that was to be introduced in this trial could not be asked during the sequestered *Witherspoon-Witt* voir dire.'" (*Ibid.*)

Moreover, in *Jenkins*, this Court explained that it was not "error to preclude counsel from seeking to compel a prospective juror to commit to vote in a particular way or to preclude counsel from indoctrinating the jury as to a particular view of the facts. (*Jenkins*, *supra*, 22 Cal.4th at p. 991, citing *People v. Rich* (1988) 45 Cal.3d 1036, 1105, and *People v. Sanders* (1995) 11 Cal.4th 475, 538-539.) "Thus," this Court in *Jenkins* explained, "it was not error to refuse to permit counsel to ask questions based upon an account of the facts of

this case, or to ask a juror to consider particular facts that would cause him or her to impose the death penalty." (*Jenkins*, *supra*, 22 Cal.4th at p. 991.)

Here, the trial court only restricted appellant's counsel from seeking to compel a prospective juror to commit to vote in a certain way. (See *People v. Coffman*, *supra*, 34 Cal.4th at p. 47 ["the trial court merely cautioned Coffman's counsel not to recite specific evidence expected to come before the jury in order to induce the juror to commit to voting in a particular way. [Citation.]".) Here, the trial court did not prohibit questioning in the abstract on aggravating circumstances whether or not such circumstances were addressed in the information. The court simply prohibited voir dire on whether a prospective juror would prejudge a potential penalty phase decision. Thus, the court's restrictions were constitutionally valid under *People v. Coffman*, *supra*, 34 Cal.4th at page 47, and *People v. Jenkins*, *supra*, 22 Cal.4th at page 991.

Furthermore, even if appellant's counsel believed they were precluded from inquiring into a juror's ability to fairly determine penalty in such a case, appellant had peremptory challenges remaining when the jury was sworn. (6RT 1054-1055.) Appellant "failed to exhaust [his] peremptory challenges or to express dissatisfaction with the jury as sworn on this ground. Any error, therefore, was nonprejudicial." (*People v. Coffman*, *supra*, 34 Cal.4th at p. 47, citing *People v. Burgener* (2003) 29 Cal.4th 833, 866.)

XI.

THE PROSECUTION DID NOT COMMIT MISCONDUCT IN ITS PENALTY PHASE OPENING STATEMENT

Appellant contends the trial court erred in failing to grant a mistrial after the prosecution committed "prejudicial misconduct" in its penalty phase

opening statement by stating that the jury acts as the "conscience of the community." (AOB 142-146.) There is no merit to this contention.

A. Proceedings At Trial

During the prosecutions's penalty phase opening statement, the prosecution explained:

> And that after you decide that all these factors in aggravation substantially outweigh factors in mitigation, the jury will then have the opportunity to then find a verdict of death.
>
> And each of you will have to make that decision. And then you will have to make that decision collectively. And in making that decision collectively, you will be acting as a conscience of the community.
>
> And at the end of this trial - -

(27RT 3810.)

Codefendant Flagg's attorneys objected and the court sustained the objection. (27RT 3810.) Thereafter, Flagg's attorneys moved for a mistrial. (27RT 3811.) The court invited Flagg's attorney to submit additional instructions on the matter if they so desired. However, the court noted that in its own remarks before jury selection it had referred to the jurors as "the conscience of the community." The court noted the jury's role in deciding the penalty is not to reduce crime, but to make a moral decision. (27RT 3812.) The court denied the mistrial motion, but again offered to further admonish the jury. Counsel for appellant joined in the mistrial motion. (27RT 3813.) It appears that the defense did not offer any instruction particular as to this point. (See 4CT 877-916 [instructions refused].)

B. The Prosecution Did Not Commit Misconduct Under State Law

A prosecutor only commits reversible misconduct under California law if: (1) "he or she makes use of 'deceptive or reprehensible methods' in attempting to persuade either the trial court or the jury;" and (2) "there is a reasonable possibility that without such misconduct, an outcome more favorable to the defendant would have resulted." (*People v. Rundle* (2008) 43 Cal.4th 76, 190 citing *People v. Cunningham* (2001) 25 Cal.4th 926, 1019.)

