

SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

COREY LEIGH WILLIAMS,

Defendant and Appellant.

CAPITAL CASE

Case No. S093756

COPY

Contra Costa County Superior Court Case No. 961903202
The Honorable Richard E. Arnason, Judge

RESPONDENT'S BRIEF

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SUPREME COURT
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DEATH PENALTY

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STATEMENT OF THE CASE

On October 10, 1996, a grand jury returned indictments against appellant and his co-defendant, Dalton Lolohea, charging them with two counts of murder (Pen. Code,¹ § 187---counts one and two). The indictment alleged the following three special circumstances: multiple murder (§ 190.2, subd. (a)(3)), murder in the commission of burglary (§§ 190.2, subd. (a)(17), 459), and murder in the commission of robbery (§§ 190.2, subd. (a)(17), 211). As to each count, the indictment alleged that appellant personally used a firearm (§ 12022.5, subd. (a)), and that appellant's co-defendant was armed with a firearm (§ 12022, subd. (a)(1). (2 CT² 394-401.)

Pursuant to appellant's motion, the trial court granted appellant and his co-defendant separate trials. (3 CT 878-881; 1 RT 225.) In a separate trial, a jury found appellant's co-defendant guilty as charged (11 CT 4277-4290), fixed a penalty of life without parole (12 CT 4645), and on May 5, 2000, the trial court imposed sentence (12 CT 4910-4911).

On August 18, 2000, the jury found appellant guilty as charged. (14 CT 5461-5478.)

On September 14, 2000, a jury fixed a penalty of death. (15 CT 5881-5882, 5886.)

On November 15, 2000, the trial court imposed the death sentence. (15 CT 5932; 14 RT 3953.)

¹ All future statutory references are to the Penal Code unless otherwise indicated.

² "CT" refers to the Clerk's Transcript on appeal; "RT" refers to the Reporter's Transcript on appeal; "AOB" refers to Appellant's Opening Brief.

STATEMENT OF FACTS

A. Guilt Phase

1. The Prosecutor's Case-In-Chief

Seventy-four-year-old Maria Elena Corrieo lived at 438 Moraga Way in Orinda for 30 years with her 53-year-old daughter, Gina Roberts, who had disabilities. (10 RT 2573-2575, 2591.) Corrieo owned a restaurant, Maria Elena's, in Concord where family members and some nonfamily members worked for her. (10 RT 2573.) Corrieo did not trust banks so she carried large amounts of money in her apron and car. (10 RT 2574.) After accumulating money of various denominations, Corrieo changed the majority of the money into \$100 bills and kept the large bills in her car. (10 RT 2592-2593.)

In 1992 or 1993, appellant met David Ross who had a best friend named Dalton Lolohea. (10 RT 2663, 2672-2673, 2744; 11 RT 2889.) Appellant, Ross, and Lolohea hung out together "quite a bit." (10 RT 2673, 2743-2744; 11 RT 2901-2902.) About a month or two prior to August 15, 1995, Lolohea told Ross that there was a car that had \$30,000 in its trunk. (10 RT 2663.) Lolohea asked Ross if he wanted to break into the car with him. (10 RT 2663.) Initially, Ross did not believe Lolohea. (10 RT 2663.) About three to four weeks prior to August 15, 1995, Lolohea told appellant about the car. (10 RT 2664, 2666.) Ross began to believe Lolohea because he told him his source, Corrieo's cook, Manuel. (10 RT 2745-2747.) Lolohea, Ross, and appellant agreed to break into Corrieo's car. (10 RT 2664, 2666.) Appellant did not have a job, and Ross had only one legitimate job so they wanted the money. (10 RT 2682-2683, 2740.) On one occasion, prior to the murders, Ross, Lolohea, and appellant drove to Corrieo's house to see her car, a green Rabbit convertible. (10 RT 2666-2667.)

Around late July 1995, Nathaniel Carlock was with appellant, Lolohea, and Ross when they discussed “doing a lick on some fools.” (11 RT 2909-2910.) “Doing a lick” means to rob someone. (11 RT 2905, 2908.)

Carlock heard a second similar conversation amongst the three men in early August while they were in Ross’s car. Carlock considered it “everyday talk,” talk that was “just in the air,” “nothing new.” (11 RT 2910-2911.)

On August 15, 1995, Lolohea and appellant met Ross at the Solano Drive In in Concord and then drove to Ross’s house in Lolohea’s mid-size white car. (10 RT 2665, 2667.) Lolohea told Ross to change into black clothing, grab his gun, a ski mask, and socks to cover his hands. (10 RT 2667-2668.) Lolohea and appellant were already wearing black and had ski masks for themselves in the car. (10 RT 2668, 2684; 11 RT 2860.) Ross grabbed a ski mask, three pairs of socks, and his Glock .40 caliber pistol. (10 RT 2668-2670, 2725; see also People’s Exh. 11.) Ross gave the gun to Lolohea. (10 RT 2667.)

Lolohea, Ross, and appellant then drove close to Corrieo’s restaurant and parked. (10 RT 2664.) Lolohea gave the gun to Ross and told him to put it in the bushes, which he did. (10 RT 2671-2672.) Lolohea, Ross, and appellant then walked to the restaurant to view Corrieo’s car. Lolohea told Ross to look inside the restaurant. Ross peeked inside and saw two ladies doing paperwork. Ross reported what he saw to Lolohea and appellant. At that point, appellant and Ross said, “Let’s break into the car.” (10 RT 2672.) Lolohea told them they were going to follow the ladies home instead of breaking into the car at the restaurant. (10 RT 2672, 2679.) Lolohea told Ross to grab the gun out of the bushes, which Ross did. (10 RT 2680.) Once Corrieo and Roberts left the restaurant, Lolohea, Ross, and appellant followed them to their house in Orinda. On the way, Lolohea told them they were going to take the ladies into their house and demand the money. (10 RT 2664, 2680.) Lolohea instructed them to call each

other “baby” instead of their names during the robbery. (10 RT 2692.) Just before Lolohea, Ross, and appellant reached the house, they put on their ski masks and covered their hands with socks. (10 RT 2681, 2684.) Lolohea told Ross to give the gun to appellant, which he did. (10 RT 2680-2682.)

As Corrieo and Roberts stopped their car in front of their house, appellant and Ross jumped out of Lolohea’s car, approached the women, and told them to get out of their car. (10 RT 2681, 2683.) Lolohea pulled his car behind Corrieo’s car, got out, told the women to sit on the porch and bench. Lolohea grabbed Corrieo’s keys from her ignition and threw them to appellant who unlocked the front door of the house. (10 RT 2683.) Appellant then gave the keys back to Lolohea who tossed them to Ross. Lolohea told Ross to search Corrieo’s car. (10 RT 2683.) Lolohea and appellant took the women into the house. (10 RT 2684.) Meanwhile, Ross searched Corrieo’s car and threw everything he found, including a blue pouch of money, shoe boxes, and plastic bags, into Lolohea’s car. (10 RT 2684-2685.)

After he finished searching the car, Ross went inside the house and saw the two women lying on their stomachs; appellant was standing next to them with the gun. (10 RT 2685.) Ross helped Lolohea ransack the house searching for money. (10 RT 2687.) At some point during the robbery, Ross grabbed Corrieo and pulled her back because he thought she might be reaching for a weapon inside a desk. (10 RT 2718-2719.) Ross opened the drawer and saw only a crystal necklace. (10 RT 2719.) When Ross saw a 32-inch television that he wanted, Lolohea helped him put it into the trunk of Lolohea’s car. (10 RT 2690-2691.) Ross could hear Corrieo saying in Spanish, “It’s not worth it.” (10 RT 2691.) Ross and Lolohea then went back inside the house and continued to search for money. (10 RT 2691.)

Ross said to appellant, “C-dog, ask them where the money’s at.” (10 RT 2691-2692.) Appellant yelled, “Don’t fucking call me by my name.

Don't call me C-Dog." (10 RT 2692.) Ross apologized and continued to search through the rooms for money. (10 RT 2692.) Lolohea, Ross, and appellant then tied Corrieo's and Roberts' hands behind their backs. (10 RT 2692-2693.) Corrieo continued to say, "It's not worth it." (10 RT 2694.) Roberts "started getting crazy," tried to get up, and said, "No, no, you can't. This is my house. You fucking can't do this." Ross kicked Roberts in the back, pushing her back down onto her face. (10 RT 2694-2695.) Roberts started cussing and got up again. (10 RT 2695.) Ross told appellant to "knock her out." (10 RT 2695; 11 RT 2791.) Appellant hit Roberts three or four times in her face until she fell down. (10 RT 2695.) Ross then told Lolohea, "Let's go." (10 RT 2695.) Lolohea told Ross to get in the car and said that he and appellant were going to make sure that the telephone lines had been cut, the women were securely tied, and make sure that they could not go anywhere for awhile. (10 RT 2696.)

Ross went to the car and sat there for a few minutes until he heard a gunshot. (10 RT 2696.) When Ross looked up, he saw Lolohea running out of the house. When Lolohea reached the car, Ross heard three more gunshots coming from the house. (10 RT 2696; 11 RT 2842.) A minute later, appellant ran out of the house and got into the front passenger's seat. (10 RT 2697.) Around 2:00 or 2:30 a.m., Nina Higgins, Corrieo's neighbor, heard four rapid gunshots. (10 RT 2597.)

Lolohea, Ross, and appellant left Corrieo's house and drove towards Walnut Creek. (10 RT 2697.) On the way, Ross asked appellant what he did. (10 RT 2697.) Appellant said that he shot "them bitches." (10 RT 2697.) When Ross asked why, appellant said because he (Ross) had called him "C-Dog." The parties stipulated that appellant had "C-Dog" tattooed on his hands. (10 RT 2698.) When Lolohea, Ross, and appellant reached Walnut Creek, they dropped off the television at a friend of appellant

named Josh Arias. Ross told Arias that he would pick it up the next day. (10 RT 2699.)

Lolohea, Ross, and appellant then drove to their “hang out” in an industrial area of Concord called Stanwell. (10 RT 2699.) While they were there, Jerome Saravia, Aura Belasco, and Michelle Marcott pulled up in a car. (10 RT 2701; 11 RT 2958.) Ross waved them off. (10 RT 2701.) Lolohea, Ross, and appellant then began searching through the items until appellant said, “We got the money.” (10 RT 2702; 11 RT 2861-2862.) Lolohea and appellant gave each other a high five and they all hugged. (10 RT 2702.) Ross suggested that they get tattoos to remind them of the night. (11 RT 2793.)

Lolohea told Ross that he was going to ditch his car for awhile and asked Ross to pick up appellant and him at Jesse Coward’s house. (10 RT 2704-2705.) Lolohea then took Ross to his house where Ross held the money. Lolohea and appellant then drove to Coward’s house. (10 RT 2705, 2707.) Ross took \$4,000 for himself and hid it. (10 RT 2707.) Ross then took his mother’s truck to go pick up Lolohea and appellant at Coward’s house. (10 RT 2705.)

After picking them up, Ross drove Lolohea and appellant back to his house where they divided the money. (10 RT 2705-2706, 2758-2759.) Lolohea and appellant received about \$12,000 each. (10 RT 2757.) Ross received about \$16,000, which included the \$4,000 he had hidden from the others. (10 RT 2712, 2733, 2757.) Ross gave \$500 to his sister, Bernadette, and told her to hide his ski mask and sweater. (10 RT 2708; 11 RT 2865, 2875-2877, 2960, 2966.) Bernadette hid them because she was scared. (11 RT 2960.) Ross told his sister that he, Lolohea, and appellant had robbed some ladies for about \$40,000, and that appellant had killed the ladies. (11 RT 2960-2964.) Ross appeared shocked and scared. (11 RT 2976.) Ross also told Bernadette that he, Lolohea, Saravia, and appellant had burned

some items at Stanwell. (11 RT 2964-2965.) Bernadette saw appellant in her brother's room the night that they divided the money. (11 RT 2963, 2966.) After dividing the money, Ross drove Lolohea and appellant back to Lolohea's car. (10 RT 2708.)

On August 16, 1995, at 9:30 a.m., Deborah Hall went to her work on Stanwell Drive. On the way, Hall saw a pile of items that had been burned in the back alley. The partially burned items included a matchbook and restaurant receipts from Maria Elena's Restaurant. (11 RT 2949.) At trial, Sergio Corrieo,³ Corrieo's son, identified a charred automobile card that he had given to his mother at her restaurant. (11 RT 3033.) The parties stipulated that a sheriff's deputy recovered the burned card from the Stanwell area on August 30, 1995. (12 RT 3125.)

On August 16, 1995, around 11:00 a.m., Ross picked up appellant at Saravia's house, and they went to the mall where appellant bought his girlfriend, Wendy Beach, a bracelet. Afterwards, Ross and appellant delivered it to Beach. (10 RT 2709-2710; 11 RT 2982.) Ross then drove appellant back to Saravia's house to "put his money up" and left appellant there. (10 RT 2710.)

Around 6:00 p.m., after Lili Williams, Corrieo's daughter, was unable to reach her mother at her home or restaurant, she went to her mother's house in Orinda. (10 RT 2584.) Williams discovered the bodies of her mother and sister inside the house. (10 RT 2585-2586.) Williams tried to call the police, but the phone lines had been cut. At 6:26 p.m., Williams's ex-husband flagged down Officer Telles. (10 RT 2588, 2594, 2601.) Officer Telles secured the crime scene until the criminalists arrived. (10 RT 2603-2604.)

³ Sergio Corrieo will be referred to hereinafter as "Mr. Corrieo" to distinguish him from his mother who shares the same last name.

When forensic specialist Ojena arrived, he noticed that the home had been ransacked. (10 RT 2609-2611, 2620-2623.) Ojena and criminalist Holes observed that Corrieo's and Roberts' hands had been bound behind their backs and that they had been shot multiple times in the head while lying on their stomachs. (10 RT 2618, 2623-2625, 2628, 2646.) The parties stipulated that underneath Corrieo's head, there was an Old Navy bag which had a boot print that latent examiner Martin later determined matched Lolohea's left boot. (10 RT 2631-2633, 2636.) Holes recovered the seven expended cartridge casings which had been fired from a .40 caliber Smith and Wesson semi-automatic handgun. (10 RT 2617, 2619-2622, 2625-2626, 2646-2647.) Holes recovered four of the casings near Roberts' body and three of the casings near Corrieo's body. (10 RT 2647, 2655.) In addition, Holes recovered five bullets from the crime scene. (10 RT 2655-2656.) Underneath a pink throw rug where Corrieo had been shot, Holes also found two rings. (10 RT 2648-2650.)

At 6:38 p.m., Officer Stroud arrested appellant in Concord on unrelated charges. (11 RT 2950.) After his arrest, appellant called Beach from jail and asked her to pick up the money he had at Saravia's house. (11 RT 2986.) Beach located about \$20,000 in Saravia's bathroom and took it. (11 RT 2986.) The majority of the money was \$100 bills, but there were some \$20 bills. (11 RT 2987.) Beach spent about \$5,000 of the money on herself. (11 RT 2986.)

On the evening of August 16, 1995, Ross rented a room at Embassy Suites to celebrate with Lolohea the money they had stolen. (10 RT 2711-2712; 11 RT 2794.) Carlock and Belasco were also in the room. (11 RT 2901, 2914, 2958.)

On August 17, 1995, Dr. Josselson conducted autopsies on Corrieo's and Roberts' bodies. (11 RT 3015.) Both Roberts and Corrieo had died from multiple gunshot wounds to the head. (11 RT 3015, 3018, 3021.)

Any one of the gunshot wounds to their heads would have been fatal. (11 RT 3016-3018, 3028.) Dr. Josselson noted that Roberts also had small scratches on her nose and her upper lip. (11 RT 3018.) The parties stipulated that the bullet fragments inside Corrieo's head weighed the same as the weight of one bullet from a Glock Smith and Wesson .40 caliber pistol. (11 RT 3124.)

On numerous occasions in late August 1995, while appellant was in jail, he called his good friend, Shannon Kaemper. (11 RT 3004, 3010.) Kaemper sometimes connected appellant to Saravia. (11 RT 3006-3007.) Kaemper overheard appellant tell Saravia that "they came up with money hella quick" and that the money was being held at Beach's house. (11 RT 3007-3008.)

Ross told others, including Clemus West, what occurred on August 15, 1995. (10 RT 2712-2713; 11 RT 2829.) The parties stipulated that the Glock .40 caliber semi-automatic pistol was the murder weapon. (12 RT 3124; see also People's Exh. 11.) At some point, Ross gave the murder weapon to West to get rid of it. (10 RT 2730-2731, 2749.) In the fall 1995, West sold the gun to Aziz Al-Ouran. (11 RT 2952-2953.) Around that time, Jesse Coward spoke with Ross in a park. (11 RT 2891.) Ross was upset and close to crying. (11 RT 2891, 2897.) Ross told Coward that he had done some "ill-assed shit," and that "they" were supposed to rob them. (11 RT 2897.) Ross was upset about what the other participants in the crime had done. (11 RT 2898.) When West moved to Las Vegas, he called Ross and told him that the "cops knew." (10 RT 2753.)

In Tijuana, Mexico, criminalist Holes processed the white car that had been driven to the crime scene. (10 RT 2651.) The parties stipulated that the items seized from the car had Lolohea's fingerprints on them. (10 RT 2653.) The parties also stipulated that the 32-inch television taken from

Corrieo's house was the source of the marks on the inside of the trunk. (10 RT 2654; 12 RT 3124.)

On January 10, 1996, Deputy Malone executed a search warrant at Beach's house and seized about \$20,000, which consisted of \$100 bills. (11 RT 2987, 3012-3013.) Beach eventually told the police that she had picked up the money from Savaria's house. (11 RT 2988.)

On January 10, 1996, the police interviewed Ross. (11 RT 2780.) Initially, Ross lied and told the police that he did not know anything about the murders. (11 RT 2781, 2801.) Ross was afraid of going to prison. (11 RT 2802.) At various points during the interview, Ross spoke with his brother, West, and Lolohea. (11 RT 2760, 2783-2785.) Ross and Lolohea's 14-minute conversation was recorded, but it was not audible because Ross and Lolohea were whispering to each other. (11 RT 2840-2841.) Ross testified that he had lied to police that Lolohea was already in the car when all the shots were fired because he wanted to protect Lolohea. (11 RT 2846-2847.)

In May 1996, the police interviewed Ross two more times. (11 RT 2782.) Ross did not lie about what appellant had done, but he minimized his own role in the crimes. (11 RT 2785, 2789-2790, 2815.)

By October 1996, when Ross testified in front of the grand jury, he had made a deal with the prosecutor in which the prosecutor agreed Ross would get life without parole if he testified. (11 RT 2794-2797.) Ross did not testify about all his past criminal activities during the grand jury proceedings because he forgot about some of them. (11 RT 2803-2812.)

On December 19, 1996, Mr. Corrieo was an inmate at California State Prison, Sacramento (C.S.P. Sacramento) where he was working in the Receiving and Release Center. (11 RT 3035.) Mr. Corrieo recognized appellant as he was arriving on the bus from San Quentin State Prison. (11 RT 3036, 3042.) Mr. Corrieo was upset because he knew that appellant

was a suspect in the murder of his mother and sister. (11 RT 3037.) Mr. Corrieo immediately approached Correctional Officer White. (11 RT 3042.) He told him that appellant was a suspect in his family's murder, he did not want to do anything stupid, and asked to be excused. (11 RT 3037, 3057.) Officer White took Mr. Corrieo away from the work area, had him briefly speak with Lieutenant Reed, and then secured him in a holding cell. (11 RT 3048, 3057-3058.)

As Mr. Corrieo was waiting in the area next to the holding room, he learned from a coworker that appellant was being held in the adjoining room which had a sliding door with a two- or three-inch gap. Mr. Corrieo could not see appellant. (11 RT 3038.) Mr. Corrieo said, "Hey, Corey," and appellant responded, "Yeah." Mr. Corrieo said, "Do you remember Maria Elena Corrieo?" Appellant said, "Yeah," and Mr. Corrieo said, "You're a dead man, mother fucker." (11 RT 3039.)

Afterwards, Lieutenant Reed and Officer White interviewed appellant to determine appropriate housing for him. (11 RT 3049.) Appellant said, "I need to lock up," meaning that he needed to be housed in administrative segregation because his life was in jeopardy. (11 RT 3051, 3061.) Lieutenant Reed asked, "Why?," and appellant said, "Because they are going to stab me." (11 RT 3051-3052, 3062.) When Lieutenant Reed asked who was going to stab him, appellant said that he was "not going to say" or he "could not say." (11 RT 3052, 3063.) Officer White then asked, "Why would they stab you?," and appellant responded, "Because I killed two Hispanics." (11 RT 3052, 3066.) Officer White then prepared a report to be put in Mr. Corrieo's file (128-B report). (11 RT 3069-3071, 3076; see also People's Exh. 19.)

Two weeks before appellant's trial, Ross's deal with the prosecutor improved and the parties agreed that Ross would be sentenced to 20 years in prison. (10 RT 2677; 11 RT 2797, 2857.) At trial, Ross admitted that he

had a signed written agreement with the prosecutor in which he agreed to tell the truth about the crimes against Corrieo and Roberts in exchange for the prosecutor's promise not to seek the death penalty against him (Ross), but rather serve a 20-year prison term. (10 RT 2673, 2677-2678; see also 3 CT 909-912; People's Exh. 14 [Ross's agreement with the Chief Deputy District Attorney to testify truthfully].) In addition, Ross admitted that he had committed various crimes, including robbery, burglary, theft, shooting at a car window, selling crack cocaine, selling marijuana, and selling stolen property, many crimes which he failed to admit during his grand jury testimony. (11 RT 2803-2804, 2810-2811.) Ross also admitted that he had been twice arrested for rape. (11 RT 2811-2812.) Ross further admitted that he was no stranger to violence and in the past had "tried to lie his way out of it." (10 RT 2695.)

2. The Defense Case-In-Chief

Teri Barela, appellant's mother, testified that she lived at various residences with appellant until he was 17 years old. (12 RT 3129-3131; see also Defendant's Exh. 9.) Barela admitted that she had been engaged in prostitution for the majority of her life since the age of 12. (12 RT 3127-3128.) Barela also admitted that she was a drug addict, but stated that she had stopped using drugs about three years ago. (12 RT 3128.)

Appellant's father, Gregory Lusk, and stepfather, Anthony Barela, often beat Barela and appellant. (12 RT 3132-3133.) Barela would escape the violence by going to her grandmother's house in Walnut Creek. (12 RT 3132.) Barela's grandmother welcomed her, but not appellant towards whom she used racial epithets because his father was Black. (12 RT 3134-3135.)

On November 6, 1992, Barela's grandmother died. When she died, there were approximately 12 relatives living at her house and Barela received one-sixth of an interest in her grandmother's house, plus \$44,000.

(12 RT 3136, 3139-3240, 3176-3177.) Barela kept the money in \$100 bills and did not deposit it in a bank. (12 RT 3142, 3145.) Barela lied to the other relatives and told them she had put the money in the bank. (12 RT 3144-3145.)

After the death of Barela's grandmother, the house was dirty, chaotic, and falling apart so Barela sold her interest in the house and received another \$40,000 in March 1994. (12 RT 3148-3154.) Afterwards, Barela was going through the money quickly so she gave \$20,000 to \$25,000 to appellant to hold for her. (12 RT 3159.) Barela told appellant not to give it back to her until she was clean and sober. (12 RT 3155, 3159-3160.) Barela did not want to know where appellant put the money and she trusted him not tell anyone about it. (12 RT 3161-3162.) Barela was not sure, but thought that the money found at Beach's house belonged to her. (12 RT 3163.)

In February 1996, while Barela was in prison in Nevada, she was interviewed by an FBI agent to whom she told that she had not given appellant any large amounts of money other than \$3,000 for a car. (12 RT 3163-3166, 3170-3172.) Barela knew that appellant had been charged with the murders, but claimed that she lied to the FBI agent because she thought it was a trick. (12 RT 3165, 3170-3171.) Barela later told the defense investigator about the money and broke her word to appellant not to talk about the money. (12 RT 3167, 3172.)

On December 5, 1995, around 9:00 p.m., Manuel Hernandez saw three men acting unusual around his elderly neighbor's house. (12 RT 3180-3182.) Hernandez confronted one of the men who claimed he was there to visit his aunt. (12 RT 3182.) When Hernandez went back to his house to call the police, one of the men knocked him out and started kicking him. (12 RT 3183-3184, 3188.) When another neighbor, James Grady, warned the men that the police were on their way, the men ran. (12

RT 3188-3189.) Grady later learned that the man beating Hernandez was Ross who was later arrested in the murders of Corrieo and Roberts. (12 RT 3190-3191.)

On January 10, and 11, 1996, Sergeant Ingersoll interviewed Ross. (12 RT 3211-3212.) Ross initially denied knowing anything about the Corrieo robbery and later said he had been dropped off at a gas station before the robbery. (12 RT 3214.) Ross gave various answers to the question about how much money was taken from the Corrieo residence, ranging from \$600 in a blue bag to \$10,000 to larger amounts, none of which he saw, claiming that "they fucked [him]" out of the money. (12 RT 3213-3217.) At the end of the interview, Ross was arrested. (12 RT 3212.)

In a later interview and during his grand jury testimony, Ross stated that there was a three-way division of the stolen money of \$12,000 each, plus Ross took an extra \$4,000 for himself. (12 RT 3219-3221.) Prior to Ross's grand jury testimony, Bernadette had not provided the police with any information about the crime although they had questioned her about it. (12 RT 3221.) Bernadette subsequently told the police that Ross had given her \$500. (12 RT 3222.) Bernadette also claimed that Ross had told her that he received \$12,000, while Lolohea and appellant received \$23,000 to \$26,000 each. (12 RT 3223.)

In the Spring 1996, inmate Hazelton, who was serving a life sentence in prison, met Ross in the Contra Costa County Jail. (12 RT 3195-3196.) Ross told Hazelton that he did not think he was ever going to see his child again because he was "here for some serious case." (12 RT 3200-3201.) Hazelton said, "Yeah." Ross responded "I wasted these two bitches." Hazelton made it clear to Ross that he did not want to hear any more. (12 RT 3201.) About two weeks later, Hazelton and other inmates noticed that Ross had been speaking with investigators and Ross told Hazelton that he was trying to make a deal in his case. (12 RT 3200.) Hazelton was later

put on a module with appellant, but he did not speak with appellant about his case. (12 RT 3201-3202.) Hazelton admitted that one way to “gain face” in prison is to injure rats and snitches. (12 RT 3205.) Hazelton also admitted that he would not mind fingering someone who testified for the prosecution, but claimed that he would not lie about that person in court and had nothing to gain by his testimony. (12 RT 3205-3206.) Hazelton stated that he was in error if he told the investigators that he conversed with Ross in 1997. (12 RT 3209.)

On December 19, 1996, when appellant told Lieutenant Reed that he needed to be “locked up” (11 RT 3082), Lieutenant Reed asked appellant the reason. Appellant indicated that it was due to his current case factors and said that he had been locked up at San Quentin State Prison. (11 RT 3084.) Lieutenant Reed recalled that appellant responded to his question by saying something about “two people [] ended up killed in a homicide case.” (11 RT 3084-3085.) Lieutenant Reed had Officer White prepare a report regarding appellant’s statement. (11 RT 3085.) Lieutenant Reed reviewed the report at trial and confirmed that it was accurate. (11 RT 3086.)

At trial, Don Antonio, an employee of a rare coin dealer in San Rafael who had 24 years of experience in selling and appraising currency, testified. (12 RT 3230-3241.) Antonio examined Defendant’s Exhibit 19, a \$100 bill printed in 1993, and stated that such bills were circulated from 1993 until 1996, when a new series with a new design was released. (12 RT 3231-3238.) In closing, defense counsel pointed out that none of the \$100 bills seized from Beach’s house was from 1993 to 1996 series.

B. Penalty Phase

1. The Prosecutor’s Case-In-Chief

Mr. Corrieo testified that, prior to the murder of his mother and sister, he had nine siblings. (14 RT 3716-3717.) Mr. Corrieo’s mother was the

caretaker for Roberts who suffered from some learning disabilities. Mr. Corrieo's mother was the nucleus of the family and kept the family together. (14 RT 3717.) Mr. Corrieo's mother had 37 grandchildren and no one was ever able to replace her as the nucleus of the family. (14 RT 3718.)

After the murders, the siblings all helped to clean their mother's house. (14 RT 3718.) The siblings had to sell the home in order to keep their mother's restaurant open. (14 RT 3717.) Mr. Corrieo and his sisters all worked for a few months to keep the restaurant open and pay the various bills. They subsequently sold the restaurant. (14 RT 3718-3719.)

Mr. Corrieo identified one of the rings that had been found under the throw rug at his mother's house the night of the murders. Mr. Corrieo stated that it was his mother's emerald and diamond ring which she often wore. His mother did not have a habit of putting her ring underneath the rug. (14 RT 3719-3720.)

Mr. Corrieo confirmed that he had testified during the guilt phase of the trial about his feelings regarding appellant when he encountered him at C.S.P. Sacramento. He stated that his feelings remained the same. (14 RT 3720.)

Alicia Todd testified that she had had a romantic relationship with appellant in 1993 for about nine months. (14 RT 3721.) After Todd ended their relationship, appellant did not like it that Todd was seeing other men. (14 RT 3722.) On November 6, 1993, appellant punched Todd in the face during an argument. (14 RT 3722-3723.) Todd's face was bruised and swollen. (14 RT 3723.)

Danielle DeBonneville testified that appellant was a member of the Norteño street gang and she understood he was "one of the dogs" in the "dog pound." (14 RT 3737-3738.) After appellant punched his pregnant girlfriend in the face, DeBonneville wanted to take her to the hospital. (14

RT 3735-3736.) Appellant came at DeBonneville with a bat and told her he would kill her if she took his girlfriend to the hospital. (14 RT 3735.)

DeBonneville testified that she was friends with Louis Sahagan who was a member of the Sureño criminal street gang. (14 RT 3738-3739, 3743.) On August 10, 1995, DeBonneville saw Sahagan in Cambridge Park talking to a girl and became upset. (14 RT 3733, 3740). She walked into the park with Sahagan and they argued. (14 RT 3740-3741.) While they were in the park, about eight to ten men, including appellant, approached them. (14 RT 3741-3742.) The men were wearing dark clothes, bandanas, ski masks, and carrying bats, crowbars, and batons. (14 RT 3742-3743.) Their bandanas were red, a color associated with the Norteño street gang. (14 RT 3743.) DeBonneville was frightened. (14 RT 3743.)

When the men reached DeBonneville and Sahagan, they surrounded them and asked, "What do you claim?" DeBonneville said, "We do not claim anything." (14 RT 3744.) Appellant immediately punched DeBonneville in the face, knocking her unconscious for about a minute. (14 RT 3744.) The men then beat DeBonneville with their bats, kicked her, and stomped on her. DeBonneville was hit at least 50 times. One of the men picked her up and tried to break her back. DeBonneville lost feeling in her legs and could not move. One of the men then tried to pull her pants down, but he could not get her tight jeans off. (14 RT 3745.) As the feelings in her legs returned, DeBonneville tried to fight back. (14 RT 3746.) Appellant was screaming at DeBonneville that she was a "B," a snitch, and a "scrap," a derogatory name for a Sureño. (14 RT 3746-3747.) During the struggle, DeBonneville ripped off appellant's mask. (14 RT 3746.) The men continued to beat DeBonneville, told her she was going to die, brought her to her knees, held her hands behind her back, and then surrounded her. (14 RT 3746-3747.) Appellant stood in front of DeBonneville and held a gun to the center of her forehead while another

man stood behind her. (14 RT 3747.) Appellant said, "Say good night." (14 RT 3747-3748.) DeBonneville freed her right hand and punched the gun as appellant shot her in the head. (14 RT 3748, 3751.) DeBonneville heard voices say, "Oh, my God, is she dead? You shot her man." (14 RT 3748.) DeBonneville heard the men run and she played dead. (14 RT 3748.) One man ran back towards her with a gun, looked at her, and then ran away. (14 RT 3748-3749.)

After her attackers left, DeBonneville screamed for Shagan, thinking he was dead, and then ran to an apartment for help. (14 RT 3749.) DeBonneville was taken to the hospital where she had four stitches and 13 staples placed in her head. (14 RT 3749.) DeBonneville's face was black and swollen. Her back and legs were also black from all of the bruises, and someone had carved "XI" into her back. (14 RT 3750.) Three days later, the doctor found the bullet in DeBonneville's head, which was not removed until two years later. (14 RT 3750.)

On cross-examination, appellant asked DeBonneville if she thought he was sorry that he had shot her. After DeBonneville said, "yes," appellant responded, "I'm not." (14 RT 3752.)

The parties stipulated that the evidence of appellant's prior conviction would be received into evidence, reflecting that on September 5, 1995, appellant pled no contest to assault with a deadly weapon (a bat) or by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), as well as admitted that he personally inflicted great bodily injury (§ 12022.7, subd. (a)), and committed the crime while participating in a criminal street gang (§ 186.22.). (14 RT 3730, 3752-3753.) The parties also agreed to stipulate that the medical records of DeBonneville would be admitted into evidence. (14 RT 3731.)

2. The Defense Case-In-Chief

During the penalty phase, appellant represented himself (13 RT 3665), and rested without presenting any evidence (14 RT 3769).

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S CONFESSION TO CORRECTIONAL OFFICERS

Appellant contends that the trial court violated his rights under the Fifth, Sixth, and Fourteenth Amendments and the state constitutional corollaries when it admitted evidence that appellant confessed to correctional officers after he was threatened by their clerk. (AOB 35.) We disagree. Appellant has forfeited his claim that his confession was involuntary as he did not secure a ruling on the voluntariness issue. In any event, the trial court did not err by admitting appellant's confession and there was no prejudice.

A. Relevant Background

On June 10, 2000, appellant filed a motion to exclude the incriminating statements that he made to correctional officers, claiming that his confession was a violation of *Miranda v. Arizona* (1966) 384 U.S. 436, and *Massiah v. United States* (1964) 377 U.S. 201, as well as involuntary in violation of his rights under the Fifth and Fourteenth Amendments. (13 CT 4920-4964.) The prosecutor filed an opposition, stating that there had been no interrogation and appellant's confession was voluntary. (13 CT 4984-4987.)

On June 30, and July 10, 2000, the trial court held a hearing on the matter and took judicial notice of the instant case file showing the dates of the indictment, arraignment, and appointment of counsel. (13 CT 4988; 3 RT 589, 622, 684.) The trial court also reviewed excerpts of appellant's California Department of Corrections (CDC) file. (3 RT 622-623; see 13

CT 4947- 4964 [excerpts of CDC file].) The CDC record revealed that in 1996 appellant had been serving a sentence in San Quentin State Prison for an unrelated offense (assault with a deadly weapon) when he was indicted for the murders in the instant case and placed into administrative segregation. (13 CT 4952-4961.) The CDC documentation regarding appellant's placement in administrative segregation at San Quentin on January 11, 1996, stated that on January 10, 1996,

information was received from Contra Costa District Attorney's Office that [appellant] was being charged as a suspect in a double homicide. Due to the nature of these case factors a need for increased custody level is required because [appellant's] continued presence in general population poses a threat to the safety and security of the institution, staff, inmates and [him]self. [Appellant] will remain in administrative segregation pending review by the Institution Classification Committee to determine proper housing and program. [¶] Administrative Segregation placement is authorized by Correctional Lieutenant T.A. Marek[.]

(13 CT 4952.) The Classification Committee affirmed the decision to place appellant in administrative segregation on January 24, 1996. (13 CT 4954.)

On December 19, 1996, appellant was transferred to C.S.P. Sacramento. (13 CT 4961-4963; 3 RT 592-593, 689.) Upon appellant's arrival, inmate Mr. Corrieo, the son of Maria Elena Corrieo and brother of Gina Roberts, was working as a clerk in the Receiving and Release (R & R) Center under Correctional Officer White's supervision. (3 RT 591-593, 601.) Mr. Corrieo informed Officer White that he could not perform his job because he had a problem with appellant who was a suspect in the murder of his mother and sister. (3 RT 594-595, 602-603.) Officer White observed that Mr. Corrieo was upset, placed him outside the receiving area, and told him to stay there. (3 RT 602-604.)

Mr. Corrieo recalled being placed in the property room. (3 RT 595.) While Mr. Corrieo was waiting, he approached the holding cell area where

appellant and other inmates were being held. (3 RT 596; see also 13 CT 4942.) Mr. Corrieo could not see appellant, but there was a three-inch gap in the door. (3 RT 596-597.) Mr. Corrieo said, "Hey, Williams." After a long pause, appellant said, "Yeah." Mr. Corrieo continued, "Do you remember Maria Elena Corrieo?" After another pause, appellant said, "Yeah." Mr. Corrieo responded, "You're a dead man." (3 RT 598.) Mr. Corrieo did not identify himself.

After speaking with Lieutenant Reed, Officer White brought Mr. Corrieo to Lieutenant Reed. Mr. Corrieo told the lieutenant about his problem with appellant, but he did not tell Lieutenant Reed about the threat he made. (3 RT 604, 686.) Pursuant to Lieutenant Reed's instructions, Officer White locked Mr. Corrieo in a holding cell where he had no access to the R & R Center. (3 RT 605.)

Lieutenant Reed and Officer White subsequently processed the bus of the incoming inmates, including appellant, to determine appropriate housing for each of them. (3 RT 606-607.) Before interviewing appellant, Lieutenant Reed noticed in appellant's Central file (C-file) that appellant had previously been housed in administrative segregation at San Quentin. (3 RT 686, 693.) Appellant's C-file also indicated, "hold capital crime." (3 RT 703-704; see also 13 CT 4960.) Lieutenant Reed said it was possible that appellant had been sent to C.S.P. Sacramento, a Level IV institution, because of the hold on the capital crime. (3 RT 704.) Lieutenant Reed knew that a capital offense was a serious felony offense, such as a homicide or "187." (3 RT 705.)

During Lieutenant Reed and Officer White's interview of appellant, appellant told them that he needed to "lock up," meaning that he need to be placed in administrative segregation. (3 RT 610, 687-688; see also 13 CT 4943-4944.) Appellant indicated that he previously had been placed in administrative segregation at San Quentin. (3 RT 691.) Lieutenant Reed

asked appellant "what his crime was because everyone is there for something." (3 RT 697, 700, 705; see also 13 CT 4944.) Lieutenant Reed recalled that appellant stated that his crime was "gang-related" and that he had safety concerns. (3 RT 693.) Lieutenant Reed believed that appellant was talking about the offense for which he had been committed. (3 RT 699.)

Appellant also said, "They're going to stab me." (3 RT 612.) Lieutenant Reed asked, "Who's going to stab you?" (3 RT 613.) Appellant responded, "I'm not going to say" or "I can't say." (3 RT 613.) Officer White asked, "Well, why are they going to stab you?" (3 RT 614, 619.) Appellant responded, "Because I killed two Hispanics." (3 RT 615; see also 13 CT 4943-4944, 4946.) Appellant did not mention the threat made by Mr. Corrieo. (3 RT 615.) Lieutenant Reed decided to place appellant in administrative segregation and prepared a lock-up order (CDC 114-D). (3 RT 615, 701; see also 13 CT 4962-4963.)

At Lieutenant Reed's direction (3 RT 699), Officer White prepared an Informational Chronology (CDC 128-B) regarding the interview to be placed in Mr. Corrieo's and appellant's files for CDC purposes (3 RT 620, 699; see also 13 CT 4946). The report was not made for any outside agencies and it was not forwarded to any outside investigative agencies. (3 RT 620, 699-700.) That report read as follows:

December 19, 1996, at approximately 1830 hours, inmate CORRIEO (K24179), assigned to post #CLK-M.032 (R & R clerk), informed me that he had a problem. In a private area, CORRIEO stated that inmate WILLIAMS (J-78875), who had just arrived from San Quentin via Bus Schedule "B" was possibly involved in the murder of his mother and sister. I removed Corrieo from R&R and notified Lt. K. Reed of the situation. Lt. Reed interviewed Corrieo at which time CORRIEO claimed that Williams was from Contra Costa County. A later review of the Williams file confirmed this. CORRIEO also stated that Williams' presence at San Quentin

was the reason he (CORRIEO) was placed at CSP-SAC. CORRIEO was kept out of R & R until Williams was escorted to Ad Seg. During the new arrival interview, Williams admitted that he had in fact killed two Hispanic people. WILLIAMS was not questioned about knowledge of inmate CORRIEO.

(13 CT 2231.)

On December 20, 1996, Mr. Corrieo's sister, Malena Rubino, contacted Sergeant Ingersoll of Contra Costa County Sheriff's Office to tell him that Mr. Corrieo had seen appellant at C.S.P. Sacramento. In follow-up to their conversation, Sergeant Ingersoll confirmed that appellant had been transferred to C.S.P. Sacramento from San Quentin. Mr. Corrieo's counselor assured the sergeant that the two men were being housed in completely separate areas of the prison. (13 CT 4941.)

On December 24, 1996, Rubino called Sergeant Ingersoll again, telling him that she had spoken to Mr. Corrieo and he had informed her that he had some important information regarding appellant and appellant's case that he did not want to discuss over the phone. (13 CT 4941.)

On December 27, 1996, Sergeant Ingersoll interviewed Mr. Corrieo. (13 CT 4941.) Mr. Corrieo told the sergeant about his brief encounter with appellant and how he had threatened appellant when he arrived at C.S.P. Sacramento. Mr. Corrieo also told the sergeant that after appellant was moved from the receiving area, Officer White informed him that appellant had requested administrative segregation because "his life was threatened." Officer White further told Mr. Corrieo that appellant would not say who had threatened him, but revealed to Lieutenant Reed and him that he was threatened "because he killed two Hispanic women." (13 CT 4942.)

That same day, Sergeant Ingersoll spoke with Officer White who confirmed that appellant had said to Lieutenant Reed and him that he had killed two Hispanic people. (13 CT 4943.)

On December 31, 1996, Sergeant Ingersoll contacted Lieutenant Reed. (3 RT 692, 700; see also 13 CT 4944.) Sergeant Ingersoll prepared the following report after interviewing Lieutenant Reed:

While he was conducting the incoming interview with Williams, Williams told him he had to be locked down in Ad. Seg. (Administrative Segregation) because of his charges. Lieutenant Reed said he asked Williams what his crime was because everyone is there for something. He said Williams told him "I killed two people." He said Williams went on to tell him that he runs with Hispanics and claimed it was a gang shooting. Lieutenant Reed said Officer White was present during the interview and he had Officer White document it. I asked Lieutenant Reed if he would write a report to document his memory of the incident. He said he would do it and fax me a copy of his report.^[4]

⁴ Lieutenant Reed stated that he did not personally document the conversation. (3 RT 701-702.) Lieutenant Reed, however, did prepare a lock-up order (CDC 114-D). (3 RT 615, 701; see also 13 CT 4962-4963.) Appellant's claim that the reliability of his confession was undermined because Lieutenant Reed's lock-up order (CDC 114-D) did not have all of the same information that was included in Officer White's Information Chronology (CDC 128-B) (AOB 41, fn. 11, & 169), is without merit. The fact that the two reports did not contain identical information is explained by the fact that the Information Chronology and the lock-up order were prepared for different purposes.

On the one hand, the Information Chronology was prepared and put into appellant's file and Mr. Corrieo's file to maintain the security of the prison as it clearly identified the two men as each other's enemies. (13 CT 4946; 3 RT 620.)

On the other hand, the lock-up order, which was prepared for the purpose of placing appellant in administrative segregation, was necessarily brief, to the point, and merely explained to "all necessary personnel" that Lieutenant Reed had authorized placing appellant in administrative segregation. (13 CT 4962; 3 RT 701.) The lock-up order also briefly stated the reasons why appellant was being segregated from the general population. The reasons included the fact that appellant had arrived from an "Ad-Seg Unit due to the seriousness of [his] crime," and based upon this

(continued...)

(13 CT 4944.)

At Sergeant Ingersoll's request, Lieutenant Reed sent Sergeant Ingersoll the report that Officer White prepared on December 19, 1996. (3 RT 702.) Neither Lieutenant Reed nor Officer White took part in the investigation of any crimes that appellant committed outside the prison. (3 RT 616, 701-702.)

On July 14, 2000, after the hearing, the trial court denied the motion to exclude appellant's statements to the correctional officers. (13 CT 5032.) The trial court initially noted the difference between an interrogation and a booking interview intended to gather neutral information. (13 CT 5031.) The trial court continued:

The standard is: "not what the police absolutely know; it is what they *should* know is *reasonably* likely to elicit an incriminating response from a suspect." After all, "police may ask whatever the needs of jail security dictate. However, when the police know or should know that such an inquiry is reasonably likely to elicit an incriminating response, the suspect's responses are not admissible against him . . . unless the initial inquiry has been preceded by Miranda admonishments. (Id. at 389-390.)

With this standard in mind, the court concludes that the correctional officers here did no[t] nor should they have know[n] that the questions they posed to defendant were reasonably likely to elicit incriminating statements. They had an immediate jail security problem in that defendant volunteered that he had an enemy in the facility. That Lt. Reed knew that defendant had a detainer from Contra Costa does not vitiate nor does the fact that defendant was transferred to Sacramento State Prison, a higher security facility than San Quentin. There is no evidence that Lt. Reed or Officer White were informed of the reason for the transfer of defendant and thus on actual or constructive

(...continued)

information, appellant had been deemed "a threat to the safety and security of the institution." (13 CT 4962.)

notice of the pending charges. Even when [Mr. Corrieo] informed them of the possibility that defendant was allegedly charged with two homicides did their questioning change in character. Their concern was first and foremost institutional security. Consistent with this task, the RR [Receiving and Release] unit has no history of engaging in criminal investigation, with the exception of crimes committed at the particular institution.

In addition, defendant's subjective condition and "personal characteristics" (Morris, supra, 192 Cal.App.3d at 389) at the time of the questioning were not such that they would put the officers on notice that their questioning might elicit an incriminating statement. Defendant did not communicate, for example, the veiled threat of [Mr. Corrieo.] There is no evidence that he was crying, as in Morris, or emotionally distraught. What defendant did communicate was his fear for his present safety.

Finally, while defendant was "in custody" because he was in state prison, his placement at Sacramento State prison cannot be viewed as "custody" for purposes of "custodial interrogation" as those terms are used in Miranda jurisprudence. Such custodial interrogation has reference to a pending criminal charge or a pending criminal investigation. The evidence here can only be interpreted to support a conclusion that the questioning was for purposes of determining present placement and institutional safety and not to investigate any pending criminal charge. To the extent defendant disagrees, he has not met his burden to the contrary.

Thus, the court finds that the questioning of defendant was not an interrogation, as defined by either Rhode Island v. Innis, supra, or Miranda, nor was it a deliberate or even an unartful attempt to elicit an incriminating statement within the meaning of Massiah v. U.S. (1964) 377 U.S. 201. Nor was defendant "in custody" as that expression is used in the Miranda context. Rather, like the probation officer in People v. Claxton (1982) 129 Cal.App.3d 638 [overruled on another ground in People v. Fuentes (1998) 61 Cal.App.4th 956, 969, fn. 12], who had no investigative function when he engaged in conversation with the defendant therein to determine the proper placement for

the juvenile defendant accused as an adult, no Miranda warnings were required in the present case.

(13 CT 5029-5032.) The trial court did not address the voluntariness of the statement, and appellant did not seek a ruling on that aspect of his motion.

At trial, Lieutenant Reed and Officer White testified that appellant had admitted to them that he had killed two Hispanics. (11 RT 3052, 3066, 3084-3085.)

The trial court denied the motion for new trial at which the issue of the admission of appellant's confession to the correctional officers was revisited. (15 CT 5912-5916, 5923; 14 RT 3934.)

B. Appellant's Confession Was Voluntary

First, appellant contends that his confession should not have been admitted into evidence because it was involuntary. (AOB 45-56.) We disagree. Initially, we submit that appellant abandoned this claim by failing to secure a ruling below on the voluntariness issue. Generally, if a party fails to press an objection and secure a ruling, he fails to preserve the issue and forfeits or abandons his claim of error for purposes of appeal. (*People v. Rowland* (1992) 4 Cal.4th 238, 259; *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1650; see also *People v. Kelly* (1992) 1 Cal.4th 495, 519 [concluding that the defendant could not challenge the admission of his confession on appeal where he failed to object to its admission below]; *id.* at p. 519, fn. 5 [undermining the validity of *In re Cameron* (1968) 68 Cal.2d 487, 503, which held that no objection is required where a confession is involuntary as a matter of law].)

In this case, prior to trial, appellant moved to exclude his confession on several grounds, including claiming that it was involuntary. (13 CT 4920-4964.) The trial court found that appellant's confession was admissible without making an explicit finding on the voluntariness issue. (13 CT 5029-5032.) Appellant did not press the objection or seek to secure

a ruling on the voluntariness issue, and although he again challenged the admission of his confession when he moved for a new trial, he made no claim that his confession was involuntary. Rather, he claimed that it should not have been admitted because the correctional officers failed to advise him of his *Miranda* rights during the “custodial interrogation.” (15 CT 5912-5916; 14 RT 3936-3927.) Having failed to secure a ruling on the voluntariness issue, or renew the claim in his motion for new trial, appellant has forfeited his claim for purposes of appeal.

Assuming, arguendo, appellant did not forfeit the claim, his claim fails because his confession was voluntary. There are two federal constitutional bases for the requirement that a confession be voluntary before it can be admitted into evidence: (1) the Fifth Amendment right against self-incrimination (see, e.g., *Bram v. United States* (1897) 168 U.S. 532, 542); and (2) the Due Process Clause of the Fourteenth Amendment (see, e.g., *Brown v. Mississippi* (1936) 297 U.S. 278).⁵ (*Dickerson v. United States* (2000) 530 U.S. 428, 433.) By its text, the Fifth Amendment, made applicable to the States by the Fourteenth Amendment (*Malloy v. Hogan* (1964) 378 U.S. 1, 12), protects an individual from being “compelled in any criminal case to be a witness against himself” (U.S. Const., amend. V). “The due process protection stems from the principle that ‘tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment’s guarantee of fundamental fairness.’” (*Doody v. Schriro* (9th Cir. 2009) 548 F.3d 847, 858, quoting *Miller v. Fenton* (1985) 474 U.S. 104, 110.) In *Malloy*, the Court unified the voluntariness tests, making it clear that “[t]he

⁵ Article I, section 15 of the state Constitution also bars the prosecution from using a defendant’s involuntary confession. (*People v. Jones* (1998) 17 Cal.4th 279, 296.)

Fourteenth Amendment secures against state invasion of the same privilege that the Fifth Amendment guarantees against federal infringement--the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.” (*Malloy v. Hogan, supra*, 378 U.S. at p. 8.) “Even after holding that the Fifth Amendment privilege against self-incrimination applies in the context of custodial interrogations, and is binding on the States, the Court has continued to measure confessions against the requirements of due process.” (*Miller v. Fenton, supra*, 474 U.S. at p. 110.)

A defendant’s admission or confession challenged as involuntary may not be introduced into evidence at trial unless the prosecution proves by a preponderance of the evidence that it was voluntary. (*Lego v. Twomey* (1972) 404 U.S. 477, 489 []; *People v. Markham* (1989) 49 Cal.3d 63, 71 [].) A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity. (*Colorado v. Connelly* (1986) 479 U.S. 157, 167 []; *People v. Benson* (1990) 52 Cal.3d 754, 778 [].)

(*People v. Williams* (1997) 16 Cal.4th 635, 659.)

A statement is involuntary [citation] when, among other circumstances, it was extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight Voluntariness does not turn on any one fact.

(*People v. Neal* (2003) 31 Cal.4th 63, 79, internal quotation marks and citations omitted.) In determining the voluntariness issue, a court must consider the “totality of the circumstances.” (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *People v. Bradford* (1997) 14 Cal.4th 1005, 1041.) Relevant circumstances include: (1) police coercion; (2) the length of the interrogation; (3) its location; (4) its continuity; (5) the techniques employed; (6) the use of physical punishment, such as deprivation of food or sleep; and (7) the defendant’s age, maturity, sophistication, education,

physical condition, mental health, and prior experience with the criminal justice system. (*People v. Williams, supra*, 16 Cal.4th at p. 660, citing *Withrow v. Williams, supra*, 507 U.S. at pp. 695-694; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 209; *McCalvin v. Yukins* (6th Cir. 2006) 444 F.3d 713, 719.) Circumstances of which the suspect is unaware at the time of questioning are irrelevant as voluntariness hinges on the suspect's perception. (*Doody v. Schriro, supra*, 548 F.3d at p. 868, citing *Moran v. Burbine* (1986) 475 U.S. 412, 422-423.) The ultimate question is "whether defendant's choice to confess was not essentially free because his will was overborne." (*People v. Memro* (1995) 11 Cal.4th 786, 827; see *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225 [finding no due process violation where the confession was the product of an "essentially free and unconstrained choice"].) "[C]onfessions procured by means revolting to the sense of justice can[not] be used to secure a conviction." (*Brown v. Mississippi, supra*, 207 U.S. at p. 286, internal quotation marks omitted.)

On appeal, we review independently the trial court's determination on the ultimate legal issue of voluntariness. (*People v. Benson, supra*, at p. 779.) But any factual findings by the trial court as to the circumstances surrounding an admission or confession, including "'the characteristics of the accused and the details of the interrogation' (*Schneckloth v. Bustamonte* [(1973)] 412 U.S. [218], 226 [])," are subject to review under the deferential substantial evidence standard. (*People v. Benson, supra*, at p. 779.)

(*People v. Williams, supra*, 16 Cal.4th at pp. 659-660.)

First, appellant's claim fails because Mr. Corrieo was not a state actor. A necessary predicate to a finding that a confession is involuntary within the meaning of the Due Process Clause of the Fourteenth Amendment is coercive police activity. (*Colorado v. Connelly, supra*, 479 U.S. at p. 167; see *id.* at p. 170 ["The sole concern of the Fifth Amendment . . . is governmental coercion"]; *Luna v. Massachusetts* (1st Cir. 2004) 354 F.3d

108, 111 [“only coercion resulting from *official* action -- court orders, police pressure, state law [not a private attorney]-- invalidates a confession”], emphasis in original.) Absent police conduct causally related to the confession, there is no ground for concluding that a state actor deprived a criminal defendant of his due process rights. (*Colorado v. Connelly, supra*, 479 U.S. at p. 164.) Even the most outrageous conduct by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause. (*Id.* at p. 166; see also *Walter v. United States* (1980) 447 U.S. 649, 656 [“a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and [] such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully”].)

Here, there is nothing in the record to suggest that there were acts of coercion which were attributable to the correctional officers. (See *Colorado v. Connelly, supra*, 479 U.S. at p. 166 [rejecting the argument that the confession should have been suppressed where the police had taken no affirmative steps to secure it]; *United States v. Pace* (9th Cir. 1987) 833 F.2d 1307, 1313 [finding that the jailhouse informant did not constitute a government actor as there was no pre-existing agreement between the FBI and the informant; in addition, there was no *quid pro quo* underlying the informant’s relationship with the government]; *People v. Hualde* (1999) 1999 Guam 3, 4, 33-34 [finding that although the defendant confessed after the police permitted him to meet with his co-defendant, the defendant’s confession was not coerced by police as there was no evidence of an agreement between the co-defendant and the police, nor was there any evidence that the co-defendant would obtain some benefit from getting the defendant to confess].)

Although Mr. Corrieo was initially working as a clerk in the receiving area under the supervision of Officer White when appellant arrived at the

prison, Mr. Corrieo discontinued acting in his clerk capacity as soon as he saw appellant. Immediately, Mr. Corrieo informed Officer White as to why he could no longer continue his clerk duties. (3 RT 594-595, 602-603.) Officer White had no arrangement with Mr. Corrieo to have him speak with appellant and he did nothing to encourage Mr. Corrieo to speak with him. (Cf. *Arizona v. Fulminante* (1991) 499 U.S. 279, 283, 288 [finding the defendant's confession to his fellow inmate coerced where the fellow inmate was a paid informant for the FBI who had been masquerading at the prison as an organized crime figure and reporting to an FBI agent who had encouraged the fellow inmate to "find out more" information from the defendant].) To the contrary, Officer White immediately removed Mr. Corrieo from the receiving area and placed him in the property room so that he would not have contact with appellant. (3 RT 595; 11 RT 3048, 3057-3058.) Officer White then left to speak with Lieutenant Reed. (13 CT 2231.) Mr. Corrieo sought out appellant's location from a co-worker, not Officer White. (11 RT 3038.) Mr. Corrieo then reacted to having some limited access to the suspect in his relatives' murders and took that opportunity to threaten him. (3 RT 595, 602-604.) At that point, Mr. Corrieo was acting on his own behalf, not as an agent for the correctional officers who did all they could do to properly deal with the chance encounter between Mr. Corrieo and appellant. (13 CT 2231; 3 RT 595, 602-605; 11 RT 3048, 3057-3058.)

Appellant relies on *People v. Whitt* (1984) 36 Cal.3d 724, *People v. Haydel* (1974) 12 Cal.3d 190, and *People v. Berve* (1958) 51 Cal.2d 286 [overruled on another ground in *People v. Cahill* (1994) 5 Cal.4th 478] to argue that a confession coerced by a private party may be deemed involuntary, and thus, inadmissible. (AOB 52-53.) All of these cases, however, preceded *Connelly* which held that "coercive police activity is a necessary predicate to the finding that confession is not 'voluntary' within

the meaning of the Due Process Clause of the Fourteenth Amendment.” (*Colorado v. Connelly*, *supra*, 479 U.S. at p. 167, emphasis added.) *Connelly* is controlling. In addition, these cases preceded Proposition 8’s truth-in-evidence provisions. This Court has determined that Proposition 8 prohibits the exclusion of relevant evidence based on state constitutional grounds. (*People v. May* (1988) 44 Cal.3d 309, 311, 319-312.) Consequently, appellant’s admission could be excluded only to the extent permitted under the federal Constitution. In this case, there was no “coercive *police* activity.” In fact, the record indicates that neither Mr. Corrieo nor appellant informed Lieutenant Reed or Officer White of the verbal threat. Thus, appellant’s confession was not excludable under the federal Constitution.⁶

Even assuming, *arguendo*, that Mr. Corrieo was a state actor, appellant’s confession was not involuntary under the totality of the circumstances. There was no evidence that the correctional officers coerced appellant’s confession. The officers were completely unaware of Mr. Corrieo’s threat. Officer White had left to speak with Lieutenant Reed in his office about the situation when Mr. Corrieo made the threat against appellant. (13 CT 2231.) Officer White had no reason to suspect that such a threat had been made as he had removed Mr. Corrieo from the receiving area to ensure there would be no encounter between appellant and Mr. Corrieo while he was speaking with Lieutenant Reed about the matter. (3 RT 602-604.) Furthermore, appellant did not tell the correctional officers who was going to stab him during the intake interview. (3 RT 612.)

⁶ We also note that in *Haydel* the defendant’s initial written statement was deemed admissible. (*People v. Haydel*, *supra*, 12 Cal.3d at pp. 195, 198.)

Appellant also did not know the source of the threat. Appellant claims that a reasonable person in his shoes would have believed that the threat came from a prison guard or trustee who had access to government-compiled information (AOB 49); however, there is no basis for appellant's claim. Mr. Corrieo made his threat from behind a wall which had a sliding door with only a two- or three-inch gap, leaving it impossible for Mr. Corrieo and appellant to see each other. (3 RT 595-597; see also 11 RT 3038, 3044.) There was no way for appellant to know what or who was behind the wall and sliding door, or to what, if any, state information that person had access. Because appellant quickly asked to be "locked up" upon meeting with the correctional officers (3 RT 610, 687-688), it is apparent that appellant believed that the person making the threat was a fellow prisoner being held in an adjacent cell and not a prison official who could have access to him regardless of where he was housed inside the prison.

Furthermore, the correctional officers' questions were not coercive in nature. During the housing assessment process (3 RT 606-607), appellant immediately told the officers that he needed to be locked up for his safety (3 RT 610, 687-688, 693); he informed them that he had been in administrative segregation at San Quentin (3 RT 691); and he stated, "They're going to stab me." (3 RT 612; see *Miranda*, 384 U.S. at p. 478 ["Volunteered statements of any kind are not barred by the Fifth Amendment"].) These statements sparked only a few questions from the officers (3 RT 613-614, 619, 697, 700), which were all pertinent to appellant's statements and request to be placed into administrative segregation as he had been at San Quentin. Given appellant's experience in the prison system, he undoubtedly found the questions posed, and procedures used, by the correctional officers fairly routine and non-threatening, especially in light of the fact that *he* had initiated the idea to be "locked up." (3 RT 610, 687-688.)

Although appellant was in a prison and handcuffed while he was speaking with the correctional officers, it is significant that these factors were present with respect to all the incoming prisoners who had been transported to C.S.P. Sacramento and who were being interviewed by Lieutenant Reed and Officer White for the sole purpose of finding them appropriate housing within the prison. (3 RT 606-607, 610; see *United States v. Calloway* (D.C. 2003) 298 F.Supp.2d 39, 49 [finding no custodial interrogation where, “pursuant to standard procedures,” the officers had secured the defendant’s hands behind his back using temporary flex cuffs, “a precaution taken to ensure the safety of the officers as well as the occupants of the residence being searched”]; *United States v. Booth* (9th Cir. 1981) 669 F.2d 1231, 1236 [“handcuffing a suspect does not necessarily dictate a finding of custody”]; see also *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1404 [indicating that, under some circumstances, an officer’s brief handcuffing of a detainee would not be considered a formal arrest and a court must consider all the circumstances surrounding the encounter]; *People v. Bowen* (1987) 195 Cal.App.3d 269, 273-274 [finding that the handcuffing of the detainee for 25 minutes did not turn the detention into a formal arrest]; *United States v. Bautista* (9th Cir. 1982) 684 F.2d 1286, 1289 [rejecting argument a defendant is “automatically” arrested when handcuffed].) Because the handcuffing was a standard procedure during the arrival of the new inmates (3 RT 610), a reasonable person in appellant’s position would not have concluded that the temporary, routine handcuffing by the officers was tantamount to being in *Miranda* custody.

Furthermore, it is evident that appellant’s encounter with Lieutenant Reed and Officer White was relatively brief, given the short conversation between them and Lieutenant Reed’s prompt decision to prepare a lock-up order for appellant following the conversation. (3 RT 610-615, 619, 687-688, 701, 705).

There was also nothing about appellant's characteristics which rendered his confession involuntary. Appellant was an adult in his early twenties, not a juvenile. Appellant had already been incarcerated for 16 months, and thus, had experience with the criminal process and the prison system. (11 RT 2950, 3036, 3042.) In addition, appellant had his high school equivalency and there was no indication that his physical or mental condition was unsound. (13 RT 3655, 3657, 3659.) Appellant simply gave in to his own compulsions when he confessed. (See *Elliot v. Williams* (10th Cir. 2001) 248 F.3d 1205, 1213 ["the constitutional due process guarantee does not protect a defendant from his own compulsions or internally-applied pressures which are not the product of police action"], internal citations and quotation marks omitted.)

Appellant analogizes the circumstances in his case to those in *Arizona v. Fulminante, supra*, 499 U.S. 279, and *Payne v. Arkansas* (1958) 356 U.S. 560, to no avail. (AOB 49-51.) In *Payne*, the Court found that the petitioner's confession had been coerced. (*Payne v. Arkansas, supra*, 356 U.S. at p. 567.) The *Payne* Court found it extremely significant that the interrogating police officer had promised petitioner that he would protect him from the angry mob outside the jailhouse if he confessed. (*Ibid.*) The Court further pointed to the following circumstances which led to it finding that the petitioner's confession had been coerced:

The undisputed evidence in this case shows that petitioner, a mentally dull 19-year-old youth, (1) was arrested without a warrant, (2) was denied a hearing before a magistrate at which he would have been advised of his right to remain silent and of his right to counsel, as required by Arkansas statutes, (3) was not advised of his right to remain silent or of his right to counsel, (4) was held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call, (5) was denied food for long periods, and, finally, (6) was told by the chief of police "that

there would be 30 or 40 people there in a few minutes that wanted to get him," which statement created such fear in petitioner as immediately produced the "confession." It seems obvious from the *totality* of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an "expression of free choice," and that its use before the jury, over petitioner's objection, deprived him of "that fundamental fairness essential to the very concept of justice," and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment.

(*Payne v. Arkansas, supra*, 356 U.S. at p. 567, footnotes omitted and emphasis in original.)