Here, there was no misconduct as "[t]he prosecutor never invited the jurors to abrogate their personal responsibility to determine the appropriate punishment." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1178.) Moreover, the prosecutor did not commit misconduct by accurately describing the jurors as the conscience of the community. (*Id.*, citing *Witherspoon* (1968) 391 U.S. 510, 519-520 [88 S.Ct. 1770, 20 L.Ed.2d 776], *People v. Lucero* (2000) 23 Cal.4th 692, 734, and *People v. Jones* (1997) 15 Cal.4th 119, 185-186.) As the United States Supreme Court stated in *Witherspoon v. Illinois, supra,* 391 U.S. at pages 519-520: "a jury that must choose between life imprisonment and capital punishment can do little more-and must do nothing less-than express the conscience of the community on the ultimate question of life or death." (Fn. omitted.)

As this Court explained in *Zambrano*:

> Here, the prosecutor's comments were not brief or isolated, but neither did they form the principal basis of his argument. Moreover, his remarks were not inflammatory. They did not seek to invoke untethered passions, or to dissuade jurors from making individual decisions, but only to assert that the community, acting on behalf of those injured, has the right to express its values by imposing the severest punishment for the most aggravated crimes. This case, the prosecutor was at pains to

suggest, was one of those that deserved such severe punishment. No misconduct occurred.

(*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1179.)

This Court similarly found the phrase "conscience of the community" when uttered by a prosecutor in the penalty phase of a capital trial to not be misconduct in *People v. Ledesma* (2006) 39 Cal.4th 641, explaining: "Several times, the prosecutor referred to the jury as the 'conscience of the community' or as representatives of the community. Such a comment is not improper." (*Id.* at p. 741, citing *Caldwell v. Mississippi* (1985) 472 U.S. 320, 333 [105 S.Ct. 2633, 86 L.Ed.2d 231] [jury is called upon to "decide that issue on behalf of the community"].) Such a reference is proper unless the prosecutor specifically intended to inflame the jury. (*People v. Lucero*, *supra*, 23 Cal.4th at p. 734.)

Unlike this case, in *Zambrano*, the prosecutor's remarks regarding the jury being the conscience of the community were not brief or isolated. In *Zambrano*, the prosecutor announced that he wanted to talk about the philosophy of capital punishment, indicated that the purpose of the death penalty is collective punishment or retribution for a wrong, indicated that such vengeance is a vital expression of the community's outrage, asserted that a society incapable of imposing such punishment where warranted was decadent and emasculated, and that the jury serves as the community's conscience in implementing this sanction. The prosecutor in *Zambrano* also discussed the concept of a social contract whereby each individual surrenders the personal right of vengeance in favor of state-controlled retribution and argued that the jury's failure to implement the death penalty would violate the contract. (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1177.)

In this case, the prosecutor's brief, isolated reference to the jury as the conscience of the community did not constitute misconduct. First of all, the reference here was minor and insignificant compared to the reference in

Zambrano, which itself was not misconduct. Moreover, this Court's "modern cases have suggested that prosecutorial references to community vengeance, while potentially inflammatory, are not misconduct if they are brief and isolated, and do not form the principal basis for advocating for the death penalty." (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1178 [listing cases].) Here, the prosecutor did not ask the jurors to abdicate their personal responsibility. Here, the remarks were not inflammatory. There is nothing in the record in this case to suggest that the prosecutor specifically intended to inflame the jury. There was nothing deceptive or reprehensible about the prosecution's attempt here to persuade the jury and, thus, no misconduct under state law. (*People v. Rundle*, *supra*, 43 Cal.4th at p. 190.)

Appellant, furthermore, has failed to demonstrate that, even assuming the brief remark constituted misconduct, in its absence, "an outcome more favorable to the defendant would have resulted." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 190.) As noted above, this remark was brief. It was not inflammatory. Significantly, it was made in opening *statement*, before any evidence had been received, rather than during *argument* to the jury at the end of the case. Appellant and his codefendants were given the opportunity to suggest an admonition regarding this remark. Also, it was a remark made in opening statement and, thus, appellant's counsel had the opportunity to address it in his own remarks to the jury. In light of the minor nature of this remark and the evidence that appellant was the ringleader and the shooter in the murder of Ms. Kim as well as the person who came very close to murdering Ms. Dassopoulos, there is no reason to believe an outcome more favorable to appellant would have resulted in the absence of this remark.