In *Fulminante*, the defendant had been befriended by a fellow inmate. That inmate was a paid FBI informant who had been masquerading at the prison as an organized crime figure, and reporting to an FBI agent who had encouraged him to "find out more" information about the child's murder from the defendant. (*Arizona v. Fulminante, supra*, 499 U.S. at p. 283.) After having several conversations with the defendant in which he denied involvement in the child's death, the FBI informant finally got the defendant to confess to killing the child when he offered to protect him from his fellow inmates, who had given him a tough time, in exchange for the defendant telling him about the murder. (*Ibid.*) The United States Supreme Court held that the Fifth and Fourteenth Amendments barred the defendant's confession, which was admitted during his trial for murder, on the basis that it had been coerced. (*Id.* at p. 282.) Finding the issue a "close one," the *Fulminante* Court said:

As in *Payne*, where the Court found that a confession was coerced because the interrogating police officer had promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door, 356 U.S., at 564-565, 567, so too here, the Arizona Supreme Court found that it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated *Fulminante* to confess. Accepting the Arizona court's finding,

permissible on this record, that there was a credible threat of physical violence, we agree with its conclusion that Fulminante's will was overborne in such a way as to render his confession the product of coercion.

(*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 287-288.)

Here, unlike in *Payne* and *Fulminante* where there was a causal connection between the promise/threat and the petitioner's/defendant's confessions and a direct intent by government officials to obtain the incriminating statements, there was no such intent by the correctional officers nor was there any such connection between Mr. Corrieo's threat and appellant's confession to the correctional officers. Appellant did not reveal Mr. Corrieo's threat to the officers and there was nothing to indicate that they knew anything about it during their separate, brief conversations with appellant and Mr. Corrieo. (13 CT 4942; 3 RT 604, 610, 612-613, 686-688, 691, 693; cf. *Arizona v. Fulminante*, *supra*, 499 U.S. at p. 283 [paid FBI informant who reported his conversations with the defendant to an FBI agent who encouraged him to "find out more" from the defendant about the murder].) The correctional officers also made no promises or threats to appellant to prompt his confession. For example, the officers did not tell appellant that they would put him in administrative segregation only if he told them about the charges pending against him. (Cf. *Arizona v. Fulminante*, *supra*, 499 U.S. at p. 283 [paid informant's offer of protection if the defendant agreed to tell him about his crime]; *Payne v. Arkansas*, *supra*, 356 U.S. at pp. 564-565, 567 [interrogating officer's promise of protection from the angry mob if the accused agreed to confess]; *United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087, 1139 [finding the defendant's statement to the FBI informant coerced where the informant told the defendant that his life was in danger and offered to intercede to protect him from his former crime partners if he confessed].) To the contrary, Lieutenant Reed believed appellant was talking about the offense

for which he had been committed. (3 RT 699.) It was more than apparent to appellant that the correctional officers were focused solely on finding him appropriate housing within the prison. The officers' questions were directed at this goal (3 RT 606-607, 613-614, 619, 693, 697, 700; 11 RT 3049), and appellant's statements made it clear that he understood this (see, e.g., 3 RT 610, 687-688, 691, 693 [appellant's statements that he needed to "lock up" and had been in administrative segregation at San Quentin]).

Furthermore, appellant was unlike the "mentally dull 19-year-old" defendant in *Payne* who had been arrested without a warrant, denied a hearing before a magistrate, and not advised of his right to remain silent and to counsel. Appellant was a sophisticated criminal who had been properly arrested, indicted, arraigned, appointed counsel, and spent 16 months in prison on another conviction by the time he reached C.S.P. Sacramento. (13 CT 4988; 3 RT 589, 622-623, 684; 11 RT 2950, 3036, 3042; see 13 CT 4947- 4964 [excerpts of CDC file].) In addition, appellant had his high school equivalency, and there was nothing to indicate that appellant was mentally impaired, or had been denied any basic needs, such as food, for any period of time. (13 RT 3655, 3657, 3659.) In light of the foregoing circumstances, it is evident that appellant made a free choice when he confessed and the correctional officers did nothing to hinder his free will. Thus, appellant's confession was voluntary.

C. There Was No Custodial Interrogation

Next, appellant contends that the trial court erred by concluding that the correctional officers did not engage in custodial interrogation for purposes of *Miranda*. (AOB 56-69.) We disagree that the trial court's conclusion was erroneous.

1. Appellant Was Not “In Custody” As That Term Is Defined For Purposes Of *Miranda*

A *Miranda* admonition is required only if there has been a custodial interrogation. (*Miranda, supra*, 384 U.S. at p. 444; *California v. Beheler* (1983) 463 U.S. 1121, 1125; *People v. Clair* (1992) 2 Cal. 4th 629, 679.) An interrogation is “custodial” if the person has been taken into custody or has otherwise been deprived of his freedom of movement in a significant way. (*Miranda, supra*, 384 U.S. at p. 444; *Stansbury v. California* (1994) 511 U.S. 318, 322; *People v. Ochoa* (1998) 19 Cal.4th 353, 401.) “[T]he ultimate inquiry is whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest. (*California v. Beheler, supra*, 463 U.S. at p. 1125.) An officer is not required to give a *Miranda* warning to every person he questions. (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495; see, e.g., *United States v. La Monica* (9th Cir. 1972) 472 F.2d 580, 581 [holding that where an arrestee invokes his *Miranda* right, but then makes an incriminating statement in response to a subsequent question during the course of a routine inventory of his personal belongings, there is no violation of the privilege against self-incrimination].) A *Miranda* admonition is not required for noncustodial interrogations. (See, e.g., *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 600-602 [*Miranda* is inapplicable to routine identification-type questions at booking]; *People v. Macklem* (2007) 149 Cal.App.4th 674, 695-696 [concluding that the inmate was not in *Miranda* custody where the inmate was told that the detective was investigating the recent jailhouse incident, was not confronted with any evidence of his guilt, was not cuffed inside the interview room which had its door ajar, and was given the opportunity to leave upon request].)

In assessing whether an interrogation was custodial, the court must apply an objective standard and decide whether a reasonable person in the defendant’s position would feel that he was under arrest or otherwise

restricted from acting autonomously. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 442.) This requires the court to make two discrete inquiries. (*Thompson v. Keohane* (1995) 516 U.S. 99, 112.) First, the court must determine what the circumstances were surrounding the interrogation. This is a factual inquiry. (*People v. Ochoa, supra*, 19 Cal.4th at p. 401.) Second, given those circumstances, it must determine whether a reasonable person would have felt he was not at liberty to terminate the interrogation and leave. The second inquiry requires the application of the controlling legal standard to the historical facts. (*Id.* at p. 402.)

Once the scene is . . . reconstructed, the court must apply an objective test to resolve the ultimate inquiry: [was] there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest This ultimate determination . . . presents a mixed question of law and fact Accordingly, we apply a deferential substantial evidence standard to the trial court's conclusions regarding basic, primary, or historical facts: facts in the sense of recital of external events and the credibility of their narrators Having determined the propriety of the court's findings under that standard, we independently decide whether a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.

(*People v. Ochoa, supra*, 19 Cal.4th at pp. 402, internal citations and quotation marks omitted.) “Neither the subjective views held by the interrogating officers nor the defendant are generally relevant to [the custody] determination.” (*People v. Macklem, supra*, 149 Cal.App.4th at p. 690, citing *Stansbury v. California* (1994) 511 U.S. 318, 323.)

An “interrogation” under *Miranda* includes express questioning or its functional equivalent which consists of any words or actions that the questioning officer should know would be reasonably likely to elicit an incriminating response. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301-302.) California courts have considered this to require a two-part inquiry in which the court must first ask: Were the officer’s remarks or actions the

type reasonably likely to elicit an incriminating response from the defendant? Second, the court must ask: Even if the officer did not intend to elicit an incriminating response from the defendant, should the officer have known his actions or remarks were likely to do so? (*People v. Mobley* (1999) 72 Cal.App.4th 761, 792, disapproved on another ground in *People v. Trujillo* (2006) 40 Cal.4th 165, 181, fn. 3; *People v. O'Sullivan* (1990) 217 Cal.App.3d 237, 241-242.) An officer, however, "cannot be held accountable for unforeseeable results of [his] words or actions" where he has no reason to know that his words or actions would elicit an incriminating response. (*Rhode Island v. Innis, supra*, 446 U.S. at p. 302.) Applying the foregoing principles, this Court should conclude that the trial court properly found no custodial interrogation.⁷

⁷ Admittedly, the trial court was incorrect to the extent that it suggested that a custodial interrogation refers only to "a pending criminal charge or a pending criminal investigation." (13 CT 5032.) As the United States Supreme Court stated, "nothing in the *Miranda* opinion [] calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody." (*Mathis v. United States* (1968) 391 U.S. 1, 4-5.) *Mathis* makes it clear that *Miranda* warnings are required for the custodial interrogations of a prisoner even if he is in prison for a different crime than the crime about which he is questioned by an official. (*Mathis v. United States, supra*, 391 U.S. at pp. 4-5; see *Smiley v. Turner* (7th Cir. 2008) 542 F.3d 574, 582 ["when an individual is subject to custodial interrogation, the fact that the custody was initiated for a reason other than the subject matter of the interrogation does not alter the necessity of [*Miranda*] warning[s]"].) However, despite the trial court's error in that limited regard, its ruling was correct that appellant was not "in custody" for purposes of *Miranda* and its ruling should be upheld. (*People v. Zapien* (1993) 4 Cal.4th 929, 976; see *People v. Koontz* (2002) 27 Cal.4th 1041, 1075, fn. 4 ["[W]e review the correctness of the trial court's ruling, not the reasons underlying it"]; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 ["We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked."].)

Not all questioning of prisoners constitute “custodial” interrogations. (See *Maryland v. Shatzer* (2010) __ U.S. __, 130 S.Ct. 1213, 1224-1225, 175 L.Ed.2d 1045 [finding that the “inherently compelling pressures” of custodial interrogation ended and there was a break in custody during the time period in which the prisoner had returned to his normal life within the prison]; *People v. Fradiue* (2000) 80 Cal.App.4th 15, 19-21 [finding, under the totality of the circumstances, no *Miranda* warnings were required because “no restraints were placed upon defendant to coerce him into participating in the interrogation over and above those normally associated with his inmate status”]; see also *United States v. Marion* (9th Cir. 2010) F.3d __, 2010 U.S.Dist.LEXIS 45141, *5.) “The bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official.” (*Illinois v. Perkins* (1990) 496 U.S. 292, 299; see *United States v. Ellison* (1st Cir. 2010) __ F.3d __, 2010 U.S.App.LEXIS 7814, *5-*9 [finding no *Miranda* custody of the defendant who was imprisoned before his trial and who made incriminating statements, emphasizing that “a suspect’s lack of freedom to go away does not necessarily mean that questioning is custodial interrogation for purposes of *Miranda*”].) In a prison setting, a court must take into consideration an inmate’s highly regulated life when determining custody within the meaning of *Miranda*. (*People v. Macklem, supra*, 149 Cal.App.4th at p. 692.)

Cervantes v. Walker (9th Cir. 1978) 589 F.2d 424 is instructive. In *Cervantes*, the petitioner was incarcerated in the county jail when a sheriff’s deputy moved him from one jail cell to another as a result of recent fight that he had had with another inmate. (*Id.* at p. 426.) In accordance with standard jail procedure when moving an inmate, the sheriff’s deputy searched the petitioner’s belongings and found what he suspected was marijuana although he was unsure. (*Id.* at pp. 426-427.)

The sheriff's deputy questioned the petitioner about the substance in front of a sergeant asking him what it was. The petitioner responded, "That's grass, man," a statement that was subsequently used at his trial. (*Id.* at p. 427.)

On appeal, the petitioner asserted that the use of the incriminating statement violated *Miranda*, and thus, was inadmissible. (*Cervantes v. Walker, supra*, 589 F.2d at p. 426.) In concluding that "the circumstances of the questioning did not require *Miranda* warnings" (*ibid.*), the *Cervantes* court rejected the petitioner's argument that *Mathis* stood for the proposition that any interrogation during prison confinement is custodial. The *Cervantes* court explained:

To interpret *Mathis* as *Cervantes* urges would, in effect, create a per se rule that any investigatory questioning inside a prison requires *Miranda* warnings. Such a rule could totally disrupt prison administration. *Miranda* certainly does not dictate such a consequence. "Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." *Miranda v. Arizona, supra*, 384 U.S. at 477 [].

Adoption of *Cervantes*' contention would not only be inconsistent with *Miranda* but would torture it to the illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart. We cannot believe the Supreme Court intended such a result. Thus, while *Mathis* may have narrowed the range of possible situations in which on-the-scene questioning may take place in a prison, we find in *Mathis* no express intent to eliminate such questioning entirely merely by virtue of the interviewee's prisoner status.

(*Cervantes v. Walker, supra*, 589 F.2d at p. 427, footnote omitted.)

The *Cervantes* court recognized that the "in custody" issue was unique because the petitioner was in jail when the deputy questioned him, and emphasized that the "free to leave" standard was not useful in

determining custody as “[i]t would lead to the conclusion that all prison questioning is custodial because a reasonable prisoner would always believe he could not leave the prison freely.” (*Cervantes v. Walker, supra*, 589 F.2d at pp. 426, 428.) The court continued:

The concept of “restriction” is significant in the prison setting, for it implies the need for a showing that the officers have in some way acted upon the defendant so as to have “deprived (him) of his freedom of action in any significant way,” [citation]. In the prison situation, this necessarily implies a change in the surroundings of the prisoner which results in an *added imposition* on his freedom of movement. Thus, restriction is a relative concept, one not determined exclusively by lack of freedom to leave. Rather, we look to some act which places further limitations on the prisoner.

In defining this concept we adhere to the objective, reasonable person standard and the same four factors we have employed under the “free to leave” test. [Citation.] Therefore, the language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him must be considered to determine whether a reasonable person would believe there had been a *restriction of his freedom over and above that in his normal prisoner setting*.

(*Cervantes v. Walker, supra*, 589 F.2d at p. 428, emphasis added; see *United States v. Jamison* (4th Cir. 2007) 509 F.3d 623, 629 [“When ‘by definition, the entire population [of inmates] is under restraint of free movement,’ a person cannot be deemed to be in custody unless a reasonable person would perceive that the police have imposed *additional* restraints on his freedom of action”], quoting *United States v. Conley* (4th Cir. 1985) 779 F.2d 970, 973.)

Applying the foregoing principles, the *Cervantes* court found that the deputy’s questioning of the petitioner did not constitute custodial interrogation, explaining:

The marijuana was uncovered in the course of a routine search. [The deputy's] question sought to ascertain the nature of the substance. The questioning took place in the prison library and appears to have been a spontaneous reaction to the discovery. Under these circumstances, we also conclude that neither the prison setting nor the presence of [the deputy and the sergeant] exerted a pressure to detain sufficient to have caused a reasonable person to believe his freedom of movement had been further diminished. Rather, this was an instance of on-the-scene questioning enabling [the deputy] to determine whether a crime was in progress. See *United States v. Edwards*, 444 F.2d 122, 123 (9th Cir. 1971) (per curiam); *Klamert v. Cupp*, 437 F.2d 1153, 1154 n.1 (9th Cir. 1970). Accordingly, no *Miranda* warnings were required and Cervantes' statement was properly admitted at trial.

(*Cervantes v. Walker, supra*, 589 F.2d at p. 429.)

Here, like in *Cervantes*, there was no added restriction of appellant's freedom over and above the normal prison setting when appellant arrived at C.S.P. Sacramento from San Quentin. Like all of the incoming prisoners for whom suitable housing needed to be found, appellant had a brief intake meeting with Lieutenant Reed and Officer White in Lieutenant Reed's office while he was temporarily handcuffed. (3 RT 606-607, 610; see *United States v. Booth, supra*, 669 F.2d at p. 1236 ["strong but reasonable measures to insure the safety of the officers or the public can be taken without necessarily compelling a finding that the suspect was in custody"], citing *United States v. Coades* (9th Cir. 1977) 549 F.2d 1303, 1305; *United States v. Conley, supra*, 779 F.2d at pp. 973-974 [finding that although the defendant was handcuffed, his freedom of movement was no more restricted than that of the other prisoners who were being transferred within the facility utilizing the same procedure].)

In order to properly house appellant within the prison, Lieutenant Reed and Officer White asked questions which were pertinent to appellant's request to be placed in administrative segregation, as well as his

statements that he had safety concerns and believed that some unidentified persons were going to stab him. (13 CT 4944; 3 RT 610, 612-614, 619, 687-688, 691, 693, 697, 700, 705.) The correctional officers' questions were not aimed at investigating appellant's pending crimes. Rather, the questions were responsive to appellant's request and statements relating to his safety concerns. (3 RT 616, 701-702; see *People v. Anthony* (1986) 185 Cal.App.3d 1114, 1122-1123 [finding it significant that the inmate initiated the phone calls from the jail to the investigators in determining that there was no custodial interrogation].)

The correctional officers also did not confront appellant with evidence pertaining to his guilt, nor did they demand that he answer their questions before they were willing to place him in administrative segregation. (See *People v. Fradiue, supra*, 80 Cal.App.4th at p. 21 [finding no custodial interrogation where the inmate was not confronted with any evidence of his guilt and was free to discontinue talking during the interview that was aimed at assisting him in preparing his defense to the administrative charges against him].) In fact, appellant did not answer all of their questions as he declined to identify who was going to stab him. (3 RT 613.)

The correctional officers' brief interview of appellant for the purpose of locating appropriate housing for him within the prison was similar to the on-the-scene questioning of prisoner Cervantes to determine whether a crime was in progress and no more restrictive than a brief, non-threatening detention involved in a traffic stop. (See *Maryland v. Shatzer, supra*, 130 S.Ct. at p. 1224 ["the temporary and relatively non-threatening detention involved in a traffic stop or *Terry* stop . . . does not constitute *Miranda* custody"]; *People v. Farnam* (2002) 28 Cal.4th 107, 180 [custody "does not include a 'temporary detention for investigation' where an officer detains a person to ask a moderate number of questions to determine his identity and

to try to obtain information confirming or dispelling the officer's suspicions"]; *Garcia v. Singletary* (11th Cir. 1994) 13 F.3d 1487, 1491 [concluding that the deputy's prompt questioning of the inmate regarding his reasons for starting the fire in his cell, after removing him from it and extinguishing the fire, was not *Miranda* custody].) Under these circumstances, a reasonable prisoner in appellant's position would not have believed his freedom of movement had been diminished more than in the normal prison intake setting. Thus, like the prisoner in *Cervantes*, appellant was not "in custody" for purposes of *Miranda*.

2. The Correctional Officers' Brief Questions Did Not Constitute "Interrogation" Within The Meaning Of *Miranda*

Furthermore, there was no interrogation. "Interrogation" as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." (*Rhode Island v. Innis, supra*, 446 U.S. at p. 301.) As indicated above, "interrogation" constitutes actual questioning initiated by law enforcement officials (*Miranda, supra*, 34 U.S. at p. 444), as well as its "functional equivalent" which includes:

any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

(*Rhode Island v. Innis, supra*, 446 U.S. at p. 301, footnotes omitted.)

"[T]he subjective intent of the police, while relevant, is not conclusive."

(*United States v. Booth, supra*, 669 F.2d at p. 1238, citing *Rhode Island v. Innis, supra*, 446 U.S. at p. 301.)

Here, Lieutenant Reed's initial question ("what his crime was because everyone is there for something") did not offend *Miranda* as it simply

addressed the safety concerns appellant had raised with the officers. (See *Rhode Island v. Innis*, *supra*, 446 U.S. at p. 300 [“Voluntary statements are not considered the product of interrogation”]; *State v. Kemp* (Ariz. 1996) 185 Ariz. 52, 58, 912 P.2d 1281 [“routine inquiries by guards concerning the security status of prisoners are not statements designed to elicit an incriminating response”].) Thus, after appellant stated that he needed to be “locked up” (3 RT 610, 687-688), Lieutenant Reed simply explored the reason and necessity for administrative segregation by asking appellant to tell him the crime for which he had been incarcerated (3 RT 697, 700, 705; 13 CT 4944). Lieutenant Reed’s question did not call for a description of appellant’s past crimes or any kind of admission on appellant’s part. (See *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601-602 [the “routine booking question” exception exempts from Miranda’s coverage questions which are posed to secure the “biographical data necessary to complete booking or pretrial services” and permissible questions include those that “appear reasonably related to the police’s administrative concerns”].) It simply gave appellant an opportunity to explain why he needed to be segregated from the general prison population. Lieutenant Reed could not have reasonably expected that appellant would have made an incriminating statement, especially since the focus of the conversation was whether appellant needed to be “locked up” and pertained to someone potentially attacking him. (3 RT 610, 612.)

Lieutenant Reed’s second question (“Who is going to stab you?”) and Officer White’s only question (“Why are they going to stab you?”) were further responses to appellant’s safety concerns and his request to be placed in administrative segregation. (3 RT 613-614, 619.) The correctional officers could not have reasonably known that their questions would have elicited an incriminating response from appellant, particularly when they had no reason to believe that appellant was aware of Mr. Corrieo’s presence

at the facility, or that Mr. Corrieo had threatened appellant. Appellant had presented himself as a victim, not a perpetrator of a crime, and the correctional officers addressed appellant's concerns as if he was a targeted victim. (See *United States v. Jamison*, *supra*, 509 F.3d at p. 632 [finding no custodial interrogation where the officer's question to the injured defendant were "precisely what would be expected were [the defendant] merely a victim"]; *United States v. Conley*, *supra*, 779 F.2d at p. 974 [finding that the inmate was not in custody for *Miranda* purposes where the two officers initially questioned him as a witness rather than as a suspect in the murder].) Also, appellant was the one who had initiated the idea of him being placed in administrative segregation. (3 RT 610, 687-688.) Their questions merely responded his request. (See *People v. Ireland* (1969) 70 Cal.2d 522, 536 ["even a defendant in *custody* might make statements admissible under *Miranda* if it were shown that such statements were the result of the defendant's own initiative and did not arise in a context of custodial *interrogation*"], emphasis in original.)

Furthermore, once appellant told the officers that "they" were going to stab him (3 RT 612), the officers needed to ask some questions for the purpose of determining whether there was any specific or immediate threat to appellant that needed to be addressed beyond placing him in administrative segregation, as well as the extent of the segregation, including yard exercise privileges.

As the *Miranda* Court explained:

General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

(*Miranda*, *supra*, 384 U.S. at pp. 477-478.)

As indicated above, this no more constituted interrogation than the permissible, brief, on-the-scene questioning of the inmate in *Cervantes* which simply enabled the deputy to determine whether a crime was in progress inside the prison. (*Cervantes v. Walker, supra*, 589 F.2d at p. 429; see *Maryland v. Shatzer, supra*, 130 S.Ct. at p. 1224 [“the temporary and relatively non-threatening detention involved in a traffic stop or *Terry* stop . . . does not constitute *Miranda* custody”]; *Garcia v. Singletary, supra*, 13 F.3d at p. 1491 [finding no custodial interrogation where the deputy promptly asked the inmate’s reason for starting the fire in his cell].)

Appellant claims that the correctional officers should have known that their questions would have elicited an incriminating response because the officers were aware of Mr. Corrieo’s statement (i.e., appellant was a suspect in the murder of his mother and sister) and Lieutenant Reed had reviewed his CDC file before he interviewed appellant. It is true that “any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining” what the police reasonably should have known. (*Pennsylvania v. Muniz, supra*, 496 U.S. at p. 601, quoting *Rhode Island v. Innis, supra*, 446 U.S. at p. 302, fn. 8.)

Appellant’s claim, however, is undermined by the fact the main focus of the conversation, which had been initiated by appellant, was that appellant needed to be placed in administrative segregation and appellant portrayed himself as a target of *someone else’s crime*. (3 RT 610, 612.) Also, when appellant said his crime was “gang-related,” Lieutenant Reed understood him to talking about the crime for which he had been committed. (3 RT 693, 699.) In addition, the officers did not know why appellant had been transferred or exactly what the pending charges against him were. (3 RT 704-705.) Furthermore, neither Lieutenant Reed nor

Officer White knew that Mr. Corrieo had threatened appellant, and appellant did not reveal that fact to the officers. (3 RT 613.)

Appellant relies on *People v. Morris* (1987) 192 Cal.App.3d 380 to contend that there was interrogation. (AOB 62-66.) In *Morris*, the defendant who had been upset, nervous, and crying during the booking process, was removed from his cell by the jailer to have an identification bracelet put on him. At that point, the defendant had calmed down and the jailer asked him, “[I]f we should anticipate any type of problem with his being there in jail.” The defendant said, “I don’t think so.” The jailer then asked, “Who are you accused of killing?,” and received the answer, “I killed my sister-in-law.” (*Id.* at p. 388.) The jailer insisted that his question was “solely for the purpose of jail security and not to elicit information from defendant that might be used against him.” (*Ibid.*)

Applying the standard announced in *Rhode Island v. Innis*, the *Morris* court found that the jailer’s questions constituted interrogation within the meaning of *Miranda* and not a neutral booking interview. (*People v. Morris, supra*, 192 Cal.App.3d at p. 391.) The *Morris* court stated in relevant part:

Even the first question asked by Officer Wilkerson, i.e., whether jail personnel should anticipate any “trouble” in connection with defendant’s incarceration, given the context of possible retaliation by members of the victim’s family or the victim’s friends, goes well beyond the type of neutral questioning permissible in a booking interview. Moreover, when defendant answered equivocally and Wilkerson pursued the matter, asking defendant who defendant had been accused of killing, it seems obvious that this is the type of police conduct which “the police should know [is] reasonably likely to elicit an incriminating response from the suspect.” (*Rhode Island v. Innis, supra*, 466 U.S. at p. 301 [64 L.Ed.2d at p. 308].)

The standard here is not what the police absolutely know; it is what they *should* know is *reasonably* likely to elicit an incriminating response from a suspect. As the court in *Rhode*

Island v. Innis made clear, the focus in this inquiry is not on objective proof that the police were intending to elicit an incriminating response; rather the focus is on the subjective perceptions of the suspect. It is much too narrow a reading of *Rhode Island v. Innis* to conclude that simply phrasing a question addressed to a criminal suspect in terms of "accusation" removes the question from the realm of those which the police should reasonably expect to produce an incriminating response. This conclusion is certainly amplified when personal characteristics of the suspect are taken into consideration; a suspect who is visibly upset and, in fact, crying, as was defendant in the instant case, is less likely to appreciate the subtlety in a question such as the one here under consideration. [Citations.]

The focus of our analysis is *not* what the police may lawfully ask a criminal suspect to ensure jail security. The police may ask whatever the needs of jail security dictate. However, when the police know or should know that such an inquiry is reasonably likely to elicit an incriminating response from the suspect, the suspect's responses are not admissible against him in a subsequent criminal proceeding unless the initial inquiry has been preceded by *Miranda* admonishments.

(*People v. Morris, supra*, 192 Cal.App.3d at pp. 389-390, emphasis in original.) Because the jailer in *Morris* knew or should have known that his inquiry was reasonably likely to elicit an incriminating response, the *Morris* court concluded that the admission of the defendant's response was error but, based upon the record, the court found the error was harmless beyond a reasonable doubt. (*Id.* at pp. 391-393.)

Here, unlike the jailer in *Morris*, the correctional officers could not have known that their questions would elicit appellant's incriminating response. Unlike the defendant in *Morris*, it was appellant who sparked the correctional officers' questions about who and why someone was going to stab him as he had stated that he needed to be "locked up" and "They're going to stab me." (3 RT 610, 612, 687-688, 693.) Thus, appellant undoubtedly perceived the correctional officers' questions as being

responsive to his idea to be put in administrative segregation, and he clearly knew that their questions were not aimed at uncovering any information about his pending crimes under such circumstances. (3 RT 613-614, 619, 697, 700.) Furthermore, unlike the defendant in *Morris* who was crying shortly before the jailer asked his questions of him, there was no evidence that appellant was visibly shaken during his brief meeting with the correctional officers. Based on the foregoing, it is evident that *Morris* is distinguishable from the instant case.

Appellant's case is more analogous to *People v. Claxton* (1982) 129 Cal.App.3d 638 (overruled on other grounds in *People v. Fuentes* (1998) 61 Cal.App.4th 956, 969) where the court found no interrogation.⁸ In *Claxton*, the defendant was in custody in juvenile hall when he sat down next to a group supervisor who he knew, and asked him, "How's it going?" The group supervisor responded, "Fine," and then asked the defendant, "What did you get yourself into?" (*Id.* at p. 647.) The defendant responded by describing his criminal conduct to the group supervisor who interjected some questions for purposes of clarification. (*Id.* at pp. 647-648.)

On appeal, the defendant claimed that his statement had been obtained in violation of *Miranda*. (*People v. Claxton, supra*, 129 Cal.App.3d at p. 648.) The *Claxton* court rejected the argument, finding that the group supervisor's neutral inquiries to the defendant's volunteered statements did not constitute an interrogation. The court stated, in relevant part:

⁸ As appellant correctly points out (AOB 67), the trial court misread *Claxton* to involve questioning by a probation officer. (13 CT 5032.) The trial court, however, correctly relied on *Claxton* to conclude that no *Miranda* warnings were required in the present case and its ruling should be upheld. (*People v. Zapien, supra*, 4 Cal.4th at p. 976; see *People v. Koontz, supra*, 27 Cal.4th at p. 1075, fn. 4 ["[W]e review the correctness of the trial court's ruling, not the reasons underlying it".])

We do not perceive the neutral inquiry, "What did you get yourself into?" as words that [the group supervisor] "*should have known*" were reasonably likely to elicit an incriminating response."

In the patois of the streets or jailhouse, the inquiry is tantamount to "What's up?" or "What are you in for?" The question did not require an inculpatory reply, nor does anything in the record suggest that [the group supervisor] expected one. Appellant, if he had desired not to talk, could have countered [the group supervisor's] "offhand" remark with any one of a number of rejoinders, from a laconic "trouble" to a recitation of the charges against him, or the alternative, a disclaimer such as he twice gave to Ray. He chose instead, for his own reasons, to make a full confession. That his will was not overcome by [the group supervisor] is further evidenced by appellant's claim of "impulse" and his failure to name his adult crime partner, who at that time had not been apprehended.

(*People v. Claxton, supra*, 129 Cal.App.3d at pp. 654-655, emphasis in original.)

Similar to the defendant in *Claxton*, appellant took the initiative to make certain statements to the correctional officers, including suggesting that he needed to be placed in administrative segregation and stating that someone was going to stab him. (3 RT 610, 612.) Lieutenant Reed's question to appellant, asking "what his crime was because everyone is there for something" (3 RT 697, 700, 705) was similar to the group supervisor's neutral question, "What did you get yourself into?" Like the group supervisor's question, Lieutenant Reed's question did not require an incriminatory response, and, given the context of the ongoing conversation (appellant's need to be placed in administrative segregation and his worry that someone was going to stab him), there was nothing in the record that suggested he expected one from appellant who was worried about someone committing a crime against him. Also, like in *Claxton*, it is apparent here that appellant's will was not overcome as he failed to name his suspected

assailant or even to recount the nature of the threat. (See, e.g., 3 RT 613 [appellant's response, "I'm not going to say" or "I can't say," to Lieutenant Reed's question, "Who's going to stab you?"].) In addition, appellant rather impulsively responded to Officer White's appropriate on-the-scene question ("Well, why are they going to stab you?") with the following response: "Because I killed two Hispanics." (3 RT 614-615, 619; see also 13 CT 4943-4944, 4946.) Thus, like *Claxton*, there was no custodial interrogation, and appellant's claim should be rejected.

**D. There Was No Violation Of The Sixth Amendment
Massiah Rule**

Lastly, appellant contends that his statements were obtained in violation of the Sixth Amendment. (AOB 70.) The Sixth Amendment prohibits the State from deliberately eliciting incriminating statements from a defendant in the absence of counsel. (*Massiah, supra*, 377 U.S. at p. 206; *Maine v. Moulton* (1985) 474 U.S. 159, 172.) As a result of this constitutional guarantee, the state cannot take any action to prevent a defendant from invoking his right to counsel in any post-indictment confrontations between the defendant and the state. (*Moulton, supra*, 474 U.S. at pp. 170, 176.) An accused is protected from questioning by a government agent when the government intentionally creates a situation that is likely to induce the accused to make an incriminating statement without the presence of counsel and the government agent attempts to elicit such a statement. (*United States v. Henry* (1980) 447 U.S. 264, 270-274; *People v. Frye* (1998) 18 Cal.4th 894, 993, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Thus, if the government directs an individual to elicit incriminating statements from the accused, the Sixth Amendment is violated. If, however, the state obtains the accused's incriminating statements "by luck or happenstance," the Sixth Amendment is not violated. (*Moulton, supra*, 474 U.S. at p. 176.) A

“knowing exploitation by the State of an opportunity to confront the accused without counsel” (*ibid.*) will render any incriminating statements inadmissible against the defendant at trial (*Massiah, supra*, 377 U.S. at p. 207; *In re Wilson* (1992) 3 Cal.4th 945, 952; see *Massiah, supra*, 377 U.S. at p. 206 [reversing the conviction of the defendant “when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel”].)

In the instant case, there was no violation of the Sixth Amendment *Massiah* rule. This is because the correctional officers did not deliberately seek to elicit any incriminating statements from appellant. (See *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459 [holding that “the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks”]; *State v. Kemp, supra*, 185 Ariz. at p. 58 [finding no violation of the defendant’s Sixth Amendment *Massiah* rights because the prison guards did not seek to elicit any incriminating statements from him].) To the contrary, the correctional officers were merely asking questions that were responsive to appellant’s request to be placed in administrative segregation and his fear of being stabbed by an unidentified assailant or assailants. (See *People v. Lucero* (1987) 190 Cal.App.3d 1065, 1068 [finding no violation of the *Massiah* rule where the defendant’s suspected crime partner did not initiate the conversation, but rather merely responded to the defendant’s questions and admonishments].)

Appellant’s reliance on *United States v. Henry, supra*, 447 U.S. 264 is to no avail. In *Henry*, the question was whether the government agent had deliberately elicited incriminating statements from the defendant in violation of the *Massiah* rule. (*Id.* at p. 270.) The *Henry* Court found it significant that: (1) the person to whom the defendant made incriminating

statements was a paid government informant who was acting pursuant to the government's instructions; (2) the informant was ostensibly nothing more than a fellow inmate of the defendant; and (3) the defendant was in custody and under indictment at the time he was engaged in conversation by the informant. (*Ibid.*) In concluding that the *Massiah* rule had been violated, the *Henry* court emphasized that these factors as well as the fact that the defendant was unaware of his informant status when he spoke with him. (*Id.* at pp. 272-273.)

Here, unlike in *Henry*, there was no intentional creation of a situation which was likely to induce appellant to make an incriminating statement. Significantly, there was no "secret" interrogation. (See *Kyhlmann v. Wilson* (1986) 477 U.S. 436, 459 [noting that the "primary concern of the *Massiah* line of cases is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation"].) Appellant was well aware of the fact that he was speaking with state officials when he briefly met with Lieutenant Reed and Officer White as they were the prison officials who determined the appropriate housing for him. In addition, unlike the informant in *Henry*, neither correctional officer was acting under the prosecutor's instructions when the interview of appellant took place. Thus, *Henry* is distinguishable from the instant case and of no help to appellant.

Appellant relies on *Estelle v. Smith* (1981) 451 U.S. 454 for the proposition that the fact that no state actor gathered evidence from the defendant pursuant to the prosecuting authorities' instructions is not dispositive of whether such evidence was deliberately elicited. (AOB 71.) In *Estelle*, the United States Supreme Court considered a situation in which a psychiatrist had conducted an ostensibly neutral competency examination of a capital defendant, but drew conclusions from the defendant's uncounseled statements about his future dangerousness, and then testified

for the prosecution on that crucial issue during the penalty phase of the defendant's trial. (*Estelle v. Smith, supra*, 451 U.S. at pp. 466-467.) In finding that the admission of the psychiatrist's testimony violated the Fifth Amendment, the *Estelle* Court compared the psychiatrist to "an agent of the State recounting unwarned statements made in a post arrest custodial setting." (*Id.* at p. 467.) The *Estelle* Court held that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." (*Id.* at pp. 467-468.)

Appellant also relies on *United States v. Furrow* (C.D. Cal. 2000) 2000 U.S. Dist. LEXIS 21771. In *Furrow*, the court relied on *Massiah* and *Estelle* to find that the prison psychologist's custodial questioning of the pretrial detainee violated the Sixth Amendment *Massiah* rule. (*United States v. Furrow, supra*, 2000 US. Dist. LEXIS at pp. *19-*22.) The *Furrow* court stated, in relevant part:

First, the fact that an individual did not gather evidence against the defendant on instructions from prosecuting authorities is not dispositive of whether such evidence is deliberately elicited. The Supreme Court made this clear in *Estelle* . . . [¶] Although Dr. Burris did not "deliberately set out to secure information for use in a pending prosecution," "the determinative issue is not the informant's subjective intentions, but rather whether the federal law enforcement officials created a situation which would likely cause the defendant to make incriminating statements." Dr. Burris may have initiated contact with Defendant for the sole purpose of assessing the threat he posed to MDC security; however, the government's subsequent attempt to use the contents of their discussions as evidence of Defendant's future dangerousness renders those sessions the functional equivalent of a custodial interrogation conducted outside the presence of counsel. If Dr. Burris is permitted to testify at the penalty phase of Defendant's trial, her role would expand well beyond merely advising prison authorities of the risk Defendant poses to fellow inmates and MDC staff. She

would be actively participating in the government's efforts to prosecute Defendant by advising the jury with respect to factors bearing on its decision whether to impose the death penalty. Yet Defendant was not informed that his sessions with Dr. Burris would influence whether, if convicted, he should be sentenced to death. *Cf. Estelle*, 451 U.S. at 467, 471. As a result, defendant "was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." *Id.* at 471.

Second, the factual circumstances of this case distinguish it from *Bey*. Significantly, the prison guard in *Bey* neither initiated contact with the defendant nor asked him questions designed to induce incriminating utterances. Nor did he take notes or compile any reports of his conversations with the defendant. Lastly, he only disclosed the confession five years later, when questioned by the prosecution. *Bey*, 124 F.3d at 531; *cf. United States v. York*, 933 F.2d 1343 (7th Cir. 1991) (informant did not report incriminating information to FBI until several months after his conversations with defendant).

By contrast, Dr. Burris contacted Defendant for the express purpose of evaluating his future dangerousness, a factor that looms large in the sentencing phase of his trial. Thus, it was not by mere "luck or happenstance" that the government obtained these incriminating statements. *Maine v. Moulton*, 474 U.S. at 176. By engaging Defendant in conversation about his violent intentions toward Lopez and unit staff, Dr. Burris was certain to elicit statements relevant to a jury's determination of his future dangerousness. Unlike the guard in *Bey*, Dr. Burris prepared written summaries of the two sessions in which Defendant threatened to kill Lopez and MDC guards, and those reports were promptly provided, at prosecutors' request, a mere two months after they were created.

(*United States v. Furrow*, *supra*, 2000 US.Dist.LEXIS at p. *19-*22, footnotes omitted.)

Furrow and *Estelle* are distinguishable in a few respects. First, in *Estelle* the trial court had called for the competency evaluation and the State had *chosen* the psychiatrist. (*Estelle v. Smith*, *supra*, 451 U.S. at pp.

456-457.) Here, the prosecutor did not choose Lieutenant Reed and Officer White to conduct an intake interview of appellant. Those correctional officers just happened to be the ones who dealt with appellant upon his arrival from San Quentin.

Second, the defendants in *Estelle* and *Furrow* had been charged with a capital offense at the time of the doctors' examinations, and thus; it was clear that the defendants' future dangerousness would be a specific issue at their sentencing. Here, the correctional officers' intake interview of appellant was aimed at finding appellant appropriate housing within the prison and only became of value to the prosecution's case when appellant unexpectedly confessed to the murders during the meeting. (See *Moulton, supra*, 474 U.S. at p. 176 [when the state obtains the defendant's incriminating statements "by luck or happenstance," there is no violation of the Sixth Amendment *Massiah* rule].)

Third, unlike in *Estelle* and *Furrow*, there was no intentional creation of a situation which was likely to induce appellant to make an incriminating statement. Unlike the doctors who initiated the contact with the defendants so they could interview them about their future dangerousness, appellant took part in a routine intake process for incoming prison inmates. At that time, appellant initiated a discussion of his need to be segregated from the general prison population and said that someone was going to stab him (3 RT 610, 612), which then sparked the follow-up questions from the correctional officers that ultimately resulted in his confession. (See *Bey v. Morton* (3rd Cir. 1997) 124 F.3d 524, 531 [finding it significant that the prison guard did not initiate contact with the defendant and never asked him questions which were designed to induce him to make incriminating statements].)

Finally, although Officer White did make a report of appellant's confession (13 CT 2231), it is significant that Officer White did not give it

immediately to the prosecution as it was not intended for use outside the prison. (3 RT 620, 699-700.) Lieutenant Reed gave it to the prosecution via Sergeant Ingersoll of Contra Costa County Sheriff's Office two weeks after appellant made the confession and only after Sergeant Ingersoll contacted him about it. (3 RT 692, 700, 702.) Based on the foregoing, it is evident that appellant's reliance on *Estelle* and *Furrow* are of no help to appellant, and appellant's *Massiah* rights were not violated.

E. There Was No Prejudice

In any event, there was no prejudice to appellant. Under federal law, the test for admitting a coerced confession is the prejudice test set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, requiring reversal unless the error was harmless beyond a reasonable doubt. (*Arizona v. Fulminante, supra*, 499 U.S. at p. 309.) The *Chapman* standard of prejudice also applies to the erroneous admission of a confession admitted in violation of the Sixth Amendment *Massiah* rule. (*Milton v. Wainwright* (1972) 407 U.S. 371, 372-378; see also *United States v. Polanco* (9th Cir. 1996) 93 F.3d 555, 562 [applying the *Chapman* test to the erroneous admission of an inculpatory statement admitted in violation of *Miranda*].) "When reviewing the erroneous admission of an involuntary confession, the appellate court . . . simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt." (*Arizona v. Fulminante, supra*, 499 U.S. at p. 310.) The Supreme Court has stated:

A court must approach [the harmless error issue] by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [coerced confession].

(*Yates v. Evatt* (1991) 500 U.S. 391, 404-405, disapproved on another ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn.4.)

Under state law, this Court has rejected a per se reversible error standard for coerced confessions. (*People v. Cahill, supra*, 5 Cal.4th at p. 510.) This Court has similarly concluded that a conviction may be affirmed despite the erroneous admission of an involuntary confession inadmissible under the federal Constitution or a confession obtained in violation of the prophylactic *Miranda* requirements or the Sixth Amendment *Massiah* rule, if the record shows that the admission of the confession was harmless beyond a reasonable doubt. (*People v. Sims* (1993) 5 Cal.4th 405, 447-448, disapproved on another ground in *People v. Storm* (2002) 28 Cal.4th 1007, 1031-1032; *People v. Cahill, supra*, 5 Cal.4th at p. 510; *People v. Catelli* (1991) 227 Cal.App.3d 1434, 1445.)

Here, even assuming the trial court erred in admitting appellant's confession, the error was harmless beyond a reasonable doubt. This is because, even without the confession that appellant made to the correctional officers 16 months after the crimes were committed, appellant would not have been acquitted. Although the prosecutor emphasized the importance of appellant's confession during his closing argument (13 RT 3479-3481, 3492, 3494, 3500, 3561), this was not a case where there was no evidence connecting appellant to the crime other than his confession. (Cf. *In re Shawn D., supra*, 20 Cal.App.4th at p. 217.) To the contrary, the evidence against appellant was overwhelming.

Ross, appellant's fellow cohort, testified that appellant murdered Corrieo and Roberts during the burglary and robbery that they committed with Lolohea on August 15, 1995, when appellant shot the women multiple times. (10 RT 2696-2697.) Although appellant attempts to undermine the strength of Ross's testimony (AOB 78), it is significant that, long before his arrest, Ross told others, including West and his sister, Bernadette, that

appellant had killed the women. (10 RT 2712-2713; 11 RT 2829, 2961-2963.) Significantly, Bernadette saw appellant in Ross's room the night that they divided the money. (11 RT 2963, 2966.) Ross also told Coward that he had done some "ill-assed shit," "they" were supposed to rob them, and that he was upset about what the other participants in the crime had done. (11 RT 2897-2898.) Furthermore, consistent with Ross's version of events, four shots were heard by Higgins, Corrieo's neighbor, the night of the murders. (10 RT 2597.) In addition, the autopsy and forensics later confirmed that the women had been shot multiple times with Ross's .40 caliber Smith and Wesson semi-automatic handgun as Ross had said. (10 RT 2617, 2619-2622, 2625-2626, 2646-2647; 11 RT 3015, 3018, 3021.)

The evidence also showed that the three men, who hung out together "quite a bit" (10 RT 2673, 2743-2744; 11 RT 2901-2902), had planned the crimes for weeks (10 RT 2664, 2666-2667). Importantly, they discussed their plans in front of Carlock who heard them discuss "doing a lick on some fools." (11 RT 2905, 2908-2911.)

It is also significant that, immediately after the crimes, appellant was in possession of approximately \$20,000, mostly \$100 bills, the denomination that Corrieo routinely kept in her car. (10 RT 2574, 2592-2593.) After his arrest, appellant directed his girlfriend to pick up this money from Saravia's house. (11 RT 2986-2987, 2988.) In addition, appellant's good friend, Kaemper, testified that, while appellant was incarcerated, she heard appellant tell Saravia that "they came up with money hella quick" and that the money was being held at Beach's house, i.e., the location where the police found it. (11 RT 2987, 3007-3008, 3012-3013.)

Moreover, appellant clearly had a motive to rob the victims as he had no job. (10 RT 2683.) In addition, appellant's motive to kill the victims was evident from the fact that appellant was afraid of being identified after

Ross called him “C-dog” (the name tattooed on his hand) during the robbery. (10 RT 2691-2692, 2698.) Based on the foregoing, it is evident that, despite any error, there was no prejudice as the evidence overwhelmingly pointed to appellant’s guilt.

II. THE TRIAL COURT PROPERLY ALLOWED THE PROSECUTOR TO ASK ROSS QUESTIONS REGARDING HIS PLEA AGREEMENT

Appellant contends that the trial court’s decision to allow the prosecutor to ask David Ross a series of leading and argumentative questions which falsely suggested that the state had guaranteed Ross’s truthfulness made it appear futile for the defense to object to the improper prosecutorial vouching and violated his right to due process under the Sixth and Fourteenth Amendments as well as the state constitutional corollaries. (AOB 82-89.) We disagree.

A. Relevant Background

During the trial, Ross admitted that he had a signed written agreement with the prosecutor in which he had agreed to tell the truth about the crimes against Corrieo and Roberts in exchange for the prosecutor’s promise not to seek the death penalty against him (Ross), but rather a 20-year prison sentence. (10 RT 2673, 2676-2678; see also 3 CT 909-912; People’s Exh. 14 [Ross’s agreement with the Chief Deputy District Attorney to testify truthfully].) Ross stated that he understood that the potential penalty for his crimes against Corrieo and Roberts was death and that if he told the truth, then he expected to spend only 20 years in prison. (10 RT 2677.) Ross also stated that he understood that his deal would be taken away if he maximized someone else’s involvement in the crime or minimized his own involvement. (10 RT 2678.) The following colloquy then transpired:

Q. [Prosecutor] You understand that there is one thing and one thing only you are required to do in order to get the benefit of this agreement and spend 20 actual years in prison?

DEFENSE COUNSEL: Objection. It's leading and argumentative.

THE COURT: Well, it's somewhat leading but for this purpose, overruled.

THE PROSECUTOR: It's foundational. Thank you.

Q. [Prosecutor] Answer the question. What one thing are you required to do in order to get the benefit of this agreement and serve 20 actual years in state prison?

A. [Ross] To tell the truth.

(10 RT 2678.)

The prosecutor also asked Ross whether he would still get the benefit of his agreement if telling the truth did any of the following: (1) made him look bad; (2) showed that he injured either of the women; or (3) showed that he murdered either of the women. Ross responded, "Yes, sir," to all three questions. (10 RT 2678-2679.) The prosecutor then asked, "And what happens if you lie and falsely cast blame on anybody else?" Ross responded, "My deal gets taken away." The prosecutor finally asked, "You understand that quite clearly?," to which Ross responded, "Yes, sir." (10 RT 2679.) Then, as the prosecutor's direct examination of Ross came to a close, the prosecutor again asked: "Mr. Ross, you understand that you get the benefit of your bargain by telling the truth?" Ross responded: "Yes, sir." The prosecutor then asked, "Have you told the jury the truth?," and Ross said, "Yes, sir." (10 RT 2718.)

During his closing argument and prior to defense counsel's closing argument (13 RT 3505-3559), the prosecutor stated that Ross was required to tell the truth under the terms of his agreement and Ross understood that if he minimized his role or cast false blame on another participant, he would not receive the benefit of his bargain. The prosecutor further stated that Ross had "enormous incentive to tell the truth" because he wanted the

20-year deal and that Ross knew that he could accept responsibility for anything that he did and still get the 20-year deal as long as he told the truth. (13 RT 3492-3493.)

B. The Trial Court Properly Overruled Defense Counsel's Objection

Initially, appellant contends that the trial court erred by overruling defense counsel's objection that the prosecutor's question to Ross about what he was required to do to get the benefit of his agreement was "leading and argumentative." (AOB 84-87.) We disagree.

An argumentative question is designed to engage a witness in argument rather than elicit facts within the witness's knowledge. (*People v. Mayfield* (1997) 14 Cal.4th 668, 755.) If a question is purely argumentative, then it is properly excluded. (*People v. White* (1954) 43 Cal.2d 740, 747; see, e.g., *People v. Horowitz* (1945) 70 Cal.App.2d 675, 691 [finding that the trial court properly excluded the argumentative question].)

Here, the trial court properly overruled defense counsel's objection as the prosecutor's question was not argumentative. The question had not already been asked and answered. The question did not call for an answer that would have contradicted anything to which Ross had previously testified. (See 1 CT 142-144 [Ross's similar grand jury testimony on the subject].) The question merely sought to elicit facts within Ross's knowledge, i.e., what he understood he was required to do in order to receive the benefit of his agreement. Thus, the question was not argumentative.

The prosecutor's question was also not leading. A leading question is a question that suggests the answer to the witness. (Evid. Code, § 764; *People v. Williams, supra*, 16 Cal.4th at p. 672.) "Except under special circumstances where the interests of justice otherwise require: [¶] (1) A

leading question may not be asked of a witness on direct or redirect examination.” (Evid. Code, § 767, subd. (a)(1).) To determine whether a question is leading,

“[t]he whole issue is whether an ordinary man would get the impression that the questioner desired one answer rather than another. The form of a question, or previous questioning, may indicate the desire, but the most important circumstance for consideration is the extent of the particularity of the question itself.” (1 McCormick on Evidence, *supra*, § 6, pp. 17-18.) Another treatise says that a question is leading if it “ ‘instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, . . . or plainly suggests the answer which the party wishes to get from him.’ ” (3 Wigmore, Evidence, *supra*, § 769, p. 155, quoting *Page v. Parker* (1860) 40 N.H. 47, 63.) And in his treatise, Justice Bernard Jefferson states that “A question calling for a ‘yes’ or ‘no’ answer is a leading question only if, under the circumstances, it is obvious that the examiner is suggesting that the witness answer the question one way only, whether it be ‘yes’ or ‘no.’ (1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 27.8, p. 762.) Justice Jefferson adds this caution, however: “When the danger [of false suggestion] is present, leading questions should be prohibited; when it is absent, leading questions should be allowed.” (*Ibid.*)

(*People v. Williams, supra*, 16 Cal.4th at p. 672.)

The danger in allowing “a question that suggests to the witness the answer that the examining party desires” (Evid. Code, § 764) is to the truth-seeking function of the trial. Allowing the examiner to put answers in the witness’ mouth raises the possibility of collusion [citation], as well as the possibility that the witness will acquiesce in a false suggestion. [Citation.]

(*People v. Spain* (1984) 154 Cal.App.3d 845, 852-853.) A trial court has broad discretion to decide when special circumstances are present and whether to allow counsel to ask a leading question. (*People v. Williams, supra*, 16 Cal.4th at p. 672.)

Here, the trial court properly overruled defense counsel’s objection because the prosecutor’s question was not leading. The prosecutor asked if

Ross understood that he was required to do one thing in order to receive the benefit of 20-year deal. (10 RT 2678.) This merely required Ross to answer “yes” or “no,” and did not suggest that he must answer one way or another. Furthermore, Ross’s answer, one way or another, was important to lay the foundation for the admission of Ross’s plea agreement (People’s Exh. 14), evidence which the jury was entitled to know and consider. (*Giglio v. United States* (1972) 405 U.S. 150, 153-155; CALJIC No. 2.20; see *People v. Brasure* (2008) 42 Cal.4th 1037, 1055-1056 [noting that a jury may consider an accomplice’s plea agreement as evidence of interest or bias in assessing the accomplice’s credibility]; *People v. Fauber* (1992) 2 Cal.4th 792, 821 [existence of a prosecution witness’s plea agreement is relevant impeachment evidence as it bears on the witness’s credibility].)

Even if the question was leading, the trial court did not abuse its discretion by allowing the prosecutor to ask it as there was no danger of false suggestion. (See *People v. Harris* (2008) 43 Cal.4th 1269, 1285 [finding no abuse of discretion where “the possibility of improper suggestion was remote”].) Ross had already testified during the grand jury proceedings that the prosecutor had promised not to seek the death penalty against him in exchange for Ross’s promise to testify truthfully. (1 CT 142-144.) Moreover, the written agreement between Ross and the prosecutor was introduced as an exhibit during appellant’s trial. The agreement clearly stated that Ross had agreed to tell the truth about the crimes against Corrieo and Roberts in exchange for the prosecutor’s agreement to seek a 20-year prison sentence against him as opposed to the death penalty. The agreement made it clear that in order for Ross to receive the benefit of his agreement, he had to tell the truth and his deal would be taken away if he maximized someone else’s involvement in the crime or minimized his own. (See 3 CT 909-912 [People’s Exh. 14: Ross’s agreement with the Chief Deputy District Attorney to testify truthfully].)

Under these circumstances, the trial court properly overruled defense counsel's objection.

In any event, it is not reasonably probable that the jury would have reached a different verdict had the trial court sustained defense counsel's objection. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Hinton* (2006) 37 Cal.4th 839, 865 [finding no prejudice stemming from the prosecutor's leading questions on foundational matters].) As indicated above, the written agreement, which was properly introduced during appellant's trial, made it clear that Ross had to tell the truth in order to receive the benefit of his agreement with the prosecutor.⁹ (See 3 CT 909-912 [People's Exh. 14].) Furthermore, the evidence against appellant was overwhelming (see Arg. IE, *supra*), and the introduction of the elicited evidence was favorable to appellant to the extent that it revealed Ross's bias, interest, and motive to testify. (See *People v. Phillips* (1985) 41 Cal.3d 29, 47 ["when an accomplice testifies for the prosecution, full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility"].) Thus, there was no prejudice to appellant, despite any alleged error.

C. There Was No Prosecutorial Misconduct

Appellant further contends that the prosecutor committed misconduct by improperly giving the jury his personal opinion that the agreement

⁹ Notably, if Ross had testified differently at the trial than he had during the grand jury proceedings, then the elicited evidence, to which appellant objects, undoubtedly would have been introduced as a prior inconsistent statement during appellant's trial. (See 1 CT 143 [Ross's grand jury testimony indicating that he had to tell the truth in order to receive the benefit of his bargain].)

ensured the truthfulness of Ross's testimony and implying that he could verify the truth of Ross's testimony. (AOB 87-89.) We disagree.

1. Appellant Forfeited Review Of This Claim By Failing To Make A Contemporaneous Objection

Initially, we submit that appellant has forfeited his claim of prosecutorial misconduct. Generally, a defendant cannot raise a claim of prosecutorial misconduct on appeal unless he raised a timely objection at trial on the same ground and requested the trial court to admonish the jury to disregard the impropriety. (Evid. Code, § 353; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823.) "[O]therwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Price* (1991) 1 Cal.4th 324, 447.)

Here, defense counsel raised no claim of prosecutorial misconduct below. Appellant's claim that an objection would have been futile because the trial court overruled defense counsel's objection to the prosecutor's question on other grounds (AOB 88-89) is meritless. The only objection defense counsel raised with respect to the prosecutor's question was that it was argumentative and leading. (10 RT 2678.) This objection had nothing to do with whether the prosecutor committed misconduct. Thus, the trial court did not leave appellant with the impression that it would have overruled an objection to the question on an entirely different ground. Furthermore, if the trial court had found misconduct, then it could have cured any harm by a simple admonishment to the jury, reminding it that counsel's questions are not evidence and that it could consider the question only for the purpose of helping it to understand the witness's answer. (See CALJIC No. 1.02; 11 CT 4028.)

Defense counsel also made no objection to the prosecutor's argument. (13 RT 3492-3493.) This left the trial court without any opportunity to

consider whether the prosecutor's argument was improper and whether it needed to admonish the jury. (See *People v. Bemore* (2000) 22 Cal.4th 809, 854 [where defense counsel made no specific claim of misconduct when the prosecutor made the statements and curative steps could have been taken, appellant failed to preserve his claim for purposes of appeal].) Having failed to satisfy the general rule requiring assignment of misconduct and a request for an admonition regarding the prosecutor's question and closing argument, appellant has forfeited his claim for purposes of appeal. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1214; see *People v. Williams, supra*, 16 Cal.4th at p. 673 [finding that the defendant had not preserved the claim of prosecutorial misconduct where the defendant failed to object to the prosecutor's question on the basis of misconduct and did not request a curative admonition].)

2. The Challenged Remarks Do Not Constitute Misconduct

Even assuming, arguendo, that there was no forfeiture, appellant's claim of prosecutorial misconduct fails on its merits.

Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.

(*People v. Morales* (2001) 25 Cal.4th 34, 44.) When the issue is the prosecutor's comments before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Clair* (1992) 2 Cal.4th 629, 663.)

Under the federal Constitution, prosecutorial misconduct is reversible only if it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales, supra*, 25 Cal.4th at p. 44;

accord *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.)

Here, there was no prejudicial prosecutorial misconduct.

Impermissible “vouching” may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness’s veracity or suggests that information not presented to the jury supports the witness’s testimony.

(*People v. Fierro* (1991) 1 Cal.4th 173, 211.)

The prosecutor’s questions about the fact that Ross was required to tell the truth in order to get the benefit of his agreement did not constitute improper vouching. The prosecutor did not give his personal opinion that the agreement ensured the truthfulness of Ross’s testimony, nor did he imply that he could verify Ross’s testimony, and thereby, enforce the truthfulness term. The prosecutor simply elicited the terms of the agreement, Ross’s understanding of the terms and the consequences that would ensue if he failed to abide by them, and whether Ross had provided truthful testimony. (10 RT 2678-2679, 2718.) The testimony elicited by the prosecutor was admissible to show Ross’s bias and it was important for the jury to learn what would occur if Ross failed to truthfully testify in appellant’s case. (*People v. Fauber, supra*, 2 Cal.4th at p. 823; *People v. Phillips, supra*, 41 Cal.3d at p. 47; see *People v. Hayes* (1971) 19 Cal.App.3d 459, 470 [finding no prosecutorial misconduct where the prosecutor’s leading questions did not produce inadmissible or prejudicial evidence].) Furthermore, the trial court properly instructed the jurors that “statements made by the attorneys during the trial are not evidence” (13 RT 3422; see also 11 CT 4028; CALJIC No. 1.02), and that they were “the sole judges of the believability of a witness and the weight to be given the testimony of each witness” (13 RT 3428; see also 11 CT 4040; CALJIC No. 2.20.) Without evidence to the contrary, it is presumed that the jury

heeded the court's instructions. (*People v. Pinholster* (1992) 1 Cal.4th 865, 919; see *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn.17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions"].) Given the foregoing, the jurors could not have reasonably interpreted the prosecutor's questions to mean that the prosecutor was giving his personal opinion about the truthfulness of Ross's testimony or that they were relieved of their duty to decide whether Ross's testimony was truthful in the course of determining appellant's guilt or innocence. (See *People v. Fauber, supra*, 2 Cal.4th at p. 823 [finding that the jury could not have reasonably understood the admission of the prosecution witness's plea agreement to mean that it was relieved of its duty to decide whether the witness's testimony was truthful].)

The prosecutor also did not commit misconduct during his closing argument.

It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.

(*People v. Wharton* (1991) 53 Cal.3d 522, 567, internal citations and quotation marks omitted.)

Here, as indicated above (see Arg. IIA, *supra*), prior to defense counsel's closing argument (13 RT 3505-3559), the prosecutor told the jury that Ross was required to tell the truth under the terms of his agreement and Ross understood that if he minimized his role or cast false blame on another participant, he would not receive the benefit of his bargain. The prosecutor further stated that Ross had "enormous incentive to tell the truth" because he wanted the 20-year deal and that Ross knew that he could accept responsibility for anything that he did and still get the 20-year deal as long as he told the truth. (13 RT 3492-3493.)

These statements constituted fair comment on the evidence. The evidence adduced during the trial showed that Ross had signed an agreement with the prosecutor in which Ross had agreed to tell the truth about the crimes against Corrieo and Roberts in exchange for the prosecutor's promise not to seek the death penalty against him (Ross), but rather a 20-year prison term. (10 RT 2673, 2677-2678, 2718; see also 3 CT 909-912; People's Exh. 14 [Ross's agreement with the Chief Deputy District Attorney to testify truthfully].) The evidence also showed that Ross understood that his deal would be taken away if he maximized someone else's involvement in the crimes or minimized his own. (10 RT 2678-2679.) The prosecutor's statements during closing argument (13 RT 3492-3493) did nothing more than highlight this evidence for the jury, which was proper. (*People v. Wharton, supra*, 53 Cal.3d at p. 567.)

Furthermore, although the prosecutor stated that Ross clearly wanted the benefit of his bargain (13 RT 3492), he argued for Ross's credibility based on the evidence adduced at trial (13 RT 3474-3492), and not on the basis of his personal belief that Ross was being truthful. The prosecutor pointed out the impeaching evidence in connection with Ross (13 RT 3491, 3493), but emphasized that Ross was there primarily to tell the jurors "how" and "why" Roberts and Corrieo were murdered, and appellant had admitted to the murders. (13 RT 3491-3494.) Also, as indicated above, the trial court properly instructed the jurors regarding counsel's statements (13 RT 3422; see also 11 CT 4028; CALJIC No. 1.02), and that they had the duty of deciding the believability of a witness as well as what weight to give each witness's testimony (13 RT 3428; see also 11 CT 4040; CALJIC No. 2.20). Based on the foregoing, it is evident that appellant's claim of prosecutorial misconduct should be rejected.

3. There Was No Prejudice

In any event, there was no prejudice. (*People v. Friend* (2009) 47 Cal.4th 1, 31-32, 37-39 [finding no prejudice, despite any prosecutorial misconduct].) Significantly, appellant confessed to the murders. (11 RT 3052, 3066.) In addition, Ross's testimony was bolstered by the fact that he had indicated to others that appellant had killed the two women long before his arrest (10 RT 2712-2713; 11 RT 2829, 2961-2963, 11 RT 2897-2898), Bernadette saw appellant in Ross's room the night that they divided the money (11 RT 2963, 2966), the neighbor heard multiple shots the night of the murders (10 RT 2597), and the autopsy and forensics confirmed that the women had been shot multiple times with Ross's .40 caliber Smith and Wesson semi-automatic handgun as Ross had said (10 RT 2617, 2619-2622, 2625-2626, 2646-2647; 11 RT 3015, 3018, 3021).

Furthermore, Carlock overheard appellant and his cohort's plan to rob the women in the weeks prior to the incident (11 RT 2905, 2908-2911), and after the crimes, appellant was in possession of approximately \$20,000, mostly \$100 bills, the denomination that Corrieo routinely kept in her car (10 RT 2574, 2592-2593). In addition, the evidence showed that appellant directed his girlfriend to pick up the stolen money from Saravia's house (11 RT 2986-2987, 2988), and appellant admitted to Saravia that "they came up with money hella quick" and that the money was being held at Beach's house, i.e., the location where the police found it (11 RT 2987, 3007-3008, 3012-3013). Appellant's motive to rob and kill the women was also clear as he had no job and he did not want to leave any surviving witnesses who could identify him. (10 RT 2683, 2691-2692, 2698.)