C. The Prosecution Did Not Commit Misconduct Under Federal Constitutional Law

Absent conduct that results in the denial of a defendant's specific constitutional rights, under the federal Constitution, misconduct by a prosecutor 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. Rundle*, *supra*, 43 Cal.4th at p. 190, quoting *Darden v. Wainright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144] (quoting *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [94 S.Ct. 1868, 40 L.Ed.2d 431]).)

Appellant has failed to demonstrate that the prosecutor's brief, isolated remark regarding the conscience of the community in opening statement so infected the penalty phase with unfairness as to make the resulting penalty determination a denial of due process. (See *People v. Rundle*, *supra*, 43 Cal.4th at p. 190, quoting *Darden v. Wainright*, *supra*, 477 U.S. at p. 181.) There was nothing improper or unfair about the prosecution's comment. Thus, the trial was not "infected" with any unfairness. Indeed, no less an authority than the United States Supreme Court has explained that "in a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'" (*Jones v. United* States (1999) 527 U.S. 373, 382 [119 S.Ct. 2090, 144 L.Ed.2d 370], citing *Lowenfield v. Phelps* (1988) 484 U.S. 231, 238 [108 S.Ct. 546, 98 L.Ed.2d 568] [citation and internal quotation marks omitted].)

Appellant relies on *United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146, for the proposition that the prosecutor committed misconduct by mentioning that the jury acts as the conscience of the community. (AOB 144.) *Solivan* does not support appellant's position. In *Solivan*, the prosecutor asked the jury to send a message to the defendant and other drug dealers like her

regarding drug dealing in northern Kentucky. (937 F.2d at 1148.) The Sixth Circuit found the particular comments in that case to be misconduct because the prosecutor directed the jurors' desires to end a social problem toward convicting a particular defendant. (*Id.* at p. 1153.)

However, the Sixth Circuit noted in *Solivan* that, "[u]nless calculated to incite the passions and prejudices of the jurors, appeals to the jury to act as the community conscience are not per se impermissible." (*United States v. Solivan*, *supra*, 937 F.2d at p. 1151, citing *Henderson v. United States* (6th Cir. 1955) 218 F.2d 14, 19-20.) And, the Sixth Circuit distinguished the case before it from a case where a prosecutor called upon the jurors "'to be the world conscience of the community" and "'to speak out for the community.'" (*Solivan*, *supra*, 937 F.2d at p. 1154, comparing *United States v. Alloway* (6th Cir. 1968) 397 F.2d 105.) Such comments, the court noted, "did not attempt to compare or to associate the defendant with a feared and highly publicized group such as drug dealers, ..." (*Solivan*, *supra*, 937 F.2d at p. 1154.) Such comments, the court explained, "did not go beyond a mere allusion to the general need to convict guilty people" or "bring to bear upon the jury's deliberations the attendant social consequences of defendant's criminal conduct or urge the jury to convict an individual defendant in an effort to ameliorate society's woes." (*Ibid.*)

Here, just as in *Alloway*, but unlike in *Solivan*, the prosecutor's statement was not deliberately injected to incite the jury against appellant. The prosecutor's remark here was not an attempt to compare or associate appellant with a highly feared group. Here, the prosecutor's remark only alluded to appellant's general criminality. Consequently, the prosecutor's remarks did not constitute federal constitutional error and cannot be said to have so infected the penalty phase with unfairness as to make the resulting penalty determination a denial of due process. (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181.)

Even assuming federal constitutional error, any such error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at 24.) As discussed earlier in regard to alleged state error, the remark in question was brief and isolated. It was not inflammatory in nature. It was made during opening *statement*, rather than *argument*. Appellant had an opportunity to request an admonition or to respond to it in argument. Moreover, appellant was the ringleader and shooter in both the murder of Ms. Kim and the attempted murder of Ms. Dassopoulus. Given the atrocities that appellant masterminded, there is no reason to believe the result would have been different absent the brief remark in opening statement regarding the conscience of the community.