In addition to the overwhelming evidence, it is significant that the trial court properly instructed the jurors regarding counsel's statements (13 RT 3422; see also 11 CT 4028; CALJIC No. 1.02), and that they had the duty of deciding the believability of a witness, as well as what weight to give

each witness's testimony (13 RT 3428; see also 11 CT 4040; CALJIC No. 2.20). Based on the foregoing, it is evident that there was no prejudice.

III. THE TRIAL COURT PROPERLY EXCUSED JUROR W.M. FOR CAUSE

Appellant contends that this Court should reverse the penalty judgment under *Witherspoon/Witt*¹⁰ and *Gray v. Mississippi*¹¹ because the trial court improperly removed Juror W.M. for cause. (AOB 90-101.) We disagree.

In *Witherspoon v. Illinois*, *supra*, 391 U.S. 510, the prosecutor, without conducting a significant examination of each individual prospective juror, succeeded in removing 47 potential jurors of the 96-person venire based upon their general scruples against imposing the death penalty. (*Id.* at pp. 514-515.) The *Witherspoon* Court held that the systematic removal of such jurors led to a jury “uncommonly willing to condemn a man to die,” and “woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments.” (*Id.* at pp. 518, 521.) The *Witherspoon* Court held that “a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding venire men for cause simply because they voiced general objections to the death penalty.” (*Id.* at p. 522.) In dicta, the *Witherspoon* Court established a strict standard for when a potential juror could be removed for cause due to his views regarding the death penalty. (*Id.* at pp. 522-523, fn. 21.)

Rejecting the strict standard set forth in footnote 21 of the *Witherspoon* case, the Supreme Court, in *Wainwright v. Witt*, *supra*, 469 U.S. 412, relied on *Adams v. Texas* (1980) 448 U.S. 38, 45, which provided

¹⁰ *Wainwright v. Witt* (1985) 469 U.S. 412; *Witherspoon v. Illinois* (1968) 391 U.S. 510.

¹¹ *Gray v. Mississippi* (1987) 481 U.S. 648, 663.

the following standard: “Whether the juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” (*Wainwright v. Witt, supra*, 469 U.S. at p. 424, internal quotation marks omitted.) The *Witt* Court instructed, in applying this standard, a reviewing court must give the trial court’s judgment deference. (*Id.* at p. 430.) “Deference is owed regardless of whether the trial court engages in explicit analysis regarding substantial impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias.” (*Uttecht v. Brown* (2007) 551 U.S. 1, 7, citing *Wainwright v. Witt, supra*, 469 U.S. at p. 430.)

More recently, in *Uttecht v. Brown, supra*, 551 U.S. 1, the Supreme Court reviewed its *Witherspoon-Witt* line of opinions, highlighting these basic principles: (1) a criminal defendant has the right to an impartial jury drawn from a venire which has not been tilted in favor of death by a prosecutor’s selective challenges for cause; (2) the state has a strong interest in having jurors who are capable of applying capital punishment within the framework of the state law; (3) in order to balance the foregoing two interests, a juror who is substantially impaired in his ability to impose the penalty of death under the state-law framework can be excused for cause; and (4) in assessing whether the removal of a potential juror would vindicate the state’s interest without violating the defendant’s right, the trial court must make a decision based, in part, on the juror’s demeanor, a decision to which a reviewing court must give deference as the trial court sits in a superior position to assess a juror’s demeanor and qualifications. (*Uttecht v. Brown, supra*, 551 U.S. at pp. 9-10.)

The standard of review of the court’s ruling regarding the prospective juror’s views on the death penalty is essentially the same as the standard regarding other claims of bias. If the prospective juror’s statements are conflicting or equivocal, the court’s determination of the actual state of mind is binding. If

the statements are consistent, the court's ruling will be upheld if supported by substantial evidence.

(*People v. Horning* (2004) 34 Cal.4th 871, 896-897; see *People De Priest* (2007) 42 Cal.4th 1, 20-21 [a trial court's determination that a juror's views regarding capital punishment would substantially impair the juror's ability to serve is entitled to substantial deference on appeal].) When reviewing a decision to grant or deny a challenge for cause, this Court must consider the voir dire as a whole rather than as individual and isolated answers to specific questions. (See *People v. Cox* (1991) 53 Cal.3d 618, 647-648 [noting that the defendant based his objections "on excerpted portions of the voir dire, isolating particular answers out of context, or fail[ed] to accord due deference to the court's fact-finding role"], disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) Applying the foregoing principles, it is evident that the trial court properly excused Juror W.M. for cause.

Here, Juror W.M. expressed views about the death penalty which made it evident that he would be substantially impaired from performing his duty as a juror. Significantly, Juror W.M. provided the following answer regarding his general feelings about the death penalty in his questionnaire: "I believe the death penalty is right. I personally would have a difficult time living with the fact I was partially responsible for putting a person to death." (24 CT 9829, 9831.) Juror W.M. referred to this same answer multiple times when asked if he had any opinions about the death penalty that would cause him to automatically vote for the death penalty or for a life sentence without the possibility of parole, regardless of the evidence introduced during the penalty phase. (24 CT 9832.) In addition, Juror W.M. stated in the questionnaire that he thought the death penalty was used "too randomly," and he was "strongly in favor" of the penalty of life in prison without the possibility of parole. (24 CT 9831.)

Juror W.M. also stated that he considered himself a religious person, he was involved with a church, and his views about the death penalty were based upon his religious beliefs. (24 CT 9805-9806.)

Furthermore, when questioned by defense counsel during voir dire, Juror W.M. stated that he had “feelings about what should happen,” but because of his “religious convictions” he did not know whether he “could actually bring [him]self . . . to the right conclusions that should be brought,” explaining that he thought “everybody has [] a right . . . to live,” including Corey Williams. (8 RT 2154-2155.) When questioned by the prosecutor, Juror W.M. stated that, although he supported the death penalty, he could not personally vote for it, explaining that his views “would make it difficult” and he would “have a rough time doing it.” (8 RT 2158-2159; see *People v. Barnett* (1998) 17 Cal.4th 1044, 1114-1115 & fn. 50 [finding that the record amply supported the trial court’s dismissal of a juror who, when pressed whether she “in good conscience” could vote to put another human being to death, said “I don’t think so”].)

Admittedly, Juror W.M. gave a few answers that conflicted with his view that he could not personally impose the death penalty. For example, in his questionnaire, Juror W.M. indicated that he voted for the death penalty and he was “moderately in favor” of it. (24 CT 9829, 9831.) In addition, when the voir dire with respect to Juror W.M. was reopened at the prosecutor’s request, Juror W.M. initially said that he “probably [] could” impose the death penalty. (8 RT 2158.) These answers, however, did not prevent the trial court from finding Juror W.M. unfit to serve as a juror. At some point, a potential juror might state or imply that he could perform his duties as a juror; this, however, does not preclude a trial court from finding, based on the entire record, that the juror nevertheless holds views that would substantially impair his ability to serve as a juror. (*People v. Griffin* (2004) 33 Cal.4th 536, 558-561.) Here, despite the few answers which

indicated that Juror W.M. might be able to perform his duties as a juror, the record as a whole made it clear that Juror W.M.'s feelings about his inability to vote for death would substantially impair his ability to serve as a juror. Significantly, even after Juror W.M. initially said he "probably [] could" personally impose the death penalty, in the same answer, he went on to say:

[B]ut I - - my own subconscious, I just don't know. I just don't believe it. Even though I voted for it, I just - - my own personal - - my own personal being I think it's right, but my own personal being I'd have to pass.

(8 RT 2158.) Under such circumstances, this Court should uphold the trial court's ruling. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 727 ["On appeal we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting and ambiguous"]; *People v. Beeler* (1995) 9 Cal.4th 953, 989 [recognizing the importance of the trial court's observation of a prospective juror's demeanor in reviewing decisions].)

Furthermore, it is notable that although defense counsel refused to stipulate to the dismissal of Juror W.M., he made no objection to the prosecutor's motion to dismiss Juror W.M., nor did he attempt to rehabilitate Juror W.M. (8 RT 2164; see *Wainwright v. Witt*, *supra*, 469 U.S. at p. 436 [noting that defense counsel did not object to the challenged juror's recusal and made no attempt to rehabilitate the juror's testimony].) Although this Court has held that a failure to object will not constitute a waiver, such a failure, even when it includes a refusal to stipulate, "does suggest counsel concurred in the assessment that the juror was excusable." (*People v. Schmeck* (2005) 37 Cal.4th 240, 262, quoting *People v. Cleveland* (2004) 32 Cal.4th 704, 734.)

Appellant also contends that this Court's decision in *People v. Stewart*, *supra*, 33 Cal.4th 425 indicates that the trial court erred when it dismissed Juror W.M. *Stewart* is of no help to appellant. In *Stewart*, the trial court granted the prosecutor's challenges for cause against certain potential jurors based solely on their responses in the juror questionnaires. (*People v. Stewart*, *supra*, 33 Cal.4th at pp. 444-445.) In finding error, this Court stated that the juror questionnaires did not provide the trial court with sufficient information to determine whether the potential jurors' views would prevent or substantially impair the performance of their duties. (*Id.* at pp. 445-449.) Although the jurors' responses in the questionnaires preliminarily indicated that the potential jurors might be challenged for cause, this could not be definitively ascertained without some follow-up questions. (*Id.* at p. 449; see also *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 (plurality opn.) [in the absence of adequate voir dire, the trial court's duty to remove prospective jurors who would be unable impartially to follow the instructions and evaluate the evidence cannot be met].) As the *Stewart* court explained, the trial court could have further explained the role of the jurors and probed whether each of the potential jurors could impose the death penalty during voir dire. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 449.)

In contrast to *Stewart*, the trial court in the instant case did allow Juror W.M. to be extensively questioned by counsel. (8 RT 2152-2155, 2158-2159.) During this questioning, Juror W.M. gave statements indicating he could not fulfill his role as a juror in the case because he did not believe he could personally vote for the death penalty. (8 RT 2154-2155, 2158-2159.) As the *Stewart* court noted, the trial court's determination that a prospective juror's views would substantially impair his performance as a juror in the case is entitled to deference. (*People v. Stewart*, *supra*, 33 Cal.4th at p. 451.) That is the case here with respect to Juror W.M.

Appellant also relies on *Gray v. Mississippi, supra*, 481 U.S. 648, claiming that the trial court erroneously removed Juror W.M. by making an effort to correct one error, while committing another one during the voir dire process. (AOB 94.) We disagree that trial court did this.

In *Gray v. Mississippi, supra*, 481 U.S. 648, the Court addressed the systematic exclusion of jurors in a case in which the prosecutor had lodged peremptory and for-cause challenges against all the jurors who had “expressed any degree of uncertainty in the ability to cast . . . a vote” for the death penalty. (*Id.* at p. 652.) After exhausting all of his 12 peremptory challenges, the prosecutor challenged a juror who had expressed no opposition to the death penalty and indicated multiple times that she could return a death verdict. (*Id.* at pp. 653-654 & fn. 5.) The trial court denied the prosecutor’s challenge. (*Id.* at p. 653.) The prosecutor then sought to reopen the previous challenges, arguing that the trial court had mistakenly denied certain for-cause challenges forcing him to waste his peremptory challenges. (*Id.* at p. 655.) The trial court refused to reopen the prior for-cause challenges, but removed the current juror over defense counsel’s objection. (*Id.* at p. 655 & fn. 7) On appeal, the state court found that the trial court had erroneously excused the juror for cause, but held that, under the circumstances, it was appropriate to treat the prosecutor’s challenge as a peremptory challenge. (*Id.* at pp. 656-657.) The United States Supreme Court reversed, holding that the trial court had erroneously removed the juror for cause because the juror was not substantially impaired under the *Witt* standard, and concluded that the error was not subject to a harmless-error analysis. (*Gray v. Mississippi, supra*, 481 U.S. at p. 659.)

Here, unlike in *Gray* and contrary to appellant’s claim, the trial court did make a finding of substantial impairment with respect to Juror W.M. (8 RT 2166.) A trial court’s granting of a motion to excuse a juror for cause constitutes an implicit finding of bias. (*Uttecht v. Brown, supra*, 551 U.S.

at p. 7.) A trial court is not required to announce for the record its conclusion that a juror is biased or its reasoning where its finding is evident from the record before it. (*Wainwright v. Witt, supra*, 469 U.S. at p. 430.)

In the instant case, although the trial court initially stated that it did not find the challenges “meritorious” (8 RT 2166), it nonetheless took the claim under advisement and, after further consideration of the record, “balance[d]” the interests of the defendant and the State, and ultimately excused Juror W.M. (8 RT 2166; see *Brown v. Lambert* (9th Cir. 2006) 451 F.3d 946, 961-962 [concluding that the trial court had implicitly found that the challenged for-cause juror was “substantially impaired” where the record showed that the trial court had listened to the juror’s voir dire statements, observed the juror’s demeanor during the voir dire, considered the prosecutor’s reason for challenging the juror, and heard defense counsel state that he had no objection to the prosecutor’s motion].) In light of the ample support in the record for the trial court’s finding, the earlier statement that the claims were not “meritorious” are likely nothing more than the verbalization of an initial impression that these were not the most facially obvious challenges seen by the court.¹²

In contrast, in *Gray*, the finding of error was based on the lack of any basis to support a challenge for cause. (*Gray v. Mississippi, supra*, 481 U.S. at p. 653.) In fact, the prosecutor in *Gray* was initially asking that the court reverse one of its prior denials for cause to allow him a peremptory challenge to use against the juror at issue, demonstrating that even the prosecutor appeared to recognize that she was not properly subject to a for cause challenge. Moreover, unlike here, the defense in *Gray* affirmatively

¹² Indeed, appellant disagrees with the trial court’s initial impression as to his challenge to Juror R.H., as he goes to some length to justify that challenge for cause. (AOB at pp. 98-101.)

objected to the challenge. Thus, it appears that in *Gray*, both parties and the Court recognized that a *Witherspoon/Witt* challenge was not appropriate, but the trial court was simply attempting to correct a possible error in an earlier ruling.

Moreover, the record demonstrates that there were sufficient, independent reasons for the trial court to excuse Juror W.M. and Juror R.H. for cause. As appellant concedes (AOB 98-101), the trial court's decision to excuse Juror R.H. for cause was appropriate. We note that Juror R.H. was just as equivocal as Juror W.M. (see 8 RT 2147, 2161; cf. 8 RT 2152), and just as much a deficient juror given his fixed, rigid ideas which demonstrated that he was for the death penalty and against life in prison without the possibility of parole. (24 CT 10200-10201; 8 RT 2152.) Thus, appellant's claim that the trial court erred by excusing Juror W.M. fails.

IV. THE TRIAL COURT PROPERLY ALLOWED APPELLANT TO REPRESENT HIMSELF DURING THE PENALTY PHASE

Appellant contends that the trial court erred by allowing him to represent himself during the penalty phase of his trial without making appropriate inquiries and properly exercising its judicial discretion. (AOB 102.) We disagree. Appellant's claim is not an appealable issue. In any event, the trial court did not err by granting appellant's motion of self-representation.

A. Relevant Background

On September 5, 2000, prior to the start of the penalty phase, appellant filed a motion pursuant to *Faretta v. California* (1975) 422 U.S. 806. (14 CT 5614-5618.) On September 6, 2000, the trial court held a hearing on the matter. (13 RT 3645-3677.) The trial court stated that it had "read carefully" appellant's *Faretta* motion which included the standard *Faretta* motion, plus appellant's letter (13 RT 3645), which said:

This letter pertains to the Faretta motion I'm filing. [¶] I do understand the conditions I must meet in order for my request to be granted.

This request is being made in reasonable time before my "penalty phase" of trial. This request is also being made unequivocally. I'm aware of the dangers in self-representation, and I knowingly and voluntarily waive my right to counsel. I'm also mentally competent.

I have represented myself before in an unrelated matter. It's my Sixth Amendment right, and I wish to exercise my rights. I can present an adequate defense and therefore waive my right to counsel. I understand the significance and consequences of this particular decision I've made.

(14 CT 5618.)

In response to the trial court's questions, appellant stated that he had spoken with his attorneys about his decision to represent himself, had given careful thought to his decision, and understood the consequences he was facing. (13 RT 3646.)

In response to the prosecutor's questions, appellant confirmed that he did not want to be represented by an attorney. (13 RT 3648.) Appellant also confirmed that he had considered that it is almost always unwise to represent yourself, especially in the penalty phase of a capital trial which requires special expertise. (13 RT 3648-3650.) In addition, appellant confirmed that he understood that in representing himself, he might conduct a defense which could possibly aid the prosecution in obtaining a death penalty recommendation. (13 RT 3648.) He also confirmed that he understood that the practice of criminal law was a specialty, the conduct of the penalty phase was a subspecialty, he would not be entitled to any special privileges, the trial court would not aid him in defending himself, and that the trial court would require him to follow the technical rules of law in his presentation of the mitigating factors. (13 RT 3648-3649.)

Appellant also indicated that he understood that the prosecutor would not treat him with leniency, that it was not likely to be a fair contest because of the prosecutor's skill, education, and experience, and that he would not be given any extra time to prepare for the penalty phase. (13 RT 3650-3652.) Appellant indicated that, while he had been in custody, he had represented himself in a misdemeanor case before a trial court in which the charges were ultimately dismissed. (13 RT 3647, 3651-3652.) Appellant indicated that he understood he would be required to make a showing to the judge to obtain any investigative resources or an expert at the public's expense. (13 RT 3652-3653.)

Appellant stated that he thought his presentation to the court would be "effective," despite his lack of skill and experience. (13 RT 3653.) Appellant felt certain that he would not be changing his mind about not wanting an attorney to represent him, and indicated that he understood that an attorney would be appointed to represent him if he misbehaved. (13 RT 3653-3654.) Appellant stated that he had considered the possible factors in mitigation that might cause the jury to rule in his favor, as well as the possible factors in aggravation that the prosecutor would introduce and how to combat them and present mitigating factors. (13 RT 3654.) Appellant understood that the maximum penalty he could receive would be the death penalty and that the other penalty constituted life without parole. (13 RT 3655.) Appellant stated that he had read and understood the discovery, motions, and the pleadings that had been filed in his case. (13 RT 3656-3657.)

When asked why he wanted to represent himself, appellant indicated that he had made this decision four years ago, and stated:

It's just a belief. I've had it from day one. I've always wanted to represent myself. That's basically it. It's simple. [¶]
You know, I'm happy with my lawyers but it's a belief that I

had. And I told them from day one that if it comes to a penalty phase time, I would like to represent myself. That's basically it.

(13 RT 3657.)

Appellant stated that his attorneys had advised him of the consequences and the potential downside of self-representation, adding "but there's no need because I know what can happen. And they might not agree with me self-representing myself but they will agree that I'm competent enough." (13 RT 3657.) Appellant indicated that he understood that his attorneys would not be his "co-counsel" and that was "okay with [him]" as he wanted to represent himself. (13 RT 3658-3659.) Appellant also indicated that he had obtained his high school equivalency and was making a knowing and intelligent decision to represent himself. (13 RT 3655, 3659.)

In response to further questions by the trial court, appellant stated that he had discussed with his attorneys the issues and testimony that he would want to introduce during the penalty phase. (13 RT 3659.) Appellant stated that he had made up his mind to be his own lawyer after giving it a lot of thought. He stated that he would be prepared to go to trial next week and was satisfied in all respects that he would be able to handle the assignment of being his own attorney. (13 RT 3659-3661, 3664.) The trial court stated:

[I]t's clear to me here that this is a very somber, serious step you're taking here, but I've been impressed with you throughout the course of the trial. You've always conducted yourself very well in the courtroom. When you have written to the court for any purpose, personal or otherwise, you write intelligently, formulate good sentences. You have expressed yourself very clearly in Court here at this time that you have knowingly . . . and intelligently waived your right to counsel; is that correct?

THE DEFENDANT: Yes.

THE COURT: And that you understand the full consequences of the possible penalty?

THE DEFENDANT: Yes, I do.

(13 RT 3663.) Appellant also confirmed that he understood that there were only two things that could happen in the penalty phase of the trial, i.e., either death or life without parole. (13 RT 3664.) The following colloquy then transpired:

THE COURT: And that you feel in your own heart and your own mind and your own conscience that you could adequately represent yourself?

THE DEFENDANT: Yes. Yes, I can.

THE COURT: And you at this time then waive your right to counsel?

THE DEFENDANT: Yes, I do.

THE COURT: And do you agree with this finding by the Court that this waiver on your part is free and voluntary?

THE DEFENDANT: Yes, it is.

THE COURT: Nobody is forcing you in any way?

THE DEFENDANT: No.

THE COURT: And you're acting on your own free will and volition?

THE DEFENDANT: Yes.

THE COURT: And you feel fine today?

THE DEFENDANT: Yes, I do.

THE COURT: It's clear to me that the defendant clearly meets the requirements of the *Faretta* case and all of the progeny that has followed that case, and I'm going to, therefore, at this time allow the defendant to release his attorneys and I'm going to grant to Mr. Williams the right of self-representation.

(13 RT 3664-3665.)

Thereafter, the trial court appointed appellant's attorneys as advisory counsel. (13 RT 3665, 3680-3681.) The following day, the trial court asked appellant if he still wanted to represent himself, and appellant said, "Yes, I do." (13 RT 3678-3679.)

B. Appellant's Claim Is Not An Appealable Issue

Initially, we submit that appellant's claim that the trial court erred by granting his *Faretta* motion is not an appealable issue. This Court's decision in *People v. Clark* (1992) 3 Cal.4th 41 is on point. In *Clark*, the defendant contended on appeal that the trial court had erroneously believed it had no discretion to deny his mid-trial *Faretta* motion as untimely, and further claimed that the trial court's failure to exercise its discretion constituted reversible error. (*People v. Clark, supra*, 3 Cal.4th at p. 109.) The *Clark* court concluded that the defendant could "not be heard to argue on appeal that his own motion should not have been granted." (*Ibid.*) The *Clark* court explained:

Defendant is correct that the court has discretion to deny a midtrial motion for self-representation. (*People v. Windham, supra*, 19 Cal.3d 121; see *ante*, at p. 98.) However, "[t]he *Windham* factors primarily facilitate efficient administration of justice, not protection of defendant's rights." (*People v. Hill* (1983) 148 Cal.App.3d 744, 760 [].) Because the court granted defendant's motion for self-representation at his own insistence, he may not now complain of any error in the court's failure to weigh the *Windham* factors. (*People v. Brownlee* (1977) 74 Cal.App.3d 921, 934 []; see also *People v. Bloom, supra*, 74 Cal.App.3d at pp. 1219-1220.)

(*People v. Clark, supra*, 3 Cal.4th at p. 109.)

Here, as this Court concluded in *Clark*, because the trial court granted appellant's *Faretta* motion at his own insistence (14 CT 5618), he is not entitled to now complain on appeal of any error in the trial court's failure to weigh the *Windham* factors. (*People v. Clark, supra*, 3 Cal.4th 41, 109; see

also *People v. Bradford* (1997) 15 Cal.4th 1229, 1363.) Thus, this Court should not consider appellant's claim on its merits.

C. The Trial Court Properly Granted Appellant's *Faretta* Motion

In any event, the trial court did not abuse its discretion by granting appellant's *Faretta* motion.

[A] defendant "must be free personally to decide whether in his particular case counsel is to his advantage," even though "he may conduct his own defense ultimately to his own detriment . . ." (*Faretta, supra*, 422 U.S. at p. 834.) The Sixth Amendment . . . implies a right of self-representation." (*Id.* at p. 821.) Thus, a state may not "constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." (*Id.* at p. 807.)

(*People v. Butler* (2009) 47 Cal.4th 814, 824.)

"When 'a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be. Furthermore, the defendant's "technical legal knowledge" is irrelevant to the court's assessment of the defendant's knowing exercise of the right to defend himself.' (*People v. Windham* (1977) 19 Cal.3d 121, 128 [], quoting *Faretta, supra*, 422 U.S. at p. 836.)"

(*People v. Butler, supra*, 47 Cal.4th at p. 824.)

The right of self-representation, however, is not absolute. (*Indiana v. Edwards* (2008) 554 U.S. 164, 128 S.Ct. 2379, 2384, 171 L.Ed.2d 345.) A defendant may waive the right to self-representation by failing to make a timely request. (*People v. Windham, supra*, 19 Cal.3d at pp. 128-129.) For purposes of assessing the timeliness of a *Faretta* motion, the guilt and penalty phases of a capital case are not separate trials, but rather parts of a single trial. (*People v. Mayfield, supra*, 14 Cal.4th at p. 810; *People v. Hardy* (1992) 2 Cal.4th 86, 193-195.) When a defendant makes a *Faretta* motion between the guilt and penalty phases, he has made an untimely

motion. (*People v. Mayfield, supra*, 14 Cal.4th at p. 810; *People v. Hardy, supra*, 2 Cal.4th at pp. 193-195; *People v. Hamilton* (1988) 45 Cal.3d 351, 369; *People v. Windham, supra*, 19 Cal.3d at p. 121; see *People v. Doolin, supra*, 45 Cal.4th at p. 454 [finding the defendant's *Faretta* motion untimely where the defendant made the motion the day of sentencing and had never made such a motion during the guilt or penalty phases of his trial]; cf. *People v. Halvorsen* (2007) 42 Cal.4th 379, 434 [finding the capital defendant's motion for self-representation timely where he made it seven months before jury selection in the retrial of the penalty phase].) The timeliness requirement "must not be used as a means of limiting a defendant's constitutional right of self-representation." (*People v. Windham, supra*, 19 Cal.3d at p. 128 fn. 5.) The purpose of the timeliness requirement is "to prevent a defendant from misusing the [*Faretta*] motion to delay unjustifiably the trial or to obstruct the orderly administration of justice." (*People v. Doolin, supra*, 45 Cal.4th at p. 454, quoting *People v. Horton* (1995) 11 Cal.4th 1068, 1110.) "When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion." [Citation.] (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.)

When the defendant makes an untimely motion,

"[a]mong other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." [Citations.]

(*People v. Hardy, supra*, 2 Cal.4th at p. 195.)

This is not to say, as appellant appears to argue, an untimely motion should presumptively be denied. Here, the trial court did not abuse its discretion when it granted appellant's *Faretta* motion, although appellant

did not make the motion prior to the commencement of his trial. (See *People v. Windham, supra*, 19 Cal.3d at p. 128 [a midtrial *Faretta* motion is “addressed to the sound discretion of the court”].) As indicated above, the purpose of the timeliness requirement is to preclude a defendant from using the motion to unjustifiably delay the trial or obstruct the orderly administration of justice. (*People v. Doolin, supra*, 45 Cal.4th at p. 454; *People v. Horton, supra*, 11 Cal.4th at p. 1110.) In this case, there was no indication that appellant was misusing the motion in such a manner. To the contrary, appellant made it clear that he was not seeking a continuance, he had already discussed with his counsel the issues and evidence he would want to introduce, and he was prepared to defend himself at the penalty phase of the trial scheduled to begin the following week. (13 RT 3659-3661, 3664; cf. *People v. Burton* (1989) 48 Cal.3d 843, 854 [a defendant’s pretrial delays, along with a motion for continuance for the purpose of self-representation, is strong evidence of the defendant’s purpose to simply delay the proceedings].)

In addition, the other relevant factors to be considered by the court in assessing a *Faretta* motion at this stage of the trial were explored with appellant. Appellant made it clear that he was not frustrated with his counsel as there were no issues regarding the quality of his counsel’s representation. (13 RT 3657; cf. *People v. Tena* (2007) 156 Cal.App.4th 598, 608 [finding that the defendant’s “remarks were impulsive reactions to his frustrated attempts to secure an attorney who would subpoena the witnesses that he desired, rather than unequivocal *Faretta* requests”]; *People v. Stanley* (2006) 39 Cal.4th 913, 932 [a *Faretta* motion made out of frustration is not unequivocal].) Appellant, however, had decided, after much thought, that he wanted to take control of his representation during the penalty phase of the trial based upon his belief “from day one that if it [came] to a penalty phase,” he should represent himself. (13 RT 3657; see

People v. Windham, supra, 19 Cal.3d at p. 130 [“the state may not constitutionally prevent a defendant charged with commission of a criminal offense from controlling his own fate by forcing on him counsel who may present a case which is not consistent with the actual wishes of the defendant”].)

Appellant had not made any prior requests to represent himself or to substitute his counsel so there was no evidence that appellant was equivocating about his decision or attempting to manipulate the proceedings. (Cf. *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002 [a *Faretta* motion must be unequivocal; “[e]quivocation of the right of self-representation may occur where the defendant tries to manipulate the proceedings by switching between requests for counsel and for self-representation”].) When appellant did make the request to represent himself, he made it unequivocally. (14 CT 5614-5618; 13 RT 3645-3646.) The record showed that appellant had considered the decision for a long period of time before he made the *Faretta* motion. (13 RT 3657; cf. *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 888 [a trial court may properly deny a request for self-representation that is a momentary caprice or the result of simply out-loud thinking].) Appellant made it clear that he had discussed with his counsel, and understood, the dangers of self-representation. (14 CT 5618; 13 RT 3646, 3657.) Appellant also stated that he had considered the consequences of his decision and was well aware of the fact that only one of two things could occur at the penalty phase, i.e., he could be sentenced to either death or life without the possibility of parole. (14 CT 5618; see *Faretta v. California, supra*, 422 U.S. 806, 835 [when a defendant moves to undertake his own defense, he “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is

made with eyes open”]; see also *People v. Pinholster*, *supra*, 1 Cal.4th at pp. 928-929.)

Furthermore, although appellant’s request was untimely, he did not make his request at an exceedingly late stage of his two-part trial. The guilt phase of the trial had just ended and the penalty phase of the trial had not yet begun. (13 RT 3613-3622; cf. *People v. Windham*, *supra*, 19 Cal.3d at p. 130 [finding that the defendant had made his *Faretta* request at an “exceedingly late of the trial” where denial of the motion “resulted in nothing more than preventing defendant from addressing the jury during closing argument”].) At that stage, appellant had the opportunity to represent himself through the entire penalty phase of his trial (13 RT 3676-3697; 14 RT 3698-3894) and at sentencing (14 RT 3944-3955), allowing him to use the defense strategy that he desired to put into place during those phases of the trial.

Moreover, there was no disruption or delay of the criminal proceedings. At the time of appellant’s request, there was a natural break in the proceedings as the jury had just delivered its verdict following the conclusion of the guilt phase of the trial. (13 RT 3613-3622.) Appellant did not seek a continuance and the penalty phase started as scheduled the following day. (13 RT 3652, 3678.)

Neither does the fact that appellant’s chosen course of conduct – presentation of no mitigation case – affect the trial court’s decision. As appellant acknowledges, the mere fact that a criminal defendant wishes to represent himself in order to seek the death penalty is not a basis on which a court can deny a *Faretta* motion. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1228.) Based on the foregoing, it is evident that the trial court did not abuse its discretion when it granted appellant’s *Faretta* motion.

V. THE TRIAL COURT PROPERLY ADMITTED MR. CORRIEO'S VICTIM IMPACT STATEMENT

Appellant contends that the trial court erred in admitting Mr. Corrieo's victim impact statement without the requested offer of proof and without holding a hearing outside the jury's presence to determine its admissibility, thereby violating his rights to due process, a fair trial, and reliability in the determination of his penalty. (AOB 109-128.) He further contends that the trial court erred by not striking Mr. Corrieo's testimony on the basis that it constituted improper opinion testimony. (AOB 129-131.) We disagree that the trial court erred. In any event, there was no prejudice to appellant.

A. Relevant Background

On September 7, 2000, the trial court asked the prosecutor to state generally to what his various witnesses would be testifying. (13 RT 3682-3683.) At that time, the prosecutor stated that he would "reserve the right to call one or two family members, as yet to be determined, on the matter of the victim impact." (13 RT 3683.) The following colloquy subsequently transpired:

THE DEFENDANT: I'm objecting to the victim impact because he may be trying to prove through them something that's too vague. He needs to be more specific about it. Like, can I know who's coming? You know.

THE COURT: It would help for him to know - - I assume you're talking about family members?

THE DEFENDANT: Yes.

MR. BARNES [prosecutor]: That's right. It will either be - - well, it will be no more than two of the family members, and it would be Lili Williams - -

THE COURT: The sister.

MR. BARNES: - - and Sergio Corrieo. I don't anticipate calling more family members than that.

THE COURT: Well, both of those witnesses have testified in some phase here. [¶] But did they testify in the penalty phase of the codefendant?

MR. BARNES: No.

THE DEFENDANT: I would like to know what areas they're going to be testifying in.

MR. BARNES: Well, the defendant is not entitled to that information. I'm not required to give discovery or any transcript of any sort of victim impact testimony. I don't know exactly what they're going to say and we'll see that when they testify.

THE DEFENDANT: I'd like an offer of proof because some areas can't be gone into.

MR. BARNES: And I know what areas can't be gone into and I don't intend to go into them.

THE COURT: Well, you'll probably have to be on your toes, Mr. Williams, to object appropriately. And you can rest assured that I will scrutinize this testimony of victim impact very, very closely. But in fairness to both the District Attorney and to you here, I would suggest that you may want to talk to your lawyer - - not your lawyer but your advisory counsel generally about what type of evidence comes in under victim impact.

I'm not going to conduct a lecture on that, but as you probably know, the United States Supreme Court - - I'm sure your former lawyers have told you a little bit about this - - outlined in the Tennessee case that there's certain types of evidence that can come in. And the District Attorney is going to have to live within the bounds of what comes in under those cases.

And if at any time you are concerned about it, about a question that's asked, or you have some concern about what you should do, I would suggest that you just hold up your hand for a moment. I'll stop the proceedings. You can meet and confer with your advisory counsel, then make any appropriate objections you deem applicable to you and I will rule on them. [¶] Do you understand that?

THE DEFENDANT: Yes, I do. Thank you.

(13 RT 3687-3688.)

During the penalty phase, Mr. Corrieo testified. He stated that prior to the murder of his mother and sister, he had nine siblings. (14 RT 3716-3717.) Mr. Corrieo's mother was the caretaker for Roberts who had some learning disabilities. Mr. Corrieo's mother was the nucleus of the family and kept the family together. (14 RT 3717.) Mr. Corrieo's mother had 37 grandchildren and no one was ever able to replace her as the nucleus of the family. (14 RT 3718.)

After the murders, the siblings all helped to clean their mother's house. (14 RT 3718.) The siblings had to sell the home in order to keep their mother's restaurant open and pay bills. (14 RT 3717.) Mr. Corrieo and his sisters all worked for a few months to keep the restaurant open until they subsequently sold it. (14 RT 3718-3719.)

Mr. Corrieo identified one of the rings that had been found under the throw rug at his mother's house the night of the murders. Mr. Corrieo stated that it was his mother's emerald and diamond ring which she often wore. He confirmed that his mother did not have a habit of putting her ring underneath the rug. (14 RT 3719-3720.)

Mr. Corrieo also confirmed that he had testified during the guilt phase of the trial about his feelings regarding appellant when he encountered him at C.S.P. Sacramento. He stated that his feelings remained the same. (14 RT 3720.) Mr. Corrieo did not give any more detail on the subject.

On September 12, 2000, appellant moved that the testimony of Mr. Corrieo be stricken as being outside the scope of permissible victim impact evidence and specifically as to his testimony regarding his opinion about the appropriate punishment for appellant. (14 RT 3794-3795.) Appellant also asked the trial court to admonish the jury that Mr. Corrieo's opinion was improper testimony. (14 RT 3795.) The prosecutor responded:

I believe that Mr. Corrieo's testimony regarding victim impact is well-within the boundaries provided for such testimony.

As to the defendant's argument that Mr. Corrieo gave an opinion as to the appropriate penalty, he did not. He testified as to motive and bias regarding the defendant, which is entirely appropriate so that the jury will recognize that, be reminded that they have a biased witness here speaking, and be reminded of his bias that was evident in the guilt phase, but he made no opinion regarding punishment, nor did I elicit one. [¶] Given that his - -

(14 RT 3797-3798.) The trial court interjected, "Except inferentially that you asked him whether his viewpoints are still the same." (14 RT 3798.) The prosecutor responded, "Yes, which was introduced solely for the purpose of motive and bias. [¶] And as a consequence, I don't believe that any portion of Mr. Corrieo's testimony should be stricken." (14 RT 3798.)

The trial court denied the motion, stating that Mr. Corrieo's testimony did not fall outside the scope of appropriate victim impact testimony. (14 RT 3804; see also 14 RT 3807-3808 [the trial court's denial of appellant's proposed instruction regarding victim impact testimony].)

B. The Trial Court Properly Admitted The Victim Impact Evidence

Initially, appellant contends that the trial court denied him due process, a right to a fair trial, and the right to reliability in the determination of his penalty when it refused his request for an offer of proof and failed to hold an Evidence Code section 402 hearing outside the presence of the jury to determine if the prosecutor's proposed victim impact evidence was admissible. According to appellant, because he was not given sufficiently detailed information about the victim impact evidence in advance, he was unable to effectively defend against it. (AOB 123-128.) We disagree that the trial court erred.

Section 190.3 provides:

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial.

(§ 190.3.) “Prior to trial” means “before the cause is called to trial or as soon thereafter as the prosecution learns of the existence of the evidence. [Citation.]” (*People v. Wilson* (2005) 36 Cal.4th 309, 356; see also *People v. Mitcham* (1992) 1 Cal.4th 1027, 1070; see *People v. Roldan* (2005) 35 Cal.4th 646, 733-734 [adequate, timely notice is required under section 190.3, but the failure to provide such notice may be deemed harmless], disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.)

Here, the trial court did not err by not granting appellant’s request for a specific offer of proof and not holding an Evidence Code section 402 hearing with respect to the victim impact evidence. This is because the prosecutor was not required to do so. Section 190.3 provides solely for pretrial “notice.” (§ 190.3; see *People v. Salcido* (2008) 44 Cal.4th 93, 157 [section 190.3 provides for pretrial notice but not discovery]; but see *People v. Gonzalez* (2006) 38 Cal.4th 932, 955 [the discovery provisions of section 1054, et. seq. coexist with the notice provisions of section 190.3].) In this case, the prosecutor informed appellant and the trial court that he intended to call Mr. Corrieo as a witness to provide impact witness testimony (13 RT 3683, 3687-3689), and during the guilt phase, appellant had heard Mr. Corrieo tell the jury about threatening him during their brief encounter at C.S.P. Sacramento (11 RT 3035-3044). Thus, the prosecutor

did what was required of him before introducing Mr. Corrieo's testimony.¹³ (Cf. *People v. Wilson* (2005) 36 Cal.4th 309, 356 [generic, nonspecific notice that the prosecution intends to rely, as an aggravating factor, on the circumstances of the crime does not give adequate notice to the defense that it also intends to present victim impact testimony from members of the victim's family].)

Even assuming, arguendo, that the trial court erred by not requiring the prosecutor to make an offer of proof or by not holding a hearing, there was no prejudice to appellant.

The test for state law error at the penalty phase of a capital trial is whether there is a reasonable *possibility* the error affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448 [].) To the extent the denial of discovery implicated defendant's federal due process rights (see *Wardius v. Oregon, supra*, 412 U.S. 470), the applicable test is whether the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18 [].) We have explained that "*Brown's* 'reasonable possibility' standard and *Chapman's* 'reasonable doubt' test ... are the same

¹³ We note that appellant does not raise the issue that this notice was untimely, and thus, he has forfeited any such claim. Even if appellant had, his claim would have failed because appellant did not ask for a continuance and he did not produce any mitigating evidence during the penalty phase of his trial. (See 13 RT 3687-3688 [appellant indicating that he understood the trial court's ruling without making a request for a continuance]; 14 RT 3769 [appellant resting without presenting any mitigating evidence during the penalty phase]; see also 13 RT 3652, 3678 [appellant made no request for a continuance after the trial court granted his *Faretta* motion and the penalty phase started as scheduled the following day].) Thus, any failure of the prosecutor to provide timely notice of the victim impact evidence would be deemed harmless on this record. (See *People v. Roldan, supra*, 35 Cal.4th at p. 734 [finding that although the trial court erred by finding that the prosecutor had given adequate, timely notice of his intent to introduce the victim impact evidence, the error was harmless where defense counsel never asked for a continuance for the purpose of effectively confronting the evidence, and it was inferable from this fact that "he was notified in time to devise a plan how best to confront it effectively"].)

in substance and effect.” (*People v. Ashmus* (1991) 54 Cal.3d 923, 990 [.]) Accordingly, we focus on the “reasonable possibility” test, but our conclusion applies equally to *Chapman*’s “reasonable doubt” test. (*People v. Ochoa* (1998) 19 Cal.4th 353, 479 [.])

(*People v. Gonzalez, supra*, 38 Cal.4th at pp. 961-962, footnote omitted; see also *People v. Gamache* (2010) 48 Cal.4th 347, 399, fn. 22.)

Here, under the *Chapman* and “reasonable possibility” tests, there was no prejudice to appellant. This is because all of the victim impact evidence was admissible under section 190.3, factor (a) and the federal Constitution.

Under [state] law, evidence of specific harm, including the impact on the family of the victim caused by the defendant’s acts, is a circumstance of the crime and is therefore admissible pursuant to section 190.3, factor (a). (*People v. Kelly* (2007) 42 Cal.4th 763, 793 [.] ; *People v. Edwards* (1991) 54 Cal.3d 787, 833-836 [.] ; Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Punishment, § 472, pp. 631–632.) (a).

(*People v. Salcido, supra*, 44 Cal.4th at p. 151.)

In *Payne v. Tennessee* (1991) 501 U.S. 808, the United States Supreme Court held:

the states could choose to admit evidence of the specific harm the defendant had caused, to wit, the loss to society and the victim’s family of a unique individual. ([*Payne v. Tennessee, supra*, 501 U.S.] at p. 825.) According to *Payne*, the federal Constitution bars such evidence only if it is so unduly prejudicial as to render the particular trial fundamentally unfair. (*Ibid.*)

(*People v. Huggins* (2006) 38 Cal.4th 175, 238, internal quotation marks omitted; see *People v. Zamudio* (2008) 43 Cal.4th 327, 364 [evidence demonstrating the direct impact of the defendant’s acts on the victim’s family and friends is not barred under either the Eighth or Fourteenth Amendments].) Thus, “[u]nless it invites a purely irrational response from the jury, the devastating effect of a capital crime on loved ones and the

community is relevant and admissible as a circumstance of the crime under section 190.3, factor (a).” (*People v. Lewis and Oliver, supra*, 39 Cal.4th at pp. 1056-1057.)

Here, Mr. Corrieo testified how his deceased sister suffered from learning disabilities and how his mother had been her caretaker. (14 RT 3717.) Mr. Corrieo also described how his mother had been the “nucleus” of their large family and the fact that no one in the family had ever been able to take her place. (14 RT 3717-3718.) This testimony was well within the realm of permissible victim impact testimony. (See *People v. Cruz* (2008) 44 Cal.4th 636, 682792 [finding none of the victim impact to be unduly inflammatory, noting that it was typical of the victim evidence routinely introduced and well within the permissible limits]; *People v. Boyette* (2002) 29 Cal.4th 381, 444 [finding the victim impact evidence permissible where the family members spoke about their love for the victims and how they missed them in their lives]; *People v. Pollock* (2004) 32 Cal.4th 1153, 1183 [a trial court may admit “victim impact testimony from multiple witnesses who were not present at the murder scene and who described circumstances and victim characteristics unknown to the defendant]; cf. *Conover v. State* (Okla. Cr. 1997) 933 P.2d 904, 921 [stating that comments about the victim as a baby, his growing up, and his parents’ hope for his future address only the emotional impact of the victim’s death and increase the risk that the defendant will be denied his due process rights].)

In addition, Mr. Corrieo told the jury how, after the murders, he and his siblings cleaned their mother’s house, worked to keep her restaurant open so that they could pay the bills, and then eventually had to sell it. (14 RT 3717-3719.) This testimony too was appropriate. (See *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172 [finding that during the penalty phase, the family members’ testimony concerning the variety of ways they

were adversely affected by the loss of the victim's care and companionship was admissible victim impact evidence].)

Mr. Corrieo also identified the ring that had been found under the throw rug at his mother's house the night of the murders as belonging to his mother. In addition, he confirmed that his mother did not have a habit of putting her ring underneath the rug. (14 RT 3719-3720.) Because this was a circumstance surrounding appellant's crimes, it too was permissible. (See § 190.3, factor (a) ["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"]; 14 RT 3832 [the trial court's instruction that the jury was "required to consider the circumstances surrounding" the crime].) The fact that Mr. Corrieo was not a witness to the crime did not undermine the relevance of the evidence. A victim impact witness need not have witnessed the crime. (*People v. Brown* (2004) 33 Cal.4th 382, 398.) Thus, error, if any, was harmless as all of the foregoing testimony was admissible.

Significantly, appellant did not object to any of the foregoing testimony. (14 RT 3716-3720.) This was so even though the trial court made it clear before Mr. Corrieo testified that appellant could make any appropriate objections during the victim impact testimony, and appellant stated that he understood the trial court. (13 RT 3687-3688.)

Now, appellant asserts he would have rebutted the victim impact evidence had he been provided the details of it in advance of Mr. Corrieo's testimony. (AOB 130-131.) His claim lacks merit. It appears from the record that appellant would not have introduced any mitigating evidence even if had had access to it. Despite the fact that appellant's former counsel provided potentially mitigating evidence to appellant, and despite the trial

court's urging of appellant to think about producing mitigating evidence, appellant declined to produce any mitigating evidence at the penalty phase of his trial. (14 RT 3755-3760.) Appellant even declined to cross-examine Mr. Corrieo. (14 RT 3720.)

In any event, even if appellant had attempted to introduce the evidence, which he suggests he would have introduced had he been given advance notice of the details of the victim impact testimony presented by Mr. Corrieo (AOB 130-131), it would not have been admitted by the trial court. Only relevant evidence is admissible, including evidence that is relevant to a witness's credibility. (Evid. Code, § 210; *People v. Kelly* (1992) 1 Cal.4th 495, 523.) A trial court is given wide discretion to determine whether the evidence is relevant (*People v. Green* (1980) 27 Cal.3d 1, 19 [overruled on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, and *People v. Dominguez* (2006) 39 Cal.4th 1141, 1155]), i.e., whether it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" (Evid. Code, § 210).

Here, appellant states that he would have introduced evidence to show that various members of the Corrieo family had drug problems, gang affiliations, and a proclivity to steal from each other, i.e., facts that he learned after his trial when the warrant affidavits were disclosed to him. (See, e.g., Supp. 6 CT 2053, 2067-2072, 2078-2079, 2081-2082, 2084-2087.) This, according to appellant, would have impeached Mr. Corrieo's testimony. We disagree.

Whether Mr. Corrieo or other members of his family had a drug problem or were affiliated with a gang had no tendency to prove that Mr. Corrieo's testimony was not believable. A trial court is not required to admit evidence to rebut victim impact testimony which merely makes the crime victim (or the victim's relatives) look bad. (*People v. Loker* (2008)

44 Cal.4th 691, 735-736; see *People v. Boyette*, *supra*, 29 Cal.4th at p. 445 [“defendant was not entitled to disparage the character of the victims on cross-examination”].)

Also, whether the Corrieo family had a proclivity to steal from each other added nothing to the extent that the affidavits did not specifically identify Mr. Corrieo as one of the members who did so. (Supp. 6 CT 2067-2068, 2072, 2079, 2086.) Even assuming there had been evidence that Mr. Corrieo had a proclivity to steal from members of his family, the trial court would not have allowed the evidence to have been introduced. Its impeachment value was negligible at best, and its introduction would have merely created a “mini trial.” In any event, the jury did have the opportunity to fairly evaluate Mr. Corrieo’s credibility based on the evidence of his bias against appellant. (14 RT 3720.) In addition, the jury was fully aware from the guilt phase of the trial that Mr. Corrieo had a felony conviction for which he had served a prison term at C.S.P Sacramento (11 RT 3033-3034), and the jury was permitted to consider that fact (Evid. Code, § 788; CALJIC No. 8.85). The trial court also properly instructed the jury regarding the impeachment evidence and its duty to consider all of the evidence which had been received during any part of the trial. (14 RT 3822-3824, 3827; see also 15 CT 5659-5661; CALJIC Nos. 2.20, 8.85.)

In addition, the evidence in support of the death penalty verdict was overwhelming. The aggravating evidence of appellant’s egregious crimes against Corrieo and Roberts, who were defenseless against appellant and his cohorts, was powerful evidence. (10 RT 2681-2687, 2691-2698, 11 RT 2791, 2842.) The aggravating evidence of appellant’s violence against Todd and DeBonneville was also powerful evidence which supported the jury’s death verdict. (14 RT 3721-3723, 3732-3753.) Furthermore, as

indicated above, appellant did not introduce any mitigating evidence to support a life sentence. (14 RT 3760.)

Moreover, Mr. Corrieo's testimony was a relatively brief, less significant part of the evidence at the penalty phase in comparison to the aggravating evidence that was introduced. (14 RT 3716-3720 [Mr. Corrieo's testimony]; 14 RT 3721-3723 [Todd's testimony about appellant punching her in the face], 3732-3752 [DeBonneville's testimony regarding the violent attack against her], 3752-3753 [documents relating to appellant's conviction for his crimes against DeBonneville]; see *People v. Taylor* (2010) 48 Cal.4th 574, 646 [noting that the victim impact evidence was relatively brief in comparison to the remainder of the aggravating evidence introduced]; *People v. Dykes* (2009) 46 Cal.4th 731, 782 [noting the brevity of the victim impact evidence].) Indeed, the prosecutor did not even mention the victim impact evidence during his closing argument. (14 RT 3847-3860.) Instead, the prosecutor focused on the evidence of the other aggravating factors in the case, highlighting the violent nature and callousness of appellant's crimes against Corrieo and Roberts, as well as those against DeBonneville just a few days before he committed the double murders. (14 RT 3856-3859.) Based on the foregoing, it is evident that, despite any alleged error, there was no prejudice to appellant.

C. The Trial Court Properly Refused To Strike Mr. Corrieo's Testimony

In a related argument, appellant claims that the trial court erred by not striking Mr. Corrieo's testimony on the basis that it constituted improper opinion evidence. (AOB 129-130.) We disagree.

The admission of a victim's family members' opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. (*Booth v. Maryland* (1987) 482 U.S. 496, 508-509, overruled on another ground in *Payne v. Tennessee, supra*, 501 U.S. at p. 830.) This is

true even after *Payne*. The Eighth Amendment still bars the admission of such evidence. (*Payne v. Tennessee, supra*, 501 U.S. at p. 830, fn. 2; see *People v. Taylor, supra*, 48 Cal.4th at pp. 646-647; *People v. Pollock, supra*, 32 Cal.4th at p. 1180.) In certain cases, opinion evidence may also invade the province of the jury. (See, e.g., *Marx & Co., Inc. v. Diners' Club* (1977) 550 F.2d 505, 510 [it is "erroneous for a witness to state his opinion on the law of the forum"].)

Here, Mr. Corrieo testified that he had previously provided testimony during the guilt phase regarding his feelings about the defendant at the time that he encountered him at C.S.P. Sacramento. He stated that his feelings "absolutely" remained the same. (14 RT 3720.) This did not constitute improper opinion evidence. *People v. Taylor, supra*, 48 Cal.4th 574 is instructive.

In *Taylor*, the victim's daughter stated, "[W]e are so completely, utterly, bitterly angry at that idiot," referring to the defendant. (*Id.* at p. 646.) On appeal, the defendant argued that this (along with other victim impact testimony) constituted an impermissible opinion about the defendant. (*Ibid.*) The *Taylor* court disagreed, stating, in relevant part:

As for one family member's reference to defendant as "that idiot," this fleeting remark likewise was part of a proper expression of the harm that the murder had caused
Contrary to defendant's assertions, the trial court admitted the challenged testimony for the proper purpose of reminding the jury that the victim was "an individual whose death represents a unique loss to society and in particular to [her] family.'
[Citation.]" (*Payne, supra*, 501 U.S. at p. 825.)

(*People v. Taylor, supra*, 48 Cal.4th at p. 647.)

Like the brief remark in *Taylor*, Mr. Corrieo's remark (i.e., his feelings about appellant remained the same) did not constitute improper opinion evidence. (14 RT 3720.) Mr. Corrieo's brief remark, which was non-specific and did not constitute a detailed reiteration of his guilt phase

testimony (14 RT 3720; cf. 11 RT 3035-3039), merely implied to the jury that the murders had caused him harm and made him angry. This simply reminded the jury that the victims' deaths were a significant loss to him as a member of their family.

This evidence was also admissible for the purpose of reminding the jury that Mr. Corrieo was a biased witness. Pursuant to Evidence Code section 780, a jury may consider the existence or nonexistence of a bias, interest, or other motive in assessing a witness's credibility. (Evid. Code, § 780, subd. (f); CALJIC No. 2.20.) Although appellant questions why the prosecutor would have impeached his own witness, it is evident that the prosecutor introduced this evidence to lessen the impact on the minds of the jurors, anticipating that appellant would impeach Mr. Corrieo about his bias against him. (See *People v. Bemore*, *supra*, 22 Cal.4th at p. 855 [“[T]he prosecutor merely anticipated predictable defense argument urging sympathy for defendant and sought to negate its mitigating effect by highlighting defendant's apparent lack of concern for the murder victim[s]”].)

Even assuming, *arguendo*, that the trial court erred by not striking Mr. Corrieo's testimony, there was no prejudice to appellant. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [concluding that the “improper denial of a defendant's opportunity to impeach a witness for bias . . . is subject to *Chapman* harmless-error analysis].) To the extent that the jury was reminded of Mr. Corrieo's bias against appellant, the evidence was to his benefit. (See *People v. Riggs* (2008) 44 Cal.4th 248, 309 [finding the instructional error, if any, harmless were the instruction as read to the jury was beneficial to the defendant]; *People v. Riel* (2000) 22 Cal.4th 1153, 1214 [stressing that any error in providing the information to the jury only benefitted the capital defendant].) Thus, no harm stemmed from the

introduction of Mr. Corrieo's testimony about his feelings towards appellant.

People v. Mills (2010) 48 Cal.4th 158 is also instructive. In *Mills*, two of the witnesses gave testimony to the effect that they could not achieve emotional closure until the trial was done. (*People v. Mills, supra*, 48 Cal.4th at p. 212.) On appeal, the defendant argued that the two witnesses had given inappropriate opinion testimony suggesting that he should get the death penalty so they could obtain closure. (*Ibid.*) The court noted that the defendant had forfeited the claim, but added:

Because any implication in this testimony that the survivors wished the jury to impose the death penalty was veiled and obscure, and because the testimony was brief and isolated, it could not have caused any prejudice even were we to assume the claim was preserved and that it was error to admit such testimony.

(*People v. Mills, supra*, 48 Cal.4th at p. 212.)

Here, as in *Mills*, Mr. Corrieo's testimony about his feelings towards appellant remaining the same since he encountered him at C.S.P. Sacramento did not indicate to the jury that he wanted the jury to impose the death penalty. That simply was not the implication from Mr. Corrieo's non-specific testimony. In addition, like the challenged testimony in *Mills*, Mr. Corrieo's testimony was quite brief and isolated. (14 RT 3720.) Moreover, unlike in *Mills* and favorable to appellant, was the fact that Mr. Corrieo was the only witness who provided victim impact testimony. (See *State v. Muhammad* (1996) 145 N.J. 23, 678 A.2d 164, 180 [imposing a single-witness limitation with respect to victim impact testimony based upon the court's conclusion that "[t]he greater the number of survivors who are permitted to present victim impact evidence, the greater the potential . . . to unduly prejudice the jury against the defendant".])

Furthermore, as indicated above (see Arg. VB, *supra*), there was no prejudice because the evidence supporting the jury's death verdict was overwhelming, appellant introduced no mitigating evidence, and the prosecutor made no mention of Mr. Corrieo's testimony during his closing argument. (10 RT 2681-2687, 2691-2698; 11 RT 2791, 2842; 14 RT 3721-3725, 3732-3753, 3760, 3847-3859.) In addition, we note that because Mr. Corrieo testified during the guilt phase of the trial (1 RT 3031-3044), and, pursuant to the trial court's instructions, the jury was permitted to "consider all of the evidence which ha[d] been received during any part of the trial" (14 RT 3827), to some extent, the evidence was redundant. Moreover, the jury was instructed that it should not be "swayed by public opinion or public feelings" (14 RT 3817; see also 15 CT 5731; CALJIC No. 8.84.1), and it was not required accept a witness's opinion (14 RT 3824; see also 15 CT 5747; CALJIC No. 2.81). Without any evidence to the contrary, it is presumed that the jury followed these instructions. (*People v. Pinholster, supra*, 1 Cal.4th at p. 919.) Based on the foregoing, it is evident that despite any error, there was no prejudice to appellant.

VI. THE TRIAL COURT PROPERLY REFUSED TO GIVE THE PROPOSED LIMITING INSTRUCTION REGARDING THE VICTIM IMPACT EVIDENCE

Appellant contends that the trial court erred by not giving the jury his proposed limiting instruction regarding the victim impact evidence. (AOB 132.) We disagree.

A. Relevant Background

On September 12, 2000, prior to the penalty phase of the trial, appellant requested that the trial court give the jury "Defendant's Special #1" instruction (14 RT 3794, 3807), which read as follows:

"The prosecution has introduced what is known as victim impact evidence." (*Nesbit*.) "Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse

impact on the victim's family is not proof of an aggravating circumstance." (*Nesbit*.) Rather, victim impact evidence may be considered, if at all, only to the extent you find it is part of the circumstances of the special circumstances murder conviction for which you are now determining whether to sentence defendant to death or life imprisonment without the possibility of parole. In assessing to what extent, if any, you should consider the victim impact evidence in your deliberations, you may not consider any victim impact evidence unless it was foreseeably related to "personal characteristics of the victim that were [actually] [] known to the defendant at the time of the crime. (*Fierro; Gathers*.) "Your consideration of the victim impact evidence must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence." (*Nesbit*.)

Article I, sections 15 and 24, of the California Constitution; Fifth and Fourteenth Amendments to the United States Constitution, and the constitutional requirement of a reliable death penalty determination (Fifth, Eighth and Fourteenth Amendments to the United States Constitution)[.]

Victim impact evidence is not a factor in aggravation but can only be considered, if at all, as part of the circumstances of the crime; that jurors must exercise great care not to attach any emotional response to victim impact evidence (*State v. Nesbit*, (Tenn. 1998) 978 S.W.2d 872); and the jury cannot consider any victim impact evidence other than "personal characteristics of the victim that were [] known to the defendant at the time of the crime" (*People v. Fierro, supra*, 1 Cal.4th 173, 260 (conc. and dis. opn. Kennard, J.); in *South Carolina v. Gathers*, 490 U.S. 805, 811-812 [104 L.Ed.2d 876, 883]. See *State v. Nesbit*, (Tenn. 1998) 978 S.W.2d 872, *New Jersey v. Muhammad, supra*, (N.J. 1996) 145 N.J.2d 23, [678 A.2d 164].)

(15 CT 5714.)

The trial court refused to give the proposed instruction, stating in relevant part:

It's clear that we don't have a heck of a lot of law, you know, on impact witness statements. The cases that are coming out, by and large, are from our Supreme Court, are older than the Payne vs. Tennessee case, which was in 1991. I may be off a

little, but most of the dog gone cases that we have rulings on are beginning to mid to late eighties, and we don't have a lot of help on that that the court[]s can give anybody on that.

But it seems to me on balance here that the proposed instruction Number 1 is faulty in many particulars, number 1, it is clearly argumentative. [¶] Number 2, I am not at all certain that it doesn't misstate at least some of the indications that - - as to the victim impact statement as defined by the United States Supreme Court. And, therefore, it will remain on the denial.

(14 RT 3807-3808.)

B. The Trial Court Properly Refused To Give The Proposed Instruction

A trial court has a duty to instruct the jury on general principles of law which are relevant to the issues raised by the evidence. (*People v. Koontz, supra*, 27 Cal.4th 1041, 1085; see *People v. Breverman* (1998) 19 Cal.4th 142, 154 [a trial court has a *sua sponte* duty to instruct on principles of law which are openly and closely connected with the evidence presented and are necessary for the jury's understanding of the case].) A defendant also has a right to an instruction that pinpoints his defense theory. (*People v. Roldan, supra*, 35 Cal.4th at p. 715; see also Evid. Code, § 355 ["When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly".]) A trial court, however, is not obligated to give a proposed instruction that misstates the law, is duplicative of other instructions, confusing, argumentative, or unsupported by substantial evidence. (*People v. Burney* (2009) 47 Cal.4th 203, 246; see *People v. Davis* (2009) 46 Cal.4th 539, 621-623 [finding that the trial court properly refused to give the various proposed penalty phase instructions which were covered by other instructions, confusing, or non-responsive to the evidence presented].)

Appellant's proposed instructions falls within these limitations; therefore, the trial court properly refused to give it. First, the instruction is duplicative of other instructions that the trial court gave the jury. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 455 [affirming the trial court's refusal to give virtually identical proposed instruction].) *People v. Zamudio* (2008) 43 Cal.4th 327 is illustrative. In *Zamudio*, the defendant argued on appeal that the trial court should have instructed the jury, in relevant part:

Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment.

(*People v. Zamudio, supra*, 43 Cal.4th at p. 369.)

The defendant also argued that the trial court should have instructed the jury:

Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(*People v. Zamudio, supra*, 43 Cal.4th at p. 368.)

The *Zamudio* court stated that the trial court had no duty to so instruct the jury and found the above-quoted portions of the proposed instruction were covered adequately by CALJIC Nos. 8.85 and 8.84.1, which had been given to the jury. (*People v. Zamudio, supra*, 43 Cal.4th at pp. 368-369; see also *People v. Bramit* (2009) 46 Cal.4th 1221, 1244-1245 [finding that the trial court had no *sua sponte* duty to give the proposed instruction regarding victim impact evidence to the extent that it was covered by

CALJIC Nos. 8.84.1 and 8.85]; *People v. Morgan* (2007) 42 Cal.4th 593, 624 [finding that the trial court was not required to give a limiting instruction regarding the victim impact evidence where the trial court gave the jury instructions, including CALJIC No. 8.84.1, which “were sufficient to inform the jury of its responsibilities, and the proposed instruction by the defense ‘would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1’”].]

Here, like in *Zamudio*, a portion of the proposed instruction is duplicative of CALJIC No. 8.85. The first paragraph of the proposed instruction states, in relevant part:

victim impact evidence may be considered, if at all, only to the extent you find it is part of the circumstances of the special circumstances murder conviction for which you are now determining whether to sentence defendant to death or life imprisonment without the possibility of parole.

(15 CT 5714.) This part of the proposed instruction was already covered by CALJIC No. 8.85, in which the trial court informed the jury:

In determining which penalty is to be imposed on the defendant, you should consider all of the evidence which has been received during any part of the trial of this case except as you may be hereafter instructed. [¶] You shall consider, take into account, and be guided by the following factors, if applicable: [¶] (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.

(See 14 RT 3827; see also 15 CT 5659; CALJIC No. 8.85.)

Another portion of the proposed instruction was covered by CALJIC No. 8.84.1, which, as discussed below, is a more accurate statement of the law than that proposed by appellant. The last sentence of the first paragraph of the proposed instruction states, in relevant part:

“Your consideration of the victim impact evidence must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence.” (*Nesbit*.)

(15 CT 5714.) This part of the proposed instruction was already covered by CALJIC No. 8.84.1, in which the trial court instructed the jury in pertinent part:

[Y]ou must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have the right to expect that you will consider all the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict.

(14 RT 3827; see also 15 CT 5731; CALJIC No. 8.84.1.)

Second, portions of the proposed instruction misstate the law regarding victim impact evidence. A trial court may properly refuse an instruction if it is an incorrect statement of the law. (*People v. Gurule* (2002) 28 Cal.4th 557, 659; see, e.g., *People v. Bramit, supra*, 46 Cal.4th at p. 1245 [finding that the trial court did not err by not giving the proposed instruction where it incorrectly suggested that a juror's emotional response to the evidence could not play a role in the juror's decision whether to vote for the death penalty].)

Here, the portion of the proposed instruction which in the first paragraph states, "Your consideration of the victim impact evidence must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence," is not a completely accurate statement of the law. Similarly, the portion of the third paragraph which stated, "jurors must exercise great care not to attach any emotional response to victim impact evidence," misstates the law. A defendant's proposed instruction is incorrect to the extent it tells the jury that "a juror's 'emotional response' to the evidence may play no part in the decision to vote for the death penalty." (*People v. Zamudio, supra*, 43 Cal.4th at p. 369; *People v. Carey* (2007) 41 Cal.4th 109, 134; see *People v. Pollock, supra*, 32 Cal.4th at p. 1195 [a jury is entitled to consider in aggravation, as a

circumstance of the crime, the impact of the capital defendant's crimes on the victim's family, and in so doing, the jury may exercise sympathy for the defendant's murder victims and for the bereaved members of their family]; *People v. Griffin* (2004) 33 Cal.4th 536, 591 [rejecting the argument that a trial court is required to instruct the jury that it must not be influenced by emotion resulting from the victim impact evidence]; see also *People v. Carrington* (2009) 47 Cal.4th 145, 198.)