XII.

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

Appellant contends that California's death penalty, as interpreted by this Court and applied to appellant's case, violated the United States Constitution. Appellant alleges numerous aspects of the death penalty sentencing scheme, alone or in combination, violate the federal Constitution. (AOB 146-189.) As appellant himself concedes (AOB 146), many of these claims have been raised and rejected in prior capital appeals before this Court.

Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should be rejected. (*People v. Williams* (2008) 43 Cal.4th 584, 648. [noting that the defendant challenged various aspects of California's capital sentencing scheme, alone or in combination, but noting that this Court had previously rejected similar challenges and, in the absence of a persuasive reason for

reconsideration, this Court would decline to do so]; *People v. Abilez* (2007) 41 Cal.4th 472, 533 [same]; *People v. Bonilla* (2007) 41 Cal.4th 313, 358 [same].) Although appellant argues that this Court has only considered the alleged defects in isolation without considering their cumulative impact or addressing the scheme as a whole (AOB 146), this Court has 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; *People v. Cook* (2006) 39 Cal.4th 566, 617.)

Moreover, it is entirely proper to reject appellant's complaints by case citation, without additional legal analysis. (E.g., *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

A. The Special Circumstances In Section 190.2 Are Not Overbroad And They Properly Perform The Narrowing Function

Appellant contends the failure of California's death penalty law to meaningfully distinguish those murders in which the death penalty is imposed from those in which it is not requires reversal of the death judgment. Specifically, appellant argues his death sentence is invalid because section 190.2 is impermissibly broad and fails adequately to narrow the class of persons eligible for the death penalty. (AOB 149-151.)

This Court has found that California's requirement of a special-circumstance finding adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871, 79 L.Ed.2d 29].) Likewise, this Court has repeatedly rejected, and continues to reject, the claim raised by appellant that California's death penalty law contains so many special circumstances that it fails to perform the narrowing function required under the Eighth Amendment or that the statutory categories have been construed in an unduly expansive manner. (*People v.*

Williams, *supra*, 43 Cal.4th at p. 648 ["The sentencing guidelines set forth in section 190.3 sufficiently narrow the class of homicide offenders who are eligible for the death penalty. [Citations.]"]; *People v. Abilez*, supra, 41 Cal.4th at p. 533; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 358; *People v. Avila* (2006) 38 Cal.4th 412, 483; *People v. Smith* (2007) 40 Cal.4th 483, 525-526; *People v. Huggins* (2006) 38 Cal.4th 175, 254; *People v. Crew* (2003) 31 Cal.4th 822, 860; accord *People v. Pollack* (2004) 32 Cal.4th 1153, 1196; *People v. Prieto* (2003) 30 Cal.4th 226, 276; see also *People v. Burgener* (2003) 29 Cal.4th 833, 884 ["Section 190.2, despite the number of special circumstances it includes, adequately performs its constitutionally required narrowing function."]; *People v. Kraft* (2000) 23 Cal.4th 978, 1078 ["The scope of prosecutorial discretion whether to seek the death penalty in a given case does not render the law constitutionally invalid."].) Appellant's claim must be rejected.

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

Appellant next contends the death penalty is invalid because section 190.3, factor (a), as applied allows arbitrary and capricious imposition of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.[29] (AOB 151-154.) Specifically, appellant contends 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 151.) The issue is without merit.

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29. 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.

The United States Supreme Court has specifically addressed the issue of whether section 190.3, factor (a), is constitutionally vague or improper. In *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750], the United States Supreme Court commented on factor (a), stating,

> We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Id.* at p. 976.)

This Court held in *People v. Guerra* (2006) 37 Cal.4th 1067, 1165, that "Section 190.3, factor (a), is neither vague nor overbroad, and does not impermissibly permit arbitrary and capricious imposition of the death penalty." Indeed, this Court has consistently rejected this claim and followed the ruling of the Supreme Court. (See e.g., *People v. Williams*, *supra*, 43 Cal.4th at p. 648; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 358; *People v. Carey* (2007) 41 Cal.4th 109, 135; *People v. Smith* (2005) 35 Cal.4th 334, 373; *People v. Brown* (2003) 33 Cal.4th 382, 401; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1053.) There is no need for this Court to revisit the issue.

C. Application Of California's Death Penalty Statute Does Not Result In Arbitrary And Capricious Sentencing

Appellant also contends California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing, and therefore violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 154-179.) He raises ten sub-claims in support of this

claim, including challenges involving the burden of proof required at the penalty phase, the failure to require juries to make written findings or reach unanimity as to the aggravating factors, and the inability to conduct an intercase proportionality review. All of these claims are without merit.

1. The United States Constitution Does Not Compel The Imposition Of A Beyond-A-Reasonable Doubt Standard Of Proof, Or Any Standard Of Proof, In Connection With The Penalty Phase; The Penalty Jury Does Not Need To Agree Unanimously As To Any Particular Aggravating Factor

Appellant asserts his death sentence violates the Sixth, Eighth, and Fourteenth Amendments for the following reasons: (1) because his death sentence was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors, his constitutional right to a jury determination beyond a reasonable doubt of all facts essential to the imposition of the death penalty was thereby violated (AOB 155-168); 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 the aggravating factors exist and outweigh the mitigating factors and that death was the appropriate penalty (AOB 168-172). Appellant's contentions are meritless because this Court has rejected appellant's claims.

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*, *supra*, 41 Cal.4th at p. 359; *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.) This Court has repeatedly rejected claims identical to appellant'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. Dennis* (1998) 17 Cal.4th 468, 552; *People v. Holt*, *supra*, 15 Cal.4th at pp. 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"]), and, because he does not offer any valid reason to vary from those past decisions, should do so again here. Moreover, California death penalty law does not violate the Sixth, Eighth, and Fourteenth Amendments by failing to require unanimous jury agreement on any particular aggravating factor. Neither the federal nor the state Constitutions require the jury to agree unanimously as to aggravating factors. (*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.)

Appellant argues, however, that this Court's decisions are invalid in light of *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2328, 147 L.Ed.2d 435]. (AOB 156-168.)

This Court has considered and rejected appellant's argument by finding that neither *Ring* nor *Apprendi* affect California's death penalty law. (*People v. Abilez*, *supra*, 41 Cal.4th at p. 535 [distinguishing California's capital sentencing scheme from Arizona's capital sentencing scheme in that, in California, the final step is a free weighing of all the factors relating to the defendant's culpability which is comparable to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another]; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 359 [jury's determination of

appropriate penalty in California capital scheme does not amount to the finding of facts but constitutes a single fundamentally normative assessment outside the scope of *Ring* and *Apprendi*]; *People v. Smith*, *supra*, 40 Cal.4th at p. 526; *People v. Monterroso* (2005) 34 Cal.4th 743, 796; *People v. Martinez* (2003) 31 Cal.4th 673, 700; *People v. Cox* (2003) 30 Cal.4th 916, 971-972; *People v. Prieto, supra,* 30 Cal.4th at pp. 262-263, 271-272; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.) The same is true as to *Blakely* and *Cunningham*. (*People v. Monterroso, supra,* 34 Cal.4th at p. 796; *People v. Morisson* (2004) 34 Cal.4th 698, 731.)

2. The Jury Was Not Constitutionally Required To Provide Written Findings On The Aggravating Factors It Relied Upon

Appellant maintains California law violates the Sixth, Eighth, and Fourteenth Amendments by failing to require that the jury base any death sentence on written findings regarding aggravating factors. (AOB 172-175.) This Court has held, and should continue to so hold, that the jury need not make written findings disclosing the reasons for its penalty determination. (*People v. Williams*, *supra*, 43 Cal.4th at p. 648; *People v. Abilez*, supra, 41 Cal.4th at p. 533; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 358; *People v. Carey*, *supra*, 41 Cal.4th at p. 135; *People v. Smith*, *supra*, 40 Cal.4th at p. 527; *People v. Avila, supra,* 38 Cal.4th at p. 485; *People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Bolden* (2002) 29 Cal.4th 515, 566; *People v. Hughes, supra*, 27 Cal.4th at p. 405; *People v. Welch*, *supra*, 20 Cal.4th at p. 772.) These decisions are consistent with the United States Supreme Court's pronouncement that the federal Constitution "does not require that a jury specify the aggravating factors that permit the imposition of capital punishment." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 746, 750 [110 S.Ct. 144, 108

L.Ed.2d 725] citing *Hildwin v. Florida* (1989) 490 U.S. 638 [109 S.Ct. 2055, 104 L.Ed.2d 728].) Appellant's claim should be rejected.