Other portions of the proposed instruction are also incorrect statements of the law. For example, the proposed instruction states in the first paragraph, "Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance." (15 CT 5714.) This is not correct. As stated in *Pollock, supra*, 32 Cal.4th 1153, "[A] jury at the penalty phase of a capital case may properly consider *in aggravation*, as a circumstance of the crime, *the impact of a capital defendant's crimes on the victim's family*." (*Id.* at p. 1195, emphasis added.)

The proposed instruction also states in the first paragraph that the jury must "not consider any victim impact evidence unless it [i]s foreseeably related to 'personal characteristics of the victim that were [actually] [] known to the defendant at the time of the crime.'" Similarly, it states in the third paragraph that the jury must not "consider any impact evidence other than 'personal characteristics of the victim that were [] known to the defendant at the time of the crime.'" (15 CT 5714.) Both of these are incorrect statements of the law. Victim impact evidence is not limited to matters within the defendant's knowledge. (*People v. Pollock, supra*, 32 Cal.4th at p. 1183; *People v. Carrington, supra*, 47 Cal.4th at pp. 196-197.)

Third, portions of the proposed instruction are confusing or repetitive and would not have been helpful to the jury. (See *People v. Harris* (2005) 37 Cal.4th 310, 358-359 [concluding that the trial court properly rejected

the defense-proffered instruction for the reason that it was confusing as it cautioned the jurors against a subjective response to emotional evidence and argument, but did not specify whether the subjective reaction was that of the victim's family or that of the jurors themselves].) For example, the second paragraph is both confusing and unhelpful. It read:

Article I, sections 15 and 24, of the California Constitution; Fifth and Fourteenth Amendments to the United States Constitution, and the constitutional requirement of a reliable death penalty determination (Fifth, Eighth and Fourteenth Amendments to the United States Constitution)[.]

(15 CT 5714.) It is difficult to discern what appellant intended to inform the jury by this incomplete statement. It appears to be an orphan paragraph with a bare legal authority without any explanation for it or how it was to be used by the jury. In addition, the final paragraph simply reiterates the statements contained in the first. Thus, it is merely repetitive in addition to suffering from the deficiencies already noted.

Fourth, the proposed instruction is argumentative. "A jury instruction is argumentative when it is of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People v. Hines* (1997) 15 Cal.4th 997, 1067-1068, internal citation and quotation marks omitted.) Here, the proposed instruction asks the jury to have no emotional response to the evidence. This instruction invites the jury to draw inferences that are favorable solely to the defense, and thus, is argumentative for that reason.

Finally, appellant suggests that the trial court should have given his proposed instruction to ensure that the jury understood that not just "any adverse impact on a capital murder victim's family constitutes an 'aggravating factor.'" (AOB 135-136.) We do not disagree that:

When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance

must provide a principled basis for doing so. See *Jeffers, supra*, at 776; *Godfrey, supra*, 446 U.S. at 433. If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm. See *Cartwright, supra*, at 364 (invalidating aggravating circumstance that "an ordinary person could honestly believe" described every murder); *Godfrey, supra*, at 428-429 ("A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman'").

(*Arave v. Creech* (1993) 507 U.S. 463, 474.)

However, appellant's proposed instruction fails to provide any guidance to the jury in this regard. To the contrary, as explained above, the proposed instruction is confusing, duplicative, repetitive and had the potential for misleading the jury due to its inclusion of inaccurate statements of the law. Based on the foregoing, it is evident that the trial court did not err by refusing to give the jury the appellant's proposed instruction regarding victim impact evidence. Thus, this Court should reject his claim.

C. There Was No Prejudice

Even assuming, *arguendo*, that the trial court erred by refusing to give the proposed instruction, there was no prejudice to appellant. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Brown, supra*, 46 Cal.3d at pp. 446-448.) Significantly, the trial court properly instructed the jury by giving them CALJIC Nos. 8.84.1 (14 RT 3827; see also 15 CT 5731) and 8.85 (14 RT 3827-3829; see also 15 CT 5659, 5752), and the prosecutor put no emphasis on the victim impact evidence during his closing argument (14 RT 3847-3859).

Moreover, as indicated above (see Arg. VC, *supra*), the evidence in support of the jury death penalty verdict was overwhelming. Contrary to appellant's claim (AOB 137), the crimes against Corrieo and Roberts were

extremely heinous. The evidence showed that appellant had brutally attacked, robbed, and killed an elderly woman and her disabled daughter when he tied their hands behind their back, punched Roberts in the face, and shot both of them multiple times in the head as they lie defenseless on the floor of their home. (10 RT 2681-2687, 2691-2698, 11 RT 2791, 2842.)

Appellant also had a violent criminal history. The evidence showed that when his pregnant girlfriend ended their relationship, he punched her in the face, causing her face to bruise and swell. (14 RT 3722-3723.) When DeBonneville wanted to take appellant's girlfriend to the hospital, appellant came at her with a bat and told her he would kill her if she took her. (14 RT 3735-3736.)

The second attack on DeBonneville was even more brutal. The evidence showed that appellant and his fellow gang members savagely beat her with a bat and tried to break her back and rape her. (14 RT 3741-3747.) During the attack, someone carved a Roman numeral into her back. (14 RT 3750.) At the end of the attack, appellant stood in front of DeBonneville pointing a gun at her head as the other attackers surrounded her and held her hands behind her back. (14 RT 3746-3747.) Appellant then callously said, "Say good night" and shot her in the head, leaving her for dead. (14 RT 3747-3748, 3751.) Afterwards, DeBonneville's face was black and swollen. Her back and legs were also black from all of the bruises she suffered. (14 RT 3750.) Three days later, the doctor found the bullet in DeBonneville's head, which could not be removed until two years later. (14 RT 3750.)

Significantly, appellant did not introduce any mitigating evidence to support a life sentence. (14 RT 3760.) In addition, appellant's comment to DeBonneville that he was not sorry that he had shot her showed that appellant lacked remorse for his heinous crime against her. (14 RT 3752.) Thus, despite any error, there was no prejudice to appellant.

VII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE IMPACT OF AN EXECUTION ON THE DEFENDANT'S FAMILY

Appellant contends that the trial court violated his due process rights when it instructed the jury that the impact of an execution on the defendant's family should be disregarded unless it illuminates some positive quality of appellant's background or character. (AOB 138.) Specifically, appellant contends that the trial court should have instructed the jury that it could consider the impact of appellant's execution on appellant's daughter. (AOB 139.) Appellant has forfeited his claim of instructional error. In any event, we disagree that the trial court committed instructional error or that there was any prejudice to appellant.

A. Relevant Background

At the prosecutor's request (15 CT 5659), the trial court instructed the jury with the 2000 version of CALJIC No. 8.85, telling the jury in relevant part:

Sympathy for the family of the defendant is not a matter that you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded, unless it illuminates some positive quality of the defendant's background or character.

(14 RT 3829; see also 15 CT 5661, 5754; CALJIC No. 8.85.)

B. Forfeiture

Appellant has forfeited his claim of instructional error by not requesting an execution impact instruction or any other modification to CALJIC No. 8.85. A claim that an instruction, correct in law, should have been modified is not cognizable on appeal where the defendant requested no such modification or clarification below. (*People v. Richardson* (2008) 43 Cal.4th 959, 1022-1023; see *People v. Lewis* (2001) 26 Cal.4th 334, 380 [the defendant could not complain on appeal about the instructions where

he failed to request further explanation or amplification of the instructions below]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503 [a party must request a clarifying instruction in order to argue on appeal that an instruction correct in law was too general or incomplete].)

Here, when appellant, the prosecutor, and the trial court discussed CALJIC No. 8.85, appellant did not object to the court giving the 2000 version of CALJIC No. 8.85 (14 RT 3790-3791), he did not request any modifying or additional language to CALJIC No. 8.85, and at no time did he request an execution impact instruction (see 15 CT 5714; 14 RT 3794 [single instruction proposed by appellant at the penalty phase]). Having raised no objection to the instruction as given to the jury, appellant cannot raise his claim of instructional error for the first time on appeal. Thus, appellant has forfeited his claim.

C. The Trial Court Did Not Commit Instructional Error By Not Giving An Execution Impact Instruction

In any event, the trial court did not err by not instructing the jury that it could consider the impact of appellant's execution on his daughter. It is well settled that the jury may not consider the impact of execution on a defendant's family as a mitigating factor. (*People v. Smith* (2005) 35 Cal.4th 334, 366-367; *People v. Smithey* (1999) 20 Cal.4th 936, 1000.) In *People v. Ochoa* (1998) 19 Cal.4th 353, 456, this Court held that "sympathy for a defendant's family is not a matter that a capital jury can consider in mitigation." Family members may only "offer testimony of the impact of an execution on them if by so doing they illuminate some positive quality of the defendant's background or character." (*People v. Ochoa, supra*, 19 Cal.4th at p. 456.) As this Court explained, it is the defendant's background and character, and "not the distress of his . . . family" which is relevant under section 190.3. (*People v. Ochoa, supra*, 19 Cal.4th at p. 456.) This Court has made a distinction between:

evidence that [a defendant] is loved by family members or others, and that these individuals want him . . . to live . . . [and evidence regarding] whether the defendant's family deserves to suffer the pain of having a family member executed.

(*People v. Ochoa, supra*, 19 Cal.4th at p. 456.) The former evidence is permissible indirect evidence of the defendant's character while the latter evidence is impermissible as it asks the jury to spare the defendant's life because it "believes that the impact of the execution would be devastating to other members of the defendant's family." (*People v. Bennett* (2009) 45 Cal.4th 577, 601, quoting *People v. Ochoa, supra*, 19 Cal.4th at p. 456; see *People v. Bemore, supra*, 22 Cal.4th at pp. 855-856 ["Sympathy for defendant's loved ones . . . and their reaction to a death verdict, as such, do not relate to either the circumstances of the capital crime or the character and background of the accused"].)

Despite this Court's holding in *Ochoa*, appellant contends that the California Death Penalty statute permits a jury to consider the potential impact of defendant's execution on his daughter based upon the language that allows a defendant to introduce evidence "as to any matter relevant to . . . sentence." (AOB 139-141.) We disagree that the language of section 190.3 should be so construed. *People v. Daniels* (1991) 52 Cal.3d 815 is instructive.

In *Daniels*, the defendant sought to introduce testimony regarding the psychological impact of an impending execution on a prisoner and the pain caused by execution in a gas chamber. (*People v. Daniels, supra*, 52 Cal.3d at p. 878.) The trial court refused to allow the proposed testimony. (*Ibid.*) On appeal, the defendant relied upon the language in section 190.3, which states that "evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, *and sentence . . .*" (Italics added.) From this language, the defendant argued that he should have been allowed to present evidence regarding the nature of the

sentence choices, even if the evidence was irrelevant to any aggravating or mitigating factor. (*Ibid.*)

This Court rejected the defendant's argument, explaining:

If we looked only to the quoted phrase, defendant's argument might be plausible. *In construing section 190.3 as a whole*, however, we have reached the conclusion that under this statute the jury determines sentence by a process of weighing the aggravating and mitigating factors to determine whether the aggravating are so substantial in comparison with the mitigating as to justify a death sentence. (See *People v. Brown* (1985) 40 Cal.3d 512, 541-544 & 545, fn. 19 [].) *Thus evidence irrelevant to aggravation or mitigation is necessarily also irrelevant to sentence.* We conclude that the trial court properly excluded the evidence in question.

(*People v. Daniels, supra*, 52 Cal.3d at p. 878, emphasis added.)

The *Daniels* court further noted:

It would be fundamentally illogical to hold that defendant can introduce evidence relating to sentence which the jury could not consider in imposing sentence. But to hold that the jury can base its sentence on something other than the statutory aggravating and mitigating factors would contradict both the language of the statute and virtually every decision of this court construing section 190.3.

(*People v. Daniels, supra*, 52 Cal.3d at p. 878, fn. 27.)

Here, as indicated above, execution impact evidence is irrelevant under section 190.3 as it does not concern a defendant's "own circumstances." (*People v. Ochoa, supra*, 19 Cal.4th at p. 456; see *People v. Smith, supra*, 35 Cal.4th at pp. 366-367 [a jury may not consider as a mitigating factor the impact of execution on a defendant's family].) Where the impact of appellant's execution on appellant's daughter does nothing to illuminate any positive quality of appellant's background or character, such execution impact evidence is irrelevant, and thus, inadmissible. (See, e.g., *People v. Bennett, supra*, 45 Cal.4th at p. 601 [finding that the trial court did not err when it refused to allow a doctor to testify about the impact of

an execution on the defendant's son because the testimony constituted inadmissible execution impact evidence that had no bearing on the defendant's character or background].)

Appellant points out that the impact of a sentence on a defendant's family is a factor when a grant of probation is considered. (AOB 141.) California Rules of Court, rule 4.414(b)(5) states that one criteria affecting the decision to grant or deny probation is the likely effect of imprisonment on the defendant's dependents. However, as this Court explained in *People v. Bennett, supra*, 45 Cal.4th 577, the rules governing probation are different than section 190.3. (*People v. Bennett, supra*, 45 Cal.4th at p. 602.) Unlike California Rules of Court, rule 4.414(b)(5) and the statute governing probation (§ 1203),

section 190.3 identifies examples of matters relevant to aggravation, mitigation, and sentence including, but not limited to, the "circumstances of the present offense, any prior felony conviction ... , and the defendant's character, background, history, mental condition and physical condition." We concluded that, "[i]n this context, what is ultimately relevant is a defendant's background and character—not the distress of his or her family." (*Ochoa, supra*, 19 Cal.4th at p. 456, italics added.)

(*People v. Bennett, supra*, 45 Cal.4th at p. 602.) Thus, the rules and statutes governing probation have no bearing on this Court's construction of section 190.3. (*Ibid.*)

Appellant also contends that the groundwork is set for a jury to consider execution impact evidence, and thus, the jury should have been instructed that it could consider such evidence with respect to his daughter. (AOB 143.) Appellant refers to Justice Kennard's concurring and dissenting opinion in *People v. Fierro, supra*, 1 Cal.4th 172, in which she stated that following the decision in *Payne*, the penalty considerations in a capital case have been "expanded from two to three." (*People v. Fierro, supra*, 1 Cal.4th at p. 261.) Justice Kennard explained, "Previously a death

sentence might be based only on the defendant's character and background and the circumstances of the crime, but after *Payne* it might be based also on the specific harm caused by the crime." (*Ibid.*) From this appellant contends that "it cannot be said that the Eighth Amendment allows the sentence to consider factors beyond 'the defendant's character and background and the circumstances of the crime' in favor of death while limiting the sentencer to that list of factors in favor of life." (AOB 143.) We disagree that the *Payne* holding laid the groundwork for a jury to consider the impact of appellant's execution on his daughter.

In *Payne*, the United States Supreme Court held that *victim impact* evidence is admissible during the penalty phase. (*Payne v. Tennessee, supra*, 501 U.S. at pp. 811, 829.) The high court did not imply by its holding that capital defendants have the right to introduce *execution impact* evidence. To the contrary, consistent with the *Ochoa* decision, the United States Supreme Court made it clear that a defendant must be allowed to introduce mitigating evidence pertaining to "his own circumstances." (*Payne v. Tennessee, supra*, 501 U.S. at p. 822.) Execution impact evidence is irrelevant under section 190.3 as it does not concern a defendant's "own circumstances." Such evidence asks a jury to spare a defendant's life based upon the effect his execution would have on *others*, namely his family members, which is irrelevant. (*People v. Ochoa, supra*, 19 Cal.4th at p. 456.)

Nothing in the federal Constitution mandates a different result. (*People v. Bennett, supra*, 45 Cal.4th at p. 603, citing *People v. Ochoa, supra*, 19 Cal.4th at p. 456.) As the high court explained in *Woodson v. North Carolina* (1976) 428 U.S. 280, in a capital case, "the fundamental respect for humanity underlying the Eighth Amendment, [citation], requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable

part of the process of inflicting the penalty of death.” (*Id.* at p. 304.)

Woodson made no reference to execution impact evidence while discussing the Eighth Amendment.

Appellant also contends that precluding the jury from considering execution impact evidence, while allowing it to consider victim impact evidence, is unreasonable and unfair. We disagree. The two are not the same. While the impact on the victim’s family is relevant to establish the specific harm caused by the crime and the defendant’s blameworthiness, the impact on the defendant’s family is not comparably relevant to mitigate the crime’s specific harm or the defendant’s blameworthiness. (See *People v. Sanders* (1995) 11 Cal.4th 475, 546.) Rather, it would more closely equate to a statement by a victim’s family member that imposition of the death penalty would somehow make him or her feel better – a statement that clearly would not be allowed. (See *People v. Pollock, supra*, 32 Cal.4th at p. 1180 [“victim impact evidence does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims’ family members or friends, and such testimony is not permitted”].) Thus, there is nothing unfair or unreasonable about excluding such irrelevant evidence while allowing relevant evidence to be introduced. Based on the foregoing, this Court should find that the trial court properly instructed the jury and committed no error by not telling the jury that it could consider the impact of an execution on appellant’s daughter.

D. There Was No Prejudice

Even assuming, *arguendo*, that the trial court erred by not giving an execution impact instruction, there was no prejudice to appellant. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Brown, supra*, 46 Cal.3d at pp. 446-448.) Significantly, because appellant did not attempt to introduce any execution impact evidence and none was admitted, such an instruction would not have been appropriate in appellant’s case. (See

People v. Burney, supra, 47 Cal.4th at p. 246 [a trial court is not obligated to give an instruction that is not supported by substantial evidence].) Although appellant briefly mentioned his daughter during his closing argument (see 14 RT 3861 [“I also regret leaving my daughter fatherless”]), this was not evidence. Furthermore, only a vague reference to appellant’s daughter was mentioned during the guilt phase of the trial. (11 RT 2981.) Appellant did not call Beach, the mother of his daughter (11 RT 2981), or his own mother to testify at the penalty phase of his trial. Indeed, appellant did not introduce any mitigating evidence to support a life sentence. (14 RT 3760.) Further, even assuming appellant had offered evidence regarding his daughter and her feelings toward him, the jury could have considered such evidence as a reflection of his character even without an execution impact instruction. (*People v. Williams* (2008) 43 Cal.4th 584, 644.) Thus, the lack of an instruction did not foreclose the presentation of evidence, and thus, did not create a constitutional violation. (See *Johnson v. Texas* (1993) 509 U.S. 350, 368 [as long as mitigating evidence is within the effective reach of capital sentencing, requirements of the Eighth Amendment are satisfied].)

In addition, the prosecutor made no mention of the victim impact evidence during his closing argument. (14 RT 3847-3859.) Also, as discussed in detail above (see Args. VB, VIC, *supra*), the evidence in support of the death penalty verdict was overwhelming. The aggravating evidence of appellant’s egregious crimes against Corrieo and Roberts, who were defenseless against appellant and his cohorts, was powerful evidence. (10 RT 2681-2687, 2691-2698, 11 RT 2791, 2842.) The aggravating evidence of appellant’s violence against Todd and DeBonneville was also powerful evidence which supported the jury’s death verdict. (14 RT 3721-3723, 3732-3753.) Based on the foregoing, it is evident that despite any

error, there was no prejudice to appellant. Thus, this Court should reject appellant's claim of instructional error.

VIII. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY DURING THE PENALTY PHASE ALTHOUGH IT DID NOT GIVE THE JURY A UNANIMITY OR PROOF-BEYOND-A-REASONABLE-DOUBT INSTRUCTION WITH RESPECT TO ALL THE AGGRAVATING CIRCUMSTANCES

Appellant contends that the trial court improperly instructed the jury to weigh in favor of death facts that not all jurors agreed were proved beyond a reasonable doubt, thereby violating his rights under the Sixth, Eighth, and Fourteenth Amendments and the state constitutional corollaries. (AOB 145.) We disagree. Appellant has forfeited his claim of instructional error. In any event, the trial court committed no instructional error and there was no prejudice to appellant.

A. Relevant Background

The trial court instructed the jury during the penalty phase of the trial, in relevant part:

An aggravating factor relating to the circumstances of the crime of which the defendant was convicted in the present proceeding does not have to be proved beyond a reasonable doubt.

(14 RT 3830-3831; see also 15 CT 5668, 5760.)

The trial court further instructed the jury:

Evidence has been introduced for the purpose of showing that the defendant, Corey Leigh Williams, has committed the following criminal acts or activities: Namely, battery of Alicia Todd, and assault with a deadly weapon or by force likely to produce great bodily injury on Daniel DeBonneville, which involved the express or implied use of force or violence, or the threat of force or violence.

Before a juror may consider any criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant, Corey

Leigh Williams, did in fact commit the criminal activity. . . . [¶]
A juror may not consider any evidence of any other criminal activity as an aggravating circumstance.

It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(14 RT 3835-3836; see also 15 CT 5688, 5778A, emphasis added.)

B. Forfeiture

Initially, we submit that appellant has forfeited his claim of instructional error. (*People v. Richardson, supra*, 43 Cal.4th at pp. 1022-1023; *People v. Lewis, supra*, 26 Cal.4th at p. 380; *People v. Hillhouse, supra*, 27 Cal.4th at p. 503.) It is true that a defendant cannot forfeit a legal argument that was not recognized at the time of his trial. (*People v. Harless* (2004) 125 Cal.App.4th 70, 97.) Here, however, that was not the case. Although the United States Supreme Court had not yet decided *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona* (2002) 536 U.S. 584, it had rendered its decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, a case upon which appellant relies. (See AOB 146.) Thus, appellant has forfeited his claim for purposes of appeal as he did not raise his claims below.

C. There Was No Instructional Error

Even assuming, arguendo, there was no forfeiture, appellant's claims fail. This Court has made clear:

The death penalty statute does not violate the Eighth and Fourteenth Amendments by failing to require the state to prove beyond a reasonable doubt that aggravating factors are true (except for other unadjudicated crimes), that aggravating factors outweigh mitigating factors, or that death is the appropriate sentence. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1059 [].) Nor does the lack of a unanimity requirement as to which

aggravating evidence is true violate the Sixth, Eighth, or Fourteenth Amendment. (*People v. Stevens, supra*, 41 Cal.4th at p. 212.)

(*People v. Loker, supra*, 44 Cal.4th at p. 755; see *People v. Prieto* (2005) 30 Cal.4th 226, 263 [“While each juror must believe that the aggravating circumstances substantially outweigh the mitigating circumstances, he or she need not agree on the existence of any one aggravating factor”]; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [“Unlike the guilt determination, ‘the sentencing function is inherently moral and normative, not factual’ [citation] and, hence, not susceptible to a burden-of-proof quantification”].)

This Court has found that nothing in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona* (2002) 536 U.S. 584, or *Apprendi v. New Jersey* (2000) 530 U.S. 466 alters these conclusions. (*People v. Loker, supra*, 44 Cal.4th at p. 755; *People v. Abilez* (2007) 41 Cal.4th 472, 535; *People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298; *People v. Stevens* (2007) 41 Cal.4th 182, 212; *People v. Cornwell* (2005) 37 Cal.4th 50, 103-104 [disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22]; *People v. Cox* (2003) 30 Cal.4th 916, 971 [disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22].) As this Court explained in *Prieto*,

Because any finding of aggravating factors during the penalty phase does not “increase[] the penalty for a crime beyond the prescribed statutory maximum” (*Apprendi, supra*, 530 U.S. at p. 490), *Ring* imposes no new constitutional requirements on California’s penalty phase proceedings.

(*People v. Prieto, supra*, 30 Cal.4th at p. 263.)

Cox is also instructive. In *Cox*, this Court explained:

As this court recently stated in *Snow, supra*, 30 Cal.4th at page 126, footnote 32: “We reject that argument for the reason given in *People v. Anderson* (2001) 25 Cal.4th 543, 589-590,

footnote 14 []: ‘[U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without possibility of parole. (§ 190.2, subd. (a).) Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*.’ The high court’s recent decision in *Ring v. Arizona* (2002) 536 U.S. 584 [] does not change this analysis. Under the Arizona capital sentencing scheme invalidated in *Ring*, a defendant convicted of first degree murder could be sentenced to death if, and only if, the trial court first found at least one of the enumerated aggravating factors true. (*Id.* at p. 603 [].) Under California’s scheme, in contrast, each juror must believe the circumstances in aggravation substantially outweigh those in mitigation, but the jury as a whole need not find any one aggravating factor to exist. The final step in California capital sentencing is a free weighing of all the factors relating to the defendant’s culpability, comparable to a sentencing court’s traditionally discretionary decision to, for example, impose one prison sentence rather than another. Nothing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt.” (Accord, *People v. Smith* (2003) 30 Cal.4th 581, 642 []; *People v. Prieto* (2003) 30 Cal.4th 226, 275[.])

(*People v. Cox, supra*, 30 Cal.4th at pp. 971-972.)

Moreover, as explained in *Prince, Cunningham* also does not alter these conclusions as that decision is “merely an extension of the *Apprendi* and *Blakely* analyses to California’s determinate sentencing law and [thus, it too] has no apparent application to the state’s capital sentencing scheme.” (*People v. Prince, supra*, 40 Cal.4th at pp. 1297-1298.) Thus, for the foregoing reasons, appellant’s claim of instructional error should be rejected.

D. There Was No Prejudice

In any event, there was no prejudice to appellant. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Brown, supra*, 46 Cal.3d at pp. 446-448.) As explained in detail above, the evidence in support of the jury's death penalty verdict was overwhelming. (See Args. VB, VIC, VIID, *supra*.) Therefore, even if this Court found instructional error, there was no prejudice.

IX. THERE WAS NO PROSECUTORIAL MISCONDUCT AND THE TRIAL COURT DID NOT ERR BY NOT GIVING THE JURY CORRECTIVE INSTRUCTIONS BECAUSE THE PROSECUTOR'S ARGUMENT WAS NOT IMPROPER

Appellant contends that the prosecutor committed misconduct by his misleading argument regarding two of the statutory mitigation factors (§ 190.3, factors (d), (i)). Appellant also contends that the trial court erred by failing to correct the prosecutor's argument with further jury instructions. According to appellant, this precluded the jury from giving meaningful consideration and mitigating effect to two of the mitigating factors, thereby denying appellant his rights under the Sixth, Eighth, and Fourteenth Amendments and the state constitutional corollaries. (AOB 152.) We disagree. Appellant has forfeited his claims of prosecutorial misconduct. In any event, there was no misconduct; therefore, it was unnecessary for the trial court to give the jury corrective instructions. Even assuming, *arguendo*, that there was misconduct, there was no prejudice to appellant. Thus, his claim should be rejected.

A. The Prosecutor's Argument Regarding Section 190.3, factor (d)

First, appellant contends that the prosecutor committed misconduct, claiming that he misstated the law with respect to section 190.3, factor (d). That factor directs the jury to take into account, if relevant, "[w]hether or

not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.” (§ 190.3, factor (d); see also CALJIC No. 8.85; 15 CT 5752; 14 RT 3827.) Appellant has forfeited this claim. In any event, there was no prosecutorial misconduct and appellant was not prejudiced.

1. Relevant Background

During the penalty phase, the prosecutor gave his closing argument to the jury. (14 RT 3847-3859.) Starting with the potential factors in mitigation, the prosecutor stated, “I don’t believe they apply, in short, and I’ll explain why that is true as I go through them.” (14 RT 3850.) The prosecutor continued:

The first potential factor in mitigation is whether the defendant at the time he committed these murders was operating under an extreme mental or emotional disturbance.

What that brings to mind is someone who kills for religious purposes, for mistaken moral purposes as a result of mental disease; those who, because of brain defects or the like, aren’t able to understand the consequences of their acts. Yet, what we see is that the defendant suffers from none of this. He suffers from no extreme mental illness or emotional disturbance. He suffers from no mental illness or no organic brain disease. He knew what he was doing when he committed the murders. He knew what he was doing and why he wanted it; in short, for greed and to kill women to leave no surviving witnesses.

So unlike those who believe that they are commanded by God mistakenly to kill or to maim people, the defendant did this for the most venal of reasons, and, as a consequence, this factor in mitigation, although it might apply to some criminal defendants, does not apply to Corey Williams.

(14 RT 3850-3851.)

2. Forfeiture

Initially, we submit that appellant has forfeited his claim of prosecutorial misconduct with respect to the argument about factor (d) (the

extreme-mental-or-emotional-disturbance factor). As noted above (see Arg. IIC, *supra*), a defendant generally cannot raise a claim of prosecutorial misconduct on appeal unless he raised a timely objection at trial on the same ground and requested the trial court to admonish the jury to disregard the impropriety. (Evid. Code, § 353; *People v. Berryman, supra*, 6 Cal.4th at p. 1072.) “[O]therwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.” (*People v. Price, supra*, 1 Cal.4th at p. 447.)

Here, appellant, who was representing himself during the penalty phase of the trial, raised no objection to the prosecutor’s argument about factor (d). (14 RT 3850-3851.) Having raised no objection below, he has forfeited his claim of prosecutorial misconduct for purposes of appeal.

Appellant cannot avoid forfeiture. An admonition certainly would have cured the alleged harm, if appellant had requested an admonition and the trial court had found that the prosecutor had misstated the law. (See *People v. Bemore, supra*, 22 Cal.4th at p. 854 [where defense counsel made no specific claim of misconduct when the prosecutor made the statements and curative steps could have been taken, appellant failed to preserve his claim for purposes of appeal].) For example, the trial court could have reminded the jury that counsel’s argument do not constitute evidence. (CALJIC No. 1.02; see also 15 CT 5754; 14 RT 3818.) It also could have admonished the jury that to the extent counsel’s statements regarding the law conflict with the instructions, it was required to follow the court’s instructions. (CALJIC No. 1.00; see also 15 CT 5666, 5758A; 14 RT 3830.) Under these circumstances, appellant cannot not avoid the forfeiture rule. Consequently, this Court should not consider his claim of prosecutorial misconduct on its merits.

3. There Was No Prosecutorial Misconduct

Even assuming, arguendo, there was no forfeiture, appellant's claim of prosecutorial misconduct is meritless. As explained above (see Arg. IIC, *supra*),

Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.

(*People v. Morales, supra*, 25 Cal.4th at p. 44.) When the issue is the prosecutor's comments before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Clair, supra*, 2 Cal.4th at p. 663.)

Under the federal Constitution, prosecutorial misconduct is reversible only if it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales, supra*, 25 Cal.4th at p. 44; accord *Darden v. Wainwright, supra*, 477 U.S. at p. 181; *Donnelly v. DeChristoforo, supra*, 416 U.S. at p. 643.)

Here, there was no prosecutorial misconduct. Although it is true that a prosecutor commits misconduct if he misstates the law (*People v. Hill* (1998) 17 Cal.4th 800, 829-830), the prosecutor in this case did not do so. Appellant has taken the prosecutor's argument out of context and isolated a few of the words within his lengthier statements about factor (d). Contrary to appellant's claim (AOB 153), the prosecutor did not limit the parameters of the extreme-mental-or-emotional-disturbance factor solely to instances where a defendant believes his crime was "commanded by God or served a moral purpose." Rather, the prosecutor correctly explained to the jury that factor (d) was dependent upon whether it found appellant to have been "operating under an extreme mental or emotional disturbance" when he

murdered Roberts and Corrieo. (14 RT 3850-3851.) In illustrating the point that factor (d) did not apply in appellant case, the prosecutor merely gave the jury an example of a type of defendant who might suffer from an extreme mental or emotional disturbance at the time of his crimes (e.g., one who believes that he had been commanded by God to kill or for moral purposes “as a result of mental disease” or “because of [a] brain defect[.]” is not “able to understand the consequences of his acts”). (14 RT 3850-3851.) Thus, the prosecutor’s argument about factor (d), when read in its entirety, was certainly not an improper statement of the law.