3. Intercase Proportionality Review Is Not Required By The Federal Or State Constitutions

Appellant contends California's death penalty statute as interpreted by this Court forbids inter-case proportionality review, thereby guaranteeing arbitrary, discriminatory, or disproportionate impositions of the death penalty, violating the Eighth Amendment. (AOB 176-178.) This contention is without merit. Intercase proportionate review is not constitutionally required in California (*Pulley v. Harris, supra,* 465 U.S. at pp. 51-54; *People v. Wright* (1990) 52 Cal.3d 367), and this Court has consistently declined to undertake it (*People v. Williams*, *supra*, 43 Cal.4th at p. 649 ["Intercase proportionality is not required"]; *People v. Abilez*, supra, 41 Cal.4th at p. 534; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 359; *People v. Carey*, *supra*, 41 Cal.4th at p. 137; *People v. Smith*, *supra*, 40 Cal.4th at p. 527; *People v. Avila, supra,* 38 Cal.4th at p. 484; *People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Lenart* (2004) 32 Cal.4th 1107, 1131).

4. Section 190.3, Factor (B), Properly Allows Consideration Of Unadjudicated Violent Criminal Activity And Is Not Impermissibly Vague

Section 190.3, factor (b), allows the trier of fact, in determining penalty, to take into account:

> (b) The presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

Appellant contends that the prosecution may not rely in the penalty phase on unadjudicated criminal activity and that, even if it were constitutionally permissible, such alleged criminal activity could not constitutionally serve as a factor in aggravation unless found to be true beyond a reasonable doubt by a unanimous jury, violated due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, thereby rendering the death sentence unreliable. (AOB 178-179.) It is well settled that the introduction of unadjudicated evidence under factor (b) does not offend the state or federal Constitutions. (*People v. Williams*, *supra*, 43 Cal.4th at p. 649 ["Consideration during the penalty phase of unadjudicated criminal activity is permissible"]; *People v. Abilez*, supra, 41 Cal.4th at p. 534; *People v. Bonilla*, *supra*, 41 Cal.4th at p. 359; *People v. Carey*, *supra*, 41 Cal.4th at p. 137; *People v. Smith*, *supra*, 40 Cal.4th at p. 527; *People v. Cook*, *supra*, 39 Cal.4th at p. 618; *People v. Boyer* (2006) 38 Cal.4th 412, 483 ["Nor is factor (b) (defendant's other violent criminal activity) unconstitutional insofar as it permits consideration of unadjudicated crimes"]; *People v. Chatman* (2006) 38 Cal.4th 344, 410; *People v. Guerra, supra,* 37 Cal.4th at p. 1165; *People v. Hinton* (2006) 37 Cal.4th 839, 913; *People v. Brown, supra,* 33 Cal.4th at p. 402; *People v. Kipp* (2001) 26 Cal.4th 1100, 1138.)

This Court has "long held that a jury may consider such evidence in aggravation if it finds beyond a reasonable doubt that the defendant did in fact commit such criminal acts." (*People v. Samayoa, supra*, 15 Cal.4th at p. 863.)

Factor (b) is also not impermissibly vague. Both the United States Supreme Court and this Court have rejected this contention. (*Tuilaepa v. California, supra*, 512 U.S. at p. 976; *People v. Lewis* (2001) 25 Cal.4th 610, 677; *People v. Lucero* (2000) 23 Cal.4th 692, 727.) The United States Supreme Court stated:

Factor (b) is phrased in conventional and understandable terms and rests in large part on a determination whether certain events occurred, thus asking the jury to consider matters of historical fact.

(*Tuilaepa v. California, supra*, 512 U.S. at p. 976.) The Court concluded: "Factor (b) is not vague." (*Ibid.*) Neither *Ring* nor *Apprendi* affect these holdings because *Ring* and *Apprendi* "have no application to the penalty procedures of this state." (*People v. Martinez, supra,* 31 Cal.4th at p. 700; see also *People v. Bonilla, supra*, 41 Cal.4th at p. 359; *People v. Abilez*, supra, 41 Cal.4th at p. 535; *People v. Cox, supra,* 30 Cal.4th at pp. 971-972.)

Appellant's claim must therefore be rejected.

D. The Death Penalty Law Does Not Violate The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants

Appellant claims that his right to equal protection of the law under the Fourteenth Amendment of the United States Constitution was violated because an enhancing allegation in a California non-capital case must be found true unanimously and beyond a reasonable doubt, but, in a capital sentencing context, there is no burden of proof as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (AOB 179-183.)

However, this Court has consistently rejected the claim that equal protection requires that capital defendants be provided with the same sentence review afforded felons under the determinate sentencing law. (*People v. Williams, supra*, 43 Cal.4th at p. 650; *People v. Abilez*, supra, 41 Cal.4th at p. 534-535; *People v. Bonilla, supra*, 41 Cal.4th at p. 360; *People v. Carey, supra*, 41 Cal.4th at p. 135; *People v. Smith, supra*, 40 Cal.4th at p. 527; *People*

v. Cox, supra, 30 Cal.4th at p. 970; *People v. Lewis* (2001) 26 Cal.4th 334, 395; *People v. Anderson, supra,* 25 Cal.4th at p. 602; *People v. Jenkins, supra,* 22 Cal.4th at p. 1053; *People v. Cox* (1991) 53 Cal.3d 618, 691; *People v. Allen, supra*, 42 Cal.3d at pp. 1287-1289.) "[P]ersons convicted under the death penalty law are manifestly not similarly situated to persons convicted under the Determinate Sentencing Act and accordingly cannot assert a meritorious claim to the 'benefits' of the act under the equal protection clause." (*People v. Williams* (1988) 45 Cal.3d 1268, 1330.) Thus, appellant's equal protection claim must be rejected since he is not similarly situated to a defendant sentenced under the Determinate Sentencing Law.

E. International Law

Appellant asserts California's use of the death penalty as a regular form of punishment falls short of international norms of humanity and decency, and violates the Eighth and Fourteenth Amendments. (AOB 183-186.) This claim was specifically rejected in *People v. Williams*, *supra*, 43 Cal.4th at page 650 (rejecting the argument that the death penalty statute is contrary to international norms of humanity and decency), *People v. Stevens*, *supra*, 41 Cal.4th at page 213 (same), *People v. Abilez*, supra, 41 Cal.4th at page 535 (same), *People v. Carey*, *supra*, 41 Cal.4th 109, at page 135, *People v. Smith*, *supra*, 40 Cal.4th at page 527, and in *People v. Ghent* (1987) 43 Cal.3d 739, 778-779 (discussing the 1977 death penalty statute). Appellant does not provide sufficient reasoning to revisit the issue here, and thus, it should be rejected.

F. Appellant's Death Sentence Does Not Violate The Eighth And Fourteenth Amendments Merely Because His Codefendants Received Life Without The Possibility Of Parole

Appellant contends his rights under the Eighth and Fourteenth Amendments were violated because his codefendants received life without the possibility of parole rather than death. (AOB 186-189.) Appellant argues that such a result is inconsistent and disproportionate and thus violates the prohibition against arbitrariness set forth in *Furman v. Georgia*, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346]. (AOB 187.) He argues that inconsistent verdicts are unfair and constitute arbitrariness that could undermine confidence in the jury's conclusion. (AOB 187, citing *Harris v. Rivera* (1981) 454 U.S. 339, 346 [102 S.Ct. 460, 70 L.Ed.2d 530].) Appellant argues that Flagg and Higgins had far worse prior records than appellant did because, unlike them, he had no prior convictions. (AOB 188.)