Furthermore, contrary to appellant’s claim (AOB 155), the prosecutor’s argument on this point was not that the evidence of extreme mental or emotional disturbance could not be considered. This would have constituted improper argument. (See *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 259 & fn. 21 [A jury must have a “meaningful basis to consider the relevant mitigating qualities” of the defendant’s proffered evidence,” and a jury may be prevented from adequately considering the defendant’s mitigating evidence “as a result of prosecutorial argument dictating that such consideration is forbidden”]; *Brown v. Payton* (2005) 544 U.S. 133, 146 [noting that the trial court has the duty of instructing the jury regarding the law and counsel may not abdicate its duty in this regard].) Rather, the prosecutor argued that there was no evidence that appellant suffered from such a disturbance, making the factor inapplicable in appellant’s case. (14 RT 3850-3851.) This constituted fair comment on the evidence or lack thereof.

It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.

(*People v. Wharton, supra*, 53 Cal.3d at p. 567, internal citations and quotation marks omitted.)

Here, there was no evidence that appellant suffered from an extreme mental or emotional disturbance. Although appellant's mother described appellant's turbulent childhood and her own life-long drug addiction (12 RT 3128-3135), she did not indicate that appellant had any type of drug addiction that hindered his mental or emotional state, nor did she state that appellant suffered from any other kind of mental or emotional disturbance. Also, no mental health expert testified during any phase of the trial that appellant suffered from any kind of mental or emotional disturbance. (Cf. *People v. Welch* (1999) 20 Cal.4th 701, 764 [noting that during the penalty phase of the trial, defense counsel introduced the testimony of "two mental health experts to establish that defendant's culpability was mitigated because his crimes were committed while under the influence of extreme mental or emotional disturbance (§ 190.3, factor (d)) and that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication (§ 190.3, factor (h))"].)

In contrast to a defendant who suffered from an extreme mental or emotional disturbance at the time of the crime, appellant was clearly someone who displayed no signs of having an extreme mental or emotional disturbance at the time of his crimes. This is evident from the circumstances of the crimes themselves. Appellant planned the robbery of the women well in advance of his crimes for his own greedy reasons (10 RT 2664, 2666, 2683; 11 RT 2909-2911), and then murdered the two women to ensure that he could not later be identified by any surviving witnesses (10 RT 2691-2692, 2698). The prosecutor's statements during closing argument did nothing more than highlight this evidence for the jury to persuade them that factor (d) did not apply in appellant's case. (13 RT 3850-3851.) This was proper. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 146 [finding no prosecutorial misconduct with respect to the

prosecutor's argument on factor (d) as the prosecutor did not say that the evidence was irrelevant, but rather that it simply was "unpersuasive because the circumstances of the crime showed 'planning,' the deliberate selection of a vulnerable victim, and consciousness of guilt"]; see also *People v. Dunkle* (2005) 36 Cal.4th 861, 937 [finding that the trial court "did not err in not treating defendant's statement to police that he develops assaultive behavior after drinking alcohol or smoking marijuana as weighty evidence of extreme mental or emotional disturbance within the meaning of section 190.3, factor (d)"], disapproved on another ground in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22; *People v. Dennis* (1998) 17 Cal.4th 468, 547-548 [the prosecutor was entitled to argue that the evidence relating to the defendant's childhood had little mitigating impact and did not warrant sympathy].)

Furthermore, although the prosecutor argued that, in his view, there was no evidence that appellant was operating under an extreme mental or emotional disturbance at the time of the murders, it is highly doubtful that the jury would have understood his argument to mean that it could not consider appellant's difficult childhood or his behavior, as appellant suggests. (See AOB 153 [the prosecutor's argument "prevented the jury from considering the mental disturbance evident in appellant's behavior and attributable to having been raised by a drug-addicted prostitute"].) *People v. Dennis, supra*, 17 Cal.4th 468 is instructive.

In *Dennis*, the prosecutor argued that only factors (a), (b), and (c) concerned matters that could be considered aggravating circumstances. The prosecutor continued, "[E]verything else in defendant's life can be considered in mitigation." (*People v. Dennis, supra*, 17 Cal.4th at p. 547.)

On appeal, the defendant argued that the prosecutor's argument had improperly "precluded" the jury from considering his son's death as a mitigating factor under section 190.3, factor (a). (*Ibid.*) The *Dennis* court

disagreed, noting that any confusion could have been avoided by an objection and admonishment to the jury. (*Ibid.*) In addition, the *Dennis* court found that the claim lacked merit, explaining:

The court's instructions also told the jury that it could consider, under the "catchall" language of section 190.3, factor (k), any other extenuating circumstance or sympathetic aspect in the case. The prosecutor and defense counsel both discussed how sympathy for the defendant, including the loss of his son, could be a proper mitigating consideration under the law. Although the prosecutor argued that in her view the death of defendant's son did not extenuate or mitigate his murders, we doubt the jury was misled by this argument into assuming it could not properly take that fact into account in deciding the penalty.

(*People v. Dennis, supra*, 17 Cal.4th at p. 547, emphasis in original.)

Here, as in *Dennis*, the jury was instructed with the catch-all provision of section 190.3, factor (k). (14 RT 3828; see also 15 CT 5755.) Thus, even though the prosecutor stated that, in his view, there was no evidence that appellant suffered from an extreme mental or emotional disturbance at the time of his crimes, this in no way prevented the jury from considering other extenuating circumstances or sympathetic aspects in the case, such as appellant's difficult childhood or the impact of having a prostitute, who had been addicted to drugs for most of her life, for a mother. Based on the foregoing, this Court should reject appellant's claim of prosecutorial misconduct.

4. There Was No Prejudice

In any event, there was no prejudice to appellant. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Brown, supra*, 46 Cal.3d at pp. 446-448.) This is so for a number of reasons. First, as indicated above (see Arg. IXA3, *supra*), there was no evidence of extreme mental or emotional disturbance in appellant's case. Appellant did not introduce any evidence relevant to factor (d), and the facts of appellant's difficult

childhood did not fall within this category. In addition, appellant made no argument that there was evidence in his case which was relevant to factor (d). To the contrary, appellant made it clear during his closing argument that, although he still claimed to be innocent of the crimes, he did not blame others for the life he had chosen to lead, stating in relevant part:

You will notice that I did not put on a defense to show mitigating circumstances of people testifying on my behalf. That's because I don't blame my lifestyle on other people. My actions are my actions and mine alone. I chose the life I lead. It might seem outrageous to you people, but it's a lifestyle that I understand

I understand there are consequences and repercussions for everything I do in life, and I'm willing to take the chance and deal with the outcome later. So in your deliberations, do as you deem necessary.

(14 RT 3861-3862.)

The foregoing closing argument demonstrated that appellant was not suffering from any kind of a mental or emotional disturbance. Indeed, although he continued to proclaim his innocence until the end, he took responsibility for the life he had chosen to lead and did not blame others or any kind of mental or emotional disturbance for his acts.

Second, even if the evidence of appellant's difficult childhood could be deemed to fall under factor (d), there was no prejudice on this record given the totality of the trial court's instructions. As indicated above (see Arg. IXA3, *supra*), the jury was not precluded from considering whether there was evidence that appellant was operating under a mental or emotional disturbance at the time of his crimes. Specifically, the trial court instructed the jury that it was required to follow the court's instructions if it found that counsel's statements regarding the law conflicted with its instructions. (14 RT 3830; see also 15 CT 5666, 5758A.) It also instructed the jury that counsel's argument did not constitute evidence. (14 RT 3818;

see also 15 CT 5754; CALJIC No. 1.02.) Significantly, the trial court instructed the jury that, in determining which penalty to impose on appellant, it “should consider all of the evidence which ha[d] been received during any part of the trial” (14 RT 3827), which included the evidence of appellant’s difficult childhood. (12 RT 3127-3135; see also Defendant’s Exh. 9.) Most significantly, it told the jury that it could consider, under the “catchall” language of section 190.3, factor (k), any other extenuating circumstance or sympathetic aspect in the case. (14 RT 3828; see also 15 CT 5755.) Thus, the instructions, as a whole, made it clear to the jury that it could consider appellant’s mental or emotional disturbance, if any existed, as well as the difficulty of his childhood in determining the penalty. (See *Boyd v. California* (1990) 494 U.S. 370, 381-382 [concluding that a jury is permitted to consider factors related to the defendant’s background and character under factor (k), even though those circumstances do not pertain to the crime itself]; *People v. Guzman* (1988) 45 Cal.3d 915, 965 [finding that the “instructions as a whole [, including the catch all provision,] allowed the jury to consider the full range of defendant’s mental or emotional disturbance evidence”], overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Finally, as indicated above (see Args. VB, VIC, VIID, *supra*), there was no prejudice because the evidence supporting the jury’s death verdict was overwhelming, appellant introduced no mitigating evidence, and it is evident from this record that the aggravating factors substantially outweighed any potential mitigating evidence in the case. (10 RT 2681-2687, 2691-2698; 11 RT 2791, 2842; 14 RT 3721-3725, 3732-3753, 3760.) Thus, appellant was not prejudiced, despite any misconduct.

B. The Prosecutor's Argument Regarding Section 190.3, factor (i)

Second, appellant contends that the prosecutor committed misconduct when it misstated the law with respect to section 190.3, factor (i). That factor provides that, if relevant, the jury may consider: "The age of the defendant at the time of the crime." (§ 109.3, factor (i); see also 14 RT 3828; 15 CT 5753; CALJIC No. 8.85.) Appellant has forfeited this claim. In any event, there was no prosecutorial misconduct and appellant was not prejudiced.

1. Relevant Background

During his closing argument, the prosecutor stated, in relevant part:

A factor to be considered by you is the age of the defendant. This is - - the courts use the word a "metonym." I'm not sure I know what metonym means, but I know that it should be considered by you to the extent that it is relevant.

What this means to me is there could be an individual who, having lived for 30 or 40 or 50 or 60 years, a law-abiding life, then commits two murders and you might take into account that law-abiding pattern over those period of years and consider that age in that capacity.

What this really means to my mind is: Does the defendant know the difference between right and wrong? Does he know the harm he causes?

All the evidence in this case suggests that he does. He knows the pain that he inflicts, and he did everything in his power to avoid those consequences: ski masks, murdering witnesses, fleeing the scene, hiding the money. He knows all those things, ladies and gentleman.

And . . . this might be a factor in mitigation, but in Corey Leigh Williams' case, it simply does not apply.

(14 RT 3854.)

2. Forfeiture

Initially, we submit that appellant has forfeited his claim of prosecutorial misconduct with respect to the argument about factor (i) (the age factor). As indicated above (see Args. IIC, IXA2 *supra*), a defendant generally cannot raise a claim of prosecutorial misconduct on appeal unless he raised a timely objection at trial on the same ground and requested the trial court to admonish the jury to disregard the impropriety. (Evid. Code, § 353; *People v. Berryman, supra*, 6 Cal.4th at p. 1072; see also *People v. Price, supra*, 1 Cal.4th at p. 447.)

Here, appellant raised no objection to the prosecutor's argument regarding factor (i). (14 RT 3853-3854.) Having raised no objection below, he has forfeited his claim of prosecutorial misconduct for purposes of appeal. Again, appellant cannot avoid forfeiture. (See *People v. Bemore, supra*, 22 Cal.4th at p. 854.) An admonition undoubtedly would have cured the alleged harm, if the trial court had found that the prosecutor had misstated the law and appellant had requested that it admonish the jury. As stated above (see Arg. IXA2, *supra*), the trial court could have reminded the jury that counsel's argument do not constitute evidence (CALJIC No. 1.02; see also 15 CT 5754; 14 RT 3818), and told the jury that it was required to follow the court's instructions if it found that counsel's statements regarding the law conflicted with its instructions (CALJIC No. 1.00; see also 15 CT 5666, 5758A; 14 RT 3830). Thus, appellant cannot avoid the forfeiture rule, and for this reason, this Court should not review his claim of prosecutorial misconduct on its merits.

3. There Was No Prosecutorial Misconduct

Even assuming, arguendo, that there was no forfeiture, appellant's claim of prosecutorial misconduct fails on its merits for a number of reasons. First, the prosecutor did not misstate the law. (Cf. *People v. Hill*,

supra, 17 Cal.4th at pp. 829-830.) Appellant has taken the prosecutor's argument out of context and isolated a few of the words within his lengthier statements about factor (i). Contrary to appellant's claim (AOB 155-156), the prosecutor did not limit the parameters of the age factor to a defendant's "inability to know right from wrong." Rather, the prosecutor merely stated that courts use the word "metonym" when referring to this factor, and then focused the jury's attention on one aspect (i.e., whether the defendant's age rendered him capable of appreciating the wrongfulness of his conduct) of the age factor to argue that it was not a mitigating factor in appellant's case. This was not an incorrect statement of the law or misconduct on the part of the prosecutor. As this Court explained in *People v. Carrington, supra*, 47 Cal.4th 145:

[W]e have observed that chronological age itself is neither aggravating nor mitigating, but the word "age" as used in factor (i) is "a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." (*People v. Lucky* (1988) 45 Cal.3d 259, 302 [].) Contrary to defendant's assertion, the trial court's finding that age was an aggravating factor in the present case is consistent with our interpretation of section 190.3, factor (i). The court explained: "The defendant was approximately 30 years of age and old enough to appreciate the wrongfulness of her conduct." The circumstance that defendant's age rendered her capable of appreciating the wrongfulness of her conduct "is a permissible age-related inference." (*People v. Mendoza, supra*, 24 Cal.4th at p. 190; see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1224 [] [the jury properly could consider the prosecutor's argument that the defendant was "'old enough to know better'"].)

(*People v. Carrington, supra*, 47 Cal.4th at pp. 201-202; *People v. Box* (2000) 23 Cal.4th 1153, 1215 [finding the prosecutor's argument appropriate where the prosecutor asked the jury not to look at the chronological age of the defendant, but at "the sophistication," and then detailed the defendant's college attendance, his attention to detail after the

murders, and his similarity in age to those in the military then stationed in Saudi Arabia], disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.)

Furthermore, the prosecutor's remarks constituted fair comment on the evidence, which is permissible. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 977 [either side may present a valid argument as to the significance of the defendant's age in the case]; *People v. Box, supra*, 23 Cal.4th at p. 1215 ["chronological age is not 'all that is relevant to [the age] factor"]; *People v. Williams* (1997) 16 Cal.4th 153, 270 [either party may present a valid argument regarding the significance of the defendant's age]; *People v. Wharton, supra*, 53 Cal.3d at p. 567 ["argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom"].)

Here, the evidence showed that appellant was old enough at the age of 19 to understand the difference between right and wrong and recognize the harm and pain he had inflicted upon the victims. As the prosecutor pointed out (14 RT 3854), this was evident from appellant's actions and the circumstances surrounding his crime. The way appellant planned the murders beforehand, made an effort to avoid the consequences of his acts by disguising himself during the crimes and by murdering all the witnesses to his crimes, his flight from the scene of the crimes, and his concealment of the fruits of crime (i.e., hiding the money) afterward, made it apparent that appellant's age rendered him capable of appreciating the wrongfulness of his conduct. (10 RT 2664, 2666, 2691-2692, 2698; see *People v. Mendoza, supra*, 24 Cal.4th at p. 190 ["a permissible age-related inference" is the circumstance that the age of the defendant rendered the defendant capable of appreciating the wrongfulness of his act].) The prosecutor's argument along those lines did nothing more than highlight this evidence for the jury to persuade it that factor (i) was not a mitigating factor in

appellant's case (13 RT 3854), which was proper. (See *People v. Dennis, supra*, 17 Cal.4th at pp. 547-548 [a prosecutor may properly argue that evidence introduced as evidence of mitigation does not actually mitigate and that a fact does not warrant sympathy]; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1224 [the jury properly could consider the prosecutor's argument that the defendant was "'old enough to know better'"].)

Furthermore, although the prosecutor argued that, in his view, age was not a mitigating factor in appellant's case, this did not prevent the jury from considering it as one if it thought it was appropriate to do so. (See *People v. Edwards* (1991) 54 Cal.3d 787, 844 [whether a defendant's age at the time of the offense is an aggravating or mitigating factor is for the jury to decide]; see also *People v. Dennis, supra*, 17 Cal.4th at p. 547 [where the court gives the catchall instruction to the jury allowing the jury to consider any other extenuating circumstance or sympathetic aspect in the case, it is doubtful that the jury would be misled by the prosecutor's argument (i.e., that a factor did not apply in the defendant's case) to believe that it could not take the factor into account in deciding the appropriate penalty].)

Here, the evidence of appellant's approximate age was before the jury. (12 RT 3129-3131; see also Defendant's Exh. 9.) In addition, the trial court properly instructed the jury that it could consider appellant's age at the time of the offense as a factor in determining which penalty to impose. (14 RT 3827-3828.) It also gave the jury the "catchall" provision of section 190.3, factor (k). (14 RT 3828; see also 15 CT 5755). Given the evidence and the court's proper instructions, it is extremely unlikely that the jury would have believed that it was prohibited from considering appellant's age as a mitigating factor, despite the prosecutor's argument that it was not one in appellant's case. (13 RT 3854.) Based on the foregoing, it is evident that there was no prosecutorial misconduct.

4. There Was No Prejudice

In any event, there was no prejudice to appellant. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Brown, supra*, 46 Cal.3d at pp. 446-448.) As explained in detail above, appellant's age was not a mitigating circumstance in his case. Given appellant's recent violent criminal past, as well as the pre-planning, sophistication, and efforts of concealment evinced by him during his current crimes, there was no demonstration of "lack of maturity" or "mitigating qualities of youth" on appellant's part, as appellant suggests. (AOB 155-156.)

In addition, there was no evidence of an "underdeveloped sense of responsibility [that] are found in youth," as appellant argues. (AOB 146.) Significantly, appellant made no argument to this effect. (14 RT 3861-3862.) To the contrary, appellant made it clear to the jury during his closing argument that although he was innocent of the crimes against Corrieo and Roberts, he did not blame others for the life he had chosen to lead and took full responsibility for his actions. (See, e.g., 14 RT 3861 [appellant's statement that his "actions [we]re [his] actions and [his] alone".])

Furthermore, even assuming, *arguendo*, that appellant's age was a mitigating factor in his case, there was no prejudice stemming from the prosecutor's argument because the instructions, as a whole, did not preclude the jury from considering appellant's age as a mitigating factor. (See Arg. IXA4, *supra*; see also 14 RT 3818, 3827-3828, 3830; 15 CT 5666, 5754-5755, 5758A; CALJIC No. 1.02 [the relevant instructions given to the jury].)

Moreover, there was no prejudice for the reason that the evidence in support of the jury's death penalty verdict was overwhelming. (See Args. VB, VIC, VIID, *supra*.) Therefore, despite any misconduct, there was no prejudice to appellant, and thus, his claim should be rejected.

X. THERE WAS NO PREJUDICIAL CUMULATIVE ERROR

Appellant contends that there was cumulative error and that the cumulative effect of all the errors rendered his trial unfair, requiring reversal of the death judgment pursuant to the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, as well as under state constitutional corollaries. (AOB 158.) Respondent disagrees because there was no error, and, to the extent there was any error, appellant has failed to demonstrate prejudice.

Where no single error warrants reversal, the cumulative effect of all the errors may, in a particular case, require reversal in accordance with the due process guarantee. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 298 [finding that the combined effect of all the individual errors denied the defendant his right to due process and a fair trial]; *People v. Hill, supra*, 17 Cal.4th at p. 844 [“a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error”].)

Here, as discussed in detail in this brief, there was no error in any part of appellant’s trial. (See Args. I-IX, *supra*, and Arg. XI, *infra*.) Even assuming there was error, whether considered individually or for their cumulative effect, the alleged errors could not have affected the outcome of appellant’s trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 691-692; *People v. Ochoa, supra*, 26 Cal.4th at p. 458; *People v. Catlin, supra*, 26 Cal.4th at p. 180; see *People v. Salcido, supra*, 44 Cal.4th at p. 156 [finding that no “cumulative deficiency arose from a combination of particular errors requiring reversal,” where the defendant failed to establish any error at the guilt phase of his trial]; *People v. Halvorsen, supra*, 42 Cal.4th at p. 422 [concluding that even the one assumed error could not have affected the verdict].) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009; *People*

v. Box, supra, 23 Cal.4th at p. 1214.) The record shows appellant received a fair trial.

In appellant's view, the guilty verdict rested on a "shaky pillar" of his "coerced confession" and the "errors giving David Ross a false aura of veracity." (AOB 158-159.) We disagree. There was no evidence that appellant's confession was coerced by the correctional officers or otherwise invalid. (See Arg. I, *supra*.) In addition, the prosecutor did not vouch for the truthfulness of Ross's testimony and Ross's bias was revealed to the jury, giving him no false aura of veracity. (See Arg. II, *supra*; 3 CT 909-912; People's Exh. 14 [Ross's agreement with the Chief Deputy District Attorney].)

Furthermore, despite this impeachment of Ross, there was independent evidence which bolstered the truth of his testimony, including forensics which were consistent with Ross's version of events and his statements to others before his arrest, indicating (both implicitly and explicitly) that appellant had killed the women. (10 RT 2712-2713, 2617, 2619-2622, 2625-2626, 2646-2647, 2829, 2961-2963; 11 RT 2897-2898, 3015, 3018, 3021.) Appellant's motive to rob and kill the women was clear. (See 10 RT 2683 [appellant had no job], 10 RT 2691-2692, 2698 [appellant did not want to be identified by his "C-dog" tattoo].) The evidence also showed that the three men had planned the crimes together (10 RT 2664, 2666-2667; 11 RT 2905, 2908-2911), appellant was in possession of a significant amount of \$100 bills after the crimes (10 RT 2574, 2592-2593; 11 RT 2986-2987, 2988), and he made an incriminating statement to Saravia from jail, blurting out "they came up with money hella quick" (11 RT 2987, 3007-3008, 3012-3013). Thus, it is evident that the evidence against appellant was overwhelming, despite any errors at the guilt phase.

Furthermore, appellant's claim that the death verdict hinged on him being identified as the killer is meritless. Significantly, aside from the fact

that the circumstances of the crime (in which appellant was no doubt a major participant who had, at a minimum, reckless indifference to human life)¹⁴ were horrendous, appellant also had a horrific history of violence against women. (14 RT 3721-3723, 3732-3753.) Significantly, the most horrific incident (i.e., the one involving DeBonneville) occurred just days before the double murders. (See Args. VB, VIC, VIID, *supra*.) Although there was some evidence which the jury could have considered mitigating (14 RT 3946-3947), that evidence in no way outweighed the aggravating factors in appellant's case. Thus, despite any error during the penalty phase, there was no prejudice to appellant.

Given the foregoing, it is evident that appellant's contention that his actions did not warrant the death sentence is meritless, even if his cohorts received a lighter sentence than him. (AOB 159.) Furthermore, we emphasize:

This Court has repeatedly held that evidence about the punishment given to codefendants or accomplices in a capital crime is irrelevant and inadmissible at the penalty phase, because it has no bearing on such issues as the defendant's conduct, character, or record, on which the jury must base its penalty determination.

(*In re Andrews* (2002) 28 Cal.4th 1234, 1276.)

In sum, appellant's claim of prejudicial cumulative error should be rejected.

¹⁴ “[S]omeone who is convicted of felony murder but did not actually kill, attempt to kill, or intend to kill, cannot be sentenced to death absent a showing of major participation in the underlying felony, combined with a culpable mental state consisting, at a minimum, of reckless indifference to human life.” (*People v. Smithey*, *supra*, 20 Cal.4th at p. 1016, citing *Tison v. Arizona* (1987) 481 U.S. 137, 150-157, and *Edmund v. Florida* (1982) 458 U.S. 782, 797-801.)

XI. THE CALIFORNIA CAPITAL PUNISHMENT SENTENCING SCHEME IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED TO APPELLANT

Appellant raises a number of challenges to California's capital punishment sentencing scheme for the purpose of preserving them for further review, while recognizing that this Court has repeatedly rejected the same arguments. (AOB 160-167.) Because this Court has correctly decided each of these issues in prior cases and appellant has not provided any meritorious grounds for reconsideration, this Court should uphold its prior decisions with respect to the following issues.

A. California's Capital Punishment Sentencing Scheme Does Not Violate The Eighth Amendment And It Does Not Fail To Provide A Meaningful And Principled Way To Distinguish The Defendants Who Are Sentenced To Death From The Vast Majority Who Are Not

Initially, appellant claims that California's capital punishment scheme, as construed by this Court in *People v. Bacigalupa* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the defendants who are sentenced to death from the vast majority who are not. (AOB 161.) As appellant concedes, this Court has rejected this argument. (*People v. Schmeck, supra*, 37 Cal.4th at p. 304; *People v. Sakarias* (2000) 22 Cal.4th 596, 632; *People v. Smithey, supra*, 20 Cal.4th at p. 1017.) Because this Court's previous decisions on this issue were correct and appellant provides no meritorious basis for reconsideration, his claim should be rejected.

B. Section 190.3, Subdivision (a) Is Not Being Applied Arbitrarily And Capriciously

Second, appellant claims that Section 190.3, subdivision (a), which permits a jury to sentence a defendant to death based on the "circumstances of the crime," is being applied in a manner that institutionalizes the

arbitrary and capricious imposition of death. (AOB 161.) As appellant concedes, this Court has repeatedly rejected this argument. (*People v. Crittendon* (1994) 9 Cal.4th 83, 156; see *People v. Schmeck, supra*, 37 Cal.4th at p. 304 [“Section 190.3, factor (a), as applied, does not fail to sufficiently minimize the risk of wholly arbitrary and capricious action prohibited by the Eighth Amendment”].) Because this Court’s previous decision on this issue was correct and appellant provides no meritorious basis for reconsideration, his claim should be rejected.

C. The Absence Of A Unanimity Instruction Did Not Violate The Sixth, Eighth, And Fourteenth Amendments

Third, appellant makes a claim, similar to his prior argument (see AOB 145), that the sentencing instructions were deficient as they did not require unanimous jury findings with regard to the truth of the various aggravating factors. (AOB 162.) As appellant concedes, this Court has also repeatedly rejected this argument. (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 1068; *People v. Schmeck, supra*, 37 Cal.4th at p. 304; *People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Pride* (1992) 3 Cal.4th 195, 268.) Furthermore, as we have explained in detail above (see Arg. VIII, *supra*), *Ring v. Arizona, supra*, 536 U.S. 584 does not alter this Court’s conclusion on this issue. Because this Court’s previous decisions were correct and appellant provides no meritorious basis for reconsideration, his claim should be rejected.

D. The Absence Of An Instruction On The Burden Of Proof To Be Applied In Determining Whether The Aggravating Factors Outweigh The Mitigating Factors Does Not Violate The Sixth, Eighth, And Fourteenth Amendments

Fourth, appellant makes a claim, similar to his prior argument (see AOB 145), that a trial court’s failure to instruct on the burden of proof to be

applied in determining whether aggravation outweighs mitigation violates the Sixth, Eighth, and Fourteenth Amendments. (AOB 163.) As we have explained in detail above (see Arg. VIII, *supra*), appellant's claim has no merit. This Court has already rejected this argument, as appellant concedes. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1059; *People v. Schmeck, supra*, 37 Cal.4th at p. 304; see *People v. Hawthorne, supra*, 4 Cal.4th at p. 79 ["Unlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification".]) Because this Court's previous decisions on this issue was correct and appellant provides no meritorious basis for reconsideration, his claim should be rejected.

E. CALJIC No. 8.85 Is Not A Flawed Instruction And The Trial Court Properly Gave It To The Jury

Fifth, appellant claims that the trial court's use of a flawed standard instruction on aggravating and mitigating factors (CALJIC No. 8.85; 15 CT 5659-5661, 5752-5754) violated his Sixth, Eighth, and Fourteenth Amendment rights. (AOB 163.) More specifically, appellant claims that CALJIC No. 8.85 is flawed because: (1) it fails to delete inapplicable sentencing factors; (2) it fails to delineate between aggravating and mitigating factors; (3) it contains vague and ill-defined factors; (4) it limits some mitigating factors by adjectives, such as "extreme" or "substantial;" and (5) it fails to specify a burden of proof as to either mitigation or aggravation. (AOB 164.)

As appellant concedes, these arguments have already been rejected by this Court. (*People v. Lindberg* (2008) 45 Cal.4th 1, 50-51; *People v. Barnwell, supra*, 41 Cal.4th at p. 1059; *People v. Ramirez* (2006) 39 Cal.4th 398, 469; *People v. Schmeck, supra*, 37 Cal.4th at pp. 304-305; *People v. Ray* (1996) 13 Cal.4th 313, 358-359; *People v. Clark* (1992) 3 Cal.4th 41, 163; see also *Tuilaepa v. California, supra*, 512 U.S. at p. 979

["A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision"].) Because this Court's previous decisions were correct on these issues and appellant provides no meritorious basis for reconsidering them, his claims should be rejected.

F. California's Capital Punishment Sentencing Scheme Does Not Violate International Law

Sixth, appellant claims that the California death penalty scheme violates international law, including the International Covenant of Civil and Political Rights. (AOB 164.) As appellant concedes, this Court has rejected this argument. (*People v. Loker, supra*, 44 Cal.4th at p. 756; *People v. Richardson* (2008) 43 Cal.4th 959, 1037; *People v. Schmeck, supra*, 37 Cal.4th at p. 305; see *People v. Hillhouse, supra*, 27 Cal.4th at p. 511 ["International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements"].) Because this Court's previous decisions were correct and appellant provides no meritorious basis for reconsideration, his claim should be rejected.

G. The Prosecution's Use Of The Facts Underlying Appellant's Prior Conviction To Obtain A Death Verdict Did Not Violate The Double Jeopardy Clause

Seventh, appellant claims that the prosecutor's use of the facts underlying his prior conviction for his crime against DeBonneville to obtain a death verdict violated the Double Jeopardy Clause. (AOB 165.) As appellant concedes, this Court has rejected such an argument. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1072; *People v. Bacigalupa, supra*, 1 Cal.4th at pp. 134-135; *People v. Douglas* (1990) 50 Cal.3d 468, 528.) Because this Court's previous decisions were correct and appellant provides no meritorious basis for reconsideration, his claim should be rejected.

H. Appellant's Constitutional Right To An Unbiased Decision-Maker Was Not Violated By Having The Same Jury, Which Determined His Guilt, Decide If He Committed Other Criminal Activity

Eighth, appellant claims that by allowing the jury, which had already found him guilty of first degree murder, to decide if he committed other criminal activity violated his right to an unbiased decision-maker under the Sixth, Eighth, and Fourteenth Amendments. (AOB 165.) As appellant concedes, this Court has rejected this argument. (*People v. Hawthorne, supra*, 4 Cal.4th at p. 77; *People v. Medina* (1990) 51 Cal.3d 870, 907.) Because this Court's previous decisions were correct and appellant provides no meritorious basis for reconsideration, his claim should be rejected.

I. The Jury Was Not Required To Make Specific Written Findings

Ninth, appellant claims that by allowing the jury to condemn him to death without making specific written findings deprived him of his due process rights and his Eighth Amendment right to meaningful appellate review. (AOB 166.) As appellant concedes, this Court has rejected this argument. (*People v. Rogers* (2006) 39 Cal.4th 826, 893; *People v. Blair* (2005) 36 Cal.4th 686, 753; *People v. Fauber, supra*, 2 Cal.4th at p. 859.) Because this Court's previous decisions were correct and appellant provides no meritorious basis for reconsideration, his claim should be rejected.

J. Although Appellant Has Not Been Appointed Habeas Counsel, He Has Not Been Denied Justice

Lastly, appellant claims that California's failure to timely provide a condemned defendant, like himself, with habeas counsel so that he has the means to develop and present evidence of his innocence requires reversal of his capital conviction and death sentence. (AOB 167-170.) The

appointment, or lack thereof, of counsel for state collateral review does not provide a basis for relief on direct appeal as state habeas is a separate and distinct remedy. (Cf. *Murray v. Giarratano* (1989) 492 U.S. 1, 10 [no constitutional requirement for the state to provide collateral review process which serves a different and more limited purpose than either trial or appellate process].) In support of his claim, appellant restated his arguments relating to his confession and the testimony of Ross. These claims have been addressed above and should be rejected. (See Args. I & II, *supra*.)

CONCLUSION

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

Dated: June 24, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 50,302 words.

Dated: June 24, 2010

EDMUND G. BROWN JR.
Attorney General of California

A handwritten signature in black ink, appearing to read "Ann P. Wathen". The signature is written in a cursive style with a large initial "A" and a distinct "W".

ANN P. WATHEN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Williams**

No.: **S093756**

I declare:

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

On June 25, 2010, I served the attached

RESPONDENT'S BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 25, 2010, at San Francisco, California.

M. Argarin
Declarant



Signature