This contention lacks merit. Even though appellant had no prior felony record, neither Flagg nor Higgins were involved in the offenses against Ms. Dassopoulos, who appellant viciously attacked, choking her, and eventually placing a gun against her head and firing a single shot into her head. Such evidence clearly demonstrated that appellant had a pattern of attempting follow-home robbery-murders of lone women from the Hollywood Park Casino. As the prosecution argued in its closing argument, appellant shot Ms. Dassopoulos "less than a week after robbing, shooting, and burning Dannie Kim." (35RT 4947.) Appellant "tasted blood once, and he was out to do it again," the prosecution argued. (35RT 4947.)

Moreover, strong evidence was presented that appellant was the perpetrator who shot Ms. Kim. Lewis testified that, when he heard the gunshots, appellant was standing in the direction where the shots were coming from and appellant was "tucking something away." (9RT 1554; see also 35RT

4944 [prosecution arguing in closing that appellant "is the shooter"], 4945 [prosecutor arguing: "Not only was he involved, he's the shooter. He's the person who took the gun and shot Dannie Kim"].)

There is little question that, based on the facts of the underlying offenses, appellant was more culpable than the others. There was nothing disproportionate about appellant receiving a harsher sentence than his cohorts. Indeed, even appellant's own counsel stated during the penalty phase that, if the jury would give death to any one defendant, it would be appellant. (36RT 5078.) Appellant's counsel conceded at sentencing that his client probably received the harsher sentence because he "had all the appearances of a ringleader" and because he was the shooter. (36RT 5144.)

Appellant was not similarly situated to Flagg and Higgins. There was nothing arbitrary about his punishment being different than the punishment they received.

Citing *Enmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140], appellant also argues that his sentence violates the Eighth Amendment requirement of proportionality in the application of the death penalty because trial courts must evaluate a defendant's culpability individually and in terms of sentences handed down to codefendants. (AOB 187.) *Enmund* is inapplicable here. In that case, the court was concerned that Enmund had received the death penalty although the only evidence of his participation was that he may have waited near the getaway car. (*Id.* at pp. 786, 788.) The court noted that Enmund was not the shooter and that his role was relatively minor. (*Id.* at pp. 791-792.) The court explained that he "himself did not kill or attempt to kill" and there was no evidence that he "had any intention of participating in or facilitating a murder." (*Id.* at p. 798.) Under the rule of *Enmund*, appellant's "punishment must be tailored to his personal responsibility and moral guilt." (*Id.* at p. 801.) However, here, appellant was the ringleader

and he was the shooter in both the murder of Ms. Kim and the attempted murder of Ms. Dassopoulos. Unlike the defendant in *Enmund*, appellant's individualized culpability in these crimes warrants the penalty imposed here.

XIII.

THERE WAS NO ACCUMULATION OF ERROR REQUIRING REVERSAL

Appellant asserts that the cumulative effect of the alleged guilt and penalty phase errors requires reversal of the judgment of death. (AOB 189-196.) However, as argued above, there occurred no errors to accumulate any weight. Simply stated, there are no multiple errors to accumulate. Whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of the trial. (See *People v. Williams*, *supra*, 43 Cal.4th at p. 650; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1165; *People v. Hinton*, *supra*, 37 Cal.4th at p. 913; *People v. Jablonski*, *supra*, 37 Cal.4th at p. 837; *People v. Panah*, *supra*, 35 Cal.4th at p. 501; *People v. Burgener*, *supra*, 29 Cal.4th at p. 884.) 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.) The record shows appellant received a fair trial. Nothing more is required. This Court should, therefore, reject appellant's claim of cumulative error.

CONCLUSION

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

Dated: November 19, 2008

Respectfully submitted,

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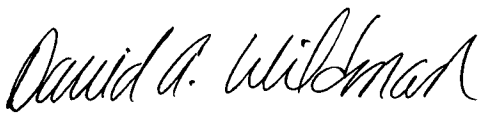

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DECLARATION OF SERVICE

Case Name: People v. Debose Case No.: S080837

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; 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.

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Respondent's Brief

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Richard P. Siref
Attorney at Law
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San Diego, CA 92101

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That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on NOV 2 0 2008, at Los Angeles, California.

L. Luna

L Luna
Signature

DAW:ll
LA1999XS0016

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 42516 words.

Dated: November 25, 2008

Respectfully submitted,

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